currency of the tenancy. Nor was there found to be a requirement for the engagement of experts in relevant fields, such as electrical wiring, and glass fabrication and installations, where such risks of defects could, in the nature of things, be seen as a possibility.[11]

Delegability of the task of inspection remains an important issue, although not one directly relevant to the present case: if the lessor has done an electrical inspection by an electrician, is that enough? Kirby J takes the view that *Northern Sandblasting Pty Ltd v Harris*[12] established that such duty was delegable.[13] Gummow and Hayne JJ[14] and Callinan J[15] regarded it as sufficient if a competent expert was engaged. That is likely now to be the law. PL

Footnotes:

1 (1997) 188 CLR 313

2 So held by Gleeson CJ, Gaudron J, Gummow and Hayne JJ, Kirby J and Callinan J, McHugh J dissenting.

3 This was said by Kirby J at paras [231]-[234] to be the true gravamen of *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313.

4 [2000] HCA 56 at para [58]: "The capacity to adjust and adapt, which is inherent in the test of reasonableness, would be diminished if a more particular test were formulated."

5 [2000] HCA 56 at para [93]. Because the glass door was not defective, it was not a breach not to replace it.

6 [2000] HCA 56 at paras [171], [172]; and see sections 103(2)(b) and 103(3)(a) of the *Residential Tenancies Act* 1994 (Qld).

7 [2000] HCA 56 at para [253]

8 [2000] HCA 56 at para [289]

9 Kirby J at para [237] regarded the issue as still open, but noted that Courts in other jurisdictions had refrained from imposing such a duty: para [244].

10 [2000] HCA 56 at para [173]

11 [2000] HCA 56 at paras [183]-[184]

12 (1997) 188 CLR 313

13 [2000] HCA 56 at para [237]

14 [2000] HCA 56 at paras [190]-[191]

15 [2000] HCA 56 at para [284]

Wife not entitled to deceased husband's semen

In the matter of Gray [2000] QSC 390, Supreme Court of Queensland, Chesterman J, No 8459 of 2000

TINA COCKBURN, BRISBANE

An application by a wife for an order authorising her to have a sperm sample removed from her deceased husband has been refused by the Supreme Court of Queensland.

The facts

The applicant's husband died unexpectedly in his sleep. The couple had one child and had intended to have another in the near future.

The applicant wished to become pregnant through artificial insemination, using semen taken from her dead husband. For such a procedure to have any chance of success, the fluid must be extracted within 24 hours of death.

The applicant's husband died intestate, although the applicant was likely to be appointed administrator of his estate. The deceased's father, his next of kin, had consented to the procedure. The deceased had given his consent to the removal of organs in the event of his

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death, though there was no evidence of any consideration of or consent to the proposed procedure.

The applicant brought an urgent application requesting orders to permit the taking of semen and its storage but preventing its use without a further court order. The applicant submitted that the court had the power to make the order sought by reason of s8 of the *Supreme Court of Queensland Act* 1991 and/or its inherent jurisdiction *parens patriae*.

The decision

Despite the similar case of *AB v Attorney-General of Victoria*[1] where an order similar to the one sought was made, Chesterman J refused the application for the following reasons:

Ethical guidelines refer to "prohibited/unacceptable practices" including "the use in ART treatment programs of gametes[2] or embryos harvested from cadavers",[3] although these guidelines have uncertain status and no apparent statutory force.[4] The protection of an IVF clinic from a charge that it was acting unethically was not sufficient reason to make the orders sought.[5]

Section 8 of the *Supreme Court of Queensland Act* 1991 provides that the court has all jurisdictions that is necessary for the administration of justice in Queensland and, subject to the Commonwealth Constitution, unlimited jurisdiction at law, in equity and otherwise. His Honour said that "the section does not confer power on the judges of the court to do whatever accords with their own, perhaps idiosyncratic, views of justice. The jurisdiction is to afford justice to litigants according to law, ie. established legal principle."[6] In this case it was difficult to identify any principle which would justify making the order[7] as the application itself was implicit acceptance that neither the widow nor next of kin had a right to interfere with the body.

The jurisdiction parens patriae[8] did not give the court jurisdiction to make the orders sought as its subject matter appears to be limited to the questions of custody, guardianship and welfare of children, and the protection of property subject to a charitable trust and does not extend to dead bodies.[9]

"it was impossible to assess what was in the best interests of any child which may be born, though it was difficult to see 'that the interests of such a child will be advanced by inevitable fatherlessness'."

Apart from statute, there is no right to interfere with a body as there is generally no property in the dead body of a human being.[10] The executors or administrators of the deceased or other persons charged by the law with the duty of interring the body simply have a right to the custody and possession of the body until it is properly buried.[11] The inference from this is that there is a duty not to interfere with the body or to violate it.[12]

Section 236 of the *Criminal Code* (Qld) 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. It is at least arguable that removing part of the testicles of a dead man would come within the section.[13]

Part 3 of the *Transplantation and Anatomy Act* 1979 which regulates the removal of tissue[14] from dead bodies. The removal must be for transplantation into the body of a living person or for some "therapeutic...or...other medical or scientific purpose". The applicant's purpose is not one of these so the Act does not apply.[15]

Even if the court had some general overriding power to permit the applicant to have reproductive tissue taken from her husband's body, such power would be discretionary.[16] If there was such power the order sought should be refused because the deceased did not expressly consent to such a procedure in his lifetime; the court could have no confidence that the applicant's desire is a result of careful or rational deliberation given the urgency, circumstances of her husband's death and the likelihood that she must have been suffering greatly from grief and shock; and it was impossible to assess what was in the best interests of any child which may be born, though it was difficult to see "that the interests of such a child will be advanced by inevitable fatherlessness".[17]

His Honour concluded his judgment with the following comment:

> Artificial reproduction is part of rapidly changing and expanding medical technology...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. PL

Footnotes:

1 BC 9803488, 12 July 1998; 23 July 1998. It was specifically noted by Chesterman J that s43 of the *Infertility Treatment Act* (Victoria) 1995 makes it unlawful for a woman to be inseminated with the sperm of a dead man.

2 Gametes are reproductive cells which would include semen.

3 See Chapter 11 (11.11) of the "Ethical Guidelines on Assisted Reproductive Technology" published by the National Health and Medical Research Council.

4 At para 8 and see A Stuhmcke, "The Legal Regulation of Foetal Tissue Transplantation", Vol 4, *Journal of Law and Medicine*.

5 At para 8.

6 At para 9.

7 At para 9.

8 See generally *Fountain v Alexander* (1982) 150 CLR 615 at 633 per Mason J;

Secretary, Department of Health and Community Services v JWB & SMB (1991-1992) 175 CLR 218 at 279-280 per Brennan J.

[9] At para 10. His Honour found support for his conclusion in the decision of O'Keefe J in *MAW v Western Sydney Area Health Service BC* 200003155, 24, 25 April; 3 May 2000. In that case the person from whom it was desired to extract semen had not died but had suffered severe brain damage in an accident, was on life support and death was imminent. The court found its parens patriae jurisdiction did not extend to giving consent, on behalf of the comatosed and dying man, for the removal of semen because the procedure could not be said to be for his welfare or protection.

[10] At para 12: *Williams v Williams* [1882] 20 Ch D 659 at 662-665 per Kay J; see also *Doodeward v Spence* (1908) 6 CLR 406.

[11] At para 18.

[12] At para 20.

[13] At para 17; relying on *Reg v Sharpe Dea & Bell CC* 160

[14] Which is defined so as to include semen.

[15] Para 22.

[16] Para 23.

[17] Para 23.

A statement of fact or argument? A point of practice from the High Court

Hancock Family Memorial Foundation Limited v Porteous [2000] HCA 51

ANNE MATTHEW, BRISBANE

A common error occurring in the terms of summary of argument has been recently highlighted by the High Court leading to a concise statement of best practice. Practitioners would do well to heed their Honours' remarks which were stated to be of general application.

Before dismissing the applicant's appeal in *Hancock Family Memorial Foundation Limited v Porteous* [2000] HCA 51 (8 September 2000), McHugh and Gummow JJ expressed their concern at the terms of the summary of argument filed by the applicants. The statement of factual background did not state all the facts found by the trial judge and the Full Court to be relevant to the issues in the case. Rather, it was a statement of the facts as seen by the applicants.

McHugh and Gummow JJ offered the following remarks generally in relation to the distinction between facts and argument when seeking leave to appeal to the High Court:

- The statement of factual background in the summary of argument will not fulfil its function unless it states concisely but comprehensively the facts found or acted upon and considered relevant by the Court whose order is the subject of the appeal.
- In jury trials, the statement of factual background should state the evidence as to every material fact that could support the jury's verdict.
- If the applicant disputes any finding of fact by the lower court or its relevance, the place to do it is the applicant's summary of argument, not the statement of factual background.
- If the applicant wishes to assert that a fact should have been found, the place to do it is the summary of argument.
- If a special leave question does not arise unless some preliminary issue of fact or law is first determined in the applicant's favour, then it is clearly misleading to state the special leave question without indicating that there are issues which have first to be determined.

Clearly the High Court sees the statement of factual background as a forum only for a frank, faithful and comprehensive statement of the material facts as found in the lower courts, regardless of whether they are favourable to the applicant. Anything less may be tantamount to misleading the High Court as to the real issues arising in the application for special leave to appeal. PL

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