McGeorge Law Review

Volume 23 | Issue 1 Article 9

1-7-1991

Moore v. Regents of the University of California: Doctor, tell me moore!

Luisa A. M. Giuffrida
University of the Pacific; McGeorge School of Law

Moore v. Regents of the University of California: Doctor, tell me moore!

INTRODUCTION

Complex biotechnology research is vital to modern society because of the possibilities that research presents for curing disease, improving human health and increasing medical and scientific knowledge.[1] This research is not without cost, and it depends on stable, accessible sources of cellular and genetic material for continuing study and advancement.[2] In the area of human cell research, the need for human cell sources gives rise to challenging questions regarding how, and at what price, these cell sources should be secured. Intimately associated with such questions is the issue of the nature and extent of an individual's property rights in the individual's own body. Finding useful answers to these questions calls for complex legal analysis of both property and tort law, as well as thorough consideration of appropriate social, ethical and legal policies.

The California Supreme Court recently addressed some of these questions in the case of *Moore v. Regents of the University of California.*[3] The plaintiff in *Moore* alleged that he had a property interest in his excised spleen and tissue which defendants had used in commercially profitable medical research.[4] The California

1. U.S. Congress, Office of Technology Assessment (OTA), *New Developments in Biotechnology: Ownership of Human Tissues and Cells* (1987) at 3 (discussing policy issues involved with the use of human biological materials).

2. *Id.* at 4.

3. Moore v. Regents of the University of California, 51 Cal. 3d 120, 793 P.2d 479, 271 Cal. Rptr. 146 (1990), *rehearing denied* August 30, 1990, *cert. denied*, 111 S. Ct. 1388 (1991).

4. *Moore*, 51 Cal. 3d at 125, 793 P.2d at 480, 271 Cal. Rptr. at 147.

Supreme Court, reversing the Court of Appeal,[5] held that no property right existed.[6] The Court further held that a physician has a fiduciary duty to inform a patient of any personal interest the physician has in the patient's treatment.[7] Although the *Moore* decision partially addressed the concerns of the particular plaintiff involved, it has also provided a breeding ground for a multitude of future cases involving the commercial use of human bodily tissue.

This Note explores the California Supreme Court's resolution of the issues presented in the *Moore* case. Part I presents a background to the major legal concepts employed by the Court in reaching its decision.[8] Part II summarizes the facts of the case and reviews the various opinions produced by the Court.[9] Part III suggests some of the potential legal ramifications of the *Moore* decision and posits some of the questions which remain unanswered after *Moore*.[10]

I. LEGAL BACKGROUND

Traditionally, the law has not recognized a specific cause of action addressing the deprivation of property rights in one's own tissue.[11] In fact, the question of whether property rights even exist in human tissues and cells was largely ignored by the common law.[12] One explanation for the lack of legal interest in this area is that historically, human body tissue, as a commodity, has had no

---

5. *See* Moore v. Regents of the University of California, 215 Cal. App. 3d 709, 249 Cal. Rptr. 494 (2nd Dist. Cal. 1988) (previous cite 202 Cal. App. 3d 1230), *superseded by*, 51 Cal. 3d 120, 793 P.2d 479, 271 Cal. Rptr. 146 (1990).

6. *Moore*, 51 Cal. 3d at 147, 793 P.2d at 497, 271 Cal. Rptr. at 164.

7. *Id.*

8. *See infra* notes 11-101 and accompanying text.

9. *See infra* notes 102-286 and accompanying text.

10. *See infra* notes 289-331 and accompanying text.

11. OTA Report, *supra* note 1, at 9.

12. *Id.* The idea that there are no commercial property rights in the human body first developed in the English ecclesiastical courts and was later carried over into the Common Law courts. Stason, *The Uniform Anatomical Gift Act*, 23 BUS. LAW. 919, 922 (1968). *Cf.* Comment, *Spleen for Sale:* Moore v. Regents of the University of California *and the Right to Sell Parts of Your Body*, 51 OHIO ST. L.J. 499, 503 (1990) (noting that the common law occasionally characterized living bodies as property, as in the attachment of a debtor in payment of the debt).

real commercial value.[13] However, as demonstrated by the *Moore* case, new medical technologies have made some human cells extremely valuable.[14] Now that developments in biotechnology research have brought these issues before the courts, the judiciary must resolve disputes by analogizing to precedent derived in other circumstances.[15] The *Moore* decision is an example of this reasoning process.

To better understand the California Supreme Court's decision, a review of relevant case law and pertinent statutes relied on by the *Moore* court will be helpful. The *Moore* court focused primarily on two areas of the law, informed consent in the doctor-patient relationship and the tort of conversion.[16]

A. Informed Consent

The doctrine of informed consent embodies the general principle of law that a physician has a duty to disclose to his patient all substantial risks associated with a particular medical treatment.[17] The purpose behind the informed consent doctrine is to enable the patient, who is faced with choosing among or refusing various treatments, to assess both the risks and benefits and to make an intelligent judgment about medical care.[18] Once effective consent is given, the patient is not entitled to a tort recovery for harm resulting from the conduct to which he consented.[19]

---

13. Havens, *A Patient's Commercial Interests in the Products of Genetic Engineering: The Brave New World of* Moore v. Regents of the University of California, 36 MED. TRIAL TECHNIQUE QUAR. 137, 146 (1990).

14. *Id.*

15. OTA Report, *supra* note 1 at 9.

16. Moore v. Regents of the University of California, 51 Cal. 3d 120, 128-47, 793 P.2d 479, 483-97, 271 Cal. Rptr. 146, 150-64.

17. BLACK'S LAW DICTIONARY 399 (Abr. 5th ed. 1983). *See also* RESTATEMENT (SECOND) OF TORTS § 892B(i) (1979) (discussing informed consent).

18. BLACK'S LAW DICTIONARY 399 (Abr. 5th ed. 1983).

19. *See* RESTATEMENT (SECOND) OF TORTS § 892A (1979) (discussing effect of consent). Section 892A reads, in pertinent part:

> (1) One who effectively consents to the conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it.
>
> (2) To be effective, consent must be. . .

The leading California case on the issue of informed consent is the 1972 California Supreme Court decision of *Cobbs v. Grant.*[20] In *Cobbs*, the plaintiff underwent surgery to remove a duodenal ulcer.[21] During surgery, the plaintiff sustained injury to his spleen, a risk inherent in the procedure, necessitating its removal in a subsequent operation.[22] Shortly after the second operation, and as a result of the removal of the duodenal ulcer, the plaintiff developed a gastric ulcer that was treated by a third operation in which a large part of his stomach was removed.[23] After being discharged from the hospital, the plaintiff began bleeding internally as a result of the third operation and a fourth hospital stay was required to treat this problem.[24]

All of the complications suffered by the *Cobbs* plaintiff were risks inherent in the course of treatment prescribed.[25] However, because the probability of any of these risks materializing was quite small,[26] the defendant surgeon had not discussed such risks with the plaintiff.[27] The plaintiff brought an action for malpractice alleging negligence by the surgeon and, alternatively, that plaintiff's consent was ineffective because of the defendant's failure to inform him fully of the risks inherent in the original operation.[28]

At trial, the jury rendered a general verdict in favor of the plaintiff.[29] The Supreme Court of California, however, found the evidence insufficient to support a finding of negligence.[30] Since

---

(b) to the particular conduct, or to substantially the same conduct.

Id.

20. 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

21. *Id.* at 234, 502 P.2d at 4, 104 Cal. Rptr. at 508.

22. *Id.* at 235, 502 P.2d at 4, 104 Cal. Rptr. at 508.

23. *Id.* at 235, 502 P.2d at 5, 104 Cal. Rptr. at 508.

24. *Id.*

25. *Id.*

26. Spleen trauma results in about five percent of these cases. *Id.* at 235, 502 P.2d at 4, 104 Cal. Rptr. at 508.

27. *Id.* at 234, 502 P.2d at 4, 104 Cal. Rptr. at 508. The Court noted, however, that the defendant surgeon did explain the general nature of the operation to the plaintiff prior to obtaining a standard written consent. *Id.* at 234, 502 P.2d at 4, 104 Cal. Rptr. at 508.

28. *Id.* at 235-36, 502 P.2d at 5, 104 Cal. Rptr. at 509.

29. *Id.* at 234, 502 P.2d at 5, 104 Cal. Rptr. at 509.

30. *Id.* at 234, 502 P.2d at 4, 104 Cal. Rptr. at 508.

it could not be determined whether the jury had relied on the negligence theory or the informed consent theory in reaching its decision, the case was reversed and remanded with guidelines for jury instructions on the nature of informed consent.[31]

In the *Cobbs* opinion the California Supreme Court set forth principles for determining the effectiveness of a patient's consent to medical treatment.[32] Specifically, the *Cobbs* Court concluded that a physician has an obligation to apprise the patient of all available choices regarding any prescribed course of therapy and of the potential risks of each choice.[33] The physician must also disclose any additional information which a skilled practitioner of good standing would ordinarily provide.[34] The standard employed by the *Cobbs* Court for deciding whether a particular risk must be disclosed to the patient is whether the risk would have a material effect on the patient's judgment.[35]

Additionally, the Court indicated that a plaintiff must show a causal relationship between the injury sustained and the tainted consent.[36] In order to satisfy this requirement, the Court used an objective test; the plaintiff must demonstrate that a reasonable person in the plaintiff's position would not have consented to the treatment if full disclosure had been made.[37] Of course, the plaintiff must also allege that the plaintiff would not have consented to the procedure if the plaintiff had known all the relevant facts.[38] The issue does not rest solely on the plaintiff's

---

31. *Id.*

32. *Id.* at 242-45, 502 P.2d at 9-12, 104 Cal. Rptr. at 513-15.

33. *Id.* at 243, 502 P.2d at 10, 104 Cal. Rptr. at 514. The physician is not required to make full disclosure if the patient is incompetent or incapable of evaluating the information. *Id.*

34. *Id.* at 244-45, 502 P.2d at 11, 104 Cal. Rptr. at 515.

35. *Id.* at 245, 502 P.2d at 11, 104 Cal. Rptr. at 515. Protection of the patient's right to autonomous decision-making is the primary consideration upon which the physician's duty to disclose is based. *Id. See* Truman v. Thomas, 27 Cal. 3d 285, 611 P.2d 902, 165 Cal. Rptr. 308 (1980) (physician must divulge both the risks of having treatment and not having treatment).

36. Cobbs v. Grant, 8 Cal. 3d at 245, 502 P.2d at 11, 104 Cal. Rptr. at 515.

37. *Id.* at 245, 502 P.2d at 11-12, 104 Cal. Rptr. at 515-16. The Court was unwilling to rely exclusively on the plaintiff's testimony that he would not have consented to the treatment if he had known of the risk. *Id.* at 245, 502 P.2d at 11, 104 Cal. Rptr. at 515. Justice would not be served by placing the defendant physician at the mercy of the plaintiff's hindsight at trial, after the potential risk had materialized. *Id.*

38. *Id.*

credibility, however, and for that reason the objective test was mandated.[39]

The Court in *Cobbs* determined that the right to weigh the risks and benefits and give consent to a course of treatment belongs ultimately to the patient, not the physician.[40] The *Cobbs* case continues to be the standard on informed consent, and serves as the foundation for the *Moore* Court's informed consent analysis.

B. The Tort of Conversion

The tort of conversion has its roots in the old common law action of trover.[41] To maintain an action in trover, the plaintiff had to allege that he was possessed of certain goods, that he had lost the goods, that the defendant found the goods and instead of returning them, the defendant converted the goods to his own use.[42] It is from this final part of the pleading that the tort of conversion derived its name.[43]

Gradually, the elements of losing and finding the goods came to be seen as a legal fiction and were no longer required.[44] Hence, the plaintiff needed only to demonstrate the plaintiff's right to possession and the actual conversion of the item by the defendant.[45] The underlying theory of conversion was that the defendant must pay for his usurpation of the plaintiff's chattel, and that the plaintiff was entitled to damages amounting to the full value of the chattel at the time of conversion.[46] Upon satisfaction of the judgment, title passed to the defendant.[47] Effectively, a

---

39. *Id.*

40. *Id.* at 243, 502 P.2d at 10, 104 Cal. Rptr. at 514.

41. *See* PROSSER & KEETON, THE LAW OF TORTS § 15 at 89 (5th ed. 1984) (discussing conversion). *See generally* Prosser, *The Nature of Conversion*, 42 CORN L.Q. 168 (1957) (discussing the tort of conversion).

42. *See* PROSSER & KEETON, *supra* note 41, § 15 at 89.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

conversion action could be viewed as a forced sale of the goods to the defendant.[48]

Modern law restricts the tort of conversion to situations involving serious interference with the plaintiff's possessory rights in the goods.[49] The Restatement Second of Torts defines conversion as an intentional exercise of dominion or control over the property of another which justifies restitution to the property owner.[50] To establish a cause of action for conversion, a plaintiff must demonstrate that he owns the property allegedly converted, that the property was wrongfully taken and that damages were sustained.[51] The Restatement outlines various significant factors for determining if a conversion exists.[52]

The California Supreme Court reviewed the tort of conversion in a well-known case, *Poggi v. Scott.*[53] In *Poggi*, the plaintiff tenant brought a conversion action against his landlord after the defendant landlord had unwittingly sold as junk some two hundred barrels of wine belonging to the plaintiff.[54] The Court concluded that the defendant had assumed unjustified control over the wine barrels which resulted in a loss to the plaintiff.[55] The defendant's intent and lack of knowledge of the plaintiff's interest in the

---

48. *Id.*

49. *Id.* at 89.

50. *See* RESTATEMENT (SECOND) OF TORTS § 222 A (1965). That section states:

(1) Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel. (2) In determining the seriousness of the interference and the justice of requiring the actor to pay the full value, the following factors are important:

(a) the extent and duration of the actor's exercise of dominion or control;

(b) the actor's intent to assert a right in fact inconsistent with the other's right of control;

(c) the actor's good faith;

(d) the extent and duration of the resulting interference with the other's right of control;

(e) the harm done to the chattel;

(f) the inconvenience and expense caused to the other.

Id.

51. PROSSER & KEETON, *supra* note 41, at 88-106.

52. RESTATEMENT (SECOND) OF TORTS § 222A(2), *supra* note 50.

53. 167 Cal. 372, 139 P. 815 (1914).

54. *Id.* at 372, 139 P. at 815.

55. *Id.* at 376, 139 P. at 816.

barrels, or the value of the contents, were irrelevant to the conversion cause of action.[56] Conversion, the Court stated, rests on the defendant's unjust tampering with the plaintiff's property and the resultant injury to the plaintiff.[57] Based on the allegations summarized above, the Court concluded that the plaintiff had adequately plead a cause of action for conversion and was entitled to take his case to a jury.[58]

California cases in more recent times have established the elements of the tort of conversion to be: (1) plaintiff's ownership or right to possession of the property at the time of conversion; (2) defendant's conversion by a wrongful action or disposition of plaintiff's property rights; and (3) damages.[59] Interpreting California law, the Ninth Circuit discussed these factors in the case of *Tyrone Pacific International, Inc. v. MV Eurychili.*[60] There it was noted that conversion is defined as any wrongful act of dominion over another's personal property inconsistent with the other's rights therein.[61] Further, in *City of Los Angeles v. Superior Court*[62] it was recognized that the tort of conversion is a form of strict liability.[63] Thus, inquiry into the defendant's good faith, motive, or lack of knowledge is inappropriate.[64]

In analyzing the tort of conversion as employed in the *Moore* case, it is necessary to determine what types of property interests are convertible. Recall that at common law, the conversion action

---

56. *Id.* at 375, 139 P. at 816.

57. *Id.*

58. *Id.* at 376, 139 P. at 816.

59. *See, e.g.*, Tyrone Pacific International, Inc. v. MV Eurychili, 658 F.2d 664, 666 (9th Cir. 1981) (citing Hartford Financial Corp. v. Burns, 96 Cal. App. 3d 591, 598, 158 Cal. Rptr. 169, 172 (1979)) (carrier's refusal to issue bills of lading to shipper was a wrongful act of dominion over shipper's property). *See also* CAL. CIV. CODE § 3336 (West 1970) (discussing the presumption relating to damages for conversion of personal property).

60. 658 F.2d 664 (9th Cir. 1981) (interpreting the elements of conversion under California law and the proper measure of damages under California Civil Code section 3336).

61. *Tyrone*, 658 F.2d at 666.

62. 85 Cal. App. 3d 143, 149 Cal. Rptr. 320 (1978) (charging conversion of property seized for nonpayment of taxes).

63. *City of Los Angeles*, 85 Cal. App. 3d at 149, 149 Cal. Rptr. at 323.

64. *Id.*

contained the fiction of losing and finding property.[65] Therefore, any tangible chattel which was capable of being lost and found could be converted.[66] Real property and the fixtures attached to it could not be converted since these things could not be lost.[67] However, once the fixtures had been severed from the land, they became personal property and were considered capable of conversion.[68]

Similarly, intangible property was at one time thought to be unconvertible since it could not be lost or found.[69] Case law expanded the conversion action to include documents which held intangible rights, such as promissory notes, checks, and stock certificates.[70] Later, the conversion action was further expanded to include intangible rights where a vital tangible object had been converted, for example savings bank books and insurance policies.[71] Eventually, conversion was allowed where no tangible item accompanied the intangible rights, such as where a corporation refuses to register a shareholder stock transfer on its books.[72]

There is a dearth of case or statutory law on the issue of whether a convertible property interest exists in the human body.[73] However, courts have recognized a limited sort of property right regarding dead bodies.[74] That is, courts have granted a type of

---

65. *See supra* notes 42, 44 and accompanying text (discussing the losing and finding fiction embedded in the tort of conversion).

66. *See* PROSSER & KEETON, *supra* note 41, § 15 at 90 (discussing conversion).

67. *Id.*

68. *Id.* at 91.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* Prosser notes that the expansion of the conversion action has been limited to intangible rights that are customarily associated with some type of document. *Id.* at 92. However, there seems to be no essential reason why there might not be conversion of other intangibles such as the goodwill of a business or an idea. *Id.*

73. *See* Note, *Ownership of Human Tissue: Life After* Moore v. Regents of the University of California, 75 VA. L. REV. 1363, 1363-64 (1989).

74. *Id.* at 1364.

property right to the next of kin of the deceased to determine how the body will be disposed of.[75]

The California Supreme Court recognized this right in the 1899 case of *O'Donnell v. Slack*.[76] Mrs. O'Donnell, a widow, successfully petitioned for leave to take the body of her deceased husband to Ireland for burial in accordance with his dying wish.[77] The Court stated that although the body of a decedent is not part of the decedent's estate, the decedent does have enough of a proprietary interest to allow for valid testamentary disposition of his own body.[78] The Court went on to find that the next of kin has a protectable property interest in the body of the deceased.[79] Mrs. O'Donnell was granted a quasi-property right in her husband's body, entitling her to recover if that right was interfered with.[80] More recently, in *Cohen v. Groman Mortuary Inc.*,[81] a case concerning negligent mishandling of a body for burial, it was stated that although there is no property right per se in the body of a deceased person, a quasi-property right of possession is recognized for the limited purpose of arranging for burial.[82]

There is a lack of authority for the proposition that convertible property rights attach to living humans or to their excised tissue. The possibility of such property rights existing was alluded to in a Maryland criminal case, *Venner v. State*.[83] The defendant in *Venner* had swallowed balloons filled with narcotics in an attempt to avoid confiscation of the drugs by the police.[84] Later, the

---

75. A number of cases recognize a quasi-property right in dead bodies. *See, e.g.*, Sinai Temple v. Kaplan, 54 Cal. App. 3d 1103, 127 Cal. Rptr. 80 (1976); Cohen v. Groman Mortuary Inc., 231 Cal. App. 2d 1, 41 Cal. Rptr. 481 (1964); Gray v. Southern Pacific Co., 21 Cal. App. 2d 240, 68 P.2d 1011 (1937); Enos v. Snyder, 131 Cal. 68, 63 P. 170 (1900); O'Donnell v. Slack, 123 Cal. 285 (1899). *See also* CAL. HEALTH & SAFETY CODE § 7100 (West Supp. 1990) (concerning right to control disposition of remains).

76. 123 Cal. 285, 55 P. 906 (1899).

77. *Id.* at 290, 55 P. at 907.

78. *Id.* at 288, 55 P. at 907.

79. *Id.* at 289, 55 P. at 907.

80. *Id.*

81. 231 Cal. App. 2d 1, 41 Cal. Rptr. 481 (1964).

82. *Id.* at 4, 41 Cal. Rptr. at 482.

83. 30 Md. App. 599, 354 A.2d 483 (1976), *affirmed*, 279 Md. 47, 367 A.2d 949 (1977), *cert. denied*, 431 U.S. 932, 97 S. Ct. 2638 (1977).

84. 354 A.2d at 486.

defendant passed the balloons, which were found in his excrement.[85] In ruling on whether the balloons were property abandoned by the defendant, the court stated in dicta that "[I]t could not be said that a person has no property right in wastes or other materials which were once a part of or contained within his body . . . ."[86] The *Venner* court held that in the instant case, however, the defendant had shown no intent to assert a right to ownership over his excrement and, therefore, intended to abandon it.[87]

It is against this background that the *Moore* Court considered and ultimately rejected the possibility of a property right existing in the cells excised from John Moore's body, and denied a conversion right of action.[88] However, the Court did not rely solely on hornbook conversion law. The decision also reviewed pertinent statutory law in an effort to determine legislative intent about the existence of property rights in excised cells.[89]

C. Statutory Law Reflecting Property Rights in the Human Body

There are few statutes which directly address the issue of property rights in the human body. One prominent example is the Uniform Anatomical Gift Act (UAGA), drafted in 1968 by the Commissioners on Uniform State Laws in response to the increasing need for transplantation organs, and subsequently adopted in some form by all fifty states.[90] The UAGA can be viewed as legislative recognition of the quasi-property right extant

---

85. *Id.*

86. 354 A.2d at 498. The court went on to state that under generally accepted social principles these materials would be discarded and would be considered legally abandoned. *Id.* at 498-99.

87. *Id.* at 499.

88. *See infra* notes 144-186 and accompanying text (discussing the conversion analysis in *Moore*).

89. *See infra* notes 167-172 and accompanying text (discussing the *Moore* majority's review of statutory law).

90. R. SCOTT, THE BODY AS PROPERTY 71 (1981). *See* Uniform Anatomical Gift Act (1968) U.L.A. §§ 1-11 (West 1983).

in the human body.[91] This is exemplified by the statute's express authorization of post-mortem devises of one's own body and body parts.[92]

The UAGA provides that any individual may make an anatomical gift, effective at the donor's death, for certain purposes such as transplantation and the advancement of medical science.[93] The UAGA as written by the Commissioners on Uniform State Laws in 1968 did not address the subject of payment for body parts.[94] However, the 1987 amended version of the UAGA, which was adopted in California, specifically forbids the sale or purchase for valuable consideration of organs for purposes of transplantation or therapy.[95] The more troubling issues, presented in the *Moore* case, of intervivos sale of body parts and tissues are not covered by the Act, which addresses only the use of the organs after the donor's death.[96]

California has also enacted legislation which regulates the disposition of certain human biological materials.[97] These statutes are based on legislative policies concerning dignified and sanitary disposition of human bodies and tissues, rather than on traditional property law.[98] For example, California Government Code section

---

91. Comment, *Regulating The "Gift of Life" -- The 1987 Uniform Anatomical Gift Act*, 65 WASH. L. REV. 171, 181 (1990) (discussing the 1987 UAGA and its implications for Washington law).

92. *See* CAL. HEALTH & SAFETY CODE §§ 7150-7156.5 (West Supp. 1991) (codifying Uniform Anatomical Gift Act).

93. *Id.* § 7150.5 (West Supp. 1991) (concerning making or refusing to make anatomical gifts by an individual). *See id.* § 7153(a) (West Supp. 1991) (purposes for which anatomical gifts may be made).

94. *See* R. SCOTT, *supra* note 90, at 72. *See* Stason, *The Uniform Anatomical Gift Act*, 23 BUS. LAW. 919, 928 (1968) (discussing the difficulty inherent in drafting a statutory provision precluding payment and advising that until the payment question becomes a problem of large dimension, it should be left to the decency of intelligent human beings); Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 G.W. L. REV. 1, 32-36 (1989) (proposing the creation of a market for transplantable organs).

95. CAL. HEALTH & SAFETY CODE § 7155(a) (West Supp. 1991). Reasonable payment for removal, processing, storage, preservation and other costs is apparently acceptable. *Id.* § 7155(b) (West Supp. 1991).

96. *See* Comment, *supra* note 91, at 177.

97. *See infra* notes 98-103 and accompanying text (discussing California legislation concerning disposition of human biological materials).

98. Moore v. Regents of the University of California, 51 Cal. 3d at 137, 793 P.2d at 489, 271 Cal. Rptr. at 156.

27491.46 permits retention of human pituitary glands following an autopsy, for purposes of university research or growth hormone manufacture by a public agency.[99] California Government Code section 27491.47 allows the coroner to remove corneal tissue if, among other conditions, the coroner has no knowledge that the deceased would have refused consent to the removal.[100] The coroner may also retain tissues after an autopsy for research or educational purposes if specified statutory conditions are met and consent is obtained from the patient or an authorized source.[101] Health and Safety Code section 7054.4 prescribes the proper procedure for disposal of human tissues, remains, and infectious waste after scientific use of these items has been completed.[102] It should also be noted that California permits the transfer of human blood, and that consideration is appropriate in such a transfer.[103]

As previously stated, there is no statutory law directly responding to the issues raised in the *Moore* case. The *Moore* Court was restricted to reviewing the few statutes concerning

---

99. CAL. GOV'T CODE § 27491.46 (West 1988).

100. *Id.* § 27491.47 (West 1988).

101. *See id.* § 27491.45 (West 1988) (retention of body tissues for investigation; removal of body parts for transplant, or therapeutic, or scientific purposes pursuant to the UAGA).

102. CAL. HEALTH & SAFETY CODE § 7054.4 (West Supp 1991) (providing that human remains must be disposed of by incineration, interment or other method). *See id.* § 7054.3 (West Supp. 1990) (mandating disposal of dead human fetus by interment or incineration).

103. *See* CAL. HEALTH & SAFETY CODE §§ 1603.5-1606 (West 1990) (relating to procurement and distribution of human blood). Generally, the transfer is termed a service rather than a sale in order to avoid liability for contaminated blood under either the Uniform Commercial Code or general principles of product liability. *Id.* § 1606 (West 1990). *See also* Note, *Hepatitis, AIDS and the Blood Product Exemption from Strict Products Liability in California: A Reassessment*, 37 HASTINGS L.J. 1101, 1109-11 (1986) (proposing that immunity from strict liability should not extend to manufacturers of blood products). The courts are aware that avoiding strict liability is the reason for this fiction; the property law ramifications of a transfer seemingly are unaffected by the "service" terminology. *See, e.g.*, Hyland Therapeutics v. Superior Court, 175 Cal. App. 3d 509, 514, 220 Cal. Rptr. 590, 592-93 (1985) (holding that procurement of blood products is a service and that strict liability was therefore not applicable); Cramer v. Queen of Angels Hospital, 62 Cal. App. 3d 812, 816, 133 Cal. Rptr. 339, 340-41 (1976) (holding that application of California Health and Safety Code section 1606 to bar recovery for patient who allegedly contracted hepatitis from contaminated blood did not violate equal protection); Shepard v. Alexian Brothers Hospital, 33 Cal. App. 3d 606, 611, 109 Cal. Rptr. 132, 135 (1973) (strict liability not imposed for hospital transfusion of contaminated blood since hospitals are not in the business of producing or marketing blood).

specific body parts for clues as to the legislative intent in the area of human body property rights.

II. THE CASE

A. The Facts

On October 5, 1976, plaintiff John Moore visited the Medical Center at the University of California, Los Angeles (UCLA) seeking treatment for a form of cancer known as hairy-cell leukemia.[104] Moore was treated by Dr. David W. Golde, who recommended removing Moore's spleen in order to treat the disease.[105] Moore consented to this surgery.[106]

Prior to the operation, Dr. Golde and Shirley G. Quan, a researcher at UCLA, determined that Moore's cancerous cells were uncommon and that Moore's blood and blood components would be commercially valuable.[107] Golde and Quan arranged to receive portions of Moore's excised spleen for use in future research projects unrelated to Moore's medical treatment.[108] Although Moore signed the standard consent forms in anticipation of the splenectomy, he was not informed of Golde's research plans, and he did not consent to the use of his bodily parts or substances in

104. Moore v. Regents of the University of California, 51 Cal. 3d 120, 125, 793 P.2d 479, 480, 271 Cal. Rptr. 146, 148 (1990). Hairy cell leukemia, or leukemic reticuloendotheliosis, is a rare, usually chronic disorder characterized by a proliferation of "hairy" cells (probably B-lymphocytes) in certain organs and blood. STEDMAN'S MEDICAL DICTIONARY 1225 (24th ed. 1982).

105. *Moore*, 51 Cal. 3d at 126, 793 P.2d at 481, 271 Cal. Rptr. at 148. Dr. Golde was the head of the Hematology-Oncology Department at the UCLA Medical Center and an expert on hairy-cell leukemia. Note, *supra* note 73, at 1365.

106. *Moore*, 51 Cal. 3d at 126, 793 P.2d at 481, 271 Cal. Rptr. at 148.

107. *Id.*

108. *Id.*

that research.[109] The splenectomy was successfully performed at the UCLA Medical Center in October of 1976.[110]

During the period between November 1976 and September 1983, Moore made a number of follow-up visits to UCLA from his home in Seattle at the direction of Dr. Golde, who allegedly made false representations that the visits were necessary to Moore's medical treatment.[111] On each of these occasions, Dr. Golde withdrew additional samples of blood, blood serum, skin, bone marrow aspirate, and sperm in furtherance of his own research.[112]

From the initial splenectomy and subsequent biopsies, Golde and Quan isolated Moore's T-lymphocytes[113] and cloned a cell line[114] that overproduced lymphokines[115] as a result of infection by human T-cell leukemia virus type II (HTLV-II).[116] The cell

---

109. *Id.* In September 1983, while unaware of the commercial value of the research, Moore signed a consent form allowing removal of blood samples which "may be used for the purpose of scientific investigation." *See* Moore v. Regents of the University of California, 215 Cal. App. 3d 709, 769 Appendix B (consent of John Moore). This consent form stated: "I (do/do not) voluntarily grant to the University of California any and all rights I, or my heirs, may have in any cell line or any potential product which might be developed from the blood and/or bone marrow obtained from me." *Id.*

110. *Moore*, 51 Cal. 3d at 126, 793 P.2d at 481, 271 Cal. Rptr. at 148. Moore used the term "blood and bodily substances" in his complaint to refer to all bodily tissue, including cells, spleen, blood and genetic material. *See* Moore v. Regents of the University of California, 215 Cal. App. 3d 709, 709, 249 Cal. Rptr. 494, 494 (1988). Hereinafter this Note will use the term "cells" as a generic term encompassing all of these items.

111. *Moore*, 51 Cal. 3d at 126, 793 P.2d at 481, 271 Cal. Rptr. at 148.

112. *Id.*

113. A lymphocyte is a type of white blood cell formed in lymphoid tissue throughout the body, such as the spleen and tonsils, and sometimes in bone marrow. STEDMAN'S MEDICAL DICTIONARY, *supra* note 104, at 816. A T-lymphocyte, or T cell, is of great immunological importance. *Id.*

114. A cell line is a sample of cells that has undergone the process of adaptation to artificial laboratory cultivation and is capable of sustaining continuous, long-term growth in culture. OTA Report, *supra* note 1, at 158.

115. Lymphokines are soluble substances, released by sensitized lymphocytes on contact with specific antigen, which helps cellular immunity by stimulating activity of monocytes and macrophages. STEDMAN'S MEDICAL DICTIONARY, *supra* note 104 at 817. One of these is "immune" (antigen) interferon. *Id.*

116. Moore v. Regents of the University of California, 51 Cal. 3d 120, 127, 793 P.2d 479, 481-82, 271 Cal. Rptr. 146, 148-49.

line, named the Mo cell line, was patented on March 20, 1984.[117] The patent listed Golde and Quan as the inventors of the Mo cell line and the Regents of the University of California (Regents) as the assignee.[118]

Between 1981 and 1983 the Regents and Golde secured agreements with Genetics Institute, Inc. (GI) and Sandoz Pharmaceuticals Corporation (Sandoz) for commercial exploitation of the Mo cell line and its derivative products.[119] Although the value of the Mo cell line is difficult to establish, Moore alleged that it has a potential market value of about three billion dollars.[120] In September of 1984, Moore sued Golde, Quan, the Regents, GI, and Sandoz alleging thirteen causes of action including conversion of property, lack of informed consent, and breach of fiduciary duty.[121]

The superior court sustained the defendants' demurrers to each cause of action, reasoning that the first cause of action, conversion, was defective and that the remaining causes were insufficient to state a claim because they incorporated by reference the conversion cause of action.[122] The District Court of Appeal reversed, holding that an individual has a property right in his own bodily materials

---

117. *Id.* Some of the products of the Mo cell line are: colony-stimulating factor (CSF); Immune interferon (type II); T-cell growth factor (TCGF, interleukin II); and neutrophil migration-inhibitory factor (NIF-T). *See* U.S. Patent No. 4,438,032 (Mar. 20, 1984) (claiming various methods of using the cell line to produce lymphokines).

118. *Moore*, 51 Cal. 3d at 127, 793 P.2d at 482, 271 Cal. Rptr. at 149. *See* U.S. Patent No. 4,438,032 (Mar. 20, 1984) (Mo cell line patent).

119. *Moore*, 51 Cal. 3d at 127-28, 793 P.2d at 482, 271 Cal. Rptr. at 149. The agreement with GI made Golde a paid consultant with rights to 75,000 shares of common stock. *Id.* GI further agreed to pay Golde and the Regents at least $330,000 over three years, including a pro-rata share of Golde's salary in exchange for exclusive access to the Mo cell line and its derivative products. *Id.* Sandoz was later added to the agreement and the compensation payable to Golde and the Regents was increased by $110,000. *Id.*

120. *Id.* at 127, 793 P.2d at 482, 271 Cal. Rptr. at 149. *See supra* note 117 (products of the Mo cell line).

121. *Moore*, 51 Cal. 3d at 128, n.4, 793 P.2d at 482, n.4, 271 Cal. Rptr. at 149, n.4. Moore's complaint alleged all of the following causes of action: (1) conversion; (2) lack of informed consent; (3) breach of fiduciary duty; (4) fraud and deceit; (5) unjust enrichment; (6) quasi-contract; (7) bad faith breach of the implied covenant of good faith and fair dealing; (8) intentional infliction of emotional distress; (9) negligent misrepresentation; (10) intentional interference with prospective advantageous economic relationships; (11) slander of title; (12) accounting; and (13) declaratory relief. *Id.*

122. *Id.* at 128, 793 P.2d at 482-83, 271 Cal. Rptr. at 149-150.

and that Moore's complaint was adequate to state a cause of action for conversion.[123] The District Court of Appeal also remanded the case to the superior court for an express ruling on the remaining twelve causes of action.[124] The defendants appealed to the California Supreme Court for a ruling on the denial of defendants' demurrers.[125]

B. *The Majority Opinion*

On July 9, 1990, the California Supreme Court reversed the Court of Appeal, holding that while Moore had stated a cause of action for lack of informed consent or breach of fiduciary duty, he had not stated a cause of action for conversion.[126] The case was remanded to the Court of Appeal for direction to the superior court to overrule Golde's demurrers to the breach of fiduciary duty and lack of informed consent causes of action.[127]

---

123. *Id.* at 128, 793 P.2d at 483, 271 Cal. Rptr. at 150. The Court of Appeal agreed with the superior court that the allegations against GI and Sandoz were insufficient, but directed the superior court to give Moore leave to amend. *Id. See also* Moore v. Regents of the University of California, 215 Cal. App. 3d 709, 249 Cal. Rptr. 494 (1988).

124. *Moore*, 51 Cal. 3d at 128, 793 P.2d at 483, 271 Cal. Rptr. at 150.

125. Since the allegations of the complaint must be accepted as true for purposes of ruling on demurrers, the factual questions of the case have yet to be addressed.

126. *Moore*, 51 Cal. 3d at 125, 793 P.2d at 480, 271 Cal. Rptr. at 147. The case produced four separate opinions. Justice Panelli wrote the majority opinion in which Chief Justice Lucas and Justices Eagleson and Kennard concurred. *See id.* at 124-48, 793 P.2d at 480-97, 271 Cal. Rptr. at 147-64. Justice Arabian wrote a separate concurrence. *See id.* at 148-50, 793 P.2d at 497-98, 271 Cal. Rptr. at 164-65 (Arabian, J., concurring). Justice Broussard wrote an opinion concurring on the breach of fiduciary duty analysis and dissenting on the conversion cause of action analysis. *See id.* at 150-60, 793 P.2d at 498-506, 271 Cal. Rptr. at 165-73 (Broussard, J., concurring and dissenting). Justice Mosk authored a dissenting opinion. *See id.* at 160-85, 793 P.2d at 506-23, 271 Cal. Rptr. at 173-90 (Mosk, J., dissenting).

127. *Id.* at 148, 793 P.2d at 497, 271 Cal. Rptr. at 164. The Supreme Court also gave directions to sustain, with leave to amend, the demurrers of the other defendants regarding the breach of fiduciary duty and lack of informed consent causes of action; sustain, without leave to amend, all defendants' demurrers to the conversion cause of action; and hear all defendants' remaining demurrers. *Id.*

1. Breach of Fiduciary Duty and Lack of Informed Consent

In deciding that the defendants had breached a fiduciary duty, the majority relied on the decision of *Cobbs v. Grant*[128] for its analytical foundation.[129] The California Supreme Court had recognized in *Cobbs* that a competent adult is free to refuse or submit to medical treatment, and that to be effective, a patient's consent must be informed.[130] Furthermore, the Court noted that a physician has a fiduciary duty to disclose all information material to the patient's informed consent decision.[131]

The Court discussed in some detail the breadth of the informed consent doctrine, and concluded that this concept was broad enough to require that a patient be told of his physician's personal research or economic interests in the case, as a necessary corollary to informed consent.[132] In support of this conclusion, the *Moore* Court referred to California Business and Professions Code section 654.2,[133] which prohibits a physician from charging a patient on behalf of any organization in which the physician has a significant beneficial interest unless the patient first receives written disclosure of that interest.[134] Persuasive authority was also found in California Health and Safety Code section 24173,[135] which

---

128. 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

129. *Moore*, 51 Cal. 3d at 129, 793 P.2d at 483, 271 Cal. Rptr. at 150. *See* notes 20-40 and accompanying text (discussing the *Cobbs* decision).

130. *Moore*, 51 Cal. 3d at 129, 793 P.2d at 483, 271 Cal. Rptr. at 150.

131. *Id.*

132. *Id.* at 128-32, 793 P.2d at 483-85, 271 Cal. Rptr. at 150-52. The Court noted that a sick patient "deserves to be free of any reasonable suspicion that his doctor's judgment is influenced by a profit motive." *Id.* at 129, 793 P.2d at 483, 271 Cal. Rptr. at 150 (citing Magan Medical Clinic v. Cal. State Bd. of Medical Examiners, 249 Cal. App. 2d 124, 132, 57 Cal. Rptr. 256 (1967)).

133. California Business and Professions Code section 654.2(a) states in pertinent part:

> It is unlawful for any person . . . to charge, bill or otherwise solicit payment from a patient on behalf of, or refer a patient to, an organization in which the licensee, or the licensee's family, has a significant beneficial interest, unless the licensee first discloses in writing to the patient, that there is such an interest . . . .

CAL. BUS. & PROF. CODE § 654.2(a) (West 1990).

134. *Moore*, 51 Cal. 3d at 129-30, 793 P.2d at 484, 271 Cal. Rptr. at 151.

135. California Health and Safety Code section 24173 states in pertinent part:

> As used in this chapter, "informed consent" means the authorization given . . . to have a medical experiment performed after each of the following conditions have been satisfied: . . . (c) the subject . . . is informed both verbally and within the written

mandates that a physician planning to conduct medical experiments involving a drug or device must inform the patient of the sponsor or funding source of the experiment.[136]

The Court was unmoved by Dr. Golde's argument that later scientific use of excised cells could not affect a patient's medical interests.[137] The Court apparently agreed with this argument in cases where the physician's interest accrues after he recommends a medical procedure to a patient.[138] However, the majority was concerned that a physician with a pre-existing research interest may not be completely objective in his judgment.[139] While acknowledging that a patient's judgment may be corrupted to the detriment of his health by disclosure of research and economic interests, the Court found the patient's interest in complete and informed decision-making to be of primary concern.[140] Citing *Cobbs*, the Court noted that under California law, a physician does not have unbridled discretion to determine what to disclose.[141] Further, the Court stated that "unlimited discretion in the physician is irreconcilable" with the patient's right to make the ultimate decision regarding medical treatment.[142]

Applying these principles to Dr. Golde's behavior prior to the splenectomy on October 20, 1976, as well as the doctor's post-operative treatment of Moore, the Court concluded that Moore's

---

> consent form, in nontechnical terms and in a language in the subject . . . is fluent, of the following facts of the proposed medical experiment which might influence the decision to undergo the experiment, including, but not limited to: . . . (9) The name of the sponsor or funding source, if any, or manufacturer if the experiment involves a drug or device, and the organization, if any, under whose general aegis the experiment is being conducted.

CAL. HEALTH & SAFETY CODE § 24173(c)(9) (West 1984). *See id.* § 24173 (informed consent).

136. *Moore*, 51 Cal. 3d at 130, 793 P.2d at 484, 271 Cal. Rptr. at 151.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 130-32, 793 P.2d at 484-85, 271 Cal. Rptr. at 151-52.

141. *Id.*

142. *Id.* 131, 793 P.2d at 485, 271 Cal. Rptr. at 152.

allegations stated a cause of action for failure to obtain informed consent or, alternatively, breach of a fiduciary duty.[143]

2. *Conversion*

In a subsequent portion of the opinion, the California Supreme Court addressed the issue of whether Moore had properly pleaded a cause of action for conversion of his blood and bodily substances.[144] Moore argued that he had a continuing property interest in his cells which gave him the authority to decide what use would be made of the cells after excision.[145] Moore maintained that the defendants' use of the cells without his consent constituted the tort of conversion, and that the appropriate remedy would be to grant Moore a proprietary interest in any products the defendants might later develop from his cells or the patented cell line.[146]

The California Supreme Court, however, declined to accept Moore's conversion theory.[147] First, the majority noted a complete lack of reported decisions addressing the issue of liability for conversion of human tissues.[148] The Court further noted that human cell lines have been used in scientific research since 1951 making it unlikely that the dearth of case law was attributable to

---

143. *Id.* at 133, 793 P.2d at 486, 271 Cal. Rptr. at 153. The Court upheld the superior court ruling that Moore had not adequately plead breach of fiduciary duty based on Golde's initial examination on October 5, 1976, since Moore did not allege that Golde intended at that time to exploit Moore's cells. *Id.* The Court noted that the splenectomy itself was of therapeutic value in treating Moore's condition. *Id.* at 133, n.11, 793 P.2d at 486, n.11, 271 Cal. Rptr. at 153, n.11. The Court did not rule on the liability of the remaining defendants for breach of fiduciary duty since that issue had not been reached below. *Id.* at 133, 793 P.2d at 486, 271 Cal. Rptr. at 153. However, the Court did indicate that defendants Quan, the Regents, GI and Sandoz had no fiduciary responsibility to Moore, and that liability could only attach vicariously through the conduct of Golde. *Id.* at 134, 793 P.2d at 487, 271 Cal. Rptr. at 154. The superior court had not addressed the sufficiency of Moore's allegations that the Regents and Quan acted as Golde's agents. *Id.* at 133, 793 P.2d at 486, 271 Cal. Rptr. at 153.

144. *Id.* at 133-47, 793 P.2d at 487-97, 271 Cal. Rptr. at 154-164.

145. *Id.* at 135, 793 P.2d at 487, 271 Cal. Rptr. at 154.

146. *Id.*

147. *See id.* at 133-47, 793 P.2d at 487-97, 271 Cal. Rptr. at 154-164 (analyzing Moore's conversion cause of action).

148. *Id.* at 135, 793 P.2d at 487, 271 Cal. Rptr. at 154.

"recent developments in technology."[149] Second, the majority considered whether a legal duty should be imposed on researchers to investigate the title and consent attached to every human cell sample used in research.[150] The majority began this aspect of its conversion analysis by recognizing the myriad social, ethical and commercial policy concerns intimately intertwined in this case.[151] Yet, the Court recognized a jurisprudential principle of reluctance to find new tort duties in the face of such complicated and conflicting policy issues.[152]

The Court next reviewed existing law, finding no basis for a conversion cause of action.[153] In the absence of direct authority supporting the alleged ownership interest in his blood and bodily substances, Moore analogized his purported rights to those recognized as privacy-interest rights.[154] Moore cited the publicity cases of *Lugosi v. Universal Pictures*[155] and *Motschenbacher v.*

---

149. *Id.* at 135 n.15, 793 P.2d at 487 n.15, 271 Cal. Rptr. at 154 n.15.

150. *Id.* at 135, 793 P.2d at 487, 271 Cal. Rptr. at 154. Imposing conversion liability would be the practical equivalent of requiring investigation into the title of each cell sample, the pedigree, since such an investigation would be the sole means of avoiding liability. *Id.* at 135 n.16, 793 P.2d at 487 n.16, 271 Cal. Rptr. at 154, n. 16. *See supra* notes 41-88 and accompanying text (discussing the tort of conversion).

151. *Moore*, 51 Cal. 3d at 136, 793 P.2d at 488, 271 Cal. Rptr. at 155.

152. *Id.* at 136, 793 P.2d at 488, 271 Cal. Rptr. at 155. In support of the advised judicial reticence to allow new tort actions, the majority cited *Nally v. Grace Community Church*, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988) (refusing to allow a negligence action for "clergy malpractice") and *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988) (barring tort remedy for breach of covenant of good faith in employment contract). *Moore*, 51 Cal. 3d at 136, 793 P.2d at 488, 271 Cal. Rptr. at 155. Justice Panelli was also concerned that the Court should not impose new duties in situations where a legislative determination of duty would be more appropriate. *Id.*

153. *Moore*, 51 Cal. 3d at 136, 793 P.2d at 488, 271 Cal. Rptr. at 155.

154. *Id.* at 137-38, 793 P.2d at 489, 271 Cal. Rptr. at 156. Moore did not claim that he retained a right to actual possession of the cells. *Id.* Possession would be inconsistent with California Health and Safety Code section 7054.4 which requires that "recognizable anatomical parts, human tissues, anatomical human remains or infectious waste following conclusion of scientific use shall be disposed of by interment, [or] incineration . . . ." CAL. HEALTH & SAFETY CODE § 7054.4 (West Supp. 1991).

155. 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979) (in suit brought by widow of movie actor Bela Lugosi seeking to enjoin licensing of Count Dracula character, held that right to exploit likeness and name is personal to artist and must be exercised by artist during lifetime).

R.J. Reynolds Tobacco Company[156] for the proposition that a person has a protected proprietary interest in his own likeness.[157] The *Lugosi* and *Motschenbacher* cases established that a tort remedy is available for the unauthorized commercial use of a person's likeness.[158] However, the remedy provided for in *Lugosi* and *Motschenbacher* was not based on property law principles.[159] Moore urged the Court to expand this recognized proprietary interest in one's persona to one's genetic material.[160] Genetic material, Moore argued, is "far more profoundly the essence of one's human uniqueness" than the persona protected in the wrongful publicity cases.[161]

The majority was unpersuaded by this argument, given the scope of defendants' previously issued patent.[162] That patent enabled its owners to manufacture lymphokines,[163] which are produced using genetic material that is the same in all human beings, unlike one's persona.[164] The majority was similarly unmoved by Moore's analogy to cases recognizing the right of patients to reject medical treatment.[165] The patient's rights are

---

156. 498 F.2d 821 (9th Cir. 1974) (in suit by professional racing car driver against cigarette manufacturer for alleged misappropriation of driver's likeness in television advertisements, court held that California courts would protect individual's proprietary interest in individual's own identity).

157. *Moore*, 51 Cal. 3d at 137-38, 793 P.2d at 489-90, 271 Cal. Rptr. at 156-57.

158. *Id.* at 138, 793 P.2d at 490, 271 Cal. Rptr. at 157.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. Lymphokines are soluble substances released by sensitized lymphocytes (white blood cells) on contact with a specific antigen, which helps cellular immunity. STEDMAN'S MEDICAL DICTIONARY, *supra* note 104, at 817. The usefulness of a cell line is its characteristic of continuous multiplication and division, i.e. an ability to continually reproduce itself. Elman, *Physician's Self-Disclosure Emerges as a Key Issue from the Moore Case*, Genetic Engineering News, Sept. 1990, at 3. In this case, the cell line enabled study of, among other things, T-lymphocytes infected with HTLV-II. *Id.*

164. *Moore*, 51 Cal. 3d at 138-39, 793 P.2d at 490, 271 Cal. Rptr. at 157.

165. *Id.* at 139-40, 793 P.2d at 491, 271 Cal. Rptr. at 158. Moore relied on a 1986 case, Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297, for the rule that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body . . . ." *Moore*, 51 Cal. 3d at 139-40, 793 P.2d at 491, 271 Cal. Rptr. at 158. The Court of Appeal used this language to buttress its decision that a patient had the power to direct the use of his cells. *Id. Cf.* Cruzan v. Director, Missouri Department of Health, 110 S. Ct. 2841 (1990) (recognizing that a competent patient has a liberty interest in refusing unwanted medical treatment and holding that the U.S. Constitution does not prevent a state from requiring clear and convincing evidence of

more effectively safeguarded, the Court held, by compelling full disclosure of the physician's research interests than by allowing a conversion cause of action.[166]

The majority next considered the effect of California statutory law on Moore's claim of conversion.[167] The main focus of California's statutory scheme is to ensure the safe, sanitary disposal of human remains and infectious waste.[168] California Health and Safety Code section 7054.4 mandates internment or incineration of human tissues and infectious waste after scientific use of these items is completed.[169] The language of this section does not indicate legislative intent regarding compensation of a patient for unauthorized use of his cells.[170] However, since the statute was designed to severely restrict a patient's control over removed cells, the majority concluded that the statute erased virtually all of the property rights attached to the cells, with the effect that conversion was no longer meaningful.[171] The Court was of the opinion that enough of a property interest remained to allow a fully-informed patient to refuse consent to a scientific use of the cells that the patient did not support.[172] Again, the Court concluded that the ability to withhold consent under those circumstances would be protected by requiring full disclosure to the patient.[173]

Additionally, the majority was unwilling to expand conversion liability in this instance, because the patented cell line and derivative products were both factually and legally separate from the cells removed from Moore's body.[174] Federal patent law

---

incompetent patient's desire to terminate life support); In re Quinlan, 70 N.J. 10, 355 A.2d 647 (1976) (decision of patient to terminate life support in event of persistent vegetative state was part of patient's right of privacy which could be asserted on her behalf by her guardian).

166. *Moore*, 51 Cal. 3d at 140, 793 P.2d at 491, 271 Cal. Rptr. at 158.

167. *Id. See supra* notes 90-103 and accompanying text (discussing relevant California statutory law).

168. *Moore*, 51 Cal. 3d at 140, 793 P.2d at 491, 271 Cal. Rptr. at 158.

169. *Id. See* CAL. HEALTH & SAFETY CODE § 7054.4 (West Supp. 1991) (disposal of human remains after scientific use).

170. *Moore*, 51 Cal. 3d at 140, 793 P.2d at 491, 271 Cal. Rptr. at 158.

171. *Id.* at 140-41, 793 P.2d at 492, 271 Cal. Rptr. at 159.

172. *Id.* at 141, 793 P.2d at 492, 271 Cal. Rptr. at 159.

173. *Id.*

174. *Id.*

provides for the patenting of organisms developed through "human ingenuity."[175] Naturally occurring, non-modified living organisms may not be patented.[176] The patent issued to the Regents provided authority for the majority to declare that the Mo cell line was the product of Golde's research, and not of Moore's own body.[177]

The majority next examined two policy considerations implicated by expanding conversion liability in the context of Moore's allegations.[178] The first is a patient's right to make independent decisions about medical treatment.[179] This right must be safeguarded with effective remedies against physicians who fail to disclose relevant information and who fail to obtain properly informed consent.[180] Balanced against this right is the second policy consideration of limiting the potential liability that may attach to socially useful activities such as biotechnology research.[181] In weighing these policy considerations, the majority placed great emphasis on the latter, and on the possibility that medical research would be impeded by expanding conversion

175. *Id.* Title 35 U.S.C. § 101 mandates that "any new and useful process, machine, manufacture or composition of matter, or any new and useful improvement thereof" may be granted patent protection. 35 U.S.C.A. § 101 (West 1984). An unaltered product of nature is not patentable because it does not belong to any of the classes in section 101. D. CHISUM, PATENTS, vol. 1 §§ 1.01-1.02[7] (1988). However, a genetically-altered microorganism may be patentable as either a manufacture or composition of matter. *Id. See also* Diamond v. Chakrabarty, 447 U.S. 303 (1980) (holding that a modified microorganism could receive patent protection as either a manufacture or composition of matter); *Cf.* M. Sitzman, Copyright: An Alternative Within the Field of Biotechnology? (1990) (unpublished manuscript) (copy on file at *Pacific Law Journal*) (suggesting that genetically engineered works are a proper subject for copyright protection).

176. *Moore*, 51 Cal. 3d at 141-42, 793 P.2d at 492, 271 Cal. Rptr. at 159.

177. *Id.* at 141-42, 793 P.2d at 493, 271 Cal. Rptr. at 160.

178. *Id.* at 142-47, 793 P.2d at 493-97, 271 Cal. Rptr. at 160-64.

179. *Id.* at 143, 793 P.2d at 493, 271 Cal. Rptr. at 160.

180. *Id.* The patient's right to full disclosure and informed consent is examined in *Cobbs v. Grant*, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972). *See supra* notes 20-40 and accompanying text (discussing the *Cobbs* case).

181. *Moore*, 51 Cal. 3d at 143, 793 P.2d at 493, 271 Cal. Rptr. at 160.

liability.[182] Since conversion is a strict liability tort,[183] an aggrieved patient in a *Moore*-type action would be able to recover from any party that used the patient's cells, even if that party acted in good faith and was unaware that the patient had not consented to use of his cells.[184]

The majority concluded that scientific exchange and progress would be stifled if researchers were required to ascertain the title of each cell sample prior to use.[185] Unwilling to take any action which could have an adverse impact on medical research, and persuaded that the fiduciary duty and full disclosure obligations would effectively protect patients, the majority declined to extend conversion liability to cases involving unauthorized commercial exploitation of human cells.[186]

C. Justice Mosk's Dissenting Opinion

In a dissenting opinion, Justice Mosk challenged the majority's analysis of Moore's conversion cause of action.[187] Justice Mosk responded to the majority's emphasis on the lack of precedent

---

182. *Id.* at 144-45, 793 P.2d at 494-95, 271 Cal. Rptr. at 161-62. The majority gleaned much of the supporting data for this thesis from a report issued by the Office of Technology Assessment (OTA). *See* OTA Report, *supra* note 1. The majority also referred to another California Supreme Court case, *Brown v. Superior Court*, 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988), wherein the Court had determined that if drug manufacturers were subject to strict liability, they would be less likely to undertake new pharmaceutical research for fear of incurring large damages awards. *See infra* note 226 (discussing Justice Mosk's dissent on the analogy to *Brown*).

183. *See supra* notes 62-64 and accompanying text (discussing strict liability aspect of conversion).

184. *Moore*, 51 Cal. 3d at 144, 793 P.2d at 494, 271 Cal. Rptr. at 161.

185. *Id.* at 144-45, 793 P.2d at 494-95, 271 Cal. Rptr. at 161-62. Currently, human cell lines are exchanged by researchers and scientists on a large scale. *Id.* Tissue banks and tissue repositories are engaged for storing and disseminating cell samples. *Id.* These repositories process tens of thousands of requests annually; samples are often distributed at no cost in order to further scientific research and interchange. *Id.*

186. *Id.* at 145-47, 793 P.2d at 495-97, 271 Cal. Rptr. at 162-64. *See generally* Bohrer, *Old Blood In New Bottles*, 9 BIOTECH. L. REP. 251, 252-53 (1990) (arguing that the *Moore* decision confuses the issue of the relief sought by Moore with the issue of whether Moore properly pleaded a conversion cause of action).

187. *Moore*, 51 Cal. 3d at 160-61, 793 P.2d at 506, 271 Cal. Rptr. at 173 (Mosk, J., dissenting). Justice Mosk agreed with the majority that a physician must disclose to the patient any personal interest the physician has in the patient's treatment. *Id.* at 178, 793 P.2d at 519, 271 Cal. Rptr. at 186 (Mosk, J., dissenting).

cases establishing an ownership interest in excised human cells by noting that *Moore* is a case of first impression.[188] Equally unsatisfying, according to Justice Mosk, was the majority's contention that the Legislature should determine the issue.[189] Justice Mosk stated that courts are often the primary instruments for adapting the common law to advances in science and technology.[190] Moreover, Justice Mosk was not persuaded by the majority's interpretation of California statutory law as restricting a patient's control over his excised cells, thereby eliminating any property interest in those cells.[191] The plain language of California Health and Safety Code section 7054.4 refers to "scientific use" of body tissues before destruction.[192] The statute does not specifically mention the commercial exploitation of cells. It would reach beyond the ordinary interpretation of the statute, Justice Mosk argued, to find that the term "scientific use" contemplated the type of commercial exploitation Moore alleged.[193]

Further, Justice Mosk indicated that it did not follow that by simply limiting the use which could be made of excised cells, the statute removed all property rights.[194] Rather, the concept of property is expansive enough to include every type of right and

---

188. *Id.* at 160-62, 793 P.2d at 506-07, 271 Cal. Rptr. at 173-74 (Mosk, J., dissenting).

189. *Id.* at 162-63, 793 P.2d at 507-08, 271 Cal. Rptr. at 174-75 (Mosk, J., dissenting).

190. *Id.* (Mosk, J., dissenting). *See, e.g.*, Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 294 (1980) (adopting theory of market share liability imposed on defendant pharmaceutical manufacturers for injuries resulting from prescription drug).

191. *Moore*, 51 Cal. 3d at 163-66, 793 P.2d at 508-10, 271 Cal. Rptr. at 175-77 (Mosk, J., dissenting). *Cf. supra* notes 167-172 and accompanying text (discussing the majority's analysis of California statutory scheme).

192. *Moore*, 51 Cal. 3d at 164, 793 P.2d at 508, 271 Cal. Rptr. at 175 (Mosk, J., dissenting). Justice Mosk agreed that the term "scientific use" would include routine postoperative examination of excised tissue. *Id.* The term might also refer to purely scientific, as opposed to commercial, studies of tissue done with the consent of the patient. *Id.*

193. *Id.* (Mosk, J., dissenting). The interpretation of California Health & Safety Code § 7054.4 advocated by the dissent would distinguish between a truly scientific use of human cells, which might produce a valuable by-product, and a purposeful commercial development of a cell-derived product. *Id.* at 164-65, 793 P.2d at 508-09, 271 Cal. Rptr. at 175 (Mosk, J., dissenting).

194. *Id.* (Mosk, J., dissenting). *See supra* notes 169-172 and accompanying text (discussing majority opinion that section 7054.4 functioned to eliminate property rights).

interest capable of possession and transfer.[195] Analogizing to zoning and nuisance laws, Justice Mosk noted that property rights of owners are often restricted by statute, but are not thereby considered extinguished.[196] A protectable property interest remains even if the property owner's choices are limited by law.[197] Therefore, even assuming section 7054.4 circumscribed Moore's rights to his excised tissues, Justice Mosk proffered that some property interests must survive.[198] Justice Mosk envisioned that Moore retained the right to arrange for the commercial development of his own cells, at least to the extent afforded the defendant.[199]

Further, Justice Mosk rejected the majority's contention that Moore could not maintain a conversion action because the Mo cell line and its products were distinguishable from Moore's own cells.[200] The purpose of developing a cell line is to extend the life of the parent cells indefinitely.[201] Moore's cells were valuable to the defendants because they produced an abundance of specific proteins.[202] It is the commercial exploitation of that protein producing capacity that was at issue in this case.[203]

Additionally, Justice Mosk concluded that the defendants' patent on the Mo cell line could not be used to defeat Moore's claim of conversion.[204] The majority neglected the fact that the patent was not granted until seven years after the cells were removed from Moore's body.[205] Assuming, arguendo, that the

---

195. *Moore*, 51 Cal. 3d at 165, 793 P.2d at 509, 271 Cal. Rptr. at 176 (Mosk, J., dissenting) (citing Yuba River Power Co. v. Nevada Irr. Dist., 207 Cal. 521, 523, 279 P. 128, 129 (1929)).

196. *Id.* at 165-66, 793 P.2d at 509-10, 271 Cal. Rptr. at 176-77 (Mosk, J., dissenting).

197. *Id.* at 166, 793 P.2d at 510, 271 Cal. Rptr. at 177 (Mosk, J., dissenting). Since property or title is a complex bundle of rights, duties, powers and immunities, the pruning away of some or even many of these elements does not entirely destroy the title. *Id.* (citing People v. Walker, 33 Cal. App. 2d 18, 20, 90 P.2d 854, 858 (1939)).

198. *Id.* (Mosk, J., dissenting).

199. *Id.* (Mosk, J., dissenting). The Court of Appeal noted that "[d]efendants' position that plaintiff cannot own his tissue, but that they can, is fraught with irony." *Id.*

200. *Id.* at 167-69, 793 P.2d at 510-12, 271 Cal. Rptr. at 178-79 (Mosk, J., dissenting).

201. *Id.* at 167, 793 P.2d at 511, 271 Cal. Rptr. at 178 (Mosk, J., dissenting).

202. *Id.* (Mosk, J., dissenting).

203. *Id.* (Mosk, J., dissenting).

204. *Id.* at 167-69, 793 P.2d at 511-12, 271 Cal. Rptr. at 178-79 (Mosk, J., dissenting).

205. *Id.* at 167-68, 793 P.2d at 511, 271 Cal. Rptr. at 178 (Mosk, J., dissenting).

patent did terminate Moore's rights, the patent could not retroactively insulate the defendants for their unauthorized use of Moore's cells before the patent issued.[206] Moreover, it is not clear that approval of the patent would completely eradicate Moore's interests.[207] Justice Mosk agreed with the majority that the Mo cell line was principally a product of defendants' ingenuity, but countered that the cell line would have been impossible without Moore's cells.[208] Since Moore's contribution to the project was vital, the patent should not be used to terminate all of Moore's rights.[209]

Justice Mosk advocated the adoption of the "joint inventor" solution and argued that the policy reasons supporting joint inventor patents should apply with equal force to cell donors.[210] Justice Mosk concluded that any person who contributes in a substantial way to the development of a product should be allowed to share in the resulting commercial rewards.[211] Under this theory, the Regents' patent would not prevent Moore from being compensated for the use of his cells because he would be a contributor of record.[212]

Justice Mosk next turned to the policy reasons propounded by the majority for barring a conversion cause of action.[213] Justice Mosk noted that the majority's first consideration, the protection of patients' autonomous decisions, would be furthered by allowing a conversion action, since the threat of conversion liability would encourage the physician to fully disclose any personal interests.[214]

---

206. *Id.* at 168, 793 P.2d at 511, 271 Cal. Rptr. at 178 (Mosk, J., dissenting).

207. *Id.* (Mosk, J., dissenting).

208. *Id.* (Mosk, J., dissenting).

209. *Id.* at 169, 793 P.2d at 512, 271 Cal. Rptr. at 179 (Mosk, J., dissenting).

210. *Id.* The OTA Report, however, determined that cell donors should not be considered inventors. OTA Report, *supra* note 1. Cell donors apparently do not qualify as "joint inventors" as that term is defined in federal law. *Moore*, 51 Cal. 3d at 169, 793 P.2d at 512, 271 Cal. Rptr. at 179 (Mosk, J., dissenting). *See* 35 U.S.C.A. § 116 (West Supp. 1991) (requirements for joint inventor patents).

211. *Moore*, 51 Cal. 3d at 169, 793 P.2d at 512, 271 Cal. Rptr. at 179 (Mosk, J., dissenting).

212. *Id.* (Mosk, J., dissenting).

213. *Id.* at 169-73, 793 P.2d at 512-15, 271 Cal. Rptr. at 179-82 (Mosk, J., dissenting).

214. *Id.* at 169-70, 793 P.2d at 512-13, 271 Cal. Rptr. at 179-80 (Mosk, J., dissenting). The majority conceded that potential conversion liability would indirectly protect patient decision making. *Id.* at 144, 793 P.2d at 494, 271 Cal. Rptr. at 161.

Continuing, Justice Mosk analyzed the policy considered controlling by the majority, the protection of innocent parties from excessive liability.[215] Justice Mosk did not agree that the threat of conversion liability would adversely impact free and efficient scientific exchange.[216]

The reality of biotechnology research is that scientific exchange is not as free as it was prior to the 1980 United States Supreme Court decision in *Diamond v. Chakrabarty*,[217] which held that biological products of genetic engineering are patentable.[218] While the majority viewed the *Chakrabarty* decision as facilitating developments within the field of biotechnology, Justice Mosk observed a downside to the patentability of genetically engineered biological products.[219] The desire for patent protection has compelled researchers to restrict access to their products, keeping valuable scientific information secret in order to meet the "novelty" requirement of patentability.[220] In point of fact, the defendants in *Moore* had attested in their patent application that the use of the Mo cell line and its products was strictly controlled.[221] To Justice Mosk, the notion of free scientific exchange of information and materials no longer exists.[222] In addition, the involvement of pharmaceutical and biotechnology companies in academic research has contributed to greater restrictions on the use

---

215. *Id.* at 170-73, 793 P.2d at 513-15, 271 Cal. Rptr. at 180-82 (Mosk, J., dissenting). Justice Mosk considered the majority's emphasis on "innocent parties" to be misplaced. *Id.* at 170, n.14, 793 P.2d at 513, n.14, 271 Cal. Rptr. at 180, n.14 (Mosk, J., dissenting). The complaint cited numerous examples of duplicitous behavior by the defendants which were inconsistent with the characterization of innocence accepted by the majority. *Id.*

216. *Id.* at 170-71, 793 P.2d at 513, 271 Cal. Rptr. at 180 (Mosk, J., dissenting).

217. 447 U.S. 303 (1980) (holding that a live, genetically altered microorganism was patentable as either a "manufacture or composition of matter" within the meaning of 35 U.S.C. § 101).

218. *Moore*, 51 Cal. 3d at 170-71, 793 P.2d at 513, 271 Cal. Rptr. at 180 (Mosk, J., dissenting).

219. *Id.* (Mosk, J., dissenting).

220. *Id.* at 171, 793 P.2d at 513, 271 Cal. Rptr. at 180 (Mosk, J., dissenting).

221. *Id.* (Mosk, J., dissenting). Justice Mosk stated:

> At no time has the Mo cell line been available to other than the investigators involved with its initial discovery and only the conditioned medium from the cell line has been made available to a limited number of investigators for collaborative work with the original discoverer of the Mo cell line.

Id. (Mosk, J., dissenting) *See* U.S. Patent No. 4,438,032 (Mar. 20, 1984) (Mo cell line patent).

222. *Moore*, 51 Cal. 3d at 171, 793 P.2d at 513, 271 Cal. Rptr. at 180 (Mosk, J., dissenting).

of genetic products, and to the frequent use of trade secret protection for genetic discoveries.[223] The possibility of a conversion cause of action is unlikely to add to the barriers to free exchange which already exist.[224] Furthermore, even where cells and tissues can be freely exchanged, the source of those cells could be easily identified through appropriate record keeping.[225] Since these records would reflect the donor's consent and the restrictions, if any, on use of the donated cells, conversion liability could be avoided.[226]

Additionally, Justice Mosk proffered several policy considerations other than those listed by the majority.[227] Of great importance to Justice Mosk was the "profound ethical imperative to respect the human body as the physical and temporal expression of a unique human persona" that is ingrained in our society.[228] That social ethic is evidenced by our society's refusal to permit the abuse of one person for the benefit of another.[229] The most extreme form of such abuse is slavery.[230] Allowing researchers

---

223. *Id.* at 171-72, 793 P.2d at 514, 271 Cal. Rptr. at 181 (Mosk, J., dissenting) (citing Note, *Patent and Trade Secret Protection in University-Industry Research Relationships in Biotechnology*, 24 HARV. J. ON LEGIS. 191, 218-19 (1987)).

224. *Id.* (Mosk, J., dissenting).

225. *Moore*, at 172, 793 P.2d at 514, 271 Cal. Rptr. at 181 (Mosk, J., dissenting). Researchers already maintain detailed records of tissue sources for other purposes. *Id.* Therefore, requiring annotations as to the state of title of the donor cells would not be unduly burdensome. *Id. See* Note, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 UCLA L. REV. 207 (1986).

226. *Moore*, at 172, 793 P.2d at 514, 271 Cal. Rptr. at 181 (Mosk, J., dissenting). Justice Mosk was unpersuaded by the analogy to *Brown v. Superior Court*, 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988), employed by the majority to illustrate the perils of imposing strict liability on biotechnology researchers. In an opinion authored by Justice Mosk, the Court in *Brown* declined to impose strict liability on manufacturers of "defectively designed" prescription drugs, in part because of the potentially detrimental effect large damage awards would have on pharmaceutical research. *Brown*, 44 Cal. 3d at 1056, 751 P.2d at 479, 245 Cal. Rptr at 421. *Brown* is not good precedent, according to Justice Mosk, because the harm at issue in that case could not have been avoided by better record keeping, and the harm was physical, not financial. *Moore*, 51 Cal. 3d at 172-73, 793 P.2d at 514-15, 271 Cal. Rptr. at 181-82 (Mosk, J., dissenting). Unlike *Moore*, *Brown* was a class action; the damages in a *Moore*-type action would be confined to one plaintiff. *Id.*

227. *Moore*, 51 Cal. 3d at 173-76, 793 P.2d at 515-17, 271 Cal. Rptr. at 182-84 (Mosk, J., dissenting).

228. *Id.* at 173, 793 P.2d at 515, 271 Cal. Rptr. at 182 (Mosk, J., dissenting).

229. *Id.* (Mosk, J., dissenting).

230. *Id.* (Mosk, J., dissenting).

to profit from cells harvested from an unconsenting patient violates that social ethic by permitting researchers to benefit from the commercial exploitation of a patient's body.[231]

As a second consideration, Justice Mosk observed the great value that our society places on principles of equity which prohibit the unjust enrichment of one party at the expense of another.[232] Our courts have consistently recognized a policy of fundamental fairness.[233] This policy, Justice Mosk concluded, cannot sanction gain to one person at the price of harm to another.[234] According to Justice Mosk, a conversion cause of action would provide a remedy for violations of this policy.[235]

Justice Mosk also disagreed with the majority's interpretation of the relevant statutory law.[236] Moreover, he interpreted California statutes as permitting the sale of blood and bodily tissues.[237] Justice Mosk read the UAGA, which prohibits post-mortem transfers of bodies for valuable consideration, to apply only to sales for "transplantation and therapy."[238] According to Justice Mosk, transfers of body parts for "medical or dental education, [or] research . . ." are permitted under the UAGA, as codified in California Health and Safety Code section 7153(a)(1).[239] Concluding that there is no express language barring sales of body parts for these purposes, Justice Mosk stated that such sales would be justified under the language of the statute.[240] The UAGA, therefore, seems to recognize that blood and body parts are a species of transferable property, supportive of Moore's claim to a compensable property interest in his own cells.[241] Justice Mosk concluded that allowing a cause of action

231. *Id.* at 174, 793 P.2d at 516, 271 Cal. Rptr. at 183 (Mosk, J., dissenting).
232. *Id.* (Mosk, J., dissenting).
233. *Id.* (Mosk, J., dissenting).
234. *Id.* (Mosk, J., dissenting).
235. *Id.* (Mosk, J., dissenting).
236. *Id.* at 176-78, 793 P.2d at 517-18, 271 Cal. Rptr. at 184-85 (Mosk, J., dissenting).
237. *Id.* (Mosk, J., dissenting).
238. *Id.* at 176, 793 P.2d at 517, 271 Cal. Rptr. at 184 (Mosk, J., dissenting).
239. *Id.* at 176-77, 793 P.2d at 517-18, 271 Cal. Rptr. at 185-86 (Mosk, J., dissenting).
240. *Id.* at 177, 793 P.2d at 518, 271 Cal. Rptr. at 186 (Mosk, J., dissenting).
241. *Id.* (Mosk, J., dissenting).

for conversion of human cells was the more effective way to protect the interests of plaintiffs such as Moore.[242]

D. Justice Arabian's Concurring Opinion

Justice Arabian authored a brief concurring opinion in which he agreed with the majority's analysis of the *Moore* case.[243] Justice Arabian wrote separately to give emphasis to the moral issue which he found evident, albeit unmentioned, in the majority's reasoning.[244]

The gravamen of Moore's complaint, according to Justice Arabian, is that Moore was requesting the Court to sanction the selling of one's own body for profit.[245] The effect of such a judicial sanction would be to equate the human body, a most special and unique instrument, with the most mundane commercial product.[246] Justice Arabian was convinced that the Court is not the appropriate forum to make a determination of such magnitude.[247] Instead, Justice Arabian commented that the greater judicial wisdom is shown in refusing to make decisions where issues as morally profound and complex as property rights in the human body are involved.[248] The repercussions to human dignity, research, and the commercial marketplace which would flow from judicial recognition of a property right in the human body could not be anticipated by the Court.[249] Thus, a ruling of such gravity clearly belongs to the Legislature.[250]

Justice Arabian also addressed Justice Mosk's dissenting argument that morality and policy concerns favor granting Moore

---

242. *Id.* at 185, 793 P.2d at 523, 271 Cal. Rptr. at 190 (Mosk, J., dissenting).

243. *Moore*, 51 Cal. 3d at 148-50, 793 P.2d at 497-98, 271 Cal. Rptr. at 164-65 (Arabian, J., concurring).

244. *Id.* at 148, 793 P.2d at 497, 271 Cal. Rptr. at 164. (Arabian, J., concurring).

245. *Id.* (Arabian, J., concurring).

246. *Id.* (Arabian, J., concurring).

247. *Id.* at 149, 793 P.2d at 498, 271 Cal. Rptr. at 165 (Arabian, J., concurring).

248. *Id.* (Arabian, J., concurring).

249. *Id.* (Arabian, J., concurring).

250. *Id.* (Arabian, J., concurring).

a conversion cause of action.[251] Justice Arabian shared Justice Mosk's view that morality issues factored strongly in the case, but disagreed that the uncertainty should be resolved in favor of Moore.[252] Rather, Justice Arabian suggested that Justice Mosk's resolution of the morality issues might function to denigrate, instead of protect, human dignity.[253] Since the Court could not possibly predict which outcome would occur, the decision should be left to the Legislature.[254]

E. Justice Broussard's Concurring and Dissenting Opinion

Justice Broussard began his opinion by noting his agreement with the majority on the issues of breach of fiduciary duty and lack of informed consent.[255] Justice Broussard found the majority's analysis of these causes of action persuasive.[256]

Justice Broussard proceeded by taking notice of the unusual fact pattern involved in the *Moore* case.[257] Unlike the typical case, where a patient consents to the use of his cells and their commercial value is discovered much later, Moore's complaint alleges that the value of his cells was known to Dr. Golde prior to excision.[258] According to Justice Broussard, the majority used the fact of the doctor's prior knowledge in determining that Moore could maintain a cause of action for lack of disclosure.[259]

---

251. *Id.* at 148-49, 793 P.2d at 497-98, 271 Cal. Rptr. at 164-65 (Arabian, J., concurring). *See supra* notes 213-235 and accompanying text (discussing the policy arguments in Justice Mosk's dissenting opinion).

252. *Moore*, 51 Cal. 3d at 148-49, 793 P.2d at 497-98, 271 Cal. Rptr. at 164-65 (Arabian, J., concurring).

253. *Id.* at 149, 793 P.2d at 497-98, 271 Cal. Rptr. at 164-65 (Arabian, J., concurring).

254. *Id.* at 149-50, 793 P.2d at 498, 271 Cal. Rptr. at 165 (Arabian, J., concurring).

255. *Id.* at 151, 793 P.2d at 499, 271 Cal. Rptr. at 166 (Broussard, J., concurring and dissenting). *See supra* notes 128-143 and accompanying text (discussing the majority opinion on issues of fiduciary duty and lack of informed consent).

256. *Id.* (Broussard, J., concurring and dissenting).

257. *Id.* at 150-51, 793 P.2d at 498-99, 271 Cal. Rptr. at 165-66 (Broussard, J., concurring and dissenting).

258. *Id.* at 150, 793 P.2d at 499, 271 Cal. Rptr. at 166 (Broussard, J., concurring and dissenting).

259. *Id.* at 151, 793 P.2d at 499, 271 Cal. Rptr. at 166 (Broussard, J., concurring and dissenting).

However, Justice Broussard stated that the majority seemingly forgot about the prior knowledge factor in ruling on the conversion cause of action.[260] Focusing on the possible detrimental effect a conversion cause of action would have on biotechnology research, the majority concluded that there was no property right in excised human cells or body parts.[261] Justice Broussard argued that this focus was misplaced, because the real issue in Moore's complaint was the allegation that the defendants interfered with Moore's legal rights in his cells before they were excised.[262]

Justice Broussard agreed with the majority that conversion would not be appropriate in the ordinary case, where the commercial value of the cells or body parts is unknown to the physician and patient until long after consent has been given.[263] In that situation, the patient has abandoned whatever interest he may have had in the cells prior to their removal.[264] Conversion has occurred, however, when a defendant has wrongfully interfered with a plaintiff's right to determine how the plaintiff's currently intact body parts will be used after their excision.[265]

Justice Broussard argued that the majority ruling was not based on the broad principle that property rights do not attach to excised human tissue.[266] Such a proposition is not logical; if the excised cells had been stolen from a laboratory, no court would conclude that conversion would not lie against the thief.[267] Justice Broussard concluded that the majority holding must be read to mean that the patient retains no property interest in his cells after

---

260. *Id.* (Broussard, J., concurring and dissenting).

261. *Id.* (Broussard, J., concurring and dissenting).

262. *Id.* (Broussard, J., concurring and dissenting).

263. *Id.* at 153, 793 P.2d at 500, 271 Cal. Rptr. at 167 (Broussard, J., concurring and dissenting).

264. *Id.* (Broussard, J., concurring and dissenting).

265. *Id.* at 153, 793 P.2d at 500-01, 271 Cal. Rptr. at 167-68 (Broussard, J., concurring and dissenting).

266. *Id.* at 153, 793 P.2d at 501, 271 Cal. Rptr. at 168 (Broussard, J., concurring and dissenting).

267. *Id.* at 154, 793 P.2d at 501, 271 Cal. Rptr. at 168 (Broussard, J., concurring and dissenting).

they have been removed from his body.[268] Justice Broussard criticized the majority for not addressing the real issue in the case: whether the patient has the right to decide how a removed body part will be used before excision occurs.[269]

Referring to language in the UAGA that expressly authorizes the making of anatomical gifts for any of the purposes specified in the statute, Justice Broussard determined that California law does grant the patient the right to decide how donated body parts are to be used.[270] Although the UAGA applies only to post-mortem transfers of body parts, Justice Broussard found the statute indicative of the state's general policy regarding the control and use of excised body parts.[271] Justice Broussard argued that because the Act permits the donor to specify the recipient or use of the donated part, within statutory limits, it grants the donor the ultimate authority to determine what will be done with the donated material.[272] Justice Broussard concluded California law gives the patient the right, prior to excision, to control the post-removal use of his bodily material.[273] Furthermore, interference with the right to control the use of one's property is compensable under the tort of conversion.[274]

Justice Broussard also disagreed with the majority's interpretation of Health and Safety Code section 7054.4 which governs the disposal of body parts after scientific use.[275] While the majority correctly concluded that the statute restricts the patient's control over an excised body part, the statute in no way

---

268. *Id.* at 153-54, 793 P.2d at 501, 271 Cal. Rptr. at 168 (Broussard, J., concurring and dissenting).

269. *Id.* (Broussard, J., concurring and dissenting).

270. *Id.* (Broussard, J., concurring and dissenting). *See supra* note 93 and accompanying text (discussing UAGA).

271. *Id.* (Broussard, J., concurring and dissenting).

272. *Id. See supra* notes 90-96 and accompanying text (discussing the UAGA as adopted in California).

273. *Moore*, 51 Cal. 3d at 157, 793 P.2d at 503, 271 Cal. Rptr. at 170 (Broussard, J., concurring and dissenting).

274. *Id.* (Broussard, J., concurring and dissenting). *See supra* notes 41-72 and accompanying text (discussing the tort of conversion).

275. *Moore*, 51 Cal. 3d at 156, 793 P.2d at 503, 271 Cal. Rptr. at 170 (Broussard, J., concurring and dissenting).

suggests that the patient is not permitted to choose among the legally allowable uses of the excised part.[276]

Justice Broussard next addressed the majority's analysis of the effect of federal patent law on Moore's claim.[277] Assuming that the majority had accurately interpreted the applicable patent law, there was no reason to believe that patent law would deny Moore a conversion action for the unauthorized use of his cells.[278] According to Justice Broussard, the patent law defense would be relevant only to damages, thus preventing Moore from recovering all of the value of the patent and its derivative products.[279] The amount of damages, however, is not pertinent to the question of whether a conversion action can be maintained.[280]

Finally, Justice Broussard attacked the policy arguments proffered by the majority for rejecting a conversion cause of action.[281] The majority's concern that free access to research materials will be impeded by the threat of conversion liability does not justify the refusal to allow conversion to attach where the defendants did not obtain cells from a cell repository, but rather obtained the cells directly from the plaintiff.[282] Justice Broussard noted that the majority's fear that access to cellular materials would be adversely affected was unfounded since the fact situations in which conversion liability would be appropriate would be very few.[283] Conversion liability would only attach where the physician knowingly misinformed the patient as to the value of the cells or where the patient's specific requests regarding the use of the cells were not followed.[284] Justice Broussard also noted that

---

276. *Id.* (Broussard, J., concurring and dissenting).

277. *Id.* at 157, 793 P.2d at 503, 271 Cal. Rptr. at 170 (Broussard, J., concurring and dissenting).

278. *Id.* (Broussard, J., concurring and dissenting).

279. *Id.* (Broussard, J., concurring and dissenting).

280. *Id.* (Broussard, J., concurring and dissenting).

281. *Id.* at 157-60, 793 P.2d at 504-06, 271 Cal. Rptr. at 171-73 (Broussard, J., concurring and dissenting).

282. *Id.* at 157-58, 793 P.2d at 504, 271 Cal. Rptr. at 171 (Broussard, J., concurring and dissenting).

283. *Id.* at 158-59, 793 P.2d at 504, 271 Cal. Rptr. at 171 (Broussard, J., concurring and dissenting).

284. *Id.* (Broussard, J., concurring and dissenting).

if the true value of the patent and derivative products results from the efforts of the researchers, and not the contribution of the patient, the damages of the patient would be limited accordingly.[285]

Justice Broussard stated that the greatest flaw in the majority's policy argument was that it effectively sanctioned the intentional misappropriation of commercial value from the patient by allowing this exception to conversion liability.[286] Although the majority had focused on the patient's right of autonomous decision-making, Justice Broussard argued that the patient's right to the commercial value of his own body parts was equally important.[287] Justice Broussard concluded that, based on the allegations in the complaint, Moore had adequately pleaded a conversion cause of action.[288]

III. LEGAL RAMIFICATIONS

Read broadly, the decision of the California Supreme Court in *Moore v. Regents of the University of California* stands for the proposition that there is no convertible property interest in human tissue. Concurrently, the decision considerably widens the scope of the doctrine of informed consent by imposing on the physician a fiduciary duty to disclose any personal interest he may have in the case unrelated to the patient's treatment.

Read more narrowly, the *Moore* decision indicates only that extension of conversion liability was unnecessary based on the facts of the case because the plaintiff's rights would be adequately protected by imposing a duty of full disclosure on the physician. Since a number of unanswered questions remain following the decision of *Moore v. Regents of the University of California*, the implications this decision will have on future cases dealing with the

---

285. *Id.* at 159, 793 P.2d at 505, 271 Cal. Rptr. at 172 (Broussard, J., concurring and dissenting).

286. *Id.* (Broussard, J., concurring and dissenting).

287. *Id.* (Broussard, J., concurring and dissenting).

288. *Id.* at 160, 793 P.2d at 506, 271 Cal. Rptr. at 173 (Broussard, J., concurring and dissenting).

issues of informed consent and the nature of an individual's rights in the individual's own tissue remain unclear. It is the purpose of this Note to examine some of the implications of the *Moore* decision, and to propose some solutions to the questions that remain.

A. What "Interests" Must Be Disclosed After Moore?

What is the nature of an "interest" which must be disclosed by a physician to avoid liability for breach of fiduciary duty or lack of valid informed consent following *Moore*? There are no definitions or guidelines given in the opinion beyond the general mandate that any personal interests that may affect the physician's professional judgment must be disclosed to the patient.[289]

Recall that in *Cobbs v. Grant*, the California Supreme Court determined that any information material to the patient's decision-making process must be disclosed.[290] Using this standard, it would appear that the physician should inform the patient of any personal interest of the physician which would have an affect on the patient's decision. In other words, it seems that any personal interest of the physician, which the patient believes would affect the physician's judgment, would require disclosure.

It seems logical, based on the facts in *Moore*, that a physician must disclose any substantial financial interest he may have in his patient's treatment or bodily materials.[291] It is unclear, however, if less direct interests would necessitate disclosure. For instance, must the patient be informed that the physician owns publicly-traded stock in a pharmaceutical company which will own the patent on the products, if any, developed through research in which the patient's cells are used? Certainly the *Moore* rule would support the argument that a physician must disclose the ownership of such stock. Yet, if the physician holds only a few shares, or is

289. *Id.* at 130, 793 P.2d at 483, 271 Cal. Rptr. at 150.

290. *See supra* notes 20-40 and accompanying text (discussing the *Cobbs* case).

291. *See* Annas, *Blinded by Science*, 9 BIOTECH. L. REP. 245, 249-50 (1990) (noting that the *Moore* holding suggests that physicians should disclose their profit on the proposed treatment, their annual income, and other personal financial information).

not an active stockholder, it seems unlikely that mere ownership would influence that physician's judgment or that patient's decision-making. Since the *Moore* holding did not include a concrete test for determining in advance which personal interests a particular physician must disclose, the decision may subject the courts to a case-by-case factual determination of whether a particular plaintiff may bring an action for breach of the *Moore* duty.

B. The Effect of Greater Disclosure on the Doctor-Patient Relationship

Consider also the effect of mandatory disclosure on the doctor-patient relationship. Certainly there is a persuasive argument that detailed and complete disclosure improves this relationship by opening communication and reassuring the patient that the physician is being completely candid. However, it must also be noted that permitting the physician to speculate about the potential uses and value of the patient's excised cells may place the physician in the inappropriate role of financial advisor to the patient.[292] If the physician is not directly involved in the research, the physician may be unable or unwilling to explain and comment on matters outside of the physician's area of expertise. In such a situation, it seems likely that there would be a possibility of confusing or misleading the patient and clouding the patient's ability to make an informed decision.

There is a chance that disclosing research interests may obscure the patient's treatment decisions by shifting the patient's focus from the patient's immediate health needs to the collateral issues of research and development. The deleterious effects on the

---

292. It seems likely that the patient's first request for additional information on potential financial rewards and probabilities of success would be directed to the physician. *See Moore*, 51 Cal. 3d at 152 n.10, 793 P.2d at 485 n.10, 271 Cal. Rptr. at 152 n.10 (noting that the term "fiduciary" does not mean that a physician has a duty to protect the patient's financial interests). *Cf.* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 763 (1986) (state could not compel physicians to inform women seeking abortions of the biological father's financial responsibility or of the medical assistance benefits available since this information was confusing, misleading and not relevant to informed consent).

patient's health and treatment choices are clear. Since requiring patient consent to use of the excised tissues implies that the patient may withhold consent,[293] it is easy to imagine a patient enticed to "shop" for the most financially advantageous treatment arrangement. For a patient requiring immediate or specialized care, the delay could result in the worsening of the patient's condition, or even death.

Of course, not all patients would be motivated to withhold consent for economic gain. Some patients may have religious or moral reasons for refusing to allow their cells to be utilized in certain types of research, believing that genetic manipulation is the province of the deity.[294] Still other patients may deny research access to their cells because of a political disagreement with the purpose of the research.[295] May the physician terminate treatment if the patient, for whatever reason, is unwilling to consent to the research? If the incentive for each is high, it is not difficult to imagine the physician and patient engaged in the bartering of treatment and consent.[296]

The *Moore* decision correctly recognizes that the patient's individual autonomy to determine what use is made of the patient's cells deserves judicial protection. However, there are compelling policy arguments indicating that nondisclosure will facilitate vital biotechnology research which is necessary to society.

---

293. Justice Mosk argued in his dissent that one shortcoming of the sole nondisclosure remedy is that it allows a patient to refuse consent to the use of his cells, but it does not give him the right to consent to the use in exchange for compensation. In effect then, the lack of informed consent action gives the patient veto power only without an affirmative right to participate in commercial research through contribution of cells or body parts. In contrast, by recognizing that a patient does retain a property interest in excised cells, a conversion cause of action would protect the patient as an active and vital participant in research efforts. *Moore*, 51 Cal. 3d at 180-81, 793 P.2d at 520, 271 Cal. Rptr. at 187 (Mosk, J., dissenting).

294. *Cf.* Cohen, *supra* note 94 at 8-11 (discussing religious views on organ transplantation).

295. For instance, consider a hypothetical patient whose cells contain extremely rare and unique properties of great utility to researchers. If access to that patient's cells could allow researchers to develop a cure for AIDS, and the patient declines consent, should the patient's decision be binding?

296. This argument assumes that the patient can bargain for compensation in exchange for consent, effectively "selling" tissue even though there is no property interest. One author has proposed that a legislative prohibition on selling human tissue for research purposes would solve this problem. *See* Note, *supra* note 73, at 1394.

C. Difficulty in Proving Causation

Justice Mosk's dissent expressed concern that, in general, an action for breach of fiduciary duty will be difficult for plaintiffs to maintain.[297] This difficulty derives from the nature of a breach of fiduciary duty or lack of informed consent action.[298] An action based on failure to disclose information sounds in negligence, and requires the plaintiff to prove causation: the plaintiff must show that he would not have consented to the treatment had he been aware of the physician's research interest and further, that no reasonably prudent patient in the same circumstances would have consented.[299] Stated simply, the plaintiff must demonstrate a causal link between the physician's lack of disclosure and the injury sustained by the plaintiff.[300]

The objective test of causation, which was required in *Cobbs v. Grant*, is the one most frequently employed by courts.[301] The value of the objective test was thoroughly discussed by the D.C. Circuit Court of Appeals in a case referred to by the *Cobbs* court, *Canterbury v. Spence*.[302] The *Canterbury* court determined that tying the factual conclusion on causation to an assessment of the patient's credibility was not satisfactory because of the danger that the patient's testimony would be influenced by hindsight and bitterness.[303] A subjective test, according to *Canterbury*, would

---

297. *Moore*, 51 Cal. 3d at 179, 793 P.2d at 519, 271 Cal. Rptr. at 186 (Mosk, J., dissenting).

298. *Id.* (Mosk, J., dissenting).

299. *Id. See* Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219, 227 (1985) (discussing the objective standard of causation for informed consent cases). *See also supra* notes 17-40 and accompanying text (discussing informed consent cause of action).

300. Morgenroth v. Pacific Medical Center, Inc., 54 Cal. App. 3d 521, 533, 126 Cal. Rptr. 681, 689 (1976) (holding, inter alia, that failure to give patient information material to informed consent does not constitute medical malpractice absent proof of causation). *See also* Stone v. Foster, 106 Cal. App. 3d 334, 351, 164 Cal. Rptr. 901, 911 (1980) (plaintiff's recovery in a medical malpractice action founded on failure to warn of risks requires causal relationship between lack of warning and injury).

301. *See* Studer, *The Doctrine of Informed Consent: Protecting The Patient's Right To Make Informed Health Care Decisions*, 48 MONT. L. REV. 85, 99 (1987). *See supra* notes 36-40 (discussing the objective test in *Cobbs*).

302. 464 F.2d 772 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064.

303. *Id.* at 790-91.

require the fact finder to evaluate whether a patient's speculative answer to a hypothetical question should be credited.[304] For these reasons, the objective test of causality is preferable.[305]

However, the objective test is not exclusive. At least one court has discarded the *Canterbury* objective test on the basis that the test restricts the very right to self-determination that the original cause of action was designed to protect.[306] That is, to the extent the plaintiff, with full knowledge, would have refused the proposed treatment and a reasonable person similarly situated would have accepted it, the patient's right of self-determination is irrevocably lost.[307] Finally, a compromise test of causation was adopted in *Leyson v. Steuermann*[308] in which the Hawaiian court analyzed causation on the basis of the actual patient acting reasonably.[309]

As previously noted, the objective causality test of *Cobbs* remains the standard in California. There is no indication that the *Moore* Court contemplated the use of any other test. However, the objective test does present a serious problem of proof to a *Moore*-type plaintiff whose injury will be difficult for a jury to assess. Given the nebulosity of an injury to the right of self-decision, how will the patient be able to prove that a reasonable person would not have consented to the post-operative use of his cells? Even if the injury is defined as loss of commercial value, rather than a violation of self-autonomy, it will be difficult for the jury to assign an economic value to it.

Justice Mosk thought it unlikely that most juries would believe that a reasonable patient would have refused needed medical treatment simply because the physician would later use his body

304. *Id.* at 791. *See also* Hartke v. McKelway, 707 F.2d 1544, 1550-55 (D.C. Cir. 1983) (in a wrongful conception case, testimony of the patient that she would not have undergone the proposed treatment if she had been informed of the risk was not necessary to bring the causation issue to the jury under the *Canterbury* rule, but patient's reasons for undergoing sterilization were relevant to damages).

305. *Canterbury*, 464 F.2d at 791.

306. *See* Scott v. Bradford, 606 P.2d 554, 559 (Okla. 1979).

307. *Id. See* Studer, *supra* note 301.

308. 705 P.2d 37 (Hawaii App. 1985).

309. *Id.* at 47.

cells or tissues in research.[310] In reality, the objective standard may not be the most appropriate measure of causation in a case such as *Moore*, where the physician's lack of disclosure injures the patient's personal autonomy or decision-making ability rather than his physical body.[311]

Viewed in this light, the *Moore* Court's holding on the informed consent issue is somewhat of a Pyrrhic victory for Moore. That is, although Moore is free to pursue a cause of action based on lack of informed consent, the objective test of causation may be an insurmountable obstacle to recovery. However, focusing on the physician's breach of fiduciary duty suggests another way of approaching the causality problem for Moore on rehearing.

D. A Constructive Trust Remedy

Due to the inherent difficulty in proving causation under an objective standard in an action for lack of informed consent, a *Moore*-type plaintiff may be unable to recover on that cause of action. However, a careful reading of the *Moore* case suggests another remedy.[312]

The *Moore* court held that the physician's failure to disclose his personal or research interests to the patient violated the physician's fiduciary duty.[313] Fiduciary responsibilities are imposed in many areas of the law, and a strict standard of disclosure is consistently

---

310. Moore v. Regents of the University of California, 51 Cal. 3d 120, 180, 793 P.2d 479, 520, 271 Cal. Rptr. 146, 187 (Mosk, J., dissenting). Most cases would be dismissed following a motion for nonsuit for failure to prove proximate cause. *Id.*

311. *See* Shultz, *supra* note 299 at 250 (discussing the theory that choices made by "reasonable others" are not proper guidelines when the issue is personal autonomy).

312. One author has suggested that Moore's claim for unjust enrichment may provide an alternative remedy. *See* Traynor, *The Unjust Enrichment Claim In* Moore v. Regents, 9 BIOTECH. L. REP. 240 (1990) (discussing the principle of restitution as applied to Moore's claim of unjust enrichment).

313. *Moore*, 51 Cal. 3d at 132, 793 P.2d at 485, 271 Cal. Rptr. at 152. The Court noted that the term "fiduciary" as used in this context did not operate to make the physician a financial adviser to the patient. *Id.* at 131, n.10, 793 P.2d at 485, n.10, 271 Cal. Rptr. at 152, n.10.

required of fiduciaries.[314] In addition, it was held in *Remillard Brick Co. v. Remillard-Dandini Co.*[315] that a fiduciary may not profit unfairly from his relationship to the cestui que trust.[316] In *Remillard*, the defendant directors held majority voting control of a manufacturing corporation.[317] The defendants formed a wholly-owned sales corporation and contracted with the manufacturing corporation to market the product at a large profit to themselves.[318] The *Remillard* court held that the defendant fiduciaries were precluded from receiving any personal benefit absent fullest disclosure and consent of the parties involved.[319]

The powers of a fiduciary are constantly subject to the equitable limitation that these powers may not be exercised for personal gain at the expense of the cestuis.[320] If this limitation is exceeded, equity will provide a remedy.[321] One equitable remedy for a breach of fiduciary duty is a decree of constructive trust.[322] A constructive trust imposes an equitable duty on the errant fiduciary to convey the property to the cestui as restitution for the fiduciary's wrongdoing.[323] The cause of action itself is not based

---

314. *See, e.g.*, Van de Kamp v. Bank of America National Trust & Savings Assoc., 204 Cal. App. 3d 819, 835, 251 Cal. Rptr. 530, 534 (1988) (trustee owes to the beneficiary the duty of fullest disclosure of all material facts); Day v. Rosenthal, 170 Cal. App. 3d 1125, 1148, 217 Cal. Rptr. 89, 103 (1985) (attorney owes client full and fair disclosure of all facts which materially affect his rights and interests).

315. 109 Cal. App. 2d 405, 241 P.2d 66 (1952).

316. *Id.* at 419, 241 P.2d at 74.

317. *Id.* at 408-12, 241 P.2d at 68-72.

318. *Id.*

319. *Id.* at 419, 241 P.2d at 74. The court noted that directors bear a fiduciary relationship to the corporation and the stockholders. *Id.* Further, even if the statutory conditions for an interested transaction are met, transactions that are not fair and reasonable to the corporation may be set aside. *Id.*

320. *Id.* at 421, 241 P.2d at 75.

321. *Id.*

322. *See, e.g.*, Ringo v. Binns, 35 U.S. 269, 280 (1836) (agent who uses defect in principal's title to land to acquire title for himself will be considered as a trustee holding for his principal).

323. *See* RESTATEMENT (SECOND) OF TRUSTS § 1 comment (e) (1959) which states in pertinent part:

> [A] constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property . . . [A] constructive trust is imposed, not to effectuate intention, but to redress wrong or unjust enrichment.

on the establishment of a trust; it is composed of the breach of fiduciary duty, fraud, or other wrongdoing which entitles the plaintiff to equitable relief.[324] A constructive trust remedy may be compelled in virtually any case where there is a wrongful acquisition or detention of property to which another is entitled.[325] Additionally, a court of equity has great latitude in decreeing a constructive trust and may shape the remedy to fit the transaction.[326]

Since the gravamen of the constructive trust remedy is to prevent the wrongful conduct of the defendants, that remedy would seem to lend itself to a case like *Moore*. A pleading for constructive trust would shift the court's focus from the plaintiff's injury, which may be difficult to prove, to the defendant's breach of fiduciary duty and lack of disclosure, which are more easily established.

The constructive trust decree typically grants to the injured party the entire profit derived from the defendant's misconduct. The award is considered a windfall to the plaintiff and is not calculated as economic recompense for the injury. Under this theory, Moore's likelihood of recovery would increase since he would not be required to prove causation on the lack of informed consent issue. Instead, Moore would have to demonstrate that his

---

RESTATEMENT (SECOND) OF TRUSTS § 1(e) (1959). *See also* CAL. CIV. CODE § 2224 (West Supp. 1991) (one who gains a thing by wrongful act becomes the trustee of the thing gained for the benefit of one who would otherwise have had it).

324. Weiss v. Marcus, 51 Cal. App. 3d 590, 600, 124 Cal. Rptr. 297, 304 (1975). The pleadings must demonstrate the defendant's wrongful act, not the establishment of a trust. *Id.*

325. *Id. See, e.g.*, United States v. Reed, 601 F. Supp. 685, 700 (1985), *rev'd on other grounds*, 773 F.2d 477 (1985) (person receiving confidential information from another and misappropriating it for personal gain holds the proceeds of the misappropriation in constructive trust); Haskel Engineering & Supply Co. v. Hartford Accident & Indemnity Co., 78 Cal. App. 3d 371, 376, 144 Cal. Rptr. 189, 192 (1978) (employer was entitled to impose constructive trust on property acquired by employee with embezzled funds); Redke v. Silvertrust, 6 Cal. 3d 94, 100-01, 490 P.2d 805, 808, 98 Cal. Rptr. 293, 296-97 (1971) (failure to perform a valid contract between spouses regarding testamentary disposition of property constitutes constructive fraud justifying imposition of constructive trust); Edwards-Town, Inc. v. Dimin, 9 Cal. App. 3d 87, 94-95, 87 Cal. Rptr. 726, 730-31 (1970) (subsequent purchaser who acquired parcels of real estate with knowledge of prior purchaser's agreement that a percentage of the sales price was to be placed in a bank account in exchange for release of vendor's lien, and that prior purchasers had not paid for the property, was held constructive trustee of the designated funds).

326. *Edwards-Town, Inc.*, 9 Cal. App. 3d at 94, 87 Cal. Rptr. at 730-31.

physician had a personal interest in Moore's treatment and that the physician failed to disclose that interest to Moore prior to obtaining Moore's consent.[327] The burden of proof would then shift to the defendant physician to justify his conduct.[328]

Justice Mosk's final attack on the nondisclosure remedy was that it could not be used to reach defendants not standing in a fiduciary relationship to the plaintiff.[329] Therefore, unless a patient could put forth a showing of secondary liability, he would be unable to recover against any defendant other than the treating physician; researchers, other physicians, and pharmaceutical companies would be insulated from liability.[330] It is possible that the constructive trust remedy could be used to reach non-fiduciary defendants as well, since there are indications that a fiduciary relationship is not a prerequisite to imposition of a constructive trust.[331]

---

327. *See* Van de Kamp v. Bank of America Nat'l Trust., 204 Cal. App. 3d 819, 853, 251 Cal. Rptr. 530, 546 (1988) (beneficiary has initial burden of proving the existence and breach of fiduciary duty, the burden then shifts to the trustee to justify actions).

328. *Id. See also* Remillard Brick Co. v. Remillard-Dandini Co., 109 Cal. App. 2d 405, 420, 241 P.2d 66, 75 (1952) (burden is on director to prove fairness of interested transaction).

329. Moore v. Regents of the University of California, 51 Cal. 3d 120, 181, 793 P.2d 479, 521, 271 Cal. Rptr. 146, 188 (1990) (Mosk, J., dissenting).

330. *Id.* (Mosk, J., dissenting). In Moore's case, only Dr. Golde would be directly liable. *Id.* The Regents, Quan, GI and Sandoz could be attacked only by showing agency. *Id.* The majority apparently did not believe that Moore had adequately alleged secondary liability, although an express ruling was not made on this question. *Id.* (Mosk, J., dissenting) Justice Mosk also wrote to "disassociate [himself] completely from the amateur biology lecture that the majority impose on us throughout their opinion." *Id.* at 182-85, 793 P.2d at 521-23, 271 Cal. Rptr. at 188-90 (Mosk, J., dissenting). The dissenter found that this material was improperly included in the majority opinion because, inter alia, the appeal was taken on sustained demurrers, therefore, the record was absent of evidence on the medical topics, and without expert testimony in the record, the Court was not competent to discuss medical science. *Id.* (Mosk, J., dissenting).

331. *See, e.g.*, United States v. Dunn, 268 U.S. 121, 132 (1925) (beneficiary of trust may follow property into hands of all but innocent purchasers for value); People v. Howes, 99 Cal. App. 2d 808, 817, 222 P.2d 969, 975 (1950) (owner of stolen property sold by thief may impose constructive trust on proceeds); Newton v. Porter, 69 N.Y. 133, 136 (1877) (owner of negotiable securities, stolen and subsequently sold to defendants with notice, was entitled to trust in proceeds so long as proceeds could be traced and regardless of absence of fiduciary relationship).

CONCLUSION

The case of *Moore v. Regents of the University of California* leaves open a number of questions about the breadth of the informed consent doctrine in cases involving commercial and research use of human cells.[332] The decision certainly increases the scope of the informed consent doctrine by requiring a physician to disclose the physician's personal interests in a patient's treatment. The *Moore* decision also grants a patient greater control over the use that will be made of the patient's excised cells. However, the long term ramifications for patients, physicians and researchers of mandating this greater disclosure have yet to be seen. As the demand for human cell sources increases, it seems likely that new cases similar to *Moore* will arise. Perhaps these future cases will find an equitable method of balancing the commercial and research needs of the medical community with the healthcare and financial needs of the patient community and society as a whole.

Luisa A.M. Giuffrida

---

332. The case also presents compelling questions about whether property rights should be recognized in the human body. Since that question was answered negatively by the California Supreme Court, a detailed discussion of the issue is beyond the scope of this Note. A number of commentaries have been written on the subject following the Court of Appeals decision in *Moore*. *See, e.g.*, Comment, *Spleen for Sale:* Moore v. Regents of the University of California *and the Right to Sell Parts of Your Body*, 51 OHIO ST. L.J. 499 (1990); Note, *Ownership of Human Tissue: Life After* Moore v. Regents of the University of California, 75 VA. L. REV. 1363 (1989); Danforth, *Cells, Sales and Royalties: The Patient's Right to a Portion of the Profits*, 6 YALE L. & POLICY REV. 179 (1988); Comment, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 UCLA L. REV. 207 (1986).