

Kate Jane Bazley

v.

Wesley Monash IVF Pty Ltd

Queensland Supreme Court
[2010] QSC 118

- [1] In July 2009, Warren Bazley was diagnosed with cancer of the liver. He was 43 years old. He and his then de facto partner (they married in December 2009), the applicant, had one child, a daughter, born in February that year. They told staff at the Wesley Hospital Oncology Clinic that they intended to have other children. They were advised that Mr Bazley would be “unable to have children” for 12 months after chemotherapy ceased, and even then he may not recover fertility.
- [2] Mr Bazley provided a semen sample to the respondent on 28 July 2009. The respondent continues to store the sample.
- [3] In November 2009, the medical advice about the progress of the cancer was “quite heartening and positive”,¹ but by 20 November 2009 the cancer had spread. Mr Bazley received intensive chemotherapy until 3 December 2009. The applicant nursed her husband from 17 December 2009 until his death on 7 January 2010.
- [4] The applicant made contact with the respondent in late January 2010, informing the respondent of her husband’s death and requesting that the respondent continue to store Mr Bazley’s sperm. A spokesperson for the respondent wrote to the applicant on 18 February 2010 to the effect that, in the absence of specific reproductive and assisted technology legislation in Queensland, the respondent operated in accordance with the National Health and Medical Research Council (“NHMRC”) Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research (“the Guidelines”).
- [5] The Guidelines provide:²

Use of gametes³ from deceased or dying persons or from persons in postcoma unresponsive state

When either parent dies before the birth of a child, this is generally regarded by society as tragic in that the child will not know that parent. The facilitation of conception in circumstances where the child born will never know one of his or her genetic parents is, by analogy, a serious act of profound significance for the person born. In addition, state or territory legislation may prohibit the use of gametes after a person has died.

Clinics must not facilitate use of gametes to achieve pregnancy in such circumstances, unless all of the following conditions are met:

¹ Affidavit of the applicant filed 6 April 2010 at [21].

² In Part B, Section 6.15.

³ “A human sperm or egg...”. ‘Explanation of key terms’ in the Guidelines at p 96.

- a deceased person has left clearly expressed and witnessed directions consenting to the use of his or her gametes; or
- ...

[6] The letter from the respondent indicated that the Guidelines prohibited storage where there was no written directive from the deceased. The storage of gametes is dealt with in Part B Section 8 of the Guidelines and provides, relevantly:⁴

Do not store gametes from deceased or dying persons or from persons in a postcoma unresponsive state

The use of gametes for conception requires the consent of the gamete provider or donor. Clinics must not store or use gametes from deceased persons or from persons who are unable to consent to the procedure, ... unless there is a clearly expressed and witnessed directive from the person that gives his or her consent to the use of the gametes.

If the clinic receives confirmation that a gamete provider or donor has died, it must dispose of the stored gametes, unless there is a clearly expressed and witnessed directive to the contrary.

[7] The respondent advised that in the absence of a directive of the kind referred to in the Guidelines, the respondent was prevented by the Guidelines from continuing to store Mr Bazley's sperm and using it in a treatment procedure to procure a pregnancy. The respondent advised that it would abide an order of the Supreme Court requiring the continued storage of the sperm, but that the Uniting Church of Australia (the operator of the Wesley Hospital) would not permit the respondent (now a single woman) to receive treatment to assist reproduction. The writer noted that the respondent would assist in the transfer of the semen to an entity which would undertake the treatment.

[8] Mr Bazley had given no directive about the use of the stored sperm post mortem. He had prepared and executed a detailed will on 17 December 2009 but did not include in it any directive of the kind mentioned in the Guidelines.

[9] The Guidelines were developed in 2004 and revised in 2007, only to the extent necessary to take account of the *Research Involving Human Embryos Act 2002* and the *Prohibition of Human Cloning Act 2002*. The Fertility Society of Australia endorses the NHMRC Guidelines as part of its accreditation process.

[10] The respondent's semen storage consent form executed by Mr Bazley contains, on page 3, the following section:

Death or Inability to Decide the Fate of the Stored Semen

I understand, acknowledge and agree as follows:

The NHMRC *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research September 2004 (Revised 2007)*, state:

Section 8.4 Do not store gametes from deceased or dying persons or from persons in a postcoma unresponsive state.

⁴ Section 8.4.

“The use of gametes for conception requires the consent of the gamete provider or donor. Clinics must not store or use gametes from deceased persons or from persons who are unable to consent to the procedure, for example, due to a postcoma unresponsiveness (‘vegetative state’), unless there is a clearly expressed and witnessed directive from the person that gives his consent to the use of the gametes. If the clinic receives confirmation that a gamete provider or donor has died, it must dispose of the stored gametes unless there is a clearly expressed and witnessed directive to the contrary.”

Wesley Monash IVF policy requires a **written**, witnessed directive.

In the event of death or if you become physically or mentally incapable of deciding the fate of the semen, Wesley Monash IVF will consider your options within the state and federal legislative and regulatory framework. **It is strongly recommended that a written, witnessed directive regarding the future use of stored semen be outlined and available to Wesley Monash IVF staff.**

Mr Bazley signed at the bottom of that page. The sperm were stored for a fee, the invoice for which was to be sent six monthly. The form set out that the failure to pay the fee might result in destruction of the stored semen and the failure to keep the respondent apprised of the donor’s contact details might also lead to that result.

[11] The applicant has deposed in her affidavit that this part of the form was not highlighted to them. At the time, death was not an anticipated outcome of Mr Bazley’s diagnosis. When his condition deteriorated, Mr Bazley had a new will prepared. It is lengthy (23 pages) and manifests care in its composition. He appointed the applicant and his accountant, Mr Graham Aland, as the executors and trustees of his will. Mr Bazley made the applicant the principal beneficiary of his estate and provided for his children, three of whom were from his previous marriage (including a step-child).⁵ As mentioned, it contained no directive about the posthumous use of his sperm.

[12] The respondent advised the applicant that in the absence of an order from the Supreme Court, it would destroy Mr Bazley’s stored sperm within 28 days of the receipt of the letter dated 18 February 2010. The applicant came before the court on 19 March 2010. By her originating application she sought orders that:

- (i) the respondent continues hold and maintain the six (6) straws of semen “belonging to the Applicant’s deceased husband...”;
- (ii) the respondent transport the straws of semen to an IVF storage facility of the applicant’s choosing;
- (iii) the respondent be restrained from destroying the straws of semen until further order.

The applicant agreed to pay the respondent’s costs of responding to the application. On the application, she sought only orders (i) and (iii). There were a number of issues that required further consideration raised on the hearing including the attitude of Mr Aland, the co-executor, in the event that Mr Bazley’s sperm was characterised as his property and an

⁵ The structure of the will is such that if the straws of semen are characterised as property, there may be an issue of allocation, but practically, it is unlikely to arise.

asset of his estate. The application was adjourned with an interim preservation order being made.

- [13] Subsequently Mr Aland swore an affidavit supporting the application and further submissions were made. On 25 March 2010, I made an order requiring the respondent to continue to preserve Mr Bazley’s semen for three months or until earlier order, pursuant to r 250(1) of the *Uniform Civil Procedure Rules* (“UCPR”), with reasons to be provided subsequently. I now provide those reasons.

Characterisation of Mr Bazley’s semen

- [14] By s 8 of the *Succession Act* 1981 (Qld):

(1) A person may dispose by will of any property to which the person is entitled at the time of the person’s death.

...

(3) A person may dispose by will of any property to which the person’s personal representative becomes entitled, in the person’s capacity as personal representative, after the person’s death.

- [15] Section 36 of the *Acts Interpretation Act* 1954 (Qld) defines certain commonly used words, including “property” and “asset”. Asset includes “property of any type”. Property means “any legal or equitable estate or interest (whether present or future, vested or contingent, or tangible or intangible) in real or personal property of any description (including money), and includes things in action.”

- [16] The question for determination is whether sperm extracted and stored can be described as “property” and thus form part of Mr Bazley’s estate. If it is property, then certain rights may attach and vest in his personal representatives. At common law, a living human body is incapable of being owned⁶ or possessed.⁷ There is ample old authority to the effect that there can be no property in a human corpse,⁸ not even by an executor whose only function, vis-à-vis the body of a testator, is to bury it.⁹

- [17] However, in *Doodeward*, Griffith CJ, with whom Barton J agreed, upheld an action in detinue by the appellant, who had come into possession of the corpse of a stillborn two-headed baby and displayed it for a fee as a curiosity, against the police officer who had seized it. His Honour concluded that merely because an object (a corpse) is at one time *nullius in rebus* does not mean that it is incapable of becoming the subject of ownership.¹⁰ His Honour subjected to close scrutiny the respondent’s argument that the continued possession of an unburied human body after death, except for the purpose of burial, is necessarily unlawful. His Honour canvassed the generally accepted reasons why such possession might be unlawful: religion, public health and public decency. His Honour noted that all were mixed questions of fact and law and subject to change when circumstances changed. He observed:¹¹

⁶ *R v Bentham* [2005] 1 WLR 1057 at 1059 per Bingham LJ and at 1062 per Rodger LJ.

⁷ *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37; [2010] QB 1 at 13 [30] per Judge LCJ.

⁸ The authorities are gathered in Higgins J’s dissenting judgment in *Doodeward v Spence* (1908) 6 CLR 406 at 419.

⁹ *Re Gray (deceased)* [2000] QSC 390 at [12].

¹⁰ *Doodeward v Spence* (1908) 6 CLR 406 at 411.

¹¹ *Ibid*, at 413.

On what ground, then, can it be asserted that the continued possession of a corpse unburied is in all cases and in all events injurious to the public welfare? So far as any argument is based upon the ecclesiastical law as part of the common law it is sufficient to say that that part (if it be a part) of the common law was never in force in Australia. The question whether the possession of a corpse is injurious to the public health is manifestly not an abstract question of law, but a concrete question of fact, depending upon the circumstances of the particular case. As to public decency, some dealings with a corpse no doubt constitute a misdemeanour,¹² but I know of no authority for saying that the retention of a human body unburied is *ipso facto* a misdemeanour.

- [18] His Honour concluded that in some circumstances there could be a rightful possession of a human body unburied and the law would protect that rightful possession by appropriate remedies. In a passage which has been employed subsequently to build exceptions to the general common law principle of no right to possession of a human corpse, Griffith CJ said:¹³

I do not know of any definition of property which is not wide enough to include such a right of permanent possession. By whatever name the right is called, I think it exists, and that, so far as it constitutes property, a human body, or a portion of a human body, is capable by law of becoming the subject of property. It is not necessary to give an exhaustive enumeration of the circumstances under which such a right may be acquired, but I entertain no doubt that, when 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, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial, but subject, of course, to any positive law which forbids its retention under the particular circumstances.

- [19] That passage has been cited in recent cases, such as *Dobson v North Tyneside Health Authority*,¹⁴ to raise a “properly arguable case” that there was property in a lost preserved brain of a woman whose administratrix wished to sue for damages for the loss, because the brain was needed to attempt to establish negligence for failure to diagnose a brain tumour; and in *R v Kelly; R v Lindsay*,¹⁵ where stolen body parts used for teaching purposes were held to be capable of being property and thus protected by rights.¹⁶

- [20] In the Californian decision of *Hecht v Superior Court of Los Angeles County (Kane)*,¹⁷ the court held that there could be property in a deceased man’s semen stored ante mortem. The facts as summarised in the case report were:

A man deposited cryogenically preserved sperm at a sperm bank with the authorisation that the sperm be released to his girlfriend or to the executor of his estate in the event of his death. He also executed a will in which he left the sperm to his girlfriend, in which he expressed the desire that the girlfriend be

¹² See *Criminal Code*, s 236(b).

¹³ *Doodeward v Spence* (1908) 6 CLR 406 at 414.

¹⁴ [1997] 1 WLR 596 at 600 – 601 per Peter Gibson LJ.

¹⁵ [1999] QB 621.

¹⁶ Discussed by Rose LJ at 626-628.

¹⁷ (1993) 20 Cal Rptr 2d 275.

impregnated with his sperm, and in which he left his estate to the girlfriend and his two adult children from a previous marriage. After the man killed himself, the will was admitted into probate, the children contested the will, and the parties attempted to settle the estate.

- [21] In a preliminary determination overturning the decision of the lower court ordering the destruction of the sperm, Lillie PJ with whom the other members of the Court of Appeal agreed held:¹⁸

... the decedent's interest in his frozen sperm vials, even if not governed by the general law of personal property, occupies 'an interim category that entitles them to special respect because of their potential for human life' (see *Davis v Davis* (Tenn. 1992) 842 S.W.2d 588, 597), and at the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had decisionmaking authority as to the sperm within the scope of policy set by law ... Thus, decedent had an interest in his sperm which falls within the broad definition of property in Probate Code section 62, as 'anything that may be the subject of ownership and includes both real and personal property and any interest therein'.

- [22] In elaborating the above opinion, Her Honour said:¹⁹

Sperm which is stored by its provider with the intent that it be used for artificial insemination is thus unlike other human tissue because it is 'gametic material' (*Davis v Davis, supra*, 842 S.W.2d 588,597) that can be used for reproduction. Although it has not yet been joined with an egg to form a pre-embryo, as in *Davis*, the value of sperm lies in its potential to create a child after fertilisation, growth, and birth. We conclude that at the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had decisionmaking authority as to the use of his sperm for reproduction. Such interest is sufficient to constitute 'property' within the meaning of Probate Code section 62. Accordingly, the probate court had jurisdiction with respect to the vials of sperm.

In concluding that the sperm was properly part of the deceased man's estate, the court did not address the further issue of the validity or enforceability of any contract or will purporting to express his intention about the stored sperm. The court did deal with issues of public policy regarding the artificial insemination of the appellant, because of her status as an unmarried woman, and found in her favour.

- [23] In the course of her opinion, Lillie PJ referred at some length to the French decision of *Parpalaix v CECOS* in the Tribunal de Grande Instance de Creteil.²⁰ Her Honour drew on a summary of the decision in an article in the *Journal of Law and Health*.²¹ It is mentioned in these reasons, although the decision was not consulted, because it has some parallels to the present application. The deceased, suffering from testicular cancer, deposited sperm with the respondent institute but left no instructions as to its future use. At the time of the deposit, he was living with a woman whom he married two days before he died at the age of 26. She requested the deceased's sperm deposit from the institute,

¹⁸ Ibid, at 846.

¹⁹ Ibid, at 850.

²⁰ (1 Ch. Cir) 1 August 1984.

²¹ Shapiro and Sonnenblick, "The Widow and the Sperm: The Law of Post-Mortem Insemination" (1986) 1 *Journal of Law and Health* 229.

which denied the request following the practice of other centres which had denied such a request from other widows.

[24] The woman applied to the court, with her parents-in-law, contending that as the deceased's natural heirs, they had become the owners of the sperm. They argued that the respondent had broken the contract with the deceased which was in the nature of a bailment. They also argued that they had a moral right to the sperm. The respondent apparently argued that its only legal obligation was to the donor and not to the wife; that sperm is an indivisible part of the body, like a limb or other organ and is not inheritable absent express instructions, and, that the act of depositing sperm was strictly for therapeutic purposes to aid the deceased psychologically when alive, whereas giving birth was not therapeutic in nature. Although there were obstacles in the French law of inheritance with respect to a child born post-mortem in such circumstances, the court implied that with new methods of procreation, those laws were outdated. The court found that the sperm was tied to the fundamental liberty of a human being to conceive or not to conceive, a liberty to be protected and not to be subjected to the rules of contract. It concluded that the sole issue was one of consent and concluded that the applicants had demonstrated that the deceased had intended that his widow be artificially inseminated, and ruled accordingly. I have not found that reported analysis to be of great assistance.

[25] Several Queensland single judge decisions of this court have considered applications for orders that a suitably qualified medical practitioner be given leave to extract semen from the body of a recently deceased husband or partner.²² In two of the decisions, the application was refused. In the other, the application was granted but only to maintain "the status quo", Atkinson J concluding that there was jurisdiction in the court to permit that which was not unlawful. She reserved, as the serious question to be tried, whether spermatozoa could or should be removed from a deceased person for the purposes of posthumous reproduction.²³

[26] In the recent decision of *Yearworth*,²⁴ the Court of Appeal in England considered the central question to be decided on this application. A number of men were diagnosed with cancer and were invited by the hospital clinicians to provide samples of semen for frozen storage in the hospital's fertility storage unit, licensed under the relevant United Kingdom legislation, prior to undergoing chemotherapy in case the treatment damaged their fertility. Prior to any attempt to use the semen, the requisite storage temperature was not maintained and the semen thawed. On the basis that the samples had perished, proceedings were commenced alleging want of care by the hospital and claiming damages for mental distress or psychological injury. The hospital admitted breach of duty to take reasonable care in respect of the storage but denied liability. One of the men had died before proceedings commenced and his wife, as administratrix of his estate, sued. The claimants were unsuccessful at first instance on the preliminary points ordered to be determined in advance of any assessment of damages, but succeeded on appeal. The Court of Appeal upheld the trial judge's conclusion that damage inflicted to a substance generated by a person's body, after its removal for storage purposes, did not constitute a bodily or "personal" injury to him. Therefore, damages to and consequential loss of each claimant's sperm was not a personal injury to him and no damages could be recovered on that basis.

²² *Re Gray (deceased)* [2000] QSC 390 per Chesterman J (as his Honour then was); *Re Baker* [2003] QSC 002 per Muir J (as his Honour then was); *Re Denman* [2004] QSC 70 per Atkinson J.

²³ *Re Denman* [2004] QSC 70.

²⁴ [2010] QB 1.

[27] The court held, however, relevantly for the present application, that since the claimants had ownership of the sperm for the purposes of claims in negligence, they had sufficient rights in relation to it to render them capable of having been bailors of it. The court held that there had been a gratuitous bailment of the sperm by the claimants to the storage unit and liability as a gratuitous bailee was established in principle. The arrangements with the complainants were held to be closely akin to contracts. It is in respect of that latter finding that the analysis of the Court of Appeal is of most assistance in answering the question whether this court has jurisdiction to make an order of the kind sought by the applicant for the temporary retention and preservation of her late husband's sperm and ultimate return to her or to another storage facility.

[28] The Court of Appeal acknowledged the important contribution to the debate of the reasoning of Griffith CJ in *Doodeward* and considered that this aspect of the appeal could have been decided by reference to the "work and skill" exception identified in Griffith CJ's reasoning. The court, however, concluded that developments in medical science "now require a re-analysis of the common law's treatment of and approach to the ownership of parts or products of a living human body".²⁵ The court said that it was not content to see the common law in this area founded upon the principle in *Doodeward* "which was devised as an exception to a principle, itself of an exceptional character, relating to the ownership of a human corpse".²⁶ The court said:

Moreover a distinction between the capacity to own body parts or products which have, and which have not, been subject to the exercise of work or skill is not entirely logical. Why, for example, should the surgeon presented with the part of a body, for example, a finger which has been amputated in a factory accident, with a view to re-attaching it to the injured hand, but who carelessly damages it before starting the necessary medical procedures, be able to escape liability on the footing that the body part had not been subject to the exercise of work or skill which had changed its attributes?²⁷

[29] The court approached the conclusion to which it came in this way: for the purposes of their claims in negligence, the men had ownership of the sperm which they ejaculated; by their bodies they alone generated and ejaculated the sperm; the sole object of their ejaculation of the sperm was that in certain events it might later be used for their benefit and concluded that no person other than each man had any rights in relation to the sperm which he had produced. This then led to a consideration of issues of bailment which had been argued at the request of the court.

[30] In *Yearworth*, the storage was offered by the hospital gratuitously. A consideration of the obligations imposed on a gratuitous bailee need not be repeated here. What is important is the recognition of rights of property in the bailor which entitled him or his representative to call for the property's return, subject to the terms of the contract between them.

[31] The learned editors of *Palmer on Bailment*²⁸ applauded²⁹ the Court of Appeal for refusing to apply the historic "no property" rule and the equally "quirky" *Doodeward* exception in a modern medical context.³⁰

²⁵ Ibid, at 19 [45].

²⁶ Ibid, at 20 [45].

²⁷ Ibid, at 20 [45].

²⁸ 3rd edition, Thomson Reuters (Legal) Limited, 2009.

²⁹ At 1527.

[32] In *Roche v Douglas*,³¹ Master Sanderson, in a thoughtful decision which examined many authorities, concluded that tissue which had been removed and stored from a testator before death was property for the purposes of making an order for DNA testing, to resolve issues of paternity pursuant to the Western Australian *Rules of the Supreme Court* 1971 O 52, r 3 (similar to *UCPR* r 250). Master Sanderson observed that:³²

It defies reason to not regard tissue samples as property. Such samples have a real physical presence. They exist and will continue to exist until some step is taken.

[33] The conclusion, both in law and in common sense, must be that the straws of semen currently stored with the respondent are property, the ownership of which vested in the deceased while alive and in his personal representatives after his death. The relationship between the respondent and the deceased was one of bailor and bailee for reward because, so long as the fee was paid, and contact maintained, the respondent agreed to store the straws. The arrangement could also come to an end when the respondent died without leaving a written directive about the semen, but plainly the bailor, or his personal representatives, maintained ownership of the straws of semen and could request the return of his property. Furthermore, it must be implied into the contract of bailment, that the semen would, if requested, be returned in the manner which it was held, which preserved its essential characteristics as frozen semen capable of being used. Any extra costs associated with that redelivery would be at the applicant's expense.³³ Such conditions may be imposed by r 250, if necessary.

[34] The orders that were made on 25 March 2010 are:

Until further earlier order the order of the court is that:

1. Until 25 June 2010, the respondent continues to hold and maintain the six (6) straws of semen belonging to the applicant's deceased husband and collected on 28 July 2009 on the same terms and conditions as previously undertaken between the applicant's husband and the respondent, except for the destruction provision.
2. The applicant pay the costs incurred by the respondent as a consequence of the application on the standard basis.
3. The parties have leave to re-list this matter on the giving of three days' notice in writing.

³⁰ Palmer, quoting *Re Gray* (supra) suggests that the reasoning in *Yearworth* would not extend to entitle a widow to extract sperm from her deceased husband for reproduction or any purpose.

³¹ (2000) 22 WAR 331.

³² Ibid, at 338 [24].

³³ Palmer (supra) at 906 [15-071].