From eternity to paternity

In this article Dr Neil Sullivan reports on a landmark case where the **DNA testing** of the extracted and stored genetic material of a **deceased male** has been used for a **paternity test**.

In Spencer v Anderson (1), the applicant had previously been made aware that a male who died of bowel cancer, may have been his biological father and in the action he sought to establish his paternity and his exposure to disease risk. The alleged father's DNA had been stored in extracted form by a local hospital.

As identified by Peter Jackson J, DNA tests post mortem fall outside of the scope of the Family Law Reform Act 1969 which, *inter alia,* only apply to the living and to the testing of bodily fluid/tissue…and not to DNA testing. In an interesting twist, such tests also fall outside of the Human Tissue Act 2004, which refers to biological samples and the *intent* to conduct a DNA test. It does not refer to stored DNA samples, which may or may not have an associated consent for its use in paternity testing. In this case, there was no way of knowing if the deceased would have consented to a paternity test. The judge had quite rightly identified a legislative void as neither paternity testing post mortem nor paternity testing on extracted DNA are adequately covered by the law.

In order to analyse DNA from the living (unless it is for an excepted purpose such as a criminal investigation) the consent of the donor is required or indeed, in the case of a minor, the consent of a person with Parental Responsibility. DNA is the means by which your genetic information is carried from one generation to the next. It carries the information necessary to establish your biological relationship to others but also can give some indication of other characteristics, such as disease risk. According to Peter Jackson, "DNA testing is an interference of the highest order with the subjects right to confidentiality and the privacy of their known family members".

In Spencer, the alleged father's samples had been given for one purpose (determination of his bowel cancer susceptibility status) and this did not imply blanket consent for other purposes such as a paternity test. If the court were to allow unconsented DNA testing for paternity post mortem, this could open a raft of new inheritance disputes and may discourage the provision of samples during medical treatment if there was a possibility of paternity testing after death. On the balance of argument, Jackson J allowed DNA testing to establish the paternity of Mr Spencer in the interest of justice using the inherent jurisdiction of the High Court.

On the other hand, a recent ruling in Germany held that the alleged father's right to privacy under Article 8 of the European Convention on Human Rights ranked higher than the woman's right to identify her father (2). Maybe the balance was swayed because the alleged father was alive and his fundamental rights might have been affected. The extended effects upon the alleged father's family are likely to have been broadly similar to Spencer, whether alive or not.

In the Spencer case, knowing that the alleged father had disease risk would be sufficient for an individual to ask for direct genetic testing in order to determine whether the susceptibility genes had been inherited at all. In our view the determination of paternity was not necessary for this purpose and contrary to the arguments made, does not contribute to the mitigation of disease risk.

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1. Spencer v Anderson (Paternity Testing: Jurisdiction) [2016] EWHC 851 (Fam) (15 April 2016)

2. http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-018.html