

## Whose Sperm Is It, Anyway?

*Men deceived into fatherhood are struggling to rescue their reproductive rights from the whim of women.*

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It became the hit story of the silly season. Boris Becker's defence against his recent paternity suit was so unlikely that it made news around the world. He claimed he'd never had intercourse with the Russian model who alleged she'd had his child. All he'd admit to was oral sex in the broom cupboard, arguing the sperm must have somehow been kept and recycled. This week the story changed, with Becker accepting paternity of the child.

Surprisingly, the unlikely early Becker defence has also had a run in the Australian courts. Just before Christmas, a NSW man learnt he'd failed to convince the Family Court that his sperm had been similarly stolen and used for conception. This time the deed didn't take place in the dark depths of a cupboard. Far from it. In the NSW case of J and D there was a witness. J's mate, S, gave evidence that both of them received oral sex from D, when she and a friend entertained them during their motorcycle tour of central NSW. What's more, the two men claimed they were using condoms at the time. J alleged that following the act, D dashed off to the bathroom carrying his used condom and conceived a child using the contents.

Sadly for J, the Family Court chose to believe the mother's story namely that she had intercourse with J and pregnancy resulted from a failure of contraception.

Had J's story been believed, the legal consequences would have been intriguing. The fact that his sperm was used without his consent for artificial conception would mean J would not have been regarded as father to the child for the purposes of child support. Instead, he would have been in the same legal position as a sperm donor and not liable for child support.

The Full Court decision on J and D is simply the latest round in the growing battle over men's reproductive rights. Courts in many countries are struggling with complex paternity cases, with developments in DNA testing now providing decisive answers to age-old questions about who's the daddy. Paternity issues are high on the agenda of men's groups both here and overseas, as men challenge their lack of control over reproductive decisions.

"Where's men's right to choose?" asks Sue Price, co-founder of Men's Rights Agency, one of the Australian lobby groups tuned into this groundswell of discontent.

"Men can be tricked into becoming fathers, or be denied the chance to be a father, they are powerless to stop a woman having an abortion and are seen as having no right to ask her to have one.

"Men's reproductive choices don't exist they all depend on women's whim."

The issue at the heart of the J and D case the question of whether J could have been tricked into paternity is attracting particular attention. The role of fraud in paternity has already had a run in the United States, in a 1981 case involving Frank Serpico, the New York policeman made famous through a movie on his role as whistleblower of corruption in the city's police department. Serpico claimed in a New York State family court that he should not have to pay child support because he could prove his child's mother had deceived him into pregnancy.

A friend of the mother testified that the mother, an ex-girlfriend of Serpico, decided to seduce Serpico in order to get pregnant. She told the friend that she had stopped taking birth control pills but had assured Serpico she was doing so. The judge in the family court ruled in Serpico's favour. The mother's "planned and intentional deceit barred her from financial benefit at the father's expense", she wrote. But Serpico lost on appeal when higher courts ruled charges of fraud were irrelevant since the only consideration in child support was "the best interests of the child".

An interesting twist on this case was that one of Serpico's lawyers was Karen DeCrow, a former director of the National Organisation for Women. DeCrow attracted considerable critical attention for supporting Serpico's cause. She told the court: "Autonomous women making independent decisions about their lives should not expect men to finance their choice." It seems unlikely men will gain that right in the near future. In fact, the impact on men of women's decisions to choose to become single mothers, with or without deception, as yet hardly registers in the public consciousness.

Think back to last year's debate on single women and IVF. A recurring theme in the debate was the benefits of enabling such women to conceive in medically safe circumstances. "No-one is going to stop single women having children if they want to and I would far prefer to treat them medically with properly treated sperm, rather than forcing them to have one-night stands to get pregnant," said Gab Kovaks, the medical director of Monash IVF.

"It's much more honest than tricking a man into fatherhood," said one such mother who was quoted in *New Idea* promoting the benefits of donor-inseminated conception. In the entire debate, not one word was raised about the consequences for men being "tricked into fatherhood". Indeed, there is a widespread assumption that deceiving men into paternity is a far from unacceptable course.

During the 15 years I answered a *Cleo* advice column, I had many letters from women who were considering doing just that and wrote seeking my approval for staging a "supposed accident".

It seems unlikely that a successful legal challenge can be mounted using fraud to overturn a father's requirement to pay child support. However, it may be possible to pay the child support and then sue the mother for damages. Lawyers see this as a long shot. Even if you could find a mother with the capacity to pay damages, it may be that no Australian court would be willing to accept the case. Sydney law professor Patrick Parkinson says: "It would raise a novel point of law. An Australian court may be reluctant to allow a remedy because it would mean that there is a court judgment saying the child was born as a result of deception. The court would want to protect the child from that."

So duped men are legally required to pay, but Australian courts have produced judgments which appear to question the morality of this situation.

Sydney lawyer Robert Benjamin mentions a case about 20 years ago where he represented a man who was stunned to discover his girlfriend was pregnant despite the fact that he'd been using condoms. Witnesses gave evidence that the woman had boasted she had removed the used condoms from the bin where he had deposited them and used the contents. The magistrate was clearly sympathetic the client was asked to pay a mere \$5 a week in child support.

Jeremy (not his real name), a Melbourne engineer, has had a similar victory. He's been fighting a 15-year battle to maintain contact with a child who was conceived deceitfully. The mother was a woman he'd only known for a few weeks who'd assured him she was using contraception. "Thanks very much. You needn't worry, you won't need to be around," she told him when gleefully

announcing the pregnancy. That was before she discovered she had to name the father in order to receive welfare benefits.

Jeremy refused to be shut out of his son's life. "You are not going to walk away," I told her and insisted the child was going to know me."

He's fought for regular contact and has always provided some financial support for the child but has resisted the Child Support Agency's efforts to determine what he should pay. "I dispute the right of this woman to surrogate me to get a sole parent's benefit." Recently he appeared before a magistrate who gave him a sympathetic hearing.

"I can't let you win in this case because it would set a precedent that would change Federal law," she told him. But while the fraud was not a ground for departure from the child-support formula, it appears to have influenced her decision to accept the income figures he presented in his application for reduced payments.

She lowered his child support to \$15 a week and worked out an extremely favourable payment schedule. "I got virtually all I asked for," Jeremy says. Since the child's mother comes from a wealthy family Jeremy is now considering mounting a damages case against the woman.

Parkinson believes Federal law should to be changed to give judges and magistrates some leeway for making decisions in such difficult cases. "The Government should amend the child support legislation to allow the court to exempt a parent from paying child support in exceptional circumstances," he suggests.

Apart from fraud, there's another paternity issue which could well be regarded as an exceptional circumstance and that's the question of the responsibility of minors. Andrew's story (see box) points to the fact that traditional parental concern for a daughter regarding the hazards of youthful sex could well be misplaced. At least daughters have choices, however difficult, in dealing with unwanted pregnancy. But a son, unless he insists on taking sole responsibility for contraception, may be given no alternative to starting his adult life facing up to 18 years of paying child support.

Under NSW law, as a 16-year-old male, Andrew was of age to consent to sex and so liable to pay child support. This is not the case for a boy two years younger. The bizarre consequences of such anomalies in the law are seen in a series of extraordinary US legal cases involving minors: A 34-year-old single mother in San Francisco was convicted of statutory rape after having sex with the 15-year-old boy she was babysitting. The boy, Nathaniel J, was required to pay child support for the child born as a result of their illegal union. "Victims have rights. Here, the victim also has responsibilities," wrote the judge. In Kansas, 16-year-old Colleen Hermesmann was charged as a juvenile offender for a sexual relationship which started when Shane Seyer was 12 years old. Although Shane was still legally under age to consent to intercourse, the court determined he was liable for child support when their child was conceived two years later. "If voluntary intercourse results in parenthood, then for purposes of child support, the parenthood is voluntary. This is true even if a 15-year-old boy's parenthood resulted from a sexual assault upon him," said the court.

Doesn't make sense? Perhaps not, but we shouldn't expect the law to always be logical, says Bond University Law professor John Wade. "The world is not logical. We are living in a world where there is a bunch of conflicting interests which have to be balanced. Does the taxpayer pay for the child or does the taxpayer mitigate damages by asking someone else to chip in?"

Wade makes the point that the balance struck at any point in time is subject to ideology which serves to “push the balance one way or another from one decade to another”. At this stage in history, the taxpayers’ interests are predominant, the balance tipped by public alarm at the rising welfare bill and anger that in the past so few men paid to support children after divorce. Currently the rights of individual men get short shrift.

“The view is,” said Wade, “`who cares that he couldn’t consent when he was 15 or 16? He’s older now, he’s got a job and so he should pay.”“

In a few years’ time, the balance could well be different and there are many people working very hard to ensure this is the case.

While the rights of children need generally to be given priority, it hardly makes for a just society when women are given licence to exploit and deceive men in order to pursue their reproductive choices.

DeCrow is one person determined to see this change. “Because of Roe v Wade, women have the right to choose to be parents. Men, too, should have that right,” the feminist lawyer proclaims.