

DISMANTLING *DOODEWARD*: GUIDED DISCRETION AS THE SUPERIOR BASIS FOR PROPERTY RIGHTS IN HUMAN BIOLOGICAL MATERIAL

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For over a century the Australian High Court's decision in Doodeward v Spence has dominated questions of property rights in the human body. Beginning with the Supreme Court of Western Australia's decision in Roche v Douglas in 2000, however, Australian courts have developed an alternative 'guided discretion' approach to finding property rights in human biological material. This approach provides a normative framework for judges deciding the property question. The existence of two legal bases that answer the same legal question within the Australian common law is unnecessary and undesirable. This article examines the case law applying the more recent guided discretion approach and identifies its three essential features. It then presents four arguments as to why Doodeward should be superseded by the guided discretion approach in questions of property rights in human biological material.

I INTRODUCTION

The Australian High Court's 1908 decision in *Doodeward v Spence* ('*Doodeward*')¹ has played an integral role in the development of the concept of the human body as property across the common law world. Famously concerning a two-headed foetus that had been preserved in paraffin oil and exhibited at a fairground, *Doodeward* held that the lawful application of work or skill to a human body (or part thereof) would turn that body from mortal remains to moveable property.² This 'lawful work or skill' exception to the traditional rule that there is no property in a corpse,³ referred to in this article as the '*Doodeward* exception',

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1 (1908) 6 CLR 406.

2 Ibid 414 (Griffith CJ).

3 See, eg, *Haynes's Case* (1614) 12 Co Rep 113; 77 ER 1389.

has been repeatedly cited by courts both in Australia and overseas in the 11 decades since it was handed down.⁴

One hundred and ten years after judgment was issued in *Doodeward*, the Queensland Supreme Court decided *Re Cresswell*.⁵ In that case Brown J applied the *Doodeward* exception to find property rights in samples of sperm that had been removed from a deceased man after his death. Before applying the work or skill exception, however, her Honour considered an alternative body of precedent developed by common law courts within the past two decades that would allow for property rights to be found in the sperm samples even without the application of work or skill.⁶ With a focus on the seminal Australian decision *Roche v Douglas* ('*Roche*'),⁷ this article examines the case law that makes up this alternative body of precedent and the new approach to property rights in human biological material⁸ it represents.

Referred to in this article as the 'guided discretion' approach to property rights, the case law examined in Part II reveals that this new approach to property rights provides a normative framework for courts faced with the question of property rights in human biological material. Under this framework judicial discretion to choose between two alternative outcomes – making a finding of property rights in human biological material on the one hand and declining to make that finding on the other – is guided and constrained by three elements: the detachment of the material at issue from the source individual, practical concerns of the court and the litigants before it, and the factual and legal context of the dispute.

With the former applying to human biological material removed from the source individual post-mortem and the latter currently limited in its application to material removed pre-mortem (and so providing an exception to the common law rule that a living person cannot be the subject of property rights),⁹ the work or skill and guided discretion approaches now represent two competing legal bases for the finding of property rights in human biological material within the Australian common law. Part III of this article examines the Australian case law and argues that the existence of two separate approaches that can be used to answer the same legal question and reach substantially the same result is unnecessary and

4 For cases applying *Doodeward*, see, eg, *Miner v Canadian Pacific Railway* (1911) 18 WLR 476 (Alberta Supreme Court); *Pecar v National Australia Trustees Ltd* (Supreme Court of New South Wales, Bryson J, 27 November 1996) ('*Pecar*'); *R v Kelly* [1999] QB 621; *Leeburn v Derndorfer* (2004) 14 VR 100 ('*Leeburn*'); *Re Organ Retention Group Litigation* [2005] QB 506; *Re Estate of Edwards* (2011) 81 NSWLR 198; *Re H, AE [No 2]* [2012] SASC 177; *KLW v Genesis Fertility Centre* [2016] BCSC 1621.

5 [2019] 1 Qd R 403.

6 I have elsewhere analysed Brown J's reasoning in detail: see Kate Falconer, 'An Illogical Distinction Continued: *Re Cresswell* and Property Rights in Human Biological Material' [2019] (1) *University of New South Wales Law Journal Forum* 1.

7 (2000) 22 WAR 331.

8 The phrase 'human biological material' is used throughout this article as a catch-all term to encompass the range of material at the centre of the disputes discussed herein. The provider of human biological material is referred to as the 'source individual' or, where appropriate, 'donor'. The difficulties associated with defining and using terminology in this area of the law have been noted: see, eg, Nils Hoppe, *Bioequity: Property and the Human Body* (Ashgate Publishing, 2009) ch 4. Unfortunately space constraints prevent further discussion of this issue.

9 See, eg, *R v Bentham* [2005] 1 WLR 1057.

undesirable. To this end, it sets out four arguments as to why the *Doodeward* work or skill exception should be superseded by the more recent guided discretion approach within the Australian common law. These arguments reveal the superfluity and inadequacy of the *Doodeward* exception, and lead to the conclusion set out in Part IV that the Australian High Court should take the next available opportunity to reject *Doodeward* in favour of the guided discretion approach in cases concerning property rights in human biological material.

II TWO LEGAL BASES FOR PROPERTY RIGHTS IN HUMAN BIOLOGICAL MATERIAL

A *Doodeward v Spence* and the Work or Skill Exception

It is a traditional rule of the common law that there is no property in a corpse. This legal principle dates back to at least the early 17th century¹⁰ and stems from the idea that burial in consecrated ground made the deceased's body solely the subject of ecclesiastical protection.¹¹ This ecclesiastical control over the body made it *nullius in bonis* – the property of no one – in the eyes of the common law.¹² The no-property rule applies to both buried¹³ and unburied bodies,¹⁴ 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.¹⁵ Over time, however, two exceptions to this rule have emerged. The first grants certain individuals the right to take possession of the body of the deceased until, and for the purpose of, disposal.¹⁶ The second exception to the no-property rule was developed by the Australian High Court in *Doodeward*.

Doodeward concerned a detinue claim brought by a fairground exhibitor (Doodeward) against a sub-inspector of police (Spence) in relation to a jar containing a stillborn two-headed foetus preserved in paraffin oil. The jar had been seized by police from the fairground where it was being exhibited and requests by Doodeward for the return of the jar and the foetus contained within it had been refused.¹⁷ In allowing the claim, the majority of the High Court (Griffith CJ and

10 See *Haynes's Case* (1614) 12 Co Rep 113; 77 ER 1389.

11 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 and R Brooke, 1797) 203.

12 'The buriall of the *cadaver* (that is *caro data vermibus*) is *nullius in bonis*, and belongs to ecclesiasticall cognisance': *ibid* (emphasis in original).

13 See, eg, *Haynes's 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.

14 See, eg, *Exelby v Handyside* (1749) 2 East PC 652, 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(1) *Current Legal Problems* 193, 208–14.

15 Justice Gillard effectively summarised the Australian position when she pronounced that '[i]t is trite law that there is no property in a corpse': *AB v A-G (Vic)* (Supreme Court of Victoria, Gillard J, 23 July 1998) 20.

16 See, eg, *Williams v Williams* (1882) 20 Ch D 659, 665 (Kay J) (acknowledging the deceased's executor as having a right to possession of the deceased's body).

17 *Doodeward* (1908) 6 CLR 406, 407, 417 (Higgins J). Doodeward was charged with exhibiting the foetus for gain to the manifest outrage of public decency and the jar was seized from the fairground as evidence.

Barton J) agreed that the foetus was property that could be the subject of an action in detinue.¹⁸ The key holding of the case is found in the judgment of Griffith CJ:

[W]hen a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in [their] lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, [they acquire] a right to retain possession of it, at least as against any person not entitled to have it delivered to [them] for the purpose of burial ...¹⁹

This is the ‘work or skill’ exception to the rule that there is no property in the body of a deceased person. Whilst appearing to contain multiple distinct elements (lawful possession and the acquisition of different attributes, for example), it is at its heart a remarkably single-natured inquiry. Whilst issues relating to one or more of these distinct elements may arise on the facts,²⁰ for the sake of convenience or otherwise courts will, in practice, only engage with the ‘work or skill’ requirement when applying *Doodeward*. And so, in the 110 years since its emergence into the common law, the work or skill exception has been applied to find property rights in a tissue sample removed as part of a post-mortem,²¹ medical specimens stolen from the Royal College of Surgeons in London,²² the cremated ashes of a deceased man,²³ organs removed from infants who had died at various UK hospitals,²⁴ and post-mortem sperm samples.²⁵

B *Roche v Douglas* and Guided Discretion

1 *An Introduction to Guided Discretion*

The emergence in recent decades of a new approach to finding property rights in human biological material outside the *Doodeward* work or skill exception has not gone unacknowledged in the academic literature.²⁶ Nonetheless, a detailed examination of the body of case law that makes up and engages with this new approach is absent from legal scholarship – a lacuna this article aims to rectify. The examination of the guided discretion approach undertaken in this section is thus in part an exercise in doctrinal legal scholarship – a description of what is

Doodeward plead guilty and the presiding judge (perhaps unsurprisingly) declined his request for the return of the foetus: *Spence v Doodeward* (1907) 7 SR (NSW) 727. Instead, the foetus was retained at a university museum by the police. The jar and the paraffin oil were, however, returned to Doodeward: *Doodeward* (1908) 6 CLR 406, 417 (Higgins J).

18 Although for different reasons. Griffith CJ based his decision on the work or skill exception to the no-property rule that the case has become synonymous with (see below n 19 and accompanying text), whilst Barton J decided the issue on the basis that the ‘foetal monster’ was never in fact a corpse awaiting burial and so was not covered by the no-property rule: *Doodeward* (1908) 6 CLR 406, 416.

19 Ibid 414.

20 See, eg, Commentary, ‘Theft of Body Parts: Property and Dead Bodies – *R v Kelly and Lindsay*’ (1998) 6(2) *Medical Law Review* 247, 251–3 (discussing issues of lawful possession arising on the facts of a case not considered by the court when applying *Doodeward*).

21 *Pecar* (Supreme Court of New South Wales, Bryson J, 27 November 1996).

22 *R v Kelly* [1999] QB 621.

23 *Leeburn* (2004) 14 VR 100.

24 *Re Organ Retention Group Litigation* [2005] QB 506.

25 *Re Estate of Edwards* (2011) 81 NSWLR 198; *Re H, AE [No 2]* [2012] SASC 177.

26 See, eg, Madeline Baker, ‘Proprietary Rights in Stored Semen: “*Roblin v Public Trustee*” and the Commonsense Approach to Stored Human Tissue of Significance’ (2017) 24(4) *Journal of Law and Medicine* 864; Norman Palmer, *Palmer on Bailment* (Sweet & Maxwell, 3rd ed, 2009) 1524–7.

happening in the case law, and an attempt to rationalise and justify it. However, describing the case law in this manner also reveals a normative framework that can be utilised by courts faced with disputes over property rights in human biological material.

This article has adopted the term ‘guided discretion’ to refer to the alternative approach taken by Australian courts in a number of more recent decisions when faced with the question of property rights in human biological material. In these cases, judges are presented with the discretion to choose between two equally valid courses of action – to make a finding of property rights on the one hand, and to decline to make such a finding on the other. Discretion on the part of judges to choose between two or more alternative and nominally equal courses of action is seen by some as problematic. It has been criticised as opening judges to claims of decisions being made based on their individual emotions and beliefs, preventing the coherent development of law, and promoting uncertainty and unpredictability in decision-making.²⁷ This term thus requires explanation lest its use invite apprehension and concern on the part of the reader.

The term ‘guided discretion’ as used in this article refers to what the case law reveals to be the confined, multifactorial deliberations of judges when exercising their discretion to find, or to decline to find, property rights in human biological material. The guiding elements discussed in this section are drawn from the existing case law and form a normative framework for future courts faced with the question of property rights in human biological material. At its core is the notion of detachment – that is, does the human biological material at issue have a real, separate physical existence from the source individual. Guided discretion then allows judges to consider factors external to the material at issue itself: the factual and legal context of the case, and the practical reasons for finding property rights. It would be a mistake to equate the guided discretion approach discussed here with the unprincipled exercise of absolute discretion on the part of judges deciding these disputes, or with the entirely principled exercise of discretion absent any guiding and constraining features.

The use of a guided discretion approach in this context is not an anomaly within Australian judge-made law. Criminal sentencing is perhaps the most oft-quoted example.²⁸ Further afield, equity is renowned for its acceptance (if not encouragement) of flexible, discretion-based reasoning in a variety of contexts. Justice Paul Finn, for example, has advocated principle-based reasoning in the remedies context – the relevant principle being the ‘appropriateness’ of the remedy to the equitable doctrine at issue as determined by the court.²⁹ And it has been convincingly demonstrated that a ‘judgment in the round’ is the preferred method for imposing equitable liability on third party accessories – such a judgment being a holistic determination of liability based on both basal principle and other factors

27 See, eg, James Edelman, ‘Judicial Discretion in Australia’ (2000) 19(3) *Australian Bar Review* 285, 299–300.

28 See, eg, Arie Frieberg, ‘Australia: Exercising Discretion in Sentencing Policy and Practice’ (2010) 22(4) *Federal Sentencing Reporter* 204.

29 See Justice Paul Finn, ‘Equitable Doctrine and Discretion in Remedies’ in WR Cornish et al (eds), *Restitution: Past, Present and Future* (Hart Publishing, 1998) 251.

of indeterminate weight.³⁰ It is also important to note that judicial discretion imposed by common law or statute will frequently be limited by guiding principles – often themselves judge-made.³¹ Clearly, then, the mere presence of discretion cannot invalidate the guided discretion approach advocated for here, provided the exercise of that discretion is sufficiently constrained.

Under the guided discretion approach the necessary constraints are provided by the three elements that the case law reveals judges to be considering when deciding to make a finding of property rights: detachment, practicality, and context. These three elements are necessarily broad. This does not detract from the validity of the guided discretion approach. Broadly framed, generalised concepts are consistently referred to throughout the common law (consider, for example, the ‘reasonable care’ that must be taken by a ‘reasonable person’ within tort law, and the ‘good faith’ with which contractual obligations must be performed).³² Provided these generalised concepts can be given some content, their application should be treated with care but not criticised or rejected without further justification.³³ The broad elements guiding judicial discretion in the finding of property rights in human biological material are far less general than ‘reasonableness’ and ‘good faith’, and (with reference to the case law) can be given exacting content. Concerns of unstructured, absolute discretion being exercised by members of the judiciary under the guided discretion approach to property rights in human biological material can therefore be put aside.

2 Explaining the Case Law Framework

The starting point for this article’s discussion of the guided discretion approach to property rights is the Supreme Court of Western Australia’s decision in *Roche*. The focus on this case requires both explanation and justification. It first must be acknowledged that *Roche* is a decision of a single member court made at a preliminary hearing – and as such its value as authority for the guided discretion approach is questionable.³⁴ Within a domestic context this critique can be answered by acknowledging that this type of decision – a single judge decision made in the early stages of a dispute – is typical of disputes in this area of the law. In Australia the question of property rights in the human body has not seen a High Court authority since *Doodeward*, and the disputes that come before the lower courts often require the property question to be satisfied as a preliminary matter before the real substance of the dispute can be reached.³⁵ Further, *Roche* has been

30 Pauline Ann Ridge, *Equitable Third Party Liability: Rationale, Principle, Method and Classification* (PhD Thesis, Australian National University, 2016) 9–12, chs 2, 9.

31 Wendy Lacey, ‘Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere’ (2004) 5(1) *Melbourne Journal of International Law* 108, 110.

32 These examples are borrowed from Joachim Dietrich, ‘Giving Content to General Concepts’ (2005) 29(1) *Melbourne University Law Review* 218, 219.

33 On the use of general concepts in legal reasoning, see Dietrich (n 32).

34 A point made by Rohan Hardcastle, who describes *Roche* as ‘not strong authority’: Rohan Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (Hart Publishing, 2007) 83.

35 For example in *Pecar* (Supreme Court of New South Wales, Bryson J, 27 November 1996). Decided based on an application of the *Doodeward* exception, the property question had to be resolved before a

repeatedly cited and applied by courts across the Australian states and territories with no concern regarding its authoritative status.³⁶

Whilst *Roche* has gained significant traction within the Australian case law, the emergence of the guided discretion approach in other common law jurisdictions is owed to the 2010 decision of the English Court of Appeal in *Yearworth v North Bristol NHS Trust* (*'Yearworth'*).³⁷ Australian courts applying the guided discretion approach treat *Yearworth* as a subsequent decision in the line of case law that originated with *Roche*,³⁸ however the international jurisprudence refers almost exclusively to *Yearworth* as the originator of this new, discretionary approach to property rights.³⁹ This includes *Yearworth* itself, the Court of Appeal making no reference to the earlier *Roche* decision in their judgment.

Yearworth might therefore be considered the originator of the guided discretion approach in international jurisprudence. Further, being a unanimous decision of a superior court, it is a decision of far greater authority than its Australian counterpart. Nonetheless, as the focus of this article is on the two competing approaches to property rights in human biological material within the Australian case law, it follows the position taken by Australian courts and treats the *Yearworth* decision as an influential case applying the guided discretion approach that first emerged with the *Roche* decision 10 years prior, and not as the guiding decision.

3 The Roche Decision

An alternative basis for finding property rights in human biological material outside of the *Doodeward* exception first emerged in the Australian context with the *Roche* decision in 2000. In this case the Supreme Court of Western Australia was asked to determine whether tissue samples that had been removed from the deceased and preserved in paraffin oil in the years prior to his death were 'property' for the purposes of the *Supreme Court Rules 1971* (WA) (*'Supreme Court Rules'*). If so, the Court could make the order requested by the plaintiff – one requiring the DNA testing of the samples for inheritance purposes.⁴⁰

The applicability of *Doodeward* appears obvious: part of a human body (tissue samples) had been removed from that body and subjected to the lawful application of work or skill (preservation in paraffin oil). Nonetheless, Master Sanderson held

dispute over succession to the intestate deceased's estate could proceed. *Roche* (2000) 22 WAR 331 dealt with a similar set of circumstances.

36 See *S v Minister for Health (WA)* [2008] WASC 262; *Bazley v Wesley Monash IVF Pty Ltd* [2011] 2 Qd R 207 (*'Bazley'*); *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 (*'Re Section 22'*); *Roblin v Public Trustee (ACT)* (2015) 10 ACTLR 300 (*'Roblin'*); *James v Seltsam Pty Ltd* (2017) 53 VR 290; *GLS v Russell-Weisz* (2018) 52 WAR 413; *Re Cresswell* [2019] 1 Qd R 403.

37 [2010] QB 1. For detailed discussions of this decision see, eg, Remigius N Nwabueze, 'Death of the "No-Property" Rule for Sperm Samples' (2010) 21(3) *King's Law Journal* 561; Muireann Quigley, 'Property: The Future of Human Tissue? *Jonathan Yearworth and Others v North Bristol NHS Trust*' (2009) 17(3) *Medical Law Review* 457.

38 See, eg, *Bazley* [2011] 2 Qd R 207, 214–15 (White J).

39 Particularly by courts in Canada and New Zealand: see, eg, *Lam v University of British Columbia* [2015] BCCA 2; *KLW v Genesis Fertility Centre* [2016] BCSC 1621; *Re Lee* [2018] 2 NZLR 731.

40 *Roche* (2000) 22 WAR 331, 332–3 (Master Sanderson).

(without explaining why) that *Doodeward* was not directly relevant to the issues raised in the case before him.⁴¹ Instead, relying on ‘general principles of law ... in accord with reason and common sense’,⁴² Master Sanderson made a finding of property rights on the basis that

it defies reason to not regard tissue samples as property. Such samples have a real physical presence. They exist and will continue to exist until some step is taken to effect destruction. There is no purpose to be served in ignoring physical reality. To deny that the tissue samples are property, in contrast to the paraffin in which the samples are kept or the jar in which both the paraffin and the samples are stored, would be in my view to create a legal fiction. There is no rational or logical justification for such a result.⁴³

This reasoning presents a sharp break with *Doodeward* and the creation of a new basis for a finding of property rights in human biological material entirely distinct from the application of work or skill. But what exactly does this new basis consist of? A study of the case law reveals there are three elements that are guiding judges in their decision-making processes under this new approach: detachment of the material at issue from the source individual, the practical needs of the case, and the context of the dispute. The existence of these elements reveals that the approach to finding property rights first set out by Master Sanderson in *Roche* is one of guided, rather than complete, discretion, and provides a superior framework for the finding of property rights in human biological material when compared with the more antiquated *Doodeward* exception.

4 Three Elements Guiding Judicial Discretion

(a) Detachment

Courts engaging in a guided discretion analysis when faced with the question of property rights in human biological material place great importance on the detachment of that material from the source individual. Indeed, it is clear that the question of detachment is the fundamental consideration of the guided discretion approach. Consider, for example, the frustration evident in Master Sanderson’s reasoning in *Roche* with the idea that the jar and paraffin oil in which the specimens at issue were stored could be the subject of property rights, but the tissue samples contained within that jar and oil could not be. Such a legal response did not accord with the reality of the situation: the clear detachment of the tissue samples from the source individual, allowing the samples to have their own separate existence in the same way as the jar in which they were contained. The actual, factual, presence of the specimens in a form readily identifiable as a moveable object and distinct from the source individual was evidently crucial to

41 Ibid 335. The difference in the human biological material at issue in the two cases may be responsible – Master Sanderson placed some emphasis on the fact that *Doodeward* dealt with an *entire* unburied body preserved in paraffin oil, whereas *Roche* concerned tissue samples preserved in the same way: at 334–5. However this entire body/body part distinction is inconsistent with authorities that have applied *Doodeward* to parts of a human body (and indeed to tissue samples): see, eg, *Pecar* (Supreme Court of New South Wales, Bryson J, 27 November 1996); *R v Kelly* [1999] QB 621. The implications of Master Sanderson’s failure to explain the inapplicability of *Doodeward* are discussed at Part III(A) below.

42 *Roche* (2000) 22 WAR 331, 335 [14] (Master Sanderson).

43 Ibid 338–9 [24].

the finding of property rights in that case. A similar approach was taken in *Bazley v Wesley Monash IVF Pty Ltd* ('*Bazley*'), where the physical presence of a pre-mortem sperm sample as distinct from the source individual led to the conclusion 'in law and in common sense' that the straws of preserved semen were the subject of property rights.⁴⁴ In neither case was the *something more* required by *Doodeward* by way of the application of work or skill relied on by the court. *Roche* provides a good example – the focus on the existence of the tissue samples within paraffin blocks going not to the application of work or skill, but rather to the moveable and possessable nature of the samples as distinct from the source individual.

The property-like effects (such as the ability to possess, transfer, and use for benefit human biological material) that detachment from the source individual produces can itself play an important role in the reasoning of the courts. The Supreme Court of British Columbia, for example, recently applied the guided discretion approach⁴⁵ to find property rights in a pre-mortem sperm sample, a key step in its reasoning being that every party involved in the transaction – from donor to purchaser to preserving facility – had treated the sample as moveable property for over a decade.⁴⁶ This ability to look to the propertied treatment of human biological material reveals the importance of detachment and its consequences to courts applying guided discretion. It is an inquiry that is not available under the *Doodeward* exception, an application of which turns solely on the question of work or skill.

These cases also reveal that the fundamental importance of the detachment criterion comes from a concern that the human biological material at issue be removed from the 'personhood' of the source individual. That is, the detachment inquiry allows for courts applying the guided discretion approach to consider whether the human biological material at issue is sufficiently distinct, if it has been sufficiently severed, from the source individual *as an individual* so that the material has its own separate existence. This severance is crucial, as it allows for the circumvention of the binding common law rule that a person cannot be both the subject and object of property rights.⁴⁷ The Australian Capital Territory ('ACT') Supreme Court's 2015 decision in *Roblin v Public Trustee (ACT)* ('*Roblin*') provides clear evidence of this. In that case, one concerning a pre-mortem sperm sample, it was held that '[t]he mere fact that the semen was formerly part of a human body is not sufficient to deny that it is property. The fact that the sperm constitutes human gametes is not sufficient at common law to take it out of the conception of property'.⁴⁸

44 [2011] 2 Qd R 207, 215 [33] (White J), citing with approval a portion of Master Sanderson's opinion in *Roche* set out above at text accompanying n 43.

45 By way of reference to *Yearworth* [2010] QB 1.

46 *JCM v ANA* [2012] BCSC 584, [69] (Russell J).

47 See, eg, *R v Bentham* [2005] 1 WLR 1057, 1061 [8] (Lord Bingham): 'One cannot possess something which is not separate and distinct from oneself. An unsevered hand or finger is part of oneself. Therefore, one cannot possess it'. This principle has been traced to Roman law: at 1062 [14] (Lord Rodger). As is discussed below at Part III(A), the guided discretion approach is currently confined to pre-mortem human biological material and so has not yet engaged with the 'no property in a corpse' rule.

48 (2015) 10 ACTLR 300, 307 [28] (Master Mossop).

This statement reflects the *otherness* of the human biological material required by courts before property rights will be imposed. The emphasis is clearly on the physical detachment of the sperm samples from the source individual. This lack of continued physical interrelation between the source and the human biological material, regardless of the fact that both continued to contain the same genetic material, was an essential element to the finding of property rights in that case. Similarly, in *Yearworth* (a case concerning pre-mortem sperm samples that had been destroyed as a result of the preserving facility's negligence), the Court discussed and rejected a personal injury argument before moving on to decide that damage to property had indeed occurred.⁴⁹ In doing so the Court expressly rejected the argument that sperm samples provided by a living source individual retained a 'living nexus' with the donor,⁵⁰ a clear iteration of the physical detachment inquiry.

As fundamental as it may be to the guided discretion approach, however, this focus on detachment is inconsistent with the dominant paradigm in property law theory – that of property as a bundle of rights. It hardly needs stating that bundle of rights theorists sees property, not as a *thing*, but as a collection of legal relationships between people.⁵¹ Master Sanderson's emphasis on physical reality, on the other hand, is more consistent with theories of property that look to the *thingness* of the subject matter under consideration – such as those espoused by Blackstone⁵² and Austin,⁵³ and more recently exclusionary scholars such as James Penner⁵⁴ and Henry E Smith.⁵⁵ Whilst this 'reified' approach to property rights has been identified as providing the 'greatest protection to a deserving plaintiff' in disputes over human biological material when compared with the bundle of rights approach,⁵⁶ its application within the Australian common law generally, and within the body of law dealing with human biological material specifically, is unclear.

It has, however, been noted that courts frequently resort to a reified view of property where human biological material is concerned because of its reliance on control over the object at issue as the determinative factor.⁵⁷ It may be that this emphasis on control, and on exclusion as its necessary counterpart, reflects an underlying acknowledgment by courts that human biological material is in some way different to other, more mundane, subjects of property rights – such as cars, televisions, and property law textbooks. Continuing this argument: as a result of human biological material's unique status, the disaggregation of property rights and the claiming of multiple rights and interests in that material that would be

49 [2010] QB 1, 10–12 [18]–[24] (The Court).

50 Ibid 10 [19].

51 A classic formulation is set out in AM Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, 1961) 107.

52 See William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765–70) bk 2. Blackstone's reference to property as 'that sole and despotic dominion' is (in)famous: at 2.

53 See John Austin, *Lectures on Jurisprudence* (John Murray, 5th ed, 1885) vol 1, 364–81 (Lecture XIV, delineating rights in rem and rights in personam).

54 See JE Penner, *The Idea of Property in Law* (Oxford University Press, 1997).

55 See, eg, Henry E Smith, 'Property as the Law of Things' (2012) 125(7) *Harvard Law Review* 1691.

56 Remigius N Nwabueze, *Biotechnology and the Challenge of Property: Property Rights in Dead Bodies, Body Parts, and Genetic Information* (Ashgate Publishing, 2007) 69.

57 For an overview of judicial reliance on the reified view of property in this area of the law, including in the *Roche* decision, see *ibid* 66–76.

allowed under the bundle of rights paradigm is undesirable.⁵⁸ Human biological material exists as a separate and distinct entity and so must be under someone's control, giving that person the right to exclude others from the material at issue; but other, more abstract rights and interests are to be avoided.

Of course, a preference for the reified view of property in the context of human biological material has never been explicitly stated by courts. Nonetheless, the point being made here is that, despite being inconsistent with dominant property law theory, there is a strong argument that the emphasis on detachment present within the guided discretion approach is appropriate in the context of human biological material and in line with current judicial thought. Further, the guided discretion approach encompasses a number of elements so that, when the approach's holistic nature is considered, this inconsistency is not in itself fatal.

(b) *Practical Issues*

Beyond the detachment inquiry the guided discretion approach moves into more normative territory, with the practical issues presented by the case being emphasised. Thus, one of the key concerns evident in Master Sanderson's opinion in *Roche* was the pragmatic needs of the court and the litigants before it:

I am satisfied that it is proper to hold that the human tissue is property. ... In this case it might well be possible by the use of DNA testing to establish definitively whether the deceased is the father of the plaintiff. If that is possible it will obviate the need for extensive evidence, much of that evidence anecdotal, to prove the plaintiff's claim. There will be a considerable saving in time and cost, so on the particular facts of this case there is a compelling reason for holding the tissue samples to be property.⁵⁹

Once again there is no need to look to the application of work or skill. The inquiry being made is not whether some additional work or skill has been applied so that the applier is seen as having *earned* the property rights. Instead, the court looks at the practical benefits of a finding of property rights and includes this information in its deliberation as to whether to make such a finding or not. In *Roche*, as the above quote indicates, the practical benefits resulting from a finding of property rights were the easier resolution of the dispute and a substantial saving of time and money for both the court and the litigants. For Master Sanderson, these issues of practicality clearly favoured the exercise of his discretion in favour of a finding of property rights.

With its express reference to budgetary and scheduling benefits, *Roche* presents a remarkably explicit engagement with the practical issues element. In other cases, applying the guided discretion approach the practical needs of litigants and the court are stated in more conservative terms. In *S v Minister for Health (WA)*,⁶⁰ for example, the practicalities of the claim weighed in favour of a finding of property rights and the granting of the requested order (one requiring the removal of sperm samples from the body of a deceased man) as this would prevent

58 James Penner is a fierce critic of this disintegration (albeit outside of the specific context under discussion here): see JE Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43(3) *UCLA Law Review* 711.

59 *Roche* (2000) 22 WAR 331, 338 [23].

60 [2008] WASC 262.

the wider dispute being nullified.⁶¹ The wider dispute related to the legality of the use of posthumously removed sperm in IVF treatment by the deceased's spouse, and could not be prosecuted unless the requested order was made allowing the sperm samples to be removed within 36 hours of the death of the deceased.⁶² Similarly, in *James v Seltsam Pty Ltd*,⁶³ the finding of property rights had the practical result of allowing the medical testing of excised lung tissue in asbestos litigation. In this case Zammit J emphasised that granting the order requiring the tests (on the basis of the antecedent determination of the property question) could lead to medical results 'potentially of great evidential value'⁶⁴ that could 'dispose of the case in its entirety'.⁶⁵

As with a focus on detachment, however, an emphasis on practical concerns would be problematic if it were the sole or determinative element of the guided discretion approach. The question of property rights in human biological material is so far removed from the need to expeditiously resolve disputes that a determination of the property question by sole reference to these practical concerns would have to be criticised. However, within the guided discretion approach a view to the practical concerns of the court and litigants is only one element to be considered and fits neatly alongside detachment and the context of the dispute. Importantly, it is an inquiry that cannot be made under an application of the *Doodeward* exception.

(c) *Factual and Legal Context of the Dispute*

Closely related to the practicalities question, the second normative element emphasised by courts deciding the question of property rights in human biological material under the guided discretion approach is the factual and legal context in which the case has arisen. In this way, courts applying the guided discretion approach take into account both the legal reason for which they are being asked to make a finding of property rights (for example, for the purposes of a particular statutory provision or for the making out of a tort claim), and the factual circumstances of the case. Perhaps the best example of this use of context as a tool to guide the exercise of judicial discretion comes from the English Court of Appeal's decision in *Yearworth*. This case concerned six men who had been diagnosed with cancer and who were advised to undertake a course of chemotherapy. Informed that this treatment could lead to decreased fertility the six plaintiffs provided samples of semen, all of which were immediately frozen and stored at the defendant hospital. Within weeks, however, the storage mechanism failed and the semen samples thawed, causing the sperm to perish.⁶⁶ The plaintiffs claimed in negligence (alleging damage to property) and bailment.⁶⁷ In deciding

61 Ibid [5]–[15] (Simmonds J).

62 Ibid.

63 (2017) 53 VR 290.

64 Ibid 305 [76].

65 Ibid 307 [82].

66 *Yearworth* [2010] QB 1, 7–8 (The Court).

67 Ibid 4–5. The plaintiffs also claimed in negligence alleging personal injury, a claim rejected by the Court: see above nn 49–50 and accompanying text.

the case the Court of Appeal first noted that the easiest course of action would be to uphold the men's claims of ownership by virtue of an application of the *Doodeward* exception – the storage of the sperm being the required work or skill.⁶⁸ However the Court not only rejected this approach but rejected the entire framework of the *Doodeward* exception, declining to extend the common law on this issue on what it identified as a flimsy foundation.⁶⁹ Instead the Court of Appeal 'rest[ed] [their] conclusions on a broader basis'⁷⁰ – this being the context of the negligence claim:

A decision whether something is capable of being owned cannot be reached in a vacuum. *It must be reached in context*; and in this section of our judgment the context is whether an action in tort may be brought for loss of the sperm consequent upon breach of the trust's duty to take reasonable care of it.⁷¹

On this broader, context-reliant basis the Court decided that the plaintiffs did in fact have ownership of their respective samples.⁷²

This focus on context is an important keystone of the guided discretion approach to property rights in human biological material. It has the benefit of allowing for the possibility of human biological material being the subject of property rights in one case (for example a tort claim) but not another (for example a piece of sale of goods legislation).⁷³ Further, it allows courts to assess each case as a normative matter rather than being confined to finding that work or skill has been applied and that property rights must therefore result (or, alternatively, that no work or skill has been applied and therefore a wrongdoing party can escape liability).⁷⁴ With fears of the commodification of the human body, both living and deceased, ever present in this area of the law,⁷⁵ a restricted finding of property rights confined to what is necessary to resolve an identified dispute must be preferred to the blunt and unrefined approach of the *Doodeward* exception.

Roche again provides a good example. In reaching a finding of property rights in that case, Master Sanderson expressly noted that he was only required to determine the question of property rights in the tissue sample within the limited context of the *Supreme Court Rules*.⁷⁶ The relevant rule did not require a decision as to in whom the property rights vested, and as such Master Sanderson expressly declined to make such a holding.⁷⁷ The finding of property rights for the restricted purpose of the relevant provision of the *Supreme Court Rules* thus avoided the

68 Ibid 20 [45] [c].

69 Ibid 20 [45] [d].

70 Ibid 20 [45] [e].

71 Ibid 12 [28] (emphasis added). *Yearworth*'s focus on context has been expressly adopted by Canadian courts: see *JCM v ANA* [2012] BCSC 584, [55]–[64] (Russell J); *Lam v University of British Columbia* [2015] BCCA 2, [110]–[115] (Bennett J); *KLW v Genesis Fertility Centre* [2016] BCSC 1621, [60]–[96] (Pearlman J).

72 *Yearworth* [2010] QB 1, 20–1 [45] [f].

73 Cf *PQ v Australian Red Cross Society* [1992] 1 VR 19.

74 The latter of these two examples was given by the Court of Appeal in *Yearworth* when rejecting the *Doodeward* exception: see *Yearworth* [2010] QB 1, 20 [45] [d] (The Court).

75 Margaret Jane Radin, *Contested Commodities* (Harvard University Press, 1996) provides an excellent overview of this issue.

76 *Roche* (2000) 22 WAR 331, 333 [8].

77 Ibid 339 [25].

question of ‘ownership’ of human biological material and any incidents of ownership – including, for example, the ability to alienate the human biological material and the right to any income produced from its use in medical research – that might arise in association with that question.⁷⁸ This narrow, context-dependent approach has been repeatedly followed by Australian courts.⁷⁹

As to factual context, the sperm sample cases again provide a good example. We saw above that the property-like effects that result from the detachment of the human biological material at issue from the source individual played an important role in the decision of a Canadian court in finding property rights in a donor sperm sample.⁸⁰ This finding also shows a consideration of the factual context of the dispute: ie, that all the involved parties – from donor to donee couple to treating facility – had treated the sperm sample as property for more than ten years.⁸¹ The factual context of the case included the moral concerns raised by the respondent, however, given the aforementioned long-term propertied treatment of the sperm, her moral objections to the commodification of the human body from which the sperm had come were (somewhat cynically) dismissed.⁸²

5 Conclusion

Within the past two decades the guided discretion approach has emerged as an alternative basis to the *Doodeward* exception for a finding of property rights in human biological material. Emphasising the separation of the human biological material at issue from the source individual and the context of the case, as well as the practical needs of the courts and the litigants before them, this approach presents a flexible, normative framework for a finding of property rights when compared to the single-inquiry nature of *Doodeward*. Whilst the two approaches currently coexist as separate and alternative bases for a finding of property rights, Part III argues that the guided discretion approach is far superior to the antiquated *Doodeward* exception and should be adopted as the sole basis for a finding of property rights in human biological material within Australian law.

III FOUR ARGUMENTS WHY *DOODEWARD* SHOULD BE SUPERSEDED

A The Pre-/Post-Mortem Distinction Is Invalid

1 The Pre-/Post-Mortem Distinction

As the case law currently stands a clear distinction can be drawn between the guided discretion approach and the work or skill exception. The former is restricted

78 Honoré famously identified eleven incidents of ownership including the two listed here: see Honoré (n 51) 112–28.

79 See, eg, *S v Minister for Health (WA)* [2008] WASC 262, [9] (Simmonds J); *James v Seltsam Pty Ltd* (2017) 53 VR 290, 304–5 [72] (Zammit J).

80 See *JCM v ANA* [2012] BCSC 584 discussed at above nn 45–46 and accompanying text.

81 Ibid [69] (Russell J).

82 Ibid: ‘Certainly, they are interesting arguments for the respondent herself to make given she participated in purchasing and using a donation of sperm from an anonymous donor’.

in its application to cases concerning human biological material removed from the source individual whilst alive.⁸³ On the other hand, the work or skill exception is applied to human biological material removed from the source individual after their death.⁸⁴

The case law is unable to offer a valid explanation for this pre-/post-mortem distinction. It will be remembered that in his opinion in *Roche*, a judgment that dealt with a pre-mortem tissue sample and launched the guided discretion approach to property rights in Australia, Master Sanderson did not explain why the *Doodeward* exception was not applicable to the facts of the case,⁸⁵ inadvertently creating the pre-/post-mortem dichotomy. Decisions since *Roche* have similarly failed to adequately explain the distinction. Prior to his elevation to the High Court Edelman J maintained the dichotomy on the basis that '[t]he position is different' in the context of post-mortem human biological material compared with cases concerning material taken pre-mortem.⁸⁶ Similarly Master Mossop of the ACT Supreme Court stated that 'different issues' arise in the pre- and post-mortem contexts.⁸⁷ The exact nature of these 'differences' is afforded little elaboration in either case.⁸⁸

2 *The Re Cresswell Decision*

Fortunately, in June of 2018 Brown J of the Queensland Supreme Court offered a more detailed consideration of the pre-/post-mortem dichotomy. *Re Cresswell* concerned a sperm sample removed from the body of a deceased man. In deciding that this sample was indeed property capable of possession, Brown J considered both the work or skill exception and the guided discretion approach, as well as their differential application, at length.⁸⁹ Her Honour ultimately maintained the pre-/post-mortem dichotomy, a close reading of her judgment revealing two

83 As demonstrated by *Roche* (2000) 22 WAR 331 and *Yearworth* [2010] QB 1. For further illustrations of this point see *Roblin* (2015) 10 ACTLR 300 (pre-mortem sperm sample, source individual deceased at time of application); *Re Lee* [2018] 2 NZLR 731 (same); *Re Section 22* [2013] WASC 3 (Edelman J expressly approving of the *Roche* reasoning in the context of pre-mortem sperm samples); *James v Seltam Pty Ltd* (2017) 53 VR 290 (pre-mortem tissue sample, source individual alive at time action commenced); *Lam v University of British Columbia* [2015] BCCA 2 (pre-mortem sperm sample, source individual alive at time action commenced).

84 The one possible exception is *R v Kelly* [1999] QB 621, where the work or skill exception was applied without discussion of the pre- or post-mortem nature of the human biological material at issue.

85 See above n 41 and accompanying text.

86 *Re Section 22* [2013] WASC 3, [8].

87 *Roblin* (2015) 10 ACTLR 300, 304 [21].

88 For Edelman J, the difference in position appears to stem from the fact that human biological material removed from the source individual post-mortem is not subject to the rule that a living person cannot be both the object and subject of property rights: *Re Section 22* [2013] WASC 3, [8]. His Honour theorised that this should make it easier for property rights to be found in post-mortem human biological material than pre-mortem material, however reached the conclusion that the adoption of the rule that there is no property in a corpse in the 17th century prevents this: at [8]. Master Mossop instead intimated that the 'different issues' arise as a result of the presence of consent in the case of human biological material removed pre-mortem: *ibid*. As will be discussed, the presence or absence of consent is in no way indicative of which approach to property rights courts will apply: see below nn 96–99 and accompanying text.

89 *Re Cresswell* [2019] 1 Qd R 403, 427–42 [97]–[162].

possible reasons for doing so: a highly formalist approach to the no-property rule, and the question of consent.

Justice Brown framed her discussion of the pre-/post-mortem distinction by reference to the views of Edelman J.⁹⁰ Writing extra-curially, his Honour has argued that there is no principled reason why the detachment-based reasoning of *Roche* should not apply equally to human biological material removed post-mortem as to material removed pre-mortem.⁹¹ Regardless of this outlining of the issue, and despite 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’,⁹² Brown J decided the property question that arose in *Re Cresswell* on the basis of the *Doodeward* work or skill exception.⁹³ Her Honour reasoned that the common law had not yet made the extension of pre-mortem principles to post-mortem human biological material advocated for by Edelman J.⁹⁴

Her Honour’s application of *Doodeward* in this case hints at the fundamental idea underpinning the pre-/post-mortem distinction. Courts upholding the dichotomy must take the view that sperm samples (and other human biological material) removed from the body of the source individual *after* their death are, at least initially, indistinguishable from a corpse awaiting disposal – and are thus subject to the common law rule that there is no property in a corpse. For a court to then make a finding of property rights in the material the work or skill exception to this rule must be applied. Human biological material removed prior to the death of the deceased is not subject to this same common law rule and so no exception is required, making way for the application of a guided discretion analysis.

The issues presented by this justification for the dichotomy are significant. Regardless of whether the human biological material is removed from the source individual pre- or post-mortem, in a large proportion of disputes over human biological material the source individual is deceased at the time the case is heard. This fact is entirely obscured by an analytical starting point that sees post-mortem human biological material as identical to an unburied corpse. The sperm cases highlight this issue. In nearly all of the disputes that arise over sperm samples – whether they are removed prior to or after the death of the source individual – there is one all-important unifying feature: the source individual is deceased at the time another party asserts a proprietary interest in his genetic material. This must surely be the more relevant consideration as against the point of time at which the sample was removed. Important issues of intention and consent – representing a broader

90 Ibid 438–40 [143]–[151], discussing *Re Section 22* [2013] WASC 3; Justice James Edelman, ‘Property Rights to Our Bodies and Their Products’ (2015) 39(2) *University of Western Australia Law Review* 47 (‘Property Rights’).

91 See Edelman, ‘Property Rights’ (n 90) 62–7. Justice Edelman labelled *Roche* a ‘path-breaking’ decision: at 59. Although on this point Justice Edelman reiterated his view that this development is practically constrained by the traditional common law rule that there is no property in a corpse: see discussion at 62–7, repeating concerns set out at above n 88. See also *Re Cresswell* [2019] 1 Qd R 403, 439 [148] (Brown J) (summarising Justice Edelman’s views).

92 *Re Cresswell* [2019] 1 Qd R 403, 442 [158] (Brown J).

93 Ibid 441 [153].

94 Ibid 442 [158].

concern relating to personal autonomy – arise in disputes involving a deceased source individual, and they arise regardless of the pre- or post-mortem status of the human biological material at issue. The consent to IVF treatment during one's lifetime given when providing a pre-mortem sperm sample does not necessarily equate to consent to post-mortem IVF treatment using that sample after one's death. Similarly, ante-mortem statements of one's desire to have children cannot necessarily equate to consent by the deceased to their partner obtaining sperm from their deceased body and using that sperm in IVF treatment. It is here pertinent to note that, as we have seen, the guided discretion approach is entirely capable of taking into account moral and ethical concerns as part of the factual context of a dispute over property rights in human biological material.⁹⁵

This discussion leads nicely into an examination of the second possible reason for Brown J's continued adherence to the pre-/post-mortem dichotomy: the question of consent. In deciding *Re Cresswell* her Honour engaged in an extensive review of the relevant case law. This review led Brown J to the conclusion that the series of decisions finding property rights in human biological material outside of the *Doodeward* 'work or skill' framework were confined to cases where the material was removed from the source individual (1) whilst alive and (2) with their consent.⁹⁶ 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. However, there is nothing to suggest that this reflects some inherent legal inability of the detachment-based approach to apply in the post-mortem context, or in the absence of consent.

A simple example proves this point. Consider the possibility that a terminally ill cancer patient might give 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 *Doodeward*'s 'work or skill' exception.⁹⁷ Consent is clearly capable of being given in the post-mortem context, and yet an application of the *Doodeward* exception to a deceased cancer patient's sperm is in no way hinged on his pre-mortem consent to its post-mortem extraction. To put it another way, consent in the post-mortem context in no way creates the expectation that *Roche* will be applied because of the presence of that consent. Nor does the absence of consent in the pre-mortem context militate against an application of *Roche*: consider a tissue sample removed from a woman in a coma (and so incapable of giving consent) who later completely recovers. Should a property dispute arise regarding that tissue sample, it almost certainly would be decided based on an application of *Roche*.⁹⁸ This is regardless of the absence of consent in the obtaining of the material. The point being made here is simple: consent, whilst undoubtedly a matter of immense importance, does not

95 See above n 82 and accompanying text.

96 *Re Cresswell* [2019] 1 Qd R 403, 441 [157].

97 As confirmed by *Re Cresswell* [2019] 1 Qd R 403 and other post-mortem sperm cases, where consent is implied from the facts.

98 Compare this example with the facts of *Roche* itself, which concerned a tissue sample removed from a man during surgery.

play a role in deciding which legal framework will be applied to answer the question of property rights in that human biological material.

It is here argued that the pre-/post-mortem dichotomy can equally be described as being the result of an analytically-limited body of precedent and a judiciary engaging in path dependency for the sake of expediency.⁹⁹ Indeed, Justice Brown's conclusion in *Re Cresswell* in many ways exemplifies this.¹⁰⁰

3 *Abandoning the Distinction?*

This discussion of consent highlights an issue that underlies the length of the pre-/post-mortem fissure: the dichotomy in 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 modern practical reality. In an age of modern medicine and modern science, disputes are emerging with increasingly varied factual scenarios and that increasingly blur the line between pre- and post-mortem.¹⁰¹ Within this modern context, one wonders how long the traditional common law rule that there is no property in a corpse (or the concomitant inability of a deceased person to give consent to the removal of human biological material) can continue to stand as a valid dividing line between guided discretion and work or skill. Its continued application in the pre-mortem context, including in cases where the source individual remains alive at the time of the dispute,¹⁰² reveals that the detachment-based analysis on which both *Roche* and *Yearworth* are founded is clearly sufficient to circumnavigate the common law rule that a living person cannot be the subject of property rights.¹⁰³ There is no impediment to that approach similarly circumnavigating the rule, of much weaker historical pedigree,¹⁰⁴ that a deceased body cannot be the subject of property rights.¹⁰⁵ Justice Brown in fact hinted at the possible future development of the law in this way in *Re Cresswell*, concluding her discussion of the pre-/post-mortem distinction with the comment that 'such an extension of the common law principles

99 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 have limited the detachment-based reasoning of *Roche* 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, see Michael J Gerhardt, 'The Limited Path Dependency of Precedent' (2005) 7(4) *University of Pennsylvania Journal of Constitutional Law* 903 (written within the specific context of American constitutional law).

100 See discussion at above nn 90–94.

101 Consider, for example, the possibility of sperm removed from an irreversibly comatose man. Does this sample fall onto the pre- or post-mortem side of the dichotomy?

102 *Yearworth* itself is an example of this, as is *James v Seltsam Pty Ltd* (2017) 53 VR 290.

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

104 For sustained critiques of the rule's basis as a matter of legal history see, eg, Edelman, 'Property Rights' (n 90) 65–7; PDG Skegg, 'Human Corpses, Medical Specimens and the Law of Property' (1975) 4(4) *Anglo-American Law Review* 412, 412–18; Matthews (n 14) 208–13; Roger S Magnusson, 'The Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions' (1992) 18(3) *Melbourne University Law Review* 601, 603 ff.

105 Thus, 'just as things severed from reality [sic] become personalty, so things severed from [deceased] bodies become the subject of property': Skegg (n 104) 418.

may well occur in the future'.¹⁰⁶ Nonetheless, '[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'.¹⁰⁷ And so the dichotomy continues.

This is not so in other jurisdictions, several of which have abandoned the pre-/post-mortem distinction and embraced the guided discretion approach in both contexts. In New Zealand, for example, the High Court recently rejected entirely that *Doodeward's* work or skill exception is part of New Zealand law.¹⁰⁸ The High Court instead applied the guided discretion approach as exemplified by *Yearworth* to the human biological material at issue – a post-mortem sperm sample.¹⁰⁹ There is a strong argument that this is also the law in England post-*Yearworth*. The complete rejection of the *Doodeward* exception in that case, which concerned pre-mortem sperm samples, certainly leaves little room to argue that the work or skill exception remains the law in the case of post-mortem human biological material. There is also judicial support for this position in Australia. In at least one case concerning human biological material removed post-mortem an Australian court has refused to uphold the pre-/post-mortem distinction, instead holding that the *Roche* guided discretion approach should apply in both contexts.¹¹⁰ Unfortunately, as *Re Cresswell* demonstrates, this approach has not been followed.

Nonetheless, if we accept that an explanation for the pre-/post-mortem distinction based on either a formalistic view of post-mortem human biological material as identical to an unburied corpse or the (fictional) omnipresence of consent in the context of pre-mortem material is unsound, there remains no valid reason for the dichotomy.¹¹¹ The complete lack of a valid explanation for the distinction between human biological material taken pre-mortem and material taken post-mortem, with guided discretion applying to the former and work or skill to the latter, highlights that there is no need for two different approaches to property rights in human biological material within the Australian common law. One approach – the guided discretion approach – is sufficient to cover all human biological material regardless of the point in time at which it was removed from the source individual.

106 *Re Cresswell* [2019] 1 Qd R 403, 442 [158].

107 *Ibid.*

108 *Re Lee* [2018] 2 NZLR 731, 757–61 [77]–[91] (Heath J). I am grateful to Dr Ben France-Hudson for bringing this decision to my attention.

109 *Ibid* 759 [83]–[84].

110 *S v Minister for Health (WA)* [2008] WASC 262.

111 A point also noted by Hardcastle, who argues that 'there is no reason in principle why the [*Doodeward*] exception should be limited to bodily materials separated from cadavers': Hardcastle (n 34) 40. This article takes the position that this statement should be inverted to read: there is no reason in principle why the guided discretion approach to property rights should be limited to bodily materials separated from living source individuals.

B *Doodeward's* Essential Underlying Inquiry Is Encompassed Within the Guided Discretion Approach

Despite the relatively recent resurgence of litigation with some connection to *Doodeward* and its exception,¹¹² the body of case law dealing with this decision is substantial. An analysis of this case law reveals that there is one essential inquiry that courts are engaging in prior to finding property rights in human biological material on the basis of the *Doodeward* work or skill exception. This inquiry asks if the material at issue is sufficiently detached from the source individual so as to allow the imposition of property rights. The sufficient detachment inquiry does not provide a separate legal basis for a finding of property rights beyond the application of work or skill required by *Doodeward*. Instead, it operates unarticulated in the background to inform judicial opinion as to whether or not property rights should be imposed *at all*, before looking to work or skill as the legal test that must be satisfied for property rights to be imposed. Importantly, as we have seen, this inquiry, an essential antecedent to an application of the *Doodeward* exception, is entirely encapsulated within the holistic guided discretion approach to property rights set out in *Roche* and subsequent decisions. Given this is the case the continued maintenance of two separate approaches to property rights in human biological material by Australian courts can legitimately be questioned.

For the purposes of an application of the *Doodeward* exception, sufficient detachment can be achieved in two ways: physical detachment and conceptual detachment.

1 *Physical Detachment*

The simplest way for the detachment inquiry to be satisfied is by the visible, physical separation of the human biological material at issue from the source individual. In this way, preserved limbs and various other body parts used as teaching specimens by the Royal College of Surgeons in London were held to be the subject of property rights following the application of work or skill.¹¹³ Organs taken as part of post-mortems and preserved for use in a research tissue bank have been similarly classified by courts applying the *Doodeward* exception.¹¹⁴ Clear, physical separation allows courts to find property rights on the basis that the human biological material at issue is so physically detached from the source individual it has become something entirely *other*. Any physical interrelation between the source individual and the human biological material has ceased. This allows courts to acknowledge the application of work or skill to the human biological material at issue whilst avoiding the rule that there is no property in a corpse.

112 *Doodeward* was the subject of some judicial interpretation in the years immediately after it was handed down (see, eg, *Miner v Canadian Pacific Railway* (1911) 18 WLR 476 (Alberta Supreme Court)), however judicial treatment of this decision only began in earnest in the Australian context with the 1986 decision *Robinson v Pinegrove Memorial Park Ltd* (1986) 7 BPR 97,622.

113 *R v Kelly* [1999] QB 621.

114 *Re Organ Retention Group Litigation* [2005] QB 506.

We have already seen the importance placed on physical detachment of the human biological material at issue from the source individual, antecedent to a finding of property rights under *Doodeward*, by courts applying the guided discretion approach to property rights.¹¹⁵ This analysis need not be repeated here. It is sufficient to emphasise that courts applying the guided discretion approach engage openly and wholeheartedly in the physical detachment inquiry that is an unarticulated antecedent inquiry to an application of the *Doodeward* exception. The inquiry is clearly one of central importance to courts tasked with deciding the question of property rights in human biological material, and the fact that it can be transferred from the rigid work or skill exception and readily incorporated into the more flexible and fluid guided discretion approach is a strong argument in favour of abandoning the former in favour of the latter.

2 Conceptual Detachment

Human biological material can also be *conceptually* detached from the source individual. In this formulation of the detachment inquiry the court is asking not whether the human biological material formerly part of the source individual now has independent physical existence from that source, but instead whether the human biological material has so altered in perceptible form as to be conceptually distinct from the source. Cremated ashes provide a good example, the case of *Leeburn v Derndorfer* (*'Leeburn'*)¹¹⁶ being illustrative. This case concerned a dispute over the place of final disposal of the ashes of a deceased man amongst his three adult children/co-executors. The deceased's two daughters collected the ashes and interred them at their preferred cemetery.¹¹⁷ Two years after this interment, the plaintiff son brought an action seeking an order that the ashes be disinterred and a third transferred to him for disposal as he saw fit. The remaining two-thirds would then be returned to the defendants for reinterment.¹¹⁸ In reaching his conclusion that the ashes should not be disinterred Byrne J applied the *Doodeward* exception. Thus, 'the application of fire to the cremated body is to be seen as the application to it of work or skill which has transformed it from flesh and blood to ashes, from corruptible material to material which is less so'.¹¹⁹ The executors held the ashes (now moveable property) as trustees for the purpose of disposal.¹²⁰

The idea of conceptual detachment is apparent in Byrne J's willingness to engage in a personal property analysis (via an application of the *Doodeward* exception and the imposition of a trust relationship) as an initial matter. However, it is also evident at a deeper analytical level that is worth exploring. For example it was instrumental to Byrne J's reasoning that ashes could be dealt with in ways not possible with respect to a dead body – be it by way of scattering, division, or

115 See Part II(B)(4)(a) above.

116 (2004) 14 VR 100.

117 Ibid 101 [5]–[6] (Byrne J).

118 Ibid 101 [8] (Byrne J).

119 Ibid 107 [27].

120 Ibid 107 [28] (Byrne J).

as the subject of an almost unqualified right of ownership.¹²¹ His Honour stressed that these actions (and particularly division of the ashes, as the focus of the case) ‘would be unthinkable in the case of an unburied corpse’.¹²² It is clear that Byrne J saw the cremated ashes at issue in *Leeburn* as something *other* than the deceased individual in the same way that courts have seen sperm samples as *other* from the source individual. His concerns about dealings with dead bodies – be they moral or practical – were entirely absolved when the human biological material at issue was cremated ashes. In the case of cremated ashes, however, the detachment that provides the *otherness* is conceptual as opposed to physical – the ashes being the deceased corpse in another form, rather than (for example) a tissue sample removed from the same.

Of course, the reply could be made that societies have treated ashes differently from dead bodies for millennia¹²³ and thus a finding of conceptual detachment resulting in property rights in the case of cremated ashes is far from surprising. However, the idea of conceptual detachment also appears, albeit in a weaker form, when historical remains are considered. The only judicial decision in this context is that of the Tasmanian Supreme Court in *Re Tasmanian Aboriginal Centre*.¹²⁴ This case concerned an application for letters of administration over the estates of 17 Aboriginal Australians who had died over 150 years previously and whose remains were being held in the Natural History Museum in London.¹²⁵ The question for the Court was whether letters of administration should be granted when none of the deceased had left any estate.¹²⁶ Granting the Tasmanian Aboriginal Centre’s application, Underwood CJ noted that there was sufficient uncertainty about the nature of the interest (proprietary or otherwise) in the remains at issue to warrant granting limited letters of administration in order for that interest to be tested in court.¹²⁷ A principal step in Chief Justice Underwood’s reasoning was a discussion of *Doodeward* and its holding that human remains are capable of becoming property.¹²⁸

The human biological material at issue in *Re Tasmanian Aboriginal Centre* was therefore at least arguably susceptible to a finding of property rights. As the human biological material was not physically detached from the bodies of the 17 deceased source individuals, but was instead the bodies themselves in a different (skeletal) form, the detachment required to warrant the finding of personal property must be conceptual. This is despite historical remains in most cases retaining at least some of the physical characteristics of a deceased body (that is, historical remains can generally continue to be identified as discreet skeletal

121 Ibid 106–7 [27].

122 Ibid 108 [31].

123 For historians a quintessential text on the matter is Sir Thomas Browne, *Hydriotaphia: Urn-Burial* (Hen Brome, 1658).

124 (2007) 16 Tas R 139.

125 Ibid 140 [1] (Underwood CJ).

126 Ibid 141 [4] (Underwood CJ).

127 Ibid 143 [10]–[11].

128 Ibid 142 [9]. For a decision in a similar vein, although absent any discussion of *Doodeward* and property rights, see *Re Estate of Tupuna Maori* (High Court of New Zealand, Greig J, 19 May 1988).

elements), and suggests that there is a temporal element to the idea of conceptual detachment in this context.

The decisions discussed within this section have both been decided under a *Doodeward* framework. As discussed above,¹²⁹ in an Australian context the guided discretion approach to property rights has to date been limited to pre-mortem tissue and sperm samples – categories of human biological material that fit squarely within the physical detachment inquiry. As a result the guided discretion approach has not yet been allowed to venture into the realm of conceptual detachment. However, given its holistic and contextual nature, it is difficult to argue that the idea of conceptual detachment would create any difficulties for courts applying that approach.¹³⁰

3 Conclusion

The case law reveals that courts faced with the question of property rights in human biological material engage in a preliminary inquiry when deciding whether or not to impose such rights under an application of the *Doodeward* work or skill exception. This inquiry asks whether the human biological material at issue is sufficiently detached from the source individual, either physically or conceptually, so that property rights can be imposed.¹³¹ Importantly, this antecedent inquiry that is so essential to the operation of the *Doodeward* exception is fully encompassed within the guided discretion approach to property rights (in the case of physical detachment), or has the means to be so encompassed (in the case of conceptual detachment). Given that this is the case there is no reason to insist on the continued existence of the *Doodeward* exception. Its essential underlying inquiry is given equal effect under the practical and contextual guided discretion approach, and, as the following discussions will reveal, it is fundamentally flawed in a number of other significant respects.

C Even When *Doodeward* Is Applied, It Is Not Given Effect

The reader might contend that the guided discretion approach to property rights is lacking in one significant respect – it provides judges with a framework to use when deciding whether to find property rights in the human biological material before them. It does not indicate in whom those property rights vest.¹³² The

129 See Part III(A).

130 Indeed the discussion of *Yearworth* above (see nn 49–50 and accompanying text), in the context of physical detachment where the human biological material at issue no longer existed, highlights the flexibility of the detachment inquiry when incorporated into the guided discretion approach.

131 This is not to say that human biological material cannot be both physically and conceptually detached from the source individual. The Iatmul people of Papua New Guinea, for example, disinter the bodies of deceased persons and detach the skulls, turning them into elaborately carved works of art. Such human biological material might be regarded as both physically and conceptually detached from the deceased. A selection of these skulls, along with other forms of human biological material, is available for sale at ‘Humans’, *SkullStore* (Web Page, 2019) <<https://www.skullstore.ca/collections/humans>>.

132 However we have seen that in fact this refusal to decide where to vest the resulting property rights is often a conscious decision on the part of the court applying the guided discretion approach: see above nn 75–79 and accompanying text. Note also that the finding of property rights without determining where they vest is not unique to the guided discretion approach, and is a route also taken by courts applying the

Doodeward exception, it could be argued, is not so limited. Indeed, the work or skill exception to the rule that there is no property in a corpse announced by Griffith CJ in *Doodeward* clearly sets out that it is the party applying that work or skill to the human biological material in whom the resulting property rights vest.¹³³ This argument falls down, however, when it is revealed that even when common law courts in Australia and overseas purport to apply the *Doodeward* exception, they almost always do so in conjunction with an additional legal process that thwarts this result. That is to say, the party applying the work or skill that is the activating factor of the *Doodeward* exception is stripped of the property rights *Doodeward* would vest in them by the imposition by the court of, for example, a trust or bailment relationship. This methodology begs the question: if the result strictly mandated by the work or skill exception is not allowed to be realised, should that exception continue to exist as a principal basis for the imposition of property rights in human biological material? As courts will take additional steps to vest property rights in the party they see as being the logical (or most deserving) recipient of those rights, greater transparency would be achieved through reference to the more flexible guided discretion approach.

The cases dealing with cremated ashes clearly demonstrate this point. It will be remembered that the Court in *Leeburn*¹³⁴ applied the *Doodeward* exception to the cremated ashes at issue, making them the subject of property rights. However instead of vesting the property rights in the applier of work or skill – the disinterested third party crematorium – as required by *Doodeward*, the Court imposed a trust over the ashes and named the children of the deceased (as executors of his estate) as trustees.¹³⁵ Whilst this result is certainly not undesirable, it is unclear that it had to be reached through this route. The Court in *Leeburn* could equally have pointed to the physical presence of the ashes, the practical reasons to resolve the dispute by the application of property principles (for example the continuing existence of the ashes and the ongoing obligations of care that could be resolved by the imposition of a trust), and the context of the case (for example the inherent jurisdiction of the court to grant such an order along with its traditional

Doodeward exception: see, eg, *Pecar* (Supreme Court of New South Wales, Bryson J, 27 November 1996). This decision pre-dates *Roche* and, with its focus on detachment ('[t]his view would justify a right to retain possession of autopsy specimens, especially in this case where the human tissue is fixed in and an accretion to a paraffin block which itself is susceptible of ownership': at 5) and practicalities ('I approach [the question] with a general disposition favourable to attaining procedural justice by employing the powers of the court to enable litigants to bring forward relevant evidence': at 5), it is interesting to consider if it might have been a guided discretion opinion if decided a few years later. The means by which property rights in human biological material might vest in particular individuals under a detachment approach has received some academic attention: see, eg, Andrew Grubb, '“I, Me, Mine”: Bodies, Parts and Property' (1998) 3(4) *Medical Law International* 299, 305–6; Edelman, 'Property Rights' (n 90) 62, 66–7; Mark Pawlowski, 'Property in Body Parts and Products of the Human Body' (2009) 30(1) *Liverpool Law Review* 35, 46–8.

133 *Doodeward* (1908) 6 CLR 406, 414. The full quote is set out at text accompanying n 19 above.

134 (2004) 14 VR 100, discussed above at nn 116–122 and accompanying text.

135 This approach was followed in *Doherty v Doherty* [2007] 2 Qd R 259. The language of both *Leeburn* and *Doherty* suggests, correctly or otherwise, that the imposed trust is one for purpose: see *Leeburn* (2004) 14 VR 100, 107 (Byrne J); *Doherty v Doherty* [2007] 2 Qd R 259, 266 (Jones J).

reluctance to interfere with the decisions of executors) in resolving the dispute under the guided discretion approach.

Another example is provided by the cases dealing with sperm samples removed post-mortem. In these cases the additional legal process applied by courts is that of an agency relationship, whereby the party preserving the sperm (and applying work or skill in the process) is held to have done so as an agent of another party.¹³⁶ This agency relationship is imposed after an explicit finding of property rights based on an application of the *Doodeward* exception.¹³⁷ As with cremated ashes, reference to the three elements of the guided discretion approach set out in Part II(B)(4) above would undoubtedly also lead courts to their desired outcome in post-mortem sperm sample cases.¹³⁸ And under the guided discretion approach the property rights would vest where the court desired without first notionally applying an exception that requires the property rights vest elsewhere.

It must be stressed that the argument here is not against the use of additional legal processes such as trusts and agency relationships in the context of human biological material. Rather, issue is taken with the nominal application of the *Doodeward* exception and the subsequent use of these additional processes as a means of ultimately vesting the property rights with the court's desired party. The guided discretion approach to property rights would almost unarguably reach the same results, however without having to employ creative legal workarounds.

That being said, courts applying the guided discretion approach do sometimes appear to be applying an additional legal process. In the pre-mortem sperm cases, for example, the relationship between the sperm donor and the preserving facility is held to be one of bailment, the sperm donor considered as having bailed his possessory rights in the sperm to the preserving facility.¹³⁹ In cases where the donor has since deceased, the bailment is held to have terminated at the date of death, the deceased's personal representative retaining property rights in the sperm sample.¹⁴⁰ Whilst this may look like the imposition of a bailment relationship as an additional legal process, it is substantively different to the use of an additional process in the *Doodeward* context discussed above. When the work or skill exception is applied the additional legal process is used as a secondary step to transfer the property rights from the party applying the work or skill to the party the court wants to vest the property rights in. The guided discretion approach on the other hand, does not require the transfer of property rights at all. Instead courts simply exercise their discretion to vest the property rights where they see as logical, as an initial matter. In the pre-mortem sperm cases, for example, courts are not required to vest

136 See *Re Estate of Edwards* (2011) 81 NSWLR 198 (surviving spouse as principal); *Re H, AE [No 2]* [2012] SASC 177 (court as principal; surviving spouse had prima facie right to possession); *Re Cresswell* [2019] 1 Qd R 403, 444 [166] (Brown J) (surviving spouse as principal).

137 See, eg, *Re Estate of Edwards* (2011) 81 NSWLR 198, 214–15 [80]–[88] (Hulme J).

138 After all, the guided discretion approach is already well established in the context of pre-mortem sperm samples: see *Bazley* [2011] 2 Qd R 207; *Roblin* (2015) 10 ACTLR 300. And as was argued above (see Part III(A)) there is no valid reason to distinguish between pre- and post-mortem sperm samples when determining on which basis property rights should be imposed.

139 See, eg, *Yearworth* [2010] QB 1, 23 [49]–[50] (The Court).

140 See, eg, *Bazley* [2011] 2 Qd R 207, 216 [33] (White J); *Roblin* (2015) 10 ACTLR 300, 307–8 [29] (Master Mossop).

property rights in the preserving facility and then vitiate this result by the application of a bailment relationship. Instead they simply impose the bailment relationship as the first and only step in their reasoning. The same result is reached without having to work around the result dictated by a supposedly binding High Court precedent.

D Work or Skill Is No Longer a Valid Test for Property Rights

It is clear from his judgment in *Doodeward* that the human biological material Griffith CJ envisioned as being brought within the work or skill exception was limited to pathological specimens, historical curiosities, and contemporary oddities one might expect to see exhibited at a travelling exhibition.¹⁴¹ This limited exception to the rule that there is no property in a corpse was all that was required by the society of 1908. However, science, medicine, and indeed society have changed dramatically since *Doodeward* held that the ‘unique specimen of malformation’¹⁴² displayed at a freak show was the subject of property rights. In the 21st century, pathology laboratories perform blood and urine tests on a regular basis, fix slices of preserved tissue less than a millimetre thick onto glass slides, and examine cells removed from the source individual via a home DNA test kit. In hospitals biopsies are performed daily, organ transplants take place at a rate only limited by the availability of donor organs, and excised tissue is disposed of in colour-coded bio-waste bins. The amount of human biological material that can possibly fall within the ambit of the work or skill exception has grown far beyond what was intended by the author of that exception. ‘The world has moved on’¹⁴³ from *Doodeward*.

Beyond the sheer quantity of material that might now fall within its ambit, issues left unanswered by the *Doodeward* exception are emerging. Consider, for example, the question of *how much* work or skill must be applied in order for the exception to be activated. Courts have readily accepted that intricate and complex processes relating to the long-term preservation of human biological material qualify as work or skill for the purposes of the *Doodeward* exception.¹⁴⁴ What then of simpler processes that perhaps only go to short- or medium-term preservation? Consider a diseased liver that is removed during surgery and placed in a specially prepared cooling device by a skilled surgeon prior to disposal several hours later. Does the placement in a climate-controlled device invoke the exception so that the

141 *Doodeward* (1908) 6 CLR 406, 413: ‘It is idle to contend in these days that the possession of a mummy, or of a prepared skeleton ... is necessarily unlawful’. See also the ‘unique specimen of malformation’ referenced in the text accompanying n 142 below. Barton J went further and described the preserved foetus as a ‘dead-born foetal monster’: at 416, a sentiment reiterated by Higgins J in his dissent: at 420.

142 *Ibid* 414 (Griffith CJ).

143 *Roche* (2000) 22 WAR 331, 338 [22] (Master Sanderson).

144 The post-mortem sperm sample cases (see above n 136) are a good example of this. However, consider also the delicate processes associated with embalming a body and preparing it for an open-casket funeral – and yet the idea that an undertaker could argue that their work vested them with property rights in the bodies surrendered into their care is an uncomfortable one. It is generally assumed that embalming a corpse will not activate the work or skill exception (see, eg, Pawlowski (n 132) 41–2), however this assumption is based on principle rather than law. The finding of property rights in this context remains a viable outcome under *Doodeward*.

surgeon, or indeed the source individual, can claim a possessory interest in the kidney? Common law courts are yet to reach a consensus on the ‘how much’ question where work or skill is concerned. The English Court of Appeal in *Dobson v North Tyneside Health Authority*, for example, implied that the preservation of a brain in paraffin oil for the one year period prescribed by statute did not constitute sufficient work so as to invoke the *Doodeward* exception.¹⁴⁵ However this focus on the required time period for retention of the brain as a determinative factor is out of line with the essence of the *Doodeward* exception – that is, the application of work or skill – and is inconsistent with decisions that have applied the work or skill exception on the basis of the human biological material’s preservation in paraffin oil without reference to the intended retention period.¹⁴⁶

Given that the *Doodeward* exception vests property rights in the applier of work or skill, another issue arises with the possibility of multiple applications of work or skill. If a pathologist takes a blood sample from a source individual and that sample is preserved at a pathology laboratory, does the pathologist acquire property rights as a result of the work or skill involved in taking the sample? Or does the laboratory acquire the rights as a result of the subsequently applied work or skill involved in preserving it?¹⁴⁷ Undoubtedly work or skill has been applied, and courts have shown they are adept at using additional legal processes to transfer the property rights to the party they see as deserving them. But surely it is far better for these questions to be resolved by the realistic, practical, and contextual guided discretion approach to property rights, with its increased transparency and case-by-case application. The physical reality of human biological material preserved only in the immediate short-term can then be taken into account, as can the factual context and nature of the claim brought in any dispute between pathologist and preserving laboratory.¹⁴⁸

Rohan Hardcastle has added to these concerns, noting that the *Doodeward* exception is silent on the question of whether the applier of work or skill must *intend* to create a new item out of the human biological material or whether the application of work or skill alone is sufficient.¹⁴⁹ Further, he queries whether work *and* skill must be applied, or if work can be applied without any skill to activate

145 [1997] 1 WLR 596, 601–2 (Gibson LJ).

146 See, eg, *Pecar* (Supreme Court of New South Wales, Bryson J, 27 November 1996); *Re Organ Retention Group Litigation* [2005] QB 506.

147 Interestingly, the federal Department of Health’s website states that a source individual may request the return of their pathology sample whilst also noting that ‘[a]lthough the original pathology specimen belongs to the person who had the test, it becomes the property of the pathology laboratory once it has been processed or analysed’: Department of Health, ‘Pathology: *The Facts*’ (Factsheet, 13 May 2013) 3 <[https://www.health.gov.au/internet/publications/publishing.nsf/Content/CA2578620005D57ACA257B6A000862D3/\\$File/What%20%20Should%20Know%20Pathology-FS.pdf](https://www.health.gov.au/internet/publications/publishing.nsf/Content/CA2578620005D57ACA257B6A000862D3/$File/What%20%20Should%20Know%20Pathology-FS.pdf)>. The return of the pathology specimen to the source individual would then appear to be a gratuitous gift from the pathology laboratory who had acquired the property rights based on the application of work or skill. It is unclear how the pathology specimen could belong to the source individual prior to the application of work or skill, or what the rights of the pathologist taking the sample are.

148 This is, of course, assuming that such a dispute would not be resolved by way of agency or by reference to an employment relationship.

149 Hardcastle (n 34) 39. See also Grubb (n 132) 311; Pawlowski (n 132) 45 (both arguing that the intention to create something new is necessary for the exception to be invoked).

the exception.¹⁵⁰ These issues disappear when the legal basis for a finding of property rights is guided discretion and not work or skill. Under the guided discretion approach, the physical detachment of the human biological material and the factual context of the case, considered in light of the practical needs of the court and the litigants, can found a judge's decision to impose property rights, rather than an unhelpful and unnecessary inquiry into the skill of the surgeon or the level of work involved in taking a blood sample.

IV CONCLUSION

Allowing for the provision of IVF treatment to the partner of a man who had been dead for two years using sperm that had been removed in an emergency surgical procedure and cryogenically preserved at temperatures colder than those on Mars, *Re Cresswell* confirms that the question of property rights in human biological material is a thoroughly modern concern. This article has demonstrated that the guided discretion approach to property rights introduced into the Australian common law in *Roche* at the start of the 21st century and developed in decisions such as that of the English Court of Appeal in *Yearworth* is the best means of resolving this modern question. Founded on detachment, practical concerns, and the context of the individual case, the guided discretion approach is a transparent means of resolving individual disputes over the status of the body as property. In contrast, the now 110-year-old *Doodeward* exception, decided some 50 years before the description of the double helix¹⁵¹ and with work or skill as its activating factor, is unclear in its application and is often subverted by the application of an additional legal process by common law courts.

This article has argued that the work or skill exception should be entirely superseded by the more recent guided discretion approach for four key reasons: the pre-/post-mortem distinction that has resulted from the existence of two competing bases for property rights lacks a valid and logical explanation; the guided discretion approach and the work or skill exception are both the result of, and give effect to, the same essential underlying inquiry – detachment of the human biological material from the source individual; the result demanded by the *Doodeward* exception is rarely allowed to be realised in practice; and work or skill is an inadequate means of assessing property rights in the modern world. This article thus takes the position that the Australian High Court should follow in the footsteps of courts both in other common law jurisdictions and at the lower domestic level and, at the first available opportunity, reject the *Doodeward* exception in favour of the guided discretion approach in questions of property rights in *all* human biological material. Until this occurs, it falls to the state courts, such as the Supreme Court of Western Australia in *Roche*, to take the first steps in this direction by applying the guided discretion approach at the expense of the *Doodeward* exception. There is simply no need for the continued maintenance of

150 Hardcastle (n 34) 39.

151 A fact pointedly noted by Master Sanderson in *Roche* (2000) 22 WAR 331, 335 [14].

two legal bases to answer the same legal question where both bases reach substantially the same result. There is no place for superfluity in the common law.