

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : RE SECTION 22 OF THE HUMAN TISSUE AND
TRANSPLANT ACT 1982 (WA); EX PARTE C
[2013] WASC 3

CORAM : EDELMAN J

HEARD : 29 DECEMBER 2012

DELIVERED : 2 JANUARY 2013

FILE NO/S : CIV 3078 of 2012

MATTER : Section 22 of the *Human Tissue and Transplant Act*
1982 (WA)

EX PARTE

C
Applicant

AND

MINISTER FOR HEALTH (WA)
Respondent

Catchwords:

Practice and procedure - Application ex parte by widow for removal and storage of spermatozoa and associated tissue from the body of her recently deceased husband - *Human Tissue and Transplant Act 1982 (WA)* s 22 and s 23 - Distinguishing order for use of material from orders for removal and storage of that material - How issues concerning requests for removal of spermatozoa from a recently deceased person should be dealt with by hospitals in future

Property - Whether sperm removed from deceased person is 'property' within O 52 r 3 - Difficulties in relying upon O 52 r 3 as a source of power for court

orders for removal of spermatozoa from deceased body

Legislation:

Human Tissue and Transplant Act 1982 (WA), s 3, s 4, s 22, s 23

Rules of the Supreme Court 1971 (WA), O 52 r 3

Result:

Orders for extraction of spermatozoa made

Category: A

Representation:

Counsel:

Applicant	:	In person
Respondent	:	No appearance

Solicitors:

Applicant	:	In person
Respondent	:	No appearance

Case(s) referred to in judgment(s):

Bazley v Wesley Monash IVF Pty Ltd [2010] QSC 118
Doodeward v Spence [1908] HCA 45; (1908) 6 CLR 406
Haynes Case (1614) 12 Co Rep 113
Hecht v Superior Court of Los Angeles County (1993) 20 Cal Rptr 2d 275
R v Bentham [2005] UKHL 18; [2005] 1 WLR 1057
R v Fox [1841] EngR 1003; [1841] 2 QB 246
R v Kelly [1999] QB 621
R v Rothery [1976] RTR 550
R v Scott [1842] 2 QB 248
R v Welsh [1974] RTR 478
Re Section 22 of the Human Tissue and Transplant Act (WA); Ex Parte M
[2008] WASC 276
Reg v Sharpe (1857) Dears & B 160; (1857) 169 ER 959
Roche v Douglas as Administrator of the Estate of Edward John Hamilton
Rowan (Dec) [2000] WASC 146
S v Minister for Health (WA) [2008] WASC 262
Williams v Williams (1882) 20 Ch D 659
Y v Austin Health [2005] VSC 427
Yearworth v North Bristol NHS Trust [2009] EWCA Civ 37; [2010] QB 1

Text(s) cited:

W Blackstone, *Commentaries on the Laws of England* (1766) vol 4
E Coke, *Institutes of the Laws of England* (1669 ed) vol 3
I Goold, 'Tissue Donation: Ethical Guidance and Legal Enforceability' (2004)
11(3) *Journal of Law and Medicine* 331
R Hardcastle, *Law and the Human Body* (2007)
T Honoré, *Ulpian: Pioneer of Human Rights* (2002)
S Huynen, 'Biotechnology - A Challenge for Hippocrates' (1990) 6(4) *Auckland
Law Review* 534
B McFarlane, *The Structure of Property Law* (2008)

EDELMAN J:

Introduction: The application for spermatozoa removal and storage

1 This application was heard urgently and late in the evening on Saturday 29 December 2012. Ms C sought orders for the removal and storage of spermatozoa and associated tissue from her husband who had died the previous day. The removal and storage of the spermatozoa will permit a future in vitro fertilisation procedure for Ms C, subject to a further court hearing. The hearing was short and I made orders immediately at the conclusion of the hearing.

2 Ms C's evidence was that she and her husband had been trying for her to conceive for nearly two years. They had commenced a programme of in vitro fertilisation. Her husband consented throughout to the plan of having a baby. On 28 December 2012 he committed suicide. He had previously encountered several bouts of depression. Ms C wanted to extract spermatozoa from his body for the possibility of future in vitro fertilisation. She was told by officials at the hospital at which her husband's body had been present, Sir Charles Gairdner Hospital, that she needed a court order. By the time that Ms C contacted the Court there were only hours remaining for (i) the hearing of the matter, (ii) the making of a formal order, (iii) the provision of the order to the doctor, and (iv) the removal of the spermatozoa from Ms C's deceased husband.

3 During the short hearing I formed the view, substantially for the reasons below, that orders should be made to permit the removal that Ms C desired. It was also apparent that a proper approach to these issues in future should permit these requests to be considered with greater speed and efficiency. My reasons below are designed to facilitate the manner in which these issues can be considered in hospitals in future. The reasons below explain:

- (1) the scope and difficulties surrounding the power to make orders under the *Rules of the Supreme Court 1971* (WA);
- (2) the operation of the *Human Tissue and Transplant Act 1982* (WA) and the orders made in this case; and
- (3) how these matters should be dealt with by hospitals in future.

(1) A power under the Rules of the Supreme Court?

4 One possible source of power, in whole or in part, to make orders of the kind sought in this case is O 52 r 3(1) of the *Rules of the Supreme Court*. Some previous applications to this Court for removal of spermatozoa have relied upon this sub-rule as a source of power. But reliance on O 52 r 3(1) is not free from difficulty.

5 Order 52 r 3(1) provides as follows:

- (1) The Court may for the purpose of enabling the proper determination of any cause or matter or of any question arising therein, make orders on terms for -
 - (a) the taking of samples of any property; or
 - (b) the making of any observation of any property; or
 - (c) the trying of any experiment on or with any property; or
 - (d) the observation of any process.

6 There has been much debate about whether living matter, including spermatozoa, removed from a *living* body, falls within the meaning of 'property'. The starting point is the long-standing principle that a living person can be the holder of a property right but he or she cannot be the object of it.¹ The late Lord Rodger, who was one of the world's finest Roman scholars, ascribed the origin of this principle to the statement by Ulpian,² perhaps the first ever human rights lawyer,³ that no-one is to be regarded as the owner of his own limbs. Of course, for at least one obvious reason, the principle that a person cannot be the object of a property right was never fully appreciated in Roman law.

7 The principle that a human body cannot be the object of a property right does not apply in relation to tissue or body parts once they are removed from a human body. It is now clear that things which are removed and separated from the living human body, such as human tissue, can sometimes be the object of property rights. As a recent monograph has acknowledged, the most extensive judicial discussion on this point in Australian common law is the decision of Master Sanderson in this jurisdiction in *Roche v Douglas as Administrator of the Estate of*

1 *R v Bentham* [2005] UKHL 18; [2005] 1 WLR 1057 [8]. See the excellent discussion in B McFarlane, *The Structure of Property Law* (2008) 137.

2 *Dominus membrorum suorum nemo videtur*: Ulpian, D 9 2 13 pr. See *R v Bentham* [2005] UKHL 18; [2005] 1 WLR 1057 [14].

3 T Honoré, *Ulpian: Pioneer of Human Rights* (2002).

Edward John Hamilton Rowan (Dec).⁴ I am indebted to his Honour's summary of key principles in this area. That decision reflects the modern recognition that things removed and separated from the living human body can be the objects of property rights. The conclusion reached by Master Sanderson has also been reached in relation to removal of spermatozoa from a living person in the context of different legislation, as well as the common law, in England and the United States.⁵ In the Supreme Court of Queensland, White J has recently supported Master Sanderson's conclusion as sound 'both in law and in common sense'.⁶ Of course, a different and sometimes difficult question may be *who* holds property rights over the removed matter.

8 The position is different in relation to deceased persons both in relation to the body and in relation to material removed from the body. The rationale that the holder of property rights cannot also be the object of them does not apply to deceased persons. It might have been thought that this would make it less difficult as a matter of principle for the common law to recognise property rights in a corpse or in parts of a corpse. Yet, for hundreds of years it has been asserted that there is no 'property in a corpse'⁷ or in parts of a corpse.⁸ Blackstone relied upon Roman foundations for this apparent rule and wrote in support of it in his *Commentaries*.⁹ The foundations, or perhaps assertions, of this 'no property' rule have been described as 'weak, resting on misinterpretations of decisions, poor records and semantics'.¹⁰

9 There were, and are, exceptions which developed at common law to this apparent rule. One exception was that administrators or executors are entitled to the possession (a property right) of a corpse for the purposes of burial.¹¹ Another exception was explained in the decision of Griffith CJ (with whom Barton J agreed) in *Doodeward v Spence*¹² as follows:

[W]hen a person has by the lawful exercise of work or skill so dealt with a

4 *Roche v Douglas as Administrator of the Estate of Edward John Hamilton Rowan (Dec)* [2000] WASC 146. See the discussion in R Hardcastle, *Law and the Human Body* (2007) 83.

5 *R v Welsh* [1974] RTR 478; *R v Rothery* [1976] RTR 550; *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37; [2010] QB 1; *Hecht v Superior Court of Los Angeles County* (1993) 20 Cal Rptr 2d 275.

6 *Bazley v Wesley Monash IVF Pty Ltd* [2010] QSC 118 [32] - [33] (White J).

7 *Haynes Case* (1614) 12 Co Rep 113 discussed in E Coke, *Institutes of the Laws of England* (1669 ed) vol 3, 110; *Williams v Williams* (1882) 20 Ch D 659, 665 (Kay J).

8 *R v Kelly* [1999] QB 621, 630 - 631 (Rose LJ); *Reg v Sharpe* (1857) Dears & B 160, 163; (1857) 169 ER 959, 960 (Erle J).

9 W Blackstone, *Commentaries on the Laws of England* (1766) vol 4, ch 17, 236.

10 S Huynen, 'Biotechnology - A Challenge for Hippocrates' (1990) 6(4) *Auckland Law Review* 534, 536; I Goold, 'Tissue Donation: Ethical Guidance and Legal Enforceability' (2004) 11(3) *Journal of Law and Medicine* 331, 334.

11 *R v Fox* [1841] EngR 1003; [1841] 2 QB 246; *R v Scott* [1842] 2 QB 248.

12 *Doodeward v Spence* [1908] HCA 45; (1908) 6 CLR 406, 414.

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 ...

10 In some cases in this jurisdiction it has been held that 'property' for the purposes of O 52 r 3 extends to the spermatozoa of a deceased person.¹³ Those cases also involved circumstances of urgency. The decisions were made almost immediately with few, if any, submissions on the difficult issues surrounding the scope of O 52 r 3. Some of those issues include:

- (i) Does the production and extraction of spermatozoa from a deceased body fall to be treated by the same rules as those which govern property rights to the corpse itself or any part of it?
- (ii) What is the basis of the 'work or skill' exception? Would this case fall within that exception? Is the exception a genuine exception or is it merely an illustration of general property law principles of *specificatio*?¹⁴
- (iii) Could, or does, the common law recognise that parts of, or tissue or material from, the body of a deceased person are capable of being the objects of property rights without the application of work or skill to acquire new attributes? If so, when?
- (iv) Could such a common law, or extended common law, principle be encapsulated within the meaning of 'property' within O 52 r 3?
- (v) If so, what is the source of power for O 52 r 3?
- (vi) Do the prefatory words of O 52 r 3, 'the purpose of enabling the proper determination of any cause or matter', mean that the 'taking of samples of any property' apply to a cause or matter *other than* a cause or matter seeking the taking of samples of property?
- (vii) Could such a power under the *Rules* supplement or modify the operation of the legislative provisions discussed below?

13 *S v Minister for Health (WA)* [2008] WASC 262; *Re Section 22 of the Human Tissue and Transplant Act (WA); Ex Parte M* [2008] WASC 276.

14 R Hardcastle, *Law and the Human Body* (2007) 129 - 137.

11 At the hearing of the application I did not consider that these questions permitted a near-immediate answer. The case before me involved circumstances of extreme urgency. Ms C was unrepresented. A decision needed to be made almost immediately. And I considered that there was a simpler legislative route to the orders that Ms C sought. The next section of my reasons explains how that legislation operates and why in future a hospital should be able to perform the desired procedure in a case like this almost immediately and without an applicant being required to come to court prior to removal.

(2) The operation of the *Human Tissue and Transplant Act 1982 (WA)* and the orders made in this case

12 Section 22 of the *Human Tissue and Transplant Act*, which has been in operation since 1997, provides as follows:

22. Designated officer may authorise removal of tissue from bodies in hospital

(1) A designated officer for a hospital may, subject to and in accordance with this Part, authorise the removal of tissue from the body of a person who has died in hospital or whose dead body has been brought into the hospital -

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

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

(2) A designated officer for a hospital may authorise the removal of tissue from the body of a person who has died in the hospital or whose dead body has been brought into the hospital -

(a) where, after making inquiries, the designated officer is satisfied that the deceased person during his lifetime expressed the wish for, or consented to, the removal after his death of tissue from his body for the purpose or a use referred to in subsection (1) and had not withdrawn the wish or revoked the consent; or

(b) where, after making inquiries, the designated officer has no reason to believe that the deceased person had expressed an objection to the removal after his death of tissue from his body for the purpose or a use referred to in subsection (1) and the designated officer is satisfied that the senior available next of kin consents to the removal of tissue from the body of the deceased person for the

purpose or a use referred to in subsection (1).

- (3) The authority of a designated officer to authorise the removal of tissue from the body of a deceased person under this section is restricted -
- (a) in the case of the circumstances referred to in subsection (2)(a), by the expressed terms of the wishes or consent of the deceased person;
 - (b) in the case of the circumstances referred to in subsection (2)(b), by the consent of the senior available next of kin,

both as to the tissue which may be removed and as to the purpose or use of the tissue.

- (4) The senior available next of kin of a person may make it known to a designated officer at any time when the person is unconscious before death that he consents to the removal, after the death of the person, of tissue from the body of the person for the purpose or a use referred to in subsection (1), but the designated officer shall not act on such an indication if the person recovers consciousness.
- (5) Where there are 2 or more persons having a description referred to in a subparagraph of paragraph (a) or (b) of the definition of 'senior available next of kin' in section 3, an objection by any one of those persons has effect for the purposes of this section notwithstanding any indication to the contrary by the other or any other of those persons.

13 The definition of 'senior available next of kin' in s 3, in relation to a person other than a child, is

- (b) ... the first in order of priority of the following persons who is available at the time -
- (i) if the person has both a spouse, and a de facto partner who has attained the age of 18 years, the spouse or de facto partner with whom the person is living as a spouse or de facto partner;
 - (ia) the spouse, or de facto partner who has attained the age of 18 years, of the person;
 - (ii) a son or daughter, who has attained the age of 18 years, of the person;
 - (iii) a parent of the person;
 - (iv) a brother or sister, who has attained the age of 18 years, of

the person.

14 Designated officer is also defined in s 4. Enquiries made of the
hospital during the hearing revealed that a medical practitioner had been
appointed as the designated officer.

The effect of the *Human Tissue and Transplant Act 1982* in this case

15 Ms C is the senior available next of kin of the deceased.

16 The effect of s 22 is that the designated officer for the hospital had
the power to authorise the removal of tissue from Ms C's deceased
husband because:

- (1) his dead body had been brought into the hospital;
- (2) the power of the authorised officer to remove spermatozoa for the
purposes of storage for later assistance for another person to
become pregnant tissue falls within 'medical purposes' in s 22(1)
(b);¹⁵
- (3) the word 'tissue', as defined in s 3 includes spermatozoa in the
relevant part of the Act, Part III;¹⁶
- (4) if the designated officer, or his delegate, had made inquiries of
Ms C then those inquiries would have revealed to the designated
officer that there is no reason to believe that the deceased person
had expressed an objection to the removal after his death of tissue
from his body for 'medical purposes' as described above and the
designated officer would have been satisfied that Ms C consented
to the removal of the spermatozoa for that purpose. Nor was there
any suggestion of any possible objection by any of the persons
listed in the definition of 'senior available next of kin'.

17 There is one additional qualification to this conclusion. Section 23
of the *Human Tissue and Transplant Act* contains one additional
restriction. That section provides that if the designated officer for a
hospital has reason to believe that the death of a person is or may be a
reportable death, the designated officer shall not, under and in accordance
with s 22, authorise the removal of tissue from the body of the deceased
person unless (i) the coroner has given his consent to the removal, or (ii)
the coroner has given a direction either before or after the death of a

¹⁵ *Y v Austin Health* [2005] VSC 427 [38] - [40] (Habersberger J).

¹⁶ Compare s 6 in Part II. See also *Y v Austin Health* [2005] VSC 427 [34] (Habersberger J).

person that his consent to the removal of tissue from the body of the person after the death of the person is not required. Section 23(4) provides that the consent of the coroner can be given orally and, if so given, shall be confirmed in writing.

18 During the short hearing, at my direction my Associate contacted a representative of the coroner who confirmed that the coroner consented to the removal of the spermatozoa from the deceased. My Associate was also informed by the hospital that the designated officer was not present and would be difficult to contact.

The orders made in this case

19 For these reasons the orders I made, with a minor correction, were as follows:

- (1) There be permission for the designated officer of Sir Charles Gairdner Hospital (within the meaning of s 4 of the *Human Tissue and Transplant Act 1982*) or a medically qualified authorised person forthwith to remove spermatozoa and associated tissue from the body of [Mr C] and such spermatozoa and associated tissue shall be stored in accordance with the *Human Reproductive Technology Act 1991* (WA).
- (2) The spermatozoa and associated tissue so removed and stored not be used for any purpose without an order of this Court.

20 Existing authority in this Court supports an order being made by this Court conferring authority upon a medical practitioner under *Human Tissue and Transplant Act* to permit the removal described above.¹⁷ However, for the reasons set out below, in future the authority ought to be conferred, at the very least in the first instance, by the designated officer or his or her delegate.

21 I have also suppressed the name of the applicant from publication, other than to the Minister for Health, until further notice. As Martin CJ has explained, in tragic cases of this kind it is in the public interest for people to be able to come to the Court without fear that their privacy will be invaded by the media at a time of great stress and trauma.¹⁸

¹⁷ *S v Minister for Health (WA)* [2008] WASC 262; *Re Section 22 of the Human Tissue and Transplant Act (WA); Ex Parte M* [2008] WASC 276.

¹⁸ *Re Section 22 of the Human Tissue and Transplant Act (WA); Ex Parte M* [2008] WASC 276.

(3) How these matters should be dealt with in future by hospitals

22 Due to the urgency of this application the respondent to this application, the Minister for Health, did not have the opportunity to appear or make submissions. The Minister will have a copy of these reasons and will have the opportunity to be represented in any future application in relation to implantation of the removed spermatozoa. One matter which should be brought to the attention of the Minister is how hospitals (including the State Mortuary) might deal with these issues more expeditiously.

23 The *Human Tissue and Transplant Act* establishes a relatively straightforward regime. In this case the hospital was aware of, and had, a designated officer under the Act. Section 4 of the Act provides that the designated officer may, in writing, delegate any of his or her powers (other than the power to delegate). The authorisation for the removal of the spermatozoa from Ms C's deceased husband could have been given by the authorised officer, or someone delegated to make the decision (and inquiries of Ms C) on his behalf.

24 In future, the most efficient procedure to follow in an urgent case such as this would be for any request for extraction of spermatozoa to be directed by the hospital to the designated officer who can consider the matters raised in s 22 of the *Human Tissue and Transplant Act* which I have described above. If the designated officer is unavailable he or she can, in writing (by email or fax) delegate the power to another officer. The delegation can occur beforehand or at the time of the request.

25 In the short time available I have been unable to locate any codes of practice made under the *Human Tissue and Transplant Act* s 32A. That section provides that the Executive Director may, with the approval of the Minister, issue codes of practice setting out directions and guidelines for the purposes of facilitating the operation of any of the provisions of the *Human Tissue and Transplant Act*. Such Codes might usefully set out the principles suggested above if they do not already do so.