



Précis Paper

Posthumous Extraction of Sperm Cells and IVF

A discussion of the recent case of *Chapman v South Eastern Sydney Local Health District [2018] NSWSC 1231* and the current state of legislation in NSW surrounding the posthumous extraction of sperm cells.

Discussion Includes

- Applications, the law and technology
- *Chapman v South Eastern Sydney Local Health District*
- Stages of the process
- Removal of cells
- Proprietary property rights
- Partners and families
- Uncertainties in the legislation
- Legislative reform

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Posthumous Extraction of Sperm Cells and IVF

1. In this edition of BenchTV, Evan James (Barrister, Garfield Barwick Chambers) and Ari Katsoulas (Barrister, 2 Wentworth Chambers) discuss the recent case of *Chapman v South Eastern Sydney Local Health District [2018] NSWSC 1231* and the current state of legislation in NSW surrounding the posthumous extraction of sperm cells.

Applications, the law and technology

2. In NSW the law has not kept up with the technology. The technology exists to extract sperm posthumously, however the legislation is quite silent on what considerations ought to be made.
3. As it stands presently, consent is required, and consent is by way of written instrument.
4. Legislation varies from state to state.

Chapman v South Eastern Sydney Local Health District

5. There was an application brought by the spouse of someone who was unconscious. This application was brought before the duty judge without any prior notice. The deceased's husband had medical complications and became unconscious in a permanent vegetative state. In the first instance, Garling J as duty judge considered that the *Guardianship Act 1987 (NSW)* allowed him to authorise practitioners at the hospital to retrieve the sperm from Mr. Chapman while he was still alive.

Stages of the process

6. It is important not to rush the matter so that you do not run into issues further down line, but a certain degree of haste is necessary in order to harvest the cells in time.

Removal of cells

7. The law on whether cells can be removed from a deceased person are not settled.
8. There are provisions through the *Human Tissue Act 1983 (NSW)* for the extraction of body parts, for donation or transplant where an authorised officer of a hospital makes a decision and fills out the requisite forms admitting the extraction.
9. There may be scope, as yet unexplored, for reproductive cells and tissues to be included in that order.

Proprietary property rights

10. The first element that needs to be proven in any case like this is whether the applicant is properly entitled to possession of the sperm.
11. There is a legislative bar for human tissue to have proprietary property rights.
12. The rights that an administrator and executor has is merely to have possession of the body to provide it with a burial.

Partners and families

13. There are guidelines for the posthumous use of sperm, and one of those guidelines is that the applicant isn't just making a rash emotional decision in the context of having a partner recently die.
14. Any objector would need to show that there was some specific reason why the applicant shouldn't have possession and use of the sperm.

Uncertainties in the legislation

15. There is sufficient uncertainty in the legislation. It may or may not be that Parliament wants people to be able to use the sperm of the deceased in NSW, but there is no step in legislation in one direction or the other.
16. The uncertainty that medical practitioners have in NSW is that they refer patients off to lawyers who go to court. When you go through the judicial process, you lose the privacy that you would have should a doctor deal with the matter in house with you.
17. It would be prudent to include terms in the will as a form of written consent to address some of the concerns the court may have.
18. In the absence of written consent, it is a complex and difficult litigious process.

Legislative Reform

19. Parliament would have to decide if they want to rely solely on a written consent, or in circumstances where the parties did not have a written consent, what considerations must be considered before any application could be made.
20. There is scope for religious objection

BIOGRAPHY

Evan James

Barrister, Garfield Barwick Chambers, Sydney

Evan commenced practice as a solicitor in 2010 and was called to the Bar in 2014 where he specialises in criminal law, mental health law and the associated Tribunals and Sports Law and the associated Tribunals. Evan has appeared in Royal Commissions and other Commissions of Inquiry, including the Northern Territory Inquiry into Stella Maris, the NSW Crime Commission, the Australian Crime Commission and ICAC. He has also appeared in such tribunals as the Racing Appeals Tribunal, Administrative Decisions Tribunal (now NCAT) and regularly appeared at the Mental Health Review Tribunal. Evans is a member of the Disciplinary Tribunal of Touch Football Australia.

Ari Katsoulas

Barrister, 2 Wentworth Chambers, Sydney

Ari specialises in Commercial, Equity and Insurance disputes and litigation. He has particular experience in Succession related disputes including Family Provision claims.

He regularly appears as an advocate in most State and Federal Courts and Tribunals as well as at mediations and settlement conferences.

Prior to being called to the Bar, Ari worked in the corporate and commercial legal team at a top-tier advisory firm, providing expert advice in relation to corporations, commercial contracts, due diligence, venture capital and private equity, effective structuring advice, trusts and investment funds and self-managed superannuation funds.

As Counsel, Ari continues in an advisory role with innovative start-ups and early stage ventures, particularly in the mobile technology sector. He has also previously worked in commercial roles in Shanghai, Hong Kong, the United Kingdom and Europe.

Ari holds a Bachelor of Laws and a Bachelor of Arts from Macquarie University.

BIBLIOGRAPHY

Focus Case

Chapman v South Eastern Sydney Local Health District [2018] NSWSC 1231

Benchmark Link

https://benchmarkinc.com.au/benchmark/banking/benchmark_13-08-2018_banking.pdf

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/5b6a2a82e4b09e99630718ab>

Cases

Gonzales v State Coroner of New South Wales [2018] NSWSC 153

Assisted Reproductive Technology Act 2007 (NSW)

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

Doodeward v Spence [1908] HCA 45

Legislation

Guardianship Act 1987 (NSW)

Human Tissue Act 1983 (NSW)

Assisted Reproductive Technology Act 2007 (NSW)