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YEARWORTH v. *NORTH BRISTOL NHS TRUST*: PROPERTY, PRINCIPLES, PRECEDENTS AND PARADIGMS

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IT IS obvious, but perhaps not always appreciated, that the human body is essential. As a nexus of human value, on the one hand, and vessel of instrumentalisation, on the other, it has been a source of both respect and confusion as far as the law is concerned: respect in the sense that the body and the integrity of the person are paramount; confusion in the sense that the law has long resisted one of the ultimate expressions of value and identity – self-ownership. Until such a time as we might digitise the living consciousness (which again raises issues of instrumentalisation), the body will remain central to the human experience and indeed to human existence. The body, then, is an artefact of value (making property an unavoidable temptation), and an artefact through which we give expression to values (i.e. a means through which we enjoy or benefit from intangibles, such as dignity and autonomy). In the recent case of *Yearworth and Others* v. *North Bristol NHS Trust*,[1] the Court of Appeal for England and Wales handed down a decision which engages meaningfully (if not always explicitly) with both of these aspects of the body, but to what long-term effect? This is the question which occupies this article. After briefly reviewing the facts and claims in *Yearworth*, we examine: (1) the property aspect of the judgment, considering its significance with respect to how and to what extent it advances the property paradigm; and (2) the values/principles aspect of the judgment, considering its position in relation to (troubling) emerging medical law trends. In short, this article assesses *Yearworth* in relation to two jurisprudential streams, offering some observations as to what sort of precedent this case might represent for the future.

I. *YEARWORTH*: THE FACTS AND CLAIMS

Six male claimants, including Yearworth, were diagnosed with cancer and consented to chemotherapy at the Southmead Hospital, Bristol, which treatment had the possibility of rendering them infertile.

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[1] *Yearworth and Others* v. *North Bristol NHS Trust* [2009] 2 All E.R. 986 (CA).

Southmead Hospital has a fertility clinic licensed under the *Human Fertilisation and Embryology Act 1990*, as amended (HFEA 1990), and offered to freeze and store samples of each claimant's semen for use at a later date. Each claimant agreed to this proposition, produced a sample and gave assent to a 10-year storage period. The agreement resulted in the generation of a Sperm Storage Request, a Consent to Storage and Use, and a Sperm Storage for Those Undergoing Chemotherapy for each claimant. These documents contained a variety of representations, including some relating to storage and future use.

Following completion of these documents, and prior to the use of the sperm by any of the claimants, the storage system failed, causing the samples to thaw and be irreversibly damaged. The claimants initiated the within action, each alleging that he suffered an adverse or traumatic reaction to the news, including mental distress or mild/moderate depression. The defendant Trust admitted that it had a duty to take reasonable care of the sperm and that it had failed to do so by neglecting to replenish the liquid nitrogen tanks when it knew or ought to have known that they required attention. However, it denied liability, arguing that, even if its breach caused injury or distress (which was denied), the claimants were barred from recovering damages because the loss of sperm was neither a 'personal injury' nor 'damage to property'.

The claimants advanced three arguments before the Court of Appeal, namely that they: (1) suffered personal injuries caused by negligence; (2) suffered damage to property due to negligence; and (3) suffered losses resulting from breach of bailment conditions. The Court, per Lord Judge C.J. (Sir Anthony Clarke M.R. and Wilson L.J concurring), rejected the personal injury claim relatively perfunctorily,[2] allowed the bailment claim,[3] which has been considered elsewhere,[4] and accepted bailment as a potential basis for a remedy for psychiatric

[2] *Ibid*, paras. 18–24. The claimants argued that they had created and not abandoned their sperm, which had retained its active properties, was meant to be used in its normal capacity, and should give rise to a claim for personal injury. The Court disagreed, differentiating the German case referred to by the claimants and stating, at para. 23: "… 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. … 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."

[3] *Ibid*, paras. 46–50. This claim was argued for the first time before, and at the behest of, the Court of Appeal. The Court stated, at para. 47, that, from its conclusion that the men had ownership of the sperm for the purposes of tort, "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." The Court distinguished *Washington University* v. *Catalona et al.* (2006) 437 F. Supp. 2d 985 (Dist Ct), concluding that a gratuitous bailment existed, and that the defendant was therefore liable under the law of bailment.

[4] See M. Quigley, 'Property: The Future of Human Tissue?' (2009) 17 Med. Law. Rev. 457–466, and C. Hawes, 'Property Interests in Body Parts: *Yearworth* v. *North Bristol NHS Trust*' (2010) 73 M.L.R. 130–140. For more on bailment, see N. Palmer, *Bailment*, 2nd ed. (London 1991), and M. Bridge, *Personal Property Law*, 3rd ed. (Oxford 2002).

injury.[5] It also, importantly, allowed the broader property claim, and it is this claim with which we are most interested, and to which we now turn.

II. *Yearworth*: the Decision and Principles

At the outset, the Court accepted that a claim for negligent loss of property must be founded on legal ownership or possessory title of the subject held by the claimant at the time of the loss. Premising its analysis on the conviction that advances in medical science are demanding a re-analysis of the common law's approach to ownership of parts and products of living bodies, particularly where originators are concerned,[6] the Court continued:

> … [W]e 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. …[7]

The Court took notice of the *Human Tissue Act 2004* (HTA 2004), which statutorily entrenches the holding in *Doodeward*[8] by permitting commercial dealings in human material which is the subject of property as a result of the application of human skill.[9] However, the Court was careful to point out that the HTA 2004 is only peripherally relevant given the involvement of gametes, which are governed by the HFEA 1990.[10] Additionally, despite Parliament's apparent instruction, the

[5] On damages, the Court, at para. 60, noted a need for further factual determinations. At paras. 54–55, it stipulated that each claimant would have to demonstrate that his psychiatric injury was a reasonably foreseeable consequence of the breach, whether the duty was considered under tort or bailment. It also noted that recovery may be subject to the same public policy limitations that exist re: secondary victims: see *Alcock* v. *Chief Constable of South Yorkshire Police* [1992] 1 A.C. 310 (HL).

[6] *Yearworth*, para. 45(a) and (b). The new realities created by biomedicine, and the reliance of those advancements on access to human tissue has been noted: see L. Andrews & D. Nelkin, *Body Bazaar: The Market for Human Tissue in the Biotechnology Age* (New York, 2001), and C. Waldby & R. Mitchell, *Tissue Economies: Blood, Organs and Cell Lines in Late Capitalism* (Durham, NC 2006). For a macabre example of the new order, note the Mastromarino case in which a former dentist conspired with funeral home directors to strip over 1,000 interned corpses of bones, skin, and other tissue for sale to companies providing material for implants, grafts and other procedures: see A. Feuer, 'Dentist Pleads Guilty to Stealing and Selling Body Parts', New York Times, 19 March 2008.

[7] *Yearworth*, para. 45(d). For more on the historical development of property and the human body, see *infra*, and see R. Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (Oxford 2007).

[8] Discussed below p. **481**.

[9] HTA 2004, s. 32(9).

[10] HTA 2004, s. 53(1). At the time of the case, the 2008 amendments to the HFEA 1990 were not yet in force, but none of the amendments would have had any bearing on the case.

Court stipulated that this statutory regime cannot and must not stifle the development of the common law where it rests "on a broader basis".[11] Precisely what is the nature of this broader basis and the implications of recognising it are the concern of this article.

While noting that storage of the sperm in liquid nitrogen represents an application of skill conferring on the sperm a substantially different attribute[12] – a fact which might vest property in the Trust, negating the claims – the Court preferred to consider the relative positions of the parties as articulated in the HFEA 1990. It accepted that the claimants alone, through their bodies, generated and ejaculated the sperm, and that the sole object of the sperm (and storage) was for the claimants' subsequent use to (genetically) reproduce.[13] It then held:

- The HFEA 1990 was designed to give legal effect to principles of good practice in modern reproductive medicine, and therefore should not be interpreted as depriving individuals of the ability to recover damages for a breach of a statutory duty.[14]
- One of the pillars of the HFEA 1990 as enunciated in *Evans* v. *Amicus Healthcare Ltd.*,[15] namely the requirement for informed consent, is of paramount importance. The stringent consent requirements instituted by the HFEA 1990 make clear that the claimants have *rights* and the Trust, as license holder, has *duties* and *limitations*; only the claimants, and nobody else, had rights in relation to the sperm which they produced.[16]
- The interjection of the need for third party support (e.g. expert storage and medical assistance to make subsequent use of the sperm) does not diminish a right held by an individual.[17]

Extrapolating from the relative positions of the parties, and noting that the Trust's actions precluded the claimants from exercising their rights, the Court held that the claimants had ownership of, and therefore property rights in, their sperm. Where these rights are negligently infringed by a third party (e.g. the Trust), as was the case here, the claimants could sue for damages.

So what is the significance of this decision, from both a property perspective and a values/principles perspective? Let us consider.

[11] *Yearworth*, para. 38.
[12] *Ibid*, para. 45(c).
[13] *Ibid*, para. 45(f).
[14] *Ibid*, para. 41.
[15] [2005] Fam. 1 (CA).
[16] *Yearworth*, para. 44. Of course, recognising a right does not necessarily imply a property right or demand the creation of a property right.
[17] *Ibid*, para. 45(f).

III. Medicine and The "Body": Property, Precedents, *Yearworth* and "Paradigm Creep"?

For many centuries, the body has been central to biomedical science and the development of medicine and healthcare. In particular, the dead body has been a source of knowledge and discovery. In the modern setting, the body's contribution to innovation has expanded to living bodies and their parts and products. Despite the role of commerce and (intellectual) property in the development of biomedicine, the orthodox position with respect to the human body has been that there can be no property interest in the human body, living or dead, a prohibition which evolved in no small part due to the traditions and machinations of the Church,[18] and which has been supported by a host of international and domestic bodies.[19]

A. The Way We Were

If we are to evaluate the significance of *Yearworth*, we must locate the decision within the constellation of property-in-the-body cases. In short, at the risk of reciting a well-known story, we must nonetheless 'begin at the beginning'.[20]

The general legal prohibition against property in the whole body finds its origin in the context of corpses,[21] the doctrine having been expounded in the seventeenth century,[22] and reiterated in a host of cases thereafter, including *R.* v. *Lynn*,[23] *R.* v. *Sharpe*,[24] *Foster* v. *Dodd*,[25]

[18] See P. Jackson, *The Law of Cadavers and of Burial Places*, 2d ed. (New York 1950).

[19] Internationally, see the Council of Europe's Convention for the Protection of Human Rights and Dignity of the Human Being With Regard to the Application of Biology and Medicine, ETS 1997, No. 164, Article 21 (which states that "the human body and its parts shall not, as such, give rise to financial gain"), and its Additional Protocol of the Convention on Human Rights and Biomedicine Concerning Transplantation of Organs and Tissues of Human Origin, ETS 2002, No. 168, Article 21 (which reiterates the prohibition on financial gain with some qualifications) and Article 22 (which prohibits organ trafficking). In the U.K., see the General Medical Council, *Guidance for Doctors on Transplantation of Organs from Live Donors* (1992), Nuffield Council on Bioethics, *Human Tissue: Ethical and Legal Issues* (1995), Medical Research Council, *Human Tissue and Biological Samples for Use in Research: Operational and Ethical Guidelines* (2001), Part 2, the live Nuffield Council consultation on "Human Bodies in Medicine and Research" (see http://www.nuffieldbioethics.org/go/ourwork/humanbody/page_1027.html), and others.

[20] To quote L. Carroll, *Alice's Adventures in Wonderland* (1865), or L. Kilmister (Motörhead), 'Keep Us On The Road' (1977).

[21] See P. Skegg, 'Human Corpses, Medical Specimens and the Law of Property' (1975) 4 Anglo-American Law Rev. 412–425, and a range of case law, *infra*.

[22] See *Haynes Case* (1614) 77 E.R. 1389, and Sir Edward Coke, *Institutes of the Laws of England* (1641), 3-203, who stated "The burial of the cadaver (that is *caro data vermibus*) is *nullius in bonis*." Though see J. Mason & G. Laurie, "Consent or Property? Dealing with the Body and its Parts in the Shadow of Bristol and Alder Hey" (2001) 64 Med. Law Rev. 710–729, who suggest that it derives from a misinterpretation of precedent.

[23] (1788) 2 T.R. 394.

[24] (1857) 169 E.R. 959.

[25] (1867) L.R. 3 Q.B. 67.

R. v. *Price*,[26] and *Williams* v. *Williams*.[27] While this doctrine worked some mischief in body-snatching scenarios,[28] an all-too-common practice in the 1700s and 1800s,[29] it has generally endured. For a more recent legal articulation of permissible actions with respect to the corpse, the HTA 2004 is useful; it permits 'donation' and 'possession' (storage and use) of a dead body by persons licensed by the Human Tissue Authority, and embodies in statute the common law exception which permits ownership (discussed below).[30] And what of the living (whole) body? Aside from that lamentable period in human history when slavery and human ownership were legally recognised,[31] the prohibition against property has also included living bodies, the position being that unauthorised interference with a living body is an invasion of a *personal*, not a proprietary, right.[32] Most recently, note *R.* v. *Bentham*,[33] wherein the House of Lords held that a person does not 'possess' his body or any part of it.

The prohibition was also applied to parts of the body, though the dubiousness of the rule – so described in *Doodeward* v. *Spence*,[34] and *Miner* v. *Canadian Pacific Railway Co*,[35] – has permitted the property paradigm to encroach slowly upon the prohibition in this setting. In *Doodeward*, the High Court of Australia recognized third party ownership in a still-born two-headed foetus preserved some 40 years previously. The court held that the lawful exercise of skill which gave the body attributes differentiating it from a mere corpse founded a right to proprietary possession. In *Moore* v. *University of California*,[36]

[26] (1884) 12 Q.B.D. 247.
[27] [1881–85] All E.R. 840. In this case, the court held that directions in a will to deliver the deceased's body to someone other than the executor are void and unenforceable because the Testator has no property interest in the body. In the American context, see *Sinai Temple* v. *Kaplan* (1976) 127 Cal. Rep. 80 (CA).
[28] If there could be no property in the body, there could be no theft of the body, and therefore no prosecution: see J. Mason and G. Laurie, n 22 above.
[29] For more on the intimate relationship between body snatching and scientific advancement, see J. Frank, 'Body Snatching: A Grave Medical Problem' (1976) 49 Yale J. Biology & Med. 399–410, I. Ross & C. Ross, 'Body Snatching in Nineteenth Century Britain: From Exhumation to Murder' (1979) 6 Brit J. Law & Society 108–118, R. MacGillivray, 'Body-Snatching in Ontario' (1988) 5 Can. Bull. Med. History 51–60, M. Highet, 'Body Snatching & Grave Robbing: Bodies for Science' (2005) 16 History & Anthropology 415–440, S. Shultz, *Body Snatching: The Robbing of Graves for the Education of Physicians in Early Nineteenth Century America* (Jefferson 2005) among others.
[30] See HTA 2004, ss. 32(9) and (10), which except from the prohibition in commercial dealing in human tissue material which is the subject of property because of an application of human skill. See also HTA 2004, ss. 1(1), (2), (3), 8, and Schedule 1.
[31] See *Gregson* v. *Gilbert* (1783) 3 Dougl. 323, wherein slaves pitched into the sea were characterised as goods thrown overboard, *Hopkins* v. *Blanco* (1974) 320 A 2d 139, wherein a wife was considered the property of her husband, and B. Dickens, 'The Control of Living Body Materials' (1977) 27 U. Tor. Law J. 142–198, who notes that a debtor could, at one time, be personally attached for payment of debts.
[32] P. Matthews, 'Whose Body? People As Property' (1982) 36 Current Legal Problems 193–239.
[33] [2005] 1 W.L.R. 1057 (HL).
[34] (1908) 6 C.L.R. 406 (Aust HC).
[35] (1910) 15 W.W.R. 161 (Alta QB).
[36] (1990) 793 P. 2d 479 (Cal SC).

a US case focused on intellectual property, the majority held that a third party could have a proprietary interest in excised tissue, but not the originator of that tissue. This led Broussard J, dissenting, to observe that, "the majority's analysis cannot rest on the broad proposition that a removed part is not property, but … on the proposition that a *patient* retains no ownership interest in [an excised] body part … ."[37]

In the UK, the court in *R.* v. *Kelly*,[38] recognised property rights in excised body parts where they had been subjected to dissection, preservation or otherwise acquired different attributes by the application of skill.[39] While the court questioned the origin of the 'application of skill' principle, it acquiesced to common law precedent, suggesting that it was Parliament's responsibility to intervene if deemed appropriate. In *A.B.* v. *Leeds Teaching Hospital NHS Trust*,[40] in response to claims of negligence for psychiatric injury and for wrongful interference with the body in relation to the manner of obtaining parental consent to post-mortems and body parts retention, the court confirmed both the no-property rule and the 'application of skill' exception, holding that the post-mortem examinations were lawfully executed and therefore capable of giving the pathologist possessory rights to retained samples. Ultimately, the court refused to create a common law tort of wrongful interference with, or conversion of, the body where none previously existed. The HTA 2004 statutorily entrenches the 'application of skill' exception, permitting licensed persons to remove, store and use material (including human cells, but not embryos outside the human body or hair and nails, from the body of a living person) for a number of purposes, including, *inter alia*, obtaining scientific or medical information about a living or deceased person, research, and transplantation.[41]

With respect to products produced by the human body, prosecutions for theft were sustained against those who stole products from those in lawful possession of them in *R.* v. *Herbert* (lock of hair),[42]

[37] See also J. Mason & G. Laurie, n 21 above, who, at 719, state that, 'the law tempers the consequent confusion in delivering one clear message: the one person who is least likely to have property rights in body parts is the person from whom these parts were taken.'

[38] [1998] 3 All E.R. 741 (CA).

[39] This right is limited by standards of public decency: see *R.* v. *Gibson* [1990] 2 Q.B. 619 (CA), wherein a freeze-dried human foetus was used to make earrings for display in an art gallery and was considered a breach of the common law offence of outraging public decency.

[40] [2005] 2 W.L.R. 358 (QB).

[41] See HTA 2004, s. 53 and Schedule 1. Ultimately, however, the HTA 2004 does not clearly theoretically ground its provisions in property, or control, or any other founding principle. In this regard, in *Venner* v. *State of Maryland* (1976) 354 A. 2d 483 (Ct Spec Apps), at 498, Powers J held that, 'It is not unknown for a person to assert a continuing *right of ownership, dominion, or control* … over such things as … organs or other parts of the body …' [emphasis added].

[42] (1961) 25 J. Crim. Law 163. A lock of Byron's hair was sold at Sotheby's Auction House in 1970 for £320: P. Skegg, n 20 above.

R. v. *Welsh* (urine sample),[43] and *R.* v. *Rothery* (blood sample).[44] But it was in *Hecht* v. *Superior Court of L.A. County*,[45] that an originator was (finally) found to have a proprietary interest. In that case, a man deposited sperm in a bank for his partner's later use, a disposition he articulated in his will. The California Court of Appeal distinguished *Moore* and held that the testator had a proprietary interest in his genetic material (sperm) under probate law and could bequeath it to his partner, an act which implicitly recognised the proprietary nature of the material, and the testator's proprietary interest therein.

So how does *Yearworth* fit into the stream? Quite neatly in some respects, and rather uncomfortably in others.

As can be seen, there has been a readiness to recognise the right to control the human body and its parts and products, and there has been a gradual expansion of the persons entitled to exercise those rights. Thus, with respect to corpses, there has been a recognition of rights to possession by survivors and other legally recognised interested parties.[46] With respect to excised body parts and products, there has been a recognition of a fuller bundle of rights, including the acceptance of commercialisation and markets.[47] And while tissue originators were usually left without rights in these settings, even that bulwark of the common law came down (in *Hecht*). Viewed against this backdrop – with its examples of judicial dissatisfaction with the property prohibition – *Yearworth* is inarguably predictable and cannot be considered an 'outlier'; it is 'the next step' in the slow creep of the property paradigm.

Having said that, it should be recognised that the rulings in this stream of cases are often pragmatic fixes to practical problems; they are ad hoc solutions based on what is thought at that moment and within the context of the specific facts of the case to be in the interests of justice. The stream has evolved in fits and starts and rights have been

[43] [1974] R.T.R. 478 (CA).
[44] [1976] R.T.R. 550 (CA).
[45] (1993) 20 Cal.R. 2d 275 (Cal CA).
[46] Many US jurisdictions adopt a flexible approach to corpses and survivors' rights and duties, deploying the language of trusts, which permit damages for mental distress caused to survivors when the body is dealt with unlawfully: see M. Pawlowski, 'Property in Body Parts and Products of the Human Body' (2009) 30 Liverpool Law Rev. 35–55. Similarly, in the UK, it has been held that a deceased's personal representatives (or others charged by law) have a right to custody and possession of the body with a view to its proper disposition: see *R.* v. *Bristol Coroner, ex parte Kerr* [1974] Q.B. 652, *Dobson* v. *North Tyneside Health Authority* [1996] 4 All E.R. 474 (CA), and others.
[47] See National Health Service Act 1977, s. 25. On this point, the Secretary of State has statutory power to charge for body parts not readily available to any person, and certain organisations acquire excised parts and supply them to researchers on a commercial basis, and both transplant services and pituitary glands from cadaver brains are sold commercially: see L. Lehtonen, 'The Bioethics Convention of the Council of Europe and Organ Sharing for Transplant Recipients in Scandinavia' (2002) 21 Med. Law 745–751, and G. Dworkin & I. Kennedy, 'Human Tissue: Rights in the Body and Its Parts' (1993) 1 Med. Law Rev. 291–319, who, at p. 305, cite the International Institute for the Advancement of Medicine and Human Biologics Inc as a prime operator in the body parts market.

extended unevenly. Thus, while some parties could claim rights of property, there was no self-ownership, and while commercial trade in human bodies, parts and products (and the property on which such commerce relies) had been accepted, the lingering uneasiness with property as a blanket solution meant that the prohibitions continued to affect tissue originators. In short, while this history does represent an evolution toward the property paradigm (with 'property' featuring to different degrees in the decisions), it is not a conscious and principled development of the property paradigm, and it never explicitly engaged with self-ownership. *Yearworth* is distinguishable in that it *does* engage with, and extend, self-ownership, though this might not be seen as a surprising or unpredictable progression.

B. The Good, the Bad, and the Unanswered Questions

There are some aspects or some achievements of *Yearworth* that are clearly good. First, by its open and explicit recognition that parts and products of the human body may be the subject of property without the acquisition of different attributes by the application of skill, it has potentially cleared away a piece of legal artifice that has bemused commentators for some time.[48] Second, by extending the right of ownership to originators of human tissue, the Court has thrown into question an inadequately justified and much criticised limitation on rights attaching to biomedically valuable tissue; it may have taken a first step toward treating all participants in the new bio-society equally, and therefore reduced a clear injustice (if it is accepted as something more than a fact-specific quick fix). Third, by its finding of property, and its associated opening up of bailment law to tissue originators, it has widened the possibilities for recovery where interference and/or loss occurs.

But how has it managed the extension of property? In this regard, it has not performed quite so well. Consider first the finding of a property right itself. Having rights (even sole rights) of control over something does not require or even necessarily imply property.[49] Property is merely one negotiated and evolving legal concept which permits us to organise society according to a particular value system and/or in

[48] This is a legal fiction that has a much-maligned sibling in patent law insofar as modern patent instruments, including the Biotech Patenting Directive 98/44/EC, circumvent the prohibition against patenting mere discoveries by allowing inventors to patent biological discoveries by removing them from their natural environment and purifying them. For a comment on this, see J. Sulston, 'Heritage of Humanity' (2002), available at http://mondediplo.com/2002/12/15genome.pdf [accessed 9 March 2006], and J. Sulston, 'Staking Claims in the Biotechnology Klondike' (2006) 84 W.H.O. Bull. 412–414.

[49] J. Berg, 'You Say Person, I Say Property: Does it Really Matter What we Call an Embryo?' (2004) 4 Am. J. Bioethics 17–18, and J. Berg, 'Owning Persons: The Application of Property Theory to Embryos and Fetuses' (2005) 40 Wake Forest Law Rev. 159–220.

pursuit of particular goals. Unfortunately, the conceptual foundation of the Court's finding of a (new) property interest is not entirely clear, and neither the brief reference to Honoré, nor the discussion of statutory consent adequately fill the lacunae. From whence does this property interest derive and why has it been so late in its recognition? Given the moral debates around property in the body and the contentiousness of commodifying the body,[50] this is a philosophical, ethical and policy question which should have been addressed as directly as was the Court's concern for the 'application of skill' exception.

It has been suggested that a neo-Lockean natural rights view might have motivated the finding of property.[51] Recall that, classically, the natural rights approach views the earth as granted *res communis* to all humankind by God, and considers that unclaimed material combined with labour gives rise to individual ownership.[52] Of course, this approach has been challenged as 'nonsense upon stilts'.[53] In any event, such a foundation is not obvious given the dearth of attention paid by the Court to ethical/moral or conceptual foundations. Alternatively, one might argue that the evolution of the jurisprudence and the Court's reference to the need for the law to keep pace with medical practice suggest a social constructivist approach. Under this approach, property is viewed as a social arrangement that is not fixed, but evolves with society's needs.[54] Presumably, this approach underwrote Honoré's eleven relational factors which, if enough of them are present, might found a proprietary relationship between person and subject.[55] Having reference to this list, Campbell suggests that we may claim that our bodies and their constituent parts *are* our property, but he asserts that this conclusion does not solve the intimately related moral issues of the consequence of this for commodification and trade.[56] He concludes that a property approach is not particularly satisfactory because the body is not merely a vessel, but rather an integral, lived-in part of the embodied self, and our obvious but often misunderstood relationship with ourselves, others, and the earth gives rise to a certain ambiguity around the body.[57]

[50] See S. Harmon, 'A Penny For Your Thoughts, A Pound For Your Flesh: Implications of Recognizing Property in Human Body Parts' (2006) 7 Med. Law Int. 329–354, and the authorities cited therein, J. Mason & G. Laurie, *Mason & McCall Smith's Law and Medical Ethics*, 8th ed (Oxford 2010), ch. 15, and the authorities cited therein.
[51] M. Quigley, n 4 above.
[52] J. Locke, *Second Treatise on the Government* (1690).
[53] See J. Waldron, *"Nonsense Upon Stilts": Bentham, Burke and Marx on the Rights of Man* (London 1987).
[54] B. Björkman & S. Hansson, 'Bodily Rights and Property Rights' (2006) 32 J. Med.Ethics 209–214
[55] See T. Honoré, 'Ownership' in A. Guest (ed.), *Oxford Essays in Jurisprudence: A Collaborative Work* (Oxford 1961) 107–147.
[56] A. Campbell, *The Body in Bioethics* (London 2009), p. 14.
[57] *Ibid*, ch. 7.

The point is that the Court failed to ground its finding of property, or to engage meaningfully with the very rich and important bioethical and legal scholarship on the subject. It even failed to apply the eleven factors of Honoré in a rigorous manner. The Court might have used the unfairness argument advanced by Broussard J. in *Moore* as a platform to discuss deeper and broader issues of justice and equity in arriving at its conclusion, but it did not. Rather it simply held that the entitlements and limitations under the HFEA 1990 and the need for the law to evolve naturally crystallised into a right of control, which the Court declared to be an ownership and indeed a property right. While this might not be a particularly mighty leap, the fact that one (property) does not necessarily follow the other (control), it was a leap that demanded a lot more justificatory work.

In the end, we are left to wonder at the foundation and appropriateness of the Court's conclusion that the claimants rightly have a *property* interest in their body products or parts.[58] How is the finding of property conceptually defended? On what moral foundations is the finding of property based? Might a better (more palatable) basis than property be developed that adequately protects originator interests, abilities to recover damages, and contribution to, and participation in, the new bio-economy? In relation to the 'application of skill' exception, it has been argued that 'These … unresolved questions demonstrate that the [underpinning] legal principle … has not been adequately identified or articulated. Without a clear underlying principle the exception cannot develop in a coherent manner.'[59] The same can be said of the *Yearworth* finding of property itself.

We might also wonder what work the property paradigm is being asked to do. It is not clear what bundle of property rights have been extended to originators. Practical questions that remain are:

- Is this putative extension of property (and the availability of damages for mental distress) dependent on the fact that gametes – which might be differentiated from other tissues – are in issue?[60] How should non-reproductive tissue be approached?
- What is the scope of originators' rights to treat with their own body and parts? What, now, is the potential for originators of tissue to participate in bio-markets?

[58] In this respect, the tendency of court to ignore the sociological, psychological and anthropological attitudes toward the body has been noted: see R. Gold, *Body Parts: Property Rights and the Ownership of Human Biological Material* (Washington 1996).

[59] R. Hardcastle, n 8 above, at p. 40.

[60] We might characterise gametes as special based on their association with genetic reproduction and having reference to the HFEA 1990. On the other hand, that differentiation may not be justified for purposes of developing the common law more broadly.

- Where and how does dignity and other important moral values fit into the new regime? Are they justificatory factors for the (new) right or restraining factors on its exercise (ie: autonomy might be used to justify the existence of a property right and dignity might be used to restrict its exercise).
- On what basis do we differentiate body parts and products from whole bodies, living or dead, and what about material taken for transplantation into another or back into oneself?

There are two consequences of these important outstanding questions: (1) both the existence and exercise of the property right are in question; and (2) both the nature and scope of *Yearworth* as a general precedent are in some doubt. These and other questions will almost certainly be tested in future cases as the *Yearworth* decision is probed, but little instruction can be gleaned from this 'root' case itself.[61]

IV. Medicine and The 'Person': Principles, Precedents, *Yearworth* and 'Paradigm Slippage'?

Health and wellbeing, and therefore healthcare and medicine, are not just about the body, they are about the person; they are about the physical, the non-physical and the rights and values we claim about and as a result of our condition in relation to both. Good health has been characterised:

- as a fundamental freedom, enabling us to define our identity and to do things we value;[62]
- as being a right fundamental to the attainment of peace and security;[63] and
- as having special meaning insofar as we strive to achieve good health in the face of conditions that mitigate against it.[64]

In short, health (and therefore healthcare) is essential for the enjoyment and maximisation of almost all human activities and has implications for one's sense of being and empowerment. Given this wide-ranging and multifaceted importance of health, it comes as little surprise that patient interests and broad, value-based principles should be(come) vitally important in the health setting, indeed often the central focus of disputes. Indeed, we have seen a trend in recent years toward the

[61] Thus far, the only case to cite *Yearworth* is *AB and Others* v. *Ministry of Defence* [2009] EWHC 1225 (QB), and that reference was only to note that Lord Judge C.J.'s statement to the effect that the common law must remain relevant in light of 'the ever-expanding frontiers of medical science' is equally relevant to statutory interpretation.

[62] A. Sen, *Development as Freedom* (Oxford 1999).

[63] Preamble of the World Health Organization's Constitution, available at http://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf.

[64] N. Daniels, *Just Health: A Population View* (Cambridge 2008).

recognition and development of health-related interests in law, of which *Yearworth* is, arguably, the latest illustration.

A. The Way We Are

In evaluating the significance of *Yearworth* in this principle-arena, we must now re-contextualise it, this time with respect to judicial trends on the issue of the individual's position as a value- and aspiration-holder in medical treatment settings.

Traditionally, courts had fairly consistently shown deference to the medical profession in determining that profession's duty and standard of care owed to patients, and in determining the best interests of patients. Conversely, there was only a grudging acceptance of the right to self-determination by patients and, related thereto, the principle of autonomy.[65] The classic example is, of course, *Bolam* v. *Friern Hospital Management Committee*,[66] in which the House of Lords queried (from the profession) what the standard of care should be based on "a responsible body of medical opinion".[67] In *Sidaway* v. *Board of Governors of the Bethlem Royal Hospital*,[68] the House of Lords went so far as to say that professional (medical) judgement could determine what information to provide to the patient when the patient was deciding how to proceed (and whether to give consent to a procedure).[69]

Changes in judicial attitudes have, however, occurred, partially as a result of the adoption of the Human Rights Act 1998. In fact, they are discernable as early as the late 1990s, when the House of Lords took back control (contrary to the *Bolam* precedent) by requiring that medical opinion must have a logical basis,[70] and when the Court of Appeal held that information disclosure decisions must be grounded on a prudent patient test.[71] These cases were followed by *McFarlane* v. *Tayside Health Board*,[72] and *Rees* v. *Darlington Memorial Hospital NHS Trust*,[73] both wrongful conception cases. In *McFarlane*, which concerned the birth of a healthy child to healthy parents after a failed vasectomy, the House of Lords rejected the negligence-based claim for damages associated with raising the child, but permitted general damages. Importantly, Lord Millett stated that the parents "have lost the freedom to limit the size of their family [and have] been denied an

[65] G. Laurie, 'Medical Law and Human Rights: Passing the Parcel Back to the Profession' in A. Boyle et al. (eds.), *Human Rights and Scots Law* (Oxford 2002) 245–274.
[66] [1957] 2 All E.R. 118 (HL).
[67] See also *Maynard* v. *West Midlands Regional Health Authority* [1984] 1 W.L.R. 634 (HL).
[68] [1985] A.C. 871 (HL).
[69] This physician-oriented approach to autonomy-based patient decisions was also adopted in Scotland: see *Moyes* v. *Lothian Health Board* [1990] S.L.T. 444 (OH).
[70] *Bolitho* v. *Hackney Health Authority* [1998] A.C. 232 (HL).
[71] *Pearce* v. *United Bristol Healthcare NHS Trust* (1999) 48 BMLR 118 (CA).
[72] [2000] 2 A.C. 59 (HL).
[73] [2004] 1 A.C. 309 (HL).

important aspect of their personal autonomy," thereby entitling them to damages.[74] In *Rees*, a healthy child was born to a disabled mother. Again, the negligence-based claim for the costs of raising the child were rejected, but "conventional damages" were viewed favourably by Lord Bingham, who held that the opportunity to live one's life in a way wished and planned should not be negligently interfered with by another.[75]

More recently, in *Chester* v. *Afshar*,[76] the House of Lords again recognised autonomy (or self-determination) as a key health-related principle. In that case, the patient suffered from chronic pain. Surgery was advised and ultimately performed. Absent negligence in the performance of the surgery, the patient suffered nerve damage, which is a known risk of very small likelihood but potentially significant consequence. The patient had not been informed of this particular risk. As noted, negligence in the surgical procedure could not be shown, so the claimant alleged negligent failure to warn/inform. However, it was also generally accepted that she could not prove that her injury was caused by the negligent failure to inform (i.e. she could not show that she would never have undergone the surgery had she known about the risk). Nonetheless, the court found in her favour. Lord Steyn viewed consent as protecting "respect for autonomy and dignity" (in addition to physical integrity),[77] Lord Hope focussed on "the right to choose",[78] and Lord Walker was concerned with the human right to "make one's own decisions".[79] In short, at the cost of well-established negligence principles, the court awarded the claimant damages for her loss, in this case being the right to exercise autonomy by making an adequately informed choice.

All of these cases demonstrate that courts have decreasingly shown deference to medical professionals and increasingly tried to provide remedies to aggrieved patients under the broad rubric of choice, linked to consent which is, in turn, linked to the ethical and legal value of personal autonomy. In the latter cases, particularly *McFarlane*, *Rees* and *Afshar*, they have done so to vindicate affronts to patients' autonomy and/or dignity. In doing so, they have allowed claims which do not fit comfortably with existing and well-grounded legal doctrines; in a sense, the harm was to choice itself, a rather strange and alien legal interest.

How does *Yearworth* fit into this stream? Again, rather neatly. In *Yearworth*, the Court arrived at an arguably surprising conclusion on

[74] *McFarlane*, para. 123.
[75] *Rees*, para. 8.
[76] [2005] 1 A.C. 134 (HL).
[77] *Ibid*, paras. 14–18.
[78] *Ibid*, para. 56.
[79] *Ibid*, para. 92.

tissue-originator property rights so that the claimants could access remedies that are available under the common law (eg: through negligence). In fact, in a commendable example of clairvoyance, the Court opened a new issue – bailment – and invited submissions thereon, which issue was wholly dependent on the finding (for the first time in the UK) of originator property interests in bodily products. We would therefore characterise *Yearworth* as 'the next step' in the gradual slippage of well settled principles (whether they be the negligence-based requirements of causation or the long-standing prohibition against people owning their bodies or parts or products thereof). It is an example of the slow and selective dissolution of principles in favour of pragmatism.

B. A Fist Full of Problems

The decision in *Yearworth* and its characterisation against the above line of cases gives rise to a number of problems of which we will focus on two. The first relates to the tendency of the above cases and of *Yearworth* to provide a remedy in the face of difficult legal hurdles to same. The second relates to the tendency in these cases, and again inferred from *Yearworth*, to base justice-motivated remedies on vague notions of autonomy. We will consider each problem in turn.

It is certainly laudable to wish to provide a remedy where a loss has occurred, particularly where that loss is consequent on an identifiable party's action or inaction. At a certain level of abstraction, a fair-minded and rights/ethics-oriented approach which identifies just outcomes and remedies and which reasons toward those outcomes/remedies cannot be condemned.[80] However, in the absence of well conceived foundations and well articulated limits, such an outcome-oriented approach will become deeply problematic in practice. One might view the Court's property approach as a natural if pragmatic justice-providing vehicle, but the use of property seems to have been used primarily as a (reflexive) means to make the claims fit within the accepted parameters of negligence (i.e. property was found because of the need for there to be a loss to property if not to the person in order for the claims to sound in damages; it was inductive rather than deductive reasoning).

Without wishing to belabour the foundational issues discussed above, it is worth reiterating that the significance of the court's finding in *Yearworth* (i.e. the finding of property against the weight of precedent) demanded something more, from a remedy-justifying perspective, than the passing references made to the need for the common law

[80] And one might cite the welcome justice extended against the weight of precedent from time to time by ground-breaking judges like Lord Denning.

to advance.[81] In this regard, the Court cited *R.* v. *Kelly*,[82] wherein Rose L.J. noted that the common law does not stand still, and that a future case may arise in which it becomes appropriate to characterise body parts as property without the need to change their attributes through work or skill.[83] Of course, the common law *must* advance, but when it does so, it should do so in a clear and defensible way. The rather uninspired and uninspiring advancement of the property paradigm in *Yearworth* suggests that property was only used as a convenient vehicle through which to achieve a certain outcome. But the property model could lead to numerous harms, including exploitation and the dehumanisation of patients and people more generally.[84] Thus, from a justice-protecting perspective, much will depend on how *Yearworth* is treated as a precedent.

Inductive reasoning aside, there appears to be some growing judicial affinity for a free-standing right to autonomy. Such a right could lead to the improper modification of longstanding negligence principles to the detriment of the law and legal predictability, and to the detriment of the health system and patients.[85] We have already expressed concern over their apparent modification to allow for recovery when one's autonomy has been affronted:

> If this is the interest now to be given recognition, it has potentially far-reaching implications for patients' rights and doctors' duties. For one thing, it may require a role for the law beyond the confines of the negligence action where injury is confined to that which is physical, economic or psychiatric. Being deprived of a choice does not fit within such categories, yet it is the basis upon which the House of Lords was able to make the link to Ms. Chester's physical injury and so cast the action as a near-approximation to a traditional negligence action. But we must ask again, what if there was no physical injury? Is there a basis for recovery nonetheless for affront to 'mere, sheer choice'?[86]

Yearworth may have moved us closer to an answer to our question, but it moves us in a manner which does not fit comfortably into the mould

[81] *Yearworth*, paras. 45(a) and (d).
[82] See n 37 above.
[83] And the Court may have cited any number of cases espousing this principle. For example, in *L.* v. *Human Fertilisation and Embryology Authority and Secretary of State for Health* [2008] EWHC 2149 (Fam), while rejecting the submission that the common law could be a basis for allowing the claimant to preserve, store and use her deceased husband's sperm in the absence of his prior written consent, the court also accepted that the common law 'does not stand still'.
[84] In this respect note A. Campbell, n 55 above.
[85] And much consternation has been expressed over the apparent trajectory: see M. Hogg, "Duties of Care, Causation and the Implications of *Chester* v. *Afshar*" (2005) 9 Edin. Law Rev. 156–167, K. Mason & D. Brodie, "Bolam, Bolam – Wherefore Art Thou Bolam?" (2005) 9 Edin. Law Rev. 398–406, J. Stapleton, "Occam's Razor Reveals an Orthodox Basis for *Chester* v. *Afshar*" (2006) 122 L.Q.R. 426–448, and others.
[86] G. Laurie, "Personality, Privacy and Autonomy in Medical Law" in N. Whitty & R. Zimmermann (eds.), *Rights of Personality in Scots Law: A Comparative Perspective* (Dundee 2009) 453–484, at p. 463.

this stream of cases originally cast. Rather than diminish or avoid traditional negligence principles (such as causation or the need for physical injury), *Yearworth* reinterprets property so as to comply with the negligence need for loss/injury, and in doing so, it joins ranks with the above precedents. The *Yearworth* Court extended the property paradigm in an effort to give a remedy (in negligence) to sympathetic claimants who suffered a blow to their autonomy – in this case the ability to have a family life that their ailments might have robbed them of but for the existence of modern medical technologies, which, in this case, were deployed negligently. That the Court is concerned with the claimants' (potential) loss of the ability to "live the life they had wished and planned for" (to borrow the language used in *Rees*) is suggested by the following:

> … [W]e 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.[87]

Its keen cognizance of autonomy and the protection of individualistic claims relating to the self is further suggested by its heavy reliance on the statutory provisions which erect consent (an autonomy-based legal tool) as a gate-keeping mechanism to legitimate certain dealings associated with the human body. By its apparent awareness of the claimants' autonomy interests, *Yearworth* fulfils the promise of the above stream and represents another in this growing line of cases which is reshaping or abandoning old practices in an effort to provide new remedies.

Given the machinations in *Yearworth*, the questions of whether there exists a pure "right to autonomy" and/or a right to a remedy for loss of autonomy-based choice (unaccompanied by physical damage) still remains. In this regard, we might take notice of the fact that autonomy has already been recognised as an important principle underlying several of the rights found in the European Convention on Human Rights (1950).[88] If a free-standing autonomy right is ultimately found to exist, we might also take notice of the fact that, once a human right has been recognised, an adequate remedy for its breach must be

[87] *Yearworth*, para. 53.

[88] In this regard, see *Pretty* v. *U.K.* (2002) 35 E.H.R.R. 1. See also *Guerra & Others* v. *Italy* (1998) 26 E.H.R.R. 357, and *McGinley* v. *U.K.* (1999) 27 E.H.R.R. 1, both of which impose positive duties on states to provide information to people so they might make autonomous choices on matters concerning their health.

provided.[89] As we inch closer to a (currently vague) autonomy right (as opposed to autonomy-based rights), it behooves the courts to ground soundly, define precisely, and delimit rationally the right, and to align it with existing legal doctrines without destroying those doctrines in the process. Some explicit appreciation of the wider consequences of such a judicial movement would also not go amiss.

V. Conclusion

For some, the *Yearworth* decision will be exciting and for others troubling. For us, it is both. For example, while celebrating the Court's obvious desire to do justice and to provide a remedy where a loss has been suffered as a result of another's actions, one might deplore the extension of the property paradigm and question why we are unable (or unwilling) to articulate relationships and rights of control which allow individuals to enjoy appropriate protections and liberties with respect to their bodies without propertising them or eroding existing legal doctrines.[90] In any event, what is clear is that *Yearworth* is both significant and disappointing, both for what it does and what it fails to do. The extent of its significance has yet to be seen.

[89] See ECHR, Art 13.

[90] On this point, see *Stevens v Yorkhill NHS Trust and Another* (2007) 95 B.M.L.R. 1 (Ct Sess), a Scottish case which offers an alternative approach based on human dignity. In that case, the parent pursuer argued that, despite authorising a post-mortem, it was never explained to her that this entailed removing and retaining organs from her deceased child. Her discovery of this led to severe depression and, ultimately, to loss of employment. She argued that: (1) a negligence-based duty to suitably inform and provide her with the opportunity to give appropriate consent to the procedure, and, separately, to the removal and storage of tissue was breached; and (2) wrongful interference with a corpse is actionable under Scots common law in its own right as an affront to human dignity.