From BEREAVED to CONCEIVED

Creating life after death through posthumous assisted reproduction

By Rachel Oakeley

In 1818, Mary Shelly wrote her sci-fi fantasy, *Frankenstein*. In her story, life was created by extracting and combining parts from dead bodies, which were illegally exhumed. In the 20th century, creating life from tissue of the deceased is not only possible but happening. The question remains, though, whether it lawfully should?

Scientific advances mean that it is now possible to collect sperm from a deceased man and use it to create a pregnancy for his wife or partner. The law is struggling to keep up with the technological developments in this field.

Human Reproductive Technology (HRT) is an accepted part of modern life. As a society, we are generally comfortable with HRT being available to create life for people struggling with fertility issues. Fertility preservation through extraction and cryogenic storage of gametes (sperm and oocytes) and embryos for use in artificial reproduction is commonplace throughout Australia and the western world. People suffering from reproductive ailments, such as cancer patients who have their reproductive functions destroyed by chemotherapy, are now afforded a chance to conceive through the preservation of gametes for later use.

HRT can also be used (and is increasingly being used) for posthumous assisted reproduction (PAR). PAR involves the use of gametes which have been collected during life and which are in cryogenic storage. Although highly controversial in the 1970s, PAR seems to be more acceptable in the 21st century. Today, a mother accessing embryos created for *in vitro* fertilisation (IVF) and using them for PAR to create a sibling for a child of a deceased father, for example, is more likely to be congratulated than criticised.

Posthumous collection and use of gametes (PCUG) remains much more controversial. PCUG involves the collection of gametes from the body in the 24 or so hours following death and their cryogenic storage with the intention that leave will be granted by the relevant authority for their use to create a pregnancy for the wife or partner of the deceased.

In Australia, PAR and PCUG are largely governed by state legislation, which has led to different outcomes for people seeking access to them, depending on their state of residence.

THE SCIENTIFIC HISTORY

The first artificial insemination of a woman's genital tract with sperm (into the vagina) was carried out by Dr Spallanzani in 1780.

In 1949, an English agricultural biologist, Christopher Polge,[1] reported that sperm could be frozen and thawed. Significant medical advances followed, initially driven by the cattle industry which began using the frozen sperm of prize bulls for breeding programs.

In the mid-1950s, doctors found that inserting sperm into the womb rather than the vagina, through intrauterine insemination (IUI), resulted in much higher pregnancy rates in women.

Medicine advanced still further when Professor Patrick Steptoe successfully developed an *in vitro* embryo, resulting in the birth of the first 'test tube baby', Louise Brown, in 1978.

In the 1990s, intra-cytoplasmic sperm injection (ICSI), in which sperm is injected directly into an ovum, enabled fertility doctors to use sperm of a lower quality. It is this technology that makes PCUG possible. Sperm which is immature, or which has reduced mobility as a result of death, can be sufficiently viable to achieve a fertilised egg using ICSI.

It is not technically possible (at the moment, at least) to harvest eggs from a deceased woman and use them to create life, so this article focuses on the posthumous use of sperm.

The idea of a man fathering a child after death is far from new. In 1866, an Italian scientist, Montegazza, discovered that human sperm could survive freezing. He proposed that sperm banks be used by widows whose husbands were killed at war.[2]

LEGAL DEVELOPMENTS IN POSTHUMOUS USE OF GAMETES

In the UK in 1977, Kim Casali gave birth to a son 16 months after his father died. It was front-page news and Ms Casali faced severe criticism. In 1984, the Warnock committee considered the Casali facts and commented, 'The use by a widow of her dead husband's semen for AIH is a practice which we feel should be actively discouraged.'[3]

Ms Casali had worked directly with a fertility clinic and without any court action being necessary. It appears that she was able to have the fertility treatment in circumstances where there was no statutory bar to it.

In 1984, the French *tribunal de grande instance* made the first-known[4] legal decision about the use of stored sperm for >>

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reproductive purposes.[5] Mr Parpalaix had deposited sperm prior to chemotherapy. His widow was granted control of the sperm after his death and she was later artificially inseminated. Sadly for her, a pregnancy did not follow. In that case, Mr Parpalaix had not given any direction in his contract about posthumous use and the court considered at length whether his intentions could be determined with sufficient certainty after death. The court also considered the legal status of the sperm – whether it was human tissue or property capable of being dealt with under inheritance law provisions.

In 1993, a Los Angeles court considered a case[6] where the deceased had provided notice of his intentions that his sperm be made available to his partner, Ms Hecht, for her own use. The deceased had deposited sperm and made a will about the use of his sperm only a matter of weeks before taking his own life. The deceased had two adult children from a previous relationship. They opposed the use of the sperm in the manner described by their father. The court held that the sperm was capable of disposition by will.

American, Gabby Vernoff, made headline news around the world in 1999, when she became pregnant with the child of her late husband, Bruce Vernoff, four years after his sudden accidental death. Mr Vernoff's sperm had been posthumously extracted 30 hours after his death, at his wife's request. Four years later, she gave birth to his child. The key issue for consideration in that case[7] was the child's legitimacy. Did she have a father or a donor? And was she entitled to inherit anything of her father's estate? The Social Security Administration Tribunal denied child survivor benefits. On appeal, the court affirmed the decision of the tribunal on the basis that the child was not a dependant of the deceased at the time of his death. Interestingly, the state of Arizona determined that a child conceived posthumously from sperm stored by the biological father just prior to him receiving cancer treatment, *was* his biological child and therefore did have legitimacy and inheritance rights.[8]

In the UK, Diane Blood was successfully able to take possession of the sperm of her husband who died in 1995 and transport it to Brussels, where, in 1999 and 2002, she was successfully impregnated. But under UK law, the births of Mrs Blood's two children had to be recorded with a blank space on the certificate where their father's name should have been. She argued that this rule breached their right to private and family life under the European Convention on Human Rights. The High Court agreed and the UK later passed the *Human Fertilisation and Embryology (Deceased Fathers) Act* 2003. Through this Act, Mrs Blood's children now have a registered legitimate father under UK law.

DEVELOPMENT OF AUSTRALIAN LAW ON PCUG

Generally, the Australian courts have made decisions on PCUG cases in two tranches: firstly making a decision about collection and storage; and secondly making a decision about use.

The first decision about collection and storage usually has to be made on an urgent *ex parte* oral application. The time between death and extraction and storage is critical. It is generally accepted among fertility specialists that collection and storage should occur within 36 hours of death if the sperm is to remain viable.

There are fascinating *dicta* about jurisdiction: whether the court (usually a state supreme court) had inherent jurisdiction – *parens patriae* jurisdiction (in the case of a man in a coma and incapable of making a decision) or jurisdiction under property law.

In *MAW v Western Sydney Area Health Service*,[9] Justice O'Keefe had to consider *parens patriae* jurisdiction of the NSW Supreme Court in relation to a man who was in a coma after an accident and in imminent danger of dying. The man's wife sought orders for the collection of his sperm. His Honour concluded that *parens patriae* jurisdiction did not extend to authorisation of the non-therapeutic procedure of the removal of sperm. He also held that the *Guardianship Act* 1987 (NSW) and the *Human Tissue Act* 1983 (NSW) did not confer jurisdiction either. In that case, the husband and wife had 'no plans' for children until they got on their feet financially. Justice O'Keefe also noted that even if jurisdictional power was available to him, he would not make the order. He expressed concern about the emotional state of the applicant and indicated that she was 'quite likely to change her mind' in the future about wishing to bear a child and raise it alone.

In *Re Gray*[10] it was held that neither the general nor the inherent jurisdiction of the Queensland Supreme Court, nor the *Supreme Court of Queensland Act* 1991 (Qld), nor the *parens patriae* jurisdiction provided the Court with the power to make orders in favour of a widow over the dead body of her husband.

The Court found that Part 3 of the *Transplantation and Anatomy Act* 1979 (Qld) regulated the removal of tissue (which was defined in such a way as to include semen) from dead bodies, but his Honour held that the Act did not apply because the removal had to be for transplantation into the body of a living person or for some 'therapeutic… or… other medical or scientific purposes' and that the applicant's purpose was not one of those.[11]

Justice Chesterman also declined the application for the following three reasons:

1. There was no evidence of consent in the lifetime of the deceased to the proposed removal of sperm;

2. The court could have no confidence that the applicant was acting upon careful or rational deliberation; and
3. It was contrary to the best interests of a child to be born fatherless.

Re Gray was followed in *Baker v Queensland*.[12] Then in 2004,[13] Justice Atkinson of the Supreme Court of Queensland held that, in the absence of explicit statutory prohibition on the retrieval of sperm from a dead body, the court *did* have inherent jurisdiction to make an order for retrieval and storage so that the question of use could be considered at a later date. Her Honour referred to *Re Gray* and *Baker v State of Queensland* but found (at [35]) that there were 'valid public policy arguments' that pointed in the opposite direction to those which she thought had led Justices Chesterman and Muir to refuse the applications in those cases.

It would appear from the more recent Supreme Court *dicta* around Australia that extraction of sperm from a deceased man is less controversial than it was in bygone years.

It is generally now settled that posthumous collection of gametes can legitimately occur under the various Acts dealing with tissue extraction and use. In *Re Section 22 of the Human Tissue and Transplant Act* 1982 (WA); *Ex Parte C*,[14] the Supreme Court of WA indicated that an urgent *ex parte* application may not be required for future cases. Justice Edleman concluded that the hospital had the power to extract and store sperm without the need for a court order on these bases:

1. The hospital could remove human tissue for medical purposes. Justice Edleman held that sperm was included in the definition of 'human tissue' and that future IVF treatment fell within the definition of 'medical purposes'.
2. The spouse or next of kin was able to indicate whether there was any possible objection to the use of the human tissue of the deceased for the proposed purpose.

Justice Edleman then followed an established judicial course of action regarding the use of the gametes; namely, to leave that decision for a more considered application at a later date.

There now appears to be a settled course: remove and store; then consider what legitimate use, if any, can be made of the gametes – in particular, whether the gametes can be used for the purpose of creating a life.

Human tissue extraction tends to be dealt with in the context of legislation governing human tissue intended for organ donation.[15] Gametes tend to be given a different or special status because they are human tissue which has the ability to create new life, rather than be used for treatment of an already existing human life.

KEY AUSTRALIAN DECISIONS

Ex parte orders for posthumous extraction have now occurred in a number of Australian jurisdictions. Whether gametes can be used after extraction will depend on the state legislation of the day and its interpretation by the courts.

The situation in WA

Section 22 of the *Human Tissue and Transplant Act* 1982 (WA) permits the removal of human tissue for 'medical purposes' from a person who has died.

The *Human Reproductive Technology Act* 1991 (WA) specifically prohibits any use of gametes from a deceased person for reproductive purposes.[16]

This has created a strange scenario for recipients of orders from the WA Supreme Court permitting the collection of gametes from a spouse or *de facto* partner.[17] Having collected the gametes, the law as it currently stands prevents the use of the gametes for reproductive purposes. The practical result in WA is that fertility clinics are burdened with the responsibility (and cost) of storing the gametes.

AB v Attorney-General of Victoria[18]

Mrs & Mrs AB were residents of the ACT. Mr AB was killed in a car crash in Victoria. Orders were made for the retrieval of sperm pursuant to the *Human Tissue and Transplant Act* 1982 (Vic) with storage in accordance with the *Infertility Treatment Act* 1995 (Vic). Whether Mrs AB could use the sperm was to be decided later.

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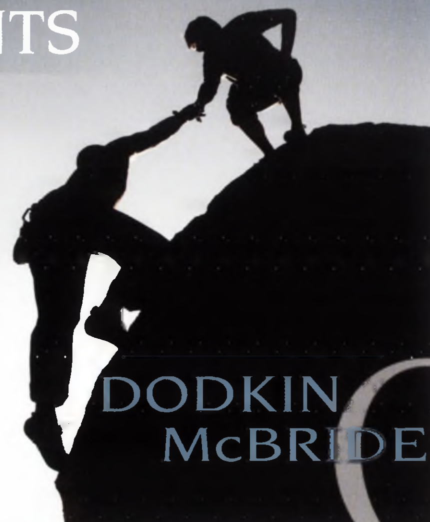

> The court also considered the legal status of the sperm – whether it was human tissue or property capable of being dealt with under inheritance law provisions.

Several years later, in *AB v The Attorney General for the State of Victoria*,[19] Justice Hargrave considered the later application by Mrs AB to use the sperm for her own treatment. Prohibited from directing that it be used to impregnate her under Victorian legislation, Mrs AB had sought to direct that the sperm be transferred to a clinic in the ACT, where she intended to use it.

Justice Hargrave considered carefully the recent amendments to the *Infertility Treatment Act* 1995 (Vic). Ultimately, he concluded that the applicant was prohibited through s12 of the Act from receiving treatment in Victoria but that she could direct that the sperm be transported to the ACT, where she could receive the treatment she sought for her own pregnancy with her late husband's sperm. According to media reports, Mrs AB went on to be successfully impregnated in the ACT.[20]

Fields v Attorney-General of Victoria[21]

An application was brought on behalf of a young wife in intensive care after a car accident which killed her 23-year-old husband. His parents sought an order for the removal and storage of his sperm. Prior to the accident, the couple had been attending a fertility treatment program. An order for retrieval and storage was made, with the question of use adjourned.

More recent decisions

In NSW in 2011, Jocelyn Edwards, as the administrator of her late husband's estate, was held to have the right to direct that her late husband's sperm be collected and then transported to a jurisdiction which would permit her to make use of it for her own pregnancy.[22] Justice Hulme had to consider whether it was proper for Mrs Edwards to take the sperm elsewhere when ss21 and 22 of the *Assisted Reproductive Technology Act* 2007 (NSW) prevented use without written consent and prohibited an ART provider from 'exporting' gametes without consent. Justice Hulme concluded that Mrs Edwards could deal with the sperm as 'property' and that she was entitled to possession of it. Justice Hulme then said that the fertility clinic would not be caught by the prohibition under s22 because the clinic was not 'supplying' to another state but 'releasing' the gametes to Mrs Edwards. Justice Hulme considered the fact that his decision could be seen as 'turning a blind eye' to the likelihood that Mrs Edwards would use the sperm in a manner which was contrary to NSW legislative provisions, by going to a different jurisdiction. Notwithstanding that likely outcome, he ordered that the sperm be released to Mrs Edwards.

In 2012, Justice Gray handed down his decision in the Supreme Court of South Australia which permitted the applicant to take possession of her late husband's sperm, knowing that she would then take it to the ACT for use in her own pregnancy, and despite there being legislation in South Australia which prohibited that use.[23]

A SUMMARY

We now have a somewhat muddled legislative scene. The Australian jurisdictions' positions were summarised by Justice Gray in his judgement in *Re H, AE (No. 2)* as follows:

'20. Legislation in New South Wales and Victoria prohibits the use of a deceased person's gametes in assisted reproductive treatment unless there is written consent from the donor to that effect. Section 23 of the *Assisted Reproductive Technology Act* 2007 (NSW) prohibits an assisted reproductive treatment provider from using a gamete, defined to include human sperm, after the death of the gamete provider unless "the gamete provider has consented to the use of the gamete after his or her death". Consent is defined to mean consent in accordance with s17 of the Act, which requires consent to be given by written notice.

21. Section 46 of the *Assisted Reproductive Treatment Act* 2008 (Vic) provides that a registered assisted reproductive treatment provider may use gametes after a donor's death only if "the deceased person provided written consent for the deceased person's gametes ... to be used in a treatment procedure".

22. Western Australia has banned the use of gametes of a deceased person. Direction 8.9 made on 30 November 2004 in the *Government Gazette* relevantly provides: "No posthumous use of gametes: Any person to whom the licence applies must not knowingly use or authorise the use of gametes in an artificial fertilisation procedure after the death of the gamete provider."

    Pursuant to section 3(8) of the *Human Reproductive Technology Act* 1991 (WA), all directions published in the *Government Gazette* are taken to be subsidiary legislation. Pursuant to s 6(1) of the Act, assisted reproductive treatment is only permitted when carried out pursuant to a licence, issued under the *Human Reproductive Technology Act*, to conduct such treatment.

23. In the remaining states and territories there is no specific legislation. In these jurisdictions, regard apparently is had to the earlier referred to guidelines of the National Health and Medical Research Council. The guidelines are not, in themselves, legally binding.

24. The *Research Involving Human Embryos Act* 2002 (Cth) regulates the provision of assisted reproductive treatment. Section 11 restricts the use of an embryo, relevantly, to accredited assisted reproductive treatment centres. Accredited assisted reproductive treatment centres are defined as those accredited by the Reproductive Technology Accreditation Committee of

the Fertility Society of Australia. Accreditation by the Reproductive Technology Accreditation Committee is contingent upon compliance with the National Health and Medical Research Council Guidelines.'[24]

WHAT DOES THE FUTURE HOLD FOR AUSTRALIANS AND PCUG?

The National Health and Medical Research Council (NHMRC) published the *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* in 2007. Regarding the use of gametes from deceased or dying persons or from persons in post-coma unresponsive state, the guidelines say:

'Clinics must not facilitate the use of gametes to achieve pregnancy in such circumstances, unless all of the following conditions are met:

- a deceased person has left clearly expressed and witnessed directions consenting to the use of his or her gametes; or
- a person in a post-coma unresponsive state ("vegetative state") prepared clearly expressed and witnessed directions, before he or she entered the coma, consenting to the use of his or her gametes; or
- a dying person prepares clearly expressed and witnessed directions consenting to the use, after death, of his or her gametes; and
- the prospective parent received counselling about the consequences of such use; and
- the use does not diminish the fulfilment of the right of any child who may be born to knowledge of his or her biological parents.'[25]

The ACT appears to be the most liberal jurisdiction in relation to PAR. The ACT reproductive treatment clinics operate under the NHMRC guidelines that govern accreditation. Although these guidelines deny the posthumous use of sperm unless 'a deceased person has left clearly expressed and witnessed directions', the guidelines are just that: guidelines. They are not enforceable or subject to judicial interpretation. The fertility clinics receiving gametes as a result of interstate supreme court orders appear to have adopted a wide interpretation of the meaning of 'clearly expressed and witnessed' consent.

PCUG is increasingly likely to be permitted in most Australian states and territories, where it is requested by the widow or defacto partner of the deceased.

There is precedent for the release of gametes to the person with legal proprietorship, in the knowledge that they will be taken to a location where they can be used for HRT treatment. Whether that release will be granted is likely to be decided on a case-by-case basis.

Decisions will be made after careful consideration of consent and best-interests-of-children principles.

CONCLUSION

It appears that the use of posthumously collected gametes will remain possible only in limited circumstances. Whether those limited circumstances will expand over time will be determined by public opinion, legislative development and judicial discretion.

Whatever direction the law takes, consistency in legislation across the states and territories is now required. There are litigants in some states who are permitted to use stored gametes and others in very similar circumstances in other states who are not. Given the trend towards a permissive approach to PCUG in recent supreme court decisions, one wonders whether conservative WA may need to consider updating its Gazetted Directions to align with the national ethical guidelines and social trends.

It is beyond the scope of this article to discuss other key considerations such as parental status (is the father named on the birth certificate?) and inheritance rights (could a posthumously conceived child have a claim over the estate of the father?)

For all states, more work and thought is needed. The law continues to play catch-up with modern medicine and societal attitudes. In Australia, where there is a lack of gametes available for couples struggling to become fertile, should gametes be capable of being donated in the same way human organs are? To paraphrase a number of supreme court judgments… that is a decision for another day. ■

Notes: **1** C Polge; AU Smith; AS Parkes, (1949), 'Revival of Spermatozoa after Vitrification and Dehydration at Low Temperatures', *Nature* 164 (4172): 666. **2** E Donald Shapiro & Benedene Sonnenblick, 'Widow and the Sperm: The Law of Post-Mortem Insemination', 1 *JL & Health* 229 (1985-1987). **3** *Report Of The Committee Of Inquiry Into Human Fertilisation And Embryology* 1984 (Cmnd 9314) available online at http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf. **4** Shapiro & Sonnenblick, see above n2. **5** *Parpalaix c CECOS* Trib. gr inst. Creteil, Aug. 1, 1984, Gazette du Palais [GP], Sept. 15, 1984, at 11. **6** *Hecht v Superior Court* (1993) 20 Cal. Rptr. 2d 275. **7** *Vernoff v Astrue United States Court of Appeals*, Ninth Circuit No. 08-55049 17 June 1999. **8** See *Gillett-Netting ex rel Netting v Barnhart*, 371 F.3d 595 (9th Cir. 2004). **9** *MAW v Western Sydney Area Health Service* [2000] 49 NSWLR 231. **10** *Re* Gray [2001] 2 Qd R 35. **11** *Ibid*, at [41]. **12** *Baker v Queensland* [2003] 2 Qd R 595. **13** See *Re Denman* [2004] QSC 70; [2004] 2 Qd R 595. **14** *Re Section 22 of the Human Tissue and Transplant Act* 1982 (WA); *Ex Parte C* [2013] WASC 3. **15** See *Human Tissue Act* 1983 (NSW); *Transplantation and Anatomy Act* 1979 (Qld); *Transplantation and Anatomy Act* 1983 (SA); *Human Tissue Act* 1982 (Vic); *Human Tissue and Transplant Act* 1982 (WA). **16** Per Direction 8.9 of the *Human Reproductive Technology Act* 1991 (WA), *Government Gazette, WA*, No. 201, 30 November 2004, 5435. **17** See *Re Section 22 of the Human Tissue and Transplant Act* 1982 (WA); *Ex Parte C* [2013] WASC 3. **18** *AB v Attorney-General of* Victoria [1998] Unreported, 23 July 1998, Gillard J (BC9803488). **19** *AB v The Attorney General for the State of* Victoria [2005] VSC 180. **20** Kate Legge, 'A matter of life and death', the *Australian*, April 6, 2013. **21** *Fields v Attorney General of Victoria* [2004] Unreported, Coldrey J, 1 June 2004. **22** *Jocelyn Edwards; Re the estate of the late Mark Edwards* [2011] NSWSC 478. **23** *See Re H, AE (No. 2)* [2012] SASC 177 (12 October 2012) and *Re H, AE (No. 3)* [2013] SASC 196. **24** *Re H, AE (No. 2)* [2012] SASC 177. **25** NHMRC, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research*, 2007, paras 6.15 – 6.17.

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