BMS101 Forum 2012

Jim Cummins: Good afternoon everyone. Thanks for coming and being present at this talk/forum for today. I've got the business recorded on dual video so that those of you listening on Lectopia at home will see the screen behind me and the PowerPoint presentations are available on LMS. We've got four speakers for you. Unfortunately one is not going to be here today, Gary Cooper had an urgent meeting with the Coroner's Office this afternoon so I've actually got a few slides of his which I will go through and I've put quite a bit of information from him on the LMS home page if you want to go and have a look at it. It includes a definition of 'death' and some of the things that the Coroner's Court gets into. To introduce the whole session and chair it I've got Maureen Harris who is the Executive Officer of the Reproductive Technology Council; so Maureen would you like to get us rolling?

Maureen Harris: Good afternoon to everyone here. This afternoon we're going to be talking about giving life after death. It's a controversial area, it's very emotive and there are social and ethical implications involved in all the discussions and debates that we have today. I'll just tell you a little bit about myself and my own role. I work at the Department of Health and I provide executive support for the Reproductive Technology Council and some of those members are here today. Sometimes I get a phone call from a clinician who's been asked to go somewhere to collect sperm from someone who is recently deceased. Sometimes we get phone calls from people who have sperm in storage and the partner has passed away and they're asking about use of the sperm. It can be quite difficult in most circumstances; most people are often very distressed. We also deal with the Legislation, not particularly with the collection because that doesn't come under the Human Reproductive Technology Act, but certainly the storage and use does come under the Act and that's where the Reproductive Technology Council will get involved. Our speakers today are Gary Cooper from the Coroner's Office who is not able to join us, we have the Reverend Joe Parkinson and he is a member of the Reproductive Technology Council, later on we'll be hearing from Vince Chapple and he is a clinician and deals in reproductive technology care and finally we have Brenda McGivern who is a lawyer and also sits on the Reproductive Technology Council. So because Gary Cooper isn't present, Jim you're going to be doing the speech for him? So if I can ask you to welcome Jim Cummins.

Jim Cummins: As I mentioned, Gary Cooper is not going to be present today unfortunately. He did send me some information that I'll go through fairly quickly. I know it's pretty boring reading material onscreen but it's probably better than nothing. Gary is quite happy for me to put up his address and his email, so if you have got questions for him—and obviously I can't answer them—you can contact him by email. He's a pretty busy guy though, so be prepared for a bit of a time lag before you actually get an answer. Gary has also sent me some of the things to do with the activities of the Coroner's Court which I've put up as the information sheet on LMS for this unit. This includes a definition of 'death' in Western Australia, how we actually deal with a dead body and deal with say the request for body parts or for donation of organs and so on. You would imagine that it's a fairly complex area of law because you're dealing with people's bodies and property and so on.

So let's have a look at what happens when a request comes through. What we've got here is a request that's come through from the representative of a deceased person and basically when this happens it's quite often an emergency – not always an emergency, people might know that they're going to die, they might have cancer, they might have prolonged illness which is going to affect them. But sometimes it's a result of a car accident. We've had cases of mining accidents, other types of problems where a man has suddenly died and there is an urgent need on behalf of the family to recover the sample, which is typically sperm. It gets taken out of the epididymis which is the duct leading from the testis. So in cases where there is a request for sperm recovery, the Coroner's not inclined to prevent that sample from being collected because it's not going to interfere with the Coronial investigation, in other words it's not going to affect the decision on what the cause of death

was, which is usually from a car accident or sudden illness. What they will do is give consent pursuant to this particular aspect of the Act, which is the *Human Tissue Transplant Act 1982*, as they would for an organ donation. That is not the same as actually giving permission for the sperm or the material to be used; that actually comes under a completely different legislation, which of course is the Reproductive Technology Act and of course as I've shown in the introductory material, we're not actually allowed under the Act to use material for reproductive purposes after death. I guess one of the purposes for setting up this forum was to get all of you thinking about this and for us in the Reproductive Council to start focusing on whether and if we should apply for a change in the law to allow us to use post mortem material in certain circumstances where permission or consent has been given in advance and in writing. This is something that comes up over and over again.

There's only a small window of opportunity to get the sample so normally the court will give consent immediately. We're talking about within 24 hours, that's how quickly you actually need to recover sperm from the epididymis to actually keep it alive. They usually speak to the lawyer representing the wife or partner and the lawyer advises that consent has been given and they make it clear that the Coroner or State Mortuary is not responsible for obtaining or storing the sample and any arrangements in that regard must be made by them. What they usually do is enlist the services of a specialist fertility clinic.

Just to sidetrack a little bit, this actually goes back to a very significant landmark case that occurred in the UK back about 10 years ago with a lady called Diane Blood. Her husband died very suddenly and she had sperm stored from him and (because he had given consent) she eventually got permission to take the sperm to Brussels where she gave birth to two sons. But she got into a real legal bind there because when she brought her sons back from Brussels she discovered that she was not allowed to put her husband's name on the birth certificates: they were simply left blank. The long and the short of this is—and I've put a link to this up on the LMS page— is that eventually it went up to the highest court in the UK, which of course is the House of Lords and within a few minutes they actually gave permission and she, along with quite a few other couples who were in a similar position, were then allowed to put their deceased husband's name on the birth certificate of the child or children. So that was a landmark case in the UK and I guess we're starting to think about whether there might actually be similar cases here. We've actually had three cases of women applying to have their husband's sperm removed and stored frozen.

What they point out too is that obtaining the sample itself is the easy part. Vince Chapple, a doctor from Fertility North has actually been involved in this – it's a fairly gruesome process as you would image, but it's the relatively easy part. But the consent of the Coroner's Court is the first step of many that actually allows the couple or the partner to actually use the sample. So it's a complicated process. Gary says he always advises lawyers to seek an order from the Supreme Court – in other words, the Supreme Court has to order the storage of the sperm. They also have to order any release for use and that's not typically give easily. I mentioned the case of Diane Blood there, which dragged on for years before the High Court in the UK actually allowed it because there was no evidence put forward other than an agreement between her and her husband to have any more children. She eventually won and I've given you a link here, which you can go and get, from the PowerPoint presentation and have a look at it. The victory actually gave her sons their legal father, in law, even though of course they never met him and have no recollection of him.

The Western Australian Courts, as Gary understands, might be following the same precedence as that set in the UK, but he might be wrong. Generally the Coroner's Court doesn't make ethical or moral judgements about the sample being provided, but the main thing we want to do is not stand in the way of the process, because if you delay it, you're going to simply finish up with dead sperm which makes the whole exercise completely pointless. There's no point recovering dead sperm because you can't do anything with them.

That basically was where Gary was going to get to in speaking and what I'll do now is just leave the order of speakers up and I'll get Maureen to introduce Joe Parkinson.

Maureen Harris: Does anybody have any questions about that last presentation? There is a process to go through when obtaining sperm. It's often very difficult for people who are at the pointy end of practice, some people don't know, that's when maybe the Reproductive Technology Unit (RTU) will get a phone call from someone to say 'what exactly do we have to do to start that process?' So while it's not our Act, my staff and I do try and help people and try and give them direction in that area. So our next speaker is the Reverend Joe Parkinson and I'll call him up to give his presentation, which I'm sure will be very enlightening.

Joe Parkinson: Thank you. Good to see you all. My brief today is to talk about this question of the posthumous collection and use of gametes and I'm going to be talking from the point of view of the male because I'm assuming that's what usually happens; the male has died and so there is some process for obtaining sperm. Without pre-empting the other speakers, Jim has said that this process of collecting sperm from a deceased man may be technically easy enough; Vince Chapple will speak to that. Legally, as far as I can see, it's quite a fraught and unclear path, but Brenda McGivern will speak to that. My brief is to talk about the ethical issues, that is, not the question as to whether it's legal or whether it can be done, the issue is whether it ought to be done. And what are some of the questions we need to ask around that question of "ought this be done?" Should we be allowed to follow this process? It's difficult to cut through the emotions – people really want to become parents and they go to extreme lengths sometimes to become parents. The whole science and the practice of IVF is built around the fact that somewhere deep within us there is a deeply felt need and desire to bring a new life into being. It's not just about the relationship with a partner, it's not just about the sexual relationship with a partner, it's actually about passing on life. And that desire is deeply engrained within human beings.

So the first point I would want to make is that we need to affirm that desire. Whatever else we say about this issue, I think we need to affirm as good this deeply felt need and desire in people's lives. So we're not lacking in compassion when we stand back and look at the issues, but we are trying to be dispassionate and there's a difference. I can care about you very deeply, but I must still be dispassionate when I look at the issues - cutting through the emotional content as it were, so that we can try and decide these questions on the basis of reason, of logic, that we can put arguments out there so that other people can look at them and we can talk about them as a community. That's what ethics is about. It's not about telling people what they should and should not do. It's the science of analysing the questions of right and wrong in our behaviour as communities and being able to talk about things dispassionately.

Ethicists traditionally question the status quo. In a way it's our job to test the waters of popular wisdom, the things that people just assume to be right and good, because often enough, popular wisdom, while it might be popular, it isn't all that wise. It may not necessarily be true or good. We've got to put that to the test. Sometimes ethics has to be counter-cultural, we have to go against the wave of popular opinion because part of our task is to force society to look at difficult questions and to make difficult decisions about what we will and will not commit to as a society. These aren't questions that just affect individuals, they affect all of us because we are part of this society and the implications of the questions that we're asking will have a rebound effect for all of us. Politics has a four-year electoral cycle and the political process tends to go with "what do most people want?" So there's a certain populism about the political approach. Ethics isn't as constrained as that; we're not on a four-year electoral cycle, we're not asking about what's popularly accepted or what most people want. We're asking is it good? That's a different kind of question. And that's why this question is really difficult; identifying what some people want is easy, but knowing what's truly good for everyone is not so easy.

What I want to first of all do is distinguish between two kinds of cases here when we're talking about the posthumous collection and use of gametes. I want to distinguish in the first where a guy has died and the issue is, now that he is dead can we go and take sperm from him with a view to reproductive use so that his partner, for example, can have his child.

There's not necessarily a prior intention there on behalf of the man who has died to become a parent. The other case is where sperm has already been collected, so as part of an IVF process. Here there is already an intention to parent, that's why this guy and this girl have gone into this process, they want to become parents. So we can at least attribute implicitly a desire to become a parent to the man who has died. His sperm is stored. The issue is not whether it can be collected and used, it's just can it be used? The law in this state doesn't allow the posthumous use of gametes collected in that way, but that's something that other speakers will address.

There are some common issues between these two scenarios but they're sufficiently distinct that we can and should think about them quite distinctively. For example if we wanted to look at this whole question from the point of view of human rights or from the point of view of the sperm as property – to whom does it belong? Who has the right to use this material? If we want to use those focuses to look at this question, we might reasonably conclude that the sperm belongs to the partner who is surviving. Or that the partner who is surviving has a right to use the sperm that has already been collected. We might reasonably assume that. Whether that's true at law is a different question, but that's an assumption. But notice that that's a different question from "should we go in and get the sperm in the first place?" If we dig deeper we find that these answers aren't quite so neat.

I want to put this question; I want to talk about "what does it mean to intend to be a parent?" What does that mean in fact? Most of us would have that as at least a possibility in our future; to want to be a mum or dad. What does that mean in fact? Is it just an intention to the biological process of conception? Is that all we mean? Or is it an intention to contribute biological material to conception and to bring a child to birth? And then we're finished? Or is it an intention to contribute biological material to bring that child to birth and then to play an active role in nurturing and forming and shaping that life and bringing it hopefully to an adult state so that it can then go off into the wide world on its own? In other words, does parenting mean playing a vital role in the life of the child who I've helped to create? When I want to become a dad, is that what I mean?

Now I sometimes ask couples who are preparing for marriage "are you planning to have children?" and most of them say "yes." But they're thinking, "I want to have a little baby." So as a bit of a reality check I often ask them "do you want to have a teenager?" and most of them kind of go white and their eyes glaze over because that's a different question, but it's part of parenting isn't it? If you want to have a baby, you're really wanting to have a teenager as well, because parenting is more than just giving biological material. But does parenting have the same meaning, that full meaning, say in the IVF context, where there is a distance between the various processes of conception? Does parenting have exactly the same meaning there? Does it have the same meaning, for example, when one partner has died after the child is conceived? So mum is already pregnant and the man dies. Is that kind of captured in the man's intention to become a dad? Would he see that as a reasonable interpretation of his intention to be a father? But what about when both parents have died after the child is born? We have children and we become concerned about that, "what if my wife and I both died? Who's going to look after our children?" So you see parenting extends to that as well, doesn't it? Making allowance for the fact that we both might die after our child is born. But do any of those senses of intending to be a parent have the same meaning as the situation of a guy who has died without ever committing to become a parent at all? But whose partner wants to retrieve his sperm so that she can have his child. Did that guy ever have an intention to become a parent? Should that matter in our decision as to whether to allow the collection of his sperm or not? That's the ethical question. We're asking questions of meaning.

I suggest that when we talk about intending to become a parent we really mean simultaneously three things; intending to co-operate with another person in the project of becoming a mum or dad – whatever that means. Secondly, as part of that, contributing biological material to a new human life and thirdly, intending, desiring, hoping to play an active role in helping to raise that child to fulfilment and to have a personal relationship with it as it grows. Because that's the way we influence people isn't it? It's through personal relationships. I can't exercise this parental forming role, unless I have a relationship with the child. Now it's true as I've said that our intention to parent is frustrated when one dies or both die after birth. And in that case, the State has a legal role to play there to ensure that this child is looked after and so there are laws about adoption and so there are laws about guardianship. So that's the way that the State tries to patch up this bad situation that has arisen by accident. But note that in that case the State is making up for what nature has taken away, it's fixing an unavoidable problem. That's an important role for the State to play.

Similarly, in the UN Declaration of Human Rights, every person has the right to found a family and so the State has a duty to make sure no-one interferes with people pursuing that right. So the State's role in that situation is to clear the way for people to pursue that right, so that no-one prevents them from doing that. But does the State have the right to redefine parenting? And I suggest that that's what might be happening. If there were a law to be passed that allows for a child to be conceived after the biological father has died and to therefore be conceived so that from the very beginning of its existence it has no possibility of a relationship with its parent. That might happen by accident, that's one thing. Here, we're actually changing the laws of the State to allow that to happen by design, because the UN Declaration of Human Rights also says that everyone has a right to be raised by his or her own parents. So that prevents the State from taking children away from their parents. That's a big issue isn't it when we come to Indigenous rights in this country. The whole stolen generation thing is a contradiction of that fundamental human right.

So if we believe that that's important enough to uphold in our view of the Indigenous health situation here in Australia, is it also important enough to uphold in this use of assisted reproductive technology? We could put it another way. Some people want to become parents, but everyone has a right to be raised by their parents. If we allow sperm to be collected after the guy has died, are we not bringing those two things into conflict? One person wants to become a parent, but the child is being denied a basic right. Can the State legitimately favour the aspirations of a group of citizens over the rights of another group of citizens? I'm just asking the question. We could put it another way; when you die, dying puts an end to everything you could do while you were alive. And that's so true, that if you want something else to happen after you're dead, you have to write a legal will, don't you? You are expressing "here is what I intend to do" or "what I would like to happen after I'm dead." But even that will can be challenged in the Courts, especially if I want to do something that is an injustice to another person.

So if dying puts an end to everything I could do while I was alive, why should the law allow me to become a biological father after I have died, that is, to participate in creating a new human being through fertilising an ovum, because that's all the law is saying parenting is about. What's so special about this, that it should survive my death? Or to put it briefly, if I'm dead enough for everything else to stop, when am I dead enough not to become a parent? I'm trying to view things from the point of view of the child, not just from the point of view of the adults who want to have kids. Someone has to speak for us to ask those questions, even though they're uncomfortable, even though they're challenging, but this is the way that civilised societies, rational societies, work their way through these issues. Not on the basis of emotion, but on the basis of reasoned thinking and careful step taking along the way. I'm trying to ask the bigger question about the extent of the State's moral power to redefine parenting, rather than allow this issue to be stuck on the emotional issues. I'm not asking whether it's fair enough for people to want to become parents because it is, there's no question of that. What I'm asking is whether it's wise, all things considered, for the State

to arrange our laws to let people meet their needs if there are reasonable grounds to suggest that in doing that they may be doing an injustice to the very children they want to have. Now that might sound like a convoluted argument but it's a very important question to ask and now you have a chance to ask your questions, if you wish.

Yes, at the back. I'm not sure if I follow the first question. You're asking about siblings/best friends... in what context? So if I'm hearing you right, the question concerns, let's put it this way, a woman who wishes to become a parent and needs a partner to do that, whether that is what we would call a social partner or a marriage partner or a sperm donor or wherever that person might come from. Is that the question? Ok, perfectly reasonable and these are exactly the issues that are coming up now. The father of the man who has died wants to become a grandfather; he wants to see his name passed on. Can he contribute sperm to his daughter-in-law or to his son's partner so that they can have grandchildren? Boy, lots of other issues there aren't there. Because now we're talking about confusing generations where this child is both the man's son and grandson. Work that one out. Or the woman who is having a child, who is actually the half brother of her husband.

These are the things that Hollywood loves. But they're important questions because they're actually challenging what we mean by family. Why do we think family is important? Or do we even think family is important? It challenges the questions and issues about how our society or will our society place boundaries around what is possible to do in terms of fulfilling our desire to become parents. And I guess that's the question I'm asking. Does the State have a right or indeed a duty to place a restriction around what this society will accept as reasonable or rightful parenting and therefore, by definition, exclude some other kinds? That's a really important question, it's not one I can address in a few minutes, but yes that is actually embraced in the sorts of comments I'm making because I think to a certain extent the same sorts of issues are arising there. What are we actually doing to our understanding of parents and parenting? What are we saying about our understanding of family and family bonds and generational relationships? If those things become mandated, that they're allowed without our legal structure, what are we committing our society to? It may be very fulfilling for this woman and her situation but it's not just about her, is it? Because it's asking a bigger question and that's the sort of question we really need to think carefully about before we go down any path of legislative change. Now I have a particular view on that and it's a fairly conservative one, but that's because I'm a fairly conservative kind of person. But I recognise that other people have other views and that's fine. There's a way of answering a question without answering it.

Anyone else like to try me and I'll not answer your question too? Ok, so I'm describing parenting as having an active role in the raising of a child and your question is what about the situation where one parent leaves, or the father is unknown. Again I would say exactly the same thing. Looking at it from the point of view of the child, what is right and just and fair? I think it's fair that they have a chance to know who their father is and form a relationship with them. I think that's fair. But notice, you're talking about parenting and I suppose I am too indirectly, but my precise focus was the intention to parent. That is, what do I have in mind when I set out down the project of becoming a dad, that's the issue. Do I in fact have just "I'll contribute biological material" is that where my picture of being a dad ends? Or do I in fact have a much bigger picture? That's the question I'm asking. I do recognise of course that tragedies happen and accidents happen and sometimes we choose to become single parents. I appreciate that entirely, but there's another conversation we should have about that. Wonderful, thank you very much.

Maureen Harris: Ladies and gentlemen we now have our next speaker Dr Vince Chapple who is from Fertility North and I understand that he has practical experience in the area of PSR (*posthumous sperm retrieva*l).

Dr Vince Chapple: Thank you very much. Good afternoon. I am a reproductive medical specialist, I'm not an ethicist or a lawyer but I do have some expertise in this field and I have been involved in the

retrieval of sperm posthumously and with one of the few cases that happened in Western Australia. So I actually have firsthand knowledge of this subject in that regard. I'm very much going to be focusing on the collection rather than the use of these substances. I have to say that I think my contribution this afternoon is not going to be for the faint hearted; it's a bit of a ghoulish topic. Inevitably I think it's kind of a morbid fascination and I'll just move over those more ghoulish bits as briefly as I can. What I've got here is an overview of what I'm going to cover; essentially I'm going to frame the whole subject of posthumous sperm retrieval (PSR) in a historical sort of framework, looking at both the scientific and technological advances that made it possible and then look at some specific, more famous cases which have brought this subject to public awareness and resulted in it becoming an increasing issue. Then I'll briefly talk about my experience of this with Fertility North.

I'm just going to back track a little bit; the two technological advances that enabled the development of PSR: first, assisted reproductive technology encompassing artificial insemination, intrauterine insemination and intracytoplasmic sperm injection. I'll deal with those a bit later on in more detail, I'm just going to put them up there to familiarise you with the terms. The significance of those developments is that with each one down that list you can achieve a pregnancy with progressively fewer and fewer sperm and that's really what has enabled PSR to become a possibility. The other important development was sperm cryopreservation. Polge (1949) is credited with the first useful cryopreservation using glycerol, as antifreeze essentially, which protects the biological material. From there, there was a lot of development and it happened quite quickly and it was rather driven by the milk industry because they wanted to freeze bull sperm so they could use it to inseminate their prized cows and get better milk producing cows. That produced a very rapid development and by the 1970's it reached a point where fertility units could start employing it to freeze biological material for use in humans and that was the critical step.

Flipping back to reproductive technology, artificial insemination is the insemination of a female's genital tract with sperm into the vagina, first done by Dr Spallanzani in 1780. It was used then in the 19th century as kind of a fringe thing among dog breeders originally, then cattle and sheep breeders and it really wasn't until the 20th century that it became so good that it actually promoted improvements, which were of economic significance. So the commercial success really only came in the 1950's and 60's and that was established because of the use of cryopreservation in conjunction with it. Toward the end of the last century with assisted reproductive technology (ART), we've got the role extending into fertility and allowing the chance of pregnancy in situations where normal sexual intercourse is not possible, of which posthumous sperm collection is an obvious example. The other widespread use of this technology nowadays is in taking endangered species and promoting biodiversity through selective breeding programs.

Intrauterine insemination became available really from about mid 1950's and it became apparent that it resulted in improved pregnancy rates. So rather than delivering the sperm into the vagina you're now taking that sperm and putting it into the uterus, which is a much more protected environment. Pregnancy rates go up dramatically and it largely replaced artificial insemination and again as I said before, it allows the use of successively, by order of magnitude, fewer and fewer sperm. So where you need millions of sperm you could probably get away with tens of thousands or the odd million in the insemination process. This technique allows treatment of sperm in worsening and worsening quality because when we're talking about posthumous sperm, we're talking about quality.

Kim Casali is famous for two reasons. Firstly she is the cartoonist who is famous for those "love is..." cartoons. She developed them from the outset of her relationship with a man who became her husband. This grand love affair was unfortunately cut short when he suddenly died of testicular cancer. Before he died, they had discussed... cryopreservation had come into existence by this time, they had discussed her going on to have children and so they did it with the expressed intention of

having children. She then went on to have a child sixteen months after his death and that was quite well publicised at the time and it was the first case like that at its time that reached into the widespread media. This is about ten months or a year before Louise Brown, the first IVF baby, was born and before any regulatory bodies which made decisions about whether you could or couldn't do this sort of thing.

The next step in this process and the step that truly allows posthumous treatment, is ICSI (intra-cytoplasmic sperm injection). We need ICSI because what we now know is that the sperm you can retrieve from a dead man is of such poor quality that it will only actually work with an ICSI process. Kim Casali's husband's sperm was retrieved before he was actually ill, before he died. So that was a live man giving sperm, which was then used posthumously. With ICSI we have the ability to use sperm of very poor quality and still use it to get a pregnancy. So while sperm could be retrieved and stored from the early 80's it wasn't until ICSI in the 90's which came about to treat severe male factor infertility, plus the cryopreservation. So you've got the two key parts of technology, which enable posthumous sperm retrieval and use.

So, Rothman (1980), this paper is the first recognised paper of successfully retrieved posthumous sperm. Dr Rothman was a urologist working in Los Angeles and it seems he did a lot of running around promoting this as a treatment and he had his own fertility unit in Los Angeles of which this was a major part. The actual methods of collection have really not changed since Cappy Rothman was running around in the 1980's. And it breaks down into two groups; there is retrieving sperm from moribund men – this is men on life support being kept alive by machines. Then they use an electrical stimulatory device through the rectum, which produces rhythmic contractions, which results in ejaculation. Unfortunately in at least 50% of the cases, the ejaculation is not normal and it goes backwards into the bladder which further compromises the quality of the sperm and it has to be retrieved from the bladder as well. So the quality in that regard is always compromised. Obviously the next step, in the case of a truly dead man, in many ways is quite a bit simpler. The poorer quality sperm that you retrieve because the man's dead can be compensated for by taking a bigger piece than we would ever take when we're treating a live patient. So in a live man when we're trying to be as minimally invasive as we can we'll try and take small bits of tissue and maybe only collect one hundred thousand sperm. In a dead man you can be quite radical; you can do things that you would never do like remove a whole testicle and chop it all up and extract as many sperm as you can. You can potentially remove thousands or millions of sperm, or as many as you need.

So from a technical perspective, with newer techniques the actual retrieval of sperm has become really quite straightforward. Flipping back to the history of this and the mainstream media, these two ladies Diane Blood and Gaby Vernoff are of particular interest. Diane Blood particular was the lady who was in the headlines and front pages in Britain. Her husband Stephen had meningitis. Interestingly, so Diane says, in the weeks before he got sick she had been reading in the papers about the other lady, Gabby Vernoff, who had a similar time in 1995 who retrieved sperm from her deceased husband and they had decided that that would be a good thing. Then Stephen gets sick, is in a coma, Diane approaches the doctors who retrieved his sperm with an electro-ejaculation technique and then he dies two days later. She then spends three years going through the Courts, being across all the newspapers and eventually achieves the right to export her sperm from the UK and she is treated in Belgium and goes on to have two children in 1998 and 2000. Gabby Vernoff is reputed and recognised as the first woman who had a genuinely posthumous collection, retrieval of sperm, use of sperm and subsequent birth and that birth was in 1999. The collection was by Dr Rothman, he was still running around collecting sperm and it took a while for that to go through the Court again to get the right to use it and eventually she went on to have a baby through an ICSI process. And that is the bit from the paper reporting it in the Los Angeles Times.

This case received massive, widespread reporting. There was an article in "People" magazine giving the full story. And these two cases that were front page, widespread media I think really lifted the profile and made people realise that this is a potential option. And from that point on, the frequency of requests for this has gone up dramatically. There was a published work in I think 1995 which had poled all the IVF units in America and asked how many of them had had requests for this and it had gone up from a handful to something like fifty over five years and half of the fifty were in the last year. So this seemed to be, at that time, an exponentially rising issue.

How long can sperm stay alive in a man? How long are they dead until they're really dead? It's about 36 hours. There are reports of sperm surviving longer, originally there was a cut off put at 24 hours, but then there were reports from Israel, sperm taken from their soldiers and they had apparent successful live births with no apparent problems from a man who's sperm was taken up to 35 hours afterwards, so they brought the cut off to 30. Again, it suggests that 36 may even be reasonable.

So, finally, with all this wide spread publicity, I think it's fair to say that in WA this process started in the late 2000's. I think the earliest case was in 2007/2008. We were contacted in January 2009 and it came right out of the blue. I was driving home from work, a member of the Hospital Executive at Joondalup contacted me and said a Court Order had been provided and would I be able to assist. Now at the time, we had no policy on posthumous sperm collection, it had never been requested or raised before. So I wasn't really too sure if we could assist or not. I had a chat with my lab manager who, as luck would have it, had actually been involved in a case previously in Victoria and that was a motor vehicle accident. A young man had died, sperm was retrieved and she had processed the sample then dealt with it. So she was very comfortable with this and at that time it was something like 20 hours from the time of death, from a legal perspective everything seemed to be in place because a Court Order had been provided and so we decided that we possibly could help. It was a bit of an odyssey, it was fairly surreal. That's us being photographed on the plane. We were being flown up to Geraldton because that's where this young man was. There was myself, the lab manager and a couple of reporters because they were covering the story and in fact they were funding the whole endeavour. When we got to Geraldton, the police took us to the hospital; we met the woman who had got the Court Order, who we treated as next of kin in our paperwork. We took a brief medical history and basically collected the tissue in very much the same way we would collect a sample from a man undergoing male factor infertility treatment. The tissue was put in a transport incubator, taken back to Perth to process and we successfully retrieved viable sperm from it. The duration was 24 hours almost exactly by the end of it. That sperm is still lying in our cryobank to this day and there is a little degree of controversy about what we should do with it.

Going forward with this, our policy after this experience was that we would not do this anymore. At the moment that's our current position. And that's it.

Any questions? Yes. How big is a cryobank? They're just movable vats of liquid nitrogen so when they fill we need to buy more. I think we have eight or nine, so they're big. We can put hundreds in there. They're grouped according at different colours and all sorts of identifying marks. Each sample is broken down and frozen in straws and a straw would be a unit, which we would regard as being suitable for a treatment. And so for an average collection, I think this chap got seven straws, so they don't take up much space and the vats are *big*. I'd have to ask my embryologist how many they put in when they regard it as being full but I think it's one hundred.

Question from Joe Parkinson: Purely out of interest, you said at the end there that your clinic has decided not to take part in PSR further, is that because of this problem now that you've got the sperm stored and you don't know what the future is or is there some other thinking behind that?

Dr Vince Chapple: Yes that's a big factor; we're currently funding this, all the people who said they would fund it at the time have disappeared into the woodwork. So we're paying for that which is not

entirely satisfactory, it's not an onerous burden but it's not something that we would like to be lumbered with in a big way. Also, until there is a proper framework, until we can know what we're doing with certainty with this I don't think it's a reasonable proposition. The problem with the case we've got is, I think that there were a lot of problems in that it was always a bit of a tricky one and I think it just demonstrated that the Courts have a fairly low threshold to saying "Yes" at the moment and until everything else is caught up we're in a pickle. That's one of the reasons why I wanted to come along today and just to help because this is the sort of forum, which I think helps and will help resolve this.

Question from the audience (*on what's going to happen to the sperm collected*).

Dr Vince Chapple: We can't shift the sperm collected by PSR, we can't export it, we wouldn't get a license because it's not been collected in a manner that is conducive or consistent with WA legislation, so it's in limbo quite literally.

Question from the audience: I was just wondering why there was a Court Order granted if the collection of sperm is illegal in WA?

Dr Vince Chapple: I'm possibly not the right person to ask. I would suspect because there was a crying lady in the Chambers. I would do it.

Maureen Harris: Thank you for that very interesting presentation. Now I'd like to invite Brenda McGivern on stage to give the final presentation, after which we'll be having a panel discussion. Thank you Brenda.

Brenda McGivern: Right, well I'm not quite sure about this timing because you got all the sort of interesting moral questions from Joe and then you've got all the gory details from Vincent, now just to round off your night we're going to deal with all the technical, 'let's look at legislation' stuff from me. So sorry about that; on the other hand it might actually help you to go off to sleep later on this evening.

So let's look at the technical stuff. Just to give you an overview of what I want to address, fundamentally we as lawyers tend to start with "what governs this?" What powers do we have to deal with this? And so I want to have a look at the current state of law in WA. As part of this process I'll also think about what other models are adopted in other parts of Australia. I'm going to flick around my slides a little bit because I'll keep coming backwards and forwards, so bear with me on this.

You've already heard from some of the speakers that there is a distinction in the concepts between 'use' - that is whatever material we've got, be that gametes (your eggs and your sperm) or be that your embryos that have already been created and are put in storage (which is another kind of material that you can use to achieve a pregnancy after death) - whatever it is that you've got, when we take those things out of storage and we use them in any procedure, that's what we treat as 'use' under the Act. If you're holding those things, that's 'storage', but the Human Reproductive Technology Act doesn't deal with issues of retrieval or removal, so that's a separate thing again. So I want you to keep those distinctions in your mind. I want to also talk to you about the concept of consent and what we mean by consent in different contexts - it actually has different requirements in different contexts. Then some of the practical issues you've already heard about; so what are some of the difficulties that our current legislation gives rise to? As part of that, necessarily, we'll think about some considerations that are relevant if we're going to change the law. An important point I think to start with is what have we got now. And then you can use Joe's sort of reasoning in terms of saying 'is what we've got now working, or isn't it?' and some of those practical considerations come into play there too. Then if the answer to that is 'no, it's not really working terribly well', we should do something different. Again coming back to Joe, what is it that we should

do differently, what direction should that take? But I think also, what is it that we need to address? So what is it, what bodies of law would we have to change to give rise to that effect that we're seeking?

The starting point that people often think about is 'gosh, this all seems to be about technology getting involved in reproduction, so the Human Reproduction Technology Act must have all the answers.' And as I've already alluded to, it doesn't. So I'll deal with what it does say. One of the other things that I suppose I should flag is to the extent that we are talking about reproductive technology, we've got this Act but we've also got other bodies of regulation that we need to be aware of. One of those, very importantly, is that the Directions published in the Government Gazette actually form part of the Act. If you look at the definitions in the Act, you will note the definition for this Act: whenever there is a reference to this Act in the legislation, it includes a reference to any Directions published in the Government Gazette under that Act. So quite alarmingly, I've seen a fairly recent article written about posthumous reproduction that asserts by reference to these provisions, that as long as a person had consented to posthumous reproduction, it appeared that that was lawful. Whoever that author was, hadn't read the Directions, which forms part of the Act because it's very clearly not the case.

So in terms of both use and storage, whatever is done under the Act, whether you are using those materials or storing them, there needs to be effective consent and then the use or storage needs to be in accordance with that consent. Importantly if you look at subsection 8, which I extracted there, effective consent is not the same thing as implied consent. It is express; and not only is it express, it takes a particular form: it's written. And I'm going to come back to that. So hold those in your mind as well. The Directions that I was referring to is what puts Vince in the difficult position he's in; that is, there is express regulation around this issue. First of all I should probably point out that under the Act you commit an offence if you perform any assisted reproductive treatment without license. So people without a license can't do it. If you hold a license, then there are restrictions on what you can and can't do, so "a person to whom the license applies must not knowingly use or authorise the use of gametes in an artificial fertilisation procedure after the death of the gamete provider." Now notice that this is about gametes rather than embryos, but the restriction is on the use of gametes after death.

I'll come back to this probably when I'm talking about reform, but just to give you an idea, we've got that very explicit - that you can't do it - it's not subject to conditions, it's not "unless", it's "may not do it at all". There are States that take a different approach and so we see a fairly recent example of this under the new Victorian Legislation, the Assisted Reproductive Treatment Act. Interestingly, their language has moved away from assisted reproductive technology to assisted reproductive treatment. But you'll see here that they've done away with an absolute prohibition and instead what they've done is put very strict conditions around the circumstances in which this sort of thing can happen. So as I say, that's just an example of what happens elsewhere. I'm going to come back to that when I look at reform.

Importantly though what I want to talk about is some of the practical and jurisdictional issues - and I think, particularly from a legal perspective, the jurisdictional issues are really very challenging. I've already pointed out to you that the Human Reproductive Technology Act doesn't deal with the issue of removal - so we know about use, we know that that's just an absolute prohibition and that's pretty clear. One thing that we can say about the use issue is that the situation is not unclear, we know what we're doing there. When it comes to removal, I think the position is very much more difficult. As a starting point I'm going to take you to the first decision, so not the 2009 one, but the first decision which was handed down mid November, but the decision was made on 5th November 2008. The reported reasons for judgement (and this might answer the question that we had earlier about why was this judgement made or on what basis was it made) is *Sv The Minister for Health*

[2008] WASC 262, for those of you who are lawyers and want your citation. This was an urgent application (and most of these are because of the issues about timing that Vince mentioned). So it was an urgent ex parte application (meaning that there isn't another party opposing the application) for orders for removal and storage of sperm and associated tissue from a person who had died a matter of hours earlier. And that person who had died was the husband of the applicant. There is very little detail in the judgement given about the circumstances of his death, but we do know that he had died as I say a matter of hours earlier and we do know that the applicant was married to him, so this is not your de facto spouse or family members or whatever else. The other thing that ended up playing a fair part in the reasoning of this particular judgement was that the applicant testified that she and her husband had intended to undergo ART treatment and in fact had an appointment on 16th November, some ten days after the date of his death. They had an appointment booked with the medical practitioner licensee where they were in fact going to undergo the process of the extraction of his sperm and her ova for the purposes of IVF treatment.

So if I can take you back to some of those initial considerations that Joe raised, what we do know is at least that this couple were intending to have children together and that they had at least contemplated assisted reproductive technology, though not posthumously. So that's the limit of what we know about their intentions. Jurisdiction then comes up and Justice Simmonds gave the judgement in this case and he said well there are sort of a few possible sources of jurisdiction here. One might be the inherent jurisdiction of the Supreme Court. Now if I can just talk a little bit about inherent jurisdiction; it's your safety net, your legal safety net. So your superior courts have inherent jurisdiction, some of those are fairly well defined, some of those will be things like the welfare jurisdiction, the *parens patriae* jurisdiction, to make orders that will be in the best interest of people who are not competent to make decisions for themselves. But there is a residual inherent jurisdiction to develop the common law where there are otherwise gaps in the law. So there's the inherent jurisdiction as a possibility.

He also then refers to the Human Tissue and Transplant Act which of course has some provisions dealing with removing and donating tissue after death and so that was a possible source of jurisdiction. And finally there were the orders of the Supreme Court, Order 52: rule 3 in particular. which gave the Court powers to make orders for the removal of property in certain circumstances, or to take samples of property. Ultimately he relies on that last source. He says in this judgement, well this is a dead person and although there are some issues around there being property in the human body, there is certainly some precedent for, in certain limited circumstances, tissue samples being treated as property and we're going to use that precent as a basis for making a property order effectively. So that's what he does. In the course of his judgement, Justice Simmonds does talk about the distinction, if you like, between removal of this sort of tissue from a live body and from a dead body and he says: "but for these purposes I don't think that I need to make that distinction". Now that might be true under the rules of the Supreme Court and I'm not entirely sure that even that is so, but for those purposes the person was dead so he didn't have that problem. Whether or not the distinction needs to be made, I think to my mind it's critical and the reason for that is if the person is alive then the relevant provisions in the Human Tissue and Transplant Act won't apply to govern the removal at all. So what Justice Simmonds says is we're going to treat this as a property order, but that order should be at least consistent because it does deal with the removal of human of tissue. It should be consistent with the requirements of the Human Tissue and Transplant Act being met. So you'll notice that an authorised officer in the hospital under section 22 of the Human Tissue and Transplant Act may authorise the removal of such tissue from a dead body for transplantation or other therapeutic or scientific purposes if the deceased has consented, or alternatively (and the alternative is important here) if during their lifetime they had consented to that or alternatively if on enquiry there was no reason to believe that they had objected to that.

You can see that the Human Tissue and Transplant Act is mostly directed towards the question of organ donation. It doesn't really have this in mind. Nevertheless, it does talk about tissues other than organs and it's quite explicit about that. Certainly in these provisions there isn't a subdivision of tissue, so the parts of the Act dealing with the removal of tissue from a dead person doesn't distinguish between kinds of tissue. The parts of the Act that deals with removal of tissue from a live person, certainly distinguishes between blood and between regenerative and non-regenerative tissue and importantly also, section 6 of the Act (which falls under the part of the Act dealing with live tissue donations) specifically excludes from the ambit of that part, gametes. It specifically says this does not apply to foetal tissue nor does it apply to ova, nor does it apply to sperm. So if you have a person who is still alive but in a comatose state, you couldn't go under the Human Tissue and Transplant Act at all.

So you've now got the Human Reproductive Technology Act that is silent on the issue and the Human Tissue and Transplant Act that is silent on the issue. There's good reason for removing all of those things; the reason is that what you're talking about is performing a medical procedure on a live person. And so really what they're involved with is the issue of medical decision-making. So if the person is competent they get to make that decision themselves, if the person is not competent then you need to ask the question is that person a child or an adult? If that person is an adult, the Guardianship and Administration Act will apply and there is a checklist, if you like, so one of the things that will be asked is 'has this person made an advance health directive?' If they had made an advance health directive (so you might have some sort of expressed intention there about removal), they could in fact authorise that removal so long as they're alive and they're incompetent and they had made a directive that covered this issue. That would be what allowed this to take place, unless there's any prohibition on any of the medical practitioners. Otherwise it would be enough to authorise that treatment.

Alternatively you then shift into substitute decision makers, so an enduring guardian or another person who is appointed as guardian or some other substitute decision maker (and I won't bore you with the detail of what that list looks like -but safe to say that there are substitute decision makers that can make decision for incompetent people about the medical treatment that they get). The trick with that, is that any decision made by a substitute decision maker (as opposed to the patient him or herself) is that that treatment must be in the best interests of the person being treated. So in other words you can't use the power to consent on that person's behalf for the benefit of a third party; it's got to be for that person's best interests. And query then what those interests are and whether or not you anticipate that those interests extend after death. So you can see how if you've got a dead person, it would seem that you can treat this as property; you can get an order from the Supreme Court and you've got to be at least consistent with the Human Tissue and Transplant Act (that is, if someone has expressed a wish against this you're not going to be able to do it).

So, if then we get such an order, or alternatively we are able to remove the sperm - I'm just going to go back to section 22 (and I should say that I'm speaking incidentally in my capacity as a legal academic and not in my capacity as a regulator) - so, 'storage' under the Act requires effective consent. 'Effective consent' is express consent in writing. So it's all very well getting an order saying you can remove this sperm, but it still doesn't overcome the need to have consent to store it. I should say something else about jurisdiction, so for the non-lawyers here and I suspect that's most of those people who have left, I should mention some 101's on legal power. Statute is superior to other law. In other words, case law, precedent, common law; all of that gives way to statute. And similarly, whatever the powers of a Court are, where statute exists the Court can interpret that statute but cannot authorise anything that is inconsistent with that statute. So when we get this order saying you can remove this sperm and it should be stored in accordance with the Act, the Act itself requires written consent by the gamete provider to that storage, or it is unlawful. A practical problem.

Then of course, you've also got the problem of use, which we've already come across. If we think that that state of affairs is problematic and if we think that at least we should engage with the idea of reform, then let me put to you that the process of reform itself is not without trial. Whatever law we think about adopting needs to respond to sets of circumstances that are incredibly complex. Even as I was listening to some of the other speakers, I was jotting down some additional scenarios and you can see how some of these will combine. So the first three points that I've got on my considerations list is really about the state of the materials. Do they exist outside of the body or not and if so how? Where a person dies and has begun ART and has embryos or gametes in storage already, we get past that whole need for removal permission. A person who has gametes in storage but has not begun ART (necessarily, if you've got embryos in storage you will have begun ART). But if you've got gametes in storage … for example, a lot of cancer patients without ever turning their minds to whether or not they intend to go down this path, may say 'I just want to preserve my position so that I can then make that intention, I can turn my mind to it.' People are often very young. A cancer patient who is 20 may not have any real thoughts about whether or not they are going to follow through with parenting later on, but want to just hold that position open.

Then a person who has none of that in storage - in which case you do need to think about both the removal and the storage issues and consent around that storage.

We also need to think about people - so the next three are a separate group of distinctions. A person who has consented to the use of gametes or embryos for reproductive purposes but hasn't considered posthumous use. This sometimes happens where you will get the person who has … a bit like the 'S' decision: it was absolutely clear that this man had thought about ART and had thought about doing that with his partner, but had not thought about it in a posthumous context. Similarly you might have somebody who's gametes are already in storage - we'd say yes, this person has formed an intention to have assisted reproductive technology with his or her partner, but not necessarily posthumously. You might also have a person who has consented to posthumous reproduction, or who has at least turned their minds to that issue. And then of course you've got people who have never express a view on assisted reproduction or posthumous reproduction. I've added there that you might also have a person who has expressed a view to being a parent, but hasn't considered the issues of ART or posthumous parentage.

I want to just throw up the facts in a very recent case in Queensland and then I am going to let you ask questions. Consider the distinction between the 'S' situation in WA and this, which is *Re Floyd* [2011] QSC 218. So this was July 2011, a man called Troy Jervis had died at a level crossing accident on the morning of the application. The Applicant was his de facto partner rather than his spouse, but that's considered an equal relationship under the law. They had in fact planned to marry at the end of the year, they had just built a house together. The Applicant said that they had constantly discussed having children and she had made an appointment with an obstetrician to go and see about having a child. She went on to say that "all he wanted was a child and we decided to build a house first because otherwise we wouldn't have been able to afford to build the house if we had a child." This raises the very issue that Joe was talking about:where he wanted a child. There was no consideration here of ART at all; this was very much intended to be something that we would do in the future, albeit the near future. Clearly from the evidence it seemed that he had in mind that that would happen a) without medical intervention and b) that he would be around. So the order was made and certainly, as we have seen, there seems to be reluctance given the timeframe and very little opportunity to consider these things. Courts kind of go: "look if we've got the power we'll do it because that preserves the status quo". And I think the short answer to that question is, the Courts tend to err on the side of preserving the status quo with the idea that the more difficult questions can be addressed later. Every single written judgement that I've seen falls over itself to say: "I'm authorising removal only, nothing in this judgement should be taken to comment on the issue of the subsequent use of this material".

So as I say, what we need to be thinking about then is if we're going to reform this, who should make these decisions? Should it be the same person whether or not you've got a live body or a dead body? Should that entity be the same? Who appropriately has that jurisdiction, or should have that jurisdiction? And then what do we want to do around use? Do we want to restrict it? Do we want to say, preserve the status quo here in terms of well you can't use it here? But arguably then one of the directions for reform might be perhaps you expressly permit export in those circumstances so you're not left in limbo, but you're not permitting it in the State. Is that appropriate? Do you want the problem moved to other States without addressing those ethical questions? Because really, effectively what you're saying is: "yes we're going to allow it, just not in our backyard". So you still need to engage with those ethical considerations.

Questions? Yes.

Question from the audience.

Brenda McGivern: To repeat the question, has anybody put through a private members bill aimed at reforming this? And my answer is not as far as I'm aware, no. So unlike other difficult areas like euthanasia for example, I don't think that we've seen a model come up with proposed reform.

Maureen Harris: Can I ask a question Brenda?

Brenda McGivern: Yes, go ahead.

Maureen Harris: Do you think it's fair that one Act allows a person to store the tissue and then the other Act is not allowed to... I'm not just thinking here of the legal side of it, I'm thinking of the emotional and financial burden that's caused by this contradiction really.

Brenda McGivern: To be fair I don't think that one Act allows it and the other doesn't. I think an Act doesn't allow use and that the rest of the legislation is silent. And we're getting some Court orders allowing the removal. To be fair I don't think that that's a deliberate state that Parliament has set up. Do I think it's a satisfactory position? No. I think it's unsatisfactory. I'd like to see clarity one way or the other, either you can't remove it because you can't use it, or you can use it but under strict conditions.

Maureen Harris: Any other questions? We're going to ask our speakers to come forward and to participate in a panel of discussion.

Joe Parkinson: I'm not quite sure whether we're going question/answer or how we're going to do this. But maybe I could ask you a question. We've heard some comments about what the law allows and clearly there are some conflicts there. We've heard from the clinicians and the kind of bind that Vince is in and I've put some issues around not what's legal but maybe what we think ought to happen in a wider context about parenting and family, what do you think should happen? Should we just leave things the way they are and just keep bouncing back and forth in the Courts and people like Vince get stuck like me in the middle. Should we be trying to change the law to allow people to become parents maybe long after they've died? Who has a view on that? You do. Ok, I'm going to play this role, is that all right? I need the exercise today.

Audience member: I disagree with the ethical aspects of it, that a child who is brought up should have a father. I think it's against their rights if they're brought up without one, so taking the gametes from a father even if there's consent from the father, I think is still wrong. That's just my feeling.

Joe Parkinson: Jethro is saying that, if I've got you right, that you shouldn't be allowed to become a dad after you have died. Is that what you're saying? Because a child needs a dad. So you're looking at it from the point of view of the child. Any response to that?

Audience member: The thing is, with a child, if it doesn't have a dad, who isn't to say that that child isn't going to be loved just as much by the mother, or if a child grows up with lesbian parents, that they won't have any father but that is not to say they would not be loved as much?

Joe Parkinson: That's a good point of view, but is that the question? Is it a question about whether people are better off with one or two parents? Or are we actually talking about a question of rights?

Brenda McGivern: I'm going to throw another question into the mix here, because Joe I was going to throw this question to you when you gave your paper. Let's consider this: if we're going to think about whether or not it's appropriate to use, forget the removal just for the moment, but just to use the sperm after death and if the objection is one about parenting or the parenting role of the gamete provider, then to be consistent are we also going to say that we should stop donations of gametes? Because necessarily whenever we have donation of gametes, that person is not going to be playing a parenting role. Just a question.

Joe Parkinson: Did you want me to make a response to this?

Brenda McGivern: If you like, Joe.

Joe Parkinson: If you're going to be strictly consistent then yes. Donation, so a man donating sperm to a woman who wants to become a mum or a woman who donates eggs to another woman so that she can become a mum, to those things we'd have to apply the same rule. But I think the clinician has a view.

Vince Chapple: In those situations, for example, if you look at the birth certificate, the birth certificate says that the wife's husband is the father. So the sperm if you like is donated with the view that there will be a surrogate standing in as that father doing that role. So I think you could say in a sperm donor situation that requirement has been fulfilled.

Brenda McGivern: The legislation on donation is absolutely clear that you can treat a woman as a single woman and that there is no question that women are treated using AI all the time.

Vince Chapple: The way the law works, definitely is fairly clear.

Brenda McGivern: But we're talking about what is allowable. If we're talking about reform, what are we going to allow? So we allow women to access sperm banks at the minute, yeah? So if we're going to be consistent about the parenting thing, then... the other question it then raises is if a substitute parent is what is needed, then do we say that we allow posthumous use of sperm as long as there is a second parent available to step in. So two years after your husband's death you re-marry, now you can use his sperm? I like this game.

Audience member: You know that I'm always going to create a stir. If we take consistency in the law to assume that there has to be a consent to parent in a posthumous case, do we not also then have to consider making the rights of living fathers the same? Because currently as it stands at the moment, if you have a couple in a relationship and she decides by whatever... one of them decides to become a parent, the other person does not have the right to insist on a termination if it was not their intent to parent.

Brenda McGivern: I think this is a very different concept here. So what we're talking about in this situation is involving others in the conception. What you're talking about is involving others in terminating a pregnancy, which is not the same starting point. So the question is do you create the conceptus with the intervention of others? And I think that's different. So there is almost if you like and I don't mean this in a strict sense this is almost a voluntary assumption of risk. If you're going to

have sex in circumstances where it is possible that you could create a conceptus, you deal with what comes next.

Audience member: Could that not then be applied as a form of consent posthumously in that if a couple have been having unprotected sex with the intent to create a life, that has been given as consent?

Brenda McGivern: This I think is where you come to the issue of what is the necessary intent and I think this is fundamental. Because the answer to my naughty question about the donation is that I don't think that's the answer. I don't think it's whether or not there's going to be... I don't really think it's about the child having access to a parent, I do think it's about whether or not as a society we treat death as the time that you stop having the ability to become a parent. And so I say that's what makes it consistent or not. I think one of the reasons that we often go back to this question about the child is because that's a more comfortable conversation. People are so used to talking about the rights of the child and we do it in other contexts; we do it in the adoption context, we do it in the donation context, we do it in the data linkage, that sort of knowing where your heritage comes from. We talk about the rights of the child a lot. As a basis for progressing this, it's a much harder question to say, because it's a new question, it's a much harder question to say are we as a society comfortable with the idea of us intentionally becoming parents after our death? So again it goes to that question of intent. This is not a person falling pregnant and then the spouse dies; that's circumstances getting in the way of an intention to do something different. But are we comfortable as a society with allowing and facilitating (importantly, actively facilitating) an intention to only become a parent genetically after our death?

Audience member: A couple of things; when we're talking about that it's really hard because I think if this was to ever happen it would have to be one of those things that happened on a case by case basis obviously. So because obviously not every case is going to be exactly the same, the law would only be able to govern under criteria, one specific kind of case. But if that was the case with being comfortable as a society in accepting somebody's genetic material being passed on once they've deceased, I don't know what happens currently with sperm donations, like with men giving sperm donations and children that are born from sperm donations. If we were to say that we were not comfortable with that, does that mean that every man in history who has given a sperm donation, once he has died, his donations then have to come off the shelf and they could no longer be used? Is that the law currently?

Brenda McGivern: The Directions are absolutely non-specific about the circumstances. It simply says, a licensee may not use the gametes of a dead person, period.

Joe Parkinson: That's the difference. I've got a question for Vince.

Audience member: I've got a pretty straightforward question; Is there a difference in law for a child that's been conceived posthumously, like the father's dead and the child is conceived. What are the inheritance rights?

Brenda McGivern: Inheritance law is not my thing, but the inheritance stuff is a completely different body of law and the short answer is no. So you have similar rights as long as you are in fact the child of the deceased person, so the testator.

Vince Chapple: Diane Blood in the UK fought a second battle to actually get her children to be heirs of the father and was successful in the UK, whereas Gaby Vernoff tried the same for her daughter in the USA and that was turned away and the American position is that children born of posthumous sperm will not be beneficiaries. I think that's a Supreme Court decision.

Brenda McGivern: The registration is certainly different because the Births Deaths and Marriages requirements are quite different and again the question will become, I mean the good thing about this blanket restriction is that you avoid a lot of these issues, but do you then treat that person as a donor because it's far more like a donation context than anything else? And if you treat that person as simply a donor of the sperm, then they are deemed not to be a parent.

Jim Cummins: I'm sorry but we are running out of time. I think we have the recording running until 5:30. I'd like to thank the panel for their very interesting contributions. Just on the question of donation though, we've got a Catholic priest here and I remember going to a seminar a few years back. There was a lot of opposition from a priest to donor insemination and the clinician in charge said "I would remind the Reverend speaker that the Christian religion is founded on the principle of donor insemination!" Anyway, I'd like to thank Maureen, Joe, Vince and Brenda. Thank you very much and thanks to all in the audience who braved it out until 5:30 on a Thursday.