Property Rights, Gametes, and Individual Autonomy

How Can It Work for New Zealand?

Ella Julie Smith

A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (with Honours) at the University of Otago.

October 2017.

Acknowledgements

To my supervisor, Jesse Wall. Thank you for helping and guiding me to develop this dissertation into something that I can be proud of. Your insight and knowledge of this topic has been incredibly valuable throughout this year.

To my family. Thank you for your constant support, guidance and and love. Special shout out to Mum, for without your encouragement and daily calls, I wouldn't have made it through my first year in Dunedin. I hope I've made you proud.

To my law buddies (Lakin, Tineke, Gen, PK, Waiana, Maddy, Julia, Tim and Cameron). I cannot thank you enough for your amazing friendship, support and encouragement over the years. You have all made this journey through law school one of the best experiences of my life.

And finally, to Missy, for being the best, cutest, and fluffiest dog in the world. Without your unconditional love, I would not be here today. Who's a good girl?

You are x.

TABLE OF CONTENTS

List of Abbreviations

ACC	Accident Compensation Act 2001.
ACART	Advisory Committee on Assisted Reproductive Technology.
ECART	Ethics Committee on Assisted Reproductive Technology.
HART	Human Assisted Reproductive Technology Act 2004.
HFEA	Human Fertilisation and Embryology Act 1990.
The Code	Code of Health and Disability Services Consumers Rights' Regulations 1996.
The Guidelines	Guidelines for the Storage, Use, and Disposal of Sperm from a Deceased Man
The Order	Human Assisted Reproductive Technology Order 2005.

INTRODUCTION

Fertility health is declining in both men and women in New Zealand,[1] increasing the need for intervention to help the conception of a child for couples and women. However, where technology can present a solution, it can cause an issue for the law; what happens when the unit breaks down and destroys the gametes[2] it was storing for these hopeful people? This issue arose in England with the case *Yearworth v North Bristol NHS Trust*.[3] Six men stored their sperm before their cancer treatments took place. While some recovered their fertility, others did not and one did not survive. However, they all lost their stored sperm when the storage unit malfunctioned. The English Court of Appeal allowed their claims of negligence and bailment on the basis that there was a property interest in their sperm.

To the layperson, this may seem like an obvious solution; their sperm is theirs so they have rights to claim compensation for its negligent destruction. But the answer that *Yearworth v North Bristol NHS Trust* provides is less obvious than it appears. It flouts the 400-year old rule that the living or deceased body and its materials are not capable of being owned by any definition of that word. While other jurisdictions had begun to develop exceptions to the so-called 'no-property rule' as required by technological advances, *Yearworth v North Bristol NHS*

[1] Nigel Dickson "Waiting to start a family could be more problematic than thought: Otago Study" (23 February 2015) University of Otago <http://www.otago.ac.nz/news/news/otago087369.html.>

[2] Human Assisted Reproductive Technology Act 2004, s 2 defines 'gametes' as an egg or sperm, whether mature or not, or any other cell that contains only 1 set of reproductive materials and can be used for reproductive purposes.

[3] *Yearworth v North Bristol NHS Trust* [2009] EWCA 37.

Trust was still a game changer in the common law world in regards to property rights in gametes.[4]

What has become apparent in the near decade since *Yearworth v North Bristol NHS Trust* is the application of its rationale in similar yet significantly distinguishable cases. Such cases raise an important question; does the application of property rights in gametes hinder individual autonomy, the fundamental principle of medical law? Therefore, the purpose of this dissertation is to discern the effect of such cases in other jurisdictions and provide an analysis on what approach New Zealand ought to consider when the issue comes to fruition here

This dissertation contains three chapters. Chapter I provides an overview of the no-property rule in other jurisdictions and consequently the landscape in which New Zealand will be guided by when a similar case arises. Specifically, this chapter looks at the history of the rule, the work and skill exception and *Yearworth v North Bristol NHS Trust* to show how property rights can enhance and protect individual autonomy.

Chapter II is a guide of how a case such as *Yearworth v North Bristol Trust* may be decided by New Zealand courts. It also considers the benefits and detriments to individual autonomy if property rights are allowed to exist in this scenario, and overall whether *Yearworth v North Bristol NHS Trust* should be applied in New Zealand.

Chapter III considers how *Yearworth v North Bristol NHS Trust* has been interpreted and utilised in later cases regarding a widow's right to use their deceased husband's sperm, and the

[4] The no-property rule and the plethora of cases and commentary devoted to it, some of which will be looked at in this dissertation, discuss all forms of the human body as being property. However, this dissertation is limited to gametes.

implications of this to individual autonomy. This chapter concludes on the positions New Zealand ought to take in regards to property rights in gametes.

CHAPTER I: THE CONCEPTION AND EXCEPTIONS OF THE NO-PROPERTY RULE.

This chapter aims to explain the history and problems with the application of the no-property rule and its exceptions until the case *Yearworth v North Bristol NHS Trust*. Within its specific facts, *Yearworth v North Bristol NHS Trust* may not be problematic to individual autonomy in medical law, and fact provide protection for the principle.

I. The Conception of the No-Property Rule.

A. The Misinterpretation of Haynes' Case.[5]

The conception of the no-property rule is interesting to say the least. Haynes stole the shrouds wrapped around the bodies of three buried cadavers. Who, if anyone, did Haynes' steal these shrouds from? The answer was no one; a cadaver could not have a property interest in the shrouds. These cadavers Haynes unearthed were 'nothing but a lump of earth' which 'hath no capacity' to have an interest in anything.[6]

Later in the century, Coke explained the case quite differently. Rather, it was the cadaver itself that was incapable of having property rights *attached* to it. Therefore, the cadaver could only belong to the Ecclesiastical cognizance.[7] This meant that a cadaver could not be owned, taken possession of, transferred or held as security. As a result, the no-property rule was conceived from a misinterpretation. However, this did not stop the no-property rule from being applied without qualm[8] for the next 300 years. Why? It made sense. During the 17th century, a cadaver

[5] *Haynes' Case* (1614) 12 Co Rep 113; 77 ER 1389.
[6] Ibid.
[7] Edward Coke "The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes" (1644).
[8] See: *Williams v Williams* (1882) 20 Ch.D 659.

was unusable and unpreservable. The value a body could have to another, or even several others, would not have crossed even the most medically alert minds of the day.[9] Therefore, the no-property rule persisted in its strict application until just over 100 years ago, when the value of the body was realised in a rather unconventional way.

II. The First Exception: Work and Skill.

A. Doodeward v Spence.[10]

In 1868 New Zealand, a child was still-born with two heads. The child was preserved in a jar and 40 years later came into the possession of the plaintiff in this case, who used the child as an attraction in a circus. Upon seeing the child, a police officer seized it with the intention of laying it to rest. The plaintiff sued the officer in both conversion and detinue, but both claims relied upon him having a property right in the preserved child. According to Higgins J of the High Court of Australia, no property rights can exist in a cadaver within the common law, so both claims must fail.[11] The majority did not agree. Griffith J declared that this child had taken on attributes distinguishing it from other cadavers awaiting burial. These differences lay in the work and skill applied to the corpse:[12]

> [W]hen a person has by the lawful exercise of work and skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it…

[9] Remigius N Nwabueza "Death of the "No-Property" Rule from Sperm Samples" (2010) 21 Kings Law Journal 561, at 561-2.
[10] *Doodeward v Spence* (1908) 6 CLR 406.
[11] At 424.
[12] At 414.

Griffith CJ accepted that 'not much' work and skill had been applied to the child, but still enough for it to acquire value and therefore changing its attributes into something akin to property.[13] Barton J agreed with Griffith CJ but cautioned against the use of this exception to the no property rule if it usurps public health policies requiring speedy burials, or the entirety of the no-property rule itself.[14]

B. Problems with Doodeward v Spence.

Doodeward v Spence provides an exception to the no-property rule only when the body (or its parts) has a new function that emulates that of an ordinary object as opposed to a human being.[15] Griffith CJ refused to give a list of the possible means in which a body could become property,[16] providing a wide definition to work and skill. Consequently, *Doodeward v Spence* has been authority for a plethora of cases defining more situations where this exception can be used on the no-property rule. However, its unique set of facts developed equally unique issues.

I. The medical value of a body.

For its time, *Doodeward v Spence* was a modern example of how a dead body could be of value to another in a commercial setting. However, since the case, there have been developments in medical technology requiring the use of body parts and materials. For example, while blood transfusions had been in contemplation since 1628, the discovery and use of anticoagulants in 1914 has allowed blood to be stored for transfusions, allowing the blood bank system to be

[13] At 414-5.
[14] At 417.
[15] Muireann Quigley "Property in Human Biomaterials – Separating Persons and Things?" (2012) 32 Oxford Journal of Legal Studies 659, at 663.
[16] *Doodeward v Spence*, above n 10, at 414.

established in 1932.[17] In 1954, the first successful kidney transplant from a live person was performed, shortly followed by the first successful transplant from a deceased person.[18] In 1978, Louise Brown was born, the first child conceived from IVF procedures in the world.

These developments in medical technology and healthcare are significant, but do not easily translate themselves into the work and skill exception expressed in *Doodeward v Spence*. To be property, the work and skill must change the attributes of the body (or materials) to something no longer akin to the human body. However, all of these procedures use products with the intention that they function in their ordinary way; blood to pump around the body, a kidney to filter blood and urine, and gametes to fertilise and produce a child. Therefore, *Doodeward v Spence* left a lacuna in the protection of blood, organs and reproductive materials in the law.

II. Who has the property interest?

The work and skill exception only presents property rights to the person who applied the work and skill. Whether the the foetus had a property interest in itself was never a tenable proposition, so the issue of whether the originator[19] could have property rights in the body was not considered in *Doodeward v Spence*. However, the issue arises when body parts and materials are removed, as seen in *Moore v Regents of the University of California*.[20]

---

[17] Advancing Transfusions and Cellular Therapies Worldwide "Highlights of Transfusion Medical History" Advancing Transfusions and Cellular Therapies Worldwide <http://www.aabb.org/tm/Pages/highlights.aspx>

[18] United Network for Organ Sharing "History" United Network for Organ Sharing <https://www.unos.org/transplantation/history/>

[19] The term 'originator' is used throughout this dissertation to refer to the person from whom the separated bodily materials come from.

[20] *Moore v Regents of the University of California* 51 Cal.3d 120.

(a) *Moore v Regents of the University of California.*

Moore had his spleen removed as a part of his treatment for leukaemia. Golde, Moore's doctor, obtained consent to perform this procedure and the numerous tests that followed. What Moore was not aware of (and therefore had no way of consenting to), was that Golde was also studying his cell-line. The result of Golde's research on Moore's cell line was estimated to be worth billions. Upon learning about this, Moore sued Golde in conversion in order to obtain a share of these profits. Moore's burden to prove was that as the originator of the cells he retained a property interest in his cell line of either ownership or possession (although it was clear on the facts Moore did not presume to have possession).[21]

Pallen J, for the majority of the Supreme Court of California, held that Moore did not have ownership of his cells. There was no applicable authority that showed conversion could cover Moore's limited interest in his cells,[22] nor should conversion principles extend to cover this situation.[23] To say that Moore had ownership of his cells would have a chilling effect on desirable research activities, and investors would be less likely to invest if there were potential claims for conversion.[24] Of course, this has to be balanced against principles of informed consent and fiduciary duties.[25] But Pallen J found a solution to this; without restricting research by accepting Moore had ownership of his cells, there can be a requirement of obtaining informed consent before any research occurs.[26] To Pallen J, this protects both the researchers and the patient in these scenarios.

[21] At 7.
[22] At 9.
[23] At 18.
[24] At 15.
[25] At 14.
[26] At 18.

Broussard J, in his dissent, was dubious of Pallen J's summation of the facts, particularly in his reference to 'innocent researchers', when it was clear that Golde intentionally withheld from telling Moore the reason for the numerous tests he was conducting.[27] According to Broussard J, a person has the right to control their body, and this control extends to when parts of it are removed. Withholding the information was wrongful interference with this right, and therefore Moore should have succeeded in his claim for conversion.[28]

Mosk J went even further in his dissenting judgment. To say Moore had no claim to conversion because there was no applicable authority was an affront to the common law itself, as the purpose of the common law is to develop as the society it governs develops.[29] He argued conversion should extend to include Moore's situation, since the only real difference between his claim and any another conversion claim was the subject matter.[30] Furthermore, Mosk J believed Pallen J's conclusion skewed the balance between facilitating research and the patients' right to autonomy.[31] Society demands fairness and respect to the human body. Golde had acted wrongly and yet the majority's decision provides no repercussion. Property rights would, and therefore should, be employed to protect Moore and others like him in this instance.[32]

To conclude, while the work and skill exception from *Doodeward v Spence* was not specifically applied in *Moore v Regents of the University of California,* the same result could be reached by using the exception alone. By their application of work and skill, Moore's cell lines do not

[27] At 21.
[28] Ibid.
[29] Ibid.
[30] At 23.
[31] At 27-29.
[32] At 31-32.

possess their natural characteristics, and therefore are capable of being Golde's property. It shows the effect of *Doodeward v Spence,* is that until there is an application of work and skill to body parts and materials, there is no property in the body materials. The dissenting judges, on the other hand, understood this paradox.

C. Summary of Doodeward v Spence and its Implications.

While *Doodeward v Spence* provided an exception to the no-property rule that was fitting to the capabilities of its time and unique set of facts, it produced more questions than answers in regards to property rights in separated body parts and materials; specifically, does the originator have any property rights to them? As seen in *Moore v Regents of the University of California*, the originator does not, and the effect is the originator's right to individual autonomy is frustrated. The limitations of *Doodeward v Spence* were noted by Rose LJ in *R v Kelly*.[33]

R v Kelly concerned the theft of preserved body parts from the Royal College of Surgeons. However, to be stolen, the body parts must have been the college's property. Applying the work and skill exception worked in this particular instance, as it was not so different to the situation in *Doodeward v Spence* itself. But Rose LJ noted the need for further developments in exceptions to the no-property rule, particularly when body parts and materials are removed but intended to retain their natural function.[34] This obiter statement is important, as it shows the developments in medical technology may allow, or indeed require, the originator to have a property interest in the body parts or materials, rather than whoever applied the work and skill.

[33] *R v Kelly/R v Lindsay* [1998] ALL ER 687.
[34] At 631E.

III. Yearworth v North Bristol Trust.

Yearworth v North Bristol Trust provides the answer Rose LJ alluded to in *R v Kelly*, that property rights can exist in gametes without the requirement of work and skill. In the case, six men were all diagnosed with cancer and, as suggested by their doctors, all provided a sample of their sperm prior to their treatments in case their fertility was affected. While some recovered their fertility when they went into remission, others did not and one did not make it to remission. However, the storage unit containing their sperm malfunctioned and destroyed all of their samples. Two issues were raised at the English Court of Appeal; was this a personal injury to the men, or was it damage to their property? Lord Judge LJ concluded that their sperm was capable of having property, and the men, who 'alone generated and ejaculated the sperm' for their own use, owned this right.[35] The following is how Lord Judge CJ came to this conclusion.

A. Personal Injury.

The men's first claim was that they had suffered a personal injury when their sperm was destroyed. They reasoned that if this had happened while the sperm was inside them, it would be a personal injury.[36] However, Lord Judge CJ was quick to quell this claim. Inside the body, damage to the sperm would be a personal injury, however, it was a 'fiction' to hold the same for ejaculated sperm.[37] This was because of the lack of authority about separated bodily materials constituting a personal injury. The closest analogy presented to the Court of Appeal was a smattering of pregnancy cases, where pregnancy was found to be a personal injury. However, since those cases were rationalised on the effects of pregnancy *inside* the mother's

[35] *Yearworth v North Bristol NHS Trust*, above n 3, at 45(f)(i).
[36] At 23.
[37] At 20.

body, these cases were distinguishable.[38] Therefore, Lord Judge CJ could simply not conceptualise the stored sperm as being a personal injury to the men themselves:[39]

> We must deal with realities. To do otherwise would generate paradoxes, and yield information, productive of substantial uncertainty, expensive debate and nice distinctions in an area of law which should be simple, and the principles clear…the law would swim into deep waters in relation to the continued biological activity.

Therefore, the men's personal injury claims failed.

B. Property damage.

In the alternative, the men argued that if the sperm could not be conceptualised as a part of the body, then it could be regarded as a *thing* that the men owned, allowing the men to claim negligence and bailment.

Lord Judge CJ acknowledged that the work and skill exception outlined in *Doodeward v Spence* would work in this situation.[40] However, taking note of Rose LJ's statement in *R v Kelly* about how the work and skill exception was built on exceptional circumstances, could not provide a stable foundation for what is a constantly developing medical treatment.[41] So rather than using the exception, Lord Judge LJ looked at whether the relationship the men had with the sperm was akin to property, the most likely being the right to use the sperm, and the nexus between

[38] At 20.
[39] At 23.
[40] At 45.
[41] *R v Kelly*, above n 33, at 630G; *Yearworth v North Bristol NHS Trust*, above n 3, at 36.

this right along with the effect of the damage caused to it.[42] To establish this, Lord Judge CJ considered the Human Fertilisation and Embryology Act 1990 ('HFEA').

I. Limitations on the men's use of their sperm in HFEA.

There are several limitations within HFEA on the how the men were able to use their sperm. They could not make an embryo, store or test, prepare, package, transport and deliver their sperm on their own, as these activities can only be performed by a licenced person under HFEA.[43] The licenced person had the power to refuse any of these activities as well.[44] Therefore, the men were limited to *requesting* how their sperm could be used, as opposed to being able to *direct* its use.[45]

II. Informed Consent.

The aforementioned limitations are only one of the 'twin pillars' of HFEA.[46] The other is informed consent. It was true that the men could only request their sperm be used, but the licence holder is unable to do *anything* with the sperm without their informed consent, thus allowing the men to maintain negative control over their sperm.[47] Furthermore, limitations on how property can be used are common without diminishing the property right as a whole.[48]

The effect of Court of Appeal's findings was that the men retained the right to use their sperm through the HFEA. Their sole purpose of producing it was to be able to use it as a later date,

[42] *Yearworth v North Bristol NHS Trust,* above n 3, at 28.
[43] At 42.
[44] Ibid.
[45] Ibid.
[46] At 44.
[47] At 45(f)(ii).
[48] Ibid.

thus creating a nexus between the right and the damage. Therefore, the men had a property interest in their sperm.[49]

IV. Why Yearworth is Significant: Individual Autonomy.

A. Individual Autonomy.

Individual autonomy is the root of many disciplines of law, but particularly in medical law. It is the recognition that every person has right to self-determination and self-rule, providing exclusive control their lives. The fundamental expression of this control is through the body,[50] which is recognised in medical law by requiring informed consent.[51] Until informed consent is provided, no one can interfere or provide medical treatment to the person, even if it results in their death.[52]

B. Yearworth v North Bristol NHS Trust's Significance.

There are clear similarities between the concept of individual autonomy and the men's right to use their sperm, causing *Yearworth v North Bristol Trust* to be a significant case for individual autonomy. Remember that Lord Judge CJ could not conceptualise the separated sperm as being a part of the body,[53] therefore individual autonomy could not extend to the separated sperm. However, by finding the men had a property interest through the right to use their sperm, the effect is essentially the same; both provide control of the sperm to the exclusion of others.

---

[49] At 45(f)(v).
[50] Jesse Wall and John Lidwell-Durnin "Control, Over My Dead Body: Why Consent is Significant (and Why Property is Suspicious)" (2012) 12 Otago LR 757 at 768.
[51] Sarah Jennings "Medical Law and Individual Autonomy: Competing Perspectives" (2003) 2 Galaway Student L Rev 104, at 105.
[52] See generally: *Re T (Adult: Refusal of Treatment)* [1993] Fam 95; *Re: C (Adult: Refusal of Treatment)* [1994] 1 WLR 290; *Re B (Adult: Refusal of Medical Treatment)* [2002] 2 All ER 449; *St Georges Healthcare NHS Trust v S* [1999] Fam 26.
[53] *Yearworth v North Bristol NHS Trust,* above n 3, at 23.

Consequently, *Yearworth v North Bristol Trust* follows Mosk J's dissent in *Moore v Regents of the University of California* by using a property interest to recognise the importance of individual autonomy and protect it.

There are, of course, arguments against this position. Wall and Lidwell-Durnin argue that there is a fundamental difference between property rights and personal rights; the former can exist independently of the person, whereas the latter cannot.[54] As aforementioned, the body is the expression of the self. The corollary of this is even separated bodily materials remain connected to the body without the need of other rights to provide that relationship.[55] With this connection, it could be argued that in *Yearworth v North Bristol NHS Trust*, personal injury could have been a viable claim for the men. However, the Court of Appeal did conclude that separated bodily materials does not sit comfortably within the law as it stands, and as will be seen in Chapter II of this dissertation, New Zealand is likely to agree that damage to separated gametes is not a personal injury through the structure of the legislation in place. The reality of the situation may be that the embodiment of the self into separated gametes can only be protected *with* property rights, despite the fundamental differences between personal and property rights.

V. Conclusion.

The no-property rule found its way into the common law on a misinterpretation but persisted for nearly 300 years. The first chink in its robust armour from a medical law perspective was the work and skill exception in *Doodeward v Spence*, which stipulated that the body (and potentially its parts) *can* have property if applied work and skill changes its attributes so it resembles property more than the human body. However, the work and skill exception proved

[54] Jesse Wall and John Lidwell-Durnin, above n 50, at 773-4.
[55] At 774.

problematic when considering the development of medical technology and when there is conflict between the originators rights and those who applied the work and skill. *Yearworth v North Bristol NHS Trust* provides the necessary next step in providing property rights to gametes when their use enhances the concept of individual autonomy.

CHAPTER II: THE YEARWORTH QUESTION IN NEW ZEALAND; WHAT WILL OUR COURTS DO?

The importance of *Yearworth v North Bristol NHS Trust* in finding that property rights can exist in gametes has had consequence for other jurisdictions in the common law, so it is reasonable to suppose this case will be considered by New Zealand Courts. This chapter discusses how a similar case might be decided in New Zealand, as there are significant differences between English and New Zealand law.

I. Personal Injury.

Will New Zealand courts find the concept of destroying stored sperm being a personal injury to be a fiction as the English Court of Appeal did? A claim for personal injury in New Zealand looks very different in New Zealand to what the men in *Yearworth v North Bristol NHS Trust* were working with. New Zealand's unique approach for personal injury claims comes from the Accident Compensation Act 2001 (ACC). ACC (and its predecessors) has been providing New Zealanders with compensation for personal injuries since 1972. The no-fault basis of ACC ensures that everyone suffering a personal injury is eligible without unnecessary burdens, as seen in other jurisdictions.

A. ACC – The Requirements for a Personal Injury.

To receive cover for personal injury under ACC, there must be a personal injury that occurred within a qualifying circumstance.[56] The definition of personal injury is extensive, but in this context it is only necessary to note that it includes death,[57] physical injuries suffered to the

[56] Accident Compensation Act 2001, s 20(1).
[57] Section 26(1)(a).

person such as sprain or strain,[58] and damage to dentures or prostheses not caused by wear or tear.[59] Qualifying circumstances for cover includes personal injury caused by accident[60] and treatment injury.[61]

The issue faced for a claimant in New Zealand is the same issued faced by the men in *Yearworth v North Bristol Trust*; that separated stored sperm is a 'personal' injury. As clearly seen in *Yearworth v North Bristol NHS Trust,* separated bodily materials do not easily fall within this definition.[62] What encompasses the definition of a person is not defined in ACC, nor does the Interpretation Act 1999 provide any guidance, as it only defines 'person' to include corporations.[63] Without a clear definition, it can be argued that ACC does not expressly exclude the concept of damaged separated bodily materials amounting to a personal injury. There are three aspects of ACC and litigation surrounding it, that shed light on how 'personal' injury is to be interpreted in ACC; the purpose of ACC, damage to dentures and prostheses, and pregnancy cases.

I. The purpose of ACC: The Woodhouse report and beyond.

(a) The Woodhouse Report.[64]

Before the Accident Compensation Scheme, there were three means of claiming injury in New Zealand; negligence claims in court, the Worker's Compensation Act 1956 and social security

[58] Section 26(1)(b).
[59] Section 26(1)(e).
[60] Section 20(2)(a).
[61] Section 20(2)(b).
[62] *Yearworth v North Bristol NHS Trust*, above n 3, at 20. See also: Nicolette Priaulx "Managing Novel Reproductive Injuries in the Law of Tort: The Curious Case of Destroyed Sperm" (2010) 17 European Journal of Health 81, at 82.
[63] Interpretation Act 1999, s 29.
[64] Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Compensation for Personal Injury in New Zealand; Report of the Royal Commission of Inquiry* (Government Printer, Wellington, 1967).

payments. The first was rarely available to the general public due to the high costs of litigations, and the burden to prove someone else was at fault for your injury. The second was clearly intended to only cover workers, defined as those who have a contract of served with the employer.[65] The last did not take into account the state of injury, merely providing basic income.[66] The result was a lacuna in compensation provisions for personal injury for the majority of New Zealanders.

Therefore, the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand, was established to investigate this lacuna in New Zealand law and submit proposals for reform,[67] in what is now commonly known as the 'Woodhouse Report'. The submissions made in this report were, to put it very simply, was that the current means of providing compensation for personal injury worked for only a fraction of New Zealanders. Particularly, none truly examined the content of the injury and the loss the person suffered because of it.[68] To remedy this position, the Woodhouse report proposed a no-fault basis for personal injury available to every person in New Zealand. Why? New technology and industry practices created new hazards that could affect everyone, not just those specifically employed to work with those hazards.[69]

The practical effect of the Woodhouse report came into fruition with the Accident Compensation Act 1972. Its purpose aligned with what the Woodhouse report set to achieve; to promote safety and prevention of injury, rehabilitation of injured people and to provide

[65] Workers' Compensation Act 1956, s 2.
[66] Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand, above n 64, at 33.
[67] At 11.
[68] At 19.
[69] At 41.

compensation for all injured persons in New Zealand and the families in cases of accidental death.[70]

While the practical realities set aside some of the Woodhouse Report's recommendations for the administration of the Accident Compensation Scheme,[71] it is clear that the scheme was intended to provide coverage for a wide range of situations, and to develop the idea of personal injury alongside the developments of society.

(b) The current ACC.

The purpose of ACC currently is more expressive than the 1972 provisions. Its purpose is to enhance the public good by minimising both the overall incidence of injury in the community, and the impact of the injury on the community (including economic, social and personal costs).[72] Thus, the primary function of the Accident Compensation Corporation is to reduce the incidence and severity of personal injury.[73] It does so by ensuring that when injuries occur, that the goal is to achieve appropriate quality of life through entitlements to restore to the maximum practical extent of the claimants health, independence and participation.[74]

Therefore, it is established that the purpose of the Accident Compensation Scheme in both its first and current form, is to both prevent injury and to assist recovery of those who are suffering. The issue here is that when gametes are destroyed outside of the body, there are no means of getting the men back to the state they were in before the damage occurred i.e., the ability to use their stored sperm. For this reason, the situation falls on the side of a property claim, in that

[70] Accident Compensation Act 1972, s 4.
[71] See generally: Sir Geoffrey Palmer "ACC, 40 years on" (2013) NZLJ 76, at 77.
[72] Accident Compensation Act 2001, s 3.
[73] Section 3(a).
[74] Section 3(c).

when there is damage to property, it is accepted that the property cannot be returned. Thus, the only form of compensation truly available, is the value of that object.

(c) Summary of the purpose of ACC.

Prima facie, the purpose of the ACC focuses on rehabilitation; damage to separated sperm does not easily fit within this mould, despite the clear intention that the provisions and application of ACC are to develop alongside New Zealand's developing society. Therefore, it is necessary to establish how New Zealand courts have applied ACC to determine whether similar situations can provide guidance as to how widely personal injury can be interpreted within this context.

II. Dentures and prostheses.

As aforementioned, damage other than wear and tear to dentures and prostheses that replace a part of the human body constitutes personal injury.[75] This shows a willingness by Parliament to include separate things under the umbrella of 'person'. However, there is scant case law and commentary on how this provision is to be interpreted, other than the case *ACC v Egerton*.[76]

ACC v Egerton provides a limited example of how this definition of personal injury works. It was decided before the section was included in ACC and is only District Court authority. However, it does provide some insight into the issues dealt with here. The essential facts are that Mr Egerton fell, and his dentures were damaged as a result. ACC, while providing compensation for his other injuries, refused to pay for the cost of repairing the dentures. Judge Beattie agreed with Accident Compensation Corporation, in that damage to dentures could not be a personal injury.[77] Previous cases established that this was 'damage' rather than 'injury',

[75] Section 26(1)(e).
[76] *ACC v Egerton* 29/8/00, Judge Beattie, DC Wellington 225/00.
[77] At 2.

placing it in the property sphere of law.[78] Furthermore, in 1990, regulations had been established which allowed compensation for damage to dentures, prostheses, clothing and spectacles,[79] but this was revoked in 1992.[80] To Judge Beattie, this was a clear instruction by Parliament not to include such damage under personal injury.[81] Therefore, Mr Egerton could not receive compensation for this damaged dentures.

The general tenure of the arguments that Judge Beattie accepted, was that as the dentures were not a part of Mr Egerton's person, the damage to them could not, of itself, be an injury to him. The new provision in ACC clearly provides otherwise, overturning this decision. The question is why? There are two options; separate objects can be classified as being part of the person, and therefore the *Yearworth v North Bristol Trust* issue would be a personal injury in New Zealand. The alternative is that because as the dentures and prostheses function as a part of the body while *attached* to the body, it becomes a part of the person in this way. Therefore, it is necessary to consider another line of cases to determine what Parliament intended exactly.

III. The pregnancy cases.

In the past decade, a plethora of cases have come before the New Zealand courts claiming personal injury by pregnancy. These cases provide more obvious examples of how New Zealand will determine personal injury in a case in the *Yearworth v North Bristol NHS Trust* situation. Both *Yearworth v North Bristol NHS Trust* and the pregnancy cases in New Zealand

[78] At 3.
[79] Accident Compensation (Damaged or Lost Artificial Limbs Aids, Clothing and Spectacles Costs) Regulations 1990.
[80] Accident Compensation (Damaged or Lost Artificial Limbs Aids Clothing and Spectacles Costs) Regulations Revocation Order 1992.
[81] *ACC v Egerton*, above n 76, at 4.

deal with the right to choose whether to have a child or not, and therefore merit the same considerations.

(a) *Harrild v Director of Proceedings*.[82]

The circumstances of *Harrild v Director of Proceedings* are tragic to say the least. A woman's child died in utero, after alleged breaches by Harrild, her obstetrician, under the Code of Health and Disability Services Consumers' Rights Regulations 1996 ('the Code'), by failing to take reasonable care.[83] Harrild claimed the mother was unable to bring proceedings against him personally because of the statutory bar that prohibits claims such as this, when it can be covered under ACC.[84]The issue for the Court of Appeal was to determine the scope 'personal injury' under the ACC, specifically, *whether the child's death, who is separable to the mother, causes her a personal injury.*

Elias CJ, McGrath and Keith JJ formed the majority and determined that the child's death was a personal injury to the mother, however each taking their own approach to the matter. Elias CJ disagreed with Lord Mustill in *Attorney-General's Reference No 3* that a foetus is not an individual in law or in fact; there is a clear physical link between child's life and the mothers.[85] To Elias CJ, the connection overrides the fact that they are not the same, and this connection does not end until the birth or death of the child or mother.[86] In either situation, the mother is physically affected for the purposes of the definition of personal injury.[87] Keith J concurred with the Chief Justice, analogising the situation to that of a still birth as a result of a care

[82] *Harrild v Director of Proceedings* [2003] 3 NZLR 289 (CA).
[83] At [1].
[84] Accident Compensation Act 2001, s 317.
[85] *Harrild v Director of Proceedings*, above n 82, at [20].
[86] Ibid.
[87] At [21].

accident.[88] McGrath J also noted the difference between the mother and child, but submitted that a 'strictly scientific approach' is not appropriate in the context of ACC,[89] which requires a generous and flexible interpretation.[90]

Blanchard and Glazebrook JJ in their dissent determined that the foetus was a separate entity to the mother, and therefore its death could not be a personal injury to her. To claim the mother and her child are the same 'ignores biological reality', and creates inconsistencies and implications for the woman's autonomy.[91] Furthermore, since the child's death is deemed to be caused by failure to deliver the child, the death cannot be regarded as a personal injury to the mother.[92] The only way to incorporate the child's death as a personal injury to the mother would require the legislation to be re-written specifying that connection. Therefore, Blanchard and Glazebrook JJ would have dismissed the appeal.

It is clear from both the majority and dissenting judgments that in order for the child's death to be a personal injury to the mother, there had to be a degree of *connection* between the mother and the child. For the majority, a *physical link* was sufficient but the dissenting judges required the *sameness*. Either link is clearly not tenable for separated stored gametes, as they are neither physically connected or genetically the same to the originator.

[88] At [42].
[89] At [131].
[90] At [130].
[91] At [66].
[92] At [70].

(b) Other cases dealing with pregnancy.

Harrild v Director of Proceedings was one of the first cases to consider whether aspects of pregnancy and conception could be considered a personal injury to the mother. Cases following this decision had widened the premises for which pregnancy can be considered personal injury. However, these cases only serve this dissertation's purpose in so far as they solidify the position taken by the Court of Appeal in *Harrild v Director of Proceedings*. *Allenby v H*[93], involving a woman who became pregnant after undergoing a sterilisation procedure. Again, the practitioner claimed he was not liable because it was a personal injury. The Supreme Court determined that pregnancy in itself could be a personal injury to the mother. Their reasoning was based on the history of the Accident Compensation Scheme since its inception, where pregnancy was regarded as a personal injury as the result of rape.[94] While reforms to the legislation removed pregnancy from the definition of personal injury, Blanchard J concluded that if Parliament intended pregnancy to not be a personal injury, then it would have done so explicitly.[95] Therefore, if pregnancy from rape is a personal injury, then pregnancy as a result of treatment injury should be as well. *Allenby v H* was followed in *C v ACC*.[96] There, it was claimed that the continued pregnancy after omitting to diagnose it with spina bifida was a personal injury, as the mother would have sought to terminate the pregnancy had she known about the spina bifida. Again, this was considered a treatment injury, as the Court of Appeal was bound to follow the Supreme Court in *Allenby v H*. In both cases, the focus was the effects of pregnancy to the mother and what caused the pregnancy or continued pregnancy.

[93] *Allenby v H* [2012] NZSC 33.
[94] At [41]- [42].
[95] At [47].
[96] *C v ACC* [2013] NZCA 590.

B. Conclusion on Personal Injury.

Neither the purpose, dentures and prostheses, or the pregnancy cases surrounding ACC, provide authority for a successful claim in personal injury when stored gametes are destroyed. The focus of these cases is the effects of pregnancy to the mother, which requires a link between the child and the mother to be present. Therefore, if the New Zealand courts were to determine a case similar to *Yearworth v North Bristol Trust*, they would be likely to follow the case in that the destroyed sperm do not constitute a personal injury.

I. Property Damage.

The second and successful claim in *Yearworth v North Bristol NHS Trust* was that the men had the right to use their sperm within HFEA and this amounted to a property interest for both their claims of negligence and bailment. The question here is whether the Human Assisted Reproductive Technology Act ('HART'), New Zealand's legislative response to governing and regulating the use of assisted reproductive technology, allows for a similar property interest.

A. HART.

HART is New Zealand's legislative control on assisted reproduction and technology. It acts by establishing two committees; the Advisory Committee on Assisted Reproductive Technology ('ACART') and the Ethics Committee on Assisted Reproductive Technology ('ECART'). ACART's purpose is to establish guidelines and advice to ECART.[97] The guidelines are to be published and publically available,[98] but can only be published if ACART has given the public a reasonable opportunity to make submissions on the guidelines and take them into account.[99] HART provides a specific list of what ACART needs to produce guidelines, in which

[97] Human Assisted Reproductive Technology Act 2004, s 35(1).
[98] Section 36(2)(b).
[99] Section 36(1).

requirements of informed consent is included.[100] ECART considers applications for the specific performance of assisted reproductive procedures and research.[101]

I. What rights of use are retained by the originator in HART?

There are established procedures under HART in which no approval by ECART is required.[102] Established procedures are declared under the Human Assisted Reproductive Technology Order 2005 ('the Order'). In the Order, the collection and preparation of the sperm for artificial insemination, in vitro fertilisation treatments (IVF), sperm, egg and embryo cryopreservation and other conception methods are included as established procedures.[103] While there remains the functional aspect of assisted reproductive procedures, in that it requires specialist knowledge and technology to perform these procedures, the originator of the gametes has significantly more control over how the gametes are used than the men in *Yearworth v North Bristol Trust*. It could be argued that a person would be able to direct the specialist into performing the procedure they required, as opposed to only being able to *request* it like the men in *Yearworth v North Bristol Trust.*

II. Limitations Imposed on the Originator's Right to Use.

However, there are still limitations in how a person can use their gametes. Gametes can only be stored for 10 years,[104] unless approval has been given by ECART to extend the storage period.[105] Other assisted reproductive procedures also require consent,[106] and must be carried

[100] Section 37(1)(f).
[101] Section 28.
[102] Section 6.
[103] Human Assisted Reproductive Technology Order 2005, schedule, part 1.
[104] Human Assisted Reproductive Technology Act 2004, s 10
[105] Section 10A.
[106] Section 16(1).

out in accordance with the application conditions and regulations if ECART deems it necessary to impose such conditions or regulations.[107] If an assisted reproductive procedure is carried out without approval by ECART, it is an offence with a fine not exceeding $50,000.[108] ECART also has the ability to change the conditions of their approval,[109] or even cancel their approval if they become aware the activity imposes a serious risk to human health and safety.[110]

There are also prohibited actions in HART that ECART cannot approve.[111] These include actions such as using cloned embryos, creating and using hybrid and implanting human embryos into animals and vice versa.[112] It is also an offence to give or receive human gametes and embryos for consideration.[113]

III. Requirements of Informed Consent.

Like in HFEA, the requirement to provide informed consent before any procedure can occur is inherent within HART. HART's functional purpose is not to mitigate the amount of assisted reproductive procedures in New Zealand, but to secure the benefits of reproductive technology for society by protecting the health, safety, dignity and rights of all individuals who undergo such procedures.[114] HART aims to provide a protective framework that secures the benefits of of developing reproductive technology through the safest and most dignified means to the individual.

[107] Section 17.
[108] Section 16(2).
[109] Section 21(1).
[110] Section 22(1)(c).
[111] Section 8.
[112] Schedule 1.
[113] Section 13.
[114] Section 3(a).

In order to protect the individual, HART identifies one its guiding principles as requiring all persons undergoing procedures to give informed consent.[115] While HART itself does not provide a guide of what is required for informed consent, advice given to the Minister of Health by ACART states that informed consent in terms of the the Code is applicable to HART. The Code outlines a consumers' rights in relation to the services they receive by their provider.[116] The applicable rights include the right to effective communication so that the consumer is able to understand the information provided,[117] to be fully informed,[118] and that no service may be provided until the consumer has made an informed choice and given informed consent.[119]

IV. The Effect of HART: Does the Originator Have the Right to Use Their Gametes?

It is clear that HART, like HFEA, imposes limitations on how the originator is able to use their gametes and other reproductive materials. However, there are established procedures in HART that allow the originator to use their gametes without requiring permission, enabling the originator to direct that their gametes be stored or used to conceive and embryo. The conclusion reached here is that within HART, the originator clearly retains the right to use their gametes in a broader way than allowed by HFEA. From this analysis alone, it could be presumed that property rights can exist in gametes in New Zealand.

---

[115] Section 4(d).
[116] The Code of Health and Disability Services Consumers' Rights Regulations 1996 uses 'consumers' when referring to the person receiving medical procedures and 'provider' for those performing such procedures.
[117] Code of Health and Disability Services Consumers' Rights Regulations 1996, clause 2, right 5.
[118] Clause 2, r 6.
[119] Clause 2, r 7.

III. Conclusion.

Despite the differences in law between England and New Zealand, the conceptual difficulties remain the same, in supposing that separated body materials can be considered a part of the person for a personal injury. It is simply not within the current gambit of ACC as it stands, and has been applied to allow it. However, analysing HART, it is possible to come to the conclusion that a person whose gametes have been destroyed are able to claim there has been property damage. The right to use their sperm is arguably more extensive in HART than in HFEA, and therefore mimics the property right established in *Yearworth v North Bristol Trust.* As in *Yearworth v North Bristol Trust* there is a link between the property right and the nature of the damage sought to it, so it would be viable in New Zealand to claim negligence and bailment in a similar situation.

CHAPTER III: THE IMPLICATIONS OF *YEARWORTH V NORTH BRISTOL NHS TRUST*: NO CONSENT FROM THE DECEASED REQUIRED?

This final chapter outlines the potential issues with allowing property rights in gametes in New Zealand. The rationale in *Yearworth v North Bristol NHS Trust* provides the required development in exceptions to the no-property rule, based on advancing technology and medical treatments. This rationale also provides, arguably, an example of how property can be used to protect individual autonomy. However, later cases applying the *Yearworth v North Bristol Trust* do not come to the same result. The question is whether New Zealand, in taking note of the problematic developments in other jurisdictions, can come to a solution which proves most beneficial to individual autonomy.

I. The Effect of Yearworth v North Bristol NHS Trust in Later Cases.

The Court of Appeal in *Yearworth v North Bristol NHS Trust* established that the men had property rights in their sperm for two reasons. First, the developing technologies in medical law required a new statement on how property interests are to be utilised in the body and its parts and materials.[120] Secondly, the men retained the right to use their sperm for their own purposes, an incident of property as identified by Professor Honoré.[121] This right to use their sperm was interfered with when the storage unit containing their sperm malfunctioned, making it unusable for its intended purpose.

[120] *Yearworth v North Bristol NHS Trust*, above n 3, at 29.
[121] *Yearworth v North Bristol NHS Trust,* above n 3, at 28; Professor Honoré "Ownership" (1961) Oxford Essays in Jurisprudence, at Chapter V.

What is important to understand is that Lord Judge CJ did not create a *rule* establishing that property rights exist in gametes. Rather, he found that *within its particular context*, a property right could exist, and only existed when the nature of the right was frustrated by the damage. The issue is that later cases have applied *Yearworth v North Bristol NHS Trust* as a rule, and as will be explained, this proves to be detrimental to the principle of individual autonomy.

A. Bazley v Wesley Monash IVF.[122]

Mr Bazely was diagnosed with liver cancer and advised to store his sperm in case his fertility was affected. However, Mr Bazley died one year after his diagnosis, leaving behind his grieving widow, Mrs Bazley. Mr and Mrs Bazley were trying to have a child together at the time of his diagnosis, so it was clear that he intended to use his stored sperm at a later date. After his death, Mrs Bazley still wanted to use the sperm and applied to the court for the continued storage and use of it to conceive Mr Bazley's child.

Unfortunately for Mrs Bazley, Ethical Guidelines on the Use of Assisted Reproductive Technology, provided by the National Health and Medical Research Council, stated that written informed consent has to be provided for the posthumous storage and use of stored gametes.[123] Mr Bazley had signed an information sheet stating this, but did not provide written consent for the posthumous use of his sperm.[124] By this alone, Mrs Bazley could not continue to store or use the sperm.

However, the Queensland Supreme Court adopted another approach. Going through cases applying the work and skill exception and *Yearworth v North Bristol Trust*, the Court comes to

[122] *Bazley v Wesley Monash IVF Pty LTD* [2010] QSC 118.
[123] At [5]-[6].
[124] At [10].

the conclusion that 'in law and in common sense' the sperm was Mr Bazley's property and a part of his estate in his death, which Mrs Bazley was entitled to.[125] Specifically, the Court acknowledged that *Yearworth v North Bristol Trust* provided the *rule* that property rights exist in gametes,[126] without examining the context in which the English Court of Appeal made their decision in, the importance of which was noted by Lord Judge CJ.[127] When a property right is established, the ability to transfer the property also appears establish itself as a fundamental component of a property interest.[128] This, along with the definition of property in Queensland law being wide enough to encompass gametes,[129] lead to the Court's conclusion that the sperm was Mr Bazley's property, which was transferred to his wife through his estate upon his death.

B. Re Edwards.[130]

Mr and Mrs Edwards intended on having a child together but were having difficulties. The day before Mr Edwards was set to undergo further tests to determine what options were available for them to have a child, he was killed in a work place accident. Mr Edwards had expressed his desire to have a child with Mrs Edwards when he was having health issues, imploring her to still have his child before something happened to him.[131] Mrs Edwards applied for a court order allowing the removal and storage of his sperm so she might still have Mr Edwards biological child. His sperm was removed before his death, and so Mrs Edwards sought permission to use the sperm.

---

[125] At [33].
[126] At [27].
[127] *Yearworth v North Bristol NHS Trust*, above n 3, at 28.
[128] Jesse Wall *Being and Owning: The Body, Bodily Materials, and the Law* (Oxford University Press, Oxford, 2015) at 167.
[129] *Bazley v Wesley Monash*, above n 122, at [14]-[15].
[130] *Jocelyn Edwards; Re the Estate of the late Mark Edwards* [2011] NZWSC 478.
[131] At 7.

The Court could not give consent for Mrs Edwards to use the sperm in New South Wales, as the Assisted Reproductive Technology Act 2007 (NSW) ('ART') expressly forbid the use of gametes from a deceased person. However, the Court concluded that she would be able to use the sperm in another state, if she had an entitlement to the sperm. It was held that there was no real distinction between this case and *Doodeward v Spence,* where the application of work and skill made it capable of being regarded as property.[132] It should be noted that this is a problematic application of *Doodeward v Spence*, as Griffith CJ expressly stated that work and skill made it possible for there to be a property interest in the body *only if* the work and skill changed its attributes into something akin to property.[133] The sperm is intended to function as sperm does naturally, so the application is not clear here.

It was held that Mrs Edwards was entitled to the sperm, on the basis that no one else was entitled to the sperm.[134] Mr Edwards was not entitled to property rights of his sperm under the application *Doodeward v Spence* as he did not apply the requisite labour.[135] He did not have property in his sperm when he was alive, so it cannot be his to pass on in death.[136] Allowing the doctors who had applied the work and skill in extracting the sperm was not effective either, as they were acting as Mrs Edwards agents when performing the procedure.[137] Mrs Edwards on the other hand had rights beyond her position as administrator of Mr Edwards' estate.[138] This meant provisions prohibiting the 'supply' of gametes to another person without consent[139] did not apply, as her entitlement defined the action as being to 'release' the gametes to Mrs

[132] At 82.
[133] *Doodeward v Spence*, above n 10, at 414-5.
[134] *Re Edwards,* above n 130, at 123.
[135] At 87.
[136] Ibid.
[137] At 89
[138] At 89-90.
[139] Assisted Reproductive Technology Act 2007 (NSW), ss 21 and 22.

Edwards.[140] This was despite the necessity in ART to consider the implications of this to the future child produced as a result, and the issue that Mr Edwards had not even provided consent for his sperm to be removed from his body.[141]

C. Summary of Bazley v Wesley Monash IVF and Re Edwards: *The Implications to Individual Autonomy.*

These two Australian cases are examples of how *Yearworth v North Bristol NHS Trust* have been interpreted and applied when determining whether or not widows have the right to use their deceased husbands' sperm. The clear implications seen by the application of *Yearworth v North Bristol NHS Trust* is that it is being interpreted as a rule, conferring a property right in gametes *in rem*, which is considered an inappropriate application of the case.[142] This application is then being used to interpret the legislation. This contradicts this dissertation's finding that *Yearworth v North Bristol NHS Trust* can actually facilitate the protection of individual autonomy. In these cases, the establishment of property rights is clearly being used to circumvent the originators rights. The first consideration to determine whether New Zealand could come to the same conclusions as *Bazley v Wesley Monash IVF* and *Re Edwards*. If so, it needs to be established why individual autonomy is worth protecting in this context

[140] *Re Edwards,* above n 130, at 136 and 139.
[141] At 143 and 148.
[142] Luke David Rostill "The Ownership that wasn't meant to be: *Yearworth* and property rights in human tissue" (2013) 40 J Med Ethics 14, at 15.

II. New Zealand's Potential Application of Bazley v Wesley Monash IVF and Re Edwards.

A. ACART Guidelines.

The issue of whether property rights exist in a deceased person's gametes is not foreign to New Zealand.[143] Accordingly, HART asserts that ACART must provide guidelines in regards to the gametes derived from foetuses or deceased persons.[144] The Guidelines for the Storage, Use, and Disposal of Sperm from a Deceased Man ('the Guidelines') states that it is ethically unacceptable to collect sperm from a comatose or recently deceased person without their prior consent.[145]A a recent sub-project by ACART shows that clinics in this situation now, informed consent is still required by the person prior to their death before their sperm can be used to produce a child.[146] If the man has not stored their sperm prior to their death, then there can be no collection of sperm at his death if he has not provided written informed consent, *or unless a Court order is obtained.*[147] This leaves the door ajar into allowing decisions such as those seen in *Bazley v Wesley Monash IVF and Re Edwards* to be made in New Zealand.

I. R v Human Fertilisation and Embryology Authority, ex parte Blood[148]

The Guidelines also refer to *R v Human Fertilisation and Embryology Authority ex parte Blood* as a legal focus for this situation.[149] Mr and Mrs Blood were intending on having a child

---

[143] Guidelines for the Storage, Use, and Disposal of Sperm from a Deceased Man (February 2000) Prepared by the National Ethics Committee on Assisted Human Reproduction (NECAHR), at p 1.
[144] Human Assisted Reproductive Technology 2004, s 37(1)(d).
[145] Guidelines for the Storage, Use, and Disposal of Sperm from a Deceased Man, above n 143, at 2.3.
[146] Informed Consent Sub-Project: Clinic Policies, Rules and Processes, at 7.
[147] Ibid.
[148] *R v Human Fertilisation and Embryology Authority ex parte Blood* (1997) All ER 687.
[149] National Ethics Committee on Assisted Human Reproduction *Guidelines for the Use, Storage, Use and Disposal of Sperm from a Deceased Man* (February 2000).

together. However, Mr Blood contracted meningitis before they could conceive a child, so Mrs Blood asked the doctors to take samples of his sperm and stored shortly before he passed away. The case is an application for judicial review, as the Human Fertilisation and Embryology Authority ('the authority') would not authorise Mrs Blood to use the sperm, nor to export it to Belgium which would allow her to use the sperm without her late husband's consent, on the basis that both actions were contrary to HFEA.[150] The authority did not come to this decision lightly; taking into consideration the careful structure Parliament had set up in relation to assisted reproductive technologies and requirements for consent, and also allowing numerous submissions by Mrs Blood on the issue.[151] However, the authority failed to take into account the EC Treaty, which allows every member of the European community the right to receive medical treatment in any member state.[152] It was this lack of consideration that allowed the appeal, and required the authority to remake the decision in light of the EC Treaty.

Note that in *Ex Parte Blood,* Lord Woolf never discussed whether Mrs Blood had a property interest in her husband's sperm, or whether Mr Blood had a property interest to his sperm. It did not appear to be of any consequence to the issue at hand,[153] as *Ex parte Blood* was decided before *Yearworth v North Bristol Trust.* However, just like in *Re Edwards*, Mrs Blood obtained her husband's sperm after he had died, again proposing that such a situation is acceptable in New Zealand. Therefore, in addition to the likelihood of New Zealand adopting *Yearworth v North Bristol Trust* in a factually similar case, it is plausible that New Zealand courts will give widows rights to their deceased husband's sperm in the absent of their consent.

[150] At 690.
[151] At 691.
[152] At 697-698.
[153] *Yearworth v North Bristol NHS Trust,* above n 3, at 37.

III. To Protect, or Not to Protect, Individual Autonomy?

Clearly there is the potential for the decisions made in both *Bazley v Wesley Monash IVF* and *Re Edwards* to be adopted in New Zealand. As aforementioned, there are clear negative implications to individual autonomy. But there is still the question of whether the decisions would be the worst thing to happen to New Zealand law. The Courts in *Bazley v Wesley Monash IVF*, *Re Edwards* and *Ex parte Blood* were both faced with grieving widows, begging the Court to give them their only and last chance of having their loved one's biological child. Is a deceased person's right to individual autonomy more important that this? I propose that the answer in law, as presented in both HART and jurisprudence, is yes. This is for two reasons; individual autonomy is already severely restricted in the assisted reproductive context by the sheer nature of reproduction; and secondly, the deceased person is entitled to the right to individual autonomy just as much as the living person is.

A. The Limitations of Individual Autonomy.

I. Limitations on individual autonomy within itself.

Individual autonomy is not an absolute principle. It can be limited as required when imposed in law, depending on what is required in the circumstances.[154] Individual autonomy is already limited in medical law generally. To give consent to a procedure implies that the procedure had been offered. A person cannot demand the offer to be made, and as such cannot demand medical treatment. Usually, the main reason for not providing treatment is resource restrictions, such as in the English case, *R v Cambridge Health Authority, ex parte B.*[155] Here, a 10-year old girl was denied numerous procedures necessary to treat her leukaemia, as without them, she would die. However, even if they treatments were performed (which together cost around $75,000),

[154] Hayley Cotter "Increasing Consent for Organ Donation: Mandated Choice, Individual Autonomy, and Informed Consent" (2011) 21 Health Matrix 559 at 607.
[155] *R v Cambridge Health Authority, ex parte B (a minor)* [1995] 2 All ER 129 (CA).

there was only a fraction of a chance they would be successful. Therefore, the hospital board refused to give her the necessary treatment. First, the hospital board's decision was thrown out, as basing the decision on restricted resources did not provide an answer in regards to 'the wisdom…or legality of the decision'.[156] However, the Court of Appeal accepted the 'polycentricism' nature of the decision that the hospital board had to make.[157] The Court had no means of assessing all of the factors associated with these types of decisions.[158] Therefore, it is better to defer such decisions to the hospitals and treatment centres.[159]

This position is exemplified in New Zealand with the Code. The Code refers to the level of care and skill to be provided and how such service is to comply with legal, professional and ethical standards.[160] The purpose of such purposes is to minimise harm and maximise quality of life.[161] No where in the Code, when determining the service's standards, does it state that the service is *guaranteed*. This allows hospital boards and other health care providers the freedom to allocate their finite supply of resources.

II. Further limitations to individual autonomy in assisted reproductive procedures.

(a) Dual consent.

Unlike most other medical procedures, assisted reproductive procedures require more than one persons' consent. The Informed Consent Guidelines issued by ACART acknowledge the implications of one persons decision to other people.[162] A man can store his sperm with the

[156] *R v Cambridge Health Authority, ex parte B (a minor)* 25 BMLR 5 (QB), at 17.
[157] *R v Cambridge Health Authority, ex parte B,* above n 155, at 137.
[158] Ibid.
[159] Ibid.
[160] Code of Health and Disability Services Consumers' Rights Regulation 1996, cl 2, rights 4(1) – (2).
[161] Clause 2, r 4(3).
[162] Informed Consent and Assisted Reproductive Technology, at 3.

intention that one day he uses it to conceive a child. He can provide consent for that procedure to happen, but he cannot force a woman to be implanted with an embryo made with his sperm or inseminated with his sperm. She has to give consent before this can happen. This issue came to a head in *Evans v Amicus Health Care*.[163]

Evans v Amicus Health Care concerns a couple, Evans and Johnson, who created embryos together in the hope of becoming parents. However, their relationship ended before this happened. Evans then sought to use the embryos on her own, however, Johnson refused to give consent and sought the embryos to be destroyed, relying on the original consent forms which he signed which stated the embryos could only be used together.[164] Consequently, the case became a battle of rights; was Evans right to be a parent outweighed by Johnson's right to refuse the procedure to take place. It was held that Evans could not use the embryos without Johnson's consent, despite Evan's right to reproductive autonomy.[165] This case exemplifies both the strength of individual autonomy when it involves *refusing* the treatment, and its weakness when *demanding* treatment.

(b) Further considerations in HART.

Furthermore, informed consent is only one of many considerations that need to be taken into account by persons exercising powers or performing functions under HART. Such persons need to be guided by the health and well-being a child born because of assisted reproductive procedures or established procedures.[166] The child, if conceived with donor sperm, ovum or both, should be able to know their genetic origins and have that information provided to them.[167]

[163] *Evans v Amicus Health Care LTs & Others* [2004] EWCA Civ 727.
[164] At 18.
[165] At 90.
[166] Human Assisted Reproductive Technology Act 2004, s 4(a).
[167] Section 4(e).

It is also considered that women, more so than men, are directly and significantly affected by assisted reproductive procedures, requiring their health and well-being to be protected more so.[168] Not only are these considerations deemed principles of HART, they exemplify international human rights conventions.[169]

B. Individual Autonomy to be Respected for the Deceased.

Respecting, or even acknowledging, a deceased's person's individual autonomy may seem like a strange concept. Accepting the definition provided in chapter I, individual autonomy is about choice and the ability to govern and rule your own fate. In this sense, the deceased has the same capacity to make such choices as the 'lump of earth' they were analogised to in *Haynes' Case*. However, it has been argued by Wall and Lidwell-Durnin that it is not possible to separate the capacity to make choices about oneself and the body.[170] The choices and decisions a person makes may affect relationships with others and develop throughout life, and the body retains the physical representation of those choices.[171] This theoretical proposition is enforced throughout New Zealand's legal system. In relation to other bodily materials, consent is required before organs can be removed from the body.[172] It is a criminal offence to improperly or indecently interfere, or otherwise offer indignity to any dead human body or remains.[173]

C. Summary: To Protect Individual Autonomy? Yes.

Individual autonomy is already severely restricted in medical law, and even more so in regards to assisted reproductive procedures. The fundamental importance of individual autonomy in

---

[168] Section 4(c).
[169] See: United Nations Convention on the Rights of the Child 1577 UNTS 3, arts 3(1) and 8(1).
[170] Jesse Wall and John Lidwell-Durnin, above n 50, at 772.
[171] Ibid.
[172] Human Tissue Act 2008, s 22.
[173] Crimes Act 1961, s 150(b).

medical law implores its protection in the face of these limitations. This includes the deceased, as their body is the physical representation of the choices made throughout life.

IV. So What Should New Zealand Consider?

This dissertation has provided two scenarios of allowing property rights in gametes and the effect of this application to individual autonomy. The application in *Yearworth v North Bristol NHS Trust* provides protection to individual autonomy, as the concept of the self cannot extend to separated bodily materials. *Bazley v Wesley Monash* and *Re Edwards* provide examples of where property rights are used to compete with the informed consent regulations in statute.

If New Zealand's focus is to be to protect individual autonomy, then allowing property rights in gametes to those who have stored their gametes with the intention that they will be used by them serves to protect their individual autonomy.

New Zealand courts could implore ACART to produce more extensive guidelines in providing a mandate that gametes cannot be used for assisted reproductive procedures or extracted without prior consent from the deceased. The issue is that the Guidelines provided by ACART already do this. However, the courts in *Bazley v Wesley Monash IVF* and *Re Edwards* were influenced by the wide definitions of property in their laws. Therefore, it could be argued that New Zealand should consider placing a restricted version of property rights in gametes. It is possible for this to happen, the definition of property was to include gametes and other reproductive materials, *only if expressly stated in the will document.*

For example, the Wills Act 2007 defines property for the purposes of a to include a contingent, executory or future interest in property.[174] The Administration Act 1969, which deals with intestacy, defines 'estate' to mean real and personal property of every kind.[175] Prima facie, both of these could include gametes and other reproductive materials. Including a provision in these Acts to restrict gametes being defined as the persons' property or part of the estate unless expressly provided in the will document would protect individual autonomy by not allowing property interests to usurp it.

V. Conclusion

Allowing property rights for gametes in New Zealand would prove problematic for the situation where a widow's deceased husband stores sperm but provides no informed consent for the posthumous use of it. The structure of New Zealand law is likely to allow this to happen, but the restrictive limitations this context has on individual autonomy means that property rights ought to be considered carefully. If New Zealand's Parliament wishes to prevent this situation and protect individual autonomy, then including a restrictive definition of property for gametes in applicable legislation could command individual autonomy the protection in law it requires.

[174] Wills Act 2007, s 8(5)(i).
[175] Administration Act 1969, s 2(1) "estate'.

CONCLUSION

This dissertation aimed to provide an analysis of the current position of the 'no-property rule' in other jurisdictions in regards to gametes. As seen from the history of the no-property rule, it was necessary to develop exceptions to its strict application in order to be consistent with developing technologies. The work and skill exception conceptualised from *Doodeward v Spence* proved to be valuable during its time, but caused unfairness to the originator, as seen in *Moore v Regents of the University of California.* Therefore, at the time *Yearworth v North Bristol NHS Trust* made its way into the England Court of Appeal, there was a clear desire within the courts to expand the scope of the limitations to the no property rule further. *Yearworth v North Bristol NHS Trust* accomplished this, by establishing that within the specific context of the HFEA, the men retained the right to use their sperm, and therefore had ownership of their sperm for that limited purpose. It was argued that the effect of this was to protect individual autonomy, and that *Yearworth v North Bristol NHS Trust* was on its facts a reasonable application of property rights in gametes. For New Zealand, the gambit of the law in regards to both ACC and HART imply this position will also be taken in New Zealand.

However, it was noted that there are consequences to adopting the *Yearworth v North Bristol NHS Trust* approach, as seen by the cases *Bazley v Wesley Monash IVF* and *Re Edwards*. These two cases used a version of *Yearworth v North Bristol NHS Trust* that implored there was a general rule that property rights exist in gametes, even though this was not the intention of the English case. The result is that the property interest undermines individual autonomy, which especially needs protecting in this context. Therefore, is is suggested that rather than providing more guidelines about informed consent, the situation could be fixed through applying a restrictive definition of property rights in gametes into New Zealand legislation.

Bibliography

A Cases

1 New Zealand

ACC v Egerton 29/8/00, Judge Beattie, DC Wellington 225/00.

Allenby v H [2012] NZSC 33.

C v ACC [2013] NZCA 590.

Harrild v Director of Proceedings [2003] 3 NZLR 289 (CA).

Takamore v Clarke [2011] NZCA 587.

Takamore v Clarke [2012] NZSC 116.

2 Australia

Bazley v Wesley Monash IVF Pty Ltd [2010] QSC 118.

Doodeward v Spence (1908) 6 CLR 406.

Jocelyn Edwards; Re the estate of the late Mark Edwards [2011] NZWSC 478.

3 England and Wales

Evans v Amicus Health Care LTs & Others [2004] EWCA Civ 727.

Haynes' Case (1614) 77 E.R. 1389.

R v Cambridge Health Authority, ex parte B (a minor) 25 BMLR 5 (QB).

R v Cambridge Health Authority, ex parte B (a minor) [1995] 2 All ER 129 (CA).

R v Human Fertilisation and Embryology Authority ex parte Blood (1997) All ER 687.

R v Kelly/ R v Lindsay [1998] 3 All ER 687.

Re B (Adult: Refusal of Medical Treatment) [2002] 2 All ER 449

Re: C (Adult: Refusal of Treatment) [1994] 1 WLR 290

Re T (Adult: Refusal of Treatment) [1993] Fam 95.

St Georges Healthcare NHS Trust v S [1999] Fam 26.

Williams v Williams (1882) 20 Ch.D 659

Yearworth v North Bristol NHS Trust [2009] EWCA 37.

4 United States of America

Hecht v Superior Court of Los Angeles County (1993) 20 Cal. Rptr. 2d 275.

Moore v Regents of the University of California 51 Cal.3d 120.

B Legislation

1 New Zealand

Accident Compensation Act 2001.

Accident Compensation Act 1972 (repealed).

Administration Act 1969.

Crimes Act 1961.

Human Assisted Reproductive Technology Act 2004.

Interpretation Act 1999.

Wills Act 2007.

Workers' Compensation Act 1956 (repealed).

II Australia

Assisted Reproductive Technology Act 2007 (NSW).

III England and Wales

Human Fertilisation and Embryology Act 1990.

D Regulations, Guidelines and Orders

Accident Compensation (Damaged or Lost Artificial Limbs Aids, Clothing and Spectacles Costs) Regulations 1990.

Accident Compensation (Damaged or Lost Artificial Limbs Aids Clothing and Spectacles Costs) Regulations Revocation Order 1992.

Code of Health and Disability Services Consumers' Rights Regulations 1996

Guidelines for the Storage, Use, and Disposal of Sperm from a Deceased Man (February 2000) Prepared by the National Ethics Committee on Assisted Human Reproduction (NECAHR)

Human Assisted Reproductive Technology Order 2005.

E Treaties

United Nations Convention on the Rights of the Child 1577 UNTS 3

F Other Parliamentary Materials

Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Compensation for Personal Injury in New Zealand; Report of the Royal Commission of Inquiry* (Government Printer, Wellington, 1967).

G Books

Ben Thomas *Accident Compensation Act: Key Sections and Commentary* (Lexis Nexis, New Zealand, 2014).

Doug Tennent *Accident Compensation Law* (Lexis Nexis NZ Limited, New Zealand, 2013).

Jesse Wall *Being and Owning: The Body, Bodily Material, and the Law* (Oxford University Press, Oxford, 2015).

Remingius N. Nwabueze *Biotechnology and the Challenge of Property: Property Rights in Dead Bodies, Body Parts, and Genetic Information* (Ashgate Publishing Agency, USA, 2007).

Rohan Hardcastle *Law and the Human Body: Property Rights, Ownership and Control* (Hart Publishing, Oregon, 2007).

H Chapters in Books

Jesse Wall "R v Cambridge Health Authority, ex parte B (A Minor) [1995]: A Tale of Two Judgements" in Jonathan Herring and Jesse Wall *Landmark Cases in Medical Law* (Hart Publishing, Oregon, 2015), 111.

Loane Skene "Doodeward v Spence (1908)" in Jonathan Herring and Jesse Wall *Landmark Cases in Medical Law* (Hart Publishing, Oregon, 2015) 11.

I Journals

Alan Ryan "Self-Ownership, Autonomy, and Property Rights" (1994) 11 Social Philosophy and Policy 241.

Cynthia Hawes "Property Interests in Body Parts: *Yearworth v North Bristol NHS Trust*" (2010) 73 MLR 119.

E. Richard Gold "Body Parts: Property Rights and the Ownership of Human Biological Materials" (1997) 10 Harvard Journal of Law & Technology 369.

Hayley Cotter "Increasing Consent for Organ Donation: Mandated Choice, Individual Autonomy, and Informed Consent" (2011) 21 Health Matrix 559.

Imogen Goold, Loane Skene, Jonathan Herring and Kate Greasely "The Human Body as Property? Possession, Control and Commodification" (2013) 40 J Med Ethics 1.

Jesse Wall and John Lidwell-Durnin "Control, Over My Dead Body: Why Consent is Significant (and Why Property is Suspicious)" (2012) 12 Otago L Rev 757.

Jonathan Herring and P-L Chau "Interconnected, inhabited and insecure" why bodies should not be property" (2014) 40 J Med Ethics 39.

Jukka Varelius "The Value of Autonomy in Medical Ethics" (2006) 9 Medicine, Health Care and Philosophy 377.

Loane Skene "Proprietary Interests in Human Bodily Material: *Yearworth*, Recent Australian Cases on Stored Semen and Their Implications" (2012) 20 Med L Rev 227.

Luke David Rostill "The Ownership that wasn't meant to be: *Yearworth* and property rights in human tissue" (2013) 40 J Med Ethics 14.

Mark Pawlowski "Property in Body Parts and Products of the Human Body" (2009) 30 Liverpool Law Rev 35.

Muireann Quigley "Property in Human Biomaterials – Separating Persons and Things?" (2012) 32 Oxford Journal of Legal Studies 659.

Nicolette Priaulx "Managing Novel Reproductive Injuries in the Law of Tort: The Curious Cae of Destroyed Sperm" (2010) 17 European Journal of Health 81.

Remigius N Nwabueze "Death of the 'No-Property' Rule for Sperm Samples" (2010) 21 King's Law Journal 561.

Richard A. Epstein "The Erosion of Individual Autonomy in Medical Decisionmaking: Of the FDA and IRBs" (2007) 96 Geo. L.J. 559.

Robin Feldman "Whose Body Is It Anyway? Human Cells and the Strange Effects of Property & Intellectual Property Law" (2010) Standard Law Review 1.

Sarah Jennings "Medical Law and Individual Autonomy: Competing Perspectives" (2003) 2 Galaway Student L. Rev. 104.

Shawn H.E. Harmon and Graeme T. Laurie "*Yearworth v North Bristol NHS Trust:* Property, Principles, Precedents and Paradigms" (2010) 69 Cambridge Law Journal 476.

Simon Douglas "The argument for property rights in body parts: scarcity of resources" (2014) 40 J Med Ethics 23.

Sir Geoffrey Palmer "ACC, 40 years on" (2013) NZLJ 76.

J Internet Materials

ACART, "Advice to the Minister of Health about Informed Consent and Assisted Reproductive Technology" (04 October 2016) https://acart.health.govt.nz/advice-minister-<health-about-informed-consent-and-assisted-reproductive-technology>

ACART "Informed Consent: Clinic policies, rules and processes" (March 2015) <https://acart.health.govt.nz/informed-consent-clinic-policies-rules-and-processes>.

Advancing Transfusions and Cellular Therapies Worldwide "Highlights of Transfusion Medical History" Advancing Transfusions and Cellular Therapies Worldwide http://www.aabb.org/tm/Pages/highlights.aspx

Nigel Dickson "Waiting to start a family could be more problematic than thought: Otago Study" (23 February 2015) University of Otago <http://www.otago.ac.nz/news/news/otago087369.html.>

United Network for Organ Sharing "History" United Network for Organ Sharing <https://www.unos.org/transplantation/history/>

K Other Materials

Edward Coke "The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes" (1644).

Hon Dr Jonathan Coleman "Informed Consent and Assisted Reproductive Technology" Report Number 20161421.

Professor Honoré "Ownership" (1961) Oxford Essays in Jurisprudence.