Westlaw UK Delivery Summary

Request made by :	IPUSERCP3396247981 IPUSERCP3396247981
Request made on:	Tuesday, 01 July, 2014 at 10:42 BST
Client ID:	ukadvlegal-245
Content Type	Cases
Title :	Yearworth v North Bristol NHS Trust
Delivery selection:	Current Document
Number of documents delivered:	1

Jonathan Yearworth and others v North Bristol NHS Trust

Case No: B3/2008/0757

Court of Appeal (Civil Division)

4 February 2009

[2009] EWCA Civ 37

2009 WL 6517

Before: Lord Judge , Lord Chief Justice of England and Wales Sir Anthony Clarke , Master of the Rolls and Lord Justice Wilson

Date: 04/02/2009

On Appeal from the Exeter County Court His Honour Judge Griggs

Lower Court Nos 6TA 1302/3/4/5/7/8

Hearing dates: 24 and 25 November 2008

Representation

Mr James Townsend (instructed by Foot Anstey , Exeter,) appeared for the Appellants.

Mr Nicolas Stallworthy (instructed by Beachcroft LLP , Bristol) appeared for the Respondent.

Judgment

Lord Judge, CJ:

1 This is the judgment of the court. The major responsibility for its preparation was undertaken by Wilson LJ.

2 Five men and the administratrix of the estate of a sixth man (compendiously, “the men”) appeal against the determination by His Honour Judge Griggs, sitting in the Exeter County Court on 12 March 2008, of four preliminary issues arising in their six actions, heard together, against North Bristol NHS Trust (“the Trust”). The effect of the judge's determination was to put an end to their claims.

3 The appeals raise interesting questions about the application of common law principles to the ever-expanding frontiers of medical science. In particular they raise a novel question about the ability to sue in tort and/or in bailment in respect of damage to bodily substances, namely semen which the men had produced for their possible later use and which the Trust had promised meanwhile to freeze and to store.

The Facts

4 The men were diagnosed with cancer. They received treatment for it at the Southmead Hospital, Bristol, for which the Trust is responsible. The treatment was provided for them under the National Health Service.

5 The men accepted the advice of the clinicians at the hospital that they should undergo a course of chemotherapy. They were advised that the treatment might damage their fertility and were asked whether they wished to produce samples of semen prior to the start of the treatment on

the basis that the hospital, which has a fertility unit licensed under the Human Fertilisation and Embryology Act 1990 ["the Act"], would freeze their samples and store them for the possible future use of the sperm in their semen to the extent permissible under the Act. The men responded that they wished to produce samples on that basis.

6 In respect of each man three main documents then came into existence. Copies of them were not placed before the judge but we acceded to the application of Mr Townsend, on behalf of the men, for permission to produce copies of them to us.

(a) The first was a form entitled "SOUTHMEAD HOSPITAL FERTILITY UNIT" and was subheaded "Sperm Storage Request". It provided for details to be furnished about each of the men and it was unsigned.

(b) The second was a form entitled "FORM FOR CONSENT TO STORAGE AND USE OF SPERM AND EMBRYOS". It informed each man that he could withdraw his consent or vary its terms at any time prior to use of his sperm. Each man thereupon ticked various boxes on the form, whether yes or no. At least some of the men thereby indicated that they consented to the use of their sperm for the purposes of treating a named partner. All of them seem thereby to have indicated that they consented to the storage of their semen for the maximum period generally permissible under the Act, namely ten years. Each of them signed the form.

(c) The third was a document entitled "SPERM STORAGE FOR THOSE UNDERGOING … CHEMOTHERAPY". The Trust thereby made various express representations to each of the men, including the following:

(i) "We are pleased to be able to store sperms for your future use."

(ii) "Your sperms will be stored in liquid nitrogen (at minus 196°C) in the Haematology Laboratory at this hospital. This storage facility … is free of charge. Sperms stored in this way will not deteriorate with time." And

(iii) "The Haematology Laboratory is run to a high professional standard. However, accidents can occur in any laboratory, for instance a failure in the supply of liquid nitrogen used for storage could lead to thawing and deterioration of the sperms. We cannot, therefore, give an absolute guarantee that your sperms would still be in a useable condition in five or ten years time, but we can undertake to look after them with all possible care."

At the end of the document each man was asked to confirm that he had read it and "[accepted] the conditions outlined in it"; and underneath he signed and dated it in the presence of a witness.

Mr Townsend produced a copy of a further document, with which presumably at least one of the men had been furnished. It spoke of various charges, in particular of £500, payable in advance, for the freezing of a sample of semen and for its storage for ten years. But Mr Townsend made clear that, in the case of the men, no such consideration for the freezing and storage had been provided by them nor actively sought from them.

7 On dates prior to 28 June 2003 but following completion of the above documentation the men provided samples of their semen. They were at once frozen and thereupon stored at the laboratory at the hospital.

8 On 28/29 June 2003, prior to any attempt to use any sperm, the amount of liquid nitrogen in the tanks in which it was stored fell below the requisite level. At that time the system for the automatic topping up of the tanks with nitrogen was not operative; and no attempt was made to top them up manually. The men's semen thawed; and the actions have proceeded to date on the premise (which the Trust has reserved the right to challenge) that their sperm then perished

irretrievably. For convenience we hereafter refer only to the sperm rather than also to the semen which contained it.

The Claims

9 No doubt the men were promptly told about the loss of their sperm. Their reaction to news of the loss lies at the heart of their claims. Whether each received the news while he was undergoing a course of chemotherapy, or beforehand or afterwards, is unclear. They each argue that in any event it is patently foreseeable that, already in a vulnerable condition, each would be likely to suffer – to put it at its lowest – a severe adverse reaction to the news that, unless he was to recover his natural fertility, his chance of becoming a father, represented by the storage of his sperm, had been lost.

10 Indeed five of the men allege, with the support of expert evidence, that, as a result of the loss of their sperm, they suffered not merely mental distress but a psychiatric injury, namely a mild or moderate depressive disorder. But, of these five men, three have subsequently recovered their natural fertility; so their claims are limited to damages for psychiatric injury sustained between the date when they received news of the loss and the date when they learnt of the recovery of their fertility. The fertility of the sperm stored on behalf of the fourth man was probably too low to have given rise to conception in any event so, notwithstanding that he does not appear to have recovered any natural fertility, the doubt which may arise to a limited extent in all six cases, namely whether, if not lost, the sperm could successfully have been used, is, in his case, more profound. The fifth is the man who died and whose administratrix sues on behalf of his estate; so its claim is for psychiatric injury sustained by him between the date of his receipt of news of the loss and the date of his death.

11 The sixth man alleges that, as a result of the loss of his sperm, he has suffered mental distress and that, inasmuch as it remains unclear whether he has recovered his natural fertility, his distress has continued to date and may well continue in the future. He does not, however, allege that he has also suffered a psychiatric injury.

12 It will be seen that the claims of all six of the men have limitations or complications, upon which it will be unnecessary for us further to dwell. We intend in no way to disparage their claims when we say that their worth in damages will be relatively small. None of them amounts – even potentially – to what one might regard as the paradigm case in which (a) a man's stored sperm was of at least average fertility (b) he suffers a long-term or untreatable psychiatric injury as a result of its loss and/or (c) the loss deprived him of his only realistic prospect of fatherhood. In such a case however the issues relating to the potential liability of the Trust would have been identical to those raised by the present claims.

The Legal Issues

13 Until the hearing before us the men pleaded their claims solely by reference to the tort of negligence. By its defences the Trust made important if inevitable admissions. Apparently reflective of an admission made through solicitors within months of the loss, it admitted that it had a duty to take reasonable care of the sperm and that it was in breach of that duty in one of the respects alleged against it, namely, at a time when it knew or ought to have known that the automatic system for topping up the nitrogen was not operative, in failing to ensure that the tanks were topped up manually.

14 The Trust, however, denied liability. It did not admit that the men had suffered psychiatric injury (or, in the case of the sixth man, mental distress) or that, if they had so suffered, this was consequent on any breach of duty. More importantly for present purposes, the Trust averred that, even if its breach of duty had caused the injury or distress, as a matter of law the men were not entitled to recover damages. In this respect the Trust asserted that the loss of the sperm constituted neither “personal injury” to the men nor damage to their “property”. It thus contended that the loss did not qualify as the sort of damage which is a necessary constituent of an action in negligence.

15 Thus it was that a district judge identified the following four preliminary issues for Judge Griggs to determine:

(a) whether the damage to the sperm in itself constituted a personal injury to the men;

(b) if so, upon what basis the amount of their damages should be assessed;

(c) alternatively to (a) and (b), whether the sperm was the property of the men; and

(d) if so, upon what basis the amount of their damages should be assessed and in particular whether they could include damages for any psychiatric injury.

16 The judge's determination of the above issues can be summarised in note form as follows:

(a) no;

(b) other than in respect of any psychological injuries, no entitlement to damages unless there was more than an even chance that a child would have been conceived by use of the lost sperm, and, even if so, only a nominal entitlement for such of the men as had regained their natural fertility;

(c) no; and

(d) no entitlement to damages, whether in respect of the physical damage (because it was agreed that the sperm had no monetary value) or in respect of any psychiatric injury.

17 The judge was not invited to and did not address potential liability in bailment or contract. As we will explain, however, the bailment issues were argued before us. Although the documents completed in respect of the men disclosed many contractual features (and indeed, as we have said, another document was shown to us which suggested that contractual arrangements were created between the Trust and other men) the claims were not advanced on the basis that there had been a contract between the Trust and the men.

Personal Injury

18 At any rate five of the men, namely those who claim to have suffered psychiatric injury, are plainly claiming in respect of “personal injuries”, such words being, for example, defined in s.38(1) of the Limitation Act 1980 as including any impairment of a person's mental condition. But such is not the focus of the first issue, which is whether the damage to the sperm “in itself” constituted a personal injury. Mr Townsend describes this as his primary contention. He so describes it on the basis that, were he able to establish that the damage to the sperm constituted a personal injury, i.e. in the circumstances a physical injury, to the men, there would be no difficulty about recovery of damages for psychiatric injury; and that, if established, it would obviate the need for him to grapple with the problem whether products of the human body can in law amount to “property” at all.

19 Mr Townsend's argument proceeds as follows:

(a) the sperm had been inside the bodies of the men;

(b) damage to it while there, for example as a result of radiation of the scrotum, would have constituted a personal injury;

(c) why should the men's ejaculation of it make any difference?

(d) unlike products of the body which are removed from it with a view to their being abandoned – such as cut hair, clipped nails, excised tissue and amputated limbs – the sperm was ejaculated with a view to its being kept;

(e) unlike yet other products of the body which are removed from it even with a view to their being kept, such as hair to be kept as a memento or blood to be dried and incorporated into a work of art, the ultimate intended function of the stored sperm was identical to its function when formerly inside the body, namely to fertilise a human egg; and

(f) the sperm retained a significant property, namely that, although such was suspended by having been frozen, it remained in essence biologically active, with the result that it retained a living nexus with the men whose bodies had generated it.

20 Mr Townsend is unable to cite domestic or any other authority whether from the Commonwealth or from the United States of America which directly supports his proposition that damage to part of a person's body, including to a substance generated by it, can constitute a personal, indeed a physical, injury to him even if inflicted after its removal from the body. His main authority is German: see [21] below. But he does claim indirect support from the decision of this court in *Walkin v. South Manchester Health Authority [1995] 1 WLR 1543* . A woman sought to sue for economic loss caused by negligence in relation to an unsuccessful procedure intended to sterilise her, with the result that she had become pregnant and given birth. She issued her writ four years after conception. The court held that her action was barred by s.11(1) of the Limitation Act 1980 in that, although the unsuccessful procedure was not in itself a personal injury, the consequential unwanted conception represented an impairment of the woman's physical condition and was thus a personal injury within the meaning of s.38(1) of the Act, with the result that her action could not be brought later than three years from when it had occurred. In holding that an unwanted pregnancy constituted a personal injury, the court certainly conferred a degree of elasticity upon the word “injury”. But the substantial elasticity which Mr Townsend needs to demonstrate relates to the word “personal” or indeed “physical”; and in that regard Walkin is of no assistance to him. On the contrary the pregnancy was, of course, a physical event within the woman's body.

21 The German decision is that of the Federal Court of Justice (the Bundesgerichtshof), Sixth Civil Senate, 9 November 1993, BGHZ, 124, 52. The defendant clinic had negligently destroyed sperm which, prior to undergoing an operation likely to render him infertile, a man had produced for the clinic to store with a view to his possible future use of it. The federal court reversed the ruling of the appeal court that the man had no cause of action for consequential pain and suffering. It held that it was too narrow to hold that, once a part of the body had been separated from it, it became only a piece of property and that damage to it could not constitute a physical injury to the body. The court observed that bodily parts, including a woman's eggs, which were extracted from the body with a view to their future reimplantation in it, rather than to their abandonment, retained a functional unity with the body, such that injury to them would constitute physical injury; and it held that, although stored sperm would not be reimplanted in the body, it would be illogical for the law to treat damage to it differently from damage to stored eggs.

22 It is important, however, to note the legal context of the decision of the German court. It was that, under section 847 of the German Civil Code in force in 1993 (subsequently replaced by section 253), a claim other than for economic loss could be brought only in the case of personal injury or deprivation of liberty. If the man was to recover, the injury had to be classified as personal. As this judgment will proceed to show, we have concluded that we labour under no such constraint.

23 We agree with the judge that the damage to, and consequential loss of, the sperm did not constitute “personal injury”. Although we understand the contrary argument, it would be a fiction to hold that damage to a substance generated by a person's body, inflicted after its removal for storage purposes, constituted a bodily or “personal injury” to him. That is sufficient to dispose of Mr Townsend's contention. We must deal in realities. To do otherwise would generate paradoxes, and yield ramifications, productive of substantial uncertainty, expensive debate and nice distinctions in an area of law which should be simple, and the principles clear. Even if we

were to admit the principle, however arbitrarily, within the parameters suggested by Mr Townsend and recorded at [19(d), (e) and (f)] above, namely that the substance should remain in essence biologically active and should be intended to be kept for an ultimate function identical to its original function, the law would swim into deep waters in relation to the continued biological activity, and the function, of several other bodily substances or parts. Even when we test Mr Townsend's contention by applying minor hypothetical variations to the facts of the present cases, we find uncomfortable anomalies. He concedes, for example, that:

(a) had one of the men died prior to the loss of the sperm, the suggested personal injury would have been inflicted upon all of the men save him;

(b) had the loss of the sperm occurred after the men, to their knowledge, had recovered their natural fertility and so had no further interest in its preservation, the suggested personal injury would nevertheless have been inflicted on all of them albeit that, as damage would be absent, it would not have been actionable; and

(c) had the loss of the sperm occurred by intentional destruction following preservation for ten years as required by law, the suggested personal injury would again have been inflicted on all of them, albeit that, again, it would not have been actionable.

24 The second issue before the judge does not therefore arise and we do not intend to address the appeal brought against his determination of part of it. The determination under challenge was to the effect that the decision in *Gregg v. Scott [2005] UKHL 2, [2005] 2 AC 176* , compelled a conclusion that, unless the men were to demonstrate a greater than even chance that the lost sperm could have been used in order to achieve conception, then, irrespective of any recovery of their natural fertility, they could not claim in respect of such physical damage to their overall ability to become fathers as was wrought by the so-called personal injury.

Damage to Property

25 “In order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred.” per Lord Brandon in *Leigh and Sillavan Ltd v. Aliakmon Shipping Co. Ltd [1986] AC 785* at 809F. In what follows we will, albeit only for convenience, elide the concepts of legal ownership and possessory title into the word “ownership”.

26 Before the judge the third issue was divided by counsel into two questions:

(a) Is a substance such as sperm, generated by the body but removed from it, capable at common law of being owned?

(b) If so, have the provisions of the Act in relation to live human gametes (i.e. sperm and unfertilised eggs) eliminated or circumscribed so many of the rights normally incidental to ownership as to remove their status at common law as capable of being owned?

27 Although he seems to have been tentatively of the view that its answer should be affirmative, the judge declined to resolve the first question. He held that it was unnecessary to do so because he was clear that the answer to the second question was affirmative. We propose however to address this third issue without confining our consideration of it by reference to the two distinct questions suggested by counsel.

28 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. The concept of ownership is no more than a convenient global description of different collections of rights held by persons over physical and other things. In his classic essay on “Ownership” (Oxford Essays in Jurisprudence, OUP, 1961, Chapter V) Professor Honoré identified 11 standard incidents of ownership but stressed that not all of them had to be present for ownership to arise. He suggested that the second incident was “the right to use” and he added, at p.116, that:

> “The right (liberty) to use at one's discretion has rightly been recognised as a cardinal feature of ownership and the fact that … certain limitations on use also fall within the standard incidents of ownership does not detract from its importance…”

We have no doubt that, in deciding whether sperm is capable of being owned for the purpose which we have identified, part of our enquiry must be into the existence or otherwise of a nexus between the incident of ownership most strongly demonstrated by the facts of the case (surely here, the right, albeit limited, of the men to use the sperm) and the nature of the damage consequent upon the breach of the duty of care (here, their inability to use it notwithstanding that this was the specific purpose for which it was generated).

29 In support of his proposition that the common law does not recognise a substance generated by the body as capable of being owned, whether when within the body or following its removal, Mr Stallworthy, on behalf of the Trust, reaches back across the centuries to the special treatment afforded by the law to *a living human body* and to *a human corpse* . The law, as we will see, has to some extent begun to be refined in relation both to a human corpse and to *parts of a human corpse* ; but it has remained noticeably silent about *parts or products of a living human body* , probably because, until recently, medical science did not endow them with any value or other significance. The effect of Mr Stallworthy's submission is that the common law is as inert as most of the subject-matter of his authorities. He warns us against any piece-meal and ill-considered attempt to develop it in order to cater for modern conditions, of which, of course, the present cases yield one example out of many; and he invites us to rely on Parliament either to update the concept of ownership in this connection or to make further provision which, without updating it, would remedy any perceived injustices in other ways.

A living human body

30 “Dominus membrorum suorum nemo videtur” (no one is to be regarded as the owner of his own limbs): Ulpian, Edict, D9 2 13 pr. The common law has always adopted the same principle: a living human body is incapable of being owned. An allied principle is that a person does not even “possess” his body or any part of it: *R v. Bentham [2005] UKHL 18, [2005] 1 WLR 1057* . Notwithstanding these principles, the law compensates by making an elaborate series of rules for the protection of the body and bodily autonomy: see, eg, *Airedale NHS Trust v Bland [1993] AC 789* . One consequence of the principles, albeit not recognised until the nineteenth century, is that, if our bodies cannot be our own property, it follows that they cannot be the property of other persons; and that therefore we cannot sell ourselves, or be sold, to others. Another consequence is that, if we do not own our bodies, we have no right to destroy them, i.e. to commit suicide; in this respect it was necessary for Parliament, by s.1 of the Suicide Act 1961 , to legislate the necessary reform to the criminal law.

A human corpse

31 In his Institutes of the Laws of England, mostly published in 1641, after his death, Sir Edward Coke wrote (3-203) that the “buriall of the Cadaver is *nullius in bonis* [in the goods of no one] and belongs to Ecclesiastical cognizance”. In his Commentaries on the Laws of England, published in 1765, Sir William Blackstone wrote (15th ed, 1809, Book II, Ch. 28, pp 428-9) that:

> “…though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains, when dead and buried. [But] if any one in taking up a dead body steals the shroud or other apparel, it will be felony; for the property thereof remains in the executor, or whoever was at the charge of the funeral.”

There were at least three reasons for the rule that a corpse was incapable of being owned. First, in that there could be no ownership of a human body when alive, why should death trigger ownership of it? Second, as implied by Coke and Blackstone, the body was the temple of the Holy Ghost and it would be sacrilegious to do other than to bury it and let it remain buried: see for example, In Re Estate of Johnson 7 NYS 2 d 81 (Sur. Ct. 1938). Third, it was strongly in the interests of public health not to allow persons to make cross-claims to the ownership of a corpse: in the words of Higgins J in his dissenting judgment in Doodeward v. Spence in the High Court of Australia, (1908) 6 CLR 406 , there was an “imperious necessity for speedy burial”.

32 Hence the decision of Kay J in Williams v. Williams [1882] 20 Ch D 659 . By codicil to his will the deceased directed that his executors should give his body to Miss Williams; and by letter he requested her to cremate his body under a pile of wood, to place the ashes into a specified Wedgwood vase and to claim her expenses from his executors. After the body had been buried at the direction of the executors, Miss Williams therefore caused it to be dug up and (because cremation was not lawful in Britain until 1902) it was sent to Milan and cremated; and she caused the ashes to be placed into the vase. Then she claimed her expenses from the executors. Kay J dismissed her claim. He held that there was no property in the corpse; that therefore a person could not dispose of his body by will; and that Miss Williams therefore had no right to cause it to be dug up and taken abroad for cremation.

33 It is well recognised that in the twentieth century the High Court of the Commonwealth of Australia has made a vast contribution to the development of the common law. But its authority was to reverberate in an area perhaps nowhere more surprising than that which was the subject of its decision in Doodeward cited above. The body of a still-born two-headed baby was preserved in spirits by the doctor who had been attending its mother; upon the doctor's death it was sold and later came into the possession of C, who exhibited it for profit as a curiosity. D, a police officer, seized it with a view to its burial. C's action for detinue succeeded. Griffith CJ said:

> “[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 his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it …”

Although evidently disgusted by C's exhibition of a “dead-born foetal monster”, Barton J agreed. Higgins J dissented on the footing that there could be no ownership of a human corpse.

Parts of a human corpse

34 In relation to parts of a human corpse our courts have recently built upon the exception, recognised in Doodeward , to the principle that there can be no ownership of a human corpse.

35 First there was the decision of this court in *Dobson v. North Tyneside Health Authority and Another [1997] 1 WLR 596* . In carrying out a *post mortem* examination on a woman who had died of a brain tumour a pathologist removed her brain and fixed it in paraffin, pending a possible further examination of it which in fact was never conducted. It was delivered to D2's hospital for storage. The rest of the woman's body was buried. Two years later the next of kin sought to examine the brain for the purpose of securing evidence supportive of their action in negligence against D1. The brain could not be found so they sued D2 for having destroyed or mislaid it. Their appeal against the striking out of their action against D2 was dismissed. In giving the only substantive judgment Peter Gibson LJ held, at 600H – 602A, that the decision in Doodeward was (at least arguably) correct; that, however, the fixing of the brain in paraffin had not been on a par with preserving it for future use as a commercial exhibit; that it had not been necessary for the pathologist to have continued to preserve the brain at any rate following the inquest; and that it had never become the “property” of the next of kin or something of which they were otherwise entitled to possession.

36 The issue was also addressed in the *Court of Appeal, Criminal Division, in R v. Kelly and Lindsay [1999] QB 621* . The defendants appealed against their conviction (and sentence) for theft of human body parts which had been preserved or fixed and had come into the possession of the Royal College of Surgeons, by which they had been used in training surgeons. Their appeals against conviction, founded upon a submission that body parts could not be property and thus the subject of theft, were dismissed. In giving the judgment of the court Rose LJ said in a valuable passage at 630G – 631E:

> "We accept that, however questionable the historical origins of the principle, it has now been the common law for 150 years at least that neither a corpse nor parts of a corpse are in themselves and without more capable of being property protected by rights: see, for example, Erle J., delivering the judgment of a powerful *Court for Crown Cases Reserved in Reg. v. Sharpe (1857) Dears. & B. 160* , 163 …
>
> If that principle is now to be changed, in our view, it must be by Parliament, because it has been express or implicit in all the subsequent authorities and writings to which we have been referred that a corpse or part of it cannot be stolen.
>
> …[But] parts of a corpse are capable of being property within section 4 of the Theft Act 1968 if they have acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques, for exhibition or teaching purposes: see Doodeward … and Dobson … where this proposition is not dissented from and appears … to have been accepted by Peter Gibson L.J.; otherwise, his analysis of the facts of Dobson's case … would have been, as it seems to us, otiose …
>
> Furthermore, the common law does not stand still. It may be that if, on some future occasion, the question arises, the courts will hold that human body parts are capable of being property for the purposes of section 4 , even without the acquisition of different attributes, if they have a use or significance beyond their mere existence. This may be so if, for example, they are intended for use in an organ transplant operation, for the extraction of DNA or, for that matter, as an exhibit in a trial. It is to be noted that in Dobson's case, there was no legal or other requirement for the brain, which was then the subject of litigation, to be preserved …"

Parts or products of a living human body

37 The well-known decision of this court in *R v. Human Fertilisation and Embryology Authority ex parte Blood [1999] Fam 151* casts no significant light on the point which we have to decide. At the applicant's request samples of sperm were taken from her husband hours prior to his death, when he was in a coma. The subsequent storage of the sperm was technically unlawful under the Act in that it was without the husband's consent; and for the same reason medical treatment of the applicant with the sperm would be unlawful in the UK. The court's decision however was to quash the authority's refusal of her request that it should permit the sperm to be exported to Belgium with a view to her being treated with it there. The court held that the rejection by the HFEA ("the authority") was unlawful in that it had failed to weigh the applicant's rights to receive medical treatment in another E.U. state pursuant to Articles 59 and 60 of the EC Treaty . It was apparently unnecessary for the court to consider the nature and extent of the rights of the applicant, whether personally or (presumably) as personal representative of her husband's estate, in relation to the sperm, and in particular to its possession and use, other than in the context of the provisions of the Act and the Treaty.

38 Section 32(9) of the Human Tissue Act 2004 , which provides a legislative framework for issues relating to the transplants and other uses of organs and other tissue taken from bodies living and dead, is also worthy of note. By s.53(1) , it does not apply to gametes because they fall within the Act of 1990. Section 32 of the Act of 2004 prohibits commercial dealings in human material intended for transplantation but, by subsection (9)(c) , it does not apply to "material which is the subject of property because of an application of human skill". So the formulation in Doodeward has even found its way into a U.K. statute. But, although the subsection would fortify the view that the common law treats parts or products of a living human body as property if they have been subject to an application of human skill (which, presumably, has changed their attributes), the effect of the subsection could not be to confine the common law's treatment of such parts or products as property if otherwise it would rest on a broader basis.

39 Two Californian authorities are of greater significance. The first is Moore v. Regents of the University of California 793 P.2d 479 (Cal. 1990), a decision of the State's Supreme Court . The claimant was suffering from leukaemia. The assumed facts were that one of the defendants, a physician, obtained his consent to the removal of his spleen and other body parts without having disclosed his intention to use them in research; and that the physician and others did so use them and thereby produced a cell-line of great economic potential in the treatment of leukaemia,

which they patented. The claimant's main forensic objective was to secure a share of the profit to be generated by the cell-line. The court held that the claimant's pleading disclosed causes of action against the physician for breach of his fiduciary duty to disclose facts relevant to the claimant's decision whether to consent and/or for operating upon him without having obtained his informed consent. But the majority held that it disclosed no further cause of action for conversion of the body parts. It rejected the claimant's allegation that, at common law, he remained owner of the body parts following removal. Its reasoning was that statute had so eroded a person's right to resist disposal of excised body parts and other material that he did not remain their owner for the purposes of suing in conversion; that, were the claimant's contention correct, researchers who came into possession of body parts without knowledge that the patient had not authorised use for research might be liable in conversion, with the result that valuable research might be hindered; that such issues of policy suggested that it should be for the legislature to intervene in this area if necessary; and that, in the light of the other causes of action available to the claimant, further relief, by way of conversion, was in any event unnecessary. Two dissenting judgments were expressed in trenchant terms.

40 The second Californian authority is Hecht v. Superior Court of Los Angeles County (1993) 20 Cal. Rptr. 2 d 275 , being a decision of the State's Court of Appeals. Prior to his suicide the deceased ejaculated sperm which he caused to be stored with the apparent intention that after his death it would enable his cohabitant to give birth to his child. In claiming the right to call for the use of the sperm, she relied on the fact that, by his Will, he purported to bequeath the sperm to her; and the court put to one side her alternative contention that he had given the sperm to her during his life-time. Following his death his adult children by a previous relationship challenged her right to use the sperm. They disputed the validity of the whole Will but the Court of Appeals decided only a preliminary point, namely whether the deceased's sperm was something capable of disposition by his Will. The court held that, at the time of his death, he had sufficient decision-making authority in relation to the use of his sperm for it to amount to “property” for the purpose of the State's Probate Code . The court distinguished Moore on the basis that there the claimant had had no expectation of continuing to exercise dispositional control over his body parts following their removal. In the light of the way in which the physician had allegedly misled the claimant in Moore , such might be a controversial basis for distinction. We nevertheless regard the decision in Hecht as of considerable interest; and the fact that under our law the cohabitant's use of the sperm with the written consent of the deceased would in principle be achievable under the Act (s.12(1)(c) and para. 5 of Schedule 3) irrespective of ownership does not derogate from the significance of the step taken in Hecht towards recognition of ownership of parts or products of a living body – indeed, as it happens, of stored sperm – for certain purposes. Indeed it is hard to regard ownership of stored sperm for the purpose of directing its use following death as other than a step further than that which the men invite us to take in the present case.

41 Before reaching our conclusions in this section, we turn to the argument which the judge accepted, namely that the effect of the Act was to eliminate any rights of ownership of the sperm otherwise vested in the men for the purposes of an action in negligence. It would, we consider, be a curious consequence of an Act designed to give legal effect to principles of good practice in modern reproductive medicine that it should deprive the men of what would otherwise be their ability to recover damages for an admitted breach of the Trust's duty of care in respect of their sperm. We will explain why we are quite unpersuaded that the Act has this effect.

42 The scheme of the Act is to confine the provision of human reproductive treatment services to persons licensed under the Act and to control the activities of licence-holders both by the application to all licences of conditions specified in the Act and to individual licences of individual conditions specified therein and by the publication of a code of practice non-observance of which can jeopardise the continued holding of a licence. The confinement of such services to licence-holders is achieved by sections 3 and 4 of the Act. Their effect on the men, not holding a licence nor otherwise acting in pursuance of it, would have been as follows:

(a) they could not themselves have used their sperm to bring about the creation of an embryo outside the human body: s.3(1) ;

(b) they could not themselves have “stored” their sperm, i.e. in effect by freezing it themselves: s.4(1)(a) ; and

(c) they could not themselves have tested, prepared, packaged, transported or delivered their sperm insofar as it was intended for human application: s.4(1A) .

Conditions of licences specified in the Act would have had the following, further effect:

(d) the Trust's fertility unit, as the licence-holder under the Act, would not have been able to use the men's sperm in the treatment of any woman unless it had taken account of the welfare of any child who may be born as a result of it (including the need of that child for supportive parenting) and of any other child who may be affected by the birth: s.13(5) , as amended by s.14(2) of the Human Fertilisation and Embryology Act 2008 when in force;

(e) once it had stored their sperm, the unit would not have been able to supply it to an unlicensed person otherwise than in the course of treatment and thus could not have acceded to a demand by the men that it be delivered back to them: s.14(1)(b) ; and

(f) the unit would not have been able to store their sperm for longer than the statutory storage period and it would then have had to allow it to perish: s.14(1)(c) .

43 Among the six main limitations thus placed by the Act on the ability of the men to deal with their sperm as they might wish, Mr Stallworthy relies in particular on the effect of s.13(5) , set out at [42(d)] above. The focus of the subsection on the welfare of the child was described by Thorpe and Sedley LJJ in *Evans v. Amicus Healthcare Ltd [2005] Fam 1* , at [23], as one of the twin pillars of the Act. Its effect, says Mr Stallworthy correctly, is that the men could not have *directed* the unit to use their sperm in any particular way, not even by implanting it into the uterus of their willing wives or partners. The men could only have *requested* the unit to use their sperm in a particular way; and, in deciding whether to accede to such a request, the unit would have had to exercise a careful professional judgment in the light of all the circumstances including, as required by the subsection and as further explained in Part 3 of the code, the welfare of the prospective child and of any other relevant child. No statistics have been placed before us which disclose the rarity (or otherwise) of occasions on which requests for use by persons in the position of the men are thus refused. We note, however, that in November 2005 the authority published a report, entitled “Tomorrow's children”, in which it explained its guidance to licence-holders in relation to s.13(5) as being that “there should be a presumption to provide treatment to all those who request it, unless there is evidence that the child to be born would face a risk of serious medical, physical or psychological harm”. At all events Mr Stallworthy submits that the effect of the subsection is that the dispositional wishes of the men do not have primacy; but, adopting a distinction well-known to family lawyers, we prefer to say only that they do not have paramountcy.

44 In our view, however, the other twin pillar of the Act, identified by Thorpe and Sedley LJJ in the paragraph in Evans cited above, is just as important for present purposes, namely “the requirement for informed consent.” In relation to a person's gametes the need for a licence-holder to act in accordance with his or her consent is set out in the provisions of Schedule 3 to the Act, as amended by the Act of 2008 when in force; and, by s.12(1)(c) , compliance with its provisions is a condition of every licence. Thus

(a) the unit would have been unable to store the men's sperm without their consent: para. 8(1) ;

(b) it would have been unable to store it for a longer period than that specified by the terms of their consent: para. 2(2) ;

(c) it would have been unable to use it for the purpose of any treatment of persons other than the men themselves (with their wives or partners) without their consent to such use: para. 5 ;

(d) it would have been unable either to store or for any purpose to use any embryo created *in vitro* with the use of the men's sperm without the consent of the men (and indeed of the women who provided the egg) to its storage or use for such purpose: paras 8(2) and 6(3) ;

(e) the men's consent for the above purposes would have to have been given in writing and signed: para. 1 ; and

(f) by notice to the unit, the men could have withdrawn their consent to the storage or use of their sperm at any stage prior to its use in the creation of an embryo; and could have withdrawn their consent to the storage or use of any embryo thereby created *in vitro* at any stage prior to its use in the provision of treatment or in other specified ways: para. 4 .

45 We conclude:

(a) In this jurisdiction developments in medical science now require a re-analysis of the common law's treatment of and approach to the issue of ownership of parts or products of a living human body, whether for present purposes (viz. an action in negligence) or otherwise.

(b) The present claims relate to products of a living human body intended for use by the persons whose bodies have generated them. In these appeals we are not invited to consider whether there is any significant difference between such claims and those in which the products are intended for use by other persons, for example donated products in respect of which claims might be brought by the donors or even perhaps by any donees permissibly specified by the donors.

(c) For us the easiest course would be to uphold the claims of the men to have had ownership of the sperm for present purposes by reference to the principle first identified in Doodeward . We would have no difficulty in concluding that the unit's storage of the sperm in liquid nitrogen at minus 196°C was an application to the sperm of work and skill which conferred on it a substantially different attribute, namely the arrest of its swift perishability. We would regard Kelly as entirely consistent with such an analysis and Dobson as a claim which failed for a different reason, namely that the pathologist never undertook to the claimants, and was not otherwise obliged, to continue to preserve the brain.

(d) However, as foreshadowed by Rose LJ in Kelly , we are not content to see the common law in this area founded upon the principle in Doodeward , which was devised as an exception to a principle, itself of exceptional character, relating to the ownership of a human corpse. Such ancestry does not commend it as a solid foundation. Moreover a distinction between the capacity to own body parts or products which have, and which have not, been subject to the exercise of work or skill is not entirely logical. Why, for example, should the surgeon presented with a part of the body, for example, a finger which has been amputated in a factory accident, with a view to re-attaching it to the injured hand, but who carelessly damages it before starting the necessary medical procedures, be able to escape liability on the footing that the body part had not been subject to the exercise of work or skill which had changed its attributes?

(e) So we prefer to rest our conclusions on a broader basis.

(f) In our judgment, for the purposes of their claims in negligence, the men had ownership of the sperm which they ejaculated:

(i) By their bodies, they alone generated and ejaculated the sperm.

(ii) The sole object of their ejaculation of the sperm was that, in certain events, it might later be used for their benefit. Their rights to its use have been eroded to a limited extent by the Act but, even in the absence of the Act, the men would be likely to have needed medical assistance in using the sperm: so the interposition of medical judgment between any purported direction on their part that the sperm be used in a certain way and such use would be likely to have arisen in any event. It is true that, by confining all storage of sperm and all use of stored sperm to licence-holders, the Act has effected a compulsory interposition of professional judgment between the wishes of the men and the use of the sperm. So Mr Stallworthy can validly argue that the men cannot "direct" the use of their sperm. For two reasons, however, the absence of their ability to "direct" its use does not in our view derogate from their ownership. First, there are numerous statutes which limit a person's ability to use his property – for example a land-owner's ability to build on his land or to evict his tenant at the end of the tenancy or a pharmacist's ability to sell his medicines – without eliminating his ownership of it. Second, by its provisions for consent, the Act assiduously preserves the ability of the men to direct that the sperm be *not* used in a certain way: their negative control over its use remains absolute.

(iii) Ancillary to the object of later possible use of the sperm is the need for its storage in the interim. In that the Act confines storage to licence-holders, Mr Stallworthy stresses its erosion of the ability of the men to arrange for it to be stored by unlicensed persons or even to store it themselves; he also stresses their inability to direct its storage by licence-holders for longer than the maximum period provided by the Act. But the significance of these inroads into the normal consequences of ownership, driven by public policy, is, again, much diminished by the negative control of the men, reflected in the provisions that the sperm cannot be stored or continue to be stored without their subsisting consent. Thus the Act recognises in the men a fundamental feature of ownership, namely that at any time they can require the destruction of the sperm.

(iv) The analysis of rights relating to use and storage in (ii) and (iii) above must be considered in context, namely that, while the licence-holder has *duties* which may conflict with the wishes of the men, for example in relation to destruction of the sperm upon expiry of the maximum storage period, no person, whether human or corporate, other than each man has any *rights* in relation to the sperm which he has produced.

(v) In reaching our conclusion that the men had ownership of the sperm for the purposes of their present claims, we are fortified by the precise correlation between the primary, if circumscribed, rights of the men in relation to the sperm, namely in relation to its future use, and the consequence of the Trust's breach of duty, namely preclusion of its future use.

Bailment

46 Shortly prior to the hearing we indicated to counsel that we wished to hear argument whether, independently of an action in tort, the men had a distinct cause of action against the Trust under the law of bailment. This led to written and oral argument at the hearing, supplemented by further written argument afterwards (albeit without extensive citation of authority), and to our decision to accede to Mr Townsend's application to amend the men's claims so as to include an allegation that there had been a gratuitous bailment of the sperm by the men to the Trust, that the Trust had undertaken to take due care of the sperm and that it had broken its undertaking.

47 Had we reached the conclusion that the law in respect of parts or products of a living human body precluded our holding that the men had ownership of sperm for the purposes of their claims in the tort of negligence, it would clearly have been important for us to proceed to enquire whether nevertheless they had such lesser rights in relation to it as would render them capable of having been bailors of it. Our conclusion that the men had ownership of it for the purposes of

their claims in tort obviates the need for that particular enquiry: for from that conclusion it follows *a fortiori* that the men had sufficient rights in relation to it as to render them capable of having been bailors of it. Nevertheless it remains necessary for us to consider whether the men have a cause of action in bailment as well as in tort. For, as we will explain, the measure of damages might be more favourable to them in bailment than in tort.

48 We shall summarise the relevant principles of the law of bailment:

(a) A bailment can exist notwithstanding that it is gratuitous, i.e. without consideration passing from the bailor to the bailee: Coggs v. Bernard (1703) 92 E.R. 107 .

(b) Although eroded to a limited extent by principles later to be developed in relation to involuntary bailment, the basic justification for casting duties upon a gratuitous bailee has always been that a person is not obliged to take possession of a chattel in relation to which another person has rights and that, if he chooses to do so, he assumes duties: see Coggs , at 108 per Powell J.

(c) Thus “the obligation arises because the taking of possession in the circumstances involves an assumption of responsibility for the safe keeping of the goods”: see the advice of the *Privy Council in Gilchrist Watt and Sanderson Pty. Ltd v. York Products Pty. Ltd [1970] 1 WLR 1262* at 1268H.

(d) A bailment arises when, albeit on a limited or temporary basis, the bailee acquires exclusive possession of the chattel or a right thereto: *Midland Silicones Ltd v. Scruttons Ltd per Diplock J, [1959] 2 QB 171 at 189, and Hodson LJ, [1961] 1 QB 106* at 119.

(e) Reservation by the bailor of a right to require that the chattel be ultimately restored into his own possession or to his order is not necessary to a contractual bailment (see, for example, every contract for hire-purchase and for carriage of a chattel to the bailor's purchaser) and there is no ground for application of any different principle to a gratuitous bailment. Mr Stallworthy submits that the reservation of such a right is inherent in the requirement that the bailor should hold “some ultimate or reversionary possessory right” (in the words of Professor Palmer on Bailment, 2nd ed (1991) p.2). He also relies on Washington University v. Catalona (2006) 437 F Supp 2 d 985, U.S. District Court, Eastern District of Missouri (a decision later affirmed by the U.S. Court of Appeals, 8th Circuit: 490 F 3d 667) in which it was held, at 1001, that persons who had donated their bodily tissue to the university for research had no continuing rights in relation to it as bailors primarily because they had indeed donated it but also because regulatory provisions (not unlike those under our Act) would in any event have precluded its restoration to them. In our view the most interesting feature of Washington University is the acceptance by both courts that the tissue was “donated”, i.e. was property capable of passing from the donors to the donee. From this it followed that the donors had abandoned any possesory interest in the tissue. The university was not a bailee but a donee. We therefore respectfully disagree with the *obiter* remarks of the judge at first instance and we reject Mr Stallworthy's submission.

(f) A gratuitous bailee assumes a duty to take reasonable care of the chattel. “This standard, although high, may be a less exacting standard than that which the common law requires of a bailee for reward [but] the line between the two standards is a very fine line, difficult to discern and impossible to define”: see the advice of the *Privy Council in Port Swettenham Authority v. T.W.Wu and Co. (M) Sdn. Bhd. [1979] AC 580* at 589C-D.

(g) If a gratuitous bailee holds himself out to the bailor as able to deploy some special skill in relation to the chattel, his duty is to take such care of it as is reasonably to be expected of a person with such skill: Wilson v. Brett (1843) 152 ER 737 .

(h) We are unpersuaded that it follows from the fact that the bailment is not contractual that

the liability of the gratuitous bailee must lie in tort. Absent authority to the contrary of which we are unaware, we are strongly attracted to the view that his liability is *sui generis* ; and, so far as we know, this is all best explained in Professor Palmer's book (above) at pp. 44 *et seq* .

(i) Indeed it may be that, where the gratuitous bailee has extended, and broken, a particular promise to his bailor, for example that the chattel will be stored in a particular place or in a particular way, the measure of damages may be more akin to that referable to breach of contract rather than to tort. This proposition is advanced, albeit with hesitation and with virtually no supporting authority, by Professor Palmer both in his book (above) at pp. 79 – 80, and in his commentary on damages in bailment in Halsbury's Laws of England, 4th ed., Vol 12(1), at §1093.

49 When in the light of these principles, we revert to the facts of the present claims, we find as follows:

(a) The unit chose to take possession of the sperm. Although its offer to store sperm was part of the Trust's overall provision of oncological medical services, in return for which no doubt it received public funds, any bailment of the sperm must be classified as gratuitous.

(b) The unit's assumption of responsibility for the careful storage of the sperm was express and unequivocal: “we can undertake to look after [it] with all possible care”, quoted at [6(c)(iii)] above.

(c) The unit acquired exclusive possession of the sperm.

(d) The unit held itself out to the men as able to deploy special skill in preserving the sperm.

(e) Analogously to its admission in relation to the claims in tort, the Trust admits that, if the unit was a bailee of the sperm, it was in breach of the duty of care consequent upon the bailment.

(f) The unit extended, and broke, a particular promise to the men, namely that the sperm “will be stored … at minus 196°C …”, quoted at [6(c)(ii)] above.

50 In the above circumstances we conclude without hesitation that there was a bailment of the sperm by the men to the unit and that, subject to the resolution of factual issues yet to be determined, the unit is liable to them under the law of bailment as well as under that of tort. Indeed, in the light of our findings at [49(f)] above, the measure of any damages may be more akin to that referable to breach of contract rather than to tort.

Recoverability for Psychiatric Injury

51 For reasons already explained, the judge addressed this fourth issue only upon the hypothesis, which he rejected, that, in respect of negligent damage to their property, the Trust was liable to the men in tort. But we must address it upon the basis of our conclusions that, in that respect, the Trust is in principle liable to the men not only in tort but also in bailment.

52 We have already made clear that the judge was not asked to determine the following factual issues, namely

(a) whether each of the first five men had suffered psychiatric injury as well as mental distress;

(b) whether the sixth man had suffered mental distress, was continuing to suffer it and would be likely to continue to suffer it;

(c) in each case, if it had been so suffered, whether the injury or distress had been caused by the loss of the sperm; and

(d) in each case, if it had been so caused, whether the injury or distress was a reasonably foreseeable consequence of the breach of duty.

53 We are concerned, however, that the judge seems to have decided the fourth issue by reference to a purported determination of the factual issue identified at [52(c)] above. For he said:

> "Further any psychiatric injury was not as the result of any past event but as a consequence of apprehension about a future event, namely apprehension that he might not regain his fertility post treatment."

Notwithstanding its introduction with the word "further", we agree with Mr Townsend that, when the terms of the judge's judgment (as opposed to his order) are properly analysed, this sentence contains his primary conclusion upon the fourth issue. Although we must not fall into the same trap by deciding the issue for ourselves, we feel driven to observe that the judge's analysis of causation is controversial and would warrant careful reconsideration in the light of evidence and submission at any further hearing. At that stage Mr Townsend would advance a contrary analysis, namely that the men's apprehension that they might not regain their fertility did not cause psychiatric injury because it was countered by their knowledge of the storage of the sperm and that the injury arose as a direct result of learning of its loss.

54 Counsel's argument before the judge on this issue was largely based on the recent decision of the House of Lords in Grieves v. FT Everard and Sons Ltd , the last of four joined cases generally known by the title of the first, namely *Rothwell v. Chemical and Insulating Co Ltd [2007] UKHL 39, [2008] 1 AC 281* . The employers of Mr Grieves negligently exposed him to asbestos dust. Thirty years later he was diagnosed as having pleural plaques. Although indicative of the presence of asbestos fibres in the lungs, plaques are benign and asymptomatic and do not in themselves increase susceptibility to asbestos-related disease. Nevertheless, as a result of learning of the diagnosis, Mr Grieves suffered psychiatric injury. His claim failed, first, because the House upheld the conclusion that his psychiatric injury was not reasonably foreseeable and, second, because it distinguished its decision in *Page v. Smith [1996] AC 155* which, according to him, demonstrated that psychiatric injury did not need to be reasonably foreseeable. The decision in Grieves does not assist in the resolution of the present issue. The principle established in Page lies even further from the present case than it lay from Grieves ; and it seems to us that, whether for the purposes of his claim in tort or in bailment, each man indeed needs to establish – as set out at [52(d)] above – that his psychiatric injury or distress was a reasonably foreseeable consequence of the breach of duty. The question is whether, this being a necessary condition of recovery, it is also a sufficient condition for recovery both in tort for negligent damage to property and in bailment.

Tort

55 In Attia v. British Gas, [1988] 1 QB 304 , D, who was installing central heating in C's home, negligently set it on fire. For four hours she witnessed her home ablaze. This court held that, subject to proof of causation and foreseeability, she could recover for psychiatric injury sustained as a result of it. Bingham L.J., at 320E, gave a different example of where recovery would lie, namely if "a scholar's life work of research or composition were destroyed before his eyes as a result of the defendant's careless conduct, causing the scholar to suffer reasonably foreseeable psychiatric damage". It will be noted that the facts both of Attia and of Bingham L.J.'s different example are of injury sustained as a result of witnessing damage to property. It may be controversial to distinguish between the person who witnesses damage to his property and in consequence suffers psychiatric injury and the person who receives information about damage to it and suffers similarly. On the other hand the distinction does no more than to replicate what, for

policy reasons, has been drawn in relation to the so-called secondary victim who foreseeably suffers psychiatric injury as a result of *personal* injury which the primary victim suffers, or to which he is exposed, as a result of the defendant's negligence: *Alcock v. Chief Constable of South Yorkshire Police [1992] 1 AC 310* . At all events, in the light of what follows, there is no need for us to consider the distinction any further.

Bailment

56 Under their causes of action in bailment, the measure of any damages to be awarded to the men may be more akin to that referable to breach of contract than to tort: see [48(i)], [49(f)] and [50] above. So the question arises: had the loss of the sperm arisen as a result of breach of a contract to store it, could the men have recovered damages for psychiatric injury or distress foreseeably suffered as a result of the breach? For the purposes of the law of contract, recovery for mental distress (and *a fortiori* for psychiatric injury) caused by breach of contract was introduced by the decision of this court in Jarvis v. Swans Tours Ltd [1973] 1 QB 233 . The court there limited such recovery to breach of certain categories of contract, such as “a contract for a holiday, or any other contract to provide entertainment and enjoyment”: per Lord Denning MR at 238A. Since then the categories of contract which, if broken, can lead to such recovery have been successively enlarged. By 1991 the test had become whether “the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation”: *Watts v. Morrow [1991] 1 WLR 1421* at 1445G, per Bingham L.J. By 2001 the requirement that such provision should be “the very object” of the contract had become only that it should be “a major or important object” of it: *Farley v. Skinner [2001] UKHL 49, [2002] 2 AC 732* , at [24], per Lord Steyn. Indeed in another decision of the House in the same year the categories were defined as “contracts which are not purely commercial but which have as their object the provision of enjoyment, comfort, peace of mind or other non-pecuniary personal or family benefits”: *Johnson v. Unisys Ltd [2001] UKHL 13* , [2003] 1 AC 518, at [70], per Lord Millett.

57 It seems clear to us that the arrangements between the men and the Trust for the storage of their sperm were closely akin to contracts and should fall within the ambit of these principles. The reference to peace of mind admirably fits the object of arrangements designed to preserve the ability of men to become fathers notwithstanding an imminent threat to their natural fertility. The arrangements were not in any way commercial and their object was, only too obviously, the provision to the men of non-pecuniary personal or family benefits. Any award of damages should reflect the realities behind these arrangements and their intended purpose.

58 In summary, the breach of bailment here was a breach not just of the duty owed by every gratuitous bailee but of a specific promise extended by the Trust to the men. The law of bailment provides them with a remedy under which, in principle, they are entitled to compensation for any psychiatric injury (or actionable distress) foreseeably consequent upon the breach.

59 Our view is fortified by the fact that it has already been decided at first instance in two principal Commonwealth jurisdictions that, apparently even irrespective of such a promise, there can be a modest recovery for mental distress in an action against a gratuitous bailee:

(a) In Graham v. Voigt (1989) 95 FLR 146, a decision of the Supreme Court of the Australian Capital Territory , C left his valuable stamp collection, built up over 40 years, and certain other chattels in D's house when he ceased to lodge there. D put his property in her garage whence, as a result of her lack of care, it disappeared. Kelly J awarded damages to C referable not only to the value of the property but also, albeit at only a nominal A$2,500, to his foreseeable distress at the loss of his collection.

(b) In Mason v. Westside Cemeteries Ltd (1996) 135 DLR (4th) 361, a decision of the Ontario Court, General Division , the bodies of C's parents were cremated, placed in urns and kept by a funeral home. C contracted with the funeral home to transfer the urns into the possession of D on the basis that D would keep them but only temporarily until he should call for them to be restored to him. When he called for them, D could not locate them. Molloy J. treated D as a gratuitous bailee; found that the loss of the urns had been due to its negligence; held that “under contract law principles … damages for mental distress are recoverable” and that “the bailment [was] more akin to contract than negligence”; and awarded damages, albeit only a nominal C$1000, for his foreseeable mental distress

resulting from the loss of the urns.

Conclusion

60 These appeals will be allowed. We shall set aside the judge's determination of the third and fourth issues before him; substitute a determination that the sperm was the property of the men for the purposes of their claims in tort and, as amended, in bailment and that they are in law capable of recovering damages for psychiatric injury and/or mental distress in bailment; and remit the remaining issues in the actions for determination in the county court, indeed (so we provisionally consider) by the same judge.