Retrieval and Use of Sperm after Death:

In the Matter of Lee (Deceased) and Long (Applicant) [2017] NZHC 3263

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I Introduction

As a result of advances in medical technology in the second half of the 20th century, it is now possible for children to be conceived *ex vivo* through utilising artificial human reproductive technology (hereinafter referred to as ART). This has inevitably led to a myriad of novel and often difficulty legal questions for judges and regulators to contend with. Particular difficulties arise where one of the gamete providers to a proposed ART procedure has died prior to it being carried out. While it has always been the case that a child could be born after the death of his or her father, this new technology now means that children can be both conceived and born after their father's death. [1]

Such children may be conceived by utilising frozen ejaculate sperm harvested and stored before the father's death, or by posthumous sperm retrieval after death.

Post-conception disputes concern filiation (who, if anybody, is the child's legal father?) and inheritance (can or should the child be able to claim against the deceased father's estate?).[2] Pre-conception controversies focus on the entitlement, if any, to harvest sperm from the potential father when he is not in a position to consent by reason of incapacity (being in a coma, for instance) or death, as well as the related question as to whether the sperm can then be used in an ART procedure for the purposes of posthumous reproduction by his surviving wife or partner.

One such pre-conception controversy[3] came before the New Zealand

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1 See generally N Peart "Life Beyond Death: Regulating Posthumous Reproduction in New Zealand" (2015) 46 (3) VUWL Rev 725; CA Scharman "Not Without My Father: The Legal Status of the Posthumously Conceived Child" (2002) 55 Vand L Rev 1001; BM Star "A Matter of Life and Death: Posthumous Conception" (2003) 64 La L Rev 613; and G Bahadur "Death and Conception" (2002) 17 Human Reproduction 2769.

2 See N Maddox "Inheritance and the Posthumously Conceived Child" (2017) 81(6) Conv 405.

3 Although to describe this case as a controversy or dispute is a little inaccurate given all of the interested parties were supportive of the application.

High Court recently in *Re Lee (Long)*,[4] and this case is a good example of the difficult and fraught nature of litigation involving posthumous conception, as well as the legal vacuum in which judges must currently operate in New Zealand in such cases.

II Background

The deceased and the applicant had been in a stable de facto relationship for 20 years. For a number of years they had tried to have children by natural means, and when these attempts failed, they sought fertility treatment and to this end the deceased gave sperm samples on two occasions to test its suitability for *in vitro* fertilisation.[5] These samples were not preserved, however. Somewhat unexpectedly, the applicant became pregnant naturally. She gave birth to a healthy baby after the deceased died suddenly and unexpectedly. Prior to the death, both the deceased and the applicant had communicated their desire to have more than one child, as they wanted their first child to have one sibling. The deceased's desire to have children was in part attributable to traditional ethnic values that encouraged continuing his bloodline and having grandchildren for his parents.[6] While the deceased clearly consented to fertility procedures during his lifetime, as is common in cases of this nature, he had not turned his mind to the possibility of his sperm being used posthumously and there was thus no consent to this posthumous use.[7] Nor was there evidence that he would object to such a use.

The coroner refused to authorise the extraction of sperm from the deceased's body for want of jurisdiction and an urgent ex parte application was made before Heath J in the High Court. Had an interim order for removal of the sperm not been made at this interim hearing, the applicant's case would have been rendered moot at this early stage as no viable sperm could be collected from the body once 48 hours had passed from the death.[8] Accordingly, an interim order was made authorising the sperm retrieval which was duly performed, and the order extended to storage by a recognised facility as agents of the Court.

In the subsequent substantive application, the applicant sought orders confirming the interim orders that permitted the removal and storage of the sperm samples. She also sought orders granting her possession and control of the samples so that she may use them for her own fertility

4 *Re Lee (Long)* [2017] NZHC 3263, [2018] 2 NZLR 731.
5 At [3]–[4].
6 At [5]–[6].
7 Healthy young men do not generally consider death as something that eds to be planned for: K Tremellen and J Savulescu "A Discussion Supporting Presumed Consent For Posthumous Sperm Procurement and Conception" (2015) 30 Reproductive Biomedicine Online 6; SE Barton and others "Population-based Study of Attitudes Towards Posthumous Reproduction" (2012) 98 Fertility and Sterility 735.
8 *Re Lee (Long)*, above n 5, at [16].

treatment if authorised to do so under the Human Assisted Reproductive Technology Act 2004 (the HART Act) or if not authorised under the act, to export them so that she may receive treatment in another jurisdiction.[9]

The Court concluded that there were no statutory or regulatory provisions that dealt with a person such as the applicant seeking to collect and use sperm from a deceased spouse or partner[10] and the decision turned on two matters; first, whether the applicant had acquired any property interest in the sperm that she could enforce as of right, and alternatively, whether the Court could exercise its inherent jurisdiction to assist the applicant?

III Sperm as Property?

In deciding if the applicant was entitled to use her late partner's sperm samples, the Court first asked if she had any property rights in them.[11] The question as to whether human gametes can be considered property is complex and contentious. There is an old common law rule that there can be "no property in the body", although it is of dubious origin, it does represent the law.[12] As a person does not "own" their body in anything other than a rhetorical sense, it cannot form the subject matter of a bequest.[13] Potentially, the rule may not apply if a piece of the body has become separated from it prior to death, and the decedent takes control of it. This occurred in *Hecht v Superior Court (Kane)*,[14] where the decedent had frozen sperm samples prior to his suicide and bequeathed them to his surviving partner, with a written direction that they be used by her for posthumous reproduction. As the samples were under the control of the decedent prior to his death, they were recognised as property for the purposes of the California succession statute.

A similar approach was taken in the recent English case of *Yearworth v North Bristol NHS Trust*,[15] where sperm had been frozen on behalf of living men who were about to begin chemotherapy. The Court of Appeal considered that they had retained some control over these samples and they thus could be considered the property of the men, at least to the extent that would allow them to sue for breach of bailment when the samples were inadvertently destroyed by the clinic. However, these authorities were irrelevant in *Re Lee (Long)* as the sperm was not separated

9 At [22].
10 Although, I doubt that it was correct on this point: see below at section 4.
11 *Re Lee (Long)*, above n 5, at [77]–[91].
12 *Haynes' case* (1614) 12 Co Rep 113, 77 ER 1389; *Exelby v Handyside (Dr Handyside's case)* (1749) 2 East PC 652; *R v Lynn* (1788) 2 TR 733, 100 ER 394 (KB); Re Sharpe (1857) Dears and Bell 160, 169 ER 959; R v Price (1884) 12 QBD 247; and M Pawlowski "Property in Body Parts and Products of the Human Body" (2009) 30 Liverpool Law Rev 35–55.
13 *Williams v Williams* (1882) 20 Ch D 659.
14 *Hecht v Superior Court (Kane)* 20 Cal Rptr 2d 275 (Ct App 1993).
15 *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37, [2010] QB 1.

from the body until after death and could not be said to have ever been under the deceased's control during his lifetime.[16]

There is an exception to the "no property" rule that allows the next-of-kin to take possession of the corpse, but only for the purposes of facilitating burial. Such rights are not really in the nature of ownership and are "transitive and purposive custodial rights" only.[17] Such limited rights would not permit the next-of-kin to appropriate the body for their own use, as this would be unconnected with burial.

1 Court Declines to Follow *Doodeward v Spence* (1908)

Heath J considered a series of recent Australian cases where property had been recognised in sperm as the application of lawful "work and skill" had served to differentiate the samples from mere dead tissue awaiting burial.[18] In these cases, the act of freezing and storing sperm was sufficient for the Australian courts to recognise the sperm as property, at least to the extent of creating an entitlement to possession of it. These decisions were based on the somewhat unusual, and undoubtedly gruesome, Australian authority of *Doodeward v Spence*,[19] a case where in issue was the ownership of a stillborn two-headed baby preserved with spirits in a jar. The majority of the Australian High Court held that the preservation of the baby was an act of work or skill that entitled the surgeon to retain possession of the body and maintain an action for its recovery; however the decision was not unanimous and Higgins J dissented on the basis that there could be no property in a corpse.[20] Recently, however, the New Zealand Supreme Court in *Takamore v Clarke* declined to follow the majority in *Doodeward*, preferring the dissent of Higgins J in holding that "the New Zealand common law position" is that "there can be no property in the dead body of a human being".[21]

Heath J felt bound by the Supreme Court decision and noted that if there is no property in a dead body:[22]

16 Heath J expressly distinguished *Yearworth* on this basis, *Re Lee (Long)*, above n 5, at [91].

17 Heather Conway "Dead, But Not Buried: Bodies, Burial and Family Conflicts" (2003) LS 423 at 426-427.

18 *Re H, AE (No 2)* [2012] SASC 177; and *Bazley v Wesley Monash* IVF Pty Ltd [2010] QSC 118, (2011) 2 Qd R 207; *Roche v Douglas* [2000] WASC 146, (2000) 22 WAR 331; *Re Edwards* [2011] NSWSC 478, (2011) 81 NSWLR 198; and Loane Skene "Property Interests in Human Bodily Material: *Yearworth*, Recent Australian Cases of Stored Semen and Their Implications" (2012) 20 Med L Rev 227.

19 *Doodewood v Spence* (1908) 6 CLR 406.

20 At 414–416 per Griffith CJ and at 417 per Barton J; whereas Higgins J dissented on the basis that there could be no property in a corpse.

21 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [117]; considered by Heath J in Re Lee (Long) above n 5, at [78] and [82]–[91].

22 *Re Lee (Long)*, above n 5, at [83].

> … it is difficult to see how there might be property in any component part of a dead body; perhaps more so when dealing with genetic material located inside a particular body part.

He adopted the reasoning of the Court of Appeal of England and Wales in *Yearworth* when it declined to follow *Doodeward* in relation to the freezing of human sperm. The *Yearworth* Court held (and Heath J agreed) that the *Doodeward* work/skill exception was a principle formulated as an exception to a principle that was itself of exceptional character (ie the "no property in the body" rule) and was inherently arbitrary in its operation.[23]

He further justified not following *Doodeward*, as the preserved baby in the case was not treated with the respect that modern society would afford to human remains being described as, for example, "a dead-born foetal monster" and "an aberration of nature" not properly to be regarded as a corpse that should have a Christian burial.[24] This view of the corpse was at variance with the current position in New Zealand law, noted Heath J, where provision is made for the registration of still-born children and burial rights, and the treatment of the body in *Doodeward* would potentially constitute a crime under the Crimes Act 1961.[25] Furthermore, he noted the decision is inconsistent with the regulatory regime set out in the HART Act which vests decision making power in relation to frozen sperm in an Ethics Committee, and not as would be the case if the sperm was recognised as her property, the applicant herself.[26]

2 *Status versus allocative questions*

When we discuss whether there is "property" in human tissue, it is not always clear what is being talked about, as there is a tendency for judges and academic commentators to elide differing issues with regard to human materials under the rubric of property, often misapplying basic property law concepts. Douglas and Goold highlight three areas in which property principles are commonly misunderstood: initial allocation of rights, how to dispose of a right and the content of rights.[27] A common misstep by the courts (as happened in *Yearworth* and *Moore v Regents of the University of California*)[28] is conflating the normative question as to whether sperm ought to be property (the "status" question) with the

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23 *Williams v Williams*, above n 14..

24 *Doodeward v Spence*, above n 18, at 416 per Barton J; considered by Heath J in Re Lee (Long), above n 5, at [85]–[88].

25 Crimes Act 1961, s 150(b), being a child who has been born under s 2 of the Births, Deaths, Marriages and Relationships Registration Act 1995; see also s 46A of the Burial and Cremation Act 1964, and ss 42 and 45 of the Coroners Act 2006.

26 *Re Lee (Long)*, above n 5, at [88].

27 S Douglas and I Goold "Property in Human Biomaterials: A New Methodology" (2016) 75 CLJ 478.

28 *Moore v Regents of the University of California* 499 US 936 (1990).

question of deciding in whom the rights would vest (the "allocation" question).[29] In both *Moore* and *Yearworth*, it was assumed that a resolution of the status question in favour of property rights existing in the biomaterials would mean those rights automatically vest in the source of the tissue. This approach ignores the traditional legal rules governing the acquisition of property; namely, first possession (ie who first takes possession of a newly created unowned object) and *specification* (whereby the creator of a new object is recognised as its owner).

The Court in *Re Lee (Long)* falls into a similar trap: it decides the question as to whether there should be property in sperm at all by reference to the allocation question: whether the surviving partner had property in the samples. Furthermore, Heath J determines the allocation question only by reference to one of the rules for acquisition of property; he does not, for instance, consider if the sperm is *res nullius* once it has been taken from the body, and thus capable of being taken into possession so as to justify property vesting in the first possessor. That is not to say that the Court's conclusions are incorrect on this issue; rather it omits the consideration of certain relevant principles when arriving at them.

The Court was undoubtedly correct to criticise *Doodeward v Spence* as leading to potentially anomalous outcomes; in particular that ownership of these materials is possible on the happenstance that some process is applied to them so as to alter them in some material way. Once one admits that ownership can vest on the basis of *Doodeward* when sperm is extracted from dead or comatose patients, as the Australian courts have done, a Pandora's box of allocative problems present themselves, as was noted by the Stewart J in a recent Scottish case, *Holdich v Lothian Health Board*, a case involving similar issues:[30]

> Maybe the clinician in such a case is to be characterised as an agent effecting occupatio on behalf of the patient. On the other hand both parties seem to agree that there is no contract in relation to the provision of treatment … so that, presumably, there is no scope for a contract of agency either … [furthermore] [t]o whom does the sperm belong when these techniques are used; and is it correct to postulate only permanently or terminally comatose, dying subjects and dead subjects. The answer to the latter question is "no" since the technique of electro-ejaculation is available for paraplegic patients. What happens to ownership if the patient recovers consciousness, say, or ceases to be paralysed?

Questions of property would also seem to create a disconnection between the question of ownership (has there been application of work/skill?) with how best to value the procreative wishes of the dying or comatose source of the sperm. In addition, as was canvassed in the *Holdich* case, one could convincingly argue that freezing of sperm does

29 Douglas and Goold, above n 26, at 480–484.
30 *Holdich v Lothian Health Board* [2013] CSOH 197, 2014 SLT 495 (OH) at [37]–[38] per Stewart J.

not really alter its inherent attributes; instead, it seeks to preserve them.[31]

Property law is attractive to judges faced with making choices in hard cases such as *Re Lee (Long)* in a legal vacuum: by recognising property in these materials it allows a remedy to be provided where otherwise there would be none.[32]The danger is to then engage in consequentialist reasoning aimed at finding property in order to achieve the favoured result without the necessary justificatory work, or without sufficient consideration for the impact on subsequent cases.[33] This is essentially what happened in the Australian cases of *Re Edwards*[34] and *Re H, AE*[35] where as in *Re Lee (Long)* both decedents had died before the sperm sample had been extracted, and neither had signed the necessary consent forms during their lifetime. As in *Yearworth*, the Court in *Re Lee (Long)* avoided the temptation of utilising the peculiar precedent of *Doodeward* to decide a hard case, and sought another basis for its decision.

Yearworth was of course distinguishable, as the men in that case had had their sperm samples frozen during their lifetime, and retained a measure of control of them. Similarly, in both *Hecht*[36] and *Bazley v Monash IVF Pty Ltd*,[37] the sperm samples had been frozen and stored before the death of the donor. As the donor retained control of the samples before his death in these cases, the Court could be justified in finding that the deceased had property in them during his lifetime and they could pass by succession.[38]

Heath J left open the question as to whether similar facts would lead to the same conclusion in New Zealand, and this may happen as control rights (even the limited and circumscribed rights that a man may retain over his stored sperm) are often, although not always, regarded as synonymous with property.[39] Accordingly, the Court did not rule out ever recognising sperm as some form of property under New Zealand law,

31 One could of course counter this argument by saying that sperm is inherently perishable once it is outside the body and the act of freezing alters this attribute.

32 RN Nwabueze "Donated Organs, Property Rights and the Remedial Quagmire" (2008) 16 Med L Rev 201.

33 I Goold and M Quigley "Human Biomaterials: The Case for a Property Approach" in I Goold and others (eds) *Persons, Parts and Property: How Should We Regulate Human Tissue in the 21st Century* (Hart Publishing, Oxford, 2014) 231 at 231–241.

34 *Re Edwards*, above n 19.

35 *Re H, AE (No 2)*, above n 19.

36 *Hecht v Superior Court (Kane)*, above n 15.

37 *Bazley v Wesley Monash IVF Pty Ltd*, above n 19.

38 The court applied *Yearworth* and found there had been a gratuitous bailment of the samples during the deceased's lifetime.

39 N Maddox "Property, Control and Separated Human Biomaterials" (2017) 24 EJHL 24.

providing it seems the sample is in storage during the life of the testator.[40] One would hope that when such a case comes before a New Zealand court, it does not simply treat control as synonymous with property and addresses the status question thoroughly before considering the allocative question. This status question is a live debate in the academic literature and it would be fitting to see it have judicial attention.[41]

IV The Court's Inherent Jurisdiction

The Court reviewed the HART Act and found that the use of sperm extracted from a dead man who did consent to this specific posthumous use was not prohibited by the Act, and the applicant could apply to the Ethics Committee established by the Act for permission to use the sperm for fertilisation.[42] It was held that the Committee, and not the Court, was the appropriate entity to decide if the applicant was entitled to use the sperm, as it was the specialist body created by Parliament to make such decisions. As a result, the Court restricted itself to determining the lawfulness of the posthumous extraction of the sperm.[43] Of course, the difficulty for the applicant, and the nub of the case, was that failure to extract and store the sperm in the two day period following the death of her partner would mean she would be unable to make this application.[44]

Heath J solved the difficulty by invoking the Court's inherent jurisdiction and permitting the extraction and freezing of the sperm as "doing no more than filling a legislative gap to provide a means by which sperm can be collected and stored pending a substantive application to the Ethics Committee as to its subsequent use", ensuring that an otherwise "lawful process be undertaken, which otherwise would be frustrated".[45] He found that the exercise of this jurisdiction in these circumstances did not conflict with any statutory or regulatory

40 This approach to recognising property in sperm has not, however, found favour everywhere. In the Scottish case *Holdich v Lothian Health Board* [2013] CSOH 197, Stewart J felt that the *Yearworth* court had gone too far in classifying sperm as property; and canvassed the view that frozen sperm is rather a "thing" in relation to which the possessory remedies of delict and delivery are available, and it thus could be the subject of a contract of safekeeping breach of which is actionable. This does not equate with property.

41 See, for example: J Wall "The Trespasses of Property Law" (2014) 40(1) J Med Ethics 19; W Boulier "Sperm, Spleens, and Other Valuables: The Need to Recognize Property Rights in Human Body Parts" (1994) 23 Hofstra L Rev 693; and RP Jansen "Sperm and Ova as Property" (1985) 11(3)J Med Ethics 123.

42 *Re Lee (Long)*, above n 5, at [52]–[55] and [92]–[98].

43 Pursuant to Human Reproduction Act 2004, s 28.

44 *Re Lee (Long)*, above n 5, at [101].

45 At [100].

provision, which would otherwise constrain the exercise of the inherent jurisdiction.[46] Section 16 of the Judicature Act 1906 provided a statutory basis for the seemingly open-ended nature of the inherent jurisdiction providing that the High Court would have all jurisdiction that it had on the coming into operation of the Act as well as "all judicial jurisdiction which may be *necessary* to administer the laws of New Zealand".[47]

Heath J considered two aspects of the inherent jurisdiction in aid of his submission that the High Court could invoke it in this case: the parens patriae and administration jurisdictions. The former was exercised as part of the Court's traditional wardship jurisdiction, and was aimed primarily at protecting vulnerable children. In *Re JSB (A Child)*,[48] Heath J. invoked the jurisdiction to justify making orders as to what would happen on the death of a still-living child. *Re Jones (deceased)*[49] was cited as an example of the administration jurisdiction. *Jones* was a succession law case where those entitled under statute to extract letters of administration were not willing to do so. In the absence of express statutory authority, the Court in *Jones* invoked the inherent jurisdiction to justify allowing a grant in favour of a person willing to administer the estate. From these cases Heath J conceptualised the inherent jurisdiction as a continuum, stating in *JSB* (in a passage cited with approval in *Re Lee (Long)*) that:[50]

> *Parens patriae* and administration are two manifestations of the inherent jurisdiction. Together, they demonstrate the existence of jurisdiction applying to a continuum, from the beginning of life until after its end. While the former is directed to the living and the latter to the dead … the Judicature Act draws no distinction between aspects of the inherent jurisdiction.

With respect to the learned judge, this view of the inherent jurisdiction and its application to the facts of *Re Lee (Long)* marks a significant widening of the court's powers. Furthermore, the facts of *Re Lee (Long)* are significantly different from previous cases in which the inherent jurisdiction has been invoked by the New Zealand courts. As noted by Jacob in his seminal article on the topic, the inherent jurisdiction traditionally applied to narrow procedural issues involving contempt of court or abuses of the processes of the court.[51] Additionally, as is evident

46 *Re Lee (Long)*, above n 5. Heath J cites *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 and the Supreme Court decision in Mafart v Television New Zealand [2006] NZSC 33, [2006] 3 NZLR 18 as setting out this legal test; Equity and common law principles may also constrain the exercise of the inherent jurisdiction *Burgess v Monk* [2017] NZHC 2424.

47 The emphasis is my own. The 1906 Act now derives its power from s 12(a) of the Senior Courts Act 2016.

48 *Re JSB (A Child)* [2010] 2 NZLR 236 (HC).

49 *Re Jones (deceased)* [1973] 2 NZLR 402 (SC).

50 *Re JSB (A Child)*, above n 49, at [55], cited in *Re Lee (Long)*, above n 5, at [38].

51 IH Jacob "The Inherent Jurisdiction of the Court" (1970) CLP 23, cited by Heath J in *Re Lee (Long)*, above n 5, at [30], n 22.

from the Canadian judgments on the issue, the inherent jurisdiction is primarily a feature of procedural law, it should be exercised sparingly and it should not be used to make changes to substantive law.[52] Nor it seems, should it be invoked to formulate law on issues more appropriately left to Parliament, or to the regulatory authorities established by Parliament for this purpose, even if the exercise of the inherent jurisdiction does not expressly conflict with any statutory provision or common law authority.

For example, and as was noted in *Re Lee (Long)*, the absence of express consent by the deceased to the posthumous use of his sperm raises important issues of policy.[53] A man's expressed desire to have a child in his lifetime does not necessarily mean he has consented to the conception of a child after his death.[54] Professor Peart correctly notes one reason for this: the deceased may never have given consideration to the fact that he could never have a relationship with the child.[55]

In England and Wales, one of the broadest applications of the inherent jurisdiction was in *Anton Piller KG v Manufacturing Processes Ltd*,[56] where the Court established the jurisdiction to grant an *ex parte* order to a party to enter, search and remove property from the premises of its opponent in civil litigation when it is likely the opponent was going to destroy integral evidence. In that case the Court noted, however, that such an order could only be justified in "exceptional circumstances". *Anton Pillar* is distinguishable from *Re Lee (Long)* as it was clearly rooted in the courts traditional jurisdiction to prevent abuse of its processes or actions designed to frustrate its processes, ie the imminent destruction of evidence. This is materially different from the loss of viability of the sperm of a deceased man two days after his death; this loss may result in the destruction of the subject matter of proceedings, but it is as the result of natural processes, not any attempt by persons to frustrate the litigation.

In examining whether any statutory or regulatory provision would be infringed by making an order, Heath J considered s 150 of the Crimes Act 1961 which makes it an offence inter alia to interfere with or offer any indignity to a human body, one of a number of legal measures recognising the need to treat human remains with dignity. The Court considered that the Act could not have been infringed since the procedure had been carried out by order of the Court. In this regard, he cited *R v Human*

52 *Ocean v Economical Mutual Insurance Co* 281 NSR 2d 201 (NSCA 2009) per Bateman J; See also the comparative discussion of MR Ferrere "The Inherent Jurisdiction and its Limits" (2013) 13 Otago Law Rev 107 at 115–131.

53 *Re Lee (Long)*, above n 5, at [9].

54 *AB v The Attorney-General for the State of Victoria* [2005] VSC 180.

55 Peart, above n 2, at 734. Portions of this article were cited in the judgment of Heath J: *Re Lee (Long)*, above n 5, at [103].

56 *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 (CA).

57 *R v Human Fertilisation and Embryology Authority, ex parte Blood* [1999] Fam 151 (CA) at 178.

Fertilisation and Embryology Authority; ex parte Blood,[57] as support for this finding. In that case, Lord Woolf found that although "technically" an offence had been committed in the extraction and storage of the sperm, no prosecution could be brought since this was done with the authority of the Court. The reasoning here is not convincing. The Court decides that invoking its inherent jurisdiction does not infringe any existing statutory provision as it has already authorised any action that could have been considered an infringement, even if that authorisation is found to be in error. Furthermore, there is Australian authority to support the proposition that removing part of the testicles of a dead man would be an improper interference with the body and thus a crime.[58]

One may also question whether the order was "necessary", within the meaning of the 1906 Act, to administer the laws of New Zealand. In *Jones*, for instance, Quilliam J deemed the utilisation of the judicial function as necessary as "The estate of the deceased must be administered."[59] In both *Takamore v Clarke* and *Re JSB* the necessity was obviously to resolve those disputes so that there may be burial. It can hardly be said that the posthumous extraction of sperm with the intention of using it in an ART procedure is necessary in the same way as it was in these cases. In addition, it is arguable in light of the provisions of the HART Act that there is no legislative gap to fill and the court usurped the functions of the committees established under that legislation.[60] This is as the Act establishes an advisory committee on assisted reproductive technology whose role is to formulate policy through the issuing of guidelines and advice to the ethics committee established under the Act who approves applications on a case-by-case basis.[61] The Act provides a number of guiding principles to guide the exercise of powers under it, one of which is that no assisted reproductive procedure should be performed on a person without their informed consent.[62] Another is the requirement to consider the welfare of a potential child born as a result of an ART procedure.[63] The definition of assisted reproductive procedure in the Act includes a procedure which involves the "storage, manipulation or use of an *in vitro* human gamete" and a plausible contention can be made that posthumous sperm retrieval is such a procedure, and it is thus for the advisory committee and not the High Court to formulate policy in this regard.[64]

58 *Re Gray* [2000] QSC 390; Baker v Queensland [2003] QSC 2; however, cf Re Denman [2004] QSC 70 where Atkinson J held that nothing was outside the High Court's inherent jurisdiction unless expressly excluded.

59 *Re Jones (deceased)*, above n 50, at 405.

60 My thanks to the anonymous reviewer for this point.

61 Human Assisted Reproductive Technology Act 2004, ss 16, 19, 28, 32 and 25.

62 At s 4(d).

63 At s 4(a).

64 At s 5.

V Sperm Retrieval from an Incapacitated Man

Heath J was careful to distinguish the facts before him from a case where consent to posthumous sperm retrieval was sought from a living but incompetent male who dies later. At length, he noted Professor Peart's discussion as to whether it is ever appropriate for sperm to be collected from a comatose patient.[65] Aside from the difficulty with garnering express consent to the *posthumous* use of the sperm noted above, she observes that some might question if it is ever appropriate to retrieve gametes from an incompetent person as it could be argued that the patient derives no benefit from the procedure.[66] Of course, there are counter-arguments and evidence as to patient's consent could be inferred from his views and values, surrounding circumstances such as the desire for a sibling for an existing child, or from discussions of posthumous conception with his surviving partner.[67] Although careful not to decide the issue definitively, Heath J noted a number of factors against it: the difficulty of characterising the extraction as in the best interests of the patient, the inappropriateness of making a comatose man the subject of a court order, and the availability of a jurisdiction to extract sperm immediately after death.[68]

There is a further objection that can be made to posthumous sperm retrieval from a comatose man. In *Y v Austin Health*,[69] Y's husband suddenly fell seriously ill and Y sought permission for sperm to be removed from him in his comatose state, or upon his death. The Victorian Supreme Court held that the Human Tissue Act 1982 allowed the wife as the next of kin to give consent to the removal, as it was for 'medical purposes' within the meaning of the act. Allowing a partner to consent to sperm retrieval in such circumstances is troublesome. The situation can be distinguished from organ donation, where the next-of-kin can be characterised as having purely altruistic motives in consenting to the retrieval of the organs from the patient. The position of the wife in Y's case is different in that she stands to gain from the procedure as she has a desire to use the sperm for reproductive purposes. This is of little consequence in a case such as *Re Lee (Long)* where the surviving partner and family are *ad idem*, but may lead to considerable difficulty and uncertainty in circumstances where there is conflict.[70] While the requirement of express consent to sperm retrieval – both pre and post mortem – may lead to anomalies and unfairness in many cases, the benefits of the legal certainty afforded by such a system may outweigh the detriment of unfairness in individual cases.[71]

65 *Re Lee (Long)*, above n 5, at [103].
66 Peart, above n 2, at 734–736.
67 At 734–736.
68 *Re Lee (Long)*, above n 5, at [105].
69 *Y v Austin Health* [2005] VSC 427.
70 As occurred in *Hecht v Superior Court*, above n 15.
71 Such was the view of the Victorian Law Reform Commission *Assisted Reproductive Technology and Adoption: Final Report* (February 2007) at 100.

VI Conclusion

Cases involving applications for posthumous sperm retrieval are invariably made at times of enormous distress to the family of the deceased, and the need to obtain a court order can only add to this distress. In a case such as this, where the surviving partner and the other family members all consent to the retrieval and use of the deceased's sperm, it is difficult to argue that the result is not the correct one. In addition, the court is to be complimented in not utilising the troublesome Australian authority of *Doodeward* and treating the sperm as property, notwithstanding that it would have provided a convenient justification for the remedies being sought. It is also desirable that there be future judicial consideration as to whether sperm ought to be the subject of property rights at all, and not simply whether the applicant is entitled to them.

Nevertheless, invoking the court's inherent jurisdiction in the broad and expansive terms utilised by Heath J is not without its difficulties. The inherent jurisdiction is a creature of procedural law and directed towards regulating and preventing abuses of the court's processes. With this in mind it is to be used sparingly, but nowhere in the judgment can be found any language of restraint in relation to the inherent jurisdiction Its role is to fill gaps and oversights by lawmakers, not to make substantive policy, particularly in circumstances where parliament has delegated policymaking in this area to specialist committees under the HART Act.