

Clarifications to the 2019 Wilson Moot Problem

Kowalski v. Saskatchewan (Attorney General)

1. The facts are as found by Justice Cairns. Mooters may conduct any research they see fit in the course of developing their arguments. Mooters are also permitted to refer to any domestic or foreign law in their written and/or oral arguments. However, no reference shall be made, in written or oral arguments, to any facts (legislative, social or adjudicative) beyond those found by Justice Cairns.
2. The High Court of the Dominion of Canada will not entertain submissions on any issues other than the three constitutional questions for which the Court granted leave, including the issue of remedy. Irina is seeking a declaration that the eligibility requirements for the Fertility Program are of no force and effect, because they infringe her rights under ss. 15 and 7 of the *Charter* and those infringements are not saved by s. 1 of the *Charter*. The government has agreed that if the appeal is allowed, the government will be required to fund her IVF. Parties may make submissions regarding the applicability of s. 15(2) of the *Charter* if so advised.
3. Irina has a valid Saskatchewan Health Card.
4. The parties agree that IVF is not medically required for Irina for the purposes of s. 14(1) of the SMCIA. Medical necessity is not at issue on this appeal.
5. All of the expert witnesses agreed in cross-examination that the terms “per month” and “per cycle” can be used interchangeably.
6. The term “success rates”, when used in the Official Problem, refers to rates of conception only. In paragraph 15, the reference to a success rate of “approximately 15% per month for women between 40-43” refers to an average rate of conception of 15% per cycle for women aged 40 to 43.
7. Section 600P of the PPS states that “where IVF is provided as an insured service, only one embryo will be transferred per cycle of treatment.” If a patient is paying for IVF out-of-pocket, a patient can transfer as many embryos during a cycle as her doctor is willing to recommend as a matter of his or her medical judgment.
8. The age requirement for IVF set out in 600P of the PPS also applies to an individual who is undergoing egg retrieval or harvesting as part of the IVF process. It does not apply to an individual contributing sperm to the IVF process. There is no dispute between the parties that if Irina used a donor egg and a surrogate who is under 40 years old, the IVF treatments would be insured services under the PPS.
9. There is a typographical error in subparagraph 14(d) of the Official Problem, which should read: “in advance of the procedure, medications may be used to stimulate ovulation and time the transfer of sperm accordingly.”