

Secretary, Department of Health and Community Services v JWB & SMB (1991-1992) 175 CLR 218 at 279-280 per Brennan J.

⁹ At para 10. His Honour found support for his conclusion in the decision of O'Keefe J in *MAW v Western Sydney Area Health Service* BC 200003155, 24, 25 April; 3 May 2000. In that case the person from whom it was desired to extract semen

had not died but had suffered severe brain damage in an accident, was on life support and death was imminent. The court found its *parens patriae* jurisdiction did not extend to giving consent, on behalf of the comatosed and dying man, for the removal of semen because the procedure could not be said to be for his welfare or protection.

¹⁰ At para 12: *Williams v Williams* [1882] 20

Ch D 659 at 662-665 per Kay J; see also *Doodeward v Spence* (1908) 6 CLR 406.

¹¹ At para 18.

¹² At para 20.

¹³ At para 17; relying on *Reg v Sharpe Dea & Bell* CC 160

¹⁴ Which is defined so as to include semen.

¹⁵ Para 22.

¹⁶ Para 23.

¹⁷ Para 23.

A statement of fact or argument? A point of practice from the High Court

Hancock Family Memorial Foundation Limited v Porteous [2000] HCA 51

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A common error occurring in the terms of summary of argument has been recently highlighted by the High Court leading to a concise statement of best practice. Practitioners would do well to heed their Honours' remarks which were stated to be of general application.

Before dismissing the applicant's appeal in *Hancock Family Memorial Foundation Limited v Porteous* [2000] HCA 51 (8 September 2000), McHugh and Gummow JJ expressed their concern at the terms of the summary of argument filed by the applicants. The statement of factual background did not state all the facts found by the trial judge and the Full Court to be relevant to the issues in the case. Rather, it was a statement of the facts as seen by the applicants.

McHugh and Gummow JJ offered the following remarks generally in relation to the distinction between facts and

argument when seeking leave to appeal to the High Court:

- The statement of factual background in the summary of argument will not fulfil its function unless it states concisely but comprehensively the facts found or acted upon and considered relevant by the Court whose order is the subject of the appeal.
- In jury trials, the statement of factual background should state the evidence as to every material fact that could support the jury's verdict.
- If the applicant disputes any finding of fact by the lower court or its relevance, the place to do it is the applicant's summary of argument, not the statement of factual background.
- If the applicant wishes to assert that a fact should have been found, the place to do it is the summary of argument.
- If a special leave question does not arise unless some preliminary issue

of fact or law is first determined in the applicant's favour, then it is clearly misleading to state the special leave question without indicating that there are issues which have first to be determined.

Clearly the High Court sees the statement of factual background as a forum only for a frank, faithful and comprehensive statement of the material facts as found in the lower courts, regardless of whether they are favourable to the applicant. Anything less may be tantamount to misleading the High Court as to the real issues arising in the application for special leave to appeal. ^{PL}

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