Belgian Advisory Committee on Bioethics

Opinion No. 28 of 21 June 2004 on reproduction after the death of one of the partners

Initiative submitted on 13 July 1998
for the purposes of analysing ethical issues related to assisted reproduction

Request for an opinion of 16 November 1998,
from Mr M. Colla, Minister for Public Health and Pensions,
on "ethical issues relating to reproductive medicine", and more especially point 6 of this question (see introduction below)

Introduction

The Advisory Committee on Bioethics has already issued three opinions on assisted reproduction, namely:

- Opinion no. 6 of 8 June 1998 on the ethical bases for optimisation of the services offered by and operating criteria governing in-vitro fertilisation centres;
- Opinion no. 19 of 14 October 2002 on the use of frozen embryos;
- Opinion no. 27 of 8 March 2004 on sperm and ovum donations.

During the plenary meeting of 15 December 2003, it was decided that a sub-committee would examine the remaining issues concerning surrogate motherhood, reproduction after the death of one of the partners, and embryo donation.

This opinion looks more specifically at the question concerning reproduction after the death of one of the partners, which was raised on 16 November 1998 by Mr M. COLLA, Minister for Public Health and Pensions, namely:

"6. Recently a woman was fertilised with the sperm of her deceased husband. Is this ethically acceptable? And if so, under what conditions?"

1. *Reproduction after the death of one of the partners*

Fulfilling the desire to reproduce after death raises ethical and philosophical questions. Three forms of reproduction after death can be distinguished:

a) when conception occurs before death, but the baby is born after the death of the father or mother. This form does not present any ethical or legal problem when it is the father who dies. Specific questions are raised in the very rare cases when the woman dies during pregnancy and where the decision is taken to maintain her vital functions artificially until the birth.
b) when conception occurs after the death of the man, using his sperm[1]. In these cases, a distinction has to be made between cases in which the sperm is taken from the dead man's body, or cases where sperm of the deceased had already been frozen.
c) when conception has taken place in vitro prior to death, but where the embryo is placed in a woman's uterus after the death of one of the partners. If it is the man who died, his partner may bear the child herself. If it is the woman who died, the man will have to have recourse to a surrogate mother.

2. *The parental project*

As was pointed out in the Committee's Opinion no. 19 on the use of frozen embryos, there are two opposing views concerning the parental project after the death of one of the partners. For one group of members of the Committee, the death of a partner automatically means the end of the parental plan that the couple had, whilst another group feels that the couple's parental plan can be pursued by the surviving partner. For the members of this latter group, respect for the autonomy of the deceased person demands that the latter must have agreed to this plan. Acceptance of the parental plan after death may only be established with certainty if the deceased had made a written declaration to this effect. The existence of a parental plan whilst this person was still alive (such as would be indicated by the existence of frozen embryos) is not enough. This requirement makes it highly unlikely that ova or spermcan be extracted after the death of the interested party, or where he or she is in a permanent state of disablement. Indeed, in the event of an unexpected death, there will almost never exist a written statement. If, on the other hand, the death was foreseeable, sperm, ovarian tissue or embryos will probably have been removed and frozen beforehand.

As regards the decision to support the vital functions with a view to the development of the foetus, there are two points of view. For some members of the Committee, it can be argued that, if the foetus is viable but an immediate birth would be extremely premature, it would be better for the child's welfare to prolong the pregnancy by a few weeks. If the foetus is not viable outside the mother's body at the time of the mother's death, it does not seem appropriate to support the mother's vital functions, on account of the considerable medical and psychological risks this would entail for the child. Other members of the Committee feel that maintaining the vital functions is unacceptable in any case. In principle, in situations where a pregnant woman is brain dead or in a chronic vegetative coma, a written agreement would have to asked of her to prolong the pregnancy. However, the situation is slightly different from the mere existence of frozen embryos, since here the pregnancy is already under way. This kind of situation is very complex and deserves a contextual approach in

[1] Bearing in mind that in clinical practice only very few ova are frozen, so that a similar possibility does not exist for the woman.

which equal consideration is given to the possibility of having a healthy baby, the attitude of society and the existence of a desire to take charge of the child's upbringing. The opinion of the woman's partner prevails in this decision because he or she was the joint creator of the parental plan and because he or she, depending on the situation, may become the child's legal parent. In the partner's absence, other close family members may ask for the vital functions to be maintained for the development of the foetus if they accepted the responsibility to raise the child.

The framework of a parental project lays down certain limits to the use that can be made of embryos or gametes in these situations:

1. Only the partner has the right to use gametes or embryos for reproduction. Reciprocally, the deceased can only direct his/her gametes or embryos to his/her partner. He or she must therefore be named and designated in the statement. In the United States and Israel, there have been several cases in which not the partner, but the parents of the deceased man have asked for sperm to be taken from their dead son. This request was mainly based on the desire to have genetically related grandchildren. However, objections can be made to this, since during their son's life the parents do not have the right to make any decisions about reproduction by him, so they do not have this right after his death either. When the two partners have died, no third person may take on the parental plan.
2. The gametes or embryos are only available for the fulfilment of a partner's wish to have a child by his/her partner. If he/she decides not to make use of this possibility, they are destroyed (possibly after prior use for scientific research). The partner may not give the gametes or embryos to a third person for reproduction.

3. *The deceased*

The rights that a person may exercise after his/her death may be open to debate. In day-to-day practice, however, we give people - while they are alive - the possibility of making certain arrangements concerning their material property and the use to be made of their body after their death. A person has the right to make his organs available for transplantation after he dies.

For some members, this capacity to make arrangements concerning one's affairs can be extended to one's own gametes after one's death. This also means that 1) a person can make his/her gametes available for well-defined purposes, and that 2) the person must also have given his/her consent for them to be used for specific ends. The manner in which this consent should be given may vary, but there is a general consensus in calling for a clear written statement in these cases[2].

It emerges in clinical practice that the persons concerned have two kinds of reason for agreeing to the use of sperm or embryos after death. The first kind of reason is that the (deceased) partner agrees because his/her partner insists and does not want to consider reproduction unless the child stems from their relationship (this partner has no explicit desire to see his or her gametes or embryos used after his/her death). In a second category, the (deceased) partner's reasons are those found just as often in cases of normal reproduction: the desire to prolong the family line in order to position oneself in a more far-reaching whole that has a future, or to receive a kind of immortality by having genetically related descendants.

Other members of the Committee think that the argument that living people can decide on

[2] Only Israel gives women the right to use their deceased partner's sperm without his prior consent, and to use it to fulfil their own desire to have a baby.

certain things that will be valid after their death, does not apply in this case. Sometimes, indeed, these decisions concern objects and not people, and sometimes they concern their dead body - no doubt more personal, but not living. The argument asserting that the deceased person's autonomy implicitly includes the right to determine what will be done with his/her gametes or embryos is therefore unsound. Reproduction post mortem calls into question the fate of at least two people: the partner and the child. This difference is clearly perceived if one considers that even those who make an analogy with the determining of what is to be done with one's body or one's estate, do not think that a desire for reproduction post mortem can oblige the surviving partner in any way. Finally, according to these members, the wish to reproduce post mortem seems to include the desire to deny human finiteness, which they do not deem reasonable.

4. *The consequences for the child*

For some members of the Committee, reproduction post mortem entails serious dangers for the child's wellbeing, and these dangers are substantial enough to limit people's reproductive autonomy. These members also feel that reproduction that risks creating difficulties for the child, even if the latter may overcome them in some cases, cannot be justified.
The other members of the Committee recognise that complications may arise, but that they are not of such a nature as to lead to the outright prohibition of these procedures. They think that, as in the case of genetic risks or handicaps, reproduction is acceptable if there is a good chance that the future child will enjoy a good quality of life. Good counselling and a good selection of the applications are likely to promote this. Because of the paucity of such applications, there are no scientific studies as yet on the effects for children born from these procedures.
Acceptance of an application for reproduction post mortem implies the recognition of a single-parent plan. Indeed, in all probability, the woman (or the man) will bring up the child (or children) on her (his) own. The comparisons with other situations such as that of widows, consciously single mothers, and single women having a known sperm donor, are shaky on several points. The request for postmortem reproduction imply a specific emotional and psychological choice on the part of the surviving partner.

5. *The partner*

There is a consensus within the Committee on the fact that the decision taken by the deceased, to authorise the use of his/her gametes or embryos, does not in any way obligate the surviving partner to use them in that way. However, the surviving partner must take a decision on the use of the gametes or embryos. It is important that he or she is able to make this choice in a calm, well-considered manner. A number of mechanisms known from the psychology of mourning should incite prudence:

1) remission of guilt. Immediately after death, the partner almost always experiences a feeling of guilt. He/she could then try to alleviate this feeling by doing something that he/she thinks the deceased would have wanted.
2) idealisation of the deceased partner immediately after his or her death.

These two reactions disappear almost completely after a few months, depending on how the grieving process evolves. The literature also shows that many requests for the storage and use

of sperm, which are raised just after the death by the surviving partner, are not followed up after a few months. It is therefore necessary to lay down a waiting period of approximately one year to avoid overly hasty and overly emotional decisions being made. The mourning process must be sufficiently completed before a treatment can be started. On the other hand, a time limit should be fixed in order to be able to close the inheritance procedures. This fixing of a maximum period may lead to psychological drawbacks in the sense that the partner knows that he or she must decide within this period, and is in this way linked to the deceased person. Also for the wellbeing of the child, it is advisable that an evaluation be made of a woman's reasons and expectations. There is a danger to the future child's autonomy if it is seen as a "souvenir child" or as the symbolic replacement of the deceased. In-depth counselling on the social and psychological consequences of the decision is always necessary.
Aside from these considerations, the surviving partner's moral or religious convictions concerning the moral status of the embryo may play a role in the decision to implant the surplus embryos. For the woman, the fact also sometimes comes into play that the surplus frozen embryos constitute her last chance of having genetically related children.

6. *Invitro fertilisation centres and sperm banks*

The invitro fertilisation centre or the doctor may refuse reproduction post mortem for reasons of conscience. However, a problem arises when a couple changes their mind after having entrusted a centre with the freezing of sperm or embryos. As was mentioned in Opinion no. 19 of 14 October 2002 on the use of frozen embryos, two opinions are expressed in this regard.
One group of members of the Committee thinks that the centres may only stipulate procedures to which they agree to lend their co-operation, but that they do not have the right to limit the couple's options. The centre may therefore not destroy the gametes or embryos if there is a written authorisation for use to be made of them after death. The couple, or the surviving partner, should retain the right to transfer the gametes or embryos to another centre.
A second group of members feels that this option constitutes a failure to understand the meaning of the original contract between the couple and the centre. Indeed, the centre would find itself obliged, in such a case, to provide co-operation for a purpose to which it expressly disapproves.

7. *Legal problems*

Reproduction post mortem raises two problems: should the deceased man or woman be recognised as the father or mother of the child? Can the child inherit from the deceased?
In the United Kingdom, the man can be recognised as the child's father, but the child cannot be recognised as his heir. The problem here is that this rule can give rise to discrimination vis-à-vis the children already born to the couple: the child born after the death would have the same parents, but would not be able to inherit. If, however, the child can inherit, a reasonable period should be determined during which the inheritance procedure can be postponed.
Some members of the Committee feel that the discrimination is ethically more negative than the temporary postponement of the inheritance procedures. Taking these considerations into account, they propose that the children born of the gametes or embryos coming from the deceased be considered as legal heirs. However, they suggest that the gametes or embryos must be used within a period of five years from the date of death. After the obligatory one-

year waiting period, there would therefore still be four years in which two births are possible (which corresponds to the average size of families in Belgium). The inheritance procedure would thus be postponed for a maximum period of five years and nine months.
Other members are not convinced that the child should be entitled to inherit. They also feel that it is not necessary for a specific period to be set in which reproduction must take place.

8. *Recommendations*

The members of the Committee who think that reproduction post mortem is not morally acceptable want to see a legal prohibition on the removal and use of a dead person's gametes. Frozen embryos must be destroyed after the death of one of the partners.
The members of the Committee who accept reproduction after death believe that the following conditions must be laid down:

- The deceased person must have given his/her free and well-informed consent, in writing, to the use of his/her gametes or embryos after his/her death.
- The gametes or embryos may only be made available to the surviving partner for reproduction by the latter himself/herself.
- In order to increase the chances of a well-considered decision being made by the partner, a waiting period of one year after the death should be respected. In-depth psychological counselling constitutes an important part of the treatment.
- For some, the children born as a result of a treatment of this kind must be recognised as the legal children and heirs of the deceased person. The gametes or embryos coming from the deceased person must be used within a period of five years. The period for the inheritance procedure must therefore be extended to five years and nine months.
  For others, children begot after the death of a parent should not inherit from thisparent, and no time period should be fixed for a post-mortem reproduction.

_____

The opinion was prepared by select commission 98/3 – quater – 2004, consisting of :

Joint chairmen	**Joint reporters**	**Members**	**Member of the Bureau**
L. Cassiers F. Mortier	G. Pennings L. Cassiers	A. André M. Baum J. Dalcq-Depoorter E. De Groot P. Devroey M. Dumont R. Lallemand Th. Locoge P. Schotsmans S. Sterckx F. Van Neste A. Van Steirteghem G. Verdonk	M. Roelandt

Member of the Secretariat : V. Weltens

The working documents of select commission 98/3 – quater – 2004 – request for opinion, personal contributions of the members, minutes of meetings, documents consulted – are stored as Annexes no. 98/3 – quater – 2004 at the Committee's documentation centre, where they may be consulted and copied.