Take outs

The judgment provides a helpful commentary on the meaning and effect of the legislative scheme of the Privacy Act. In light of contemporary circumstances seeing the proliferation of data creation and increased sensitivity to the means of protecting personal information it is important to understand the legislative limits of the Privacy Act and related laws. While the Privacy Act enshrines protections of personal information, it also sets out important exceptions to such protection, including in respect of disclosures by public sector agencies, including law enforcement agencies.

CHAPMAN v SOUTH EASTERN SYDNEY LOCAL HEALTH DISTRICT [2018] NSWSC 1231

By Ari Katsoulas, Barrister, Second Floor Wentworth Chambers

The Supreme Court of New South Wales in *Chapman v South Eastern Sydney Local Health District* [2018] NSWSC 1231 (***Chapman***) recently declared that the deceased's widow was entitled to possession of sperm posthumously recovered from the body of her late husband. In addition to confirming that human tissue can become capable of possession, the decision is significant in that it has sought to close the gates for parties seeking urgent relief from the Court to extract and preserve sperm soon after death in the absence of prior written consent.

Facts

The late Mr Chapman suffered complications while undergoing an endovascular embolization procedure. On 28 March 2018, the Plaintiff obtained orders from the Common Law duty judge permitting the Plaintiff to consent to the procedure for the extraction of sperm of Mr Chapman, however, with use of the sperm to be restrained until further order of the Court.

Mr Chapman was pronounced dead at 10am on 29 March 2018. At 4:00pm that day, and purportedly in accordance with the Court's orders, the sperm was extracted from the deceased and subsequently cryopreserved and stored at the Royal Hospital for Women, Randwick.

By Amended Summons, the Plaintiff sought a declaration that she was entitled to possession of the sperm and a discharge of the restrictions.

At hearing, it was not in contest that the Plaintiff and deceased were married and shared a mutual intention to have children in the future. However, the *Artificial Reproductive Technology Act 2007* (NSW) (***ART Act***), which regulates the use of artificial reproductive technology and the use of gametes in New South Wales, prohibits the use and supply of gametes without the written consent of the donor. In the present case, the gametes were posthumously harvested and consent was therefore incapable of being given.

Issues for Determination

The questions before the Court in granting the declaration were:

A. Is the Plaintiff entitled to possession of the sperm?

B. Are there any discretionary factors as to why the declaration should not be granted, namely, is there any incurable infringement of the *ART Act* which prohibits the utility of any declaration?

A. The Proprietary Rights in Sperm

In order to make the declaration, the Court had to be satisfied that the Plaintiff had a legal entitlement to possession of the sperm. Alternatively framed, did the sperm extracted from the deceased obtain characteristics making it capable of possession? His honour followed *Doodeward v Spence* (1908) 6 CLR 406 (***Doodeward***) being an appeal to the High Court which considered whether a two-headed foetus preserved in a jar had acquired proprietary rights. In that case, the majority considered that human tissue could acquire characteristics making it capable of possession if the claimant had come into lawful possession of the human tissue and expended some work and skill on that tissue.

In applying *Doodeward*, the Court concluded that the sperm was lawfully removed by virtue of the orders of the Court on 29 March, and that the cryopreserving of the sperm at the behest of the Plaintiff was sufficient to give rise to a *prima facie* entitlement to possession.

B. Discretionary Factors

The Attorney-General, who appeared as contradictor, advanced the submission that section 21 of the *ART Act,* whereby providing, *"An ART provider must not supply a gamete…to another person…except with the consent of the gamete provider…"* prohibited the Plaintiff's possession of the sperm. The Court rejected the wide construction of "supply" and held that the release of the sperm from the storage facility as bailee to the Plaintiff, being the rightful owner, would be characterised as a release relinquishment or surrender, and not a supply. Furthermore, the Plaintiff causing her agent to transport the sperm interstate would not account to an "export" as prohibited by section 22 of the *ART Act*.

Final Orders

As the Court was satisfied that there was legal precedent for the Plaintiff to obtain a proprietary right in the sperm, and that the possible infringement of the *ART Act* could be curbed by appropriate orders, the Court made a declaration that "the plaintiff is entitled to possession of the sperm recovered…from the body of her late husband…"

For Practitioners

Chapman was used by the Court as a vehicle to clarify the power of the Supreme Court to make orders for sperm retrieval in the absence of written consent when the donor was unconscious or deceased. Notwithstanding the earlier decisions of the Supreme Court in *Chapman* and earlier proceedings, his honour considered that:

- Section 36 of the *Human Tissue Act 1983* (NSW) explicitly bars any person from purporting to consent to removal of sperm from an unconscious patient and prevents the Court itself authorising that act - subject to any other law. His honour found that neither the *parens patriae* jurisdiction of the Court or the *Guardianship Act 1987* (NSW) constituted any other law to authorise extraction in the absence of prior written consent.

- In circumstances where the donor has recently deceased, provided the deceased has given written consent for the posthumous removal, storage and use of his sperm, a designed officer under the *Human Tissue Act* may be able to authorise the extraction (subject to compliance with any other provision of the *ART Act)*.

In this regard, *Chapman* is in contrast to the earlier decision of Johnson J in *Gonzales v State Coroner of New South Wales* [2018] NSWSC 153 (in which I also appeared as counsel) where posthumous extraction of sperm at the behest of the deceased's spouse was authorised. Should *Chapman* be followed, the Supreme Court of New South Wales is unlikely to authorise posthumous sperm extractions in the absence of prior written consent to removal, use and storage of the gametes.

Without delving into the policy and ethical questions arising, practitioners advising on estate planning should consider raising the importance of written instruments around the posthumous use of gametes. This clarity may equally act to authorise or bar any application to posthumously harvest and use gametes.

CIVIL LITIGATION COMMITTEE'S SUBMISSIONS ON CLASS ACTIONS AND LITIGATION FUNDING

By Andrew Hack and Jem Punthakey

On 31 May 2018, the Australian Law Reform Commission (**ALRC**) released its Discussion Paper on the Inquiry into Class Action Proceedings and Third-Party Litigation Funders. The paper is available on the ALRC's website.

The Discussion Paper put forward a number of proposals and posed several questions, inviting the public to provide commentary by way of submissions. By way of summary, the ALRC proposed:

1. The introduction of a licensing scheme where third-party litigation funders would be required to hold a "litigation funding licence";

2. Conflict of interest reporting and audits of litigation funders;

3. A prohibition on solicitors from having financial interests in third-party litigation funders;