

Abandoned DNA and Sperm Ownership Rights (Part 1) A talk with Glenn Cohen

I. Ownership Rights to Biological Material

A. Property interests in biological material

1. Moore v. The Regents of the University of California, 51 Cal. 3d 120 (1990)¹
 - a. John Moore underwent treatment for hairy-cell leukemia at the Medical Center of the University of California at Los Angeles. During the course of treatment, Dr. David Golde recommended that Moore's spleen be removed. Moore signed a written consent form to remove the spleen. Golde, without Moore's knowledge or permission, took portions of the spleen for research purposes, unrelated to Moore's medical care. Moore returned to the hospital from Seattle numerous times from 1976 through 1983. At each time, Golde took samples of blood, skin, bone marrow, sperm, and other biological fluids and parts. Golde established a cell line from Moore's T-lymphocytes and applied for a patent in 1981. Golde negotiated agreements for commercial development of the cell line.
 - b. Moore stated several causes of action, including conversion, breach of fiduciary duty, and lack of informed consent.
 - c. The court rejected the conversion claim. The court, however, held that a doctor seeking a patient's consent for a procedure must disclose personal interests unrelated to the patient's health, whether research or economic, that may affect his medical judgment.

B. Law enforcement

1. State v. Athan, 158 P. 3d 27 (2007)²
 - a. In 1982, 13-year-old Kristen Sumstad was found dead inside a cardboard box, nude from the waist down. Semen was found on her body. Detectives investigated leads related to John Athan, who was a teen at the time, but did not find sufficient evidence to charge him. The crime went unsolved for about twenty years.
 - b. The Seattle Police Department's cold case detectives sent the sperm to the crime lab which isolated the DNA profile. Detectives located Athan because he had been a person of interest at the time and determined that he might be a flight risk. Posing as a fictitious law firm, they sent him a letter inviting him to join a fictitious class action lawsuit. When the letter was returned, the crime lab obtained a DNA profile from the saliva on the envelope flap. The DNA matched the semen found on Sumstad's body. The detectives arrested Athan and charged him with first-degree murder. Athan motioned to suppress the DNA evidence and dismiss the case. The trial court denied the

¹ Moore v. The Regents of the University of California, 51 Cal. 3d 120 (1990):

<http://law.justia.com/cases/california/supreme-court/3d/51/120.html>

² State v. Athan, 158 P. 3d 27 (2007):

https://scholar.google.com/scholar_case?case=5735800714416864567&hl=en&as_sdt=6&as_vis=1&oi=scholar

motions. He was found guilty of second-degree murder and sentenced to 10 to 20 years. He appealed.

- c. With regard to the DNA obtained without a warrant, the court found that the detectives did not violate state or federal Constitution and the DNA evidence admissible under both state and federal constitutions. The court noted that there is no inherent privacy interest in saliva and that obtaining the saliva in the manner that the detectives did was not invasive nor involuntary. The court affirmed the conviction.

2. Combined DNA Index System (CODIS)

- a. CODIS is FBI's program of support for criminal justice DNA databases and the software used to run the databases. It has multiple levels where DNA profiles can be searched. It uses its forensic index that contains DNA profiles and its offender index that contains DNA profiles of individuals convicted of violent crimes to generate investigative leads.
- b. National DNA Index System (NDIS) is part of CODIS and contains the DNA profiles contributed by federal, state, and local participating forensic laboratories.
- c. The DNA Identification Act of 1994 (42 U.S.C. § 14132)³ authorized the establishment of a national DNA index. The Act specifies categories of data that may be maintained in NDIS: convicted offenders, arrestees, legal data, detainees, forensic, unidentified human remains, missing persons, and relatives of missing persons.

C. Discrimination laws

1. Americans with Disabilities Act (ADA) prohibits employers from discriminating against qualified individuals with disabilities in job application, procedures, hiring, and privileges of employment, among other things.
2. The ADA covers employers with 15 or more employees.
3. As defined by the ADA, an individual with a disability is a person who has a physical or mental impairment that substantially limits one or more major life activities; has a record of such impairment; or is regarded as having an impairment.

D. Havasupai Tribe of the Havasupai Reservation v. Arizona Board of Regents, 204 P.3d 1063 (2008)⁴

1. In 1989, Arizona State University (ASU) researchers conducted a project with the Havasupai Tribe which included health education, collecting and testing of blood samples, and genetic association testing to search for links between genes and diabetes risk. After failing to find a link, they used the samples for other unrelated studies on schizophrenia, migration, and inbreeding, all of which were taboo subjects in Havasupai culture. In 2003, the tribe learned about these later studies during a lecture at ASU. The Tribe filed suit for misuse of their samples, claiming, among

³ The DNA Identification Act of 1994, 42 U.S.C. § 14132:

<https://www.law.cornell.edu/uscode/text/42/14132>

⁴ Havasupai Tribe of the Havasupai Reservation v. Arizona Board of Regents, 204 P.3d 1063 (2008):

https://scholar.google.com/scholar_case?case=5912034599918111657&hl=en&as_sdt=6&as_vis=1&oi=scholar

other things, lack of informed consent, asserting that ASU conducted experiments for purposes unrelated to diabetes without tribal members' consent.

2. The case came before the Arizona Court of Appeals in 2008 on a summary judgment appeal against the plaintiffs for failing to comply with a notice of claim statute. The court reversed Arizona superior court's summary judgment orders and remanded.
3. The parties reached a settlement agreement in 2010. As part of the settlement, ASU was required to pay the tribe \$700,000 and to return all blood samples in its possession. It was also required to return all research materials derived from the blood samples.

E. Henrietta Lacks

1. Henrietta Lacks was a black tobacco farmer in Virginia. In 1951, at the age of 30, she was diagnosed with cervical cancer. Without her consent or knowledge, her doctor at John Hopkins took samples of healthy tissue and cancerous tissue and gave them to a researcher. Her cells were found to be unique because they reproduced more quickly and could be kept alive longer. The cancerous cells were grown into the first immortal human cell line, called the HeLa cell line. The HeLa cell line was used for many modern scientific achievements like the polio vaccine, gene mapping, and cloning.
2. The HeLa cell line launched a multi-billion dollar industry. The Lacks family only learned of the cell line in the 1970s when they were contacted by researchers requesting blood samples after the HeLa cells had contaminated other cultures. They have not benefitted from the commercialization of Lacks' cells.
3. In 2013, the National Institute of Health agreed to make Lacks' genome data accessible only to those who applied for and were granted access. The agreement did not include any financial compensation.

II. Privacy Rights

A. Law enforcement context

1. Fourth Amendment

a. California v. Greenwood, 486 U.S. 35 (1988)⁵

- i. In 1984, the Laguna Beach Police Department received information that Billy Greenwood was dealing drugs from his home. The police surveilled his home and observed numerous cars making brief stops at the house at night. The police asked the garbage collectors to collect the garbage bags that Greenwood left on the curb in front of his house and turn it over to the police. They found items indicative of drug use, which they used to obtain a search warrant for Greenwood's home. In his home, the police found cocaine and hashish and arrested Greenwood on felony narcotics charges. Greenwood posted bail.
- ii. The police received more complaints of cars stopping at Greenwood's house at night. They again collected his garbage, found drug related

⁵ California v. Greenwood, 486 U.S. 35 (1988): <http://caselaw.findlaw.com/us-supreme-court/486/35.html>

items, obtained a search warrant, and found drugs at his home. Greenwood was arrested again.

- iii. The California Superior Court dismissed the charges, finding that warrantless searches violated the Fourth Amendment and the California Constitution. The Court of Appeal affirmed.
- iv. The Supreme Court reversed the lower court decision and held that the Fourth Amendment does not prohibit warrantless searches of garbage left on the curb of a home. It found that there was no reasonable expectation of privacy for garbage on the streets because Greenwood voluntarily left his trash at the curb where anyone can presumably inspect it.

B. Disclosure of health information

1. Criminal transmission of HIV

- a. 33 states have HIV-specific criminal transmission laws. All states have assault and battery or reckless endangerment laws that can be used to prosecute individuals for similar behaviors as well.
- b. Although the laws vary, most require persons who are aware of their HIV status to disclose it to their sexual partners. The laws also criminalize certain behaviors like knowingly infecting someone, and engaging in unprotected sex or donating blood or other organs knowing that the person has HIV.

2. Healthcare provider's duty to disclose

- a. *Bradshaw v. Daniel*, 854 S.W.2d 865 (Tenn.1993)⁶
 - i. Elmer Johns went to the ER because of headaches, muscle aches, fever and chills. Dr. Chalmer Daniel admitted him. Johns' condition deteriorated and he died a couple of days later. An autopsy confirmed that he died of Rocky Mountain Spotted Fever. Dr. Daniel never advised Johns' wife, Genevieve Johns, of her risk of exposure to the disease or that the disease could have been the cause of Johns' death. A week after Johns' death, Genevieve Johns went to the ER with similar symptoms. She was treated for Rocky Mountain Spotted Fever but died three days later. Dr. Daniel was not her doctor. Genevieve Johns' son filed suit alleging that Daniel's negligence in failing to advise Genevieve Johns and failing to warn her of her risk of exposure caused her death. Dr. Daniel argued that he owed Genevieve Johns no legal duty because there was no physician-patient relationship, and because Rocky Mountain Spotted Fever is not a contagious disease, there is no duty to warn of the risk of exposure.
 - ii. The court concluded that the existence of the physician-patient relationship is sufficient to impose upon a physician an affirmative duty to warn the patient's immediate family against foreseeable risks

⁶ *Bradshaw v. Daniel*, 854 S.W.2d 865 (Tenn.1993):
https://scholar.google.com/scholar_case?case=15831758329623797928&q=Bradshaw+v.+Daniel&hl=en&as_sdt=2006

emanating from a patient's illness. It found that Dr. Daniel had a duty to warn Genevieve Johns of contracting the disease.

III. Ownership Rights to Sperm

A. Phillips v. Irons, 883 N.E.2d 1151 (2005)⁷

1. Richard Phillips and Sharon Irons, both doctors, had previously had a romantic relationship. Unbeknownst to Phillips, Irons was still married at the time. Phillips told Irons that he did not want to have children before and intended to use a condom if they engaged in sexual intercourse. Irons and Phillips engaged in oral sex after which she artificially inseminated herself with his sperm. When Phillips learned Irons was still married five months into their relationship, he ended the relationship.
2. The following year, Irons filed a petition to establish paternity against Phillips. DNA tests confirmed that Phillips was the father. He was ordered to pay \$800 a month in child support.
3. Phillips sued Irons for fraudulent misconception, conversion, and intentional infliction of emotional distress. The lower court dismissed Phillips claims.
4. The Appellate Court of Illinois dismissed the fraudulent misconception claim because the claim is only available for economic wrongs. The court also dismissed the conversion claim because Phillips did not intend for his semen to be returned. The court ruled that the IIED claim could go forward.

B. In vitro gametogenesis

1. In vitro gametogenesis involves taking stem cells to create gametes (reproductive cells – eggs and sperm capable of creating offspring). Scientists have been able to create in vitro gametes from mice.
2. IVG could allow same-sex couples to have biological children related to both partners.

⁷ Phillips v. Irons, 883 N.E.2d 1151 (2005):
https://scholar.google.com/scholar_case?case=10501308084585024934&hl=en&as_sdt=6&as_vis=1&oi=scholarr