University of Wollongong

Research Online

Faculty of Law, Humanities and the Arts -
Papers (Archive)

Faculty of Arts, Social Sciences & Humanities

2005

Of the monstrous regiment and the family jewels

Marett Leiboff

University of Wollongong, marett@uow.edu.au

Follow this and additional works at: <https://ro.uow.edu.au/lhapapers>

Part of the [Arts and Humanities Commons](#), and the [Law Commons](#)

Research Online is the open access institutional repository for the University of Wollongong. For further information contact the UOW Library: research-pubs@uow.edu.au

Of the monstrous regiment and the family jewels

Abstract

This article seeks to engage with the deeply-imbricated anxieties about post-mortem sperm harvesting, and its subsequent use by widows and fiances, in a small body of case law from Queensland and Victoria and the 2005 recommendations of the Victorian Law Reform Commission. It does so by suggesting that these anxieties can be uncovered through unstated cultural resonances about the 'proper' function of men and women in reproduction. These resonances recall some of the responses to supposed 'unnatural' and 'monstrous' behaviours of women, as they were characterised in the initial stages of the early modern period, when the emerging reason and rationality of the new social form collided with superstition and irrational explanations for human conduct. The deep sense of disquiet, and indeed disgust, at the thought that a woman would 'plunder' and 'violate' the body of her deceased spouse in order to achieve a pregnancy after her husband's death continues into the 21st century. These responses persist with respect to post-mortem sperm harvesting, though there is now general acceptance of postmortem organ donation, which, until recently, was also the subject of disquiet.

Keywords

family, regiment, jewels, monstrous

Disciplines

Arts and Humanities | Law

Publication Details

M. Leiboff, 'Of the monstrous regiment and the family jewels' (2005) 23 The Australian Feminist Law Journal 33-59.

OF THE MONSTROUS REGIMENT AND THE FAMILY JEWELS

*Marett Leiboff**

1. THE MONSTROUS REGIMENT

1.1 *Women behaving badly*

This article seeks to engage with the deeply-imbricated anxieties about post-mortem sperm harvesting, and its subsequent use by widows and fiancées, in a small body of case law from Queensland and Victoria and the 2005 recommendations of the Victorian Law Reform Commission. It does so by suggesting that these anxieties can be uncovered through unstated cultural resonances about the ‘proper’ function of men and women in reproduction. These resonances recall some of the responses to supposed ‘unnatural’ and ‘monstrous’ behaviours of women, as they were characterised in the initial stages of the early modern period,¹ when the emerging reason and rationality of the new social form collided with superstition and irrational explanations for human conduct. The deep sense of disquiet, and indeed disgust, at the thought that a woman would ‘plunder’ and ‘violate’ the body of her deceased spouse in order to achieve a pregnancy after her husband’s death continues into the 21st century. These responses persist with respect to post-mortem sperm harvesting, though there is now general acceptance of post-mortem organ donation, which, until recently, was also the subject of disquiet.²

* Marett Leiboff is a member of the Law School, QUT, GPO Box 2434, Brisbane QLD 4001. My thanks to my colleagues Mark Thomas and Nigel Stobbs for their advice and helpful comments on this article, and to the very helpful comments of the anonymous referees.

This article has its origins in work about the legality of the use of bodies in artistic display: Leiboff Marett *A Beautiful Corpse*, paper presented at the 12th Conference of the Law & Literature Association of Australia, Brisbane, 9–11 July 2004; Leiboff Marett ‘A Beautiful Corpse’ (2005) 19 *Continuum: Journal of Media & Cultural Studies* 221.

I am dedicating this article to my friend Lloyd Davis (1959–2005), who died 7 August 2005. Lloyd was Associate Professor in the School of English, Media Studies and Art History at the University of Queensland and a brilliant scholar of the literature of the Renaissance and Early Modern period. I am honoured to be able to pay homage to his area of scholarly expertise in this article.

¹ This period run from the 15th century through to the 18th century.

² Even those opposed to the use of organs may alter their views when personally affected by illness. Mr James Cameron, as a member of the NSW Legislative Assembly during the 1980s, had voted against the establishment of the organ transplants program for moral and ethical reasons. He went on to become one of the first to use it to have a heart transplant after he nearly died from a heart attack, and because he had young, dependant children. Referred to in the eulogy in the NSW Upper House 14 March 2002.

Instead, the woman who seeks the authority over the man in reproduction, is heir(ess?) to the 'monstrous regiment of women' who sought power and authority over men.³ The 'monstrous' in this context is that which is unnatural, as was the resulting monstrous birth (or deformities) that resulted from unnatural conduct, in which the 'wrath of God' was invoked against the behaviour of parents, in particular, the actions of mothers. They also recall the belief that women categorised as witches could steal sperm, make men impotent, and be impregnated by the devil.⁴

These notions are redolent of Michael Thomson's characterisation of the 'monstrous feminine' who, through her potential to access reproductive assistance without a male, can 'marginalize, lay impotent or castrate the masculine in reproduction'.⁵ However, Thomson is not particularly sympathetic to the nuclear family model of 'posthumous pregnancies [that] extends the desire for a male presence to almost macabre length in the priorities it reveals',⁶ that characterise the post-mortem sperm harvesting cases. For entirely different reasons, Belinda Bennett, among others, has argued that post-mortem sperm harvesting should not be permitted because the finality of death intervenes in any potential for reproduction; death means that the 'corporeal bond between husband and wife is broken',⁷ and as a result any possibility allowing for conception is consequently broken.

For a short period of time post-mortem, however, there is some chance that living sperm can be harvested; even though the man is not living, these cells may, depending on the circumstances, remain viable.⁸ My interest centres on what may be seen as the possibilities for the creation of a new life from this fleeting presence and vitality after death, and the concerns about this possibility, through the lens of the *cultural legal form* (rather than an ethical, moral or medical law question). As will be seen, the law in Australia, for the most part, turns its face against the possibility of the creation of life in this way *not* because of the desire for the male presence, as suggested by Thomson, but because of the way that the man is treated physically to access sperm,

³ Knox John *The First Blast of the Trumpet Against the Monstrous Regiment of Women* 1588.

⁴ As catalogued in the 1487 *Malleus Maleficarum* by the German Dominican, Heinrich Kramer. Though never sanctioned by the Catholic Church, this document was used as a tool in Catholic and later Protestant countries to prosecute witches, it operated as a thesis to prove that witchcraft needed to be controlled by the Church. Later documents followed, including the *Daemonologie* by the Protestant James I of England (VI of Scotland) in 1597. To be considered in more detail later in this article.

⁵ Thomson Michael 'Legislating for the Monstrous: Access to Reproductive Services and the Monstrous Feminine' (1997) 6 *Social and Legal Studies* 401 at 406.

⁶ As above at 416; Biggs Hazel 'Madonna Minus Child. Or — Wanted: Dead or Alive! The Right to have a Dead Partner's Child' [1997] 5 *Feminist Legal Studies* 225. Hazel Biggs saw Diane Blood, whose case raised the issue of a widow seeking access as a 'Madonna' who was treated as 'saintly' because of her status as the perfect mother. See also Belinda Bennett, 'Posthumous Reproduction and the Meanings of Autonomy' (1999) 23 *Melbourne University Law Review* 286, 305 who argues that the widow has no special claim to access fertility services.

⁷ Belinda Bennett, 'Posthumous Reproduction and the Meanings of Autonomy' (1999) 23 *Melbourne University Law Review* 286, 306; Anne Reichmann Schiff 'Arising from the Dead: Challenges of Posthumous Creation' (1996–1997) 75 *North Carolina Law Review* 901

⁸ Victorian Law Reform Commission, *Paper One: Assisted Reproduction and Adoption Access* May 2005, p 36 n 104, notes that the prospect of achieving a pregnancy with sperm extracted from a dead or dying man depends on the amount and quality obtained. The man's underlying condition and events surrounding death may impair sperm production and quality. [http://www.lawreform.vic.gov.au/CA256902000FE154/Lookup/Assisted_Reproductive_Technology_and_Adoption/\\$file/Position_Paper_1.pdf](http://www.lawreform.vic.gov.au/CA256902000FE154/Lookup/Assisted_Reproductive_Technology_and_Adoption/$file/Position_Paper_1.pdf).

along with the concern about the actions of his partner in making the request. The actions of the remaining partner potentially lead to concerns that the deceased partner may lose his identity as a person, and instead becomes a body without rights or interests.⁹ However, it is through developments in science that a last chance exists for a ‘corporeal bond’ between the man and his partner, a bond that will provide the potential (rather than the actuality) for a new life.

1.2 *Verfremdungseffekte*

As a cultural legal studies piece, this article is not seeking to conduct a conventional analytical exposition of the challenges and concerns about post-mortem sperm harvesting. Instead, it adapts the Brechtian *Verfremdungseffekte*, a performance technique created by the Marxist German performance theorist and dramatist, Bertolt Brecht.¹⁰ This technique seeks to ‘strange-make’ or ‘estrangle’ an audience from becoming emotionally involved in a performance, and therefore seeks to breakdown the Aristotelian ideal of performance: that the audience should undergo a cathartic or emotional experience through the course of a play.¹¹ Thus, by juxtaposing the commonsense of rational legal decision making of the early 21st century, with the commonsense as it was at the time of the early modern period, a new set of insights may be gained into what is considered to be normal, sensible and rational. Similarly, the readings of the cases undertaken in this article, especially in the fourth part of this article, where the views of judges are juxtaposed against the construction of social forms taken from the early modern period, are not suggesting a literal and linear reading. As James Sharpe points out in his study of witchcraft in the English early modern period, the ‘mental world’ of the educated person of that period was one that incorporated magic, astronomy, alchemy and the spirit world as a part of normal practices of the time.¹² He urges that the modern observer, in observing this mental world, needs ‘to wrest ourselves from our own cultural assumptions, from our own sense of cultural superiority, and to eschew ‘the enormous condescension of posterity’ decreed so powerfully by Edward Thompson’.¹³ Conversely, we may see things about the present world which have their origins in the past by suspending the normality of the world view of the here and now.

For the same Brechtian reasons of estrangement, this article is also intentionally structured to deviate from the normal linear, expository and analytical structure of a conventional developed

⁹ Anne Schiff, in particular, argues that it necessary to consider the concept of posthumous harm: Anne Reichmann Schiff n 7, 935 and following pages.

¹⁰ Brecht (1898–1956) lived through the Weimar Republic in Germany, was exiled from Germany after the rise of the Nazis in 1933, lived in the US during 1941–1947, and returned to the then Communist East Germany in 1949 where he lived until his death. He established the Berliner Ensemble with his wife Helene Weigel, the consummate Brechtian actor, where he practised his theatre form.

Among the enormous body of literature on Brecht see generally: White John J *Bertolt Brecht's Dramatic Theory* Camden House Rochester New York 2004; Jameson Fredric *Brecht and Method* Verso London and New York 1998; Eddershaw Margaret *Performing Brecht* Routledge New York 1996.

¹¹ A number of techniques are used to keep the audience distanced, including the use of a particular style of acting, the breaking down of the fourth wall of the stage, and adopting an episodic, and non-linear style of playwriting.

¹² Sharpe James *Instruments of Darkness: Witchcraft in England 1550–1750* Hamish Hamilton London 1996 p 42.

¹³ As above p 58.

piece of argumentative writing. This article is structured in five parts — the first (The Monstrous Regiment) introduces the article and its methodology, the second ('Good Sense and Ordinary Concepts of Morality') provides a brief overview of the law and recommendations for law reform, the third (The Consenting Subject) considers issues relating to consent to procreation, the fourth (Generation, Authority and the Role of Women) juxtaposes decisions in two Queensland Supreme Court cases against tropes from the early modern, and the fifth and final part (Conclusion: Needing a Father) concludes the article. However, what may conventionally be seen to be the 'end' of the article is contained in the third part, because it incorporates potential changes to policy. It leaves to the fourth part, however, an examination of the characteristics given to women in the early modern period who act outside the bounds of acceptable conduct and their (unstated) resonance with the views expressed by Chesterman J in the decision in *Re Gray*.¹⁴ In doing so, however, it mirrors the structure of the decision-making in *Re Gray*, in which the actions of Mrs Gray in seeking to access the sperm of her deceased husband are subjected to significant judicial comment, are *considered at the end* of the decision denying her access to her husband's sperm.¹⁵

In its structure, the article is therefore seeking to imitate and reflect the sense of personal discomfort that readers will find embedded in the claims of the women in these cases, and indeed, in the possibilities that arguments exist that may support their claims, and why responses of this kind are felt. The sense of personal outrage felt when a person may want to pursue a procedure that is well outside the norm is something that James Cameron clearly felt when he voted against organ donation in the New South Wales parliament.¹⁶ However, when the matter becomes personal, views may be changed, when Mr Cameron, after voting against this course of action, had a heart transplant himself when his own life was threatened. The use of the *Verfremdungseffekte* seeks to both underscore and highlight the discomfort found in the narrow edge that exists at points in time when scientific developments throw out challenges to good sense and ordinary concepts of morality.

2. 'GOOD SENSE AND ORDINARY CONCEPTS OF MORALITY'

2.1 *Harvesting sperm, post-mortem*

In the Queensland Supreme Court in 2000, Chesterman J refused Mrs Gray's application to access the body of her deceased husband to obtain a semen sample,¹⁷ so that she could attempt to

¹⁴ [2001] 2 Qd R 35.

¹⁵ These cases may also be seen to be redolent of the psychoanalytic, through unstated concerns about castration and the like. This mode of analysis, however, is not being employed here.

¹⁶ See note 2 above.

¹⁷ Chesterman J referred to the removal semen, though more usually, the removal of the testicles and related tissue is sought in these cases in order to access sperm. Needle aspiration or biopsy of one or both testes or the epididymis: Amanda Stevens and Richard Silver 'Posthumous extraction and use of semen' *Proctor* August 2000 p 23 at 23–24. Semen may be accessed in men who are still alive through electrostimulation.

conceive a child post-mortem. This application sought the removal and storage of the sample only; any further decision about its use to be the subject of further orders.¹⁸ In a set of reasons published two weeks after he refused the application,¹⁹ his Honour held that the law contained the principle that she could have possession of the body for the purposes of ensuring prompt and decent disposal only; thus as a corollary, there was a duty of the spouse not to interfere with the body, and that the next of kin may not remove part of the body.²⁰ Chesterman J did not follow the 1998 decision of the Gillard J, of the Victorian Supreme Court, in *AB v Attorney-General (Vic)*,²¹ which had allowed the removal of sperm and associated tissue from the body of the deceased, but who had ordered that the material not be used without an order of the court. Chesterman J concluded his reasons for his decision in the following terms:

Artificial reproduction is part of rapidly changing and expanding medical technology. As science progresses the law will obviously face frequent challenges for which there may be no adequate precedent, although I do not myself accept that this is such a case. It is not a proper criticism of the law that it has not developed a specific principle applicable to the opportunities presented by such change. The law should not have to cater for every technological possibility. Good sense and ordinary concepts of morality should be a sufficient guide for many of the problems that will arise. When they are not the appropriate legal response should be provided by Parliament which can properly access a wide range of information and attitudes which can impact upon the formulation of law that should enjoy wide community support.²²

The discursive disposition of the judgment made it plain that Mrs Gray's application offended 'good sense and ordinary concepts of morality'. As will be developed more fully under the fourth part of this article, Chesterman J was clearly concerned that her unstable state of mind and her grief led her to act irrationally and unreasonably, and the court was able to prevent her from pursuing a course that would not only damage her deceased husband, but would harm herself and any child that may be conceived in this way.²³ Moreover, Chesterman J appeared to enter the mind of the deceased partner to declare what he — the deceased husband — would have thought about Mrs Gray's action.²⁴ But curiously, he also denied the existence of any jurisdiction over the issue, though he made determinations as to the state of the law.²⁵ Because of the short window period in which the tissue may be collected after death (within 24 hours to four days, or seven at

¹⁸ *Re Gray* [2001] 2 Qd R 35 at 36 [5].

¹⁹ *Re Gray* [2001] 2 Qd R 35 at 37 [7].

²⁰ *Re Gray* [2001] 2 Qd R 35 at 40 [20].

²¹ 23/07/1998 (Unrept, Vic SC, Gillard J).

²² *Re Gray* [2001] 2 Qd R 35 at 42 [24].

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

For an analysis of this point, see below: *Generation, Authority and the Role of Women*, in particular 4.2: *The witch*.

²⁴ *Re Gray* [2001] 2 Qd R 35 at 41 [23].

For an analysis of this point, see below: *Generation, Authority and the Role of Women*, in particular 4.3: *Images of the Paternal or the Father*.

²⁵ *Re Gray* [2001] 2 Qd R 35 at 37–38 [9] — [11].

the most), the decision was final, and Mrs Gray was saved from her actions, it seemed, for her own good.²⁶ I will return to consider the reasons for his Honour's views later in this article.

Despite the precedent set in *Re Gray*, two other women applied to the Queensland Supreme Court in the same set of circumstances. In 2003, in *Baker v State of Queensland*,²⁷ Muir J refused Simone Baker's application to access her fiancé's body, using a similar mode of reasoning to that adopted by Chesterman J.²⁸ Her conduct was also effectively driven by her grief, and Muir J's observations suggested that his Honour thought they were irrational and unreasonable, and again, Simone Baker was saved from acting against her own interests.²⁹ I will also come back to this judgment, and the public response to it, later. However, in 2004, Atkinson J allowed Elizabeth Denman's application to remove and store the testicles from her husband's body,³⁰ but that no further use was to be made of the tissue without the permission of the court.³¹ Her Honour treated the case as if it were an interlocutory injunction; as such, the balance of convenience required that the sperm be harvested, because 'if it is not harvested then there is no relief that can be sought by the applicant.'³² These three conflicting decisions set out the common law position in Queensland with respect to post-mortem sperm harvesting.

Other Australian cases exist, including those relating to semen removed from the body of a dying man, in which access was denied.³³ Three other cases come from Victoria, where the law is covered by the *Infertility Treatment Act 1995* (Vic).³⁴ Though two earlier cases had allowed access to tissue removed post-mortem,³⁵ on 27 May 2005, in *AB v Attorney-General for the State of Victoria*,³⁶ a decision was made about the ability to use the tissue removed post-mortem. In relation to its use, s12 of the *Infertility Treatment Act 1995* (Vic) required express consent to treatment,³⁷ which had not happened here. Hargrave J held that the original decision to remove the tissue was covered by the *Human Tissue Act 1982* (Vic),³⁸ and though there was an unlimited jurisdiction of the Victorian

²⁶ For an analysis of this point, see below: *Generation, Authority and the Role of Women*, in particular 4.4: *A monstrous birth*.

²⁷ 6/01/2003 (Unrept, Qld SC Muir J), generally.

²⁸ *Baker v State of Queensland* 6/01/2003 (Unrept, Qld SC Muir J), p 4.

²⁹ *Baker v State of Queensland* 6/01/2003 (Unrept, Qld SC Muir J), p 4.

For an analysis of this point, see below: *Conclusion: Needing a Father*.

³⁰ *Re Denman* [2004] 2 Qd R 595 at 598.

³¹ *Re Denman* [2004] 2 Qd R 595 at 598.

³² *Re Denman* [2004] 2 Qd R 595 at 598.

³³ *MAW v Western Sydney Area Health Service* (2000) 49 NSWLR 231, in which O'Keeffe J declined to permit removal of semen from a dying man on the basis that he had no jurisdiction over the case.

³⁴ See also *R v Human Fertilisation and Embryology Authority; ex parte Blood* [1997] 2 All ER 687, in relation to the decision-making processes established under the *Human Fertilisation and Embryology Authority Act 1990* (UK). Biggs Hazel 'Madonna Minus Child. Or — Wanted: Dead or Alive! The Right to have a Dead Partner's Child' [1997] 5 *Feminist Legal Studies* 225.

³⁵ In the initial application by AB, Gillard J had permitted its removal: *AB v Attorney-General (Vic)* 23/07/1998 (Unrept, Vic SC, Gillard J).

In *Fields v Attorney-General of Victoria* 01/06/2004 (Unrept, Vic SC, Coldrey J) Coldrey J adopted a two stage approach of the kind Atkinson J established in *Re Denman* ie to permit the removal to allow the widow to apply to the court for use of the sperm at some later stage.

³⁶ 27/05/2005 (Unrept, Vic SC, Hargrave J).

³⁷ 27/05/2005 (Unrept, Vic SC, Hargrave J). [102], [104].

³⁸ 27/05/2005 (Unrept, Vic SC, Hargrave J). [142].

Supreme Court, the *Human Tissue Act 1982* (Vic) meant that the tissue should not have been removed.³⁹

However, his Honour also considered the common law position, because of the original order made by Gillard J that allowed AB to harvest the sperm,⁴⁰ and he would have followed the decision of Chesterman J in *Re Gray*. He approved both the ‘non-interference’ principle,⁴¹ which was consistent with the ‘inviolability’ principle that applies to living people,⁴² and Chesterman J’s statement about the role of law in artificial reproduction.⁴³ Hargrave J held that: ‘In my view, policy and logic dictate that the inviolability principle should extend to corpse in the absence of a statute regulating the extent to which violation is permitted’.⁴⁴ Thus, despite the possibility that a person may expressly consent to the removal of the material, both Hargrave J and Chesterman J make it plain that the common law would not permit the violation of a body post-mortem — only statutory interventions could overturn the inviolability principle.

On 11 May 2005, two weeks before the decision in *AB v Attorney-General for the State of Victoria*, the Victorian Law Reform Commission (‘the Commission’) issued a Position Paper, *Paper One: Assisted Reproduction and Adoption Access* (‘the Position Paper’). In it, the Commission considered, among other things, the issue of posthumous use of gametes,⁴⁵ including the situation where a person is dying or has just died. It observed that, practically, this will only apply when a woman wants to access the body of a dead or dying man,⁴⁶ as there is no viable way to harvest ovum and tissue post-mortem. The Commission noted that as a result of an amendment in 2003, the *Infertility Treatment Act 1995* (Vic) does not prevent the creation of embryos *outside a woman’s body*, using the gametes from a dead person,⁴⁷ though under s 43 (1) it is unlawful for a woman to be *inseminated*, resulting in an anomaly in the structure of the legislative arrangements. In considering its position about accessing and using sperm harvested post-mortem, however, the Commission was not focussed on these inconsistencies. The Commission adopted the policy that the posthumous use of gametes should take account of the wishes of the deceased, and that

³⁹ 27/05/2005 (Unrept, Vic SC, Hargrave J). [106]–[108].

⁴⁰ *AB v Attorney-General* (Vic) 23/07/1998 (Unrept, Vic SC, Gillard J).

⁴¹ *Re Gray* [2001] 2 Qd R p35 at 40 [20].

⁴² Hargrave J used the authority of *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, (*Marion’s Case*) that it is unlawful to interfere in the body of a living person without their consent. That case concerned the rights or children, in this case, an intellectually disabled young woman, and the intention of her parents to sterilise her. It thus limited the scope of parental authority over the child: Basser Marks Lee Ann *Whatever happened to Marion? Children’s Rights in the Late 1990’s*, paper presented at the 6th Australian Institute of Family Studies Conference, Melbourne, 25–27 November 1998.

⁴³ 27/05/2005 (Unrept, Vic SC, Hargrave J). [136]; *Re Gray* [2001] 2 Qd R 35 at 42 [24].

⁴⁴ 27/05/2005 (Unrept, Vic SC, Hargrave J). [136].

⁴⁵ *Infertility Treatment Act 1995* (Vic) s 3 (1) defines ‘gamete’ to mean an oocyte or sperm, ‘oocyte’ meaning an ovum from a woman, and ‘sperm’ meaning from a man.

⁴⁶ Victorian Law Reform Commission *Position Paper, Paper One: Assisted Reproduction and Adoption Access* 11 May 2005 at 36 para 5.1.

⁴⁷ *AB v Attorney-General for the State of Victoria* 27/05/2005 (Unrept, Vic SC, Hargrave J). [62]– [65] held that this was the correct interpretation.

without their consent, their use could be seen as breaching the principle it had established, that a person's reproductive capacity should not be exploited.⁴⁸

It recommended that there could be some post-mortem use of gametes and embryos, but the *express* written consent of the person who had died or is dying was needed for reasons of certainty — if inferred consent was to be allowed, it would be necessary to apply to a court for a determination of its use. In considering this recommendation, the Commission noted that the use of gametes to create a child was a 'deeply personal decision', so any decision to create a child had to be made with the person's consent during their life. Despite this, it was concerned that the creation of a child after the death of a parent could negatively affect other children born from the relationship, such as the impact on the property rights of other children. The Commission also noted that the deceased's brothers and sisters could be adversely affected.⁴⁹ However, its key concern was the health and wellbeing of children conceived post-mortem, and it recommended that their wellbeing be monitored. It accepted that posthumous use of gametes (acquired during a person's lifetime as part of fertility treatment) could be permitted, subject to counselling of the surviving partner after a cooling off period.⁵⁰

For people who died suddenly, the Commission adopted the same principles: without the express consent in writing to the procedure, it should not be permitted.⁵¹ A range of views had been expressed by submitters on this point. Some favoured the approach that sperm could be accessed only where the man had expressly consented to this action being taken during this life.⁵² Others argued that express consent was not needed: instead, they argued, it would be acceptable for consent to be assumed, *unless* the man explicitly indicated that he was opposed to the removal of his sperm post-mortem.⁵³ Alternatively, consent to post-mortem sperm harvesting could be inferred from conduct undertaken in life, such as already being involved in a fertility treatment program.⁵⁴

The Commission did note that submitters considered that couples affected by a sudden death would be discriminated against because they would not have been in a position to deal with the issue that may have been possible to other couples.⁵⁵ It also noted that the submissions dealing with the substantive issues were generally in favour of allowing the posthumous use.⁵⁶ However, despite this, it concluded that gametes should only be removed posthumously if the deceased person expressly consented to their removal and use to create a child,⁵⁷ and that the legislation should be amended to ensure that the next of kin cannot consent to the removal of

⁴⁸ Victorian Law Reform Commission *Position Paper, Paper One: Assisted Reproduction and Adoption Access* 11 May 2005 at 38 para 5.10.

⁴⁹ As above at 40 paras 5.18 — 5.19.

⁵⁰ As above at 39–40 para 5.17.

⁵¹ As above at 42 paras 5.28 — 5.29.

⁵² As above at 38 para 5.11.

⁵³ As above.

⁵⁴ As above at 38 para 5.12.

⁵⁵ As above at 39 para 5.12.

⁵⁶ As above at 39 para 5.14.

⁵⁷ As above at 42 para 5.30.

gametes from the body of the deceased person.⁵⁸ In other words, it ‘overruled’ Gillard J, Atkinson J, and Coldrey Js decisions to allow access to the material pending later considerations. Subject to its views about the welfare of children, its views on accessing the body post-mortem appeared to come from nowhere. Instead, a clue may be found in a footnote appended to the observation ‘that gametes should only be removed posthumously if the deceased person expressly consented to their removal and use to create a child’.⁵⁹ There, the Commission notes that ‘sperm collection after death is also quite an invasive procedure: it generally involves wide exposure of the male genital tract: information supplied by Professor Gordon Baker, Melbourne IVF’.⁶⁰

2.2 *Plundering the body*

I will suggest that the reference to this point — the opening up of the body — is one other, unstated, reason why there is such disquiet about women accessing the *male body* in this way. The procedure used to access sperm post-mortem requires that the male body is opened up in the same way that women’s bodies are open and opened during their lives. However, it is now the woman who is his wife or fiancée, the woman who in life was his partner, who may now be seen to interfere or violate him, or to plunder this body at the time that he is most vulnerable, that is after he is deceased and cannot protect himself. The law, as Ngaire Naffine has pointed out, turns its face against men who choose to open their bodies by choice:

The man who reveals his cavity/vulnerability, who opens his body boundaries in a manner which is seen to resemble or mimic the female mode of opening, becomes woman as non-bounded subject. To be entered sexually is to be feminised. Law, therefore, outlaws the incomplete man. It prohibits violation of the male sovereign self and simultaneously, in the same act, constructs the incomplete female self.⁶¹

By asking the court to permit her to access the sperm, through the agency of medical help, she is therefore asking the court to allow the defilement of her partner, by asking it to condone the ‘feminising’ opening up of his body so that his sperm can be removed. This image clearly horrified Chesterman J, who held that:

It should also be noted that s 236 of the *Criminal Code* makes it a misdemeanour for any person, without lawful justification or excuse the proof of which lies on the accused, to improperly or indecently interfere with or offer any indignity to any dead body or human remains. On an indictment prosecuting such an offence it would no doubt be for the jury to decide what is improper or indecent, or an indignity, *but it would seem at least arguable that removing part of the testicles of a dead man would come within the ambit of those words.* In *Reg. v Sharpe Dea & Bell* CC 160, a son who caused his mother’s coffin and body to be disinterred for the purpose of being reburied in consecrated ground was convicted of a cognate offence despite

⁵⁸ As above at 43 para 5.31.

⁵⁹ As above at 42 para 5.30.

⁶⁰ As above at 42 n 124.

⁶¹ Ngaire Naffine ‘The Body Bag’ in Naffine Ngaire and Owens Rosemary (eds) *Sexing the Subject of Law* LBC Sydney 1997 p 79 at 91.

his having acted without disrespect for the dead and from subjectively good motives.⁶² (emphasis added)

Not only does Chesterman J have to protect this man from the indignity of having his testicles removed (as a post-mortem castration), but he makes it clear that the actions of Mrs Gray are disrespectful, and operate from a subjectively *improper motive* by seeking to enter his body for her own purposes, in contrast to the respectful actions of the son in *R v Sharpe*.⁶³ Thus:

Anybody with access to the body may help themselves to part of it. The limitation imposed by the laws defending public decency or s 236 of the *Criminal Code* appear altogether too uncertain to determine who may and who may not plunder a corpse and for what purposes.⁶⁴

Though there is the potential for interpreting Mrs Gray's desire to enter the body of her deceased husband as an act of fidelity to him, to allow *him* to continue to reproduce beyond the grave, it must be seen instead as an act that *she* takes in her life, as his life is now extinguished. His decision-making power is now extinguished in the absence of consent. Thus, Chesterman J is concerned about the physical insult to her dead husband, which is characterised as an unnatural act by a woman who is behaving as if she were a resurrectionist, or grave robber, a woman who defiles her husband by entering his body without his consent. Mrs Gray was someone whose actions could only be characterised as simply plundering the corpse of her deceased husband. It is her behaviour that is indecent, not his: she is not simply acting against 'good sense and ordinary concepts of morality', but acting outside the boundaries of normal and decent conduct. Such conceits cannot be traced to a normal woman, so Chesterman J, in deference to her grief, reconstructs her as a woman who is not herself. However, her conduct now recalls the monstrous, the witch, and the hysteric: in other words, the unnatural woman because of her attempt to physically acquire access to her husband's body.

Indeed, as a physical action, the description of the techniques to extract sperm resonates with the methods used in the 16th century to extract a baby from the body of its dead mother: the mother's mouth and 'nether places' were opened wide (as the man's genital tract must be to enable sperm harvesting),⁶⁵ to preserve the patrilineage of the male parent.⁶⁶ Not all women were

⁶² *Re Gray* [2001] 2 Qd R p 40 [17]. Section 236 of the Queensland Criminal Code provides that:

Any person who, without lawful justification or excuse, the proof of which lies on the person-

(b) improperly or indecently interferes with, or offers any indignity to, any dead human body or human remains, whether buried or not;

is guilty of a misdemeanour, and is liable to imprisonment for 2 years.

⁶³ Ngaire Naffine 'The Legal Structure of Self-Ownership: Or the Self-Possessed Man and the Woman Possessed' (1998) 25 *Journal of Law and Society* 193 at 203-204.

⁶⁴ Chesterman J *Re Gray* [2001] 2 Qd R 35 at 41 [21].

⁶⁵ Blumenfeld-Kosinski Renate *Not of Woman Born: Representations of Caesarean Birth in Medieval and Renaissance Culture* Cornell University Press Ithaca 1990 p 1.

Cited in Chamberlain Stephanie 'Fantasizing Infanticide: Lady Macbeth and the Murdering Mother in Early Modern England' (2005) 32.3 *College Literature* 72.

⁶⁶ Chamberlain as above at 85

dead when caesareans were performed, and if not, then they generally died as a result of the procedure. As will be shown later in this article, because a child was assumed to be the child of the father (that the woman's role was that of carrier), a woman's life could be sacrificed so that the child would survive. Women's lives now may also be maintained through life support after they have sustained life-threatening injuries or conditions, such as a permanent vegetative state, or who are brain stem dead, for the purpose of allowing a pregnancy to continue, in which case the woman becomes an incubator for the child.⁶⁷ The child's life can only be saved through this medical intervention, because in nature the child would not survive its mother's death. The child will be born by caesarean section, and its mother's life support will be turned off after the birth of the child. In so doing, the aim of continuing a life or the potential for a life, of a child will override the state of nature, in which the lives of both mother and child would end together, and which the law will treat as a good, rather than a bad outcome.

It should be pointed out that the accessing of ova post-mortem is generally not possible, and has not been done in humans,⁶⁸ though some living women have been able to freeze their eggs for later use. There is no reason why a man couldn't attempt to conceive a child in this way, and the same principles should be able to apply to a man who wants to attempt to conceive a child with his deceased partner's eggs. There are some differences: while the living woman can actively be involved in using the sperm taken from her partner, a man would have to find a surrogate to be able to have a child with the mother post-mortem. It is difficult to analyse these cases, at least at present, on a gender neutral basis, because women are in a position that is not available to men.

In the present circumstances, and within the context of the decisions surrounding the cases already decided in this area, it is a man's widow who must, by necessity, take an *active role* in any potential creation of a child, and he is now exposed, rendered impotent and lacking in vitality. As such, this procedure as it applies to men alters the 'natural order of things': in reproduction, though it would do less so for women as it is unexceptional for women's bodies to be exposed, intruded upon, entered, or, historically, sacrificed in favour of the child born of her husband. Post-mortem sperm harvesting and the potential for conception, thus reverses culturally assumed male and female roles by making the woman active and the man passive. I will develop this point later in this article.

However, the language, tropes, and reasoning betray a more fundamental disquiet which relies on the appalling image of a woman 'plundering'⁶⁹ and 'helping herself',⁷⁰ to her partner's body to achieve a pregnancy without his consent. Indeed, her conduct may be seen as taking

⁶⁷ Robertson John A 'Posthumous Reproduction'(1993–1994) 69 *Indiana Law Journal* 1027; Haberfield Les 'Pregnant Women: Judicial Intervention and the Right of Pregnant Women to Refuse Treatment' (1995) 2 *James Cook University Law Review* 1.

For a detailed analysis of the problems involved in the continuation of pregnancies for women in either a permanent vegetative state, or who are brain stem dead, including the liability of medical practitioners, the loss of capacity, see Peart Nicola and others 'Maintaining a Pregnancy Following Loss of Capacity' (2000) 8 *Medical Law Review* 275.

⁶⁸ Victorian Law Reform Commission *Position Paper, Paper One: Assisted Reproduction and Adoption Access* 11 May 2005 at 36 n 104.

⁶⁹ *Re Gray* [2001] 2 Qd R 35 at 41 [21].

⁷⁰ *Re Gray* [2001] 2 Qd R 35 at 41 [21].

authority over a man in something akin to the sexual domain, in which she may violate his body.⁷¹ But the law in Australia had accepted 'that sexual rights ran in both directions, that there was mutual possession and hence sexual equality',⁷² to certain eyes, it may have looked as if she was seeking possessory rights over her husband, in a perversion of the historical common law construction of the wife as the property of her husband.⁷³ These responses mask cultural resonances that are deeply irrational, in a modern, science base world, but deeply ingrained: John Knox's Calvinist rejoinder to 'the monstrous regiment of women', who unnaturally seek authority over men, theories of active male roles and passive female roles in reproduction, emasculating witches who steal the sperm of men, and the damage that may result in a monstrous birth because of the actions of its mother at conception. They do not appear in any reasoning of any court and will never be articulated. Instead, they are reconstructed into modern, liberal ideals of concern for the behaviour of the women seeking access to the sperm, concern for the welfare of the child, who not only will have been conceived unnaturally, but who will be brought up without a father, and more particularly, a concern for the wishes of man who is not able to participate further in the decision to have a child.

The physical and social effects of the creation of a child in this way are keenly felt in the judgments and in the consideration of what is a proper use of a body. Indeed, in establishing the common law position, the decisions refusing women access to the bodies of their fiancé or spouse in this way betray a sense of unease that a child may be born from death through the agency of assisted reproductive technology. Through the adoption of the touchstone of 'good sense and ordinary concepts of morality', the cases which prevent her accessing the body of her spouse deny the hysterical, unstable irrational woman from damaging her deceased partner, from marking out and damaging her child as the product of an unseemly conception, through the rationality of the judgment. However, what may be seen as good sense, however, hides deeply-ingrained *cultural resonances* that have been inherited into the social and legal imaginary, as to the correct, proper and natural role of men and women in creating children.

3. THE CONSENTING SUBJECT

As the view of the Victorian Law Reform Commission makes abundantly clear, the overriding issue to be considered when deciding whether someone's gametes can be used in an attempt to create a new life is premised on the requirement of express consent. The Commission's view reflects the prevailing discourse in the medical law literature to impose the express requirement of consent, as noted earlier in this article. The issue is usually expressed as the choice that comes from being human — that a person should be able to make decisions about their fertility or as

⁷¹ *AB v Attorney-General for the State of Victoria* 27/05/2005 (Unrept, Vic SC, Hargrave J). [136].

⁷² Ngaire Naffine 'The Legal Structure of Self-Ownership: Or the Self-Possessed Man and the Woman Possessed' (1998) 25 *Journal of Law and Society* 193, 209. Naffine is referring to the decision of the High Court in *R v L* (1991) 174 Crim Law Reports 379, 398.

⁷³ As above at 208.

Anne Schiff argues, the importance of 'allowing a person to control the fate of his or her gametes ... because procreation is central to an individual's identity'.⁷⁴ As such, the usual questions about the unbridled autonomy of the contemporary liberal subject give way to considering the interests of the other party, or through understanding the individual in their relations with others, or relational autonomy.⁷⁵ A decision to have a child is something to be considered by both parties, even though the decision may deny the other party a chance to procreate at all.⁷⁶

However, is there a real choice about the ability to decide what happens to one's gametes that constitutes a true and complete consent? Though it may seem an incredibly obvious thing to say, natural conception occurs as a consequence of having sex, meaning that, at least within a teleological explanation of the outcome of having sex:

... genitors' obligations are grounded in an idea of consent (either to procreation itself or to running a risk of it). But to what is a man deemed to have consented and when does this consent take place? [this view says] he was consenting to run the risk of pregnancy when he consented to engage in particular kinds of sexual activity.⁷⁷

However, having sex does not mean that the two people involved may mean to, intend or consent to create a child.⁷⁸ At most, the consent involves access to bodies only. Clearly, sex may happen with the intention to have a pregnancy, from which a child may or may not be born, and these acts may or may not occur within marriage, or with partners involved in long term relationships. In the same kinds of relationships, sex will occur without any the intention to conceive, and without thinking about the consequences of the act concerned. If a pregnancy results, the male partner may have no intention of wanting a child, and if the female partner continues with the pregnancy, the male partner will not necessarily have anything to do with any resulting children, and indeed may not even know that they have parented a child. As Sally Sheldon puts it, instead of the idea that may be drawn from natural law that having sex could be understood as involving consent to *risk* procreation, it is now the case that in agreeing to have sex, sexual partners 'do not necessarily agree to procreate'.⁷⁹ Of course, for a large body of the population who adhere to particular religious and moral beliefs, sex and procreation are inextricably interrelated and follow the teleological patterning adopted by a natural law understanding of consent to sex being a consent to pregnancy.

Conception, however, can occur without having sex. Reproductive technologies may be employed to assist the chance of conception in cases of infertility, the detail of which is beyond

⁷⁴ Schiff refers to both male and female, but as already demonstrated, it is only the female who can actually use them: Schiff above n 7 at 933–934.

⁷⁵ Sheldon Sally 'Unwilling Fathers and Abortion: Terminating Men's Child Support Obligations?' (2003) 66 *Modern Law Review* 175 at 178.

⁷⁶ Howard Johnstone refused Natalie Evans access to their stored embryos. She had had ovarian cancer and the embryos were her only chance to have her own genetic child. The Court of Appeal upheld his ability to have the embryos destroyed. The decision is explored in Sheldon Sally 'Gender Equality and Reproductive Decision-Making' (2004) 12 *Feminist Legal Studies* 301.

⁷⁷ Sheldon above n 75 at 178.

⁷⁸ Sheldon Sally 'Sperm Bandits', Birth Control Fraud and the Battle of the Sexes' (2001) 21 *Legal Studies* 460.

⁷⁹ Sheldon above n 75 at 179.

the scope of this article. The consenting subject becomes someone who consents to a medical treatment to achieve a pregnancy, a situation which significantly alters the assumed teleology — that procreation occurs through natural activity.⁸⁰ So when a woman intends to have a child, *without* the possibility of having a male partner physically around (as in the case of post-mortem conception), her actions are scrutinised, her life examined, and the intention, or otherwise of the potential male parent explored. Her actions are no longer seen in terms of something that is so easy in life — consent to an interaction between two bodies — to now focus on consent to potentially create a child. In other words, the test adopted in the post-mortem cases looks beyond a physical act that may or may not have resulted in the creation of a child. Thus, the removal of reproductive tissue, which is carried out with the sole intention of creating a child, by one partner only, is subjected to a requirement of express consent that is not required during life. So, the measure being used to test whether a child can be created post-mortem may be seen to be of the character of an extraordinarily high standard, of a kind which is not applied in life.

What this means, in the case of post-mortem conceptions, is that the *silence* of the male partner about having a child will deny his female partner an attempt to have a pregnancy. In life, however, silence about the chance of pregnancy is not out of the ordinary. The standard to be adopted by the common law when a woman attempts to access the body of her deceased partner is to require the active decision of a man to consent to the potential creation of a child. In effect, this means that the state of nature has now become turned around. How so? By focussing on *the consent of the male* to the creation of a child, it suggests that a female partner is now obliged to prevent a pregnancy unless the man agrees. Thus, she may be denied a pregnancy if he does not want a child, and may be forced to have the pregnancy terminated, become a single parent, or be subjected to domestic difficulties because of the pregnancy. It is also only since the introduction of easily accessible contraception during the 1960s that there was any possibility of having control over conception, which is as much as anything a boon to the male who may not want to parent.

However, the way that consent is used by the law itself is not unmediated. Especially as it concerns the impact of technology in the bio-medical field, the consenting subject allows the law to defer or postpone legal decision-making that attempts to deal with the consequences of new technology, Alain Pottage argues that:⁸¹

The consenting subject is an artefactual role to which law and bio-ethics delegate the function of deciding on the distinction between person and body ... the device is used within scientific, medical and legal settings in order to absorb or defuse the uncertainties generated by law's difficult relation to biology. Rather than decide where to draw boundaries, the scheme of informed consent leaves the person themselves to decide on the limits of person or body.⁸²

⁸⁰ In nature, of course, the physical activity that would enable a child to be conceived post-mortem would end at death. As my colleague Mark Thomas reminded me, a child could be conceived post-mortem, because of the time period that elapses after ejaculation and before the successful sperm reaches the ovum.

⁸¹ Alain Pottage 'Unitas Personae: On Legal and Biological Self-Narration' (2002) 14 *Cardozo Studies in Law and Literature* 275 at 302.

⁸² As above.

However, consent is something that living people do, and the consent of a person to certain actions after they die may not be pursued. However, in the sperm harvesting cases, his humanity is maintained by the living, whether it be his partner or the courts. Emphasising consent — the archetype of the liberal subject who makes decisions about his body — the man is given the status of person when he has not given his express consent to allow his partner to use his sperm. If he has consented, presumably, the law will reconstruct his status as person to become a body, for the purpose of the treatment concerned. As Pottage argues, law's role in managing the effects of science on the biological individual as distinct from the legal person may be seen as a type of deferral of what may be the person and what may be the body:⁸³

New problems arise when law has to find fixed reference points in the flux of biological process. In the older mode of articulation, the imaginary junction between law and biology was materialised in the surface form of the body. This image of the body as a kind of party wall between law and biology becomes problematic when the biological or medical body is increasingly treated as the medium or product of processes which exceed any simply model of individuality or integrity.⁸⁴

The importance of treating the human deceased with respect, and to not treat it in a way that negatively affects the dignity of the person whose life related to that body is deeply held. The individual during their life will have their own views, but after death, the family of the person and the community to which they belong are the bearers of responsibility for the body, such as arranging burial or cremation, permitting the removal of organs for transplantation, or taking other action. Any indignity to the body will be linked to the effect it has on those who remain alive. However, the male body post-mortem has the potential to contribute to the creation for new life, because of the potential to extract viable sperm in the period after death. The man's life, as person, is over. The agency of science may permit something that can no longer occur naturally, and in which his spouse or partner now engages actively. Science provides the means for his body, rather than his person, to be involved in the procreation of a new life, as Atkinson J in *Re Denman* points out:

There is room for much debate as to the public policy issues involved in such as case and it may be that the law needs to develop to keep up with scientific advances and the opportunities that those scientific advances have *given for children who might not otherwise have been able to be conceived to be born*.⁸⁵ (emphasis added)⁸⁶

⁸³ As above generally.

⁸⁴ As above at 291.

⁸⁵ *Re Denman* [2004] 2 Qd R 595 at 597.

⁸⁶ Following Atkinson J's decision, the then Australian Medical Association Queensland president David Molloy, an IVF clinician, was reported as saying that there was little support from the National Health and Medical Research Council, the courts or the community for the use of human eggs or sperm from dead donors: "It's basically a triumph of science over nature — once you die, you're not supposed to have children."

Edmiston Leanne 'Child from dead dad's sperm 'no worse off' *The Courier-Mail* (Brisbane) 21 February 2004 p 1.

For her partner, the question then arises whether her request to access his body, with its potential for life, is one that is disrespectful of his status as a now deceased person in a way that could harm him. Indeed, as Atkinson J observed in *Re Denman* with respect to the effect of s 236 of the *Criminal Code* (Qld);⁸⁷

It appears to me at least strongly arguable that removing the testes of a dead man in order to harvest sperm could not be seen as indecently interfering with or offering indignity to that body, particularly when it is his widow who wishes to have that sperm in accordance with the keenly expressed desire of both herself and her recently deceased husband to have children.⁸⁸

The actions of a woman in these cases are examined because she is acting through an extension of their relationship in life. Indeed, Atkinson J's views make it clear that the image of a partnership is being proposed as a continuation of the outcome of a joint venture. There is no suggestion that the actions of the woman are designed to sacrifice herself and her future to preserve the male line. Indeed, the woman is now able to make an active choice to pursue this course, and could potentially make a choice to not pursue the chance of this occurring.

If the question is treated as one in which her desire to attempt a pregnancy absent any express consent is focussed on her aim to procreate, then could it be harmful to him, and could her act be seen as selfish? If he expressly indicated in his life that *he did not want* children during his life or post-mortem, then it will be harmful and it will be selfish. If he did not object during his life, or did not expressly consent but all his actions indicated that he was acting in a way that demonstrated he wanted children, such as Simone Baker's fiancé, then she is pursuing an implied consent to pregnancy that persists from his life. Indeed, it may be suggested that Ms Baker was pursuing the course of action she did because she had, in life, prevented a pregnancy because she wanted to be married first.⁸⁹ An attempt to conceive, however, is never a guarantee of a pregnancy, and her chances may be no different from the chance people have in life — that pregnancies may happen whether or not there is actual consent. There is a sense that the courts in the cases where sperm harvesting and its use was denied, may see her actions as holding on, Miss Havisham-like, to a relationship that could never be brought back, through holding onto a chance of a child, something that clearly troubled Muir J when applied to Simone Baker,⁹⁰ who took the view that she would be better moving on to a new relationship.

Any decision of this kind would be confined to her husband or long term partner — she could not, by necessity access the body of an acquaintance or stranger, by definition. Moreover, if she did make the choice to attempt a pregnancy, she would do so bearing all the responsibilities for the child, unlike the situation affecting men who, in life, are concerned that they will be subjected to family law consequences where they are unwilling and unwittingly father a child. In the popular realm, it seems that ordinary people support the right of a widow to use her dead

⁸⁷ Compare Chesterman J in *Re Gray* [2001] 2 Qd R 35 at 40 [17].

⁸⁸ *Re Denman* [2004] 2 Qd R 595 at 597.

⁸⁹ *Baker v State of Queensland* 6/01/2003 (Unrept, Qld SC Muir J), p 1.

⁹⁰ *Baker v State of Queensland* 6/01/2003 (Unrept, Qld SC Muir J), p 4.

husband's sperm to conceive — 80% of the readers of *Herald-Sun* newspaper in Melbourne were prepared to support it (though there are no indications what the 80% comprised of, or the nature of the study).⁹¹ Similarly, people in the UK supported Diane Blood in her attempt to conceive in this way.⁹²

The notion of an implied consent based on actions in life is used in relation to consent to transplant organs, used in the *Transplantation and Anatomy Act 1979* (Qld), where tissue may be removed, so long as it appeared that the deceased person had not, during his or her lifetime, *expressed an objection* to the removal after death of tissue from his or her body (emphasis added).⁹³ Any signed written consent by the deceased during their life is authorised by the Act, overriding any views of the next of kin.⁹⁴ Tissue can be removed if the senior available next of kin of the deceased person,⁹⁵ has consented to its removal for transplanting it to the body of a living person,⁹⁶ or for it to be used for other therapeutic purposes or for other medical or scientific purposes.⁹⁷ The responsibility falls on the remaining living people with the closest connection to the deceased who would also act to prevent harm or indignity to the body based on their awareness of the views of the man. There are clearly differences between organ donation and sperm harvesting, not least the limited scope for access to organs, unlike the number of sperm able to be accessed from the body. There is scope to prevent a woman seeking the tissue if any other close family member were to object, thus ensuring his status as a person is not compromised, and to ensure that implied consent was correctly interpreted by the living partner.

4. GENERATION, AUTHORITY AND THE ROLE OF WOMEN

In this part of this article, I will return to the tropes of the monstrous regiment, early modern theories of reproduction, the sperm stealing witch, and the child born as a result of malformed conception — the monster, as they prevail in the decisions of Chesterman J in *Re Gray* and Muir J in *Queensland v Baker*. The aim in this part of the article is to take passages from the judgments in

⁹¹ Riley Robyn 'Creating Life from Death' *Herald-Sun* (Melbourne) 2 June 2005 p 18.

⁹² Thomson above n 5 at 416.

⁹³ *Transplantation and Anatomy Act 1979* (Qld) s 22 (1) (b) For bodies not in hospital, s 23 (1) provides that the senior available next of kin can authorise the removal of tissue, by signed writing, unless the deceased person had made expressed an objection to the removal of tissue: s 23 (2) (a).

⁹⁴ *Transplantation and Anatomy Act 1979* (Qld) s 22 (5), s 23 (3).

⁹⁵ In terms of priority, the spouse of the person is the first in line: Definitions s 4 (1): senior available next of kin: (b)(i) followed by adult children, then the person's parent, and finally adult siblings Definitions s 4 (1): senior available next of kin: (b)(ii) — (iii). However, an objection by any of these people to the removal of tissue can negative the views of the others: s 22 (4); s 23 (2) (b) however, places the onus on the senior available next of kin who has reason to believe that another next of kin of the same or a higher order of classes in s 4 definitions *senior available next of kin*, then the tissue removal shall not be authorised.

⁹⁶ *Transplantation and Anatomy Act 1979* (Qld) s 22 (1) (c) (i); s 23 (1) (a).

⁹⁷ *Transplantation and Anatomy Act 1979* (Qld) s 22 (1) (c) (ii), s 23 (1) (b). In *Re Gray* Chesterman J held that the removal of tissue had to be for therapeutic or other medical or scientific purposes. His Honour held that the applicant's purpose was not for any of these purposes: *Re Gray* [2001] 2 Qd R 35 at 41 [22].

which their Honours express their concern about the actions of the women, and juxtapose them against the tropes of the early modern period. In particular, Chesterman J, at the end of the decision in *Re Gray*, sets out three reasons why, even if he had found he had jurisdiction to permit sperm harvesting, why he would not have permitted it. The juxtaposition of the reasons for decisions, are characteristic of the moral panic that occurs in the face of changes to the accepted order, in this case, in the face of new reproductive forms. The structure is episodic and non-linear, in line with the method of the *Verfremdungseffekte*.

4.1 *The early modern period and the monstrous regiment*

As an overarching conceit, periods of change are replete with challenges to existing social, political and cultural orders. The 'early modern period' — the 15th century, through to the 18th century is one of those. In classic Marxist historiography, it sits in the period that saw the shift from feudalism to capitalism, and an era in which modern ideas of science began to emerge, along with the development of secular political entity, the liberal conception of the individual, and the development of modern notions of government. The epochal shifts saw a tension between the old order, until the new institutional structures took their recognisable, modern form during the 18th century. In what was to become the United Kingdom, the early modern period begins in 1485, with ascension to the throne of Henry VII, the first Tudor monarch. As well as the political changes, it was in the early stages of this period that the English Renaissance occurred, the Reformation of the English and Scottish Churches, and new scientific and technological discoveries occurred.

Alongside essentially 'modern' developments, however, the old, medieval order was retained during the clash of institutions, and as noted earlier in the article, different 'mental worlds' in which magic, alchemy and the like sat alongside emerging rational discourse. However, tensions result at any point of change, not least in 1558, when the founder of Calvinism in Scotland, John Knox, issued his infamous tract against women, *The First Blast of the Trumpet against the Monstrous Regiment of Women*.⁹⁸ This document championed the new Protestantism, but drew on classical authors, biblical texts, and the associated glosses of the leaders of the church: Saint Paul, Saint Augustine and Saint Jerome to condemn the government of women. *The Monstrous Regiment*, in short, showed that it was unnatural for women to have power and authority over men.⁹⁹ Though specifically written to condemn Mary of Guise, the Regent of Scotland, and Mary Tudor, the Queen of England (both Catholics), the *First Blast* made it clear that no woman could have authority or power over men:¹⁰⁰

⁹⁸ URL 5 August 2005 <http://www.mcgees.net/fragments/primary/%20documents/public/%20address/FirBlast.htm>.

⁹⁹ Meikle Maureen M 'John Knox and Womankind: A Reappraisal' (2003) 79 *Historian* 9 generally; Jansen Sharon L *The Monstrous Regiment of Women: Female Rulers in Early Modern Europe* Palgrave Macmillan New York 2002 for background.

¹⁰⁰ Once the Protestant Elizabeth I ascended the throne, Knox found that she was not impressed with his views, even though he was more disposed to her as a non-Catholic.

I fear not to say, that the day of vengeance, which shall apprehend that horrible monster Jezebel of England [Mary Tudor] ... for assuredly her empire and reign is a wall without foundation. *I mean the same of the authority of all women.* (emphasis added)

Indeed, men who submit to the authority of women, or who consent to their authority, are compounding the problem because:

the authority of a woman is a corrupted fountain, and therefore from her can never spring any lawful officer. She is not born to rule over men ... [Men] must acknowledge that the regiment of a woman is a thing most odious in the presence of God. They must refuse to be her officers, because she is a traitress and rebel against God.

These arguments, though not their language, are familiar today. The ability for women to use reproductive technologies to have children without the assistance or support of male partners forms the classic locus of disquiet in the early part of the 21st century that is not limited to these post-mortem cases. The woman is now able to take an active role over the passive man, in effect giving her power over men. However, by following the actions of a woman, a man fails to correctly follow the will of God. As a result, any child born from an unnatural relationship will be corrupted and damaged, and it is in the image of the witch and the monster that the early modern explained the consequences of the unnatural actions of the parents, particularly the mother, of the child.

4.2 *The witch*

As I suggested earlier in this article, in the context of the potential application of s 236 of the *Criminal Code* (Qld), Chesterman J implied that no rational person would attempt to access a person's body to attempt to conceive a child. Put in those terms, the actions of anyone who could do such a thing must surely be seen as irrational. Irrationality, it seems, is much better reason to prevent someone accessing a body, than to have to deal with the possibility that a person would intentionally seek to access a body: such an action is surely unnatural. Chesterman J would, if he had had the power to allow her to access his body, he would have refused:

The court could have no confidence that the applicant's desire is a result of careful or rational deliberation. Given the need for urgent removal and the circumstances of her husband's death the applicant must have been suffering greatly from grief and shock. The decision made under the effect of such emotions is one she may well come to regret. It may not reflect her true desire or her assessment of what is best for herself and her child.¹⁰¹

To be otherwise than a woman suffering shock and grief would, however, recall the claims that took legal form in the early stages of the early modern period, about the actions of witches. Indeed, it is also the irrationality of the woman in these cases that is suggestive of another trope

¹⁰¹ *Re Gray* [2001] 2 Qd R 35 at 41 [23] (b).

from the early modern period, in which at the time of the witchcraft trials of the seventeenth century, Joanna Levin argues that

... the witch, the bewitched, and the hysteric were synchronic categories brought together under the auspices of a complex struggle for religious and political authority at the outset of King James's English reign ... the demonic woman and the hysteric each sought to explain "disorderly" womanhood, and to enforce (if also to differentiate between) modes of masculinist control. Depending on a topos of perverse or corrupted maternity/sexuality, the satanic female and the hysterical mother existed on a close continuum.¹⁰²

The parallels with the actions of Mrs Gray can be found as another factor of the early modern period: the rise and fall of the witch hunt. In the early modern period, the European explanation for the actions of witches is traced to the *Malleus Maleficarum* of 1487 by the German Dominican Heinrich Kramer. This document was used to explain the heretical actions of witches, and to catalogue the kinds of actions they carry out.¹⁰³ One of Kramer's claims was that devils would use witches to steal semen from a man, as a way for the devil to subvert and pervert the sacrament of marriage. The devil would firstly take:

the form of a succubus by constructing an aerial female body; after copulation with a man, the devil instantaneously transports the stolen semen to a witch; changing into an incubus, he copulates with her and injects the stolen semen into her body ... children born from this copulation are not actually the devil's offspring [but] ... many are doomed to become witches.¹⁰⁴

The methods and explanations found in this and other European treatises on witchcraft were followed by James I in his *Daemonologie*, where:¹⁰⁵

Witches can ... as well proved their power in special: *as of weakening the nature of some men, to make them unable for women: and making it to abound in others, more then the ordinary course of nature would permit.*

The theological and popular views about witches were supported by the law in the medieval and early modern periods.¹⁰⁶ However, it was James I's 1604 statute 'against conjuration, Witchcraft

¹⁰² Levin Joanna 'Lady Macbeth and the Daemonologie of Hysteria' (2002) 69.1 *ELH* 21 at 22–23.

¹⁰³ Stephens Walter 'Witches Who Steal Penises: Impotence and Illusion in *Malleus Maleficarum*' (1998) 28 *Journal of Medieval and Early Modern Studies* 495. St Thomas Aquinas, in the document *Quaestiones Quodlibetales* claimed that demons impede carnal copulation, cited in Shah J 'Erectile Dysfunction through the Ages' (2002) 90 *BJU International* 433 at 435.

¹⁰⁴ Stephens, as above 510–511, footnotes removed.

¹⁰⁵ I have used modern spellings, not the originals and in later extracts used.

¹⁰⁶ In England and the *De haeretico comburendo* was passed in 1401: 1 Edw VI, c 12. Henry VIII introduced a statute establishing the death penalty for 'invoking or conjuring an evil spirit', it was repealed by Edward VI. However, Elizabeth I's Act of 1563 provided that the death penalty would apply to anyone who should 'use, practise, or exercise any Witchcraft, Enchantment, Charm, or Sorcery, whereby any person shall happen to be killed or destroyed': 5 *Eliz I*, c 16. Hester Marianne *Lewd Women and Wicked Witches: A Study of the Dynamics of Male Domination* Routledge London 1992 Chapters Six — Eight in particular, provides a detailed account of the witchcraft pamphlets and trials in the Elizabethan and Jacobean periods.

and dealing with evil and wicked spirits',¹⁰⁷ which provided that the death penalty would apply to any person or anyone who helped them,¹⁰⁸ who among other things:

shall use practise or exercise any Invocation or Conjuraton of any evil and spirit, or shall consult covenant with entertain employ feed or reward any evil and wicked Spirit to or for any intent or purpose; or *take any dead man woman or child out of his her or their grave or any other place where the dead body resteth, or the skin, bone or any other parte of any dead person, to be employed or used in any manner of Witchecrafte, Sorcerie, Charme or Inchantment.*

This piece of legislation brings out two characteristics that marry up to the sperm harvesting woman — her taking of any part of any dead person, to be used to carry out an unnatural activity — namely by creating life from the dead. Her actions, in so doing, invoke the behaviour of the devil. Interestingly, historians suggest that it is widows who were most often accused of witchcraft during this period of the early modern.¹⁰⁹ Its traces are redolent in Chesterman J's decision. It also makes it clear that any fears about the outcome for the child of this form of early 21st century conception is one that will be tainted: the child will be marked as being akin to the offspring of the devil and the witch that so concerned Kramer.

4.3 *Images of the paternal or the father*

The first of the three reasons why Chesterman J would have refused Mrs Gray's application was based on assumptions about the nature of the reproductive roles of men and women: that it is the man whose role it is to impregnate his wife, and that conception occurs because she is impregnated by him:

The deceased did not in his lifetime indicate his consent to such a procedure. He did not, naturally enough, ever turn his mind to such an eventuality. While it may be accepted that he desired another child *it was a desire he wished to consummate in his lifetime*. There is no reason to believe he wished his *wife to be impregnated* posthumously.¹¹⁰ (emphasis added)

Max Andréoli points out that it was only at the beginning of the 20th century that the mythology of conception, which claimed that children's moral form was derived from their fathers, was truly put to rest. These views were typified by the 16th century French Renaissance scholar Montaigne: 'that the drop of seed from which we are produced should carry in itself the impression not only of the bodily form, but even of the thoughts and inclinations of our fathers!'¹¹¹ Thus, Chesterman J is following in the tradition that holds that the:

¹⁰⁷ 1 *Jas I*, c 12

¹⁰⁸ This statute in 1736, at the newly rational stage of the latter early modern period, when the law was directed at people *pretending* to have the power to call up spirits, foretell the future, cast spells, was now a misdemeanour 9 *Geo II* c 5.

¹⁰⁹ Hester Marianne *Lewd Women and Wicked Witches: A Study of the Dynamics of Male Domination* Routledge London 1992 p 192–193.

¹¹⁰ Chesterman J *Re Gray* [2001] 2 Qd R 35 at 41 (a).

¹¹¹ Montaigne, 'On the resemblance of children to their fathers' in the *Essays of Michel de Montaigne*, II, Charles Cotton trans. (London: Dell, 1913), p 495.

man has precedence over woman in matters of generation and the transmission of name and inheritance [though] ... it is woman ... who provides the space in which fertilisation and its consequence occurs.¹¹²

Thus, in constructing the relationship in these terms — he did not wish his *wife to be impregnated* posthumously — Chesterman J was using the word in its 17th and 18th century usage.¹¹³ Well into the 16th century, scholars relied upon the classical authors for understanding the processes of reproduction, or ‘generation’. Galen and Aristotle provided the key theory based on the ‘fluids’: the child was formed from the active principle in the male sperm shaping the female matter of menstrual blood.¹¹⁴ St Thomas Aquinas had adopted an Aristotelian methodology of the ‘two bloods’, which ‘makes it possible to preserve the dominance of paternity by giving the paternal semen the active role, while the passive role is accorded to the womb’.¹¹⁵ Thus, the passive, ordinary blood that forms the material body of the child came from the mother, while ‘another blood which is purer and more highly developed, the ‘perfect’ blood whose source is the paternal heart and which, in the guise of sperm, forms the child’s soul.’¹¹⁶

By the 17th century, there was some understanding of the role of sperm and ova in the creation of a child through the development of microscopes, but until well into the 19th century, theories about the means by which children were created abounded. The most popular and famous was the idea of preformation of the child in either the ova or the sperm (popularised as the homunculus, in which the reproduced child of the father was passed on to the mother’s body). The continued notion that the male parent transmits the character of the child is evident in Chesterman J’s judgment, as does the potential for damage caused to a child by the circumstances surrounding its conception.

4.4 *A monstrous birth*

The early modern period was intrigued by the birth of monsters. Monsters, in this sense, are child born physically deformed, and the explanation in this period for these births was traced back to the situation surrounding its conception. Clara Pinto-Correia notes that by the end of the 16th century, ‘treatises on monsters had become a veritable genre’,¹¹⁷ though monsters had been the subject of considerable discussion through the classical and medieval period. They caused theological and legal difficulties, as monsters as creatures were creatures without souls, for the

Cited in Max Andréoli ‘Heredity and Paternity’ in Spaas Lieve and Selous Trista (eds) *Paternity and Fatherhood: Myths and Realities* Macmillan Press Hampshire and London 1998 p 15 at 15.

As Andréoli wryly observes the ‘drop of seed’ ... *obviously* refers to the paternal semen and ignores the role of the mother in the process of biological heredity’ at 16.

¹¹² Andréoli, as above at 16.

¹¹³ Oxford English Dictionary.

¹¹⁴ Patricia Crawford ‘Sexual Knowledge in England, 1500–1750’ in Porter Roy and Teich Mikuláš (eds) *Sexual Knowledge, Sexual Science: The History of Attitudes to Sexuality* Cambridge University Press Cambridge 1994 p 82 at 85.

¹¹⁵ Andréoli above n 111 at 18.

¹¹⁶ As above n 111 at 17.

¹¹⁷ Pinto-Correia Clara *The Ovary of Eve: Egg and Sperm and Preformation* University of Chicago Press Chicago and London 1997 p 148.

most part.¹¹⁸ By the early modern period, attempts to explain monster's scientifically began with Ambroise Paré's *On Monsters and Marvels* published in 1573, followed by Frances Bacon's recommendations in 1620 that a natural history be made of 'all monsters and prodigious births of nature'.¹¹⁹ He was translated into English in 1634.¹²⁰ Paré was the French royal surgeon, who set out 13 reasons why monsters are caused:

The first is the glory of God. The second, His wrath. The third, too great a quantity of seed. The fourth, too little a quantity. The fifth, the imagination. The sixth, the narrowness or the smallness of the womb. The seventh, the indecent posture of the mother ... The eighth, through a fall, or blows ... The ninth, through heredity or accidental illness. The tenth, through rotten or corrupt seed. The eleventh, through mixture or mingling of seed. The twelfth, through the artifice of wicked beggars. The thirteenth, through Demons and Devils.¹²¹

The creation of the monster has points in common with the work of the witch. Chesterman J makes two observations in the final reasons for refusing to allow the sperm harvesting — one issue relates to the question of the fatherless child (to be considered below), while the other relates to the potential damage to the child brought about by the circumstances of its conception (relating to the danger that the mother will, through her actions, create a monster):

The interests of any child born as a result of the procedure must be of particular importance in the exercise of the discretion. I cannot see how it can be said that the interests of such a child will be advanced by inevitable fatherlessness. *The very nature of the conception may cause the child embarrassment or more serious emotional problems as it grows up.* More significant, because the court can never know in what circumstances the child may be born and brought up, it is impossible to know what is in its best interests.¹²²

Historically, in law, the monster caused difficulties, as it may not have been given the status of a person. This issue troubled the Court of Appeal in England in 2000,¹²³ where it had to consider whether conjoined twins were 'reasonable creatures' and thus a person,¹²⁴ or whether

¹¹⁸ They were also called in aid to explain the evils of one or other religious forms during the reformation. Pinto-Correia as above at 161–164; Knoppers Laura Lunger and Landes Joan B (eds) *Monstrous Bodies: Political Monstrosities in Early Modern Europe* Cornell University Press Ithaca 2004 generally.

¹¹⁹ Pinto-Correia as above n 117 at 151.

¹²⁰ Crawford above n 114 at 90

¹²¹ Pinto-Correia as above n 117 at 151–152

¹²² Chesterman J *Re Gray* [2001] 2 Qd R 35 at 41 (c).

¹²³ In *Re A (children) (conjoined twins: surgical separation)* [2001] Fam 147.

¹²⁴ Brooke LJ was concerned that the editors of *Archbold*, including the 2000 edition, had used the word 'reasonable' in relation to Coke's definition of a reasonable creature (which his Lordship observed that they wrongly ascribe to Lord Hale) related to the appearance rather than the mental capacity of the victim, thus excluding 'monstrous births' at 212.

they were monstrous births.¹²⁵ In deciding that they were reasonable creatures, Brooke LJ noted that the court: had wanted to understand

some of the thinking of seventeenth century English philosophers in an effort to ascertain what Coke may have meant when he used the expression 'any reasonable creature' as part of his definition. *We had in mind their absorbing interest in the nature of 'strange and deformed births' and 'monstrous births'*¹²⁶ (emphasis added)

Aside from the intriguing possibility that the rational development of the common law and the emerging liberal mindset sat side-by-side with the 'monster', Brooke LJ accepted the following submission of the friend of the court that: 'Whatever might have been thought of as "monstrous" by Bracton, Coke, Blackstone, Locke and Hobbes, different considerations would clearly apply today'.¹²⁷ Though that disposed of the possibility that the notion of the monster may survive in law in England, the potential for the cases of this kind to retain its trace in the law and its notion of commonsense remains open. Nearly 90 years earlier in Australia, the status of the monster exercised the minds of Barton J and Higgins J in *Doodeward v Spence*.¹²⁸ Barton J clearly accepted that the stillborn two headed child was a monster to be denied a status as a person, and not to be given a Christian burial.¹²⁹ Higgins J dissented, and traces the ancient law about monsters back to Coke:

This case is also to be found stated in the same way in *Hawkin's Pleas of the Crown*, and it shows that the same law applies to what Lord Coke called "monsters" as well as to normal human beings. It seems that when the "monster" is double-headed, it is the Christian habit

¹²⁵ *State of Qld v Alyssa Nolan & Anor* [2002] 1 Qd R 454 which involved the separation of conjoined twins who were joined at the head. As in *Re A*, one of the twins would die as a result of the surgery. Chesterman J did not explore the status of the children.

¹²⁶ His Lordship cited the following at 213:

(see Thomas Hobbes (1640) *Elements of Law* part II, ch 10, s 8, and John Locke *An Essay Concerning Human Understanding* (1690), Book III, ch III, section 17, Book III, ch VI, ss 15 and 26 and Book III, ch XI, s 20).

¹²⁷ At 213 Miss Davies QC, had submitted that

In "The Sanctity of Life and the Criminal Law" (1958), Professor Glanville Williams stated at p 31: "There is, indeed some kind of legal argument that a 'monster' is not protected even under the existing law. This argument depends upon the very old legal writers, because the matter has not been considered in any modern work or in any court judgment." After discussing the meaning of the word "monster" (which might originally have connoted animal paternity) he states at pp 33–34: "Locked (Siamese) twins present a special case, though they are treated in medical works as a species of monster"

¹²⁸ *Doodeward v Spence* (1908) 6 CLR 406.

¹²⁹ *Doodeward v Spence* (1908) 6 CLR 406 at 416:

... it is an aberration of nature, having two heads. Can such a thing be, without shock to the mind, associated with the notion of the process that we know as Christian burial? Does it not almost seem indecent to associate that notion with such facts? Do not all these considerations lead us to doubt whether such a thing as a dead-born foetal monster, preserved in spirits as a curiosity during four decades, can now be regarded as a corpse awaiting burial ... It would have been difficult to admit that this dead foetus answered that description at the time, almost immediately after its birth, when Dr. Donahoe was allowed to take it away and when he preserved it in spirits.

to baptize both heads.¹³⁰ It is illegal to destroy monsters; any one who kills a two-headed child born alive is guilty of child murder.¹³¹ (footnotes removed)

However, the continuing fear that a child would be born as a result of a procedure of this kind with profound difficulties of a welfare nature and of a physical nature is clear in Chesterman J's views. The possibilities of a future child damaged because of the actions of its mother hang deeply over the judgment, and also sit in and around the social views about posthumous conception and sperm harvesting in general. Any damage done to a child has historically been placed on the mother. The modern analogy is the harming mother, or as Sally Sheldon points out: 'because of the corporeal nature of women's engagement with reproduction, it is the woman who has been seen as posing the greatest risk to the foetus'.¹³² Indeed, at the heart of these concerns, it may be argued, are more simple, social questions about who should be a parent, and who should not, in early 21st century Australia. This particular question is tied up with, and mixed into, the moral and social anxieties that were found at another stage of transition — the early modern — and its own demonisation of those who do not conform.

5. CONCLUSION: NEEDING A FATHER

Chesterman J's views about the possible creation of this child mirrors the anxieties of the Australian Liberal Party Senator Guy Barnett who, in the debate that resurfaced in 2005 about allowing single women and lesbians access to IVF treatment and Medicare rebates, noted that 'I believe that a child is entitled to come into the world with a reasonable expectation of the love and affection of both a mother and a father'.¹³³ In effect, Chesterman J is particularly concerned that a child would be born without a father, and he would inevitably disagree with Michael Thomson's suggestion that an absent father is considered to be a more acceptable option than a child born outside a standard heterosexual relationship:

The desire for a male presence appears so extreme as to privilege those who may provide a clinician with a macabre, disembodied and spectral presence over those who may seek treatment services with an embodied, corporeal and supportive partner who happens to be of the same sex.¹³⁴

The need for a father clearly concerned Muir J when his Honour refused Simone Baker's request. In agreeing with Chesterman J's refusal to exercise his discretion to allow Mrs Gray to

¹³⁰ Pinto-Correia above n 117 p 161 indicates this is the case also.

¹³¹ *Doodeward v Spence* (1908) 6 CLR 406 at 419–420.

¹³² Sally Sheldon 'ReConceiving Masculinity: Imagining Men's Reproductive Bodies in Law' (1999) 26 *Journal of Law and Society* 129 at 130.

¹³³ Price Matt and Pirani Clara 'Demand for IVF ban on lesbians' *The Australian* 2 July 2005 p 2.

¹³⁴ Thomson Michael *Reproducing Narrative: Gender, Reproduction and Law* Aldershot Dartmouth 1998 p188.

have access to the tissue from her husband's body, Muir J sought to read the mind of the deceased, to get a sense of what should honourably happen to Simone Baker on his decease:

... it must be even more doubtful here that the procedure contemplated by the applicant would have accorded with the wishes of the deceased. Had he turned his mind to the question, he would no doubt have given anxious consideration to the best interests of the applicant and of the child or children to be born as a result of the proposed procedure. He would have seen the existence of such a child or children was capable of restricting the applicant's ability to pass beyond her grief and start life afresh. He would have contemplated also the difficulties which face a single working mother and the constraints that would be imposed on her social life and on her ability to enter into a new relationship or relationships.¹³⁵

The nature of these comments was extraordinary, given that his Honour had already noted that Simone Baker and her deceased fiancé, had already made arrangements to accommodate the birth of children, including changing their medical benefit cover. It was Simone Baker's decision to defer having children until after they were married, though her fiancé had no such preference.¹³⁶ His Honour's comments were not well received publicly; in particular his comments indicating what Simone Baker's fiancé would have wanted, which were clearly not based on any evidence heard by the court.¹³⁷ Simone Baker's father was reported as saying that Muir J's comments about a child prolonging grief was an outrageous comment, and that he did not think anyone who knew their relationship could say that sort of thing. Her application had been supported by her own parents and her fiancé's parents. Her fiancé's father said that it would have meant everything for them for Simone Baker to have his son's children and that it was their only chance for grandchildren.¹³⁸

In effect, his Honour made a decision that assumed that the correct place to have a child is within a conventional relationship. He clearly took the view that a woman should not be a single mother, and along with Chesterman J, characterised a decision to have a child in these circumstances in public policy terms. Of course, neither judge cannot prevent her from seeking to have a child by any other means with another man, but he has actively prevented the women from attempting to conceive with her deceased partner. On the other hand, Atkinson J took a decidedly different stance from either of her brother judges on this point, also couched in public policy terms:

It is certainly the case that any child born, if that were to happen as a result of successful posthumous reproduction, would be born without a father, but children have been born without fathers for a very long time ... No doubt it is preferable for a child to have not one but two parents, both of whom fulfil their parental responsibilities, but many children do not have that, and there are many children who do extremely well in one parent families. It

¹³⁵ *Baker v State of Queensland* 6/01/2003 (Unrept, Qld SC Muir J), p 4.

¹³⁶ *Baker v State of Queensland* 6/01/2003 (Unrept, Qld SC Muir J), p 1.

¹³⁷ Griffith Chris 'Law not tuned in to private dreams' *The Courier-Mail* (Brisbane) 7 January 2003 p 2.

¹³⁸ Gregory Jason and other 'Death and the courts end family dream' *The Courier-Mail* (Brisbane) 7 January 2003 p 1.

cannot be thought that because the child will only have one living parent that will necessarily not be in its best interests, particularly when the alternative is for the child not to exist at all.¹³⁹

As already noted, her Honour adopted the approach used in the Victorian cases which allowed the removal of sperm to be frozen, and that the sperm not be used without the further order of the court. Any decision to use the sperm would have to be deferred, so that the partner could be counselled about any decision to later use the sperm. Her actions may be seen to be the ultimate act of fidelity to her partner, and perhaps, his family. These may be bad reasons for her to think of having a child this way, and on reflection, she may not want to conceive this way. Atkinson Js' order that no use be made of the sperm without further orders of the court reflect the need for her to have time before making such a decision. On the other hand, the decisions of Chesterman J and Muir J prevent any possible later chance for a decision to be made. The policy clashes translate into personal destinies. It may be that the adoption of the test of 'good sense and ordinary concepts of morality' would deny the potential for the existence of a child, and the chance for the continuation of a genetic, and family line. This is the point at which the continued moral panic surrounding the potential for the creation of a new life out of death will continue unabated while the adoption of an express requirement for consent is retained, a test which imposes a standard which is not always adopted in life. ●

¹³⁹ *Re Denman* [2004] 2 Qd R 595 at 597.