Jocelyn Edwards; Re the estate of the late Mark Edwards

(2011) 4 ASTLR 392; [2011] NSWSC 478
Supreme Court of New South Wales
23 May 2011
Hulme J

1. **HIS HONOUR:** What right does a woman have to take sperm from the body of her deceased partner so that she may conceive a child? This judgment addresses some, but by no means all, of the issues that relate to such a complex, difficult and controversial question.
2. Ms Jocelyn Edwards seeks a declaration that she, as the administrator of the estate of her late husband, Mr Mark Edwards, is entitled to possession of sperm that was extracted from his body shortly after his death. Although there is no direct evidence, the clear and only inference is that she desires to have a child with the aid of assisted reproductive treatment.

Background

3. Because of the range of matters that will ultimately require consideration it is necessary to set out in some detail a number of background matters. These are sourced from Ms Edwards' two affidavits.
4. Ms Edwards is 40 years of age. She has a 20 year old son from an earlier relationship who lives with her. Mr Edwards had a son from an earlier relationship who is now aged 13 and lives with his mother. Ms Edwards has maintained contact with him.
5. Mr and Ms Edwards were married in November 2005 and they began planning to have children soon after. They were living in a home unit at the time and agreed to delay attempting to have children until they had purchased a house. This was achieved by late 2006 and Ms Edwards ceased taking the contraceptive pill from that time.
6. When Ms Edwards had not fallen pregnant, in mid-2008 the couple undertook medical tests and started to think about fertility treatments and assisted reproductive technology. Mr Edwards experienced chronic back pain, however, and this appears to have diverted the couple's focus for some time.
7. On Valentine's Day in 2009, Mr Edwards expressed to his wife a concern that he might have a terminal illness. Ms Edwards said that in telling her of his fears in this regard he also said to her:

"If something happens to me I would want a part of me to be here with you. Our baby will be a part of us - our legacy even after we are both gone. She will be the bond that unites our families. The bond between [their two children]. If we find out I have cancer I want to make sure we have our baby before I am unable to have one, before I do any chemo. Please promise me you will still have our baby".

8. Mr Edwards condition was further investigated with a variety of tests until in late 2009 it was determined that he had a condition known as ankylosing spondylitis (a form of chronic

inflammation of the spine). His general well-being improved once he commenced appropriate treatment. Ms Edwards deposed, however, that her husband had been told that the condition might have affected his sperm count which had caused difficulties in conceiving a child. Ms Edwards herself was found to be suffering from a gynaecological condition which could have affected her fertility and she underwent surgery for this in early 2010.

9. From this time on the couple pursued their investigation of obtaining fertility assistance. At her husband's request, Ms Edwards obtained a referral from her general practitioner to the Westmead Fertility Clinic. The first available appointment was in July and on that occasion they met with Dr Mangat and discussed the tests that were required and the various treatment options available.

10. Testing was undertaken on 2 and 3 August 2010. On the evening of 4 August, the couple had a discussion about the proposed treatment. Mr Edwards expressed a preference for in vitro fertilisation (IVF) and Ms Edwards agreed. The couple were due to attend a further appointment at the clinic on 6 August 2010 when it was anticipated that they would discuss their preferred treatment option and sign consent forms to commence treatment.

11. Tragically, at about 12.15pm on 5 August, Mr Edwards was fatally injured in a workplace accident. His body was conveyed to the Royal North Shore Hospital. Ms Edwards attended the hospital to identify the body. Inquiries were made with hospital staff about extraction of sperm to enable Ms Edwards to proceed with the IVF as she and Mr Edwards had planned.

12. Contact was made with Dr Smith at the Westmead Fertility Clinic. He made some inquiries and subsequently advised Ms Edwards that posthumous extraction of sperm had been shown to be successful overseas. However he also advised that in order for the procedure to be performed an order from the Supreme Court duty judge would need to be obtained.

13. Simpson J was the duty judge and she was contacted late in the evening of 5 August. Her Honour was advised of the circumstances and indicated that she would make an appropriate order. The following morning this was formalised with orders in writing that the body of the deceased be made available to Dr Smith, or another doctor, for the purpose of extracting sperm for preservation; that any sperm extracted be held in such conditions as will preserve it for future use pending further order; and that the sperm not be released until further order.

14. Notes within the court file indicate that Simpson J had discussed the matter with the State Coroner who indicated to her Honour that she too had been contacted and had given her authorisation for the procedure to be performed. The latter has some significance in relation to one of the statutory requirements which will be addressed later.

15. Sperm was retrieved from the body of the late Mr Edwards at Royal North Shore Hospital by Dr Frank Quinn and Dr Claire Morgan. It was transported to the Greenwich laboratory of IVF Australia where three straws were cryopreserved. Dr Quinn has confirmed that the frozen sperm would be suitable to be used as part of an IVF/Intra Cytoplasmic Sperm

Injection treatment cycle (sperm injected directly into the egg in the laboratory to achieve fertilisation).

16. The only other evidence to mention is that members of the deceased's family (his father, stepmother, mother, two sisters and three brothers) have indicated not only that they do not object to Ms Edwards using the sperm recovered from the deceased, but positively support her request to be able to do so.

The proceedings

17. Ms Edwards filed a notice of motion on 29 September 2010. The orders which were sought were to the effect that the sperm held under storage at the IVF Australia laboratory be released and Ms Edwards be permitted to use it for the purposes of the provision to her of assisted reproduction technology.

18. The motion came before me as duty judge on 6 October 2010. Mr Darvall of counsel appeared for Ms Edwards. There was, of course, no defendant or other contradictor.

19. Certain problems were identified with the proceedings on that occasion. The commencement by way of notice of motion was one. As there was no defendant, a summons was required: r 6.4 *Uniform Civil Procedure Rules* 2005 ("UCPR"). That was only a technical issue.

20. More fundamentally, provisions of the *Assisted Reproductive Technology Act* 2007 ("the ART Act") appeared to provide a substantial hurdle to the making of the orders sought. After some discussion of the issues raised by this legislation, it was resolved that the proceedings would be adjourned in order to determine whether either the Attorney General or the Minister of Health (as the minister responsible for the ART Act) may wish to become involved in the proceedings.

21. The Attorney General of New South Wales filed an appearance as amicus curiae on 30 November 2010. A final hearing was deferred pending an application by Ms Edwards for a grant of letters of administration in respect of her late husband's estate. An order to that effect was made on 3 March 2011.

22. Ms Edwards now accepts that the orders sought in the original notice of motion could not be made because of the provisions of the ART Act. A summons was filed in which the following declaration and orders were sought:

> 1. A declaration that in the events which have occurred, the Plaintiff, as Administrator of the Estate of the (late) Mark Edwards is entitled to possession of the sperm (gametes) the subject of the Order of Simpson J made 6 August 2010.
> 2. Discharge the Orders of Simpson J made 6 August 2010 to the extent they remain extant.
> 3. Further or other Order.

23. The Attorney General neither consents to, nor opposes, the Court granting the relief sought.

24. It is important to emphasise that I am dealing with an entirely different proposition to that which was brought before me last October. On that occasion, the orders sought were concerned with the release of the semen that was being stored pursuant to the order of Simpson J *and* the use of it by Ms Edwards in the provision of assisted reproduction technology to her. Now, all that is sought is a declaration that she is entitled to possession of the sperm. The Court is being asked, in effect, to put aside any consideration of what she might do with it as a result of such possession. However, as the detailed submissions by counsel for the Attorney General reveal, the issue is one of considerable complexity.

25. I propose to first deal with the legal basis of the orders made by Simpson J and their present status. Then I will address the question whether Ms Edwards has any entitlement to possession of the sperm. If she does, it will then be necessary to consider a range of discretionary factors concerned with whether the declaration she seeks should be made. In this context it will be necessary to consider whether it will be possible for Ms Edwards to use the sperm in obtaining assisted reproductive treatment in this State or elsewhere. It will also be necessary to consider whether there are any matters of policy relevant to whether this Court should permit Ms Edwards to take such a course.

The orders made on 6 August 2010 for the extraction and storage of the semen

26. It was submitted on behalf of the Attorney General that it was unnecessary for Ms Edwards to approach the Court for authorisation of the removal and storage of sperm from the late Mr Edwards on 5/6 August 2010. The *Human Tissue Act* 1983 provides a statutory basis for authorising the removal of tissue from the body of a deceased person.

27. The long title to the *Human Tissue Act* is in the following terms:

"An Act relating to the donation of tissue by living persons, the removal of tissue from deceased persons, the conduct of post-mortem examinations of deceased persons, and certain other matters."

28. "Tissue" is defined in s 4(1) to include "an organ, or part, of a human body and a substance extracted from, or from a part of, the human body". Subsection (2A) of s 4 provides that, except in so far as the context or subject-matter otherwise indicates or requires, a reference to tissue includes a reference to, inter alia, semen.

29. A foundational provision in the Act is s 36(1) which is in these terms:

> (1) A person shall not remove tissue from the body of any other person (whether living or deceased) except in accordance with a consent or authority that is, under this Act, sufficient authority for the removal of the tissue by the firstmentioned person. Maximum penalty: 40 penalty units or imprisonment for 6 months, or both.

30. Part 4 of the Act provides for the removal of tissue after death. It makes no provision for the courts to play any role in this regard. Section 23 provides for the removal of tissue where the body of the deceased is at a hospital. This is the applicable provision because, at the relevant time, the body of Mr Edwards was at Royal North Shore Hospital. Section 23, relevantly, is in these terms:

23 Authority to remove tissue where body of deceased at a hospital

(1) If a designated officer for a hospital is satisfied, after making such inquiries as are reasonable in the circumstances in relation to a person who has died in the hospital or whose dead body has been brought into the hospital, that:

(a) the person had, during the person's lifetime, given his or her consent in writing to the removal after that person's death of tissue from that person's body for the purpose of:

(i) its transplantation to the body of a living person, or

(ii) its use for other therapeutic purposes or for medical purposes or scientific purposes, and

(b) the consent had not been revoked, the designated officer may, by instrument in writing, authorise the removal of tissue from that person's body in accordance with the terms and any conditions of the consent.

(2) An authority under subsection (1) is not to be given in respect of a deceased child.

(3) If the designated officer is not satisfied as to the matters referred to in subsection (1), or the deceased person is a deceased child, and the designated officer is satisfied, after making such inquiries as are reasonable in the circumstances in relation to the deceased person, that:

(a) the deceased person had not, during the person's lifetime, expressed an objection to the removal of tissue from the person's body, and

(b) a senior available next of kin has given his or her consent in writing, or in any other manner prescribed by the regulations, to the removal of tissue from the person's body, and

(c) there is no next of kin of the same or a higher order of the classes in paragraph (a) or (b) of the definition of *senior available next of kin* in section 4 (1) who objects to the removal of tissue from the person's body,

the designated officer may, by instrument in writing, authorise the removal of tissue from the deceased person's body in accordance with the terms and any conditions of the consent referred to in paragraph (b).

...

31. There was no consent in writing by Mr Edwards during his lifetime to the removal of tissue from his body after his death. Accordingly, s 23(1) could not apply and the relevant provision would be s 23(3).

32. Unlike s 23(1), s 23(3) does not refer in express terms to the purposes for the removal of tissue. However, in the context in which it appears, the necessary implication is that the purposes should be regarded as being limited to those identified in s 23(1)(a), that is, for "transplantation to the body of a living person" or for "use for other therapeutic purposes or for medical purposes or scientific purposes". I am satisfied that removal of sperm could be regarded as "for medical purposes" where the proposed use is in assisted reproductive treatment. The ART Act defines "ART treatment" as "being any medical treatment or procedure that procures or attempt to procure pregnancy ...". S 4(1) ART Act. I am fortified in this by the fact that Habersberger J reached the same conclusion in relation to the similar Victorian legislative provision in *Y v Austin Health* [2005] VSC 427; (2005) 13 VR 363 at [39].

33. The responsibility for determining whether tissue could be removed from the deceased fell with a "designated officer" for the hospital. If the designated officer had made "such inquiries as are reasonable in the circumstances", it is highly likely that he or she would have learnt from Ms Edwards that her husband had not expressed an objection during his lifetime to the removal of tissue from his body, or at least to the removal of tissue of the type in question (s 23(3)(a)). It is also highly likely that the designated officer would have learnt from Ms Edwards that she consented to such removal (s 23(3)(b)). Ms Edwards, as the spouse of the deceased, was the "senior available next of kin" according to the definition of that term in s 4(1) and there was no next of kin of the same or a higher order of the classes in that definition than her (s 23(3)(c)).

34. Account must also be taken of s 25 of the *Human Tissue Act* . It applies to a person in respect of whose death a coroner has jurisdiction to hold an inquest under the *Coroners Act* 2009 (s 25(1)). Mr Edwards died as the result of a workplace accident. This would be a "reportable death" for which the coroner would have jurisdiction to hold an inquest pursuant to s 21 of the *Coroners Act* ; a "reportable death" being defined in s 6(1) to include where a person died a "violent or unnatural death".

35. Section 25 of the *Human Tissue Act* , relevantly, provides:

> **25 Consent by coroner**
> (1) This section applies to a person in respect of whose death a coroner has jurisdiction to hold an inquest under the *Coroners Act 2009* .
> (2) A designated officer for a hospital, a senior available next of kin or a principal care officer shall not authorise the removal of tissue from the body of a person to whom this section applies unless a coroner has given consent to the removal of the tissue.
> Maximum penalty: 40 penalty units or imprisonment for 6 months, or both.
> ...
> (5) A consent by a coroner under this section may be given orally and, if so given, is to be confirmed in writing as soon as practicable.
> ...

36. I have earlier referred to the State Coroner having informed Simpson J that she had authorised the procedure. Accordingly, it seems that the requirement of s 25(2) had been met. Whether the coroner had provided written confirmation of her consent as required by s 25(5) remains unknown.

37. The designated officer's power to authorise the removal of tissue pursuant to s 23(3) is discretionary: "... *may* , by instrument in writing, authorise ...". However, having regard to the fact that it was the deceased's spouse who was requesting that the procedure be carried out, it is possible that the discretion would have been exercised in favour of authorisation. Nevertheless, there was no written authorisation by a designated officer and so, theoretically at least, there was an infringement of s 36(1) of the *Human Tissue Act* .

38. What, then, is the status and effect of the orders made by Simpson J on 6 August 2010? The Supreme Court has a wide jurisdiction to do all that is necessary for the administration of justice in New South Wales: s 23 *Supreme Court Act* 1970. Questions were raised in the submissions for the Attorney General as to the appropriateness of the orders made by Simpson J. However, it was also acknowledged that as orders of a superior court of record they were binding and of force until set aside: *Cameron v Cole* [1944] HCA 5; (1944) 68 CLR 571 at 590; *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 620. It must also be borne in mind that Simpson J was presented with an urgent and unusual application, very late at night, by an undoubtedly grief stricken applicant and with no assistance by any legal practitioner.

39. There is only one decision of this Court that is concerned with a question as to the removal of sperm from a man unable to provide his consent. In *MAW v Western Sydney Area Health Service* [2000] NSWSC 358; (2000) 49 NSWLR 231, O'Keefe J dealt with an urgent application to authorise the taking of sperm from a man who was in a coma and in imminent danger of dying. The proceedings were said to invoke the parens patriae jurisdiction of the Court. O'Keefe J held that this jurisdiction did not extend to authorising a non-therapeutic surgical procedure such as was proposed. He also indicated that even if he had jurisdiction, he would not exercise the discretion in favour of making the orders sought. The issues considered in *MAW* were different to those raised in the present proceedings and I note that the *Human Tissue Act* has been the subject of a number of significant amendments in the intervening years.

40. Mr Kirk submitted that whether or not the removal of the sperm was legally valid, the Court must accept the facts as they presently are and deal with the present application upon those facts. It was submitted that the legality or otherwise of the removal remains of relevance to the discretion to be exercised. Having said that, the difficulties attendant upon the application to Simpson J were noted, and the concession was made that the requirements in the *Human Tissue Act* for properly authorised removal of tissue would not seem to have been insurmountable hurdles if there had been a correct understanding of the statutory provisions.

Ms Edwards' entitlement to possession

41. Senior counsel for Ms Edwards asserted that she has, incidental to her duty as administrator of her late husband's estate in relation to the disposal of his body, a right to possession of any part thereof and no other party has a superior right.

42. Counsel for the Attorney General raised the alternative proposition that there is a right of property. He disputed the basis upon which Mr Simpson relied. In Mr Kirk's submission, the right of an executor or administrator to possession of the deceased's body is limited to fulfilling the duty to ensure prompt and decent burial or cremation.

43. There are a number of authorities relevant to these propositions. *Doodeward v Spence* [1908] HCA 45; (1908) 6 CLR 406 is a starting point. It concerned the body of a "two headed baby" which had been still-born in 1868. The attending doctor, Dr Donahoe, took the body away and preserved it in spirits in a bottle and kept it in his surgery as a curiosity. When Dr Donahoe died in 1870 the preserved body was sold as part of his personal effects. It then came into the possession of the appellant who exhibited it for gain. The defendant, a police inspector, seized the bottle and its contents. The plaintiff brought an action in detinue. A majority of the High Court (Griffiths CJ and Barton J) held that he was entitled to an order for recovery of the body.

44. Higgins J, in his dissenting judgment, referred to many authorities, some of great antiquity, for the proposition that there is no property in a corpse. He concluded (at 421-422):

> From first to last, I can find no instance of any Court asserting any property in a corpse except in favour of persons who wanted it for purposes of burial, and who by virtue of their close relationship with the deceased might be regarded as under a duty to give the corpse decent interment.

45. Griffiths CJ and Barton J acknowledged such authorities but the Chief Justice, Barton J agreeing, did not find that they assisted with the case at hand. His Honour (at 412) was of the view that the court was "free to regard it as a case of first instance arising in the 20 th century, and to decide it in accordance with general principles of law, which are usually in accord with reason and common sense".

46. Griffiths CJ then held (at 413-4) that no law forbade in all circumstances the mere possession of a human body for purposes other than immediate burial. He concluded (at 414):

> If, then, there can, under some circumstances, be a continued rightful possession of a human body unburied, I think, as I have already said, that the law will protect that rightful possession by appropriate remedies. 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. (Emphasis added)

47. The plaintiff succeeded upon the finding that the body had originally come into the possession of Dr Donahoe "not unlawfully"; that he had bestowed some work or skill upon it, and that it had acquired an actual pecuniary value.

48. Three decisions of single judges of the Supreme Court of Queensland were referred to in the course of submissions. They each concerned an urgent application for the taking of sperm from deceased men but they also considered the property issue.

49. The application for the taking of sperm was refused in *Re Gray* [2000] QSC 390; [2001] 2 Qd R 35. Chesterman J referred to authorities for the proposition that there is no property in a deceased body of a human being. His conclusion is encapsulated in the following:

[20] 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 representative may remove part of the body

50. In *Baker v State of Queensland* [2003] QSC 2, Muir J found the circumstances of the application were not relevantly distinguishable from those in *Re Gray* and the application was dismissed by the adoption of the reasoning of Chesterman J.

51. Atkinson J granted the application in *Re Denman* [2004] QSC 70; [2004] 2 Qd R 595. Her Honour referred to *Re Gray* and *Baker v State of Queensland* but found (at [35]) that there were "valid public policy arguments" that pointed in the opposite direction to those which she thought had led Chesterman and Muir JJ to refuse the applications in those cases. The authorities concerned with the property status of a deceased body that Chesterman J referred to were not directly addressed in her Honour's judgment.

52. *Roche v Douglas* [2000] WASC 146; (2000) 22 WAR 331 was decided before any of the Queensland cases just referred to but was not cited in any of them. The issue for Sanderson M in this case was whether certain body samples taken from the deceased and stored prior to death were "property". The plaintiff sought orders having the effect that the samples be submitted for DNA testing to assist in the determination of whether she was the deceased's natural daughter and, thus, entitled to claim on his estate. The application was put on two bases, each of which involved a consideration of whether the tissue samples were property.

53. Sanderson M referred to authorities such as *Williams v Williams* [1882] 20 Ch D 659 in which it was held by Kay J at 662-665 that, "there can be no property in the dead body of a human being ... after the death of a man, his executors have a right to the custody and possession of his body (although they have no property in it) until it is properly buried". His review of authorities also included*Doodeward v Spence* , above, but he found them all to be distinguishable upon the basis that they were concerned with bodies and he was concerned with tissue from a body. He concluded:

> [23] Having given careful consideration to all of the cases I have mentioned and to the many learned articles on the subject, I am satisfied that it is proper to hold that the human tissue is property. In reaching that conclusion I am mindful of what was said by Griffiths CJ about the need to apply the principles of law in line with reason and good sense. In this case it might well be possible by the use of DNA testing to establish definitively whether the deceased is the father of the plaintiff. If that is possible it will obviate the need for extensive evidence, much of that evidence anecdotal, to prove the plaintiff's claim. There will be a considerable saving in time and cost, so on the particular facts of this case there is a compelling reason for holding the tissue samples to be property.

> [24] In the wider sense, 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 to effect destruction. There is no purpose to be served in ignoring physical reality. To deny that the tissue samples are property, in contrast to the paraffin in which the samples are kept or the jar in which both the paraffin and the samples are stored, would be in my view to create a legal fiction. There is no rational or logical justification for such a result.

54. A similar application came before this Court in *Pecar v National Australia Trustees Ltd and Anor* , unreported, Supreme Court of New South Wales, Bryson J, 27 November 1996. The plaintiff sought an order determining his alleged entitlement as son of the deceased to share in the distribution of his estate. He made an application for orders that would have the effect of permitting a comparison of his DNA with that contained in human tissue samples from the deceased that had been taken during an autopsy and were being held at a pathology laboratory. The application was made under Pt 25 r 8 of the *Supreme Court Rules* 1970 which related to the inspection of "property". Bryson J identified the question before him as whether tissue samples or other parts of a dead human body are property. He referred to the exception identified by Griffiths CJ in *Doodeward v Spence* and held:

> This view would justify a right to retain possession of autopsy specimens, especially in this case where the human tissue is fixed in and an accretion to a paraffin block which itself is susceptible of ownership. In my opinion the pathology specimen is property within the general meaning of that term which connotes that property has an owner.
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> In my opinion however the word "property" in r8 as extended by subr(4) is not used so as to require that there be any right of ownership. The rule does not deal with rights of ownership but with adduction of evidence, and it was not significant for the purposes of the rule whether or not there was a right of ownership. In my opinion the autopsy samples are property within the meaning of r8.

55. In *S v Minister for Health (WA)* [2008] WASC 262, Simmonds J dealt with an urgent application for orders permitting the recovery of sperm from a deceased husband who had been about to embark upon assisted reproductive treatment with his wife. His Honour found (at [9]) jurisdiction to make the orders in the same rule that was applied by Sanderson M in *Roche v Douglas* and agreed with the master that "property" within that rule was capable of including tissue taken from the body of a person who subsequently died. He saw (at [10]) no distinction in taking samples of tissue from a body before death and the taking of a sample after death.

56. There are two cases in the United Kingdom where tissue samples have been regarded as property in the context of criminal prosecutions for larceny but they are of no real authority. No cases were cited in either judgment.

57. In *R v Welsh* [1974] RTR 478 a man was taken to a police station under suspicion of being in charge of a motor vehicle whilst under the influence of alcohol. He provided a urine sample but then when the constable left the room he emptied it into a sink. He was convicted of attempting to defeat the course of justice and theft of the urine sample. He appealed, but

only in respect of the severity of the sentences imposed. The conviction for theft was not questioned.

58. In *R v Rothery* (1976) 63 Cr App R 231, a man in similar circumstances to those in *Welsh* was required to provide a specimen of blood. The specimen was provided but then stolen when the constable's back was turned. The man was charged with theft and with failing to provide a specimen for laboratory testing. He pleaded guilty to both offences yet appealed against his conviction, but only in respect of the latter offence. The appeal was upheld. Again, the conviction for theft was not questioned.

59. One of the authorities referred to by Sanderson M was *Dobson v North Tyneside Health Authority* [1997] 1 WLR 596; [1996] 4 All ER 474. The brain of a deceased woman had been removed and preserved in paraffin in the course of a post mortem examination on behalf of the coroner. The body was returned to the deceased's family for burial but the brain was retained at a hospital. No further examination of it was required by the coroner and so it was disposed of. Three years after the death, the deceased's mother took out letters of administration to the estate and commenced proceedings in her own right and as next friend for the deceased's son. The proceedings included an action against the hospital for destroying evidence which could have been of use in a case against another hospital for having failed to detect the tumours from which the deceased had died. The proceedings were for conversion, and it was necessary for the plaintiff to establish, in the absence of actual possession, an immediate right to possession.

60. Gibson LJ referred (at 600-601) to authorities for the proposition that there is no property in a corpse but noted that it is subject to qualification. Reference was also made to *Doodeward v Spence* . He concluded, however, that there was no right of the next of kin to possession of the deceased's brain. It had been taken and preserved for purposes associated with the coronial investigation of the death. Once those purposes were served there was no need for its further retention. This factual situation was not "on a par with stuffing or embalming a corpse or preserving an anatomical or pathological specimen for a scientific collection or with preserving a human freak such as a double-headed foetus that had some value for exhibition purposes". For these reasons, Gibson LJ, with whom the other members of the court agreed, held (at 601-602) that the preservation of the brain in this case did not render it an item the possession of which the plaintiffs ever became entitled for any purpose. Because the judgment engaged in identifying this distinction, it would seem that the correctness of *Doodeward v Spence* was not doubted.

61. *AB & Ors v Leeds Teaching Hospital NHS Trust and Anor* [2004] EWHC 644 (QB) was concerned with claims for psychiatric injury brought by parents of children who had died. Body parts had been taken during post mortems and not returned. The plaintiffs relied upon their duty to bury as conferring a right to possess the body, including all its parts, for the

purpose of burial. The defendants claimed that there was at least a right of the hospitals and pathologists to possess organs on which work and skill had been carried out.

62. Gage J referred to *Doodeward v Spence, Dobson v North Tyneside Health Authority* and *R v Kelly* [1999] QB 621; [1998] 3 All ER 741 and held:

> [148] In my judgment the principle that part of a body may acquire the character of property which can be the subject of rights of possession and ownership is now part of our law. In particular, in my opinion, *Kelly's* case establishes the exception to the rule that there is no property in a corpse where part of the body has been the subject of the application of skill such as dissection or preservation techniques. The evidence in the lead cases shows that to dissect and fix an organ from a child's body requires work and a great deal of skill, the more so in the case of a very small baby such as Rosina Harris. The subsequent production of blocks and slides is also a skilful operation requiring work and expertise of trained scientists.

63. The Court of Appeal of England and Wales has recently taken the view that semen samples can be property: *Yearworth and others v North Bristol NHS Trust* [2009] EWCA Civ 37; [2010] QB 1. Six men were diagnosed with cancer and were being treated at a hospital for which the defendant was responsible. They were asked if they wished to provide semen samples for storage in the event that the chemotherapy they were about to undergo was damaging to their fertility. Such samples were provided, preserved and stored. However, the liquid nitrogen in the tanks in which the samples were stored fell below the required level and the semen thawed. Proceedings based upon the tort of negligence were brought against the Trust by five of the men and the administrator of the estate of the sixth man. It was claimed that each had suffered either psychiatric injury or mental distress. The defendant asserted that even if a breach of duty (which it admitted) had caused the harm claimed, the men were not entitled to recover damages because the loss of the sperm constituted neither personal injury nor damage to property. A judge determined preliminary issues adversely to the men, including finding in favour of the Trust on the two matters I have just mentioned.

64. The Court of Appeal upheld the finding of the trial judge as to there being no personal injury, but a different view was taken on the property issue. It was held, unanimously, that the sperm, in the circumstances of the case, could be property for the purposes of the law of negligence.

65. *Yearworth* involved a distinction with the present case in that the property right asserted was that of living men, or, in one case the administrator of the estate of a man, who had each freely donated sperm for a specific purpose (potential use to conceive a child by assisted reproductive treatment if they were rendered infertile).

66. The Court accepted (at [31] - [32]) that long-standing authorities established the propositions that there was no property in either a living human body or a human corpse. Reference was made (at [33]) to *Doodeward v Spence* , which, it was noted (at [34] - [36]), had been acknowledged in *Dobson v North Tyneside Health Authority* and in *R v Kelly* . In the latter it was held that human body parts which had been preserved and were in the

possession of the Royal College of Surgeons and used in training surgeons could be property and thus the subject of theft. Rose LJ stated (at 630-631):

> "We accept that, however questionable the historical origins of the principle, it has now been the common law for 150 years at least that neither a corpse nor parts of a corpse are in themselves and without more capable of being property protected by rights. ...
>
> ... [But] parts of a corpse are capable of being property within s 4 of the [Theft Act 1968], if they have acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques, for exhibition or teaching purposes ... Furthermore, the common law does not stand still. It may be that if, on some future occasion, the question arises, the courts will hold that human body parts are capable of being property for the purposes of s 4, even without the acquisition of different attributes, if they have a use or significance beyond their mere existence."

67. The Court in *Yearworth* then noted (at [39] - [40]) two Californian authorities. In *Moore v Regents of the University of California* (1990) 793 P 2d 479 a man sued his surgeon who had removed his spleen and other body parts with consent but had then used them profitably in research without having disclosed his intention to do so. One of the causes of action was for conversion of the body parts. The Californian Supreme Court rejected this aspect of the claim on the basis that the man did not remain the owner following their removal. However, in *Hecht v Superior Court of Los Angeles County* (1993) 20 Cal Rptr 2d 275, a man donated sperm and caused it to be stored, bequeathing it in his will to his partner with the intention that she would use it conceive a child. The man committed suicide. A preliminary point determined in a challenge by the deceased's children to the will was whether the sperm was something that was capable of disposition by will. The Californian Court of Appeals held that it was. The Court in *Yearworth* regarded ownership of stored sperm for the purpose of directing its use following death as being a step beyond that which the six men were inviting it to take in the case at hand.

68. Amongst a number of conclusions reached in *Yearworth* (at [45]) were the following:

> (a) In this jurisdiction developments in medical science require a re-analysis of the common law's treatment of and approach to the issue of ownership of parts or products of a living human body, whether for present purposes (viz an action in negligence) or otherwise.
>
> ...
>
> (c) For us the easiest course would be to uphold the claims of the men to have had ownership of the sperm for present purposes by reference to the principle first identified in *Doodeward's* case (1908) 6 CLR 406. We would have no difficulty in concluding that the unit's storage of the sperm in liquid nitrogen at minus 196 C was an application to the sperm of work and skill which conferred on it a substantially different attribute, namely the arrest of its swift perishability. We would regard *R v Kelly* [1998] 3 All ER 741, [1999] QB 621 as entirely consistent with such an analysis and *Dobson's* case [1996] 4 All ER 474, [1997] 1 WLR 596 as a claim which failed for a different reason, namely that the pathologist never undertook to the claimants, and was not otherwise obliged, to continue to preserve the brain.

> (d) However, as foreshadowed b Rose LJ in *R v Kelly* , we are not content to see the common law in this area founded upon the principle in*Doodeward's* case, which was devised as an exception to a principle, itself of exceptional character, relating to the ownership of a human corpse. Such ancestry does not commend it as a solid foundation. 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 a part of the 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?
> (e) So we prefer to rest our conclusions on a broader basis.
> (f) In our judgment, for the purposes of their claims in negligence, the men had ownership of the sperm which they ejaculated. ...

69. The most recent case to which Mr Kirk referred in his submissions was *Bazley v Wesley Monash IVF Pty Ltd* [2010] QSC 118. Mr Bazley and his wife had one child and intended to have more. When he was diagnosed with cancer, he was told that the treatment would temporarily, and perhaps permanently, adversely affect his fertility. He provided a semen sample which the respondent stored. Mr Bazley subsequently died. He left a will nominating his wife and his accountant as executors and trustees and his wife as the principal beneficiary. However, the will made no mention of the semen sample.

70. Ms Bazley contacted the respondent and asked that it continue to store the sample. It responded that it was bound by guidelines which prohibited the storage and use of gametes (in this case, sperm) in the absence of a "clearly expressed and witnessed directive" from the gamete provider. Ms Bazley applied to the Queensland Supreme Court for orders that the respondent continue to store the samples and be prohibited from destroying them until further order.

71. White J characterised (at [16]) the question for determination as being "whether sperm extracted and stored can be described as 'property' and thus form part of Mr Bazley's estate". Her Honour referred to *Yearworth* and the authorities considered therein. She noted that the Court of Appeal there had held, in addition to what I have referred to earlier, that there had been a bailment of the sperm by the men to the defendant. Reference was also made to *Roche v Douglas* , above, before her Honour concluded:

> [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. ...

The extent of a proprietary right

72. Before turning to a consideration of the cases above on the question of whether the deceased's gametes should be recognised as property, it is important to make clear what rights of property are in question.

73. The High Court of Australia observed in *Zhu v Treasurer of the State of New South Wales* [2004] HCA 56; (2004) 218 CLR 530 at 577:

"Property" is a comprehensive term which is used in the law to describe many different kinds of relationship between a person and a subject-matter; the term is employed to describe a range of legal and equitable estates and interests, corporeal and incorporeal. Accordingly, to characterise something as a proprietary right (and, a fortiori, a quasi-proprietary right) is not to say that it has all the indicia of other things called proprietary rights. Nor is it to say "how far or against what sort of invasions the [right] shall be protected, because the protection given to property rights varies with the nature of the right". (Citations omitted).

74. A discussion paper released in the course of a joint inquiry by the Australian Law Reform Commission and the Australian Health Ethics Committee included a review of a number of Australian and English authorities and journal articles concerned with the ownership of human tissue samples: *Protection of Human Genetic Information* DP 66 (2002), ALRC, Sydney Ch 17. It stated:

17.20 However, the cases to date have dealt with only very limited fact situations. The courts have not produced any clear ruling on the particular property rights that may be held over tissue samples, beyond a right to possess - the violation of which constitutes theft only in very specific circumstances. It is not clear how far other property rights could be said to exist in relation to tissue samples.

75. The inquiry examined a wide variety of arguments for and against recognition of property rights in genetic material and concluded (at 17.43) that "the benefits of regarding genetic samples as property are outweighed by the drawbacks". It proposed (Proposal 17-1) that the common law right to possession of preserved samples should continue to be upheld, but full property rights should not be granted.

76. The Inquiry remained of that view in its final report: *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC 96, 2003) at 20.37. It recognised that granting recognition of property rights in genetic material was problematic in that the concept of property generally involved rights including, but not limited to, use, transfer, sale and management as well as possession: see the discussion at 20.16 - 20.37. Recommendation 20-1 of the Inquiry was that:

> "The proprietary rights in preserved samples, which are currently enjoyed by hospitals and others under the common law, should continue to be upheld on a case-by-case basis. Legislation should not be enacted to confer full proprietary rights in human genetic samples."

77. A consideration of rights that flow from a recognition of something as "property" is complex and beyond the scope or need of this judgment. An illustration of the array of issues that potentially have relevance is provided in Lyria Bennett Moses, *The Applicability of Property Law in New Contexts: From Cells to Cyberspace* (2008) 30(4) *Sydney Law Review* 639-662.
78. Recognition of the deceased's sperm as property for the purposes of the present proceedings must be understood in the context of the declaration that Ms Edwards seeks, that is that she is entitled to possession. The Court is not being asked to recognise a property entitlement beyond that.

Consideration of the authorities
79. There are, of course, significant features of the present case that differentiate it from those to which I have referred. They have each involved issues of ownership or property rights which have been determined by the application of established principles, or the extension of such principles, within the specific factual matrix of the case at hand. Aside from *Doodeward v Spence* , none are binding upon this Court. However, it is of some use to see that the law has not remained rigid but has been applied with a flexibility, albeit significantly constrained, in order to meet new situations exposed by the advancement in medical technology.
80. It was submitted by Mr Kirk, correctly with respect, that I am bound by the decision of the High Court in *Doodeward v Spencer* , notwithstanding that it is over 100 years old. However, it was also submitted that there was persuasive force in what Master Sanderson said in *Roche v Douglas* about not ignoring the physical reality. There is a sample of sperm being stored by IVF Australia. It is a real object; a physical thing. It has a value or worth in an intangible sense. Indeed, it has, as Mr Kirk put it, potentially enormous human importance to Ms Edwards and her family. These are matters that the law should recognise and protect.
81. I take Bryson J in *Pecar v National Australia Trustees Ltd and Anor* to have adopted a similarly pragmatic approach in recognising that the samples in that case amounted to "property", at least from the perspective that there was an entitlement to possession of them.
82. Applying Griffiths CJ's test in *Doodeward v Spence* to the facts of the present case, the removal of the sperm was lawfully carried out pursuant to the orders made by Simpson J. Work and skill was applied to it in that it has been preserved and stored. Accordingly, on this long standing and binding authority the sperm removed from the late Mr Edwards is capable of being property.
83. I do not find the Queensland decisions, apart from *Bazley v Wesley Monash IVF Pty Ltd* , of any real assistance. It is significant that each was concerned with an application for removal of sperm from a deceased man, whereas the proceedings at hand involve a factual matrix that is beyond that issue.

84. *Bazley v Wesley Monash IVF Pty Ltd* and the cases from other jurisdictions provide support for the conclusion of property. Although they are not binding, they are, collectively, persuasive of the view that the law should recognise the possibility of sperm being regarded as property, in certain circumstances, when it has been donated or removed for the purpose of being used in assisted reproductive treatment. *Yearworth* shows a preparedness of the England and Wales Court of Appeal to extend the law considerably beyond*Doodeward v Spence* . However, the conclusion of property in the present case can be made under the High Court's long-standing authority without any need for further exploration of the limits of the law.

85. Sanderson M in *Roche v Douglas* saw a distinction between the case before him, involving tissues removed from a body, and authorities that were concerned with whether a deceased body can be property. There may well be an importance in some circumstances of recognising such a distinction. However, the authorities to which I have referred demonstrate a repeated application of *Doodeward v Spence* to the property status of body parts or tissues removed from a body. For the purpose of the case at hand I do not see that any distinction is significant.

86. If the deceased's sperm is capable of being regarded as property, the question is then, whose property?

87. It was not Mr Edwards' property. The authorities to which Higgins J referred, which were not doubted by the majority, support that proposition. The point of departure between the majority and Higgins J was only as to the recognition of the "lawful exercise of work or skill" exception. Accordingly, upon the authority of *Doodeward v Spence* , as Mr Edwards did not have property in his semen when he was alive, it did not form part of the assets of his estate upon his death.

88. A second theoretical possibility was suggested by Mr Kirk and that was that the property lay in the doctors and technicians who lawfully exercised the "work or skill", such as was the case with Dr Donahoe in *Doodeward v Spence* . However, the better view is that the doctors who removed the sperm and the doctor and technicians who then preserved and stored it did not do so for their own purposes but performed these functions on behalf of Ms Edwards. In effect, they were acting as her agents and so did not acquire any proprietary rights for their own sake.

89. It remains to be considered whether Ms Edwards herself has any entitlement. Senior counsel put her asserted entitlement to possession, not upon the basis that the semen was part of the assets of the estate, but that as "incidental to her duty as Administrator in relation to the disposal of the deceased's body, a right to possession of any part thereof". But again, the authorities endorsed by the High Court in *Doodeward v Spence* do not support a proposition that Ms Edwards' "duty" gave her any entitlement to do as she wished other than, to use the

words of Higgins J, "to give the corpse decent internment". (The words reflect the terminology of the times but the effect is clear).

90. There is available, however, the alternative of recognising a right that extends beyond that which she would have as administrator. The only relevance that there is in Ms Edwards being the administrator of the estate is that the views of such a person would be a relevant matter to consider in determining how the discretion should be exercised as to making the declaration sought. Obviously, the administrator in this case is in favour.

91. Subject to a consideration of various discretionary aspects to which I am next to turn, in my view Ms Edwards is the only person in whom an entitlement to property in the deceased's sperm would lie. The deceased was her husband. The sperm was removed on her behalf and for her purposes. No-one else in the world has any interest in them. My conclusion is that, subject to what follows, it would be open to the Court to conclude that Ms Edwards is entitled to possession of the sperm.

Discretionary considerations

92. There are a range of matters to consider in order to determine whether the discretion should be exercised to make the declaration which Ms Edwards seeks. There is the question of whether she may use the sperm in obtaining assisted reproductive treatment in New South Wales. My conclusion is that she may not. It will then be necessary to consider whether she may do so elsewhere. It will also be necessary to consider whether there are any policy reasons why the declaration should, nor should not, be made.

Legality of assisted reproductive treatment in New South Wales

93. There is no real dispute that Ms Edwards will not be permitted to use the sperm from her late husband to obtain assisted reproductive treatment in this State. However, as Mr Kirk submitted, consideration of why this is so, and of the provisions of the ART Act in general, may assist with an understanding of public policy considerations that are relevant to the ultimate issue.

94. The long title to the ART Act is:

> "An Act relating to the regulation of assisted reproductive technology services, the registration of assisted reproductive technology service providers and the prohibition of commercial surrogacy; and for other purposes."

95. The objects of the Act are set out in s 3:

> **3 Objects of Act**
> The objects of this Act are:
> (a) to prevent the commercialisation of human reproduction, and
> (b) to protect the interests of the following persons:
> (i) a person born as a result of ART treatment,
> (ii) a person providing a gamete for use in ART treatment or for research in connection with ART treatment,
> (iii) a woman undergoing ART treatment.

96. As Mr Kirk observed, it is a clear that the ART Act is not simply about protecting the interests of women receiving ART treatment, but also the children born as a result of such treatment and persons who provide gametes for use in such treatment.

97. Some definitions in s 4(1) of the ART Act need to be noted. An "ART provider" is defined to include a person who provides ART services. "ART service" is defined to include ART treatment and the storage of gametes (and embryos) for use in ART treatment. "ART treatment" is defined to mean:

> [A]ssisted reproductive technology treatment being any medical treatment or procedure that procures or attempts to procure pregnancy in a woman by means other than sexual intercourse, and includes artificial insemination, in-vitro fertilisation, gamete intrafallopian transfer and any related treatment or procedure that is prescribed by the regulations."

98. A "gamete" is defined in s 4(1) to mean "a human sperm or a human ovum" (and there is a note referring to the provision of s 8(b) of the*Interpretation Act* 1987 as to singular words or expressions including the plural).

99. Part 2 of the ART Act is concerned with ART providers. Division 3 of Part 2 is concerned with the use of gametes. Section 23, within Div 3 Pt 2, is in the following terms:

> **23 Use of gametes or embryos after death of gamete provider**
> An ART provider must not provide ART treatment to a woman using a gamete if the ART provider knows or believes on reasonable grounds that the gamete provider is deceased, unless:
> (a) the gamete provider has consented to the use of the gamete after his or her death, and
> (b) the woman receiving the ART treatment has been notified of the death or suspected death of the gamete provider and the date of death (if known), and
> (c) the woman receiving the ART treatment has given written consent to the provision of the ART treatment using the gamete despite the death or suspected death of the gamete provider.
> Maximum penalty: 400 penalty units in the case of a corporation or 200 penalty units in any other case.
> Note. The *Human Tissue Act 1983* regulates the removal of tissue (including gametes) from a deceased person.

100. There is no difficulty with (b) and (c) but, because of the absence of consent by Mr Edwards to the use of his gametes after his death, it is (a) that provides the hurdle to Ms Edwards receiving ART treatment in this State. The conclusion that an ART provider within New South Wales is prohibited from providing ART treatment to Ms Edwards using the sperm retrieved from her late husband is accepted by her counsel.

101. The provisions of the ART Act that are concerned with consent being given by a gamete provider are relevant to an understanding of some relevant public policy considerations. The terms of s 17 that are relevant are:

> **17 Giving, modifying and revoking consent**

(1) A gamete provider may give an ART provider that obtains, or proposes to obtain, a gamete from the gamete provider a written notice setting out the gamete provider's wishes in relation to the gamete (the gamete provider's *consent*).
(2) A gamete provider's consent may address such matters as the uses that may be made of the gamete (or an embryo created using the gamete) and whether the gamete or embryo may be stored, exported from this State or supplied to another ART provider.
(3) A gamete provider may modify or revoke his or her consent by giving written notice of the modification or revocation of consent to the ART provider:
(a) that obtained the gamete from the gamete provider, or
(b) that is in possession of the gamete or embryo to which the modification or revocation of consent relates.
(4) A consent may be modified or revoked at any time up until:
(a) in the case of a donated gamete-the gamete is placed in the body of a woman or an embryo is created using the gamete, or
(b) in the case of a gamete other than a donated gamete-the gamete is placed in the body of a woman or an embryo created using the gamete is implanted in the body of a woman.
(5) Modification or revocation of consent takes effect in relation to an ART provider as soon as the ART provider is given written notice in accordance with this section.
...

102. The conversation that Ms Edwards set out in the second of her two affidavits that took place on Valentine's Day in 2009, on a rather liberal construction of it, might support an inference that Mr Edwards consented to the use of his gametes after his death. However, consent by a gamete provider is defined in s 16(a) as consent given under s 17. Section 17(1) requires "written notice". Whilst the concept of "writing" in other contexts has been interpreted broadly (for example, *Islamic Council of South Australia Inc v Australian Federation of Islamic Councils Inc* [2009] NSWSC 211 at [19] - [21] per Brereton J), it is clearly the case that Mr Edwards did not "give an ART provider ... written notice setting out [his] wishes in relation to the gamete".

103. Two provisions of particular significance in the present case are to be found in ss 21 and 22. An ART provider must not supply a gamete (or embryo) to another person (s 21) or export, or cause to be exported, a gamete (or embryo) from this State (s 22), unless in either case it is with the gamete provider's consent, and in a manner that is consistent with such consent. There are issues about these provisions which I will consider later.

104. The foregoing is not an exhaustive survey of the restrictions provided in the ART Act but is sufficient to demonstrate that, through the mechanisms provided by s 17, a gamete provider has the facility to exercise and maintain substantial control over the uses that can and cannot be made of, and the things that can and cannot be done with, that person's gametes. The provisions demonstrate the importance of one of the objects of the Act, to "protect the interests of ... a person providing a gamete for use in ART treatment or for research in connection with ART treatment" (s 3(b)(ii)).

105. The purpose of these provisions was explained in the Agreement in Principle Speech for the Bill by the Minister of Health (New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), 7 November 2007 at 3643):

> The development of this legislation has been guided by three important principles. The first is to recognise obligations already imposed on assisted reproductive technology providers by the existing laws, such as the Medical Practice Act 1992. The second is to recognise the rights of individuals to have control over the use of their genetic material. The final principle is the best interests of the child and recognition of the paramount importance of this principle.
>
> The bill does not duplicate the existing regulatory framework that applies to the clinical aspects of assisted reproductive technology practice. Rather, it complements and enhances the current system to clarify and protect the rights and obligations of people involved in assisted reproductive technology treatment; it must be recognised that this includes the rights of children born as a result of that treatment. ...
>
> The second underlying principle in the bill is recognition of the rights of individuals involved in assisted reproductive technology treatment either directly or as donors to have control over the use of their genetic material. The bill requires providers to use gametes in accordance with the consent provided by the person from whom they were obtained. Donors will be able to withdraw or modify their consent to the use of their gametes at any time before the gamete is implanted in a woman or until an embryo is created using those gametes. In the case of an embryo created using sperm created by a woman's spouse, the spouse is to be able to withdraw his consent at any point up until the embryo is implanted. These provisions will ensure that a person's gametes can only be used in accordance with their explicit instructions and consent. For example, if a person dies their gametes can only be used if that person consented to their posthumous use. Similarly, gametes may only be collected from a person who is in a persistent vegetative state or otherwise unable to consent if that person gave consent to collection and use of their gametes before losing the ability to consent.
>
> Clause 17 of the bill allows a gamete donor to place conditions on their consent including a condition that directs that their gametes can only be used by a particular person or a particular classification of people. For example, people of a particular cultural or ethnic background may only consent to the use of their gametes by a person from a similar background. The ability for donors to place conditions on the use of their gametes is especially important because any child born as a result of that donation will be able to identify their genetic parents and may wish to contact or meet them. It is believed to be in the best interests of the child for the genetic parent to have given consent to the circumstances surrounding the child's birth and upbringing. To put this in another way, it will not be in the child's best interests to discover later in life that their genetic parent has a fundamental objection to their existence or the social and cultural circumstances in which they were raised. ...

106. The aims and principles which guided the drafting of the Bill were multifarious. However, it can be seen from the passages above that respect for the wishes of the gamete provider as well as for the interests of children born as a result of ART treatment were paramount considerations which are reflected in the provisions surveyed earlier. This provides, at least in part, an understanding of the purpose of the prohibition in s 23 of the use

of gametes in ART treatment after the death of the gamete provider if there has been no written consent to such use.

107. Mr Kirk submitted that examples of why a person might not be prepared to consent to such use included that "one partner might prefer the other to move on with their life in the event of their death, and/or might prefer not to have a child who does not have two parents alive". These are valid possibilities and serve to illustrate that circumspection is required in making assumptions as to what a deceased gamete provider's wishes may have been.

108. I accept the evidence of Ms Edwards as to what Mr Edwards conveyed to her in the Valentine's Day conversation, which, for convenience of reference, I shall repeat:

"If something happens to me I would want a part of me to be here with you. Our baby will be a part of us - our legacy even after we are both gone. She will be the bond that unites our families. The bond between [their two children]. If we find out I have cancer I want to make sure we have our baby before I am unable to have one, before I do any chemo. Please promise me you will still have our baby".

109. It seems clear enough that Mr Edwards was conveying that he wished to have a child with Ms Edwards. However, whether he contemplated that a child might be born as a result of assisted reproductive treatment being given to Ms Edwards after he had died is not at all clear.

The availability of assisted reproductive treatment elsewhere in Australia

110. It is assumed that it is Ms Edwards' intention to use the gametes from her late husband in order to obtain assisted reproductive treatment elsewhere. Of course, that may include overseas. Whether that would be possible is not something that was raised in submissions and it is something that I am unable to determine. I confine my consideration to the more likely expectation that treatment in some other state or territory will be sought.

111. Mr Kirk's most helpful submissions included a survey of the legislative framework governing ART treatment in Victoria and Western Australia. Legislation is now in force in South Australia as well.

112. In Victoria, a person's gametes may be used after the provider's death in limited circumstances, including that the deceased person provided written consent: s 46 *Assisted Reproductive Treatment Act* 2008 (Vic).

113. In Western Australia, directions given by the Commissioner of Health pursuant to the *Human Reproductive Technology Act* 1991 (WA) (Western Australian Government Gazette No 201, 30 November 2004, (direction 8.9)) prohibit the use of gametes from a deceased provider.

114. In South Australia, the *Assisted Reproductive Treatment Act* 1988 (SA) provides that assisted reproductive treatment may only be provided by registered persons (s 5). It is a condition of registration that such treatment only be provided in circumstances specified in s 9(1). The specified circumstances include the use of sperm collected before the donor's death,

provided the donor consented, but do not include the provision of treatment with sperm collected after death.

115. In jurisdictions in which there is no legislation it seems recourse is had to the guidelines of the Australian Government National Health and Medical Research Council: *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* , June 2007 ("the NHMRC Guidelines").

116. Section 6.15 of the NHMRC Guidelines is in these terms:

> **6.15 Use of gametes 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:
>
> • a deceased person has left clearly expressed and witnessed directions consenting to the use of his or her gametes; or
>
> • a person in a postcoma unresponsive state ('vegetative state') prepared clearly expressed and witnessed directions, before he or she entered the coma, consenting to the use of his or her gametes; or
>
> • a dying person prepares clearly expressed and witnessed directions consenting to the use, after death, of his or her gametes; and
>
> • the prospective parent received counselling about the consequences of such use; and
>
> • the use does not diminish the fulfilment of the right of any child who may be born to knowledge of his or her biological parents.

117. Section 8.4 is in these terms:

> **8.4 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, for example, due to postcoma unresponsiveness ('vegetative state'), 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.

118. There is some ambiguity, as Mr Kirk observed, in these provisions. The first bullet point in 6.15 does not expressly refer to "use after death" of the gamete provider. There is no express requirement for any consent to be in writing; although the use of the word "left" may

imply some physical manifestation such as writing. However, it will be noted shortly that a view has been expressed in the Victorian Civil and Administrative Tribunal that writing is not required. Determination of the issues in the present case does not require me to ascertain the precise meaning of these guidelines. More importantly, I do not have any evidence as to how they have been applied in practice. It is sufficient to proceed upon the basis that it is possible that Ms Edwards will be able to obtain assisted reproductive treatment elsewhere.

Should Ms Edwards be permitted to obtain elsewhere what she is prohibited from obtaining in New South Wales?

119. Counsel were unable to refer me to any relevant precedent in New South Wales in respect of this question but there are some decisions of courts in Victoria, Queensland and the United Kingdom that bear upon the issue.

120. *AB v Attorney-General for the State of Victoria* [2005] USC 180; (2005) 12 VR 485 was a decision of Hargrave J in respect of declaratory relief sought by a widow who wished to use the sperm of her deceased husband to have a child. AB's husband had been killed in a motor vehicle collision. Orders were made by the Supreme Court of Victoria permitting the removal of semen. The application was made in circumstances of urgency, somewhat similar to the application that was made in the present case before Simpson J.

121. After some time had elapsed, AB formed the view that she did indeed wish to use the sperm to become pregnant. Legal advice to her was to the effect that s 43 of the *Infertility Treatment Act* 1995 (Vic) (since repealed and replaced by the *Assisted Reproductive Treatment Act* 2008 (Vic)) prohibited such use of the sperm of a man known to be dead. AB then applied to the Victorian Infertility Treatment Authority for permission to transfer the sperm to the Australian Capital Territory where she intended to undertake ART treatment. Permission was refused, the Infertility Treatment Authority taking the view that AB wished to do in the Australian Capital Territory what was prohibited in Victoria.

122. AB sought declarations to the effect that the procedure, which involved the creation of an embryo outside of her body by the injection of an ovum with a single sperm from her late husband, did not infringe the legislative prohibition. Hargrave J noted that the proposed procedure was, in the light of certain amendments to s 43 of the *Infertility Treatment Act* , no longer prohibited. However, he identified another provision, s 12, which, in effect, prohibited the proposed procedure because of the absence of consent in writing by AB's late husband.

123. It was then necessary to consider a submission by the Attorney General that declaratory relief should be refused upon the basis that such relief would be founded upon the original order for removal of the sperm that was made without jurisdiction. It was held that the order was made within jurisdiction but that it should not have been made. Provisions of the *Human Tissue Act* 1982 (Vic) were similar to those in the corresponding New South Wales legislation I have considered earlier. In AB's case, there was a lack of evidence of consent

having been given by the coroner which led Hargrave J to conclude that the removal order should not have been made. Nevertheless, he also concluded that the removal was pursuant to an order of a superior court, such order remaining valid until set aside.

124. A declaration was made that s 43 did not prohibit the carrying out of the assisted reproductive procedure. However, a further declaration was made that s 12 prohibited the proposed procedure being carried out in Victoria.

125. Six months later, AB found herself in the Victorian Civil and Administrative Tribunal but in the resulting judgment she was identified by different initials: *YZ v Infertility Treatment Authority* [2005] VCAT 2655. Following the declarations made by Hargrave J, she had again sought the approval of the Infertility Treatment Authority for permission to remove the sperm from Victoria and to transfer it to the Australian Capital Territory. Permission had again been refused.

126. There was evidence on this occasion that a clinic in Canberra had considered YZ's request to undergo the procedure and was satisfied that it met the requirements of the NHMRC Guidelines. The President of VCAT, Morris J, referred to evidence upon which he was satisfied that, having regard to the years that had passed since her husband's death, YZ was not motivated by grief and that her decision was rational and genuine. He also found that she had family support which was said to be relevant in two respects: YZ's desire to have a child using her late husband's sperm was an expression of positive, rather than negative, emotions; and any child produced would be nourished, loved and supported by not only YZ but also her late husband's family.

127. There was a provision in s 56(1) of the *Infertility Treatment Act* which, inter alia, prohibited "a person" taking "a gamete or embryo from Victoria outside the human body". By s 56(2), however, the Victorian provision did not apply if there was written approval of the Infertility Treatment Authority. (The corresponding provision in the ART Act (s 22) is limited in its application to ART providers).

128. Morris J noted the "guiding principles" set out in s 5(1) of the *Infertility Treatment Act* . Mr Kirk submitted that these were matters which had relevance to the discretionary judgment called for in the present matter. Those principles were listed in what was said to be a descending order of importance as follows:

> (a) the welfare and interests of any person born or to be born as a result of a treatment procedure are paramount;
> (b) human life should be preserved and protected;
> (c) the interests of the family should be considered; and
> (d) infertile couples should be assisted in fulfilling their desire to have children.

129. Morris J found in favour of YZ upon a consideration of these principles. He then considered the relevance of the fact that YZ was seeking to do in another jurisdiction what was prohibited in Victoria. He said:

[55] Victoria is part of the Commonwealth of Australia. As a federal nation, it is important that the laws of the Commonwealth and other States be recognised. Many Australians move

from State to State on a frequent basis. The benefits of living in one nation would be lost if one State sought to prevent activities in another State which were lawful in that State. ...
[56] ... it is clear enough that one of the factors in the exercise of the discretion is that we live in a federal country where citizens freely move from State to State and each State may take a different approach to infertility treatment.
[57] Hence I would not regard as decisive the fact that the export of XZ's sperm to New South Wales is designed to overcome the ban on its use in Victoria. ...

130His Honour did not regard it as decisive that the export was designed to overcome the ban in Victoria. However, there were provisions in the *Infertility Treatment Act* concerned with the Infertility Treatment Authority granting approval for export, amongst other things, which Morris J regarded as acknowledging that other jurisdictions would not adopt precisely the same approach to infertility treatment as Victoria. He also took into account that the home of YZ and her late husband at the time of his death was in the Australia Capital Territory. It was happenstance that the motor vehicle collision occurred in Victoria. Morris J observed that if the death had occurred in the Australian Capital Territory, the lack of any written consent by the deceased would not have been an issue because that was not a requirement of the NHMRC Guidelines.

131. Orders were made in YZ's favour, permitting the transfer of the sperm recovered from her late husband to the clinic in the Australian Capital Territory for the purpose of it being used in assisted reproductive treatment.

132. On the basis that it was "somewhat analogous" to *YZ v Infertility Treatment Authority* , Mr Kirk referred to *R v Human Fertilisation and Embryology Authority, ex parte Blood* [1997] 2 All ER 687. In that case, sperm was taken from Mr Blood when he was gravely ill and shortly before he died. The sperm was preserved and stored. Mrs Blood sought judicial review after her request to be able to use the sperm to become pregnant was rejected by the Human Fertilisation and Embryology Authority. It was contended that the statute did not prevent her receiving treatment, but that if it did, the Authority should permit the export of the sperm so as to enable her to receive treatment in Belgium.

133. Lord Woolf MR, delivering the judgment of the Court of Appeal, concluded (at 702-703) that both the storage of the sperm and the proposed use within the United Kingdom was contrary to the *Human Fertilisation and Embryology Act* 1990 (UK). It was held, however, that the Authority had failed to take into account two important considerations in the exercise of its discretion to authorise the export of the sperm for treatment abroad. First, it had failed to recognise that Mrs Blood had a right under European Community law to receive treatment in a member country unless there were good public policy reasons for not allowing this to happen. Secondly, the Authority had been concerned that an undesirable precedent would be created which could result in the flouting of the terms of the Act; yet the recognition in the judgment that storage cannot lawfully take place without written consent, from a practical point of view, meant that there would be no fresh cases.

134. The making of the orders sought in the present case would have the effect that Ms Edwards would be permitted to undergo treatment in another State or a Territory, or perhaps even overseas, when such treatment would be contrary to the law of New South Wales. It was the submission of the Attorney General that there are matters of public policy that need to be considered in this context. *R v Human Fertilisation and Embryology Authority, ex parte Blood* serves to highlight two such matters. They are, whether the granting of Ms Edwards' application would involve the turning of a blind eye to actions taken which were contrary to New South Wales legislative provisions; and whether this would encourage similar cases in the future.

The effect of s 21 and s 22 of the ART Act

135. Counsel drew my attention to s 21 and s 22 of the ART Act. If one took a certain view of the effect of their provisions they might prevent any declaration made in Ms Edwards' favour having any utility. They are in the following terms:

> **21 Supply of gametes or embryos to another person**
> An ART provider must not supply a gamete or an embryo to another person (including another ART provider) except with the consent of the gamete provider and in a manner that is consistent with the gamete provider's consent.
> Maximum penalty: 800 penalty units in the case of a corporation or 400 penalty units in any other case.
> **22 Export of gametes or embryos from NSW**
> An ART provider must not export, or cause to be exported, a gamete or an embryo from this State except with the consent of the gamete provider and in a manner that is consistent with the gamete provider's consent.
> Maximum penalty: 400 penalty units in the case of a corporation or 200 penalty units in any other case.

136. On one view, s 21 would prohibit IVF Australia from giving possession of the gametes to Ms Edwards because of the absence of consent by Mr Edwards to the "supply" of them to her. That would be the case if one was to apply a dictionary definition of "supply" such as "to furnish or provide".

137. Strictly speaking it is unnecessary for me to determine the correct construction of s 21. What is sought from me is a declaration that Ms Edwards is entitled to possession of the gametes by virtue of her being administrator of the estate of her late husband. Whether IVF Australia provides them to her if such a declaration is made is another issue. However, a relevant matter for me to consider in the exercise of my discretion is whether making the declaration sought would have any utility. It would be futile to make a declaration in circumstances where Ms Edwards would not be able to obtain the gametes from IVF Australia because that would involve a prohibited "supply" of them to her.

138. Mr Kirk suggested that "the notion of supply as used in this statute might well be seen to imply some degree of control or choice". Thus, if there was a declaration to the effect that Ms Edwards had a proprietary interest in the gametes, by providing them to her, IVF Australia

would not be doing so by way of choice but would, in effect, be deferring to her greater claim for possession. In this way, IVF Australia would not be engaging in a "supply" of the gametes that is prohibited by s 21 because of the absence of the provider's consent.

139. In my view, if Ms Edwards does have an entitlement to possession, the handing over of the stored gametes to her would more appropriately be regarded as them being "released" to her, rather than them being "supplied" to her. I have in mind the definition of "release" in the Macquarie Dictionary, revised 3 rd edition, to which Mr Kirk drew my attention. It is defined to include "give up, relinquish, or surrender". Provision of the gametes to Ms Edwards, if she has an entitlement to their possession, would, in my view involve IVF Australia giving up, relinquishing or surrendering to her what is rightfully hers.

140. As to the provisions of s 22, IVF Australia, being an ART provider, is prohibited from exporting, or causing to be exported, the gametes from this State because of the absence of the provider's consent. However, Mr Kirk submitted that releasing the gametes to Ms Edwards, even with knowledge that she intended to take them out of the State, would not constitute IVF Australia causing exportation. I accept that submission. IVF Australia's release of the gametes to Ms Edwards would not be an operative cause of her taking them out of the State. It might enable it to happen but it would not be a cause of it happening.

Other discretionary considerations

141. I have mentioned that O'Keefe J in *MAW v Western Sydney Area Health Service* , above, at [64]), indicated that if he had jurisdiction he would not have exercised his discretion in favour of the plaintiff. Matters that he considered that could be relevant to Ms Edwards' application were "(1) [a]ny consent, whether express or inferred, given by the patient"; "(4) [t]he best interests of any child that may be conceived as a result of the use of the semen"; "(5) [w]hether there are any generally held community standards in respect of the situation proposed"; and "(6) [w]hether what is proposed by the plaintiff would, or would not, accord with any such standards".

142. As to the first of those matters, I accept Ms Edwards' evidence concerning the desire she and her husband held to have a child together. I express no view as to the strength of the inference for which she, at least implicitly, contended that Mr Edwards was in favour of her having their child even after his death. That is a matter that may be of considerable significance to any ART provider who may be approached by Ms Edwards with a view to obtaining assisted reproductive treatment. It is best that I not intrude upon a fair consideration of that issue by expressing a view one way or the other. I do, however, take into account that Ms Edwards' quest to have her deceased husband's child has the support of his family.

143. The "best interests of any child that may be conceived" is a difficult matter to contemplate. O'Keefe J recognised (at [73]) that it was "virtually impossible to talk sensibly" about this factor when a child has not been, and never may be, conceived. He referred to an

inability to predict such things as the plaintiff's future health, her employment and financial situation, and whether she will remarry. Earlier in his judgment (at [43]) he had discussed "the best interests of the welfare of a child". He referred to the child not knowing its father; recognising that he or she was not sought to be procreated during the life of the father; and, should the circumstances of the child's conception come to be known, there would be people in the community who would tend to regard the child as "different".

144. I tend to think that circumstances have changed significantly since *MAW* . I acknowledge the force of some of the matters to which O'Keefe J had regard. But the evidence before me is clear that any child that will be conceived will be born to a loving mother and with a supportive extended family. Beyond that I am of the view that it would be inappropriate to engage in speculation about a variety of indeterminable matters.

145. As to the matters to which O'Keefe J referred in the earlier part of his judgment, it is important to recognise that, whilst conception of children with assisted reproductive technology was well accepted in 2000, it seems safe to assume that this is even more the case in 2011.

146. The fifth and sixth matters considered by O'Keefe J related to community standards. Mr Kirk submitted that the best measure of these is the public policy manifest in the ART Act (which, of course, did not exist at the time of his Honour's writing). I have earlier set out the objects of the Act which are expressed in s 3. It is evident that many of the provisions which are of relevance to this case reflect such policy. However, Ms Edwards no longer seeks any approval to undergo assisted reproductive treatment in New South Wales. I have inferred that she will look elsewhere. There is, as I have observed, similar legislation in some States but elsewhere in the Commonwealth of Australia the provision of such services is governed by the application of the NHMRC Guidelines. I have earlier noted they contain a degree of ambiguity. Moreover, they are not statutory provisions, but are ethical guidelines. With no evidence before me as to how they are applied in practice, I cannot conclude that assisted reproductive treatment will be denied to Ms Edwards elsewhere in the country.

147. In this regard I respectfully adopt the reasoning of Morris J in *YZ v Infertility Treatment Authority* , above. I note also the somewhat analogous reasoning that underlaid the decision of the English Court of Appeal in *R v Human Fertilisation and Embryology Authority, ex parte Blood* , above.

148. The circumstances in which the sperm samples were taken is a relevant matter but not determinative. That respect for the human body, even when deceased, is a public policy manifest in the *Human Tissue Act* is evident from the various consents and authorisations that are required before there can be any interference. The provisions of the *Human Tissue Act* were not complied with, but not because they presented an insurmountable hurdle. There was, however, (a) an order made by this Court; (b) authorisation by the State Coroner; and (c) preparedness by medical practitioners to undertake the procedure. Misinformation or

misguidance in unusual and urgent circumstances was at play rather than any deliberate flouting of important statutory provisions. I would not decline to exercise my discretion to make the declaration sought on the basis that there was not exact compliance with the provisions of the*Human Tissue Act* .

149. Another matter that I have taken into account is that there is no suggestion that anyone other than Ms Edwards claims any entitlement to possession of the sperm. The person who is currently holding the sperm, IVF Australia, has not suggested that it has any interest in it, proprietary or otherwise. Putting it bluntly, only two outcomes are possible: Ms Edwards takes possession of the sperm or it is destroyed.

Conclusion

150. Earlier I concluded that it would be open to the Court to make the declaration sought. Having considered the range of matters set out subsequent to the expression of that conclusion, I am of the view that Ms Edwards' application should be granted. It will be necessary to revoke the order made by Simpson J as to the retention of the sperm so as to enable Ms Edwards to take advantage of the declaration.

151. I note that the Attorney General did not seek an order for the payment of costs.

Orders

152. I make the following declaration and order:

1. That Ms Jocelyn Edwards is entitled to possession of the sperm recovered from the body of her late husband, Mr Mark Edwards.
2. The order made by Simpson J on 6 August 2010 that the sperm not be released until further order is discharged.