

POST-MORTEM SPERM HARVESTING, CONCEPTION AND THE LAW: RATIONALITY OR RELIGIOSITY?

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I INTRODUCTION: CONCEIVING FAMILIES

The circumstances surrounding cases that challenge accepted conventions, practices, and values, in particular those involving the conception of the family and how those families come into existence, is understandably, highly charged. In particular, those cases which operate at the intersection of medicine, biology, technology, social expectation, and religion,¹ and which could not occur in ‘nature’,² cause the most apprehension. They can only come about because of biotechnological and medical intervention. As Dwyer observes, ‘these techniques may be desired by the subject, but may cause wider public concern. Bioethics is therefore increasingly concerned with protecting the interests of society from the individual as well as the individual from society’.³ Brownsword suggests that there has been a loss of moral compass guiding individuals (blaming postmodernism and social dislocation among other things), which never occurred in more than the cohesive social structures of pre-modern society.⁴ Thus, the State must intrude in problematic cases, overriding choices of individuals where necessary.

In Australia, since the late 1990s, these cases have enabled a single woman to access assisted reproductive technologies (‘ART’),⁵ and a transsexual man to marry.⁶ The law,

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¹ A recent collection highlights the range of possible positions in these debates: H Kuhse and P Singer (eds), *Bioethics: An Anthology* (Blackwell, 2nd ed, 2006).

² D Beylveled and R Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford University Press, 2001); R Brownsword, ‘Happy Families, Consenting Couples, and Children with Dignity: Sex Selection and Saviour Siblings’ (2005) 17 *Child and Family Law Quarterly* 435.

³ D Dwyer, ‘Beyond Autonomy: The Role of Dignity in ‘Biolaw’’ (2003) 23 *Oxford Journal of Legal Studies* 319. See also Donna Dickenson, *Advisory Document for Retained Organs Commission* (undated) University of Birmingham, Centre for the Study of Global Ethics <http://www.globalethics.bham.ac.uk/consultancy/Retained_organ.htm> at 2 December 2006.

⁴ Brownsword, above n 2.

⁵ *McBain v Victoria* (2000) 99 FCR 116; *Re McBain*; *Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372.

however, has been more ambivalent in the ‘sperm harvesting’ cases,⁷ where women apply to the courts to allow the removal of reproductive material from their deceased partner, with the aim of using this material at some later date to achieve a pregnancy. The applications provoke sharply divided responses from the community, involving the nature of family, the intervention in nature itself, and the effect on children through the circumstances of their conception, and the consequences of being brought up in this kind of family.⁸ The courts are, in effect, being asked to reach decisions that are both socially controversial and morally sensitive, in which the state itself may be seeking to interfere in the life choices of individuals.

As such, the courts’ decisions may accept the role of the state in preventing individuals from pursuing their choices in life, and in doing so, their ability to have a family. How far the state should, in these circumstances, interfere in the lives of individuals, and for what reasons, end up being law’s problem. However, these cases do not only concern individuals, but they also involve their broader family. The choices of an individual are not isolated in these cases, but are *relationally* driven through the family. In this mode, Lior Barshack suggests the family needs to be seen as an autonomous jurisdiction, which the state should be reluctant to interfere with, because individuals derive their dignity and identity from groupings like the family. State intervention can be justified for the welfare of the individual, *if* the integrity of the family is considered, and the actions do not eliminate human ‘self-realisation’.⁹ Fundamentally, the ability to have a child and continue a family line (or gene line), lies at the heart of the sperm harvesting

⁶ *Re Kevin (Validity of Marriage of Transsexual)* (2001) 28 Fam LR 158; *Attorney-General for the Commonwealth v Kevin and Jennifer and Human Rights and Equal Opportunity Commission* (2003) 30 Fam LR 1.

⁷ *AB v Attorney-General (Vic)* (Unreported, Supreme Court of Victoria, Gillard J, 23 July 1998); *Re Gray* [2001] 2 Qd R 35; *Baker v Queensland* [2003] QSC 2 (Unreported, Supreme Court of Queensland, Muir J, 6 January 2003); *Re Denman* [2004] 2 Qd R 595; *Fields v Attorney-General of Victoria* (Unreported, Supreme Court of Victoria, Coldrey J, 1 June 2004); *AB v Attorney-General (Vic)* [2005] VSC 180 (Unreported, Supreme Court of Victoria, Hargrave J, 27 May 2005); *YZ v Infertility Treatment Authority (General)* [2005] VCAT 2655 (Unreported, Victorian Civil and Administrative Tribunal, Morris J, 20 December 2005). Internationally, a string of cases of this kind have received notoriety, in particular the Diane Blood case in the UK. *R v Human Fertilisation and Embryology Authority; ex parte Blood* [1997] 2 All ER 687, in relation to the decision-making processes established under the *Human Fertilisation and Embryology Authority Act 1990* (UK). See for example D Morgan and R G Lee, ‘In the Name of the Father? Ex parte Blood: Dealing with Novelty and Anomaly’ (1997) 60 *Modern Law Review* 840.

⁸ In the appeal to the Full Family Court, counsel for the Attorney-General argued that marriage, in the context of the Marriage Act, should be interpreted from a monogamistic Christian perspective. This was rejected by the Full Family Court, which accepted a broader social understanding of marriage: *Attorney-General for the Commonwealth v Kevin and Jennifer and Human Rights and Equal Opportunity Commission* (2003) 30 Fam LR 1, 18–21. At the time of the appeal, Jennifer was about to give birth to a child conceived using ART. Kevin was not, of course, the child’s biological father, but would father the child as a parent. In *YZ v Infertility Treatment Authority (General)* [2005] VCAT 2655 (Unreported, Victorian Civil and Administrative Tribunal, Morris J, 20 December 2005) [50], Morris J noted:

‘If there is such a thing as a perfect family, it is a loving, caring family; a family is not a perfect family simply because it consists of a father, a mother and children. As a society, we must get away from stereotypes. In my opinion, the fact that any child born as a result of the export of the sperm the subject to this proceeding will not have a father – or will be conceived from the sperm of a man who is dead – is not of major consequence’.

⁹ L Barshack, ‘The Holy Family’ (2004) 18 *International Journal of Law Policy and the Family* 214. Compare with J Laing and D Oderberg, ‘Artificial Reproduction, the ‘Welfare Principle’ and the Common Good’ (2005) 13 *Medical Law Review* 328.

cases, and in this sense, forms the zenith of self-realisation.¹⁰ If the family disagrees with the woman's choice, then her actions *must* be prevented by the State,¹¹ but if they agree, then her actions should not be interfered with. This conception of family is found in the decision of Morris J in the last of the Australian sperm harvesting cases, *YZ v Infertility Treatment Authority (General)*:¹²

I should also observe that when the Parliament refers to the interests of “the family”... it is concerned about the interests of a unit. I should also add that I would regard the parents and siblings of a deceased husband to be members of the family of that person's widow. In other words, the parents and siblings of XZ [the deceased husband] have a family relationship with YZ [the applicant]. Further, if YZ is to give birth to a child – especially if the child is produced using the sperm of XZ – the parents and siblings of XZ would be part of the relevant “family”.¹³

In comparison, Muir J's decision in *Baker v Queensland*¹⁴ disregarded the interests of the family, including the parents of the deceased fiancé. Both families actively supported her application. Her fiancé's father said that it would have meant everything for them for her to have his son's children and that it was their only chance for grandchildren.¹⁵ There was ample evidence he wanted a child, yet Muir J took the view that her fiancé *would not* want to her have a child in these circumstances:

it must be even more doubtful here that the procedure contemplated by the applicant would have accorded with the wishes of the deceased. Had he turned his mind to the question, he would no doubt have given anxious consideration to the best interests of the applicant and of the child or children to be born as a result of the proposed procedure. He would have seen the existence of such a child or children was capable of restricting the applicant's ability to pass beyond her grief and start life afresh. He would have contemplated also the difficulties which face a single working mother and the constraints

¹⁰ The desire of individuals to have children is significant for their broader family, as shown by a decision of an Israeli court in early 2007. The family of an Israeli soldier was given permission to use his sperm that was removed at the time of his death, so that *his* desire to have a family could be achieved. He had no partner or girlfriend, but they had proof that he wanted to become a father. The family chose a woman (who agreed to the circumstances involved) to have the child. The Attorney-General had refused their application to allow the woman to have the procedure, because only a spouse could request this procedure. The court, however, accepted that the son wanted to have children, and the family was successful. The soldier's parents will not interfere in the child's upbringing, but will take on the role of grandparents. David Sharrock, ‘Court Clears Way for Dead Man to be a Dad’, *The Australian* (Sydney), 19 January 2007, 7.

See also B Simpson, ‘Making ‘Bad’ Deaths ‘Good’: The Kinship Consequences of Posthumous Conception’ (2001) 7 *Royal Anthropological Institute* 1.

¹¹ I have argued elsewhere that a relational approach be taken to these cases – if the family agrees, the procedure can proceed, while if it refuses, the procedure must be refused: M Leiboff, ‘Of the Monstrous Regiment and the Family Jewels’ (2005) 23 *Australian Feminist Law Journal* 33. Simpson, above n 10, notes that ‘The consolations that the prospect of future offspring bring encompass extended family members also’, 11.

¹² [2005] VCAT 2655 (Unreported, Victorian Civil and Administrative Tribunal, Morris J, 20 December 2005).

¹³ Ibid [40]–[41].

¹⁴ [2003] QSC 2 (Unreported, Supreme Court of Queensland, Muir J, 6 January 2003).

¹⁵ Gregory Jason, ‘Death and the Courts End Family Dream’, *The Courier-Mail* (Brisbane), 7 January 2003, 1. In *Re Gray*, Mrs Gray's father-in-law had also given permission for the removal of the tissue and subsequent procedure: *Re Gray* [2001] 2 Qd R 35, 36 [6].

that would be imposed on her social life and on her ability to enter into a new relationship or relationships.¹⁶

The contrasting position of choice and family are starkly illustrated in these two sets of comments, and no legal basis can adequately explain the different positions taken. But a conventional reading of the cases will bypass these comments and isolate the legal principles that derive from the case. So while raising considerable policy, bioethical and jurisprudential debate, in a conventional reading of these decisions, they simply involve the law relating to property in bodies, consent to interference with the body, and questions relating to the best interests of the child. Yet, following from the contrasting positions in *YZ* and *Baker*, the Australian sperm harvesting cases are split equally between decisions that would allow the procedure – the access cases – and those they would prevent it – the no access cases. As will be seen, the assumptions and reasoning used by the courts conflict, and while conventional legal analysis will explain that the cases succeed or fail on the facts and law, factual and legal variations inadequately explain the differing results in these cases. Instead, it will be shown that the judge's *personal views* about the applicant and her actions, or their concern about the lack of choice or consent by her deceased partner, inform the outcome of the case, which can usually only be traced through the interstices of judgments, though occasionally, these personal views are overtly revealed.

This kind of analysis – that judges impose personal views into decision-making – is redolent of the position that morals play a role in the creation and development of the law.¹⁷ But it also bears the trace of Jerome Frank's realist assertion that judges work back from their decisions to construct the law, or the critical legal scholarship, which seeks to uncover the indeterminacy of legal rules, where the courts will use legal principles that best achieves the most desirable outcome over others. Instead, this article takes a cultural legal studies position, in which it will see how the *language* of reason can be used to conceal personal moral viewpoints in controversial cases like the sperm harvesting cases.¹⁸

So instead of considering this question in conventional jurisprudential terms about law, morality and reason,¹⁹ I will consider the question in terms more akin to popular morality, as a trope of religiosity located within reason, and its adoption in the sperm harvesting cases. This approach is characterised by Jonathan Montgomery's argument that the values imparted by religion should be considered as central to healthcare law,²⁰ otherwise it is 'at risk of being transformed – moving *from* a discipline in which the moral values of medical ethics ... are a central concern, *to* one in which they are being supplanted by an amoral commitment to choice and consumerism'.²¹ Thus, the moral policy found in law that initially denied Dianne Blood the use of her husband's sperm

¹⁶ *Baker v Queensland* [2003] QSC 2 (Unreported, Supreme Court of Queensland, Muir J, 6 January 2003) 4.

¹⁷ S Veitch, *Moral Conflict and Legal Reasoning* (Hart, 1999).

¹⁸ A Norrie, *Law and the Beautiful Soul* (Glasshouse Press, 2005), considers this same question as an attempt to create a legal sphere which is demarcated from the moral, through the imposition of legal form over moral questions.

¹⁹ Among the large body of literature considering law and morality, the influences and relationships between natural law and positivism and considered in the collection: K E Himma and B Bix (eds), *Law and Morality* (Ashgate, 2005).

²⁰ J Montgomery, 'Law and the Demoralisation of Medicine' (2006) 26 *Legal Studies* 185.

²¹ *Ibid* 186.

was overridden by an amoral ‘market issue’ because she was allowed to export the sperm under European law, despite the morality based legal arguments going against her.²² Choice without morality, in this view, is flawed. But this is, as Simpson suggests:

Clearly, the introduction of sentiment, by way of theological debate, [which] had moved the debate into a territory very different to the one mapped out for the autonomous, self-determined individual upon whom legal and bioethical decision-making typically is predicated.²³

It is this notion of *sentiment via theology*, or religiosity as a popular morality, that is the subject of my interest here. Defined in the Oxford English Dictionary to mean ‘religiousness, religious feeling or sentiment’ or an ‘affected or excessive religiousness’, religiosity provides a starting point to consider popular morality of a sort that is *visceral* and appeals to the senses through emotions ranging from a sense of what is right and proper, as found in Montgomery’s position, to one of disgust or revulsion, or ‘I don’t like it’. While a conventional natural law position may be identical to this visceral religiosity, its methodological position is different, though the resulting outcomes will be the same.²⁴ Thus, natural law’s use of *properly* ordered reason by following a ‘set of principles of *practical reasonableness* in ordering human life and human community’,²⁵ may reach the same conclusion, but through very different means.²⁶

So, while both natural law and the more visceral religiosity will both see the creation of life as an absolute good, a natural law methodology will insist that any attempt to create life from non-vital means, such as the taking of sperm from a deceased man, which involves the creation of life after death, must fail one of the basic elements needed to create life - the requirement of vitality. Any request by the partner must be viewed as selfish and irrational, but perhaps may be explained because of her grief. A decision-maker must refuse an application to harvest and use the sperm of her deceased partner. Indeed, any decision that *allows* the procedure must be unreasonable, and the reasoning of any court that allows the procedure must be wrong. On the other hand, the visceral religiosity will respond in terms of disgust, displeasure, or very simply, ‘the yuck factor’, and applications refused because of the decision-maker’s distaste.

In either case, to be convincing, a sufficiently moral decision needs to be dressed within law’s parameters, or bear some other mark of objectivity, rather than be expressed as a moral position.²⁷ Using these techniques, such as a Hohfeldian language of rights,²⁸ a sufficiently ‘legal’ outcome can be reached that accords with a personal moral standpoint or values of the judge in the case. In order to ascertain how this occurs in the sperm harvesting cases, this article will juxtapose the judges’ views in key aspects of

²² Ibid 192-3.

²³ Simpson, above n 10, 7.

²⁴ T Honore, ‘The Necessary Connection between Law and Morality’ (2002) 22 *Oxford Journal of Legal Studies* 489.

²⁵ J Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980) 280.

²⁶ Compare with M C Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge University Press, 2006).

²⁷ To test this claim, adopting a cultural legal studies approach, I will examine what lies behind the black letter of the judgments and what the judgments *say* they are using as reasoning. What this means is that I will not analyse the law used to justify the decision.

²⁸ M Williams, ‘An Ethics Ensemble: Abortion, Thomson, Finnis and the Case of the Violin Player’ (2004) 17 *Ratio Juris* 381.

the cases, about the applicant, her actions, and the consequence for any child born of the procedure, to demonstrate how personal views enter these judgments. In other words, this article will examine whether they conceal unstated or concealed views about the correct nature of post mortem reproduction, under the guise of rationality. The conflicting decisions of the ‘sperm harvesting’ cases provide an extraordinary set of case studies which raise questions about the assumptions brought to bear in *framing* the legal foundation of these decisions. This article will argue that the more strongly reliant the decision relies on the visceral religiosity, the more strongly reliant they are in their use of the language of reason, as a metonymic device to conceal underlying moral choices.

II THE CASES

Since 1998, courts in the Australian states of Queensland and Victoria have been asked to decide if widows (and in one case, a fiancée) can be permitted to remove reproductive material from the bodies of their deceased husbands, and if that material can be used by them in an attempt to conceive a child.²⁹ For a short period of time post-mortem, viable, living sperm can be harvested,³⁰ and a pregnancy attempted using assisted reproduction technologies. These applications have met a mixed response in a small number of Australian cases, all of which have been decided by single judges. Though the Queensland cases are based in the common law and the Victorian cases are based in the *Infertility Treatment Act 1995* (Vic) (‘the Victorian legislation’), there are points of commonality across the cases.

A *The no access cases*

Applications were refused in two Queensland Supreme Court decisions: the 2001 decision of Chesterman J in *Re Gray*,³¹ and the 2003 decision of Muir J in *Baker v State of Queensland*,³² and in the 2005 Victorian Supreme Court decision in *AB v Attorney-General (Vic)* (‘*AB 2005*’).³³ In this case, while Hargrave J agreed with the principles set out in *Re Gray*, the decision did provide that AB was permitted to apply to the Infertility Treatment Authority, to export the sperm, though she was not permitted to use it in Victoria.

A series of principles can be found in these cases. *Re Gray*³⁴ provides that the court does not have jurisdiction over cases of this kind, there is no right in a dead body other than to ensure its burial, there is scope for the potential application of s 236 of the *Criminal Code* (Qld), which makes it a misdemeanour for any person to improperly interfere or offer indignity to a dead body, and that the *Transplantation and Anatomy Act 1979* (Qld) does not apply. If there had been any jurisdiction, the lack of consent by the husband, the rationality of the widow and her state of mind and the child who has to live with the knowledge of the circumstances of their conception would mean that the

²⁹ One other case exists relating to a dying man: *MAW v Western Sydney Area Health Service* (2000) 49 NSWLR 231, in which O’Keeffe J declined to permit removal of semen from a *dying* man.

³⁰ The removal of the testicles and related tissue is sought in these cases in order to access sperm. Needle aspiration or biopsy of one or both testes or the epididymis: A Stevens and R Silver, ‘Posthumous Extraction and Use of Semen’ *Proctor* (August 2000) 23, 23-4.

³¹ [2001] 2 Qd R 35.

³² [2003] QSC 2 (Unreported, Supreme Court of Queensland, Muir J, 6 January 2003).

³³ [2005] VSC 180 (Unreported, Supreme Court of Victoria, Hargrave J, 27 May 2005).

³⁴ [2001] 2 Qd R 35.

application would be refused. In *Baker v Queensland*,³⁵ it was held that contract law cannot be used in place of property concepts in cases of this kind. In *AB 2005*, neither the jurisdiction of the Supreme Court or the *Human Tissue Act 1982 (Vic)* would allow removal of the tissue. Hargrave J followed the ‘non-interference’ or ‘inviolability’ principle³⁶ in *Re Gray*,³⁷ and distinguished Atkinson J’s decision in *Re Denman*.³⁸

Chesterman J had reached this position by drawing on the principles from a series of cases concerning burial combined with the principles of the criminal law relating to the improper of indecent interference with a dead body or human remains:

It appears that the underlying principles of law are that those entitled to possession of a body have no right other than the mere right of possession for the purpose of ensuring prompt and decent disposal. The prohibition on interfering with a body sanctioned by the possibility of criminal prosecution indicates that to remove part of the body for whatever reason or motive is unlawful. The opinion expressed in *Peirce* [sic], which goes further than English authority, is but a logical extension of it.³⁹

Chesterman J the adopted a Hohfeldian language of right, duty and correlative as the basis on which Mrs Gray’s application should be assessed and refused:

The principle clearly established, that the deceased's personal representative or, where there is none, the parents or spouse, have a right to possession of the body only for the purposes of ensuring prompt and decent disposal has, I think, the *corollary* [emphasis added] that there is a duty not to interfere with the body or, to use the language found in *Pierce*, to violate it. These principles are inimical to the proposition that the next of kin or legal personal representative may remove part of the body.⁴⁰

However, as will be seen later in this article, the use of these concepts provides a metonym that disguises his Honour’s moral standpoint. Hargrave J in *AB 2005*,⁴¹ agreed with Chesterman J’s reasoning, but added in an additional layer to create a ‘super-added personhood’ to the deceased person:

it is a necessary corollary of the first two principles of law [no property in a body and possession of the body is for prompt and decent burial]⁴² referred to by him that there is a duty by those entitled to possession of a corpse not to interfere with it. This reasoning is consistent with the principle of inviolability referred to in *Marion’s* case in respect of a living person. In my view, policy and logic dictate that the inviolability principle should extend to a corpse in the absence of a statute regulating the extent to which violation is permitted.⁴³

³⁵ [2003] QSC 2 (Unreported, Supreme Court of Queensland, Muir J, 6 January 2003).

³⁶ *AB v Attorney-General (Vic)* [2005] VSC 180 (Unreported, Supreme Court of Victoria, Hargrave J, 27 May 2005) [136].

³⁷ [2001] 2 Qd R 35.

³⁸ [2004] 2 Qd R 595.

³⁹ *Re Gray* [2001] 2 Qd R 35, 41 [18].

⁴⁰ *Ibid* 42 [20].

⁴¹ *AB v Attorney-General (Vic)* [2005] VSC 180 (Unreported, Supreme Court of Victoria, Hargrave J, 27 May 2005).

⁴² *Ibid* [132]-[3].

⁴³ *Ibid* [136]. *Marion’s* case, or *Secretary, Dept of Heath and Community Services v JWN and SMB* (1982) 175 CLR 218, where it was confirmed that it is unlawful to interfere with the body of a living person without their consent: *AB v Attorney-General (Vic)* [2005] VSC 180 (Unreported, Supreme Court of Victoria, Hargrave J, 27 May 2005) [124].

His Honour would have followed ‘*Re Gray* if the applicable law in Victoria was the common law’.⁴⁴ That he went to such lengths in a case which he held was covered by the Victorian legislation, suggests that he sought to approve the moral standpoint found in *Re Gray*,⁴⁵ in order to disapprove the access cases. The real sense of the moral position of these decisions can be found in a coda to *Re Gray*,⁴⁶ which Hargrave J expressly approved and quoted.⁴⁷ At the end of the judgment, just after holding that he would refuse any application of this kind, Chesterman J commented that:

Artificial reproduction is part of rapidly changing and expanding medical technology. As science progresses the law will obviously face frequent challenges for which there may be no adequate precedent, *although I do not myself accept that this is such a case*. It is not a proper criticism of the law that it has not developed a specific principle applicable to the opportunities presented by such change. *The law should not have to cater for every technological possibility. Good sense and ordinary concepts of morality should be a sufficient guide for many of the problems that will arise*. When they are not the appropriate legal response should be provided by Parliament which can properly access a wide range of information and attitudes which can impact upon the formulation of law that should enjoy wide community support.⁴⁸ [emphasis added]

While the morality underscoring the judgment is made explicit, Chesterman J is also saying there is nothing *wrong* with the law as interpreted in the case. While the final sentence appears to suggest that the matter should be up to the legislature, his Honour is instead saying that so long as ‘good sense and ordinary concepts of morality’ are used, decision-making in these kinds of cases will be correctly made.

B *The access cases*

Morality, in the sense of religiosity, does not have a place in the ‘access’ cases. Instead, these decisions adopt a test that may be termed ‘guided relationalism’.⁴⁹ While they may initially allow the sperm to be harvested, they do not allow it to be accessed immediately,⁵⁰ and examine attitude of the family (and where applicable, both families), towards the woman’s aim of using the deceased partner’s sperm to conceive a child.⁵¹ The ‘access’ courts thus err on the side of caution.

Three of the access cases involved this first step only, where the courts permitted the removal of the material: the 1998 Victorian Supreme Court decision of Gillard J in *AB v*

⁴⁴ *AB v Attorney-General* (Vic) [2005] VSC 180 (Unreported, Supreme Court of Victoria, Hargrave J, 27 May 2005) [142].

⁴⁵ [2001] 2 Qd R 35.

⁴⁶ *Ibid*.

⁴⁷ *AB v Attorney-General* (Vic) [2005] VSC 180 (Unreported, Supreme Court of Victoria, Hargrave J, 27 May 2005) [136].

⁴⁸ *Re Gray* [2001] 2 Qd R 35, 42 [24].

⁴⁹ Compare with B Bennett, ‘Posthumous Reproduction and the Meanings of Autonomy’ (1999) 23 *Melbourne University Law Review* 286; A Reichmann Schiff ‘Arising from the Dead: Challenges of Posthumous Creation’ (1996-1997) 75 *North Carolina Law Review* 901, who argue for a different notion of relationalism, which would refuse access to sperm.

⁵⁰ *AB v Attorney-General* (Vic) (Unreported, Supreme Court of Victoria, Gillard J, 23 July 1998); *Re Denman* [2004] 2 Qd R 595, 598; *Fields v Attorney-General of Victoria* (Unreported, Supreme Court of Victoria, Coldrey J, 1 June 2004).

⁵¹ *AB v Attorney-General* (Vic) (Unreported, Supreme Court of Victoria, Gillard J, 23 July 1998); *Re Denman* [2004] 2 Qd R 595, 598.

Attorney-General (Vic),⁵² the 2004 decision of Coldrey J in *Fields v Attorney-General of Victoria*,⁵³ and the Queensland Supreme Court decision of Atkinson J in *Re Denman*.⁵⁴ Only one decision has actually allowed its use. Morris J in the Victorian Civil and Administrative Tribunal ('VCAT') in December 2005, in the case of *YZ v Infertility Treatment Authority (General)*,⁵⁵ allowed material previously removed to be exported from Victoria to New South Wales, so it could be used by the widow in her attempt to conceive a child. The decision in *YZ* adopts the tests set out in s 5 of the Victorian legislation,⁵⁶ but in doing so, makes certain presumptions about *YZ* and her actions that accords with Atkinson J's approach in *Re Denman*.⁵⁷

While there are a relatively large number of cases across the two jurisdictions, they actually form a smaller pool, because three of the four Victorian cases affect one woman: AB, or as she was to be known in the VCAT case, *YZ*. The cases in which she was involved span seven years, starting in 1998 with permission being granted to remove sperm, and finally concluding in December 2005 with permission being granted to export the sperm for its use in an ART procedure.⁵⁸ There is no way of knowing whether AB/*YZ* has been successful in achieving a pregnancy, but the seven years it took for her to attempt to do this indicates her strong desire to achieve this particular pregnancy.

In deciding that *YZ* could now proceed, Morris J drew a line under this series of cases, and through the peculiar change of initials used to define the applicant, denoted a move from the A 'alpha' (AB) to the Ω 'omega' (*YZ*), from the beginning to the end, and from the first and the last. The religious symbolism that underscores this denotation marked the passage from the initial permission to access the tissue, to the possibility that it may be exported albeit within the context that the tissue should never have been removed, to the final permission to export it. It suggests that these cases, as well, should be removed from the legal arena. As Morris J concluded:

⁵² (Unreported, Supreme Court of Victoria, Gillard J, 23 July 1998).

⁵³ *Fields v Attorney-General of Victoria* (Unreported, Supreme Court of Victoria, Coldrey J, 1 June 2004).

⁵⁴ [2004] 2 Qd R 595.

⁵⁵ [2005] VCAT 2655 (Unreported, Victorian Civil and Administrative Tribunal, Morris J, 20 December 2005).

⁵⁶ Section 5 of the Victorian legislation provides:

1. It is Parliament's intention that the following principles be given effect in administering this Act, carrying out functions under this Act, and in the carrying out of activities regulated by this Act –
 - (a) the welfare and interests of any person born or to be born as a result of a treatment procedure are paramount;
 - (b) human life should be preserved and protected;
 - (c) the interests of the family should be considered;
 - (d) infertile couples should be assisted in fulfilling their desire to have children.
2. These principles are listed in descending order of importance and must be applied in that order.

⁵⁷ [2004] 2 Qd R 595.

⁵⁸ Morris J ordered that the frozen sperm could be exported to New South Wales on four conditions: the sperm must be transferred directly to Sydney IVF Ltd; it could only be used under its the control and supervision; it could only be used in a treatment procedure or procedures using gametes of *YZ* to produce an embryo or embryos to be implanted in her; and any live birth resulting from the use of the sperm must be reported to the Infertility Treatment Authority (Vic) and information must be provided to the Authority concerning the treatment procedure, the persons who provided the gametes, the person to whom the child was born, the sex of the baby and any other reasonable information required by the Authority.

ethics committees are required to deal with difficult moral and philosophical issues which do not always permit a single answer. If the answers were always obvious, we would not need ethics committees. Courts and tribunals should not unreasonably confine the scope of decisions that ethics committees must make.⁵⁹

On the other hand, in *Re Gray*,⁶⁰ and *Baker v Queensland*,⁶¹ Mrs Gray and Ms Baker had lines irrevocably drawn through their ability to ever have the child they sought, or to create or enhance their family, despite the agreement of the families of their deceased partners. In these cases, law was used to make ethical and moral decisions, which Morris J implicitly criticises in this statement. Refusing access to the tissue meant that any further examination of the applicant's choice was over.

But at another level, these cases bear the traces of 'unreason'. In Mrs Gray's case, reasons for the refusal to allow her access to the sperm were published two weeks after Chesterman J's decision. She did not know the legal basis on which the refusal was founded. In the end, the court decided it did not have jurisdiction over the matter, yet reached a series of conclusions why the application must be rejected. Muir J was able to refuse her application despite the approval of her fiancé's family. And while counsel had sought to argue the case based on contract law, to distinguish it from *Re Gray*,⁶² Muir J did not accept this distinction, holding that the facts were not different from *Re Gray*,⁶³ and the application was rejected. The decision could not be undone; once the viability of the tissue was lost, all chance of a pregnancy was ended. It was precisely for this reason that Atkinson J in *Re Denman*⁶⁴ allowed the tissue to be removed. Analogous to an injunction, if the tissue was harvested, then a later decision could be made about its use. If the tissue was not harvested, then the action would be lost for good.

Though Atkinson J explained the differences in the Queensland cases on a different reading of 'public policy arguments',⁶⁵ by juxtaposing key *attitudes* expressed by the courts in *Re Gray*,⁶⁶ and *AB 2005*,⁶⁷ on the one side, and *Re Denman*,⁶⁸ and *YZ*,⁶⁹ on the other, I will suggest that personal, visceral attitudes towards the procedures and the nature of family that would result, are the key factors which guided the decisions in the no access cases. These attitudes are revealed through the court's views in four areas: the indignity to the corpse, the effect on the child, the intention of the deceased, and the applicant's state of mind.

C *Indignity to the corpse*

⁵⁹ *YZ v Infertility Treatment Authority (General)* [2005] VCAT 2655 (Unreported, Victorian Civil and Administrative Tribunal, Morris J, 20 December 2005) [65].

⁶⁰ [2001] 2 Qd R 35.

⁶¹ [2003] QSC 2 (Unreported, Supreme Court of Queensland, Muir J, 6 January 2003).

⁶² [2001] 2 Qd R 35.

⁶³ *Ibid.*

⁶⁴ [2004] 2 Qd R 595.

⁶⁵ *Re Denman* [2004] 2 Qd R 595, 597.

⁶⁶ [2001] 2 Qd R 35.

⁶⁷ *AB v Attorney-General (Vic)* [2005] VSC 180 (Unreported, Supreme Court of Victoria, Hargrave J, 27 May 2005).

⁶⁸ [2004] 2 Qd R 595.

⁶⁹ *YZ v Infertility Treatment Authority (General)* [2005] VCAT 2655 (Unreported, Victorian Civil and Administrative Tribunal, Morris J, 20 December 2005).

The key determinate driving the no access cases was the principle of inviolability, that there is a duty not to interfere with the body or to violate it, which includes the removal of any part of the body. As referred to earlier, Hargrave J in *AB 2005* approved this principle: ‘In my view, policy and logic dictate that the inviolability principle should extend to a corpse in the absence of a statute regulating the extent to which violation is permitted.’⁷⁰ But it is *how* Chesterman J reached this position that provides a clear insight into the personal sense of disquiet about the treatment of the body in this way:

It should also be noted that s 236 of the *Criminal Code* makes it a misdemeanour for any person, without lawful justification or excuse the proof of which lies on the accused, to improperly or indecently interfere with or offer any indignity to any dead body or human remains. On an indictment prosecuting such an offence it would no doubt be for the jury to decide what is improper or indecent, or an indignity, *but it would seem at least arguable that removing part of the testicles of a dead man would come within the ambit of those words ...* Anybody with access to the body *may help themselves to part of it*. The limitation imposed by the laws defending public decency or s 236 of the *Criminal Code* appear altogether too uncertain to determine who may and who may not *plunder* a corpse and for what purposes.⁷¹ (emphasis added)

This is a speculative invocation of the criminal law, in order to vilify the widow who *helps herself to* or *plunders* part of her husband’s body. This is emotive language that clearly suggests a very personal attitude to the application, and does not hide behind the reasoned basis for the refusal of access to the body that forms the principle found in the case. It is a stridently visceral response based on a sense of what should properly happen to a body after death. Atkinson J in *Re Denman* reads the same action very differently, seemingly as a direct response to Chesterman J’s position:

It appears to me at least strongly arguable that removing the testes of a dead man in order to harvest sperm *could not* be seen as indecently interfering with or offering indignity to that body, particularly when it is his widow who wishes to have that sperm in accordance with the keenly expressed desire of both herself and her recently deceased husband to have children.⁷² (emphasis added)

D *The effect on the child*

The contrast in the two positions could not be more marked. But the key question must relate to the circumstances of the child’s conception, and the effect this would have on the child itself. The no access cases make the position clear. Though deciding that there was no jurisdiction to allow the procedure, if there had been, Chesterman J would have refused the application:

The interests of any child born as a result of the procedure must be of particular importance in the exercise of the discretion. I cannot see how it can be said that the interests of such a child will be advanced by inevitable fatherlessness. The very nature of the conception may cause the child embarrassment or more serious emotional problems as it grows up. More significant, because the court can never know in what

⁷⁰ *AB v Attorney-General* (Vic) [2005] VSC 180 (Unreported, Supreme Court of Victoria, Hargrave J, 27 May 2005) [136].

⁷¹ *Re Gray* [2001] 2 Qd R 35, 40–41, [17], [21].

⁷² *Re Denman* [2004] 2 Qd R 595, 597.

circumstances the child may be born and brought up, it is impossible to know what is in its best interests.⁷³

There is a strong sense of disquiet that a child may be born who was conceived in these circumstances. There are strongly visceral responses here – how could the child live with the circumstances of its birth? But because a child could *never* be born, it would never know whether it would be angry, embarrassed, disgusted, or happy about its birth, or would prefer not to have been born. No one would know unless they were born, and once living, would have to live with the actions its mother and family. The personal views of individual children may be very different, and they may resent the circumstances of their conception.

This issue was considered by Morris J, who was of the view that the ‘fact that the child will be conceived after the death of one biological parent is not a sufficient reason to refuse consent to the export of the sperm’.⁷⁴ In noting that there was very little research on the question about the well-being of children born in these circumstances, Morris J drew ‘comfort from the expressed attitude of relevant family members.’⁷⁵ Indeed, these factors were tested against s 5 of the Victorian legislation, which requires that the ‘welfare and interests of any person born is paramount’. Morris J took as central the question whether ‘a person, to be born as a result of a treatment ... will be nourished, loved and supported’.⁷⁶

Chesterman J also hinted that being brought up by the mother in a single parent household, through ‘inevitable fatherlessness’ presumes that without the father as head of that family, the circumstances of its upbringing must be unacceptable. Atkinson J in *Re Denman* again answers Chesterman J:

It is certainly the case that any child born, if that were to happen as a result of successful posthumous reproduction, would be born without a father, but children have been born without fathers for a very long time ... No doubt it is preferable for a child to have not one but two parents, both of whom fulfil their parental responsibilities, but many children do not have that, and there are many children who do extremely well in one parent families. It cannot be thought that because the child will only have one living parent that will necessarily not be in its best interests, particularly when the alternative is for the child not to exist at all.⁷⁷

Morris J adopted the same view:

I am satisfied that the applicant has the will and the capacity to provide this love and care. I am also satisfied that the child will have the support of others – including the immediate family of XZ – which will enhance the child’s welfare. In my opinion, the fact that the child will not have a father is not a sufficient reason to refuse to consent to the export of the sperm. It is trite to observe that many children born naturally do not have a father – or a loving father – yet still live long and happy lives.⁷⁸

⁷³ *Re Gray* [2001] 2 Qd R 35, 41 [23].

⁷⁴ *YZ v Infertility Treatment Authority (General)* [2005] VCAT 2655 (Unreported, Victorian Civil and Administrative Tribunal, Morris J, 20 December 2005) [49].

⁷⁵ *Ibid.*

⁷⁶ *Ibid* [37].

⁷⁷ *Re Denman* [2004] 2 Qd R 595, 59.

⁷⁸ *YZ v Infertility Treatment Authority (General)* [2005] VCAT 2655 (Unreported, Victorian Civil and Administrative Tribunal, Morris J, 20 December 2005) [47]-[8].

E *The intention of the deceased*

The views of the deceased and his intention to have a child form a fundamental point of disagreement between the two sides of the judicial line. Chesterman J refused to countenance an implied notion of consent:

The deceased did not in his lifetime indicate his consent to such a procedure. He did not, naturally enough, ever turn his mind to such an eventuality. While it may be accepted that he desired another child it was a desire he wished to consummate in his lifetime. There is no reason to believe he wished his wife to be impregnated posthumously.⁷⁹

The notion that a child could only be conceived from the active involvement of the male parent, is deeply imbued in this comment.⁸⁰ It speaks of the need for the child to be the result of the desire of the male parent, as a naturally ordered action. On the other hand, Morris J answered this view in these terms:

I conclude these reasons by making this observation. In my opinion, there is every reason to think that XZ would now want his sperm to be used to produce children mothered by YZ, if this is the course desired by YZ. Most people who die accept that they cannot, and should not, seek to rule from the grave. Rather they leave on-going decisions to the living; especially to the living who they love or respect. (footnotes removed)⁸¹

In reaching this conclusion, Morris J was particularly concerned that the notion of consent must be read in terms of how people go about expressing choice - 'by words or by conduct – not by legal instrument'.⁸² In this case, it 'was clearly expressed and witnessed'.⁸³

F *The applicant's state of mind*

Knowing what the husband thought is one thing, but the state of mind of the applicant is also of considerable debate. In *Re Gray*, Chesterman J was sceptical about the applicant's state of mind:

The court could have no confidence that the applicant's desire is a result of careful or rational deliberation. Given the need for urgent removal and the circumstances of her husband's death the applicant must have been suffering greatly from grief and shock. The decision made under the effect of such emotions is one she may well come to regret. It may not reflect her true desire or her assessment of what is best for herself and her child.⁸⁴

Chesterman J did not contemplate a deferral of the final decision-making, clearly believing that the decision to take the tissue from the husband itself was problematic.⁸⁵ In comparison, in *YZ*, Morris J noted that in the seven years since her husband died, *YZ* had not remarried or repartnered, and she had no wish to do so. She did not want to

⁷⁹ *Re Gray* [2001] 2 Qd R 35, 41 [23].

⁸⁰ Leiboff, above n 11.

⁸¹ *YZ v Infertility Treatment Authority (General)* [2005] VCAT 2655 (Unreported, Victorian Civil and Administrative Tribunal, Morris J, 20 December 2005) [70].

⁸² *Ibid* [66].

⁸³ *Ibid* [67].

⁸⁴ *Re Gray* [2001] 2 Qd R 35, 41 [23].

⁸⁵ Leiboff, above n 11.

have children from an anonymous donor, but ‘wishes to have a child, or children, using her late husband’s sperm as she regards him as her life partner and wants him to be the genetic father of her children’.⁸⁶ Morris J did not find that she was ‘motivated by grief’, and though other widows would not take this course of action, found ‘her decision is rational and genuine’.⁸⁷ He had already considered that the Ethics Committee at Sydney IVF, where the procedure would be carried out, had investigated her desire to have a child, and they were satisfied about the nature of XZs consent.⁸⁸

These comparisons show the extent of deeply contested divisions that exist in the views in these decisions, which serve to highlight the inevitable sense that the no access cases are based on personal values that fundamentally disapprove of the possibility of post mortem reproduction in all its forms. But these views are not made explicit in the *legal* reasoning which are extracted from the decisions. They have only come to light by taking a different reading of the text of the decisions, which would otherwise be dislocated from the principles of the case. Thus, *Re Gray* and *AB 2005* stand for the legal principle that the only purpose for which a body may be possessed by a spouse of family member is to ensure its prompt burial, and that no spouse or family member can violate a corpse. In this sense, it appears incontrovertible, extracted from the other parts of the text in *Re Gray*. How this principle is explained in the language of objectivity, neutrality, and reason, while disguising the underlying attitudes in *Re Gray*, forms the subject of the next part of this article.

III DISGUIISING RELIGIOSITY IN *RE GRAY*: HOHFELDIAN CORRELATES, RIGHTS AND DUTIES

As noted earlier in this article, the decision and legal principle is structured as being highly reasonable, using the *language* of the Hohfeldian correlates of ‘right and duty’. Hohfeld’s theory is an exercise in philosophical pragmatism in which fundamental legal concepts could be identified, to then be used to facilitate the processes of judicial reasoning.⁸⁹ I will suggest that his Honour adopted this approach in order to sanction the decision with the indicia of logic, objectivity and legality, and mirrors John Finnis’ partial use of Hohfeld in order to render a moral argument against abortion.⁹⁰ I will suggest that the use of Hohfeld provides the metonym for reason and rationality in place of personal viewpoints, visceral religiosity or natural law that underscores the decision in *Re Gray*.⁹¹ In doing so, it must be acknowledged that while Chesterman J himself did not expressly refer to Hohfeld in this decision, the elements of Hohfeld are apparent in the implicit relationalism just described.

For this reason, I want to return to consider the statement of the inviolability principle in *Re Gray*:

The principle clearly established, that the deceased’s personal representative or, where there is none, the parents or spouse, have a *right* to possession of the body only for the

⁸⁶ *YZ v Infertility Treatment Authority (General)* [2005] VCAT 2655 (Unreported, Victorian Civil and Administrative Tribunal, Morris J, 20 December 2005) [17].

⁸⁷ *Ibid* [18].

⁸⁸ *Ibid* [16].

⁸⁹ W N Hohfeld (ed W W Cook), *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Greenwood Press, c1919, republished 1978).

⁹⁰ Williams above n 28.

⁹¹ [2001] 2 Qd R 35.

purposes of ensuring prompt and decent disposal has, I think, the *corollary* that there is a *duty* not to interfere with the body or, to use the language found in *Pierce*, to violate it. These principles are inimical to the proposition that the next of kin or legal personal representatives may remove part of the body.⁹²

Thus the notion of right had to have some kind of real legal meaning, as opposed to some kind of abstract notion which had no legal significance. As has been seen, a Hohfeldian right bears its meaning through its correlate, where another person has a *duty* with respect to the right bearing person. So, where there is no correlate of duty, it is impossible for a person to have a right. If there is no such right, the person may have a privilege or *liberty*, where the correlate is *no-right*. Liberty is, in this sense, the choices we have to do what we want without legal burden, and questions like those concerning the sperm harvesting cases potentially exist with out the correlative of right, instead suggesting liberty,⁹³ because the theory is ultimately relational.⁹⁴

So here, the duty not to interfere follows from the right to possession of the body for burial. But how can this logically follow? This formula is self-referential, taking as it does the relationship between the right of possession and a duty (to whom?) not to interfere with the body. The only person, as such, can be the deceased spouse, though there is no legal status of personality, as such, held by a deceased person, meaning the dead cannot have rights.⁹⁵ But as Ngaire Naffine points out, law can constitute personhood for whatever purpose it wants.⁹⁶ However, Matthew Kramer suggests that there is a possibility that the dead have rights,⁹⁷ based on ‘subsuming the aftermath of each dead person's life within the overall course of his or her existence’.⁹⁸ This involves acknowledging:

the continuing influence of the dead person on other people and on the development of various events, the memories of him that reside in the minds of people who knew him or knew of him, and the array of possessions which he accumulated and then bequeathed or failed to bequeath--we can highlight the ways in which the dead person still exists. He endures, of course, not typically as an intact material being but as a multi-faceted presence in the lives of his contemporaries and successors. For a certain period, then, he can be morally assimilated after his death to the person he was during his lifetime. Even if one feels that the interests of dead people should be given scanty legal protection, one

⁹² *Re Gray* [2001] 2 Qd R 35, 42 [20].

⁹³ Brownsword, above n 2, tests a range of possibilities about rights and liberties, in a Hohfeldian sense, concerning the use of ones own gametes, and whether their use should be prevented, even if a person has consented to their use.

⁹⁴ For this reason, Hohfeld is criticised because the theory cannot adequately explain these kinds of cases. Harris, for instance, complains that correlativity implicitly suggests that all judicial questions involve two people. He also observes that judges will use the language of ‘duty’, ‘right’ and so on, where the concept is not being employed dispositively as to an issue between X and Y? Moreover, not only do judges use these terms in a non-relational sense, but they can be caught by the method of correlativity which can actually result in the ‘miscuing’ of judgments. JW Harris, *Legal Philosophies* (Butterworths, 2nd ed, 1997) 88, 90.

⁹⁵ N Naffine, ‘Who are Law’s Persons? From Cheshire Cats to Responsible Subjects’ (2003) 66 *Modern Law Review* 346, 357, 362-3.

⁹⁶ *Ibid.*

⁹⁷ M H Kramer, ‘Do Animals and Dead People Have Legal Rights?’ (2001) 14 *Canadian Journal of Law & Jurisprudence* 29, 31-2.

⁹⁸ *Ibid* 47-8.

ought to accept that any legal obligations which do noncontingently confer protection on those interests have thereby conferred legal rights on the dead.⁹⁹

Holding aside for one moment the possibility that Kramer's construction of rights of the dead would show that the 'continuing influence' of the dead person would support the actions of the widow, the continuation of personhood in death in the no access cases takes a very different reading of rights. In Hargrave J's extension of the reasoning of *Re Gray*,¹⁰⁰ in *AB 2005* the *rights* do not relate to the continuation of his life, but are constructed against an amorphous sense of what is 'right'.¹⁰¹ If dead people do not have rights, is the duty owed to the public or the State, in a Brownswordian sense, as the holder of the interests a community may hold in the dead? The duty constructed is not easy to establish, and in this sense appears to be rhetorical, as against the whole world.

The use of these Hohfeldian concepts, however, is expressly acknowledged in a similar US decision. The 9th Circuit US Federal Appeal decision has some interesting resonances with *Re Gray*,¹⁰² through its references to the 1872 Rhode Island decision of *Pierce*¹⁰³ on which Chesterman J based the principle of inviolability. I will return to the use of *Pierce*¹⁰⁴ as an authority in the next part of this article, but in the context of its Hohfeldian credentials, the case was employed to provide an historical overview about property interests in dead bodies in the 2002 decision in *Newman v Sathyavaglswaran*.¹⁰⁵ That case concerned the rights of parents whose deceased children's corneas were removed by the Los Angeles County Coroner's office without notice or consent, who brought an action alleging a taking of their property without due process of law. It was held that the next of kin have the exclusive right to possess the bodies of their deceased family members, thus creating a property interest, which gave the parents rights in the corneas. The Coroner could not take the corneas without due process of law. In the context of explaining the nature of common law interests in dead bodies, the majority noted that in 17th century England, it was understood that a person had a *right* to be buried, and there was an ecclesiastical *duty* for a parish to bury the person. This was the subject of examination in *Pierce*,¹⁰⁶ and in relation to that case, the opinion of the majority noted in a footnote:

The logical relationship between rights and duties has been the subject of considerable academic examination. Wesley Hohfeld famously described rights and duties as "jural correlatives" -- different aspects of the same legal relation. Oliver Wendell Holmes described rights as "intellectual constructs used to describe the consequences of legal obligations. As he puts it, 'legal duties are logically antecedent to legal rights.' Holmes' description appears particularly apt in respect to the law regarding dead bodies where duties to provide burial were recognized as flowing from a right of the dead, even though

⁹⁹ Ibid 48.

¹⁰⁰ [2001] 2 Qd R 35.

¹⁰¹ *AB v Attorney-General (Vic)* [2005] VSC 180 (Unreported, Supreme Court of Victoria, Hargrave J, 27 May 2005) [136]. *Marion's case*, or *Secretary, Dept of Heath and Community Services v JWN and SMB* (1982) 175 CLR 218, where it was confirmed that it is unlawful to interfere with the body of a living person without their consent: *AB v Attorney-General (Vic)* [2005] VSC 180 (Unreported, Supreme Court of Victoria, Hargrave J, 27 May 2005) [124].

¹⁰² [2001] 2 Qd R 35.

¹⁰³ *Pierce v Swan Point Cemetery* (1872) 10 R.I. 227.

¹⁰⁴ Ibid.

¹⁰⁵ 287 F.3d 786.

¹⁰⁶ *Pierce v Swan Point Cemetery* (1872) 10 R.I. 227.

"strictly speaking, ... a dead man cannot be said to have rights." Pierce, 10 R.I. at 239,¹⁰⁷ [other references removed].

While the correlatives make sense as structured in *Newman v Sathyavaglswaran*, the use of Hohfeld in *Re Gray*¹⁰⁸, while possible to deduce, appears to be the window dressing needed to clothe a fundamentally moral, and viscerally religious position, in the language and method of rationality and reason.

A *Finnis and Hohfeld and the moral compass*

Hohfeld has been used in this erroneous way before, as a way of supporting a profoundly moral argument by Finnis against a claimed right to abortion. Melanie Williams has undertaken a critique of his use of Hohfeldian methods, and the criticisms she raises resonate, *mutatis mutandis*, in relation to moral criticisms of sperm harvesting, and the incorrect use of Hohfeld to disguise a moral position. Williams notes 'it would be a testing exercise to explore a topic such as abortion in terms of Hohfeldian analysis'.¹⁰⁹ At issue is Finnis' adoption of Hohfeld's correlates to ascribe the status of 'person' to a foetus. As Williams points out, 'the claim to such status is not only weak in law, it is the very point of contention at the core of the *moral* debate'.¹¹⁰ Moreover, she notes that Hohfeld did not consider the status of the body in his analysis of the existence of rights.¹¹¹ She points out that Finnis uses Hohfeld to activate his argument, but having used his methods to claim the analytical high ground of reason and rationality, then shifts out of Hohfeld to impose an obligation of duty and responsibility of a mother towards her unborn child,¹¹² based in natural law and theological notions of feminine self-sacrifice. Williams excoriates Finnis' ambush of Hohfeldian reason and rationality to reach a natural law position. She complains:

But if the uniquely insoluble dilemma of unwanted pregnancy can only be resolved in moral terms by the sacrifice of feminine autonomy, consigning her to the place of biological determinism, to the fracturing of her development and projects, this places here in a second order position in the calculus of ethics, to a fatalistic, though morally uplifting, acceptance of her lot. And, so the consolation runs, from such self-sacrifice may spring moral rewards unwonted and divine.¹¹³

The real reason for the decision in *Re Gray*¹¹⁴ is now apparent, and it is clear that the reliance on Hohfeldian method is illusory and is used as a metonymic device to rationalise and reason the unstated positioning found in the no access sperm harvesting cases. Replace the word pregnancy and abortion with sperm harvesting and post-mortem ART, and Chesterman J achieves the same moral outcome that Finnis achieved. Hohfeld is used to lead to a natural law outcome, or religiously unambiguous decision grounded in religiosity and personal viewpoints. The widows have a duty and responsibility to the deceased spouse to bury him, and not to have children post-mortem. In Williams' terms, the widow has been required to sacrifice their desire for a

¹⁰⁷ 287 F.3d 786, 790–91.

¹⁰⁸ [2001] 2 Qd R 35.

¹⁰⁹ Williams, above n 28, 387.

¹¹⁰ *Ibid* 388.

¹¹¹ *Ibid* 389.

¹¹² *Ibid* 391-3.

¹¹³ *Ibid* 393.

¹¹⁴ [2001] 2 Qd R 35.

child, and by denying her, she will be given the opportunity, through her sacrifice, to enjoy the ‘morally uplifting acceptance of her lot’.

It is through the use of Hohfeld, and the principles derived from *Pierce*¹¹⁵ that Chesterman J concluded that she must be prevented from accessing and then using her husband’s sperm. But *Pierce*,¹¹⁶ and the other cases on which Chesterman J based the decisions, are problematic as authorities, and need to be considered in more detail, that is redolent of Williams’ concerns about the weakness of Finnis’ claims about the legal status of the foetus, Chesterman J’s use of authorities is weakened by selectivity, thus rendering them unreasonable, irrational, and unnatural.

B Using *Pierce*

Chesterman J came to use *Pierce*¹¹⁷ through the dissenting decision of Higgins J in *Doodeward v Spence*.¹¹⁸ It must be remembered that this case concerned the property status of a preserved, stillborn two-headed baby. The majority held that it was property for a range of reasons, including its lack of human characteristics, which made it undeserving of a Christian burial.¹¹⁹ Higgins J did not agree, and said the preserved baby should have been buried, and not become an object of property.¹²⁰

It appears that the dissenting judgment was being relied upon, because it had apparently been approved by ‘the English Court of Appeal [which] has recently reaffirmed the principle stated by Higgins J in *Doodeward* [sic]:¹²¹ *Dobson v North Tyneside Health Authority*.¹²² However, Peter Gibson LJ for the Court of Appeal did not do this,¹²³ instead noting in general terms the views of textbook writers that executors and administrators charged with the duty of interring the body have a right of custody and possession of it until it is properly buried, and that if there is no duty to bury, then there is no legal right to possession of the body. But rather than standing for the principle that a right to possession of a corpse must be for burial only, the case instead decided that the family of the deceased did not have a right in property over her preserved brain that had subsequently been disposed of by the hospital. Indeed, the decision was far from convinced about the status of the authorities relating to the ‘no property’ rule,

¹¹⁵ *Pierce v Swan Point Cemetery* (1872) 10 R.I. 227.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ (1908) 6 CLR 406, 422.

¹¹⁹ *Doodeward v Spence* (1908) 6 CLR 406, 416-17 (Barton J).

¹²⁰ (1908) 6 CLR 406, 422.

¹²¹ *Re Gray* [2001] 2 Qd R 35, 40 [16].

¹²² [1997] 1 WLR 596.

¹²³ What Peter Gibson LJ said, [1997] 1 WLR 596, 600 was:

First, as is stated in Clerk & Lindsell (*ibid.*), "the executors or administrators or other persons charged by the law with the duty of interring the body have a right to the custody and possession of it until it is properly buried." In the present case there were no executors and there was no administratrix until October 1994, long after the body of the Deceased was buried. The other persons who are charged by the law with the duty of interring the body include, for example, the parent of an infant child who dies where the parent has the means to do so (see *Clarke v London General Omnibus Co. Ltd.* [1906] 2 K.B. 648 at 659 and Halsbury's Laws 4th ed. para 1017), but I am not aware that there is any authority that there is such a duty on the next of kin as such. If there is no duty, there is no legal right to possession of the corpse. However even if that is wrong and the next of kin do have some right to possession of the body, there is no authority that right is otherwise than for the interment or other proper disposition of the body.

noting the academic research in the field that showed the partial nature of the authorities in the area.

The dissenting judgment has not therefore been approved. But Chesterman J somehow came to use the judgment as an imprimatur of approval to use *Pierce*¹²⁴ as an authority. However, even if the dissenting judgment had been approved, Higgins J did not rely on *Pierce*¹²⁵ as an authority, but mentioned it in passing only, along with a string of other US cases that related to the duty to bury:¹²⁶

In *Peirce* [sic] v *Swan Point Cemetery*, the Rhode Island Court, while admitting that there was no property in a dead body in the ordinary sense, interfered by injunction to prevent the removal of a man's corpse to another part of the cemetery against the will of his daughter and her husband.¹²⁷

But Chesterman J put it this principle altogether differently:

In one of the American cases cited and apparently relied upon by Higgins J, *Peirce* [sic] v *Swan Point Cemetery* 14 Am Rep 667 it was said:

That there is no property right in a dead body, using the word in the ordinary sense, may well be admitted. . . . there is a duty imposed by the universal feelings of mankind to be discharged by someone towards the dead; a duty, and we may also say a right, to protect from violation; and a duty on the parts of others to abstain from violation.¹²⁸

Higgins J accurately described the 1872 decision of the Supreme Court of Rhode Island in *Pierce*, as involving the decision by a widow and the cemetery to move the deceased's remains.¹²⁹ The man's child and her husband sought to restore the remains to the lot he was originally buried in. The court ordered that the remains be restored to their former place, because *he had purchased the burial lot with the wish that he be buried in it*:

as the body was removed by the widow, without the consent of the child, from a place where it was deposited by his own wishes and her consent, we think it should be restored to the place whence it came . . . It is not necessary to decide at present what might have been done if the child had assented, or what the child might do of herself. And from the view we take of the case it is of less consequence to whom the custody is given.¹³⁰

In other words, the case was about the intention of the deceased and his burial, not about the intrusion on a body. Nor did the case concern the violation of a corpse. Potter J instead commented, in general terms, about the human response to burial. I have included the sentences that Chesterman J left out of his quote from the case in italics:

¹²⁴ *Pierce v Swan Point Cemetery* (1872) 10 R.I. 227.

¹²⁵ *Ibid.*

¹²⁶ *Doodeward v Spence* (1908) 6 CLR 406, 422.

¹²⁷ *Ibid* 421.

¹²⁸ *Re Gray* [2001] 2 Qd R 35, R 35, 40 [15].

¹²⁹ *Doodeward v Spence* (1908) 6 CLR 406, 421.

¹³⁰ *Pierce v Swan Point Cemetery* (1872) 10 R.I. 227, 242-3.

That there is no property right in a dead body, using the word in the ordinary sense, may well be admitted.¹³¹ *Yet the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property.* There is a duty imposed by the universal feelings of mankind to be discharged by some one towards the dead; a duty, and we may also say a right, to protect from violation and a duty on the part of others to abstain from violation; *it may therefore be considered as a sort of quasi property, and it would be discreditable to any system of law not to provide a remedy in such a case.*¹³²

Potter J had looked at the notion of the possibility of the dead having ‘rights’, but these are something exercisable by the family:

Now, strictly speaking, according to the strict rules of the old common law, a dead man cannot be said to have rights. Yet is it common so to speak, and the very fact of the common use of such language, and of its being used in such cases as we have quoted, justifies us in speaking of it as a right in a certain qualified sense, a right which ought to be protected.¹³³

The notion of quasi property was significant to understanding the nature of the obligation, was also not referred to by Chesterman J:

Although, as we have said, the body is not property in the usually recognized sense of the word, yet we may consider it as a sort of *quasi* property, to which certain persons may have rights, as they have duties to perform towards, it arising out of our common humanity. But the person having charge of it cannot be considered as the owner of it in any sense whatever; *he holds it only as a sacred trust for the benefit of all who may from family or friendship have an interest in it*, and we think that a court of equity may well regulate it as such, and change the custody if improperly managed.¹³⁴

Based on the attitude of the family, *Pierce*¹³⁵ thus stands for the principle the relationship with the body is filial and related to family, the *sacred trust for the benefit of all who may from family or friendship have an interest in it*, and the nature of the relationships that are concerned to ensure a proper treatment of a body. The idea that a body would be left unburied would offend our common humanity. There is nothing in the judgment that, Hercules-like, a court could find to prevent the ongoing family interests in pursuing the filial bonds of enabling the continuation of the family through the deceased spouse. *Pierce* may stand, instead, for the proposition that such a course of action be permitted, if the family agree. If they do not agree, then they are free to intervene, and custody changed because of ‘improper management’. Of course, in the sperm harvesting cases, the family supported, rather than rejected her position, so the family themselves would not see the actions of the widow acting against the rights of the deceased.

IV CONCLUSION

¹³¹ In a footnote, it was noted that by the old English law the body was not recognised as property, but the charge of it belonged to the church and the ecclesiastical courts.

¹³² *Pierce v Swan Point Cemetery* (1872) 10 R.I. 227, 237-9.

¹³³ *Ibid* 239-40. Hohfeld would have claimed the looseness of the use of the language of rights here as an example why legal concepts need to be sharply focussed on what they actually do.

¹³⁴ *Pierce v Swan Point Cemetery* (1872) 10 R.I. 227, 242-3.

¹³⁵ *Ibid* 227.

Of course, this is a decision of a single judge of a US state made in 1873. But along the lines of the other cases relied upon by Chesterman J, it does not stand for the principle of inviolability claimed. Indeed, the principles that emerge from *Pierce*¹³⁶ can be read very differently, to instead *cherish* the choices of family, of a kind proposed by Lior Barshack,¹³⁷ and to potentially allow that family to follow the deceased husband's desire to have a child.¹³⁸ But *Pierce*,¹³⁹ as a precedent, has to be considered with caution. In the US, it went on to have a short and rocky life. And the principle for which it really stood – the ability of a cemetery to move remains – up until the 1920s, it was cited in a small series of US cases, but was generally disapproved. Its value in the 2002 decision in *Newman v Sathyavaglswaran*,¹⁴⁰ was historical, as Potter J had written an excellent history of the law relating to burial. Its resurrection in Australia, in these circumstances, was extraordinary. What is problematic, however, is its use in *Re Gray*,¹⁴¹ and subsequent adoption in *AB 2005*,¹⁴² to stand for principles never contemplated by the facts or circumstances of the case. Its use, along with the adoption of the Hohfeldian correlates of right and duty, have been captured to achieve decisions that adopt religiosity, rather than rationality, in the guiding principles on which they are based.

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¹³⁶ Ibid.

¹³⁷ Barshack, above n 9.

¹³⁸ Kramer, above n 97; *YZ v Infertility Treatment Authority (General)* [2005] VCAT 2655 (Unreported, Victorian Civil and Administrative Tribunal, Morris J, 20 December 2005) [40]–[41].

¹³⁹ *Pierce v Swan Point Cemetery* (1872) 10 R.I. 227.

¹⁴⁰ 287 F.3d 786.

¹⁴¹ [2001] 2 Qd R 35.

¹⁴² *AB v Attorney-General (Vic)* [2005] VSC 180 (Unreported, Supreme Court of Victoria, Hargrave J, 27 May 2005).