Lesbians, artificial insemination and human-rights laws

Can doctors place limits on their medical practices?

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Education

Éducation

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Can Med Assoc J 1997;156:839-40

In brief

PHYSICIANS SHOULD EXERCISE GREAT CAUTION and probably seek legal counsel if they decide to place specific limits on the work they will do or patients they will see, lawyer Karen Capen warns. The BC Human Rights Council recently ruled that a physician had violated the province's Human Rights Act when he declined to provide artificial insemination for a lesbian couple. The physician argued unsuccessfully that increased risks of litigation constituted a bona fide and reasonable justification for denying the service.

En bref

LES MÉDECINS DEVRAIENT ÊTRE TRÈS PRUDENTS et, probablement, consulter un avocat s'ils décident de limiter le travail qu'ils veulent faire ou les patients qu'ils recevront, affirme Karen Capen, avocate. Le Conseil des droits de la personne de la Colombie-Britannique a décidé récemment qu'un médecin avait enfreint la Loi sur les droits de la personne de la province en refusant de fournir des services d'insémination artificielle à un couple de lesbiennes. Le médecin a soutenu en vain que l'augmentation des risques de litige constituait une raison véritable et raisonnable de refuser le service.

In 1993 Tracy Potter and Sandra Benson filed a human-rights complaint alleging that Dr. Gerald Korn, an obstetrician/gynecologist, had denied them artificial insemination (AI) because they are lesbians. Two years later the BC Council of Human Rights found that their complaint was justified and that Korn had discriminated against them because of their sexual orientation.

Korn asked the BC Supreme Court for a judicial review of the tribunal's ruling, but his petition was dismissed in April 1996. This case illustrates physicians' human-rights obligations in the context of the physician–patient relationship and doctors' responsibilities concerning practice-related decisions and the provision of medical services.

When Tracy Potter scheduled her appointment with Korn, a significant portion of his practice involved the treatment of infertility through AI. He recruited and screened semen donors and created a sperm bank solely for his patients. Over the years Korn had artificially inseminated more than 1000 women, and he said 4 or 5 of those treatments involved lesbian couples. However, following a child-support case in the late 1970s in which he was a witness, he decided to stop providing the service to lesbians, although he continued to provide other obstetric and gynecologic services to both lesbians and heterosexual women.

Tracy Potter, a physician, and Sandra Benson, a lawyer, had an established and stable relationship and were considering starting a family when they consulted Korn on Apr. 20, 1993. He advised them that he had stopped providing AI to lesbians after a lesbian mother whose children were conceived via AI that he provided sued her separated partner for child support. However, Korn provided Potter and Benson with the names of 2 other physicians whom he believed could assist them.

The couple found that one of these physicians would provide the service but did not have access to a sperm bank. Accordingly, having decided to go ahead

with their plans, the couple obtained semen from a sperm bank in California and Tracy Potter performed the procedure on her partner, who became pregnant and successfully gave birth.

The couple unsuccessfully complained to the College of Physicians and Surgeons of British Columbia, alleging an unethical refusal of services. The college was unable to conclude that Korn did not have legitimate concerns regarding the potential impact on his practice and on his ability to provide service to other patients. The couple then filed a complaint with the BC Council of Human Rights, alleging that Korn "denied . . . a service or facility available to the public, because of . . . sexual orientation and/or family status."

The act requires "bona fide and reasonable justification" to be proven if a person is to be allowed to deny an accommodation, service or facility to another on the basis of family status, sexual orientation or some other factor. The complainant must provide evidence of a *prima facie* contravention of the act; if this is successful, the burden shifts to the defendant to provide evidence of a legitimate — nondiscriminatory — reason for certain conduct or practices, or to advance a statutory defence.

The Council of Human Rights found that Potter and Benson had established a *prima facie* case against Korn; his defence was that the increased risk of litigation that arises in providing AI to lesbians constituted a bona fide and reasonable justification for denying the treatment.

In a 1982 case, *Ontario (Human Rights Commission)* v. *Etobicoke*, the Supreme Court of Canada described a 2-part test for establishing whether a defence in a human-rights complaint is bona fide and provides reasonable justification for an action. Although that case dealt with an employment issue, the principles it set out were applicable in the BC case involving Korn. The "test" stated that:

- To be a bona fide requirement, the limitation must be imposed honestly, in good faith and in the sincerely held belief that [it] is imposed in the interest of the adequate performance of the work involved, and not for ulterior or extraneous reasons aimed at objectives that could defeat the purpose of the code.
- It must be related in an objective sense to the performance of the employment concerned in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

The issue in the case, therefore, was whether Korn's concern about possible legal proceedings offered a bona fide justification for denying AI services to lesbians. The adjudicator stated that "in my view, the law applied to physicians and all other providers of services customarily available to the public is that they may not discriminate on any prohibited ground [e.g. age, gender, race, ethnic origin, religion and sexual orientation], unless they have a bona fide and reasonable justification for the discrimination. Something more than the mere assertion of professional autonomy of the personal comfort of the physician or patient is required."

The BC Human Rights Council decided that the complaint against Korn was justified; he had not established that excluding lesbians from his AI practice was reasonably necessary for him to be able to conduct his practice efficiently and economically. Potter and Benson were awarded $900 for expenses and $2500 as compensation for "emotional injury."

Korn sought a judicial review based on several questions. Did the Human Rights Council err in law in finding that Korn denied AI to Potter and Benson? Did the council have jurisdiction to consider these matters? Did the Council, having accepted the bona fides of Korn's motivation in refusing AI to Potter and Benson, err in law by finding that he did not have a reasonable justification for refusing to accept lesbians as patients?

The BC Supreme Court decided that the ultimate question before the court was not whether it would reach the same conclusion as the Human Rights Council, but only whether it was reasonable for the council to reach the conclusion it did. It decided that the decision met the test of correctness and could not be considered unreasonable.

Physicians should pay heed to an important statement in the Supreme Court judgement: "The professional or medical ethic which permits a practitioner to refuse services to a patient must not be confused with discrimination as proscribed by [human-rights legislation]". Both the council's reasons and the BC Supreme Court judgement referred to the ethical standards that govern the medical profession in Canada (the CMA Code of Ethics, 1990).

In August 1996 the CMA General Council approved a revised Code of Ethics that contains many revisions to the version referred to in this case. The new version states: "In providing medical service, do not discriminate against any patient on such grounds as age, gender, marital status, medical condition, national or ethnic origin, physical or mental disability, political affiliation, race, religion, sexual orientation or socioeconomic status. This does not abrogate the physician's right to refuse to accept a patient for legitimate reasons."

This case provides an example of what will and will not be considered "legitimate" when a physician decides to limit the provision of a medical service to a individual or couple on the basis of prohibited human-rights categories of discrimination. The second sentence, which allows for "legitimate reasons," was added to the CMA code following considerable debate at General Council. As Korn's case illustrates, physicians should exercise great caution and probably seek legal counsel before choosing to place limits on the professional work they will accept. ?