

TAKING BODY PARTS TO THE CASHIER: ARE THE COURTS TOO SLOW TO REGISTER?

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Property rights over body parts have been a controversial area in for the last decade. Courts have traditionally refused to recognise property rights in body parts with limited exceptions. The recent advancement in reproductive technology has forced the Courts to consider who has property rights over human gametes and whether the same principles governing body parts should apply to them. This paper will explore the current position, recent cases, policy considerations and conclude with recommendations that aim to realign the law with the advancements in reproductive technology.

I INTRODUCTION

Property rights should be afforded over body parts to the person whom which the body parts have come from. Property rights should only be afforded over body parts to the person from whom the body part was sourced. Traditionally, body parts have not been capable of being characterised as property. This position is dated and fails to adequately represent proprietary rights over modern day innovations such as intellectual property. First, I will outline the basic principles of personal property and demonstrate the court's approach to extending property rights to body parts. Secondly, I will consider any policy considerations that may limit this proposed extension of the law. Finally, I will conclude with recommendations that will provide more certainty for the public, medical practitioners and the courts in determining whether there are property rights over body parts. I will demonstrate the only way to afford a just outcome is for the courts to recognise property rights can extend to body parts.¹

I will predominantly focus on disputes over property interests in vital organs and human gametes to demonstrate that the traditional approach to property is dated and out of touch with modern conceptions of property.

II DEFINITION OF PROPERTY

There is no exhaustive definition of personal property. Over time, the legal definition of personal property has evolved from a bundle of rights² to a liberty

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¹ Vanessa White, 'Property rights in human gametes in Australia' (2013) 20 *Journal of Law and Medicine* 629.

² *Yanner v Eaton* [1999] HCA 53.

against the world.³ There have been various approaches adopted by the court when assessing whether various tangible or intangible objects are capable of being property. The 'bundle of rights' proves problematic because it does not take into account the existence of property rights over intangible items including intellectual property.⁴ It is apparent the courts have adopted the approach that property rights are instead a liberty against the world to use property.⁵

Further, Legislators have not provided any further guidance as to the definition of property. The *Personal Property Securities Act*⁶ defines personal property as anything other than land or a right, entitlement or authority. This gives little guidance as to what property is. Although there is no established definition of personal property, there are common law principles, which assist in determining the type of rights that can exist in relation to property. These principles include ownership and possession.

A Ownership

Ownership is the right to alter, alienate, maintain and recover exclusive possession.⁷ There is a presumption that a person with actual and legal possession is the owner of the property.⁸

B Possession

Possessory rights over property are often referred to as nine-tenth of the law. In other words, possessory rights are a substantive right in themselves, and can be enforced by various common law remedies.⁹ There are different types of possession including actual, legal and a right to possession. These possessory rights entitle the party to the property subject to a superior title.¹⁰

1 Actual Possession

Actual possession requires occupation or control over the property.¹¹ To have effective control a person with a proprietary right must be able to exclude

³ *Gatward v Alley* (1940) 40 SR (NSW) 174, 180.

⁴ *Zhu v Treasurer of the State of New South Wales* [2004] HCA 56.

⁵ Simon Douglas and Ben Mcfarlene, 'Defining Property Rights' in James Penner and Henry E. Smith (Ed.), *Philosophical Foundations of Property Law* (Oxford University Press, 2013), 220.

⁶ *Personal Property Securities Act* 2009 (Cth) s 10.

⁷ Austin J, *The Province of Jurisprudence Determined*, 5th ed, (1885), 789.

⁸ *Gatward v Alley* (1940) 40 SR (NSW) 174, 179; *The Winkfield* [1902] P 42 (CA), 54-5.

⁹ Pollock, Sir F and Wright, Sir R S, *An Essay on Possession in the Common Law*, Clarendon Press, Oxford, (1888), 12; *Perpetual Trustees v Perkins* (1989) Aust Reports 80-295, 69,201 (Green CJ).

¹⁰ *Gatward v Alley* (1940) 40 SR (NSW) 174, 180; *Moffatt v Kazana* [1968] 3 All ER 271 (Wangham J).

¹¹ Above n 9, 12.

strangers from interfering with the property owner's use and enjoyment.¹² This will depend on whether the property is capable of being controlled or used,¹³ whether there is an intention to possess the property¹⁴ and whether a person has the right legally or factually to object to the control has consented to it.¹⁵

2 *Legal Possession*

Legal possession is when a person has the legal right over property. Legal possession is typically found in conjunction with actual possession however there are limited circumstances in which legal possession is separate from actual possession. A few examples are when an agent or licensee has physical custody over the property however the principal or the licensor has legal possession over the property.¹⁶

3 *Right to Possession*

A right to possession is the right to actual possession.¹⁷ This is often an inferior right because it is often subject to other rights. For example, a person's right to possession may be subject to the right of a person who has been wrongfully deprived of possession.¹⁸

III BODY PARTS: PROPERTY?

*There is no property in the dead body of a human being.*¹⁹

The traditional rule is that body parts are not capable of being property.²⁰ The courts have found alternative legal means to reach a just outcome for parties disputed over body parts. For example, the courts have charged grave robbers for the sheets stolen with a body,²¹ granted administrators the right to possession of a body for disposal purposes,²² charged people for the theft of their own blood²³ and urine.²⁴

¹² Above n 9, 13.

¹³ *The Tubantia* [1924] All ER Rep 615.

¹⁴ *Hibbert v McKiernan* [1948] 1 All ER 860; *Martin v Marsh* [1955] Crim LR 781; *R v Jessop* [1959] Cr LQ 487; *R v Waterhouse* (1911) SR (NSW) 217; *Anic v R* (1993) 61 SASR 223; *R v Edwards and Stacy* (1877) 13 Cox CC 384; *Williams v Phillips* (1957) 41 Cr App R 5.

¹⁵ Above n 9, 14-15.

¹⁶ Above n 9, 140; *Perpetual Trustees v Perkins* (1989) Aust Torts Reports ¶80-295, 69,203.

¹⁷ *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204, 241, 229.

¹⁸ Above n 9, 27.

¹⁹ *Williams v Williams* (1992) 20 Ch D 659, 662.

²⁰ *Williams v Williams* (1992) 20 Ch D 659, 665; *R v Kelly* [1998] 3 All ER 741, 749 (Rose LJ).

²¹ *Hayne's Case* (1613) 77 ER 1389; *R v Sharpe* (1857) 169 ER 959.

²² *Williams v Williams* (1992) 20 Ch D 659.

²³ *E v Australian Red Cross Society* (1991) 105 ALR 53, 58 (Lockhart J); *R v Rothery* [1976] RTR 550.

Live bodies are protected by torts and criminal law, for example the tort of battery deters people from interfering with another person's right to use their body.²⁵ Similarly, courts also protected a person's rights over their detached body parts by finding that the medical practitioner owed their patient a fiduciary duty. In *Moore v Regents of the University of California*,²⁶ the Supreme Court of California found the doctor breached his fiduciary duty to Moore by removing and using his spleen without his consent.²⁷ The Court maintained that the spleen was not property.

In Australia, the courts have also traditionally maintained that body parts are not capable of being property. In *Doodeward v Spence*,²⁸ Griffith CJ and Barton decided that a preserved two-headed still-born baby was property and the doctor who had preserved the body was entitled to recover it. This decision is significant for two reasons. First, the Court affirmed the general rule that there is no property in a human body.²⁹ Second, the Court created an exception to this general rule in the situation that a person has applied 'work or skill' to the body.³⁰ The Court qualified this exception by stating that the right was *subject* to an administrator's right over the body for burial or cremation.³¹ The property right of a person who has applied 'work or skill' to a body or body part can be described as a *right to possession* limited by the administrator's *right to possession* for burial and cremation purposes.

*Doodeward v Spence*³² has been widely accepted by Australian courts.³³ However, in more recent cases a new approach appears to be gaining traction. The new approach is that property rights in body parts should be determined according to 'reason and common sense'.³⁴ This approach was first expressed in Sanderson M's judgment in *Roche v Douglas*.³⁵ Sanderson M found that the body samples taken from the deceased and stored prior to death were property because they had a 'real physical presence', existed and continued to exist until

²⁴ *R v Welsh* [1974] RTR 478.

²⁵ Loane Skene, *Proprietary rights in human bodies, body parts and tissue: regulatory contexts and proposals for new laws* 22 *Legal Stud.* 102 (2002), 116.

²⁶ (1990) 793 P 2d 479 Cal SC.

²⁷ *Ibid*, 535.

²⁸ *Doodeward v Spence* [1908] 6 CLR 406.

²⁹ *Ibid*, 414.

³⁰ *Ibid*.

³¹ *Ibid*, 409.

³² *Doodeward v Spence* [1908] 6 CLR 406.

³³ *H, AE (No 2), Re* [2012] SASC 177; *Edwards; Re, Estate of Edwards* (2011) 81 NSWLR 198; *Leeburn v Derndofer* [2004] VSC 172; *R v Kelly* [1999] QB 621; *Pecar v National Australia Trustees Ltd (Unreported, Supreme Court of NSW, Bryson J, 27 November 1996)*.

³⁴ *Roche v Douglas* [2000] WASC 146 [14].

³⁵ [2000] WASC 146.

they were destroyed.³⁶ He further stated there is no rational or logical justification to find that tissue samples could not be characterised as property when the court in *Doodeward v Spence* held that a still-born in a jar was capable of being characterised as property.³⁷ This decision has set a precedent that a person can claim legal possession over body parts. This is superior right.

This approach appears to be gaining judicial traction in the courts. For example, Mossop M in *Roblin v The Public Trustee for the Australian Capital Territory & Anor*,³⁸ recently decided that human gametes were capable of being property with consideration to the ‘reason and common sense’ approach enunciated in *Roche v Douglas*.³⁹ His Honour stated that ‘the fact that the sperm constitutes human gametes is not sufficient at common law to take it out of the conception of property’.⁴⁰ This recent decision indicates that the courts are prepared to recognise more extensive property rights in human gametes and possibly body parts in general. Next, I will discuss compelling policy reasons, which will limit extending property rights to body parts.

IV POLICY CONSIDERATIONS

The four main policy reasons for not classifying bodies and body parts as property include for the interests of religion, public health or public decency, for the advancement of medical science and to avoid exploitation of the public. Lastly, I will specifically address the extension of property rights over human gametes.

A Religion, Public Health or Public Decency

The traditional reason that the courts have refused to characterise body parts as property on the basis that ‘possession is injurious to the public welfare, and the notion that it is so injurious must be founded upon considerations of religion or public health or public decency’.⁴¹

The first consideration is religion. The courts have expressed the importance of religion as the basis for giving administrators the right to possession of a corpse for burial or cremation.⁴² This allows for an administrator to ensure that a deceased person is buried or cremated consistent

³⁶ *Roche v Douglas* [2000] WASC 146 [24].

³⁷ *Ibid.*

³⁸ [2015] ACTSC 100.

³⁹ *Roblin v The Public Trustee for the Australian Capital Territory & Anor* [2015] ACTSC 100 [26].

⁴⁰ *Ibid.*, [8].

⁴¹ *Doodeward v Spence* [1908] 6 CLR 406, 413-414.

⁴² *Williams v Williams* (1882) 20 Ch D 659 at 662-5; *Rees v Hughes* [1946] KB 517 at 523-4, 527-8; *Dobson v North Tyneside Health Authority* [1997] 1 WLR 596 at 600.

with the deceased person's cultural and religious beliefs.⁴³ However, this right is limited to disposal of the body and does not afford the administrator full ownership rights over the body.⁴⁴

The second consideration is public health. The courts have limited the administrator's right to possession of a corpse in certain situations to avoid unreasonable delay in burying the body.⁴⁵ In these circumstances, the court has placed a greater weight on the public policy concerns on the prompt disposal of the body.⁴⁶ The Australian Law Reform Commission ('ALRC') have also recognised that the need for prompt burial is more important in some circumstances than the interests of surviving relatives.⁴⁷

The last consideration is public decency. Public decency is important because corpses are 'so strongly connected with, and part of, the person who has died, that non-consensual interference is... an affront to humanity.'⁴⁸ In other words, the relatives and friends of the deceased person attach great emotional attachment to the corpse of loved ones. Legislators have therefore given weight to these policy considerations by prohibiting the interference or removal of body parts from a corpse.⁴⁹

The Federal Court in *Calma v Sesar* considered the consideration of religion, public health and public decency.⁵⁰ In this case, a dispute arose between the mother and father for the possession of their deceased son's body. Martin J decided to 'resolve the argument in a practical way paying due regard to the need to have a dead body disposed of without unreasonable delay, but with all proper respect and decency.'⁵¹ His Honour also rejected that the father's initial possession of his son's body as a 'weighty consideration' for the Court based on the reasoning that a body was not capable of being property.⁵² Based on these reasons, his Honour found in favour of the mother and ordered an injunction restraining the father from infringing on the mother's right to possession of the body for the burial.⁵³ This case illustrates how the courts often limit proprietary rights over body parts due to religious, public health and public decency considerations. I agree that weight should be placed on these considerations to ensure that body parts are dealt with consistent with the deceased person's interests, disposed in a safe way and that bodies are not used

⁴³ Above n 25, 119.

⁴⁴ *Ibid.*

⁴⁵ *Cala v Sesar* (1991) 106 FLR 446 [14].

⁴⁶ Above n 25, 119.

⁴⁷ *Human Tissue Transplants* [1977] ALRC 7 [15].

⁴⁸ *Human Tissue Transplants* [1977] ALRC 7 [15].

⁴⁹ *Criminal Code Act Compilation act 1913* (WA) s 214-215.

⁵⁰ (1991) 106 FLR 446.

⁵¹ *Cala v Sesar* (1991) 106 FLR 446 [14].

⁵² *Ibid.*, [12].

⁵³ *Ibid.*, [15].

indecently after death. For these reasons, proprietary interests over body parts should always take these three considerations into account.

B *Medical Science*

The donation of bodies and body parts significantly contribute to the advancement of medical science.⁵⁴ This is a compelling reason not to extend property rights to deceased bodies or body parts. In Western Australia, tissue can be removed from a deceased person for the purpose of transplantation or for therapeutic, medical or scientific purposes.⁵⁵ Tissue can be removed if a designated officer is satisfied that the deceased person expressed the wish or gave their consent to remove the tissue during their lifetime.⁵⁶ If there is no reason to believe that the deceased person has objected then the next of kin can consent to the removal of the tissue.⁵⁷ This is not a property right, instead it is characterised as a *personal autonomy right* over one's own body.⁵⁸ This characterisation has different implications than, for example, if the body was deemed to be property. For example, a donor cannot put conditions on the tissue after donating it. This is important because ensures that medical institutions have unfettered access to bodies and body parts for teaching and research purposes, thereby reducing the cost of medical research.⁵⁹ For this reason, legislative intervention should deem that the donation of bodies and body parts extinguishes all property rights over those bodies and body parts.

C *Exploitation*

The characterisation of body parts as property could lead to a commercial market for body parts.⁶⁰ A black market for organs already exists due to the shortage of organ donations.⁶¹ This market already exists notwithstanding that it is illegal in most countries to sell organs.⁶² These markets are problematic as they exploit desperate buyers. Buyers are unable to verify the quality of the organs and often undergo medical surgery in poor conditions.⁶³ Further, people who sell their organs only do so because they are in desperate financial situations.⁶⁴ The World Health Organization has expressed concern on this

⁵⁴ *Doodeward v Spence* [1908] 6 CLR 406, 413-414.

⁵⁵ *Human Tissue and Transplant Act* 1982 s 22(1).

⁵⁶ *Human Tissue and Transplant Act* 1982 s 22(2)(a).

⁵⁷ *Human Tissue and Transplant Act* 1982 s 22(2)(b).

⁵⁸ Above n 25, 17.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, 120.

⁶¹ Lyndon Griggs, 'The Ownership of Excised Body Parts: Does an Individual Have the Right to Sell' (1994) 1 *Journal of Law and Medicine* 223, 227.

⁶² *Ibid.*, 46.

⁶³ *Ibid.*, 227.

⁶⁴ *Ibid.*

very situation by urging member states to prohibit the sale of organs. Arguably, body parts should not be capable of being property because the 'physical, psychological and social risks to individuals and communities caused by trafficking in material of human origin and transplant tourism'.⁶⁵

This recommendation has been adopted in Australia, who is a member state. For example, in Western Australia, bodies and body parts cannot be sold.⁶⁶ A contract for the sale of body parts is void and entering into such an agreement can amount to an offence.⁶⁷ The only compensation that is allowed are the expenses for the operation.⁶⁸ Notwithstanding the current state of the law, should the legislators or courts consider recognising property rights in body parts thereby allowing for the body parts to be sold on a market?

There are two compelling arguments against characterising body parts as property. First, people will still be exploited if the sale of body parts is legalised. The sale of body parts should not be an option at all.⁶⁹ Lastly, conferring property rights over body parts will increase the cost of medical research. This has been discussed above. This point can be illustrated by the Supreme Court of California's decision in *Moore v Regents of the University of California* discussed body parts in the context of medical research.⁷⁰ In this case, the majority found Moore had no proprietary interest in the enlarged spleen that his physician removed without his consent. As a result, Moore could not sue on the conversion, claim back possession of the spleen nor have it destroyed. The Court decided that placing a mandate on medical researchers to pay the donor a portion of the proceeds would lead to an onerous duty on the researchers to investigate that there was fully informed consent for each human cell used.⁷¹

There are three compelling arguments for extending property rights to include body parts and thereby allowing the sale of body parts. First, legislators can monitor the quality of the market to ensure that buyers are not being exploited. Legislators could impose similar guarantees as the *Australian Consumer Law*,⁷² which aims to protect consumers. Similar guarantees can be applied to body parts to ensure that they are of acceptable quality⁷³ and that people do not make misleading or deceptive statements in relation to them.⁷⁴ Second, people have autonomy over their bodies when they are alive and

⁶⁵ World Health Organization, *Sixty-Third World Health Assembly*, 21 May 2010, 63.22(1), (2).

⁶⁶ See *Human Tissue and Transplant Act 1982* (WA).

⁶⁷ *Human Tissue and Transplant Act 1982* (WA) s 29(1), (2).

⁶⁸ *Human Tissue and Transplant Act 1982* (WA) s 29(1), (3).

⁶⁹ Alexandra George, 'Marketing Humanity Should We Allow the Sale of Human Body Parts?' [2005] *UTSLawRw* 2; (2005) 7 *University of Technology Sydney Law Review* 11, 59.

⁷⁰ (1990) 793 P 2d 479 Cal SC.

⁷¹ *Moore v Regents of the University of California* (1990) 793 P 2d 479 Cal SC.

⁷² *Competition and Consumer Law 2010* (Cth) ('Australian Consumer Law') Div 1.

⁷³ *Ibid*, see s 55.

⁷⁴ *Ibid*, see s 18.

should similarly have autonomy over their bodies and body parts after they die.⁷⁵ Third, a person should be entitled to a part of the profits that medical institutions make from applying their skills to harvest body parts from cadavers.⁷⁶

In my view, property rights should not extend to include vital organs. I believe that due weight should be given to the situation where a person enters into the sale of an organ because they are in a dire financial situation. However, there is still scope for property rights to extend to include other body parts such as hair or blood. Both of which are renewable body parts that do not typically hold the same emotional attachment as other body parts, such as vital organs. The sale of renewable body parts would not attract the same repugnance as selling other, more substantial body parts.⁷⁷

D Human Gametes

The rapid development of reproductive technology has resulted in numerous disputes arising out of negligently destroyed gametes and a deceased husband's gametes for reproductive purposes. These disputes have involved complicated analysis of the *Human Tissue and Transplant Act 1982* (WA), *Human Reproductive Technology Act 1991* (WA) ('ART Act') and ultimately whether human gametes are property.

1 *Living Person's Property Rights Over Stored Human Gametes*

The current position is a living person who has stored human gametes with a fertility clinic does have property rights over the gametes. In *Yearworth v North Bristol NHS Trust*,⁷⁸ the Court found that men who had stored their gametes with a clinic prior to undergoing Chemotherapy had property rights over the gametes. The Court found that the clinic negligently allowed the gametes to thaw and the men could claim compensation for mental distress caused by the clinic's negligence.⁷⁹ The Court reached this decision based on five reasons. First, the men had generated the gametes themselves.⁸⁰ Second, the men had absolute negative control. In other words, they had the ability to direct the way that the gametes could not be used,⁸¹ which is consistent with the liberty to exclude others from the use and enjoyment of property. Third, the men could

⁷⁵ Lyndon Griggs, 'The Ownership of Excised Body Parts: Does an Individual Have the Right to Sell' (1994) 1 *Journal of Law and Medicine* 223, 227.

⁷⁶ Above n 69, 47.

⁷⁷ Above n 25, 120.

⁷⁸ *Yearworth and others v North Bristol NHS Trust* [2010] QB 1, 20.

⁷⁹ *Ibid*, 20-21.

⁸⁰ *Ibid*, 45.

⁸¹ *Ibid*.

also order the gametes to be destroyed at any time.⁸² Fourth, the trust had duties in relation to the gametes however the men ultimately had rights over the gametes. Lastly, there is a 'precise correlation' between the men's rights to use the gametes in the future and the direct consequence of the trust's breach of duty.⁸³

2 *Property Rights over a Deceased Person's Human Gametes*

In Western Australia, gametes are 'tissue' for the purposes of the *Human Tissue and Transplant Act*.⁸⁴ As discussed above, tissue can be removed with the consent of the donor. In the absence of consent, the next of kin may consent.⁸⁵ Although a person can consent or the next of kin can order for gametes to be removed, a person cannot use the gametes in an artificial fertilisation procedure after the death of a gamete provider.⁸⁶ It is irrelevant if it is for a therapeutic, medical or scientific purpose.⁸⁷ The policy considerations that weigh against the use of gametes for reproductive purposes include the welfare of the child and whether the spouse had adequate time to grieve before making the important decision to conceive with the gametes.⁸⁸ In the last decade there has been numerous disputes concerning a wife's property rights over her late husband's gametes. These disputes have forced the courts to consider whether a wife has a property claim over the gametes and whether this means that they may use the gametes for reproductive purposes. The courts have extended proprietary rights over human gametes over the last decade. In 2008, Simmons J S *v Minister for Health (WA)*,⁸⁹ in decided that there was no distinction between samples of tissue from a living or deceased body. In 2010, White J in *Bazley v Wesley Monash IVF Pty Ltd*,⁹⁰ decided that the human gametes in dispute was property and would form a part of the deceased's estate. She added the relationship between the deceased and the reproductive clinic was one between a bailor and a bailee. For this reason, the clinic was holding the human gametes as property.

In 2011, Hulme J in *Edwards; Re Estate of Edwards*⁹¹ found in favour of Ms Edwards and ordered that she was entitled to possession of human gametes retrieved from her late husband after death. Hulme J considered a number of

⁸² Ibid.

⁸³ Ibid.

⁸⁴ *Human Tissue and Transplant Act 1982* s 3.

⁸⁵ *Human Tissue and Transplant Act 1982* s 22(2).

⁸⁶ *Human Reproductive Technology Act 1991* s 3; *Human Reproductive Technology Act Directions 2004 (WA)* Direction 8.9.

⁸⁷ *Human Tissue and Transplant Act 1982* s 22(1).

⁸⁸ Reproductive Technology Council *Position on Posthumous Collection and Use of Gametes* para 2.6.

⁸⁹ [2008] WASC 262 (Simmonds J).

⁹⁰ [2010] QSC 118.

⁹¹ (2011) 4 ASTLR 392, 152.

important issues. Firstly, his Honour rejected the archaic view⁹² that a child born out of artificial reproductive technology ('ART') was 'different' and that a child conceived without a father was not in the best interests of the child.⁹³ Hulme J further accepted that ART reproduction was well accepted and this type of reproduction does not hold any policy weight against it.⁹⁴ Secondly, his Honour adopted the 'reason and common sense' approach. He highlighted that the law should not be rigid and it should be flexible to adapt to medical technology.⁹⁵ Further, tissue is a real and physical object, which has intangible value therefore, is capable of ownership.⁹⁶

Lastly, his Honour considered whether Ms Edwards was entitled to her husband's gametes. His Honour decided the gametes could not pass by will because the gametes were not retrieved before death. Therefore, Mr Edwards never owned the gametes and could not form a part of his assets.⁹⁷ His Honour rejected the argument that Ms Edwards was entitled to the gametes in her capacity as the administrator of Mr Edward's estate. His Honour affirmed that an administrator's duty was limited to the purposes of burial or cremation and not to 'do as she wishes' with the body or gametes.⁹⁸ Finally, his Honour accepted that the practitioner who retrieved the gametes had done for Ms Edward's benefit and on her.⁹⁹ For this reason, Ms Edwards was deemed to have applied 'work or skill' to retrieve the gametes and was the only person who was rightfully entitled to the gametes.¹⁰⁰

His Honour also reduced the scope of the *ART Act*. The *ART Act* prevents a clinic from *supplying* gametes from a person known to be deceased.¹⁰¹ His Honour decided the act would not apply in this situation because the clinic did not *supply* the gametes. Rather they were giving up, relinquishing or surrendering what is already rightfully Ms Edward's property.¹⁰² His Honour also accepted that a conversation in which Mr Edwards expressed to Ms Edwards that he would like to have children if he was to die was sufficient consent to the use the gametes for reproductive purposes. This decision is important because his Honour also approved the 'reason and common sense' approach in *Roche v Douglas*.¹⁰³ Indicating that Courts are to adopt a more flexible approach when dealing with disputes over body parts. The 'reason and

⁹² *MAW v Western Sydney Area Health Service* [2000] 49 NSWLR 231 (O'Keefe J).

⁹³ *Edwards; Re, Estate of Edwards* [2011] NSWSC 478 [144].

⁹⁴ *Ibid*, [145].

⁹⁵ *Ibid*, [80].

⁹⁶ *Ibid*, [80].

⁹⁷ *Ibid*, [87].

⁹⁸ *Ibid*, [89].

⁹⁹ *Ibid*, [88].

¹⁰⁰ *Ibid*, [91].

¹⁰¹ *ART Act* s 3.

¹⁰² *Edwards; Re, Estate of Edwards* [2011] NSWSC 478 [144].

¹⁰³ *Roche v Douglas* (2000) 22 WAR 331 [24].

common sense' approach is broader than the 'work or skill' exception in *Doodeward v Spence*¹⁰⁴ and recognises a right to legal possession, not just a mere right to possession.

V CONCLUSION

It is wrong to say that no one has property rights over body parts. As I have discussed, courts have awarded more substantial property rights for living person's negligently handled gametes,¹⁰⁵ a deceased's person's gametes either retrieved before¹⁰⁶ or after death.¹⁰⁷ Although these authorities do not confer full ownership rights over body parts, it does indicate the court's shifting attitude towards extending property rights to body parts.

In my opinion, more substantial property rights should be recognised in body parts. These rights should be limited due to important policy reasons. In particular:

- an administrator should maintain the right to bury or cremate a body;
- body parts should be disposed according to public health;
- a person should retain the autonomy to decide how their body is disposed after death;
- vital organs should not be capable of being sold; and
- property rights to use a deceased's gametes for reproductive purposes should be limited to situations where is clear consent.

Finally, the traditional exception in *Doodeward v Spence* is dated and is inapplicable to recent advancement in reproductive technology. The courts must adopt the 'reason and common sense' approach to ensure that the law keeps up with technological advancement in the future. If the courts do not take a more flexible approach to property rights over body parts, the courts will continue to be too slow to register legal recourse for parties who have been wronged.

¹⁰⁴ *Doodeward v Spence* [1908] HCA 45.

¹⁰⁵ *Yearworth and others v North Bristol NHS Trust* [2010] QB 1, 20.

¹⁰⁶ [2010] QSC 118.

¹⁰⁷ [2015] ACTSC 100.