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## The Husband, his Widow, his Sperm and the Court...

A recent decision in the New South Wales Supreme Court found that Ms Edwards, the wife of a deceased man had a possessory interest in his sperm, removed after his untimely death. The decision is interesting to property lawyers for a number of reasons. First, it discusses at some length the nature of the interest found to vest in the applicant wife. Secondly, it highlights the challenges involved in identifying rights in the human body, or parts of it, in favour of third parties.

The case again affirmed the turn of the (20th) century Australian decision in *Doodeward v Spence*, which held that there was no property in the human body unless the so called 'work and skill' exception applied:

'...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...'

*Doodeward v Spence* is one in a long line of cases that demonstrates the courts' reluctance to find property in the human body - dead or alive - or in parts of the human body. In one sense, the recent NSW decision does likewise.

The court identified that Ms Edwards held a right to possess her deceased husband's sperm. The Court referred to a High Court decision:

"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).

This wide and inclusive definition of 'property' has been identified as problematic in relation to genetic material. A 2003 Law Reform Commission Report, for example, recommended against regarding genetic material (which would include sperm) as property. To do so may imply its suitability for transfer sale and management. Possession however would be appropriate.

In the Edwards case, the Court therefore had the task of identifying what kind of right might vest in the sperm. It found that this right whether property or not, amounted only to possession. It seems though that even this possessory right was limited.

While it was clear that Ms Edwards would seek to use the sperm for the purposes of IVF, the Court was not in a position to award possession for this purpose. Indeed the Court was

### ABOUT ME



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asked 'to put aside any consideration of what she might do with it as a result of such possession' - legislation in New South Wales forbids the use of gametes for IVF where the gamete provider is deceased and there is no (written) consent.

In finding even this limited possessory right, the Court had to overcome a number of obstacles in identifying Ms Edwards herself as the party entitled to that possession. First, was it Mr Edwards who had an interest in his own sperm? If this were the case, then the right to the sperm would vest in his administrator (Ms Edwards) as property. The Court found that he did not - he did not have an interest in his sperm before death, so he did not have one afterwards.

Secondly, applying the 'work and skill' exception to no property in the human body, did the doctors who removed the sperm post mortem have property in the sperm? Again, the Court found that they did not. In this case, they undertook this work on behalf of Ms Edwards and for her benefit.

Thirdly, if Ms Edwards as administrator of the estate has a 'quasi' property right to the body of the deceased, did she have 'quasi' property in the sperm? This right is limited to possession for the purpose of burial, not for the extraction and possession of sperm from the deceased. Ms Edwards' role as administrator though was relevant in influencing the Court's discretion as to possession of the sperm:

"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."

The Court in this case, in citing the Law Reform Commission Report, acknowledged the appropriateness of a case by case approach - an approach that will weigh up the public interest and private rights at stake in each set of circumstances. The outcome of this decision is instructive of the challenge of the public private divide in determining which rights exist and which are at stake.

This case was resolved in terms of property interests in sperm. While the Court accepted that the sperm would be capable of being subject to a property right, it nonetheless exercised caution in finding a possessory interest. This represents the caution exhibited by the Courts in such cases, where they seek to avoid opening the possibility of creating property and therefore a market in human body or tissue.

On the other hand, the private interest of Ms Edwards in having a child with her late husband and the consequences for a possible child create a matrix of considerations that weigh in against the wider public interest of maintaining the dignity of human life. In light of these complex questions, it remains to be seen as to whether dealing with human gametes in terms of proprietary (via possessory) interests is of any value or whether an alternative framework of thinking might provide a less problematic answer.

Posted by Kate Galloway at 13:28



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