AB

v.

Attorney-General for the State of Victoria

(2005) 12 VR 485; [2005] VSC 180

Victorian Supreme Court
Hargrave J

27 May 2005

Introduction

1 This case raises for the first time an important issue arising out of the developing science of assisted, or artificial, human reproductive technology. The plaintiff is a widow. She wishes to use the sperm of her deceased husband, together with her ovum, to form outside of her body an embryo and to transfer that embryo to her body in an attempt to become pregnant. The plaintiff seeks declarations that this procedure is not prohibited by law. The declarations sought would, if made, provide sufficient authority to doctors to carry out the proposed procedure and for a hospital to allow the procedure to be performed on its premises. Declaratory relief is necessary because there is doubt about the lawful nature of the procedure proposed.

Relevant facts

2 The plaintiff met her husband in 1986 when both of them were 17 years of age. They were married some four years later. They were together for a total of 12½ years, including 8 years and 2 months of marriage, until her husband's untimely death on 12 July 1998 in a motor vehicle collision in Victoria. At this time, the plaintiff's husband was temporarily residing in Victoria for the purposes of his employment. He ordinarily resided in the Australian Capital Territory with the plaintiff.

3 Upon learning of her husband's death, the plaintiff travelled from the Australian Capital Territory to the morgue in Melbourne to identify her husband's body. She was accompanied by her parents and by her husband's mother and stepfather.

4 After identifying her husband's body, the plaintiff decided that she wanted to have a sample of his sperm taken and stored so that she may use it to conceive a child, or children, in the

future. She advised her family and her husband's family of her wishes. She then approached the Coroner's clerk on duty at the morgue and sought his advice about what to do.

5 That evening, the plaintiff spoke with Dr Catharyn Stern, a consultant gynaecologist at Melbourne IVF, and informed her of her wishes. Dr Stern provided the plaintiff with medical advice regarding the procedure that would need to be conducted to retrieve sperm from the husband's body.

6 On the morning of 13 July 1998, the plaintiff sought legal advice. As a result, an ex parte oral application was made to this Court on that day seeking an order that sperm be removed from the husband's body and stored in accordance with the *Infertility Treatment Act* 1995 (the Act).

7 On 13 July 1998, the Honourable Justice Gillard ordered that permission be given to a legally qualified medical practitioner to remove sperm and associated tissue from the body of the plaintiff's deceased husband, that any sperm so removed be stored in accordance with the Act and that such sperm not be used for any purpose without an order of this Court. These orders were made upon the undertaking of the solicitor for the plaintiff to issue proceedings naming the Attorney-General for the State of Victoria as respondent.

8 The formal orders made by Gillard, J. were as follows:

> 1. None of the names of the parties to this proceeding nor the fact of the making of this order be published until further order of this court.
>
> 2. Permission be given to a legally qualified medical practitioner to remove spermatozoa and associated tissue from the body of [MB] (deceased) which is presently at the Coroner's Court in Melbourne and that such spermatozoa and tissue be stored in accordance with the *Infertility Treatment Act* 1995. (I will call this order "the removal order.")
>
> 3. The spermatozoa and tissue so removed and stored not be used for any purpose without an order of this court.

There were other procedural orders which are of no significance at this time.

9 The orders made by Gillard, J. were made in circumstances of great urgency. There was no time for detailed argument directed to, or for consideration by his Honour of, the jurisdiction

of the Court to make the orders which were sought and made. In these circumstances, his Honour acted so as to preserve the subject matter of the proceeding pending an opportunity for there to be full argument and consideration of all issues. In this regard, his Honour stated:

> "The question of the court's jurisdiction and the exercise of it are matters which will have to be explored, as will the question of the use of the semen hereafter, if at all. In directing that the Attorney-General be joined I intended that the Attorney should represent the public interest."

10 In reliance upon the authority given by the removal order, on 13 July 1998 a pathologist removed sperm and associated testicular tissue from the body of the plaintiff's late husband. I will hereafter refer to the sperm removed from the body of the plaintiff's late husband as "the sperm."

11 The sperm was transferred to the Royal Women's Hospital Reproductive Biology Unit. Dr Stern there arranged for tests to be carried out on the sperm to ascertain its viability. Microscopic examination of the sperm revealed hundreds of live moving sperm, indicating viability.

12 Dr Stern then arranged for the sperm to be placed in cryogenic storage facilities at the Royal Women's Hospital. The Royal Women's Hospital is an approved storage facility under the Act and the sperm remains stored in accordance with the provisions of the Act.

13 The events of 12 and 13 July 1998, and their immediate aftermath, were obviously extremely traumatic and distressing for the plaintiff. By 1999, the plaintiff formed the view that she did indeed wish to use the sperm to become pregnant. At that time, she received advice that s.43 of the Act, as it was then in force, prohibited the use of her the sperm of a man known to be dead in a fertilisation procedure. Further, she was advised that it would be an offence punishable by fine or imprisonment for the sperm to be used in contravention of s.43 of the Act.

14 In 1999, s.43 of the Act prohibited all forms of possible use of sperm from a man known to be dead in connection with each possible step which might be undertaken in order to achieve a pregnancy by the use of assisted reproductive technology. I will not interrupt this factual account with reference to the precise terms of s.43. I will do so later when considering the

Act in detail and the various repeals to the Act since 1999.

15 On 11 June 1999, the plaintiff applied to the Infertility Treatment Authority ("the Authority") to remove the sperm from Victoria and to transfer it to storage in the Australian Capital Territory. If her application was successful, the plaintiff intended to undergo assisted reproductive treatment in the Australian Capital Territory, with the intention of becoming pregnant as a result of the use of the sperm in that treatment.

16 By letter dated 30 August 1999, the Authority refused the plaintiff's application to export the sperm. The reason given for refusal was that the Authority was satisfied that the sperm would be used in the Australian Capital Territory in a manner which would contravene s.43 of the Act.

17 The plaintiff made a further application to remove the sperm from Victoria on 9 October 2001. By letter dated 4 December 2001, this application was also refused. It would appear that this refusal was again based upon the prohibition on the use of sperm from a man known to be dead in s.43 of the Act.

18 In its letter of refusal, the Authority referred to amendments made in 2001 to s.43 of the Act, but noted that these amendments were of no assistance to the plaintiff because the amendments only allowed the use of embryos which had been formed from the sperm of a man known to be dead before death of the man concerned.

19 After the 2001 amendment to s.43, Parliament further reviewed the prohibitions contained in s.43 of the Act. Further amendments were made in 2003.

20 As evidenced by the plaintiff's applications for removal of the sperm from Victoria, so that she may use it in the Australian Capital Territory without restriction, the plaintiff continues to wish to conceive a child using the sperm. In this regard, she has continued to consult Dr Stern.

21 Dr Stern has advised the plaintiff that the only viable method by which the plaintiff could conceive a child using the sperm is by a fertilisation procedure involving the creation of an embryo by a form of *in vitro* fertilisation (IVF) known as intracytoplasmic sperm injection

(ICSI). ICSI is a form of IVF developed after the traditional form of IVF was developed. It involves a single sperm being directly injected into an oocyte (or ovum) using very fine micromanipulation equipment.

22 Dr Stern swore an affidavit in which she stated the opinion that, in her belief, the only viable method by which the plaintiff could conceive a child using the sperm is by the ICSI procedure. This evidence is not disputed.

23 I received evidence as to the detail of the ICSI procedure and as to why it is the only viable method by which the plaintiff could conceive a child using the sperm. It is unnecessary to refer to that evidence in any detail. It is sufficient to note that, as it was taken after death, the semen taken from the plaintiff's late husband contains only limited numbers of sperm. Further, although functional, the sperm is immature and thus less motile. Accordingly, the sperm is less capable of fertilising an oocyte of its own accord than the sperm of a live male which has been the subject of the usual maturation which occurs upon ejaculation. Accordingly, neither artificial insemination nor traditional IVF are reasonably viable alternatives to the ICSI method.

24 Finally, in respect of factual issues, there is evidence that the plaintiff's chances of a successful embryo implantation are reducing significantly as time passes. She is now 36 years of age. The evidence of Dr Stern is that the chance of successful embryo implantation begins to reduce significantly for a woman from the age of 35 onwards, and there is an increasingly rapid decline from the age of 38 years. If the plaintiff is to be permitted to use her late husband's sperm in an attempt to become pregnant, she needs to act soon.

Summary of issues

25 In this proceeding, the plaintiff seeks the following relief:[1]

1. Order 3 made by this Court on 13 July 1998, that the spermatozoa and tissue removed and stored pursuant to Order 2 made by this Court on 13 July 1998 not be used for any purpose without an order of this Court, be discharged.

2. A declaration that s.43 of the Act does not prohibit the carrying out on the plaintiff of the assisted reproductive procedure consisting of the transfer to the plaintiff's body of a zygote[2] formed by way of intracytoplasmic sperm injection, using spermatozoa removed from the body of the plaintiff's late husband and stored pursuant to Order 2 made by this Court on 13 July 1998 and an oocyte from the plaintiff. **(the procedure).**

3. A declaration that the Act does not otherwise:

   (a) prevent the plaintiff undergoing the procedure administered by a doctor approved under Part 8 of the Act at a place licensed under Part 8 of the Act in accordance with any terms, conditions, limitations or restrictions of the doctor's approval and the place's licence;

   (b) prohibit a doctor approved under Part 8 of the Act administering the procedure at a place licensed under Part 8 of the Act in accordance with any terms, conditions, limitations or restrictions of the doctor's approval and the place's licence.

4. Alternatively to 3, a declaration that the carrying out of the procedure by a doctor approved under Part 8 of the Act, in accordance with any terms, conditions, limitations or restrictions of the doctor's approval, would comply with sub-sections (6)(a) and (6)(c) of the Act.

26 In essence, the plaintiff seeks the removal of the embargo on the use of the sperm and declarations designed to ensure that any medical practitioner who is to perform the procedure, and any hospital at which the procedure is to be performed, will not be acting in breach of the Act.

27 A separate declaration is sought in respect of s.43 of the Act. As I understand it from the argument presented to me on behalf of the plaintiff, a separate declaration is sought in respect of s.43 because, to date, the Authority has relied upon s.43 only in refusing the plaintiff's

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1 The relief set out incorporates amendments to the form of declaratory relief sought in the amended originating motion. There was no objection to relief being sought in these terms and, if I am satisfied that it is appropriate, relief being granted in accordance with the reformulated form of declarations sought during argument.

2 The evidence is that it is an embryo which is to be transferred.

applications for transfer of the sperm to the Australian Capital Territory. Accordingly, a declaration that s.43 of the Act does not prohibit the procedure may have utility, even if a wider form of declaration is not made – to the effect that the Act does not otherwise prohibit the procedure. I apprehend that the plaintiff wishes to preserve the possibility that a declaration in respect of s.43 only may carry weight in a future application to the Authority for transfer of the sperm to the Australian Capital Territory, or to such other State or Territory which may permit the procedure to be conducted.

28 The Attorney-General, representing the interests of the public of Victoria, opposes the plaintiff's application. Ms Tate, S.C., Solicitor-General for the State of Victoria, who appeared with Ms Orr of counsel for the Attorney, submitted in summary that:

(1) Section 43 of the Act prohibits the use of the sperm of the plaintiff's late husband for any assisted reproductive procedure. Alternatively, when the Act is construed as a whole, there is an express or an implied prohibition against use of the sperm in the absence of the written consent of the plaintiff's late husband.

(2) The removal order was made without jurisdiction. Accordingly, even if the Act does not prohibit use of the sperm, I should not make orders or declarations which will have the effect of allowing the sperm to be used for any purpose.

29 Mr Hanks, Q.C., who appeared with Ms Walker of counsel for the plaintiff, submitted in summary that:

(1) On a proper construction of the Act, there is no statutory prohibition upon the proposed use of the sperm.

(2) There was jurisdiction for the making of the removal order. Alternatively, if there was no jurisdiction, that was an irrelevant historical fact. The only relevant fact is that the sperm has been preserved and is available for use.

The Infertility Treatment Act

30 In general terms, insofar as is relevant to the issues before me, the purpose of the Act is to regulate and prohibit certain activities and procedures involving human reproductive technology.[3]

31 Insofar as the Act prohibits certain procedures and practices, significant criminal sanctions are imposed.

32 Section 3(1) of the Act contains many definitions. It is necessary to understand a number of these definitions in order to approach the task of statutory interpretation which confronts me. The following are of immediate relevance:

> "'**artificial insemination'** means a procedure of transferring sperm without also transferring an oocyte into the vagina, cervical canal or uterus of a woman;
>
> **'gamete'** means an oocyte or sperm;
>
> **'oocyte'** means an ovum from a woman;
>
> **'sperm'** means sperm from a man;
>
> **'treatment procedure'** means—
>
> (a) artificial insemination of a woman with sperm from a man who is not the husband of the woman; or
>
> (b) a fertilisation procedure;
>
> **'fertilization procedure'** means –
>
> …
>
> (b) the medical procedure of transferring to the body of a woman an embryo formed outside the body of any woman; or
>
> (c) the medical procedure of transferring –
>
> (i) an oocyte, without also transferring sperm, to the body of a woman; or
>
> (ii) sperm (other than by artificial insemination) to the body of a woman; or
>
> (iii) an oocyte and sperm to the body of a woman."

33 Section 3(1D) of the Act provides:

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3 Sections 1(a), (ba), (bb) and (c).

"In this Act, a reference to an embryo is a reference to a human embryo, unless the contrary intention appears."

34 Section 3(1) defines "human embryo" in the following terms:

"'**human embryo'** means a live embryo that has a human genome or an altered human genome and that has been developing for less than 8 weeks since the appearance of 2 pro-nuclei or the initiation of its development by other means."

35 When originally enacted, the Act defined "embryo" in the following terms:

"'**embryo'** means any stage of human embryonic development at and from syngamy."

36 In order to understand this definition of embryo, it is necessary to understand the definitions of "zygote" and "syngamy" appearing in the Act as initially enacted. These terms were defined in the following way:

"'**zygote'** means the stages of human development from the commencement of penetration of an oocyte by sperm up to but not including syngamy.

'syngamy' means that stage of development of a fertilised oocyte where the chromosomes derived from the male and female pronuclei align on the mitotic spindle."

37 Following amendments to the Act which are considered hereafter, the definitions of "embryo", "syngamy" and "zygote" were removed and replaced with definitions of "human embryo" and "oocyte in the process of fertilization" appearing in the current version of the Act. It is convenient to quote these two definitions together, notwithstanding that the definition of human embryo has been quoted above:

"'**human embryo'** means a live embryo that has a human genome or an altered human genome and that has been developing for less than 8 weeks since the appearance of 2 pro-nuclei or the initiation of its development by other means;

'oocyte in the process of fertilisation' means an oocyte at any stage of human development from the commencement of penetration of the oocyte by human sperm up to but not including the appearance of 2 pro-nuclei."

38 In general terms, the effect of these amended definitions is to replace the definition of "zygote" with "oocyte in the process of fertilisation". In my view, the definitions of these terms continue to recognise the technical or medical fact that it is impossible to form a human

embryo without first forming a "zygote" or "oocyte in the process of fertilisation". This statutory recognition of the separate steps in the process of development of a human embryo is important to the resolution of the issues which I must decide in respect of s.43 of the Act. The reasons for this will become apparent.

39 It is important to observe that there is no definition in the Act of "inseminate" or "insemination".

Does s.43 of the Act prohibit the proposed procedure?

40 The first declaration which is sought by the plaintiff relates to the content of the prohibition in s.43 of the Act. In order to be successful in obtaining this declaration, the plaintiff must establish that the procedure which is described in the form of declaration which she seeks ("the proposed procedure") will not contravene s.43.

41 I note that the form of the declaration sought is in respect of a procedure involving the transfer to the plaintiff's body of a zygote formed from the sperm. However, the evidence of Dr Stern is that the proposed procedure will involve the transfer of an embryo formed by use of the sperm. It may be that the draftsman of the form of declaration had in mind an argument that the transfer of a zygote would not fall within the definition of "fertilisation procedure" because, having previously been included as paragraph (a) of the definition of "fertilisation procedure", its removal from that definition indicated a statutory intent to permit the transfer of a zygote formed outside the body of a woman without any form of regulation.[4] However, no such argument was advanced before me.

42 As originally enacted, s.43 provided:

> "**43. Ban on procedures involving gametes of people known to be dead**
>
> A person must not -
>
> (a) inseminate a woman with sperm from a man known to be dead; or
>
> (b) transfer to a woman a gamete from a person known to be dead.

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4 As originally enacted, the definition of "fertilisation procedure" in s3(1) of the Act included "(a) the medical procedure of transferring to the body of a woman a zygote formed outside the body of any woman."

(c) transfer to a woman a zygote or an embryo formed from a gamete from a person known to be dead; or

(d) form a zygote with sperm from a man known to be dead; or

(e) form a zygote, if the woman who produced the oocyte used to form the zygote is known to be dead.

Penalty: 240 penalty units or 2 years imprisonment or both."

43 By s.5 of the *Infertility Treatment (Amendment) Act* 2001, s.43(c) was repealed.

44 By s.22(4)(d)(iii) of the *Health Legislation (Research Involving Human Embryos and Prohibition of Human Cloning) Act* 2003, sub-s.43(d) and (e) were repealed.

45 Accordingly, s.43 currently provides:

"**43. Ban on procedures involving gametes of people known to be dead**

A person must not -

(a) inseminate a woman with sperm from a man known to be dead; or

(b) transfer to a woman a gamete from a person known to be dead.

Penalty: 240 penalty units or 2 years imprisonment or both."

46 As originally enacted, s.43 was a blanket prohibition upon the use of gametes from a person known to be dead in any form of treatment procedure. However, Parliament did not use this language. Given the detailed definitions of artificial insemination, fertilisation procedure and treatment procedure, it could easily have done so. Instead, Parliament chose to prohibit, by separate sub-section, each distinct activity or procedure by which it is possible to use a gamete from a person known to be dead in a treatment procedure or in the formation of any embryo to be used in a treatment procedure.

47 It was accepted by the parties that Parliament should not be taken to have enacted unnecessary provisions, so that each sub-section of s.43, as originally enacted, should be treated as having had a separate field of operation. The relevant principle of statutory construction was stated in *Project Blue Sky Inc. & Ors v. Australian Broadcasting Authority*, in the following terms:

"Furthermore, a court construing a statutory provision must strive to give

> meaning to every word of the provision. In *The Commonwealth v. Baume* Griffith, C.J. cited *R. v. Berchet* to support the proposition that it was 'a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void or insignificant, if by any other construction they may all be made useful and pertinent.'"[5]

48 It follows that, at the time of enactment, each of the separate sub-sections of s.43 had work to do in its individual field of operation.

49 Based on this accepted principle of statutory interpretation, the plaintiff submitted that the repeal of s.43(c), (d) and (e) demonstrated a clear statutory intent to permit the use of gametes from persons known to be dead in the circumstances which were previously the subject of the prohibitions contained in those sub-sections.

50 The argument before me concerned the proper interpretation of s.43(a). No reliance was placed by the Attorney-General on s.43(b). It was submitted on behalf of the plaintiff that, because s.43(b) must be given separate work to do, it must refer to the transfer of an oocyte, because the transfer of sperm is dealt with in s.43(a). It was not submitted to the contrary on behalf of the Attorney-General. To the extent that s.43(b) prohibits the "transfer" of sperm from a person known to be dead, it adds nothing to s.43(a). In my opinion, s.43(b) prohibits the transfer of an oocyte from a woman known to be dead to a woman. There is no other part of s.43, as originally enacted, which prohibited this procedure.

51 Section 43(a) prohibits the use of the sperm of a man known to be dead to "inseminate a woman". The term "inseminate" is not defined in the Act. However, it is in my view clear that the term "inseminate" bears its ordinary meaning, in both general and medical usage.

52 In general usage, the term "inseminate" means "to sow in; to cast in as seed".[6]

53 In medical usage, the term "insemination" is defined as the "introduction of semen into the vagina".[7]

54 Another medical definition of "insemination" is "the injection of semen into the uterine canal.

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5 (1998) 194 C.L.R. 355 at [71] per McHugh, Gummow, Kirby and Hayne, JJ.
6 Shorter Oxford Dictionary.
7 Oxford Concise Colour Medical Dictionary (Oxford University Press, 2nd ed., 1998).

It may involve an artificial process unrelated to sexual intercourse."[8]

55 In my view, in the absence of a statutory definition to the contrary, "inseminate" in s.43(a) means to transfer or introduce semen into the vagina. This interpretation is reinforced by the definitions in the Act of "artificial insemination" and "donor insemination". In each case, it is clear that the procedure of transferring sperm is distinct from the procedure of transferring an embryo formed outside the body of a woman, formed from sperm, to the body of a woman. Furthermore, the distinction is also evident from the definitions of "fertilisation procedure" and "treatment procedure".

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8 Mosby's Medical Nursing and Allied Health Dictionary (Mosby-Year Book Inc., Missouri, 4th ed. 1994).

56 Accordingly, on a plain reading of the words of s.43(a), it does not prohibit the procedure which the plaintiff wishes to undergo. It is not proposed to "inseminate" the plaintiff with the sperm of her late husband. It is proposed to transfer to her an embryo formed outside of her body which will be formed from the sperm of her late husband. This is the very procedure which was specifically prohibited by s.43(c) whilst it was still in force. In my view, it necessarily follows that Parliament intended, by the repeal of s.43(c) to permit such a procedure provided that it was not otherwise prohibited by the Act.

57 At the time s.43(c) was repealed, there remained in the Act a prohibition upon the formation of an embryo from the sperm of a man known to be dead. That prohibition was to be found in s.43(d). Section 43(d) prohibited the formation of a zygote with sperm from a man known to be dead. An embryo cannot be formed without first forming a zygote. Accordingly, the prohibition on the formation of a zygote contained in s.43(d) operated to prohibit the formation of an embryo using sperm from a man known to be dead.

58 In 2003, the prohibition on forming a zygote from sperm of a man known to be dead was also repealed. Accordingly, it was submitted on behalf of the plaintiff that there is now no statutory prohibition upon the plaintiff undergoing the procedure. A zygote, or oocyte in the process of fertilisation, can now be formed in a legal manner using the sperm of the plaintiff's late husband. The resulting embryo can now be transferred to the plaintiff, notwithstanding that it was formed from the sperm of a person known to be dead.

59 On behalf of the Attorney-General it was submitted that s.43(a) contains a blanket prohibition on the use of sperm from a man known to be dead for the purpose of any treatment procedure upon a woman. It was submitted that I should so construe s.43(a) for two reasons.

60 In the first place, it was submitted that the statements of the Minister for Health to the Parliament, in the Second Reading Speech to the Bill that became the amending Act which repealed s.43(c), disclosed a clear intent by Parliament to retain the prohibition on the use of sperm from a man known to be dead. The relevant passage from the speech of the then Minister for Health, Minister Thwaites, is as follows:

> "There is no intention to remove the prohibition on the use of the sperm or eggs of a donor who has died. The Act will still not permit the creation of

embryos using the sperm or eggs of an already deceased person."[9]

61 It was accepted by the parties that the only purpose of the repeal of s.43(c) was to permit the use of an embryo formed using the sperm of a man who was alive at the time of the embryo's formation, but who subsequently dies.

62 Furthermore, both parties accepted that the repeal of s.43(c) left in place the prohibition upon the use of the sperm of a man who was dead to form an embryo after his death. It was submitted on behalf of the Attorney-General that this prohibition was contained in s.43(a). I do not accept this submission.

63 In my opinion, before and after the repeal of s.43(c), the formation of an embryo from the sperm of a man known to be dead was prohibited by s.43(d). The formation of an embryo from the oocyte of a woman known to be dead was prohibited by s.43(e). It was these prohibitions which Minister Thwaites was, in my view, referring to in the above quoted passage from his Second Reading Speech.

64 The subsequent repeal of sub-s.43(d) and (e) had the effect of removing the prohibition against the creation of a zygote from the gametes of persons known to be dead. The creation of a zygote, as previously defined in the Act, is an essential step in the formation of an embryo. In my opinion, it necessarily follows that Parliament intended to allow the sperm of a man known to be dead to form a zygote, an oocyte in the process of fertilization or an embryo.

65 Accordingly, subject to arguments concerning the jurisdiction to make the removal orders, and as to discretion, I would be prepared to make the first declaration sought by the plaintiff in respect of s.43. As to the form of such a declaration, I have already noted that the word "zygote" should be replaced with the word "embryo" so as to accord with the evidence.

Does the Act otherwise prohibit the proposed procedure?

66 Next, the plaintiff seeks a declaration that the Act does not otherwise prohibit the proposed procedure. The wording of the declaration which is sought, reflects the requirements of s.6 of

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9 Hansard (Parliamentary Debates, Legislative Assembly, Infertility Treatment (Amendment) Bill, 27 September 2001, p.762).

the Act.

67 The proposed procedure is a fertilisation procedure, and also a treatment procedure, as defined in s.3 of the Act. Accordingly, the plaintiff must establish that the carrying out of the procedure does not contravene s.6 of the Act. Section 6 provides:

> "**6. Fertilisation procedures**
>
> A person may only carry out a fertilisation procedure if –
>
> (a) he or she is a doctor who is approved under Part 8 to carry out a fertilisation procedure of the kind carried out; and
>
> (b) he or she is satisfied that the requirements of Divisions 2, 3 and 4 and section 36 have been met; and
>
> (c) the procedure is carried out at a place licensed under Part 8 for the carrying out of that kind of fertilisation procedure.
>
> Penalty: 480 penalty units or 4 years imprisonment or both."

68 The plaintiff has sworn that, if the proposed procedure is to take place in Victoria, she will have the proposed procedure carried out by a licensed doctor at a place licensed for treatment in accordance with the Act. Accordingly, the issue is whether the plaintiff can establish that the proposed procedure meets, or does not contravene, the requirements of Divisions 2, 3 and 4 of Part 2 and s.36 of the Act. Given the uncertainty surrounding the matter, I infer that no doctor in Victoria will perform the proposed procedure without the Court declaring, in effect, that it is satisfied that the requirements of Divisions 2, 3 and 4 and s.36 will have been met if the proposed procedure is conducted. Nor, I infer, will any licensed place allow a doctor to carry out the proposed procedure in the absence of a court declaring that to be the case.

Division 2 of the Act

69 In summary, Division 2 provides that a woman may only undergo a treatment procedure if, at the time of the procedure:

(1) she is married or in a de facto relationship and is living with her husband (including a de facto husband) on a genuine domestic basis (the "marriage requirement");

(2) both she and her husband consent to the carrying out of the kind of procedure

to be carried out; and

(3) a doctor is satisfied that the woman is unlikely to become pregnant from an oocyte produced by her and sperm produced by her husband other than by a treatment procedure.[10]

70 Section 8 of the Act provides:

> "**8. Persons who may undergo treatment procedures**
>
> (1) A woman who undergoes a treatment procedure must-
>
> (a) be married and living with her husband on a genuine domestic basis; or
>
> (b) be living with a man in a de facto relationship.
>
> (2) Before a woman undergoes a treatment procedure she and her husband must consent to the carrying out of the kind of procedure to be carried out.
>
> (3) Before a woman undergoes a treatment procedure –
>
> (a) a doctor must be satisfied, on reasonable grounds, from an examination or from treatment he or she has carried out that the woman is unlikely to become pregnant from an oocyte produced by her and sperm produced by her husband other than by a treatment procedure; or
>
> (b) a doctor, who has specialist qualifications in human genetics, must be satisfied, from an examination he or she has carried out, that if the woman became pregnant from an oocyte produced by her and sperm produced by her husband, a genetic abnormality or a disease might be transmitted to a person born as a result of the pregnancy."

71 Section 9, 10 and 11 of the Act provide detailed requirements as to the giving of consent, which must be in writing, and provide that consent may not be given unless the woman and her husband have been counselled in accordance with the Act and provided prescribed information which must be recorded on a register.

72 The marriage requirement has not been met by the plaintiff. She is neither married nor living in a de facto relationship. However, it is common ground that the effect of the decision of the

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10 Section 8 of the Act.

Federal Court in *McBain v Victoria*[11] is that the marriage requirement is invalid or inoperative by reason of inconsistency with s.22 of the *Sex Discrimination Act* 1984 (C'th). Notwithstanding the decision in *McBain*, no amendment has been made to the Act to remove the marriage requirement. Accordingly, the Act must be interpreted in the light of a clear statutory intent to impose the marriage requirement.

73 The decision in *McBain* means that the plaintiff need not satisfy s.8(1) in order to succeed.

74 As to s.8(2), the plaintiff has sworn that she is capable of complying with the consent and other requirements of Division 2. I accept this.

75 The plaintiff's late husband has provided no consent to the carrying out of the procedure. There was no occasion for him to do so before his untimely death. Does this mean that the doctor who is to carry out the procedure can never be satisfied that the requirements of Division 2 have been met?

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11 (2000) 99 F.C.R. 116.

76 On behalf of the plaintiff, it is argued that, as she is not currently married or living in a de facto relationship, she does not have a husband for the purposes of s.8(2). Accordingly, the only consent which is required before the plaintiff undergoes the procedure is her own consent. She will give that consent, give the prescribed information and undergo the relevant counselling required by Division 2 of the Act. Accordingly, it is submitted on behalf of the plaintiff, that is an end of the matter.[12]

77 On behalf of the Attorney-General, it is accepted that the plaintiff does not have a husband for the purpose of s.8(2) and that s.8(2) does not require his consent. However, it was submitted on behalf of the Attorney-General that:

(1) Section 12, which appears in Division 3, requires the consent of the plaintiff's husband, which could have been given before his death; or

(2) When the Act is construed as a whole, the role which consent and counselling plays is so paramount that there is an implied prohibition upon the carrying out of a treatment procedure unless both the male and female who provide the gametes to be used in the treatment procedure consent and undergo counselling. I will refer to this argument as "the overriding consent argument".

78 As to s.8(3), it was submitted on behalf of the plaintiff that it depended for its validity upon the marriage requirement. Accordingly, it is invalid and need not be satisfied by the plaintiff. This was not contested on behalf of the Attorney-General. The plaintiff need not satisfy s.8(3).

Division 3 of the Act

79 Section 12 of the Act relevantly provides:

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12 It is not contended that the decision in *McBain* has any relevance, except to the extent that it is implicit in s.8(2) that a woman undergoing a treatment procedure must be married. If a woman is married or living in a de facto relationship at the time she is to undergo a treatment procedure, it is not contended that the consent of the husband is not required. However, that matter does not fall for decision in this case.

"**12. Donation of gametes or embryos**

(1) Sperm is not to be used in a treatment procedure to be carried out on a woman who is not the wife of the man who produced the sperm, unless, before the sperm is used, that man consented to the use of the sperm in the kind of procedure proposed.

…

(3) An embryo must not be used in a treatment procedure to be carried out on a woman, if the sperm used to form the embryo is not the sperm of the husband of that woman, unless –

(a) before the embryo is formed, the man who produced the sperm consented to the use of the sperm to form an embryo to be used in the kind of procedure proposed;

…".

80 There are detailed consent and counselling requirements contained in Division 3 of the Act in sub-s.13 to 19. In respect of the man who produced the sperm, not only is his consent required but that of his spouse.[13] The consent must be in writing.[14] Before the man or his spouse give their consent, each must receive counselling in accordance with the Act.[15]

81 On behalf of the plaintiff, it is argued that s.12 requires consent from "the man who produced the sperm" only if that man is not, at the time the sperm was produced, the husband of the woman who is to undergo the treatment procedure. Accordingly, Division 3 has no application to the procedure to be carried out on the plaintiff. Division 3 is directed to an entirely different factual circumstance. It is only intended to apply where the treatment procedure concerned is to utilise sperm produced by a man who is not, at the time the sperm is produced, the husband of the woman who is the subject of the treatment procedure.

82 Alternatively, it is argued on behalf of the plaintiff that s.12 was originally enacted at a time when s.43 prohibited the use of sperm produced by a man known to be dead in any form of treatment procedure. At the time of its enactment, s.12 could not have been concerned with the need for consent from a man who produces sperm but dies before the treatment procedure is conducted. In other words, s.12 only refers to a man who is alive and able to consent.

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13 Section 13 (1).
14 Section 14 (1).
15 Section 16.

83 I will deal first with s.12(3). In my view s.12(1) does not apply to the facts of this case. The sperm is not to be used in a treatment procedure. The sperm is to be used to form an embryo.[16] Accordingly, s.12(3) is the applicable provision.

84 On behalf of the Attorney-General, it is argued that the time at which one is to consider whether the sperm used to form the embryo which is to be used in a treatment procedure is the sperm of the husband of the woman who is to undergo the treatment procedure is the time of the formation of the embryo. Accordingly, at the time of the formation of the embryo for use in the proposed procedure, the sperm will not be that of the plaintiff's husband. As a result, s.12(3) requires the consent of the plaintiff's late husband. In this regard, it was submitted that consent given before death would be sufficient to comply with s.12(3).

85 If s.12(1) does have application to the proposed procedure, it is argued on behalf of the Attorney-General that the time at which one is to consider whether the woman who is to undergo the treatment procedure is the wife of the man who produced the sperm is the time of the treatment procedure. Accordingly, at the time of the proposed procedure, the plaintiff will not be the wife of the man who produced the sperm within the meaning of s.12(1). As a result, s.12(1) requires consent from the plaintiff's deceased husband. In this regard, it was submitted that consent given before death would be sufficient to comply with s.12(1).

86 I accept the submissions on behalf of the Attorney-General concerning s.12. In my opinion, the Attorney-General's submissions are in accord with the plain words of s.12(3) and, if applicable, s.12(1).

87 If such were not the case, absurd and obviously unintended results would follow. For example, the consent of the man who produced the sperm would not be required in the following circumstances:

(1) At the time the sperm is produced, and placed in storage, the man is married.

(2) The man who produced the sperm consents in writing, in accordance with the provisions of the Act, to his sperm being used for an "artificial insemination"

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16 I note that the Act does not prohibit the formation of an embryo outside the body of a woman with the intention of creating a pregnancy in a particular woman: s.38E of the Act.

procedure and no other procedure.

(3) The wife of the man who produced the sperm undergoes one or more treatment procedures. These may or may not be successful.

(4) The man who produced the sperm divorces the woman who was his wife at the time he produced the sperm.

(5) After the divorce, the man who produced the sperm remarries.

88 On the plaintiff's argument, the woman, who *was* the wife of the man who produced the sperm at the time that it was produced, could use that sperm:

(1) to form an embryo outside of her body using an oocyte produced by her, and then use that embryo in a treatment procedure; or

(2) in a treatment procedure of any other kind to be carried out on her,

without the consent of the man who produced the sperm or, indeed, of his new wife. Parliament could not have intended such a result.

89 Furthermore, on the plaintiff's argument, it would make no difference if the man who produced the sperm had withdrawn his consent under s.37 of the Act, because such consent was not required and is not to be considered as a consent given under s.12. This would be inconsistent with the obvious intent of s.14(1)(c) of the Act, which provides that a consent under s.12 must not have been withdrawn or have lapsed when the procedure takes place.

90 I note that the Act does not contain a provision which states that, on divorce of a married couple, or separation of a de facto couple, any consent previously given automatically lapses. The fact that Parliament obviously intended the marriage requirement to be a valid law is no answer to the significance of this omission in the Act.

91 I do not accept the plaintiff's alternative argument that, by reason of the original form of s.43, s.12 only refers to a man who is alive and able to consent. In my view, s.12, like s.8, is concerned with the marital situation at the time referred to. This view is reinforced by the

fact that Parliament obviously intended the marriage requirement to be a valid one.

92 It follows that the plaintiff is not entitled to the wider declaration which she seeks. In my view, s.12 of the Act does prohibit the use of the sperm in the proposed procedure, in circumstances where the plaintiff's late husband has not consented in writing as required by the Act. In this regard, I note that the only evidence before me was that the plaintiff and her late husband had an intention to have children. Even if implied consent were a relevant consideration, which it is not, this intention would not be enough to establish implied consent on the part of the plaintiff's late husband to the proposed procedure. It is one thing for a married man to wish to have a family. It is altogether another thing for a married man to consent to his sperm being used in a treatment procedure as defined by the Act. It should not be assumed that such consent would necessarily have been forthcoming if the matter had been considered by the plaintiff's late husband.

Division 4 of the Act

93 Having regard to my decision in respect of the operation of s.12 of the Act, it is not necessary for me to consider Division 4 of the Act. However, for completeness I do so. Division 4 comprises ss.20 and 21.

94 Section 20(1) of the Act provides:

> "**20. Circumstances in which donor procedure may be used**
>
> (1) A treatment procedure must not be carried out on a woman involving the use of sperm produced by a man who is not the woman's husband or of an embryo formed from an oocyte produced by that woman and sperm produced by a man who is not her husband unless –
>
> (a) the woman is unlikely to become pregnant from the sperm of her husband or from an embryo formed from his sperm."

95 Section 20 was found to be invalid or inoperative for inconsistency with Federal legislation in *McBain*. It has no relevance to consent. It prohibits the conduct of the treatment procedure involving the use of a gamete which is produced by anyone other than the woman who is to undergo the treatment procedure or her husband.

96 Section 21 of the Act provides that, before a woman undergoes a treatment procedure, she and her husband must be advised in writing of certain matters. Section 21 can survive the decision in *McBain*, insofar as it provides for advice to be given to a woman's husband, if she has one, about the matters referred to in that section. In this regard, s.21 is comparable to s.8(2). This section does not prohibit the plaintiff undergoing the proposed procedure.

Section 36 of the Act

97 Section 36 of the Act provides that, if the Authority has approved a form for the giving of consent, a person giving consent under Part 2 or 3 must give it on the approved form. The relevant Part is Part 2. It is common ground that there is no approved form at this stage. Accordingly, the only requirement which must be met in order to satisfy s.6(b) is that any consent which is required by Divisions 2, 3 and 4 of the Act comply with the provisions of those divisions. In particular, this requires that the consent must be in writing.[17] This is the only requirement as to consent which it is necessary to consider. There is no consent in writing from the plaintiff's late husband. Accordingly, as I have found that the consent of the plaintiff's late husband is required in order for the proposed procedure to be lawfully conducted, the plaintiff is not entitled to the second declaration which she seeks.

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17 Sections 9(1) and 14(1).

Implied Prohibition: The Overriding Consent Argument

98 It is contended on behalf of the Attorney-General that the requirements of consent and counselling imposed by Divisions 2 and 3 of the Act, when read in the context of the Act as a whole, form the basis of an implied prohibition upon the use of sperm from a man known to be dead in any treatment procedure. Accordingly, if there is no express consent requirement, there was an implied consent requirement in every case where it is sought to use the sperm of a man known to be dead. Having regard to my finding that there is an express consent requirement in s.12, in the circumstances of this case, it is not necessary for me to consider the overriding consent argument further. However, as the matter was fully argued and an appeal is possible, I express my view on the overriding consent argument.

99 On behalf of the plaintiff, it is submitted that the Act does not expressly require consent from the plaintiff's late husband as a pre-condition to the plaintiff undergoing the proposed procedure. Further, it is submitted on behalf of the plaintiff that the Court should not imply that such consent is necessary. To do so would be to extend the scope of criminal liability to cover a situation which Parliament has not expressly dealt with in the Act.

100 In this latter regard, it must be remembered that the penalty for contravention of s.6 of the Act is 480 penalty units or four years' imprisonment or both. The penalty for contravention of s.43 of the Act is 240 penalty units or two years' imprisonment or both. There is no doubt that the relevant statutory provisions impose criminal liability for their contravention.

101 In *Krakouer v. The Queen*, McHugh, J. said:[18]

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18 (1998) 194 C.L.R. 202 at [62].

> "A court should not disregard clear words and interpret a legislative provision so as to extend to the scope of criminal liability even if it thinks that, by inadvertence, the legislature has failed to deal with a matter. That is so even if the court thinks that the legislature would probably have dealt with the matter if it had been drawn to the legislature's attention. Jordan, C.J. put the relevant principle succinctly in delivering the judgment of the Full Court of the New South Wales Supreme Court in *Ex parte Fitzgerald; Re Gordon*:
>
> > 'If conduct of a particular kind stands outside the language of a penal section, the fact that a court takes the view that it is through inadvertence of the legislature that it has not been included does not authorise it to assume to remedy the omission by giving the penal provision a wider scope than its language permits.'
>
> Still less should a court ignore the clear words of a provision so as to give it a meaning that would or might make it easier to convict an accused if the intention of the legislature is at best a matter of contestable opinion, as it is in this case."

102 In my view, it is important to keep these principles in mind when considering the argument. In my opinion, the overriding consent argument must be rejected. Consent is either required by the Act or it is not. If I am wrong, and the consent of the plaintiff's late husband is not required by s.12 of the Act, then I would not imply a consent requirement.

103 It is true that there are detailed and comprehensive requirements for consent by, and counselling of, all participants in a fertilisation procedure or a treatment procedure. These include consent by, and counselling of, the spouses, including de facto spouses, of any person whose gametes are used in the course of the relevant procedure.

104 However, if my interpretation of s.12 of the Act is wrong, and consent is not required, then it follows, that this would be a clear case of the legislature, by inadvertence, failing to deal with a particular matter. The particular matter being the necessity for consent to be given by a deceased husband of a woman who is to undergo a treatment procedure utilising the sperm of her late husband in a manner which is not prohibited by s.43 of the Act. In such a circumstance, I would not have been prepared to fill the gap left by the legislature by implying a consent requirement. However, as I have said, that is not this case.

Should the removal order have been made?

105 There is no appeal by the Attorney-General against the removal order. Nor is there any application to set it aside on the basis that it was made *ex parte*. However, the question of

jurisdiction remains relevant. This is because it was submitted on behalf of the Attorney-General that I should refuse to grant any declaratory relief to the plaintiff because such relief would be based upon the removal order, which order was made without any jurisdiction. As I have indicated that the plaintiff's arguments concerning s.43 are to be preferred, this issue remains for determination by me.

106 In my opinion, there was jurisdiction for the removal order. However, the removal order ought not to have been made. As I have stated, no criticism can be made of Gillard, J. for making the removal order. The circumstances in which it was sought were of great urgency, and there was no time to consider the matter. In these circumstances, Gillard, J. acted so as to preserve the subject matter of a proposed proceeding to enable use of the sperm. His Honour ordered that the Attorney-General be joined to such proceeding so as to represent the public interest. Furthermore, his Honour ordered that the sperm not be used for any purpose without an order of this court.

107 The Supreme Court of Victoria is the superior court of Victoria. Under s.85(1) of the *Constitution Act* 1975, this court has "unlimited jurisdiction." Although this unlimited jurisdiction may be limited, or diminished, by an Act which complies with the provisions of s.85(5), there is no such Act which is relevant to the case before me.

108 It follows, in my opinion, that the question is not whether Gillard, J. had jurisdiction to make the removal order. The relevant question is whether the removal order was in accordance with the law of Victoria.

109 The relevant law in Victoria is contained in the *Human Tissue Act* 1982. That Act allows the removal of sperm from a man known to be dead in certain circumstances. Those circumstances did not exist in this case when the removal order was made.

110 Section 44 (1) of that Act provides:

> "(1) A person shall not remove tissue from the body of a person whether living or dead except in accordance with a consent or authority that is, under this Act, sufficient authority for the removal of the tissue by that person.
>
> Penalty: 100 penalty units or imprisonment for six months, or both."

111 For the purposes of the *Human Tissue Act*, "tissue" is defined by s.3(1) to include "a substance extracted from, or from a part of, the human body." Accordingly, the prohibition in s.44(1) against the removal of tissue, includes a prohibition against the removal of sperm.[19]

112 Sections 25, 26 and 27 of the *Human Tissue Act* provide for the consent or authority referred to in s.44(1).

113 Section 25(a) provides that an authority under s.26 is sufficient authority for a registered medical practitioner to remove tissue from the body of a deceased person in accordance with s.26.

114 Section 26 establishes a regime under which a deceased person may, before death, consent to the removal of tissue from his body after death. If there is no such consent from the deceased person, then the "senior available next-of-kin" of the deceased person may provide consent to the removal of tissue from the body of the deceased person if the deceased person has not objected to such removal. In each case, the consent to removal of tissue from a deceased person is limited by reference to the purpose of removal. The only permissible purposes for removal of tissue from a deceased person are expressed in ss.26(1) and 26(2) in the following terms:

> "(a) for the purpose of transplantation of the tissue to the body of a living person; or

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19 For the purposes of donations of tissue by living persons, Part II of the *Human Tissue Act* excludes sperm from the definition of tissue: s.5.

(b) for the use of the tissue for other therapeutic purposes or for medical or scientific purposes …"

115 The ability to provide valid consent under s.26 of the *Human Tissue Act* is subject to s.27. By s.27(1) of the *Human Tissue Act*, a consent provided under s.26 does not authorise the removal of tissue from the body of a deceased person in circumstances where there is reason to believe that the Coroner has jurisdiction under the *Coroner's Act* 1985 to investigate the death of the person, unless the Coroner has given his consent to the removal. Section 27(1) of the *Human Tissue Act* provides:

"**27. Consent by a coroner**

(1) If the designated officer for a hospital or, in a case to which section 26(2) applies, the registered medical practitioner or the authorized person has reason to believe that the circumstances applicable in relation to the death of a person are such that a coroner has jurisdiction under the **Coroners Act 1985** to investigate the death of the person, the designated officer or the registered medical practitioner or the authorized person, as the case may be, shall not authorize the removal of or remove tissue from the body of the deceased person unless a coroner has given his consent to the removal."

116 There is provision in s.27(3) for the Coroner to give a direction that his consent is not required for the removal of tissue. By s.27(4) a consent or direction of the Coroner may be subject to conditions. By s.27(5) a consent or direction of the Coroner may be given orally and, if so given, it must be confirmed in writing.

117 The plaintiff did not establish by evidence that, under s.27(1), the Coroner had given his consent to the removal of the sperm or that, under s.27(3) the Coroner had given a direction that his consent was not required. Such a consent or authority was necessary in order for there to be a valid consent or authority under s.26, because the plaintiff's late husband died in an accident, thus attracting the jurisdiction of the Coroner under the *Coroner's Act* 1985.[20]

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20 See s.15(1) *Coroner's Act* 1985 and paragraph (e) of the definition of "reportable death" in s.3(1) of that Act.

118 If the Coroner had given his consent, a question would have arisen as to whether the plaintiff, as the "senior available next-of-kin" of her deceased husband, had the capacity to give a valid consent under s.26 of the *Human Tissue Act*. This would have raised the issue of whether the removal of the sperm was for "medical purposes". In this regard, I have no doubt that the transfer of the embryo to the body of a woman is a "medical procedure". The definition of "fertilisation procedure" in the Act refers to it as such. Accordingly, if it were relevant for me to decide it, I would have decided that the purpose of removing the sperm was for its use for medical purposes within the meaning of s.26(2)(b) of the *Human Tissue Act* 1982. In this circumstance, the plaintiff could have given a valid consent or authority under s.26 if there was evidence that the Coroner had given his consent under s.27(1), or a direction that his consent was not required. There was no such evidence.[21]

119 It is not contended on behalf of the plaintiff that any of the forms of consent or authority provided for by ss.25, 26 or 27 of the *Human Tissue Act* have been provided in this case. Instead, the plaintiff relies upon s.44(5)(b) of the *Human Tissue Act*, which provides:

> "(5) Nothing in sub-s.(1) …. applies to or in relation to –
>
> (a) ….
>
> (b) any other act authorised by law."

120 On behalf of the plaintiff, it was submitted that, as the sperm had been removed pursuant to the removal order, that removal was an Act authorised by law within the meaning of s.44(5)(b). Accordingly, no question of any breach of s.44(1) arises. I agree.

121 However, in my opinion, the express prohibition contained in s.44(1) is inconsistent with any suggestion that the common law authorises a court to permit the removal of tissue from a corpse in circumstances where there is not, under the *Human Tissue Act*, sufficient authority for that removal.

122 Accordingly, I am of the view that the removal order ought not, by reason of s.44(1) of the *Human Tissue Act*, to have been made.

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21 I note that in his brief Reasons given on 21 July 1998, Gillard, J. referred to the fact that he had been informed on 13 July 1998 that the Coroner had no objection to any order being made for removal of sperm from the plaintiff's late husband. However, there was no evidence of this before me. In any event, a lack of objection is not consent; nor is it a direction that consent is not required.

123 Although I base my decision as to whether the removal order ought to have been made on my construction of the *Human Tissue Act*, I heard full argument as to the content of the common law in the absence of such a statutory prohibition on the removal of tissue, including sperm, from the body of a deceased person. As an appeal is possible, and the matter was fully argued, I express my view on the content of the common law in the absence of a statutory prohibition.

124 In *Secretary, Dept of Health and Community Services v. JWB and SMB* ("Marion's case") (1982) 175 C.L.R. 218, the High Court confirmed that it is unlawful to interfere with the body of a living person without their consent. This was referred to in the judgments as the principle of personal or bodily "inviolability"[22].

125 In *Marion's case*, the High Court also recognised the existence in a superior court of record of a "parens patriae" jurisdiction. It was not disputed that this court has such a jurisdiction. On behalf of the plaintiff, it was submitted that the parens patriae jurisdiction gave Gillard, J. a discretion to give consent to the removal of the sperm from the plaintiff's late husband because he was not in a position to give consent.

126 On behalf of the Attorney-General, it was submitted that the parens patriae jurisdiction was not exercisable in respect of the body of a deceased person. This is because the parens patriae jurisdiction is essentially protective in nature. This requires a living person who requires protection.

127 I accept the submission on behalf of the Attorney-General. In my view, the parens patriae jurisdiction has no application to this case. It is a jurisdiction which only applies where there is a living person who is in need of protection and is unable to

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22 *Marion's case* (1992) 175 C.L.R.. 218 at 233-4 per Mason, C.J., Dawson, Toohey and Gaudron, JJ.; 309-10 per McHugh, J.

provide his or her consent to the necessary course of action to provide that protection.

128 My view that the parens patriae jurisdiction does not provide a basis for the making of an order such as the removal order is supported by single judge decisions in other states.

129 In *MAW v. Western Sydney Area Health Service*[23] O'Keefe, J. considered whether the parens patriae jurisdiction provided a legal basis for ordering the removal of semen from the plaintiff's husband. The plaintiff's husband was still alive, but had suffered severe brain damage and was being kept alive by mechanical means. His death was imminent. O'Keefe, J. found that the parens patriae jurisdiction did not extend to enabling the court to consent, on behalf of the comatose and dying man, to the removal of semen from his body. This was because the procedure of removing his semen could not be said to be for his welfare or protection.[24]

130 In *Re Gray*[25], Chesterman, J. considered a case such as the present. His Honour held that the parens patriae jurisdiction was not exercisable with respect to a dead body. His Honour reached that conclusion based upon the decision of O'Keefe, J. in *MAW*. In his Honour's view, the decision in *MAW* made it impossible to invoke the parens patriae jurisdiction as a legal basis for the removal of sperm from a dead body. If such a procedure could not be for the welfare or the protection of a comatose and dying man, it could not possibly be of such benefit to a man who was already dead.[26]

131 Chesterman, J. then considered whether there was any jurisdiction other than the parens patriae jurisdiction which could provide a legal basis for ordering the removal of sperm from the plaintiff's deceased husband. In his Honour's view, there was no such legal basis. He reached this conclusion upon the following reasoning.[27]

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23 (2000) 49 N.S.W.L.R. 231
24 (2000) 49 N.S.W.L.R. 231 at [41].
25 (2001) 2 Qd.R. 35
26 (2001) 2 Qd.R. 35 at [11].
27 (2001) 2 Qd.R. 35 at [12] to [21].

132 First, his Honour found that, with one possible exception, which was of no relevance in *Re Gray* and is of no relevance here, there is no right of property in a corpse.[28] I accept that this is so.

133 Second, his Honour found that the executors or legal personal representatives of a deceased have a right to possession of the corpse for the purpose of ensuring prompt and decent disposal by burial, cremation or other means.[29] I also agree with this.

134 Third, his Honour referred to and relied upon a 19th century American case, *Pierce v. Swanpoint Cemetery*[30], in which it was said:

> "That there is no right of property in a dead body, using the word in its ordinary sense, may well be admitted … There is a duty imposed by the universal feelings of mankind to be discharged by someone toward the dead; a duty, and we may also say a right, to protect from violation; and a duty on the part of others to abstain from violation;"[31]

135 Based on this reasoning, Chesterman, J. concluded:[32]

> "The principle clearly established, that the deceased's personal representative or, where there is none, the parents or spouse, have a right to possession of the body only for the purposes of ensuring prompt and decent disposal has, I think, the corollary that there is a duty not to interfere with the body or, to use the language found in *Pierce*, to violate it. These principles are inimical to the proposition that the next of kin or legal personal representatives may remove part of the body."

136 I agree with the reasoning of Chesterman, J. in *Re Gray* that it is a necessary corollary of the first two principles of law referred to by him that there is a duty by those entitled to possession of a corpse not to interfere with it. This reasoning is consistent with the principle of inviolability referred to in *Marion's* case in respect of a living person. In my view, policy and logic dictate that the inviolability principle should extend to a corpse in the absence of a statute regulating the extent to which violation is permitted. In this regard, I agree with the

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28 The exception referred to is that found by the majority of the High Court in *Doodeward v. Spence* (1906) C.L.R. 406. The exception relates to the circumstance where a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial. In such a case, that person acquires a right to retain possession of the corpse or part of it as against others.

29 *Williams v. Williams* (1882) 20 Ch.D. 659 at 662–665; *Rees v. Hughes* [1946] K.B. 517 at 523–4, 527–8; *Dobson v. North Tyneside Health Authority* [1997] 1 W.L.R. 596 at 600.

30 14 Am.Rep. 667 (1872).

31 *Pierce* 14 Am.Rep. 667 at 676–7.

32 (2001) 2 Qd.R. 35 at [20].

comments of Chesterman, J. in *Re Gray*[33] that:

> "Artificial reproduction is part of rapidly changing and expanding medical technology. As science progresses the law will obviously face frequent challenges for which there may be no adequate precedent, although I do not myself accept that this is such a case. It is not a proper criticism of the law that it has not developed a specific principle applicable to the opportunities presented by such change. The law should not have to cater for every technological possibility. Good sense and ordinary concepts of morality should be a sufficient guide for many of the problems that will arise. When they are not, the appropriate legal response should be provided by Parliament which can properly access a wide range of information and attitudes which can impact upon the formulation of law that should enjoy wide community support."

137 In *Baker v. Queensland*[34] Muir J. followed *Re Gray*.

138 There are decisions which have refused to apply *Re Gray*. In *Re Denman*[35] Atkinson, J. in the Supreme Court of Queensland refused to follow *MAW* and *Re Gray*. Her Honour ordered that named medical practitioners be permitted to remove and store the sperm of a deceased man pending an application for the use of the sperm. Pending such an application, her Honour ordered that the sperm not be used except by order of the court.

139 In *Fields v. Attorney-General of Victoria*[36] Coldrey, J. noted *Re Gray* but, given the urgency of the situation, decided to adopt a pragmatic approach and to order that permission be given for removal of the sperm of the deceased husband so as to preserve for the widow the option of applying to the Court for leave to use it should she so desire.

140 The approach which Atkinson, J. took in *Re Denman*, and which Coldrey, J. took in *Fields*, is similar to that taken by Gillard, J. in this case.

141 In *Re Denman* Atkinson, J. noted the decision in *Re Gray*, and also that in *Baker v. Qld*, but nevertheless declined to express her own view as to the state of the law. Instead, her Honour approached the application before her as though it was an application for interlocutory relief. Her Honour said:

> "At this stage, the question is very similar to that to be decided on an

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33 (2001) 2 Qd.R. 35 at [24].
34 [2003] QSC 2.
35 [2004] 2 Qd.R. 595.
36 Unreported, Supreme Court of Victoria, Coldrey, J. (1 June 2004).

> interlocutory injunction; is there a serious question to be tried and, if so, what does the balance of convenience require should be done?
>
> As there is no express statutory prohibition on the removal of sperm from a deceased person in Queensland, it appears to me there is a serious question to be tried as to whether or not sperm can or should be removed from a deceased person and used for the purpose of posthumous reproduction."[37]

142 In these circumstances, *Re Denman* does not establish any general legal principle that the court has a general discretion to permit interference with a corpse. Nor does the decision of Coldrey, J. in *Fields* establish any such principle. As I have said, I would follow *Re Gray* if the applicable law in Victoria was the common law. However, I have decided that the matter is governed by the *Human Tissue Act* and not the common law.

Declaratory relief

143 It is common ground that the removal order, being an order of a superior court, remains valid until set aside.[38] Accordingly, the removal of the sperm from the plaintiff's late husband was an act authorised by law. A sufficient quantity of the sperm has been stored so as to enable the procedure to be carried out.

144 On behalf of the plaintiff, it was submitted that it does not matter whether there was jurisdiction for the removal order. Whether or not there was jurisdiction, the order operated as a valid order of this Court at the time that the sperm was removed from the body of the plaintiff's late husband. Accordingly, the declarations sought should be made if I am of the opinion that the plaintiff's interpretation of the Act is correct.

145 On behalf of the Attorney-General, it was submitted that I should not make any of the declarations sought by the plaintiff, even if I accept the plaintiff's interpretation of the Act, because that would be giving effect to, or making orders consequential upon, an order which was made in excess of jurisdiction. As I have said, although the removal order ought not to have been made by reason of s.44(1) of the *Human Tissue Act*, I do not accept that the removal order involved any jurisdictional error. However, as the matter was fully argued and there may be an appeal, I express my view on this submission.

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37 (2004) 2 Qd.R. 595 and 597.

38 *Cameron v. Cole* (1944) C.L.R. 571 at 590 per Rich, J.: *Isaacs v Robertson* [1985] AC 97 at 102; *Jackson v Sterling Industries Ltd* (1987) C.L.R. 612 at 620 per Wilson and Dawson, JJ.

146 I do not accept that the declarations sought by the plaintiff are properly characterised as "consequential" upon the removal order. In my view, the declarations sought depend upon two things. First, the fact that the sperm of the plaintiff's late husband exists in storage and is capable of being utilized in the procedure. Second, the declarations sought depend upon the proper interpretation of the Act.

147 Both parties placed reliance upon the decision of the High Court in *Re Brown; ex parte Amman*[39] (*Re Brown*). On behalf of the Attorney-General, it was argued that *Re Brown* stood for the proposition that, upon a court finding that there was no jurisdiction to make the earlier orders made by it, the court should not make orders that further steps be taken which are consequential upon the earlier orders made in excess of jurisdiction.

148 In *Re Brown*, the Federal Court ordered that Amman Aviation Pty. Ltd. be wound up under the Corporations Law (N.S.W.). Subsequently, the Federal Court made orders for the issue of summonses directed to named persons to attend for examination about the affairs of the company pursuant to sub-s.596A and 596B of the Corporations Law. The examinees sought declarations that the Federal Court had no jurisdiction to make the winding up orders or to order the conduct of the examinations and sought that the summonses for examination be set aside. On appeal, the High Court found that the Federal Court lacked jurisdiction to make the winding up order. However, because it had not been shown that third parties would not be adversely affected if the winding up orders were quashed, the High Court refused to quash the winding up orders. The High Court ordered that prohibition should be granted to prohibit further steps in the winding up, but not in respect of the examinations as nothing remained to be done in them and prohibition would serve no useful purpose.

149 On behalf of the Attorney-General, it was submitted that *Re Brown* demonstrated that a court should prohibit further steps which would give further effect to an order which was found to be in excess of jurisdiction. I do not accept that *Re Brown* states such an unqualified principle of law. Further and in any event, it is distinguishable from the present case.

150 In the first place, the further steps which were the subject of the orders for prohibition in *Re*

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39 (1999) 198 C.L.R. 511.

Brown were properly to be characterised as "consequential" upon the earlier winding up order which had been made outside jurisdiction. The further steps were legally, as opposed to factually, dependent upon the validity of the winding up order.

151 In contrast, the fact that the sperm exists in storage, and is capable of being used in the procedure, is a matter of fact. The Act says nothing about the manner in which sperm to be used in a treatment procedure is to be obtained. The Act does not require a court order for the removal of sperm to be used in a treatment procedure. There are many ways in which sperm can be obtained or removed from a man in order to use that sperm can be used in a treatment procedure. The situation is entirely different from a consequential step in a winding up, which depends for its validity upon the existence of a valid winding up order.

152 Furthermore, in *Re Brown* Gummow and Hayne, JJ. (with whose reasons and orders Gleeson, C.J. and Gaudron, J. agreed[40]) considered a situation directly analogous to the argument presented on behalf of the Attorney-General in the present case. In *Re Brown*, an order was sought that the tapes and other records of the examinations which had been conducted be delivered up for destruction. The order for delivery up of the tapes was refused because, although the examination had occurred pursuant to orders made without jurisdiction, Gummow and Hayne, JJ. contemplated that some lawful use might be made of the material obtained[41]:

> "Whether any use may properly be made of the information obtained, or answers given, in the course of the examinations that were conducted pursuant to orders made without jurisdiction may depend upon what use is intended and the circumstances of that use. It is not possible nor desirable to attempt to give some general answer to that question. And yet that is the premise from which the application for delivery up for destruction proceeds: that there could not in those circumstances be any legitimate use of the material obtained. We would refuse the application for these orders."

153 The same can be said of this case. The sperm exists because it was removed pursuant to an order of this Court. That removal was lawful. Given that the sperm exists, it may be used for any "legitimate use".

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40 (1999) 198 C.L.R. 511 at [25] (Gleeson, C.J.) and [26] (Gaudron, J.).
41 (1999) 198 C.L.R. 511 at [167].

154 Counsel for the Attorney-General also relied upon *Re Fuller*[42]. In my view, *Re Fuller* does not assist the case of the Attorney-General. In that case, it was argued on behalf Fuller that, because the judgment on which the sequestration order against him had been based was given without jurisdiction (which was not disputed), the resulting sequestration order was void and so the court had no jurisdiction to entertain an application to recover assets for the benefit of the bankrupt's estate. These submissions were described as misconceived.[43] It was held that the underlying judgment, although made without jurisdiction, was valid until set aside. The sequestration order based on that judgment remained valid and effective until the underlying judgment was set aside and an application was made on that ground to annul the sequestration order.[44]

155 Furthermore, the facts in *Re Fuller* were different. The sequestration order which was made was legally dependent for its validity upon the judgment which had been made without jurisdiction. In this case, the declaration sought is in no sense legally dependent upon the validity of the removal order. It depends for its utility upon the fact of the existence of the sperm in storage.

156 It was also argued on behalf of the Attorney-General that, in making the removal order, Gillard, J. contemplated a "multi-staged process" in which the question of the court's jurisdiction to make the order for removal of sperm and associated tissue from the plaintiff's late husband would be considered by the court. It is true that, in his brief statement of reasons for making the removal order, Gillard, J. referred to the issue of jurisdiction being considered if and when an application was made for use of the sperm. However, his Honour's statements do not render the declaratory relief now sought by the plaintiff legally dependent or consequential upon the removal order.

157 Finally, it was argued on behalf of the Attorney-General that I should refuse the declaratory relief sought in the exercise of my discretion.

158 I was not referred to any case in which declaratory relief has been refused because, in order

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42 [1999] FCA 1811.
43 [1999] FCA 1811 at [8].
44 [1999] FCA 1811 at [17].

for the declaratory relief to have any utility, an essential fact which is necessary for that utility only exists because of an order made without jurisdiction. On the other hand, I accept that the factors relevant to the exercise of the discretion to make a declaration are not closed.[45]

159 It was submitted on behalf of the plaintiff that, in order for me to consider the jurisdiction for the removal order, I would need to be satisfied that there was a legal connection between the basis for refusing declaratory relief and the actual relief sought. I do not accept that submission. In my view, the fact that the declarations sought will only have utility because of actions taken pursuant to an order of the court made in excess of jurisdiction, or which ought not to have been made, is a relevant factor for me to consider in the exercise of my discretion. However, although relevant, I do not believe that it is a factor which should cause me to refuse the declaratory relief sought. In my view, the justice of this case is in favour of making the declaration which is sought by the plaintiff in respect of s.43. I am of this view because the plaintiff has at all times acted appropriately in seeking the authority of this Court before taking any steps to implement her wish to achieve a pregnancy using the sperm of her late husband[46].

160 Furthermore, in my view, there is utility in making the declaration sought by the plaintiff as to the operation of s.43. As I have said, until now the authority has refused the plaintiff's requests to transfer the sperm to the Australian Capital Territory on the ground that any use of the sperm would contravene s.43 of the Act. Although it is probable that any further application by the plaintiff for transfer of the sperm will raise the issue of lack of consent by the plaintiff's late husband to the use of the sperm, that is a matter for the Authority and not for me.

Conclusion and orders

161 Subject to replacing the word "zygote" with the word "embryo", I will make the declaration sought by the plaintiff in respect of the operation of s.43. For the reasons stated, I refuse to

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45 *Ainsworth v. Criminal Justice Commission* (1992) 175 C.L.R. 564 at 581-2 per Mason, C.J., Dawson, Toohey and Gaudron, JJ.

46 Compare *Airedale N.H.S. Trust v. Bland* [1993] A.C. 789; *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1960] A.C. 260

make the wider declaration sought by the plaintiff, in respect of the operation of the remaining provisions of the Act.

162 The question arises as to whether I should discharge order 3 of the 13 July 1998 orders, which prohibited the use of the sperm without an order of this Court. In my view, I should do so. The plaintiff should be free to make a further application to the Authority for transfer of the sperm, if she so wishes. However, I do not believe that it is appropriate to discharge order 3 of the 13 July 1998 orders without also making

a declaration as to the effect of s.12 of the Act. Otherwise, the combination of the discharge of the order and my declaration in respect to s.43 may cause confusion. Accordingly, it is in my view appropriate that I declare that s.12(3) of the Act prohibits the proposed procedure being carried out in Victoria.

163 I will hear counsel for the parties as to the form of proposed orders and declarations, including orders for costs. With respect to costs, I note that counsel for the Attorney-General informed me that the Attorney-General did not seek costs against the plaintiff.
