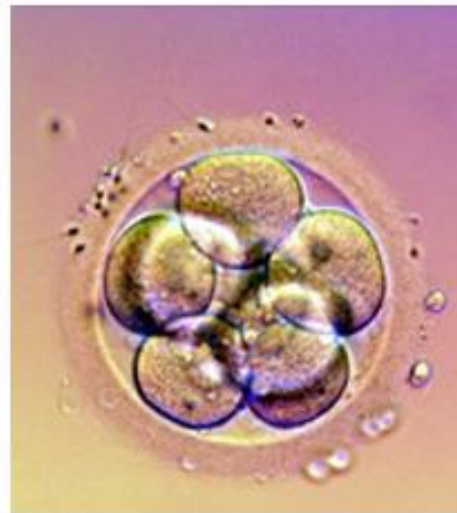


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Goa, India

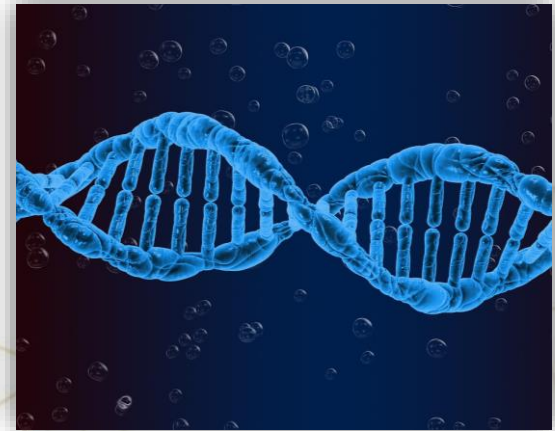


Human reproductive rights: Can the law keep pace with science?

**Tuesday | 7 March 2023**

# Overview

- ❑ The Malaysian Experience
  - ❑ Case Discussion
  - ❑ Observations



# The Malaysian Experience





The first baby conceived through IVF was born in 1978 in England. Assisted Reproductive Technology (ART) was introduced in Malaysia soon after.

The first IVF facility in Malaysia was set up in the late 1980s.

Sources:

BBC, 30<sup>th</sup> birthday for first IVF baby, <http://news.bbc.co.uk/2/hi/health/7505635.stm>

Dr Haris Hamzah on Infertility Aide, <https://www.infertilityaide.com/doctors/dr-haris-hamzah>

# No Specific Legislation



Malaysia has no specific legislation for Human Reproductive Technology. There are however professional guidelines for medical practitioners & guidelines for the accreditation of Laboratories and Operation Theatres:

- **Malaysian Medical Council Guideline 003/2006 on Assisted Reproduction** (January 2007)
- **Ministry of Health Standards for Assisted Reproductive Technology Facility – Embryology Laboratory and Operation Theatre** (October 2012)





- Example: Sex selection provision in **MMC Guideline**:

*“There should be no selection of the sex of embryos for social or personal reasons. Sex selection is, however, allowed if a particular sex predisposes to a serious genetic condition e.g. haemophilia, Duchenne muscular dystrophy, fragile X syndrome, etc.”*



- Example: Sex selection provision in **MMC Guideline**:
- This is not sufficiently clear.
  - Is sex screening allowed for *all* embryos, or only embryos that have a particular risk of a sex-related genetic condition?
  - Are all types of sex screening allowed, or specific types?



- Example: Surrogacy in **MMC Guideline**:

*“In a surrogate arrangement a women agrees to becomes pregnant and bear a child for another person/persons and to surrender it at birth. The above practice is not acceptable to most of the major religions in this country. Such a surrogate pregnancy can also potentially lead to many legal dilemmas for the persons involved.”*





- Example: Surrogacy in **MMC Guideline**:
- This is also not clear.
  - Is a medical practitioner allowed to be part of a surrogacy arrangement?



- However, the **MMC Guideline** does provide some absolute prohibitions for downright unacceptable practices, e.g.:
  - Experimentation with the intent to clone individuals.
  - Pre-implantation to create designer babies.
  - The use of Assisted Reproductive Technology in unmarried couples.



**Fatwa** by The National Council of Islamic Religious Affairs prohibits surrogacy for Muslims.



Incidentally, a proposed legislation, the Assisted Reproductive Technique Services Act never saw the light of day.

# Issues of Concern







- Surrogacy carries on unregulated.
- The rights of the commissioning parents, surrogate and the resulting child remain unprotected,

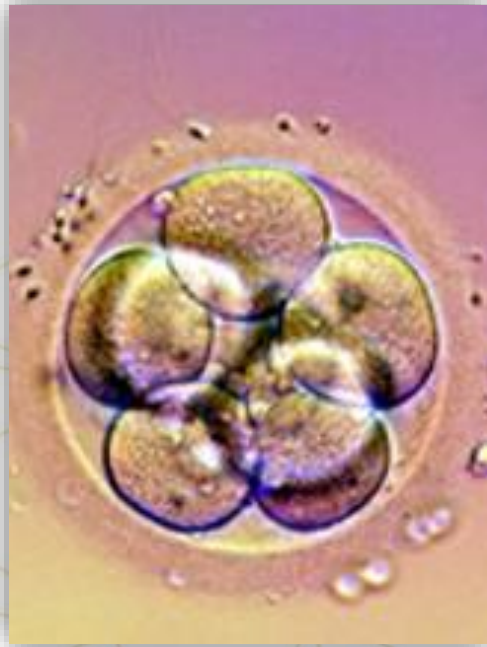


- The business of cross-border commercial surrogacy with locals being enticed to become surrogate mothers in exchange for financial gain without being properly advised of the risks to their own health.



Women under financial pressures to donate eggs through private agents who entice them with lucrative payments without being counselled on inter alia:

- the limits on the number of donations they should undertake
- the fact that they are depleting their store of eggs that they may use for their own reproduction
- the risk of premature menopause.



- Lack of genetic record. Since there is no body or framework to record the genetic information of donated gametes, human beings conceived using ART may inadvertently inbreed.

# Case Discussion





# ACB v Thomson Medical Pte Ltd and others [2017] SGCA 20

**Singapore Court of Appeal**



# ACB v Thomson Medical Pte Ltd and others [2017] SGCA 20



## **Facts:**

The Appellant underwent IVF. At the birth of the baby, it was discovered that, due to a mix-up, the Appellant's ovum had been fertilized using sperm from an unknown third party instead of sperm from the Appellant's husband.

# ACB v Thomson Medical Pte Ltd and others

## [2017] SGCA 20

### Held:

- The Plaintiff could not recover for “upkeep costs” because it would be inconsistent with the obligation in parenthood to maintain one’s child, to show that their child is a “net loss”.
- The Plaintiff could not recover for “loss of autonomy” because the concept of autonomy is nebulous, and is generally vindicatory rather than compensatory.
- However, **the Plaintiff could recover 30% of the full cost of raising the baby as loss of “genetic affinity”**, recognising that blood relations are significant to many parents. Being denied this genetic affinity constituted a recoverable loss.

# ACB v Thomson Medical Pte Ltd and others

## [2017] SGCA 20

### Held:

“127 We begin with this. The Appellant’s desire to have a child of *her own, with her Husband*, is a desire that is a basic human impulse, and its loss is keenly and deeply felt, even if it is difficult to put into words. Her desire (and therefore her loss), as explained by Fred Norton in an excellent article, was for “genetic affinity” [...]

128 [...] This fact of biological experience – heredity – carries deep socio-cultural significance. For many, the emotional bond between parent and child is forged in part through a sense of common ancestry and a recognition of commonalities in appearance, temperament, and physical appearance. For yet others, genetic continuity and biological lineage is deeply important to religious and cultural belonging [...]

# ACB v Thomson Medical Pte Ltd and others

## [2017] SGCA 20

### Held:

“129 [...] Now, all this is not to lay out a prescriptive definition of what family should be or, worse, to denigrate adoption, which is a precious and valuable thing, but to explain that persons who consciously choose to undergo IVF do so because of a deep desire to experience, as far as it is possible, the ordinary experience and incidents of parenthood. And when, as in the present case, a person has been denied this experience due to the negligence of others then she has lost something of profound significance and has suffered a serious wrong.”



# ACB v Thomson Medical Pte Ltd and others

## [2017] SGCA 20



### Key takeaways:

- A court can redress negligence in the context of ART for loss of “**genetic affinity**”. This concept recognised the true sense of loss to the parents, without entering the ethically dubious area of “upkeep costs” and “loss of autonomy” resulting from the birth of a child.
- This case is an example of courts keeping apace with science, medicine, and social attitudes.

# XX v Whittington Hospital NHS Trust [2020] UKSC 14

**UK Supreme Court**



# XX v Whittington Hospital NHS Trust [2020] UKSC 14



## **Facts:**

Claimant became infertile as a result of Defendant (NHS trust)'s negligent delay in diagnosing her with cancer of the cervix. She brought an action for damages claiming inter alia, the cost of undergoing four pregnancies by surrogacy arrangements, which she intended to make either in California (commercially) or in the UK (non-commercially) using her own eggs or donor eggs.

# XX v Whittington Hospital NHS Trust

## [2020] UKSC 14

### Held:

- Damages to fund surrogacy arrangements were recoverable – whether using the Claimant's own eggs or donor eggs – so long as the prospects of success were reasonable.
- Damages to fund the cost of commercial surrogacy arrangements in California were recoverable in this case.
  - Would not be a criminal offence. Would have been recoverable if the surrogacy took place in the UK.
  - Although there was no plans to allow commercial surrogacy agencies to operate in the UK, the courts had recognised the parental relationships created by foreign commercial surrogacy.

# XX v Whittington Hospital NHS Trust [2020] UKSC 14

## Held:

“49 That leaves only the most difficult question: what about the costs of foreign commercial surrogacy? Surrogacy contracts are unenforceable here. It is well-established that the UK courts will not enforce a foreign contract which would be contrary to public policy in the UK: see *Rousillon v Rousillon* (1880) 14 Ch D 351; *Israel Discount Bank of New York v Hadjipateras* [1984] 1 WLR 137. Why then should the UK courts facilitate the payment of fees under such contracts by making an award of damages to reflect them?”



# XX v Whittington Hospital NHS Trust [2020] UKSC 14

## Held:

“53 For all those reasons, I conclude that it is no longer contrary to public policy to award damages for the costs of a foreign commercial surrogacy. However, that does not mean that such damages, still less damages such as are claimed in this case, will always be awarded. There are some important limiting factors. First, the proposed programme of treatments must be reasonable. There may be good reasons to think that, but for the negligence, the claimant would have had the number of children now proposed, but there may not. Second, it must be reasonable for the claimant to seek the foreign commercial arrangements proposed rather than to make arrangements within the UK. This is unlikely to be reasonable unless the foreign country has a well-established system in which the interests of all involved, the surrogate, the commissioning parents and any resulting child, are properly safeguarded ...

# XX v Whittington Hospital NHS Trust [2020] UKSC 14

## Held:

... Unregulated systems where both surrogate and commissioning parents are at the mercy of unscrupulous agents and providers and children may be bought and sold should not be funded by awards of damages in the UK. This has not been explored in this case, but it should not be concluded that, even in California, all is always well (as the Report of the United Nations Special Rapporteur shows). Third, the costs involved must be reasonable. This too has not been put in issue in this case, which has been argued as a matter of principle, but it should certainly not be taken for granted that a court would always sanction the sorts of sums of money which have been claimed here.”

# XX v Whittington Hospital NHS Trust [2020] UKSC 14



## Key takeaways:

- Concepts of “public policy” can evolve with science, medicine, and developing social attitudes.
- Courts can be doctrinally flexible/innovative. Here, the court recognised that a commercial surrogacy contract would be “unenforceable”, yet the court may still award damages for the costs of commercial surrogacy resulting from negligence that caused infertility.

# Leow Fook Keong v Pendaftar Besar Bagi Kelahiran dan Kematian Malaysia [2022] 1 MLJ 398

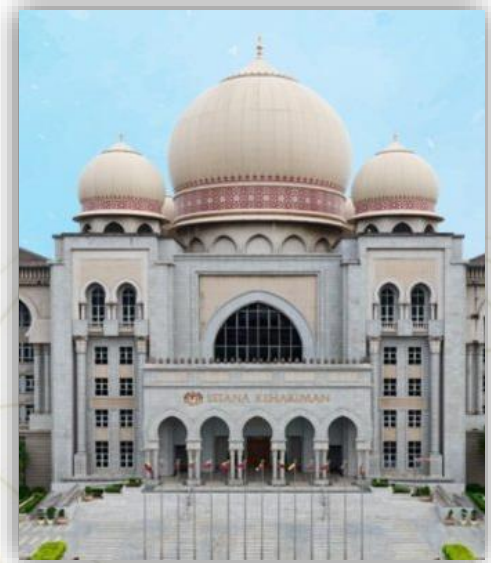
**Malaysian Federal Court**



# Leow Fook Keong v Pendaftar Besar Bagi Kelahiran dan Kematian Malaysia [2022] 1 MLJ 398

## Facts:

- Appellant procured a court order declaring him as biological father of an “illegitimate child”, on the basis of a DNA test.
- The mother of the child had not provided information about the Appellant’s paternity to the Registrar of Births and Deaths. Therefore, the child’s father had not been recorded.
- Appellant commenced proceedings against the Registrar seeking to update the register to reflect the declaratory order that he was the biological or natural father of the child.

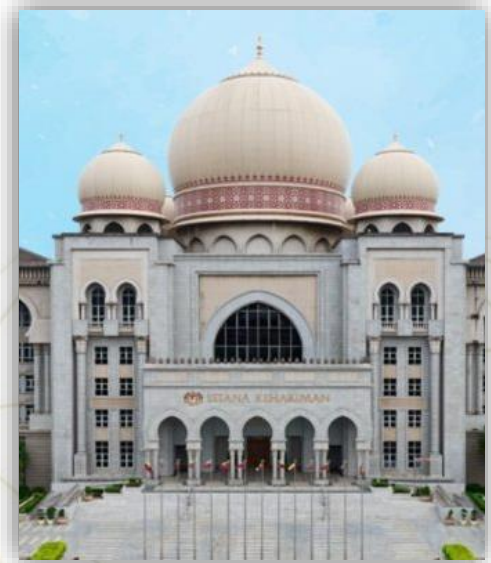




# Leow Fook Keong v Pendaftar Besar Bagi Kelahiran dan Kematian Malaysia [2022] 1 MLJ 398

## Facts:

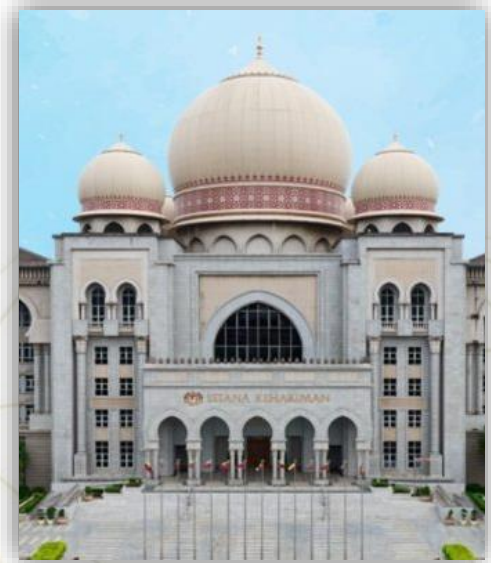
- The High Court had granted an order that the Registrar was duty-bound to maintain correct particulars in the register.
- The Court of Appeal disagreed, holding that the High Court's decision was “in conflict with public policy”, “culture of the people”, and “religious values”.



# Leow Fook Keong v Pendaftar Besar Bagi Kelahiran dan Kematian Malaysia [2022] 1 MLJ 398

The question for the Federal Court;

*“Whether the National Registration Department is under a statutory duty to record the particulars of the natural father of an illegitimate child and/or to correct/amend/update such records, when evidence and undisputed facts are available.”*



# Leow Fook Keong v Pendaftar Besar Bagi Kelahiran dan Kematian Malaysia [2022] 1 MLJ 398

## Held:

- The Registrar was under a duty to maintain correct and accurate registers, and any errors or omissions subsequently discovered may be corrected.
- This duty serves to ensure that the registers are current and reliable records, to form evidence of any birth or death, and as the source and indices of the country's population.
- Following DNA results and the court order, the Registrar was obliged to update the register to correct the now-inaccurate information.

# Leow Fook Keong v Pendaftar Besar Bagi Kelahiran dan Kematian Malaysia [2022] 1 MLJ 398

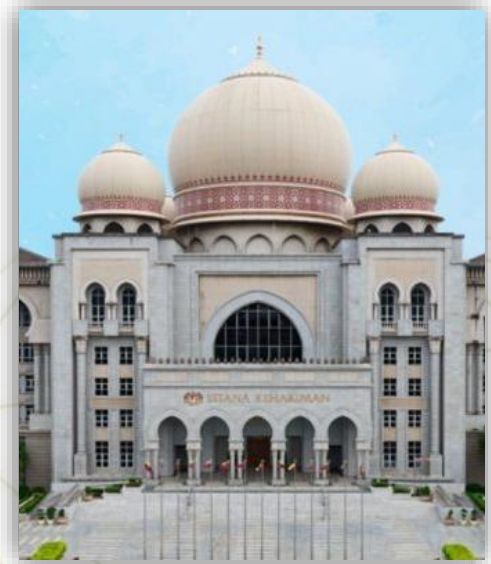
## Held:

“[71] The beginning of life, the arrival of a new-born should be celebrated with joy and a sense of well-being. The inclusion of the name of a person as the mother or father of a new-born child does not necessarily mean that such named mother or father is the legitimate or even biological parent of the child, given the advent of assisted or *in vitro* fertilisation and surrogacy (distinguishing further between birth, natural and genetic parents) and without casting any moral judgment, the practice of cohabitation. Had it been properly appreciated at the outset, that the registration of births by the Registrar-General is essentially administrative and facilitative, and not a judicial function, there would have been a prescience to obviate any if not all the obstacles that were presented in this appeal.”

# Leow Fook Keong v Pendaftar Besar Bagi Kelahiran dan Kematian Malaysia [2022] 1 MLJ 398

## Key takeaways:

- Malaysia's apex court recognised that cultural values should not diminish the Registrar's duty to record the biological parents of a child.
- In this regard, the court anticipated that ART may challenge ordinary cultural perceptions of parenthood.






# Observations



- Difficult to argue that this area will not benefit from specific legislation.
- However, a failure by the legislators can be addressed through more stringent and specific guidelines by the medical profession & a progressive body of judge made law.
- Medical science is afterall ever evolving, the law must find its most flexible form to keep pace.

- For the most part, medical science would have been developed to do good.
- Here, the technology “*..has been developed out of concern for individuals and couples who are unable to have children when they desire them.*” (MMC Guideline 003/2006)



The law and the medical profession needs to keep that basic  
objective on track.

# Thank You



**Raja Eileen Soraya | [eileensoraya@rdl.com.my](mailto:eileensoraya@rdl.com.my)**