AN ILLOGICAL DISTINCTION CONTINUED: *RE CRESSWELL* AND PROPERTY RIGHTS IN HUMAN BIOLOGICAL MATERIAL

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I INTRODUCTION

On 20 June 2018, the Queensland Supreme Court handed down *Re Cresswell*.[1] This decision saw Brown J apply a 110-year-old High Court authority to find property rights in the spermatozoa removed from a deceased man nearly two years beforehand.[2] The decision in *Re Cresswell* was widely reported in local and national media and the motivations of the young applicant, the deceased's surviving de facto partner, were repeatedly questioned.[3] Unsurprisingly, these somewhat sensationalised media reports failed to note the importance of the Supreme Court's reasoning when making the property rights determination.

The body of Australian case law dealing with the question of property rights in human biological material is large and contradictory. *Re Cresswell* is the culmination of over three decades of Australian jurisprudence on the issue and is notable for its comprehensive and in-depth discussion of preceding decisions.[4] Brown J's use of precedent (more precisely, her Honour's favouring of one body of precedent over another) is not without issue, however. After setting out the factual background to the dispute in Part II, this article engages with Brown J's reasoning in *Re Cresswell* in three key respects. Part III first describes Brown J's reasoning in reaching the conclusion that the sperm at issue was capable of being the subject of property rights.

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1 [2018] QSC 142.

2 This article adopts the approach of Brown J in *Re Cresswell* and uses the more common term 'sperm' from this point: see ibid [1].

3 Discussing an earlier decision in the Cresswell litigation, one commenter on an online news article, for example, suggested that Ms Cresswell was attempting to use her deceased partner's sperm as 'a ticket to a single mothers [sic] pension': 'Woman's Plea to Use Dead Boyfriend's Sperm for Baby', *The Chronicle* (online), 8 May 2017 <https://www.thechronicle.com.au/news /womans-plea-use-dead-boyfriends-sperm-baby/3175108/>. Commenting on another article, user aussieauld accused those involved in the application of attempting to 'replicate' the deceased through a child: Belinda Cleary, 'Woman, 23, Wins the Right to Use Her DEAD Boyfriend's Sperm to Start Their Family because "It's What He Would Have Wanted"', *Daily Mail Australia* (online), 15 October 2016 <http://www.dailymail.co.uk /news/article3839221 /Toowoomba-woman-Ayla-Cresswell-wins-right-use-late-partner-Joshua-Davies-sperm.html>.

4 Within the particular context of sperm samples, previous cases include *AB v A-G (Vic)* (Unreported, Supreme Court of Victoria, Gillard J, 23 July 1998); *MAW v Western Sydney Area Health Service* (2000) 49 NSWLR 231; *Re Gray* [2001] 2 Qd R 35; *Baker v Queensland* [2003] QSC 2; *Re Denman* [2004] 2 Qd R 595; *AB v A-G (Vic)* (2005) 12 VR 485; *Y v Austin Health* (2005) 13 VR 363; *S v Minister for Health (WA)* [2008] WASC 262; *Bazley v Wesley Monash IVF Pty Ltd* [2011] 2 Qd R 207; *Re Estate of Edwards* (2011) 81 NSWLR 198; *Re H, AE [No 2]* [2012] SASC 177; *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte C* [2013] WASC 3; *Roblin v Public Trustee (ACT)* (2015) 10 ACTLR 300; *Re Patteson* [2016] QSC 104.

Crucially, this description reveals a distinction in the approaches taken in the case law between finding property rights in human biological material[5] removed from a source individual pre-mortem and material removed post-mortem.

Against the background of her Honour's reasoning, this article makes its central critique in Part IV: that the explanation offered for the pre-/post-mortem dichotomy by Brown J is a result of unwarranted legal formalism that ignores the practical realities of disputes in this area of law. Further, the traditional approach taken by Australian courts – including the Queensland Supreme Court in *Re Cresswell* – to the question of property rights in human biological material removed from a source individual after their death is inherently problematic.

Finally, Part V questions the very deliberate decision of the Queensland Supreme Court in *Re Cresswell* not to abandon the pre-/post-mortem distinction despite being presented with an ideal opportunity to do so. This part sets out, and refutes, three possible reasons for Brown J's conscious decision to uphold the dichotomy. This article ultimately concludes with a call to arms to future state courts faced with the question of property rights in human biological material. It falls to these courts to take the initial steps towards removing the pre-/post-mortem distinction from the Australian jurisprudence. Instead of doing so in *Re Cresswell*, the Queensland Supreme Court allowed an illogical dichotomy to continue within the Australian common law.

II FACTUAL BACKGROUND

Ayla Cresswell met Joshua Davies in 2013. After a brief friendship, the two started dating. The pair moved in together in early 2016 and began planning a future together. These plans included saving for a house, getting married, and, crucially, becoming parents.[6] Tragically, these plans would never eventuate. Without any apparent warning, Josh Davies took his own life in the early hours of 23 August 2016.[7] Within hours of Josh's death, Ayla made the decision, with the full support of Josh's parents, that she wanted to have Josh's child by way of in-vitro fertilization ('IVF') treatment. This required that Josh's sperm be removed from his body and preserved – a process that must take place within 48 hours after death to ensure sperm viability. Such removal not being possible without a court order, Ayla made the necessary application seeking orders for the removal of sperm from Josh Davies' body on the morning of 24 August 2016. The application was heard urgently, and Burns J of the Queensland Supreme Court ordered that Josh's testes and sperm be removed and provided to Ayla's nominated IVF clinic.[8]

Importantly, the orders of 24 August required that a further application be made to the Queensland Supreme Court before Ayla could use Josh's sperm in IVF treatment.[9]

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5 Another note on terminology: the phrase 'human biological material' is used throughout this article as a catch-all term to refer to all forms of tissue and other bodily substances (including sperm) that have been the subject of litigation in the property rights context. It is intended to be no more than convenient shorthand.

6 *Re Cresswell* [2018] QSC 142, [6].

7 Ibid [1], [7].

8 Ibid [9]–[10].

9 Ibid [10].

This application was heard before Brown J on 15 September 2017. This article's tripartite analysis centres on Brown J's treatment of one of the four issues that arose for determination in that application: whether the sperm that had been removed from the deceased's body was property that was capable of being possessed.[10]

However before this analysis is set out, another of these four issues must be briefly dealt with. Prior to considering the property rights question, Brown J had to determine if the initial removal of sperm from Josh Davies' body two years previously was authorised under the *Transplantation and Anatomy Act 1979* (Qld) ('*TAA*').[11] Whilst the removal had taken place in accordance with a court order, at the time that court order was issued, the Coroner had not yet consented to the removal of sperm from Josh's body as required by section 24 of the *TAA*.[12] Brown J ultimately reached the conclusion that the Coroner had either impliedly consented or directed that their consent was not required prior to the removal of the sperm,[13] and thus that the *TAA* requirements had been 'substantially satisfied' at the time the removal took place.[14] Her Honour also found that, even if the consent requirement of section 24 had not been fulfilled prior to the removal of sperm, the initial court order provided a valid basis for the removal so that it was 'authorised by law' under section 48(3)(b) of the *TAA* and thus not an offence under section 48(1).[15] In reaching the conclusion that a court order can essentially circumnavigate the authorisation and consent requirements imposed by the *TAA*, Brown J was following the approach taken by courts in other Australian jurisdictions in relation to tissue removal and transplant legislation.[16] And it is here that the question of authorisation – at first glance an entirely disparate issue – is linked to the question of property rights. Brown J was clear that the legal basis for the removal of sperm from Josh Davies' body remained relevant as it was the means by which the sperm became separated from the body and thus, potentially, the subject of property rights.[17] If a court order authorising removal had been issued despite substantial *non*-compliance with the *TAA* (or other relevant state or territory legislation), this factor would weigh heavily in the discretionary considerations of a court deciding the property rights issue.[18]

Nonetheless, as any non-compliance with the *TAA* in *Re Cresswell* was 'not of a substantive nature',[19] the property rights determination could proceed, and it is to this question that this article now turns.

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10 The four issues are set out at ibid [4].

11 An important first step was finding that the posthumous removal of sperm for the purpose of reproductive treatment was 'for other therapeutic purposes or for other medical or scientific purposes' so that authorisation was required under Part 3 of the *TAA*: ibid [77].

12 Ibid [80]–[83]. The *TAA* also requires the authorisation of the senior available next of kin (s 22(1)(b)) and a designated officer of the hospital (s 22(1)(c)(ii)). Both had been obtained prior to the issuance of the court order, however the latter was not in writing and so not in compliance with the *TAA*: at [78]–[79].

13 *Re Cresswell* [2018] QSC 142, [85]–[86].

14 Ibid [87].

15 Ibid [94].

16 See, eg, *AB v A-G (Vic)* (2005) 12 VR 485 (in the context of the *Human Tissue Act 1982* (Vic) and the *Infertility Treatment Act 1995* (Vic)); *Re Estate of Edwards* (2011) 81 NSWLR 198 (in the context of the *Human Tissue Act 1983* (NSW)). Brown J discussed both of these authorities in detail: *Re Cresswell* [2018] QSC 142, [89]–[94].

17 *Re Cresswell* [2018] QSC 142, [95].

18 Ibid.

19 Ibid [87].

III THE PROPERTY RIGHTS DETERMINATION

When deciding whether the sperm removed from Josh Davies could be classified as property,[20] the first hurdle faced by Brown J was the traditional common law rule that there is no property in a corpse.[21] This legal principle dates back to at least the early 17th century[22] and stems from the idea that burial in consecrated ground made the deceased's body solely the subject of ecclesiastical law and protection. This ecclesiastical control over the body made it *nullius in bonis* – the property of no one – in the eyes of the common law.[23] This rule applies to both buried[24] and unburied bodies,[25] and has continued despite the eventual decline of ecclesiastical jurisdiction and the growing number of bodies disposed of other than by burial in consecrated ground.[26] Thus, the question for Brown J in *Re Cresswell*[27] was whether, as argued by the applicant,[28] work or skill had been applied to the sperm at issue so that it fell within the 'work or skill' exception to the no-property rule identified by the High Court in *Doodeward v Spence*.[29]

Doodeward v Spence concerned a two-headed stillborn foetus that had been preserved in paraffin oil and was being exhibited at a fairground.[30] When police confiscated the foetus, Doodeward sued for its return.[31] He could only succeed in his detinue claim if the preserved foetus was property under the common law.[32] The High Court found that work and skill had been applied to the foetus by its preservation in paraffin oil – thus, it had been transformed from a corpse awaiting burial to moveable property.[33] In reaching this conclusion Griffith CJ famously stated that

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20 The property question arose due to the inapplicability of the Court's *parens patriae* jurisdiction in the case of sperm removed from a deceased person and the absence of a legislative regime governing the use of posthumous sperm: ibid [3], [98].

21 Ibid [98].

22 See *Haynes' Case* (1614) 12 Co Rep 113; 77 ER 1389, although statements in Bracton suggest it was likely an accepted rule in earlier centuries: P D G Skegg, 'Medical Uses of Corpses and the "No Property" Rule' (1992) 32 *Medicine, Science and the Law* 311, 311.

23 'The buriall of the *cadaver* (that is *caro data vermibus*) is *nullius in bonis*, and belongs to ecclesiasticall cognisance': Sir Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* (E & R Brooke, first published 1644, 1797 ed) 203.

24 See, eg, *Haynes' Case* (1614) 12 Co Rep 113; 77 ER 1389; *R v Lynn* (1788) 2 TR 733; 100 ER 394; *R v Sharpe* (1856–57) Dears & B 160; 169 ER 959.

25 See, eg, *Exelby v Handyside* (1749), discussed in Edward Hyde East, *A Treatise of the Pleas of the Crown* (J Butterworth, 1803) vol 2, 652; *Williams v Williams* (1882) 20 Ch D 659; cf Paul Matthews, 'Whose Body? People as Property' (1983) 36 *Current Legal Problems* 193, 208–14.

26 Gillard J's 1998 pronouncement that '[i]t is trite law that there is no property in a corpse' effectively summarises the Australian position: *AB v A-G (Vic)* (Unreported, Supreme Court of Victoria, Gillard J, 23 July 1998) 20.

27 See *Re Cresswell* [2018] QSC 142, [98].

28 See ibid [99].

29 (1908) 6 CLR 406.

30 The facts are set out in full in the earlier decision of the Supreme Court of New South Wales: *Doodeward v Spence* (1907) 7 SR (NSW) 727, 727.

31 Ibid.

32 Ibid 728 ('It is perfectly clear law that there can be no property in a corpse, and in an action for detinue it is essential that the plaintiff should have property in that which is said to have been detained …') (Simpson J).

33 *Doodeward v Spence* (1908) 6 CLR 406, 414–15.

> when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it.[34]

If this 'work or skill' exception applied in *Re Cresswell*, the sperm would be moveable property capable of possession.[35]

According to Brown J's reading of *Doodeward v Spence*, in order to obtain a possessory right to retain a body or body part based on the 'work or skill' exception, three elements must be satisfied: first, the party claiming the right was in lawful possession of the human biological material; second, the party had applied work or skill to the material; and third, the material had acquired different attributes as a result of that application of work or skill.[36]

If the 'work or skill' exception is successfully made out in a particular case, the right obtained is one of permanent possession of the human biological material. This possessory right extends to the principal of an agency relationship where, as in *Re Cresswell*, the work or skill is carried out by a preserving facility (the IVF clinic) in the service of the requesting party (Ayla Cresswell).[37]

In contrast to the *Doodeward v Spence* exception, Brown J next laid out an emerging body of case law in which property rights have been found in human biological material even in the absence of an application of work or skill.[38] This body of case law includes the highly influential decision of the Court of Appeal of England and Wales in *Yearworth v North Bristol NHS Trust* ('*Yearworth*').[39] This case concerned claims in tort and bailment stemming from the negligent destruction of pre-mortem sperm samples by the facility responsible for their preservation. The providers of the samples were cancer patients whose fertility was likely to be affected by the intensive treatment they were to undergo.[40] Whilst rejecting a personal injury claim,[41] the Court of Appeal held that the sperm samples were indeed the property of the plaintiffs, and that this property had been damaged by its negligent destruction.[42] The fundamental principle underlying the Court of Appeal's finding of property rights in *Yearworth* was not work or skill, but instead the detachment of the relevant sperm samples from the men who had produced them.[43] In the Australian context, similar reasoning appeared in the decision of Master Sanderson of the Supreme Court of Western Australia in *Roche v Douglas*,[44] perhaps the most important Australian decision discussing the question of property rights in human biological material since *Doodeward v Spence*.[45] This case concerned an application for an order that DNA

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34 Ibid 414.
35 *Re Cresswell* [2018] QSC 142, [99].
36 Ibid [113].
37 Ibid [155].
38 See ibid [117]–[129], [140]–[148].
39 [2010] QB 1, discussed by Brown J in *Re Cresswell* [2018] QSC 142, [117]–[121].
40 *Yearworth* [2010] QB 1, 7–8.
41 Ibid 11–12 [23].
42 Ibid 20–1 [45].
43 Ibid [45] [c]–[f].
44 (2000) 22 WAR 331.
45 In the view of the author.

testing be carried out on tissue samples removed from a deceased man during his lifetime and preserved in paraffin oil. For the order to be made, the tissue samples had to be considered 'property' for the purposes of the *Supreme Court Rules 1971* (WA).[46] Emphasising their detachment from the source individual, Master Sanderson held that the tissue samples were the subject of property rights for the simple reason that to do otherwise would '[ignore] physical reality' and 'create a legal fiction'.[47]

Brown J next turned to discuss the Australian case law where the express question of property rights in sperm samples under the common law fell to be determined. Her Honour's treatment of these decisions revealed the differential analysis taken by courts depending on whether the sperm at issue before them was removed prior to, or after, the death of the deceased.[48] Put simply, in cases dealing with pre-mortem sperm samples the detachment analysis of *Yearworth* and *Roche v Douglas* is applied, whereas in cases where the sperm at issue was removed post-mortem, recourse is had to the *Doodeward v Spence* 'work or skill' exception.[49]

Applying this analysis to the case before her, Brown J concluded that 'the present state of the law in Australia is that the recognition that rights of property can exist in posthumous samples of sperm is based on the application of *Doodeward* to the circumstances of the particular case'.[50]

Returning to the three elements required to make out the exception in *Doodeward v Spence*, her Honour held that the work or skill required to preserve the sperm was sufficient to satisfy the exception, and that the sperm in its preserved form had acquired attributes suitably distinct from the body from which it had been removed.[51] Josh Davies' sperm, removed from his body within 48 hours of his death pursuant to a court order, was therefore property capable of possession within the eyes of the common law.[52]

IV EXPLAINING THE DISTINCTION

As is clear from this discussion of Brown J's reasoning, there exists within the Australian common law two radically different approaches to finding property rights

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46 *Roche v Douglas* (2000) 22 WAR 331, 333 [8]. The specific provision at issue was rule 52.3(1).

47 Ibid 339 [24].

48 *Re Cresswell* [2018] QSC 142, [127]–[141], discussing *Bazley v Wesley Monash IVF Pty Ltd* [2011] 2 Qd R 207 (pre-mortem sperm sample); *Re Estate of Edwards* (2011) 81 NSWLR 198 (post-mortem); *Re H, AE [No 2]* [2012] SASC 177 (post-mortem); *Roblin v Public Trustee (ACT)* (2015) 10 ACTLR 300 (pre-mortem).

49 This distinction is not limited to cases involving sperm samples: see, eg, *Pecar v National Australia Trustees Ltd* (Unreported, Supreme Court of New South Wales, Bryson J, 27 November 1996) (post-mortem tissue sample held to be the subject of property rights based on an application of the exception in *Doodeward v Spence* (1908) 6 CLR 406); *James v Seltsam Pty Ltd* (2017) 53 VR 290 (pre-mortem tissue sample held to be the subject of property rights based on an application of *Roche v Douglas* (2000) 22 WAR 331).

50 *Re Cresswell* [2018] QSC 142, [153].

51 Ibid [156]. Her Honour had previously determined that the sperm had been lawfully removed and placed in the possession of the IVF clinic in question, thus satisfying the first of her three elements (lawful possession on the part of the party attempting to invoke the 'work and skill' exception): ibid [94].

52 Ibid [165]. Brown J further found that Ayla Cresswell was the only person with a prima facie entitlement to permanent possession of the sperm: ibid [166].

in human biological material. Which of these two approaches is applied depends on whether the material at issue before the court was removed from the source individual pre-mortem or post-mortem. In cases of human biological material removed from the body of the source individual *after their death*, courts (including the Queensland Supreme Court in *Re Cresswell*) apply the 1908 *Doodeward v Spence* decision. However in disputes over sperm samples and other forms of human biological material removed from the source individual *whilst alive*, courts apply the *Roche v Douglas* detachment-based line of case law. These cases focus on the separation of the material at issue from the source individual as the foundation for a finding of property rights – no work or skill required.

This pre-/post-mortem division has been repeatedly upheld by Australian courts – including in *Re Cresswell*. However the dichotomy has gone unexplained in the decisions that have upheld it; prior to *Re Cresswell*, justification for its existence had not extended beyond a small annotation that 'different issues' arise in the pre- and post-mortem contexts.[53] *Re Cresswell* has, thankfully, gone further and offered at least some discussion of the rationale underlying the pre-/post-mortem distinction, and is an important decision for that reason alone. Unfortunately, as the following analysis shows, this discussion is entirely insufficient to explain the continued adherence to the dichotomy by Australian courts.

Brown J framed her discussion of the pre-/post-mortem distinction by referring at length to both the curial and extra-curial writings of Edelman J.[54] Relying on principles of Roman law, Edelman J is a firm believer in the possibility of human biological material separated from the body of the source individual being classed as property.[55] His Honour's thesis is that the emergence of property rights is based on *how* the separation occurs rather than what is done to the human biological material post-separation.[56] In this context, *Roche v Douglas* was a 'path-breaking' decision for Edelman J,[57] his Honour taking the view that there is no principled reason why this detachment-based reasoning should not equally apply to human biological material removed post-mortem.[58]

Edelman J's approach to the property question was acknowledged by the Supreme Court of Western Australia in *GLS v Russell-Weisz*,[59] itself decided only three months before *Re Cresswell* was handed down. However, despite acknowledging the views of

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53 *Roblin v Public Trustee (ACT)* (2015) 10 ACTLR 300, 304 [21]. See also *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte C* [2013] WASC 3, [8], where Edelman J stated that 'the position is different' in the context of post-mortem human biological material as compared with cases concerning material taken pre-mortem. Lest the reader underestimate the importance of the argument being made here, it must be stressed that the two brief statements just now referred to represent the only attempts in the case law prior to *Re Cresswell* to explain the pre-/post-mortem distinction.

54 *Re Cresswell* [2018] QSC 142, [143]–[149], discussing *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte C* [2013] WASC 3 and James Edelman, 'Property Rights to Our Bodies and Their Products' (2015) 39(2) *University of Western Australia Law Review* 47.

55 Edelman, above n 54, 62.

56 Ibid 66–7.

57 Ibid 59.

58 Although Edelman J noted the practical constraints presented by the traditional common law rule that there is no property in a corpse: see discussion ibid 62–7. See also Brown J's summary of Edelman J's views: *Re Cresswell* [2018] QSC 142, [148].

59 (2018) 52 WAR 413, 438 [114].

his former Supreme Court colleague, Martin CJ in that case maintained that the correct approach in the case of human biological material removed post-mortem remains the narrower *Doodeward v Spence* 'work or skill' exception.[60]

In deciding *Re Cresswell*, Brown J agreed with Martin CJ's assertion in *GLS v Russell-Weisz* and, as we have seen, decided the property question on the basis of an application of the *Doodeward v Spence* exception to the facts.[61] This is despite her Honour clearly and explicitly agreeing with Edelman J that 'in principle there is no reason to treat tissue separated from a living person differently from tissue separated from a deceased person'.[62] As evidenced by her application of *Doodeward v Spence*, the crux of Brown J's adherence to the pre- and post-mortem distinction in *Re Cresswell* must be the idea that sperm samples (and other human biological material) removed from the body of the source individual after their death are subject to the general common law rule that there is no property in a corpse. That is, a sperm sample removed from the deceased post-mortem is, at least initially, indistinguishable from a corpse awaiting disposal in the eyes of the common law. For a finding of property rights to subsequently be made, recourse must be had to a recognised exception to that rule – currently a list of one: the *Doodeward v Spence* 'work or skill' exception. Human biological material removed prior to the death of the deceased is not subject to this common law rule and so no exception is required.[63]

There are two significant problems with this framing of the issue. The first stems from the fundamental inefficiencies of the 'work or skill' exception. An application of the *Doodeward v Spence* exception requires courts to take the second step of engaging in a reallocation of property rights. The *Doodeward v Spence* exception vests property rights in the party applying work or skill – rarely the applicant in a court dispute. In *Re Cresswell*, as in other cases involving sperm samples, the party applying work or skill was the IVF facility that originally preserved the sperm. Thus, under *Doodeward v Spence*, that facility holds the property rights to the human biological material at issue. This means courts hearing applications and disputes relating to human biological material removed from the deceased post-mortem must then find a legal basis to transfer these property rights from the party applying work or skill to the party they see as deserving to hold the rights. In *Re Cresswell* this was done on the basis of an agency relationship imposed by the court. The preserving facility had acted as agent to Ayla Cresswell as principal in removing and preserving the sperm. Ayla Cresswell, then, was the true holder of the property rights all along.[64]

This necessary recourse to a second, additional legal process to reallocate the property rights that result from an application of the *Doodeward v Spence* exception highlights the inefficiency of this approach. It necessarily means that the result strictly mandated

60 Ibid 438–9 [115].

61 *Re Cresswell* [2018] QSC 142, [153].

62 Ibid [158].

63 Brown J also dealt at some length with the question of property rights in human biological material *yet to be removed from the source individual*, whether alive or dead. Her Honour reached the conclusion (without finally deciding the question) that the common law did not support a finding of property rights in as-of-yet unremoved human biological material: ibid [159]–[161]. This is intuitively correct; however, this issue is beyond the scope of this article.

64 Ibid [166]. In contrast, when sperm samples are removed prior to the death of the source individual, the method of reallocating property rights is the imposition of a bailment relationship: see, eg, *Bazley v Wesley Monash IVF Pty Ltd* [2011] 2 Qd R 207.

by *Doodeward v Spence*, cited as a binding High Court precedent by courts applying it, is not given effect. The end result is a notional citation of *Doodeward v Spence* as a means of creating property rights and then an immediate second step to reallocate those rights to the appropriate party. The argument here is not against the use of additional legal processes such as agency relationships in the context of human biological material. Rather, issue is taken with the nominal application of the *Doodeward v Spence* exception and the subsequent use of these additional processes as a means of voiding the result required by *Doodeward v Spence* and ultimately vesting the property rights with the court's desired party. If the result mandated by an apparently binding High Court precedent is not allowed to be given effect, the apparent necessity felt by courts to apply it at all must be questioned.

There are additional problems with the 'work or skill' exception. Questions have been raised regarding *how much* work or skill is necessary before property rights can result, and whether both work *and* skill are required or if unskilled labour alone is sufficient.[65] Further, it will be recalled that Brown J identified three elements that must be satisfied in order for an application of the *Doodeward v Spence* exception to be successful: lawful possession, work or skill, and the acquisition of different attributes.[66] This formulation of the exception has itself been challenged, the necessity of the human biological material acquiring different attributes being called in to doubt.[67] Clearly, then, even after 110 years the *Doodeward v Spence* 'work or skill' exception is far from a precise formula. This, together with the fact that the exception is rarely, if ever, actually given effect, make it a remarkably inefficient means of finding and allocating property rights in human biological material.

Brown J's ode to legal formalism – her Honour's insistence that a post-mortem sperm sample begins from the same analytical starting point as an unburied corpse – gives rise to a second significant issue. Brown J's reasoning completely obscures the fact that in nearly all disputes over human biological material, regardless of the pre- or post-mortem status of that material, the source individual is deceased at the time of the court hearing. This issue is especially pronounced in the sperm context. The sperm samples at issue in both the pre- and post-mortem contexts have one all-important consideration in common: in nearly all cases, the source individual is no longer alive at the time another party asserts a proprietary interest in their sperm. This consideration must surely outweigh the seemingly irrelevant fact of whether the sperm sample was removed from the source individual prior to or after their death. Courts must engage with similar issues of proof of consent and intention in both instances. The consent to IVF treatment during one's lifetime implicit in providing a pre-mortem sperm sample does not necessarily equate to consent to post-mortem IVF treatment after one's death. Similarly, statements of one's desire to have children made whilst alive cannot necessarily equate to consent by the deceased to their partner's use of their posthumously obtained sperm.

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65 These issues are skilfully explored in Rohan Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (Hart Publishing, 2007) 28–40. In this context it is interesting to note that Griffith CJ in *Doodeward v Spence* set out the work *or* skill exception, but held that both work *and* skill had been applied to the human biological material at issue in that case: (1908) 6 CLR 406, 414–15.

66 See text accompanying n 36 above.

67 See Hardcastle, above n 65, 30. Note, however, that the English case law has accepted the correctness of the 'different attributes' element: see *R v Kelly* [1999] QB 621, 631.

In this way, the dichotomised approaches taken to the question of property rights in pre-mortem human biological material on the one hand, and post-mortem material on the other, entirely fails to reflect practical reality. As disputes emerge with increasingly varied factual scenarios and the line between pre- and post-mortem becomes ever more blurred,[68] one wonders how long the traditional common law rule that there is no property in a corpse can continue to stand as a valid dividing line between detachment and work or skill.

The purpose of this critique is not, however, to argue for a reform of the no-property rule.[69] The position taken by this article is that a formalist approach to the question of property rights in human biological material removed from a source individual after their death – whereby that material is seen as analogous to a whole, undisposed-of body – is entirely unwarranted. It results in the application of ineffective precedent and the overlooking of practical realities. By its continued application in the pre-mortem context, including cases in which the source individual is alive at the time of the dispute,[70] the detachment-based analysis on which both *Roche v Douglas* and *Yearworth* are founded has clearly been accepted as sufficient to circumnavigate the equally prevalent common law rule that there is no property in a living person.[71] Why should the same not be true of the rule, of much weaker historical pedigree,[72] that there is no property in a deceased person?

Brown J concluded her discussion of the pre-/post-mortem distinction by stating that '[t]he development of the common law has not however extended the principles applied to tissue removed from a living person to tissue removed from a deceased person'.[73] Why should that extension not have taken place in *Re Cresswell*? *Re Cresswell* presented a perfectly appropriate opportunity for the adoption of the *Roche v Douglas* principles of separation and detachment as a basis for a finding of property rights in the context of post-mortem human biological material. Whilst it may be true that 'such an extension of the common law principles may well occur in the future',[74] the Queensland Supreme Court walked away from an ideal opportunity to make that extension in *Re Cresswell*.

With this in mind, this article now questions why, when presented with the opportunity to do so, the Queensland Supreme Court did not abandon the pre-/post-mortem distinction in *Re Cresswell*.

V MAINTAINING THE DISTINCTION

68 Consider, for example, the possibility of sperm removed from a brain-dead, ventilated man. Does this sample fall onto the pre- or post-mortem side of the dichotomy?

69 Others have done that before me: see, eg, Edelman, above n 54, 65–7; Matthews, above n 25; Roger S Magnusson, 'The Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions' (1992) 18 *Melbourne University Law Review* 601, 603 ff.

70 *Yearworth* [2010] QB 1 itself is an example of this. See also, eg, *James v Seltsam Pty Ltd* (2017) 53 VR 290.

71 For a modern illustration of this principle, see *R v Bentham* [2005] 1 WLR 1057.

72 For sustained critiques of the rule's basis as a matter of legal history, see, eg, the sources set out above at n 69.

73 *Re Cresswell* [2018] QSC 142, [158].

74 Ibid.

The crux of the critique offered by this article is that the pre-/post-mortem dichotomy is invalid. We have seen above that the *Doodeward v Spence* 'work or skill' exception that dominates in the post-mortem context is an inefficient means of finding and allocating property rights in human biological material. This article therefore takes the position that, when squarely faced with the issue in *Re Cresswell*, Brown J ignored an ideal opportunity to adopt the detachment-based reasoning of *Roche v Douglas* and *Yearworth* in the context of human biological material removed post-mortem. *Re Cresswell* arose for determination at a time when the pre-/post-mortem distinction was as clear in the case law as justifications for it were absent. The facts of the case were uncomplicated and clearly allowed for an application of either approach. Deficiencies with the *Doodeward v Spence* exception were evident. Why was the detachment approach not adopted? A close reading of Brown J's judgment presents two possible reasons.

1 Confined Case Law Precedent

In *Re Cresswell* Brown J engaged in an expansive and in-depth review of the current Australian case law. Ultimately, her Honour found that the series of decisions finding property rights in human biological material outside of the *Doodeward v Spence* work or skill framework were confined to cases in which the material was removed from a source individual (1) whilst alive and (2) with their consent.[75] This is undeniably a correct assessment of the body of Australian case law dealing with the question of property rights in human biological material as it currently stands. It is not, however, a sufficient reason to confine the detachment-based reasoning of *Roche v Douglas* to pre-mortem human biological material.

We have already seen in Part IV that the pre-/post-mortem distinction (or to borrow Brown J's terminology, the alive/dead distinction) lacks a logical and convincing justification. The issue of consent is similarly non-decisive. A simple example proves this point. Consider the possibility of a terminally ill cancer patient giving express and recorded (and for argument's sake, statutorily compliant) consent for the removal of sperm from his body after his death. Under the current common law framework, a finding of property rights in that sperm would be required to be decided on the basis of the *Doodeward v Spence* 'work or skill' exception. Consent is clearly capable of being given in the post-mortem context, and yet an application of the *Doodeward v Spence* exception to a deceased cancer patient's sperm in no way hinges on his pre-mortem consent to its post-mortem extraction. To put it another way, consent in the post-mortem context in no way entails that *Roche v Douglas* will be applied because of the presence of that consent. The point made here is simple. Consent is undoubtedly a matter of immense importance in the removal of biological material from a person whilst alive as well as in the use of sperm samples in IVF treatment after death. Nonetheless, it does not play a role in deciding which legal framework will be applied to answer the question of property rights in that human biological material.

This discussion provides further support to the argument made in Part IV above that the continued adherence to the pre-/post-mortem dichotomy has forced the Australian common law in this field into a position that fundamentally fails to acknowledge the

75 Ibid [157].

practical realities of the disputes that arise. The same issues – of consent, proof of intention, and the identity of the rightful holder of any resulting property rights – arise regardless of whether the material at issue was separated from the source individual before or after their death. That the detachment-based approach of *Roche v Douglas* and *Yearworth* is currently confined to cases dealing with human biological material removed with consent during the deceased's lifetime is in no way a reflection of some inherent legal inability for that approach to apply in the post-mortem context, or in the absence of consent. It is the result merely of an analytically limited body of precedent and a judiciary, faced with immense time constraints,[76] engaging in path dependency for the sake of expediency.[77]

2 Potential Illegitimacy of the Detachment Approach

For Brown J, the legal basis for Master Sanderson's decision in *Roche v Douglas* was unclear.[78] Her Honour was of the view that the Master had failed to definitively state whether his finding of property rights in that case was based on the detachment of the human biological material at issue from the source individual (relying on *Yearworth*) or the subsequent application of work or skill to that material (extending *Doodeward v Spence*).[79] Her Honour considered this uncertainty 'unfortunate'.[80]

With respect to Brown J, the position taken by Master Sanderson in *Roche v Douglas* in relation to the *Doodeward v Spence* exception is clear. The Master in that case maintained that, '[a]lthough *Doodeward v Spence* is of interest, *it is not directly relevant to the matters at issue in this application*'.[81] His Honour went on to express doubt about the applicability to modern disputes of a case 'decided in 1908 some 50 years before Watson and Crick described the DNA double helix'.[82] To say that it is uncertain whether Master Sanderson was applying the *Doodeward v Spence* exception to the dispute before him simply does not accord with his written judgment.

Further, Master Sanderson's reliance on detachment-based reasoning in deciding *Roche v Douglas* is unmistakable: 'it defies reason to not regard tissue samples as property. Such samples have a real physical presence. They exist and will continue to

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76 We have already seen that the original order allowing the initial removal of Josh Davies' sperm was made as the result of an urgent application that required Burns J to be woken in the early hours of the morning so that the procedure could take place within the necessary time limitations (see text accompanying n 8 above). This is far from a unique situation in this body of case law.

77 The concept of path dependency borrows from social science, particularly economics, and proposes that past events (or, in the case of judges, past decisions) can exclude particular choices for decision-makers. In the context of human biological material, the fact that previous decisions limited the detachment-based reasoning of *Roche v Douglas* (2000) 22 WAR 331 to material removed pre-mortem provides a convenient reason for judges, faced with immensely time-sensitive disputes and unwilling to engage in in-depth legal analysis, not to apply that reasoning in the post-mortem context. For more on path dependency in judicial reasoning, albeit within the specific context of American constitutional law, see Michael J Gerhardt, 'The Limited Path Dependency of Precedent' (2005) 7 *University of Pennsylvania Journal of Constitutional Law* 903.

78 *Re Cresswell* [2018] QSC 142, [124].

79 Ibid.

80 Ibid.

81 *Roche v Douglas* (2000) 22 WAR 331, 335 (emphasis added).

82 Ibid.

exist until some step is taken to effect destruction. There is no purpose to be served in ignoring physical reality'.[83]

Clear in his Honour's reasoning is the idea that the human biological material at issue in that case had been removed from the source individual and had its own, independent, physical existence. It would defy both reason and logic to deny the existence of property rights in such circumstances.[84]

Nonetheless, perhaps if his Honour's reasoning in *Roche v Douglas* had been expressed in terms of an express adoption of a new, detachment-based approach to the question of property rights in human biological material, things would be different. If that were the case, the Court in *Re Cresswell* would perhaps have felt comfortable adopting a detachment-based theory of property rights in human biological material regardless of that material's pre- or post-mortem status.

3 A Third Option

There is a third option that must be considered. Ultimately, *Re Cresswell* was a decision by a single judge sitting in a state court. Whilst it is undoubtedly an immensely thoughtful judgment that engages with a substantial body of conflicting precedent, it is nonetheless possible that Brown J was not willing, or did not see it as her judicial role, to unilaterally abandon a High Court precedent that has been on the books for 110 years.

And, of course, it is true that *Doodeward v Spence*, as a High Court authority, must be formally overturned by the High Court in order to make a forced disappearance from the body of case law dealing with property rights in human biological material. However it is important to note that this is by no means a bar to the adoption of the far more recent *Yearworth* and *Roche v Douglas* decisions in the context of human biological material removed post-mortem. The detachment-based analysis of these cases provides a separate, distinct basis for the recognition of property rights in human biological material to the *Doodeward v Spence* 'work or skill' exception. It can circumvent the rule that there is no property in a corpse as it does the rule that there is no property in a living human being.[85] *Doodeward v Spence* does not need to be formally overruled. Instead it can be allowed to merely fade into historical obscurity – to become the 'curiosity' that Griffith CJ identified the two-headed foetus in that case as being.[86]

VI CONCLUSION

83 Ibid 338–9.

84 'There is no rational or logical justification for such a result': ibid 339.

85 See discussion above at text accompanying nn 70–71. Alternatively, the reasoning in *Roche v Douglas* (2000) 22 WAR 331 can be adopted as a second exception to the no-property rule in addition to the 'work and skill' exception – although the objections taken above to the use of the no-property rule as an analytical starting point by courts in the case of post-mortem human biological material remain.

86 *Doodeward v Spence* (1908) 6 CLR 406, 411.

There is no denying that *Re Cresswell* is a hugely important case in terms of its result. Described as a 'landmark decision' within hours of being handed down,[87] it is the first time in Queensland's history that the approval of the courts has been given to first the extraction and then the subsequent use of sperm taken from the body of a deceased man.[88] However focusing on the novelty of its outcome ignores the deficiencies in its reasoning.

The Queensland Supreme Court's decision in *Re Cresswell* upheld an illogical and awkward distinction between the treatment of human biological material removed pre-mortem and material removed post-mortem in the property rights context. Although providing the most detailed discussion of this distinction in the case law to date, Brown J's reasons for upholding the dichotomy are overly formalistic and fail to acknowledge both the fundamental inefficiency of the *Doodeward v Spence* 'work or skill' exception and the practical realities of litigation in this area of law.

The common law is notorious for its slow development. It is not enough for judges deciding questions of property rights in human biological material, such as Brown J in *Re Cresswell*, to recite the distinction and hope for its eventual abolition. This question is unlikely to squarely arise for resolution before the High Court in the near (or even distant) future. State courts must take the necessary first steps to remedy this dichotomy of their own accord.

Re Cresswell presented an ideal opportunity for an Australian court to take these first steps towards abolishing the pre-/post-mortem distinction from the Australian case law. Instead, the status quo was further entrenched, necessarily making the task harder for the next court presented with an opportunity to do the same. The Queensland Supreme Court has passed the buck on the possibility of a united approach to property rights in human biological material – to whom and with what result remains to be seen.

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87 By Bill Potts, deputy president of the Queensland Law Society, quoted in Ashleigh Stevenson and Laura Gartry, 'Toowoomba Woman Wins Court Bid to Use Her Dead Boyfriend's Sperm to Have a Baby', *ABC News* (online), 20 June 2018 <http://www.abc.net.au/news/2018-06-20/court-ayla-cresswell-use-dead-boyfriend-sperm-to-have-baby/9889068>.

88 Although the Queensland Supreme Court had previously allowed the removal of sperm from deceased men, with orders that a further application must be made to the Court before the sperm is used: see *Re Denman* [2004] 2 Qd R 595; *Re Patteson* [2016] QSC 104. Similarly, in 2012, the Supreme Court of South Australia allowed the removal of sperm from a deceased man (*Re H, AE* (2012) 113 SASR 560), ordered that the deceased's widow was entitled to possession of that sperm (*Re H, AE [No 2]* [2012] SASC 177), and that the widow was entitled to remove the sperm to the ACT for the purposes of IVF treatment not allowed under South Australian legislation (*Re H, AE [No 3]* (2013) 118 SASR 259). Considered against this background, *Re Cresswell* [2018] QSC 142 arguably loses some of its 'landmark' status.