Published in final edited form as:

Am J Obstet Gynecol. 2015 August ; 213(2): 186–187.e1. doi:10.1016/j.ajog.2015.03.046.

Kamakahi vs ASRM and the future of compensation for human eggs

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Abstract

A recent lawsuit that alleges that the American Society for Reproductive Medicine (ASRM) engages in price-fixing by capping the amount of compensation paid for human oocytes has several critical ethical and policy implications that have received relatively little attention. ASRM has argued that ceilings on donor compensation prevent enticement, exploitation, and oocyte commodification. Critics counter that low donor compensation decreases supply, because fewer women are then interested in donating, which then increases prices for the service that physicians, not donors, accrue, and that ethical goals can be better achieved through enhanced informed consent, hiring egg donor advocates, and better counseling and screening. Yet, if compensation caps are removed, questions emerge concerning what the oocyte market would then look like. Informed consent is an imperfect process. Beyond the legal and economic questions of whether ASRM violates the Sherman Anti-trust Act also lie crucial questions of whether human eggs should be viewed as other products. We argue that human eggs differ from other factory-produced goods and should command moral respect. Although eggs (or embryos) are not equivalent to human beings, they deserve special consideration, because of their potential for human life, and thus have a different moral status. ASRM's current guidelines appear to address, even if imperfectly, ethical challenges that are related to egg procurement for infertility treatment. Given public concerns about oocyte commodification and ASRM's wariness of government regulations, existing guidelines may represent a compromise by aiding patients who seek eggs, while simultaneously trying to avoid undue influence, exploitation, and eugenics. Although the ultimate outcome of this lawsuit remains unclear, policy makers, providers, lawyers, judges, and others should attend seriously to these issues. Alternatives to current ASRM guidelines may be possible (eg, raising the current caps to, say, \$12,000 or \$15,000, potentially increasing donation, while still avoiding certain ethical difficulties) and warrant close consideration. These complex conflicting ethical issues deserve more attention than they have received because they affect key aspects of clinical practice and the lives of countless patients.

Keywords

eugenics; ethics; compensation; policy; undue influence

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The authors report no conflict of interest.

A recent law suit that alleged that the American Society for Reproductive Medicine (ASRM) engages in price-fixing by capping the amount of compensation that is paid for human oocytes has several critical ethical and policy implications that have received relatively little attention. In 2011, Lindsay Kamakahi, a young Asian American woman, sued ASRM, arguing that the maximum compensation its Ethics Committee sees as justifiable violates the Sherman Anti-Trust Act; in 2013, a US District court rejected ASRM's motion to dismiss the case.¹ Although several legal aspects of this case have received commentary,² other complex ethical issues deserve consideration and bear on the future of payments for human eggs and organs and the practices of professional medical associations that publish guidelines. Will Kamakahi vs ASRM be another example of the law trumping medical ethics?

Background

Compensation for human oocytes has long-raised questions as to whether market-driven supply and demand should govern payments. In 2000, ASRM suggested providers should compensate only "reasonable" amounts for human oocytes³ but, in 2007, further specified that compensation >\$5000 required justification and that amounts >\$10,000 were inappropriate. Furthermore, compensation should not vary based on donors' traits or pedigrees.⁴

ASRM has argued that ceilings on donor compensation prevent enticement, exploitation, and oocyte commodification. Offering high sums for self-reported medical, educational, and family history might also promote misrepresentation in efforts to appear more attractive.

Critics counter that low donor compensation decreases supply because fewer women are then interested in donating, which increases prices that physicians, not donors, accrue (seen by economists as "rents")² and that ethical goals can be better achieved through enhanced informed consent, hiring egg donor advocates, and better counseling and screening.²

If compensation caps are removed, questions emerge concerning what the oocyte market would then look like. Free-market proponents argue that providers should instead determine their own "reasonable amounts" of payment. But providers would likely define "reasonable" in varying ways, which prompts ethical concerns. Arguably, payment to donors would increase and differentiate widely. Compensation for unique pedigrees or phenotypes probably would rise disproportionately, which would pose concerns about eugenics. Oocyte prices might range across a broad spectrum, as do most purchased goods, and be viewed as commodification. Perceptions of highly sought genetic qualities in eggs, rather than risks of egg retrieval, might dictate donor compensation.

ASRM critics argue that we should not worry about these concerns and instead let the marketplace rule.² But unbridled compensation likely will have far-reaching effects beyond egg donor enrichment. ASRM opponents assert that, nationally, the number of egg purchasers is small so that the overall effect would not be large. Yet, donor egg use will continue to increase as women delay childbearing to pursue careers. Moreover, perceptions that reproductive medicine is widening disparities, preferentially serving wealthier

individuals who can afford these procedures, would likely increase, which would undermine public attitudes about assisted reproduction and trust in physicians more generally.

Critics assert that ASRM's other guidelines (eg, concerning informed consent) and the addition of egg donor advocates and enhanced donor screening can address these ethical concerns.² However, informed consent is an imperfect process. Many individuals fail to read or understand key elements of informed consent documents. Moreover, these alternatives would not address concerns about commodification and eugenics. Additionally, ASRM's policies are not law, only guidelines. ASRM cannot monitor these guidelines and lacks authority to enforce them; many clinics do not follow these recommendations.⁵

Excessive payments that would emerge without caps could unduly entice some woman; other donors actually might be exploited by comparative underpayment within the same marketplace. Although current guidelines may allow providers to collect rents,² increased policies will not necessarily reduce and may even heighten these earnings. Stores selling luxury goods make proportionally more profit per item than those selling inexpensive items.

Beyond the legal and economic questions of whether ASRM violates the Sherman Act lie crucial questions of whether human eggs should be viewed as other products. We think not. Human eggs should command moral respect; although eggs (or embryos) are not equivalent to human beings, they deserve special consideration because of their potential for human life and have a moral status different than that of factory-produced goods that are not made by human cells.

This case highlights, too, how ethical and legal principles can clash. No laws exist against eugenics, which historically have caused harm (most egregiously not only in Nazi Germany but also in the United States), fueling stigma, discrimination, and injustice. If laws against eugenics existed, courts might use them to counter this suit. Laws should embody and reflect cultural consensus but clearly do not always do so.

ASRM's current guidelines appear to address, even if imperfectly, ethical challenges that are related to egg procurement for infertility treatment. Given public concerns about oocyte commodification and ASRM's wariness of government regulations, existing guidelines may represent a compromise: aiding patients who seek eggs, while simultaneously trying to avoid undue influence, exploitation, and eugenics. Although some observers may view any payment for oocytes as commodification, compensation caps offset the degree to which that is the case. Ironically, ASRM's desire to address various ethical concerns now makes it vulnerable to antitrust litigation. Heretofore, particularly after perceived abuses (eg, "Octomom"), critics have sought increased industry regulation. This lawsuit, if successful, represents movement in the opposite direction, which prompts less, not more, industry oversight and regulation.

Broader implications

This lawsuit highlights tensions between new technologies vs 18th and 19th century statutes. The Sherman Act law was passed in 1890 to attack monopolies of powerful national corporations (eg, in oil and railroads), which was decades before in vitro fertilization.

Similarly, patent laws were developed in the 18th century, before genes were identified. In 2013, the Supreme Court rejected some, but not all, of Myriad Genetics DNA patents, and the future of patents concerning biologics remains unclear. Challenges exist in applying patent and antitrust laws to human life, which suggests the need to develop other policies. Broader discussions among legal scholars, policy makers, and other stakeholders are vital to assess whether alternatives might be possible, and if so, what.

This case also has potential implications for other debates that concern sales of body parts. Companies now produce and sell embryos⁶; debates rage over whether compensation for organs, especially kidneys, should be allowed.⁷ The National Organ Transplant Act of 1984 bans compensation for donations (such as kidneys) but compensation for bone marrow has recently been allowed,⁸ presumably because an individual has only a limited supply of solid organs (such as kidneys) but a far larger, if not essentially endless, supply of marrow, sperm, and oocytes. Kidney donation is also more invasive and potentially can cause more harm.⁷ Kidney sales may also disproportionately favor the wealthy who can afford to buy them. Yet, removing all constraints on free-markets for eggs may fuel efforts to permit sale of other organs, too.

Moving forward

The ultimate outcome of this lawsuit remains unclear, and we suggest that judges not support the plaintiff and that policy makers, providers, lawyers, judges, and others attend closely to these issues. Alternatives to current ASRM guidelines may be possible (eg, raising the current caps to, say, \$12,000 or \$15,000, potentially increasing donation, while still avoiding certain ethical difficulties), and warrant close consideration.

Debates about whether markets for eggs and other human body parts should be constrained (and if so how) surely will continue. These complex, conflicting ethical issues deserve more attention than they have received because they affect key aspects of clinical practice and the lives of countless patients.

Acknowledgments

The authors thank Patricia Contino, MFA, for her assistance in the preparation of this manuscript.

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