

If law and policy assume rationality within institutions, he says, they are "out of touch" to the extent that emotions, instead of pure calculation, drive behaviour.

"Where those emotions come from is complex. Some of it is biological; hence my interest in high levels of testosterone, which researchers show is related to different patterns of risk-taking and ethical judgment.

"But it's also social – plainly one reason the crowd acts as it does is the energy generated by the interaction itself."

Markets, he says, reflect

omy is intense competition – for jobs, market share, capital – so that if good judgment is predictably thrown off by competitive stress, it is truly problematic."

In the US, he said, the most notable aspect of securities enforcement recently had been a dramatic "up-tick" in insider trading cases. Unlike most other countries, such as Australia, the US does not have a statute regulating insider trading. It was really up to the courts to describe the law relating to when insider trading was deceptive, and hence fraudulent.

With the increasing use of criminal investigative techniques like wiretaps and secretly recorded conversations, the stakes were higher. Hedge funds and others, who heretofore had avoided prosecution because it was so hard to make a circumstantial case of illegal trading on their part, now faced threats

that someone, somehow, might be listening to private conversations.

"This, in turn, puts more stress on the fuzzy legal issues that courts have to address. For instance, what information is 'material' enough? Suppose a global hedge fund manager receives information that most investors would not know how to interpret, but he or she exploits? Is that good research or illegal trading?"

"The unusual doctrinal nature of US insider trading law is also troubling, as cases are brought against foreign investors, who, at best, are used to a different approach to enforcement," Langevoort said. □

*The 2011 Supreme Court of NSW Annual Corporate Law Conference, New Trends in Sharemarket Regulation, is jointly hosted by the Law Society of New South Wales and the Ross Parsons Centre. It will be held in the Banco Court of the Supreme Court, Queen Square, Sydney, on Tuesday 23 August 2011 from 1.30 to 6.00 pm. The cost is \$250, which includes afternoon tea and drinks in the evening. Register online at the Events tab at [www.lawsociety.com.au/events](http://www.lawsociety.com.au/events).*

## MEDIA mentions

### Mittu Gopalan

Partner, Milne Berry Berger & Freedman

**The case:** Ms Edwards, our client, approached us in August 2010 to assist her to get access to her late husband's frozen sperm for the purposes of an IVF program. Her husband had died as a consequence of a workplace accident the day before the couple were to sign the final documents to commence the program. Our client was faced with the prohibition outlined in the *Assisted Reproduction Technology Act 2007*. This states that an IVF program cannot be undertaken in NSW in absence of our client's late husband's written consent. The legislation provided no discretion to the courts to grant permission. All States and Territories in Australia have different legislation. The issue became how our client could obtain the frozen sperm, considering the obstacles in the Act. Our client was successful and was able to persuade the Supreme Court Judge to allow the sperm to be given to her, as she was the sole executrix of her late husband's estate. This will now permit her to consider entering into an IVF program outside NSW.

**How did you get involved?** Our client approached Harry Freedman, a partner, who passed the matter to me, with his assistance.

**Your background:** I completed my law degree from University of Sydney in 1997, and have been with Milne Berry Berger & Freedman since 2000. I became a partner in 2008 and managing partner in 2010.

**Your reflections on the case:** I am mighty pleased and thrilled that I was able to



provide a widow with legal assistance. This case showed me a rare example of how the legal system could work efficiently and fairly. It also highlighted what I anticipate will become a regular issue of how the law has to deal with the changes in science and technology and how that affects society; the need for louder and more complete public discussion; the issues of a federal uniform set of laws rather than each state having different approaches; and the need for courts to have some discretion to deal with unusual situations which could not be properly contemplated by the legislature.

**How did the media treat the case?** The media was quite understanding and considerate to our client's feelings and emotional state, and accordingly was quite gentle with our client. By believing that they are on your client's side, a smooth working relationship evolved. I wanted to have the client prepare as well as possible before meeting the media. I feel the need to be in control and not allow the journalists to take over. I recognise that they are in there for the story, but occasionally, such as in this instance, demonstrable compassion was shown. □

**"Loyalty, dedication and energy can be precisely the things that lead to bias, and if lawyers rely on them too greatly, the lawyers will be misled."**

sentiment, the beliefs of "the crowd". Professional investors are sometimes psychologically savvy, and try to exploit the sentiment.

"But this turns out to be very dangerous, because although people can, and often do, sense that we're in some kind of 'bubble', knowing how long it will last is nearly impossible. People, and firms, have gone broke betting against a bubble that took too long to pop."

#### Psychology of competition

The most interesting aspect of why the global financial crisis happened relates to the psychology of competition, Langevoort says. In many accounts, there was a palpable sense that players felt it necessary to increase their aggressiveness and risk appetite. If they did not, they felt their competitors would, and that they would lose the competition even if, in the long run, that might be the more prudent strategy.

"I'm fascinated by how judgment and decision-making changes when people sense they're in a fight. To me, this goes well beyond just the financial crisis: a notable aspect of life today in our global econ-