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PROPERTY IN BODY PARTS AND PRODUCTS OF THE HUMAN BODY

Abstract

An intriguing question, which until recently had not been directly explored by the courts, is the extent to which English law recognises body parts and products of the human body as property capable of ownership. Although the common law currently recognises no general property in a dead body (and only limited possessory rights in respect of it), this apparent "no-property rule" provides no justification, it is submitted, for denying proprietary status to parts or products of a living human body. The recent decision of the Court of Appeal in Yearworth v. North Bristol NHS Trust[1] lends strong support to the view that genetic material (as the product of a living human body) is capable of ownership, at least in the context of a claim in the tort of negligence and bailment. This article examines the various issues by reference to both English and Commonwealth authority.

INTRODUCTION

It will be convenient to consider the so-called "no-property rule" as it applies to dead and living bodies, including the limited exceptions to the rule, before analysing the English and Commonwealth case law on ownership of parts and products of the living human body, including genetic material and biotechnological products. It is the thesis of this article that modern case law is moving steadily towards a general recognition of human material as property capable of ownership at common law.

THE NO-PROPERTY RULE

Dead Bodies

The principle that there can be no property in a dead body originates from early legal writings dating back to the 17th century and a plethora of 18th and 19th century cases[2]. The rationale for the rule is not easy to discern from the case law and it has been convincingly argued elsewhere[3]

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[1] [2009] EWCA Civ 37.

[2] *Exelby v. Handyside* (1749) 2 East P.C. 652*; R. v. Lynn* (1788) 2 T.R. 733; 100 E.R. 394; *R. v. Sharpe* (1857) Dears. & Bell 160; 169 E.R. 959, *per* Erle J.; *Foster v. Dodd* (1867) L.R. 3 Q.B. 67, *per* Byles J.; *R. v. Price* (1884) 12 Q.B.D. 247, *per* Stephen J.; *Williams v. Williams* (1882) 20 Ch. D. 659, at p. 664, where Kay J. said: "the law of this country recognises no property in a corpse"; *Re Dixon* [1892] P. 386; and *Lee v. Harvey* [1898] P. 63.

[3] P. Matthews, "Whose Body? People As Property", (1983) 36 Current Legal Problems, 193, at pp. 197-200. See also Roger S. Magnusson, "Proprietary Rights in Human Tissue", in *Interests in Goods*, (ed. Palmer and

that it is based on a misunderstanding of earlier authority dealing with the unlawful removal of corpses from graves. The basis for the rule is that a corpse is a *nullius in bonis* (i.e., in the legal ownership of nobody[4]) – a dead body belonged exclusively to the ecclesiastical jurisdiction[5] until the 19th century. Because "the Church took the body to itself"[6], the common law courts had no legal control over it and the person having charge of the body could not be considered the owner of it. The Church's exclusive domain over the dead was based on the simple fact that burial grounds all belonged to the churches. Coupled with this, the ecclesiastical courts had probate jurisdiction and were responsible for preventing any sacrileges to the body after death. Thus, no mode of burial was permitted which would prolong the natural decay of the body.
Despite this, there appears to have existed (at least prior to 1804[7]) a right to arrest a dead body for debt. It was also recognised, as we shall see later, that the deceased's personal representatives have the right (and duty) to bury their dead. Subject, however, to this and other minor exceptions, the no-property rule is firmly embodied in English law. Founded, as it is, on dubious *obiter dicta*[8], the general academic consensus is that the rule is now ripe for reappraisal in the light of modern scientific and academic technologies. As one commentator has put it[9]:

> " . . . [these *obiter* remarks] are ghosts of the past, statements which cannot stand in the light of modern ideas, being remnants of the superstition with which less advanced communities surround the manifestations of death".

Not surprisingly, most American states have firmly rejected the strict rule in favour of a (more flexible) right of "quasi-property" in the deceased's body in favour of the surviving spouse or

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McKendrick), (1993), at pp. 239-242; P.D.G. Skegg, "Human Corpses, Medical Specimens and the Law of Property", (1975) 4 Anglo-American Law Review 412.

[4] By contrast, materials as abstract as gas and electricity can be possessed and stolen: *R. v. White* (1853) Dears C.C. 203; 169 E.R. 696. Vibration has been treated as an "object" in trespass and nuisance law: *Hoare and Co v. McAlpine* [1923] 1 Ch. 167, at p. 175, *per* Astbury J. Computer software has been held to be property within the meaning of the Criminal Damage Act 1971: *Cox v. Riley* (1986) 83 Cr. App. Rep. 54. It has also been held to constitute "goods" for the purposes of the Sale of Goods Act 1979: *Saphena Computing Ltd v. Allied Collecting Agencies Ltd*; *St Albans City and District Council v. International Computers Ltd*; *Toby Construction Products Property Ltd v. Computa Bar (Sales) Property Ltd* [1983] 2 N.S.W.R. 48.

[5] See, *Haynes' Case* (1614) 12 Co. Rep. 113; 77 E.R, 138, where there is a judicial reference to a cadaver as being "but a lump of earth". By an ordinance of William the Conqueror, the temporal and spiritual jurisdictions were severed and control of churchyards and burials was absorbed by the ecclesiastical authorities. By the middle of the 19th century, the ecclesiastical jurisdiction had declined significantly in importance and more bodies were being buried in unconsecrated ground.

[6] Jackson, *The Law of Cadavers and of Burial Places* , (2nd ed., 1950), at p. 126: "[The Church] held that a corpse was appropriated by it, by divine service and consecrated burial. The spirit departed to the realms of the supernatural; the body was held by the divine agent to await resurrection".

[7] In 1804, Lord Ellenborough declared such arrest illegal as being contrary to the public interest: Redfield's Surr. Rep. Vol. 4, p. 527. See also: *R. v. Fox* (1841) 2 Q.B. 246 and *R. v. Scott* (1842) 2 Q.B. 248n.

[8] This is expressly acknowledged in the Canadian case of *Miner v. Canadian Pacific Railway Co*. (1910) 15 W.W.R. 161, at pp. 166-168.

[9] T.W. Price, "Legal Rights and Duties in Regard to Dead Bodies, Post-Mortems and Dissections", (1951) 68 South African L.J. 403, at p. 404. See also, Griffith C.J. in *Doodeward v. Spence* (1908) 6 C.L.R. 406, (High Court of Australia), at p. 412: "I do not myself accept the dogma of the verbal inerrancy of ancient text writers. Indeed, equally respectable authority, and of equal antiquity, may be cited for establishing as a matter of law the reality of witchcraft."

next of kin for the purposes of burial[10]. The person who possesses the right is not the owner of the body but holds it "in trust" for family and friends who have an interest in its disposition. Essentially, such quasi-right carries with it a right to an action for damages[11] for any unlawful interference with the body both prior to burial and after. To the extent that the next of kin have legally recognised rights of custody, control and disposition (i.e., the essential attributes of ownership), it is apparent that this quasi-right is akin to property in the corpse. More recent American decisions have also concluded that the next of kin have a constitutionally protected "property right" which, if infringed, may give rise to a civil claim in damages.[12]

The English rule has led, in turn, to the notion that a dead body is not capable of being the subject of theft.[13] This corollary of the no-property rule applies to both bodies awaiting burial and buried corpses. Other criminal offences (involving unlawful disinternment and corpse-removal) provide a substitute for the crime of theft in this context.[14] For the same reason, a civil action for conversion will not lie in respect of a dead body, except in limited circumstances where the claimant, at the time of conversion, has either actual possession or the immediate right to possession of the body in question (e.g., a personal representative, coroner, parent of a child, etc.). The right to possession for the purpose of burial emanates from the common law when it began to assume jurisdiction over religious offences from the ecclesiastical courts. Although the principle that there was no property in a body was maintained, the person who was charged with the duty of disposing of the body had the limited right to possess it until burial.

Moreover, the deceased cannot by will direct the delivery of his dead body to someone who is not an executor named in the will. Any such direction is void and unenforceable[15]. Moreover, the

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[10] See, *Brotherton v. Cleveland* (1990) 923 F. 2d 477, (6th. Cir. C.A.), at p. 480. See further, J.H. Olender, "Donation of Dead Bodies and Parts Thereof for Medical Use", (1960) 21 U. Pitt. L. Rev. 523, at pp. 523-531.

[11] The usual basis of damages is mental distress and anguish caused to the relatives. See, for example, *Gonzales v. Metro Dade City Health Trust* (1995) 651 So. 2d 673, (Supreme Court of Florida), where it was held that an action for mental anguish based on negligent handling of a dead body could be brought by relatives of the deceased if physical injury could be proved or the defendant's conduct was wilful or wanton; *Mackey v. U.S.* (1993) 8 F. 3d 826, (United States Court of Appeals), noted in [1995] Med L.Rev. 222. In England, *negligently* inflicted mental distress is irrecoverable unless part of a "pain and suffering" claim arising out of physical injury: *Alcock v. Chief Constable of South Yorkshire Police* [1991] 4 All E.R. 907, (HL). If, on the other hand, the defendant interfered with the body with the intention of causing harm to the plaintiff, then the rule in *Wilkinson v. Downton* [1897] 2 Q.B. 57 would apply and an action would lie for any recognised psychiatric injury: see further, (1996) 4 Med. L. Rev. 216, where it is argued that a negligence action would only succeed if the plaintiff satisfied the *Alcock* rules for recovery of damages for psychiatric injury as a "secondary victim". On this basis, the decesaed's relatives would need to "witness" the mishandling of the body in order to succeed: cf. *Owens v. Liverpool Corporation* [1938] 4 All E.R. 727, (CA), where a claim for psychiatric injury by relatives of a deceased who witnessed an accident involving the hearse carrying the body was upheld.

[12] See, 42 U.S.C., s.1983 and *Whaley v. County of Tuscola* (1995) 58 F. 3d 1111, (6th Cir. C.A.). See further, T. O'Carroll, "Over My Dead Body: Recognizing Property Rights in Corpses", (1996) 29 Journal of Health and Hospital Law 238, for a critique of the *Whaley* decision.

[13] The Theft Act 1968 does not appear to have altered the position since the statute must still be construed in the light of common law rules as to property. The Criminal Law Revision Committee Report, "Theft and Related Offences", (1966, Cmnd. 2977) makes no mention of human corpses.

[14] See, eg., *R. v. Harmsworth* [1975] Crim L.R. 525 and *R. v. Farrant* (1975) 61 Cr. App. Rep. 200.

[15] *Williams v. Williams* (1882) 20 Ch. D. 659, at pp. 664-665, *per* Kay J., who said (at p. 665): "If there be no property in a dead body it is impossible that by will or any other instrument the body can be disposed of". For the same reason, an heir has no property right in the body of his ancestor. Contrast the American position where the deceased has the right to determine the manner of disposal by will (or even contract) of his or her body organs. See further, M.I. Barish, "The Law of Testamentary Disposition – A Legal Barrier to Medical Advance!", 30 Temple L.Q. 40 (1956), who argues that the reasonable wishes of the deceased concerning the final disposition of his body should be paramount to all other interests.

executor is not bound to obey the terms of the will in this regard[16]. Similarly, a dead body cannot be the subject of a *donatio mortis causa* (i.e., a death-bed gift). In the absence, therefore, of specific legislation, it seems that a person cannot lawfully provide for the disposition of his organs after death.

Not surprisingly, a number of statutes, in particular, the Anatomy Act 1984 and the Human Tissue Act 1961, have allowed some qualification of these common law principles regarding testamentary disposition.[17] However, it has been cogently argued by Skegg[18] that, apart from certain limited exceptions, there is no recognised tort[19] which would create civil liability for unauthorised removal of human tissue. Interestingly, it has been held that the shroud in which a body is wrapped remains the property of the person to whom it previously belonged.[20] The shroud, as opposed to the body itself, is thus capable of theft.

It seems, however, that after burial a corpse may form part of the land in which it is buried and the right to possession of it will go with the land. This accords with the general principle that chattels affixed to the land become part of the realty.[21] One difficulty, however, with this approach is that it may be questioned whether the annexation principle can apply to an object which, as a matter of law, cannot be the subject of property. On this view, a human remain would only become "affixed" to the land once it had become indistinguishable from the soil (for example, when human bones have turned into dust) – only then could an action for trespass to land be maintained in respect of the human remains which had become part of the ground. It seems, on this reasoning, that a cremated corpse falls to be treated in the same way as a buried one, although for purposes of property, the ashes would become the property of the realty presumably from the moment of interment. The significance, therefore, of the cremated corpse becoming part of the land in this way is that the landowner will acquire rights in respect of it as estate owner with consequent legal remedies in trespass and nuisance if the land is disturbed or dug up in order to remove the ashes.[22]

Whole Living Bodies

[16] By contrast, see the American case of *Re Eichner's Estate*, 18 N.Y. (2d) 573, where it was held that: "the wishes of the deceased in respect of the disposal of his remains as expressed in his will, if reasonable, practical and possible, are paramount to all other considerations, even the opposition of surviving relatives".

[17] See now, the Human Tissue Act 2004.

[18] See, P.D.G. Skegg, "Liability for the Unauthorized Removal of Cadaveric Transplant Material", (1974) 14 Med. Sci. & Law 53 and P.D.G. Skegg, "Liability for the Unauthorized Removal of Cadaveric Transplant Material: Some Further Comments", (1977) 17 Med. Sci. & Law 123.

[19] The Canadian case of *Edmond v. Armstrong Funeral Home Ltd* [1931] 1 D.L.R. 676 lends some support for a tort of interference with the right to possession of the body. But see, I. McColl Kennedy, "Further Thoughts on Liability for Non-observance of the Provisions of the Human Tissue Act 1961", (1976) 16 Med. Sci & Law 49, at p. 50, who favours liability in negligence where nervous shock is caused, or a tort of breach of statutory duty.

[20] *Haynes' Case* (1613) 12 Co. Rep. 113.

[21] See, eg., *Elwes v. Brigg Gas Company*, (prehistoric boat submerged in the land); (1886) 33 Ch. D. 562;. *R. v. Jacobson* (1880) 14 Cox C.C. 522, (buried bones turned into dust). See also, *Doodeward v. Spence* (1908) 6 C.L.R. 406, at p. 412, (High Court of Australia), where Griffiths C.J. opined that: "after a burial a corpse forms part of the land in which it is buried, and the right to possession goes with the land."

[22] It has been argued that ashes which are retained unburied should be the subject of property like other bodily products: see, P. Matthews, (1983) 36 Current Legal Problems, 193, at pp. 206-207. But see, *Bourne v. Norwich Crematorium Ltd* [1967] 2 All E.R. 567, where the court rejected the submission that cremation constituted the "subjection of goods or materials to a process" within the Income Tax Act 1952.

It is evident that modern English law does not recognise property rights in a whole living body.[23] Any interference with the body is classified as an invasion of a personal (as opposed to a proprietary) right. Moreover, although the individual has considerable autonomy over his (or her) own body, both Parliament and the common law prohibits or restricts a person's freedom to consent to particular types of physical interference with the body. The laws on abortion[24] and female circumcision[25] are just two examples. Consent is, generally speaking, not a defence to an assault or other crime involving injury to the person.[26]

With the abolition of slavery in the British Colonies in 1833, it is, as Matthews[27] observes, wholly "unrealistic at the present day to conceive of one person as having "property" in another whole, living body". Interestingly, however, as late as 1860, the English courts were willing to recognise the validity of a contract for the sale of slaves in Brazil on the basis that slavery was still lawful by the law of that country[28].

As we have seen, the notion that the living body cannot be the subject of property has been extended to the body after death. The body does not form part of the deceased's estate and cannot be disposed of by will. Whilst no one would argue with the principle that a living person cannot be owned by another[29], it does not follow that a person cannot have property in his own body or bodily parts. As one academic commentator has observed[30]:

> "The law of persons provides an adequate legal regime for the bodies of living persons, and little would be gained by seeking to apply the law of property to them. However, once parts are removed from a living person, there is undoubtedly a case for the parts to be regarded as 'property'."

As we shall see, until the recent decision in *Yearworth*, English law accorded proprietary status to the human body (and its parts) in only a few limited circumstances.

EXCEPTIONS TO THE RULE

Personal Representatives

[23] At one time, a wife was considered to be the property of her husband: see, *Hopkins v. Blanco* 320 A. 2d. 139 (1974). See also, *Gregson v. Gilbert* (1783) 3 Dougl. 232; 99 E.R. 629, (slaves pushed overboard from a boat running short of water held to constitute a throwing overboard of goods). At common law, a debtor could be personally attached to force payment of the debt: see, further, "Notes: Body Attachment and Body Execution: Forgotten but not Gone", (1976) 17 William and Mary L.R. 543.

[24] The Abortion Act 1967, as amended.

[25] Prohibition of Female Circumcision Act 1985.

[26] See, for example, *R. v. Brown* [1992] 2 All E.R. 552, (CA), affmd. [1993] 2 All E.R. 75, (HL), where consent to sado-masochistic acts was held not to be operative consent.

[27] (1983) 36 Current Legal Problems 193, at p. 223.

[28] See, *Santos v. Illidge* (1860) 8 C.B. (N.S.) 861; 141 E.R. 1404.

[29] For example, an employer has no property rights over his employee and cannot ordinarily obtain specific performance of his employment contract compelling him to work.

[30] See, P.D.G., Skegg, "The 'No Property' Rule and the Rights Relating to Dead Bodies", (1997) Tort L. Rev., 222, at p. 228.

There are two well-recognised exceptions to the no-property rule. The first relates to the personal representatives of the deceased. In *Dobson v. North Tyneside Health Authority*[31], the Court of Appeal, whilst accepting that there was no general right of property in a dead body, concluded that a deceased's personal representatives had a right to the custody and possession of the body until its proper burial as an incidence of their legal duty to dispose of it. This exception apparently extends to other persons charged by law with the duty of interring the body, for example, a parent of an infant child, who dies where the parent has sufficient financial means to bury the child[32], and a husband in respect of his wife's body even though he was separated from her.[33] It seems also that a coroner, who decides to hold an inquest, has a right to possession of the body in question until the inquest is concluded.[34] No doubt, the police have a similar right to possession as a consequence of their function in the investigation of crime. A statutory duty is also placed on any householder to dispose of a dead body lying on his premises[35], and on a local authority in any case where it appears that no suitable arrangements for the disposal of the body have been or are being made. The upshot of these cases is that, in the absence of personal representatives, there is a common law duty to see that the body is buried and the person lawfully in possession is normally the occupier of the premises where the body is found or the person who has the body. Thus, if the deceased dies in hospital, it seems that the person(s) having control of the management of the hospital will be legally in possession of the body until someone with a better title to possession (for example, the executor) claims the body.[36]

It is, of course, a corollary of the principle that the deceased's executors or administrators (or other persons charged by law with the duty of interring the body) have a right to the custody and possession of the body until it is properly buried, that any violation of that right to possession constitutes a trespass for which a civil action will lie.[37] This right of possession may even continue after burial so as to restrain another seeking to disinter and rebury the deceased.[38] Interestingly, however, Peter Gibson L.J. (who gave the leading judgment of the court in

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[31] [1996] 4 All E.R. 474, (C.A.). See also, *Williams v. Williams* (1882) 20 Ch. 659.

[32] *Clark v. London General Omnibus Co Ltd* [1906] 2 K.B. 648, at p. 659, *per* Lord Alverstone C.J., but see also Farwell L.J., at p. 683, who expressed doubts. See also, *R. v. Vann* (1851) 2 Den. 325, (where it was held that a father was under a duty to dispose of the body of his deceased child if he has the means to do so) and *R. v. Gwynedd C.C., ex parte B* (1991) 7 B.M.L.R. 120, (C.A.).

[33] *Ambrose v. Kerrison* (1851) 10 C.B. 776; *Bradshaw v. Beard* (1862) 12 C.B. (N.S.) 344. See further: S.G. Hume, "Dead Bodies", (1956-58), 2 Sydney L. Rev. 109.

[34] *R. v. Bristol Coroner, ex parte Kerr* [1974] Q.B. 652.

[35] See, *R. v. Stewart* (1840) 12 Ad. & El. 773. It has been held that the master of a workhouse was in lawful possession of a body lying in the workhouse: *R. v. Feist* (1858) Dears. & B. 590.

[36] This is the view put forward by D. Lanham, "Transplants and the Human Tissue Act 1961", (1971) 11 Med. Sci. & Law 16, at p. 20, who argues that, until the executors or relatives know about the death, the hospital must be regarded as lawfully in possession of the body. Even mere knowledge of the death may not be sufficient to vest possession (ie, there must be an intention to possess communicated to the hospital). See also, D. F. de Stoop, "The Law in Australia Relating to the Transplantation of Organs from Cadavers", (1974) 48 A.L.J. 21, at p. 22, who submits that "the person who has actual physical custody of the body has lawful possession (and the duty of disposal) of it until someone with a higher right (for example, an executor) claims the body". It has also been suggested that close relatives should have a right to possess the body as the person(s) next entitled to be appointed the administrator of the deceased's estate under the Non-Contentious Probate Rules, rule 22, namely, the surviving spouse, children, parents, siblings, and so on: see, [1996] 4 Med. L. Rev. 216, at p. 218.

[37] An order of mandamus will lie to compel delivery of a corpse to the person charged with the duty of burying it: *R. v. Fox* (1841) 2 Q.B. 246.

[38] *Waldman v. Melville (City)* [1990] 2 W.W.R. 54, (Sask. Q.B.).

Dobson[39]) suggested that there was no such duty of interment or disposal and, hence, no right of possession of the body (or any part of it) on the deceased's next of kin.[40] Even if the next of kin *did* have a right to possession of the corpse for the purpose of burial, this would have no bearing on the disposal of the deceased's brain (the subject of dispute) retained for a quite different purpose after an official post-mortem examination.

Application of Human Skill

Apart from a right to possession conferred on those with a legal duty of interment, it seems that a dead body can become the subject of property where it has undergone a "process or other application of human skill".[41] Although there is a reference to "stuffing or embalming" in *Clerk and Lindsell on Torts*[42], it is doubtful (as we shall see later) whether this would on its own be enough to transform the body into an item of property.[43] But, assuming the application of human skill goes beyond mere preparation of the body for burial, an action for conversion may be brought for an anatomical or pathological specimen such as a skull, skeleton or cadaver, used for research or medical exhibition.[44]

There is a passing reference to "skeletons and anatomical preparations" by Stephen J. in *R. v. Price*[45] but the leading authority for this proposition is the majority decision of the High Court of Australia in *Doodeward v. Spence*[46], involving the preserved foetus of a two-headed baby, still-born 40 years previously, which the appellant had purchased for about £36 at an auction. He sought to recover it from the police (who had prosecuted him for exhibiting the body in public) so that he could again exhibit it for gain. He succeeded in an action in detinue. The majority of the High Court[47] accepted that a corpse may possess such peculiar attributes as to justify its preservation on scientific or medical grounds and that, if a person had by lawful exercise of work or skill so dealt with such a body in their lawful possession that it had acquired some attributes differentiating it from a mere corpse awaiting burial, they acquired a right to possession of it and, if deprived of its possession, could maintain an action for its recovery. The obvious analogy is that of the capture of a wild animal which will convert the creature (viewed in law as a *res nullius* in its wild state) into the hunter's property. The upshot of the majority decision, therefore, was to recognise that the successor in title to the preserved remains of a still-born child had a proprietary claim for its return from another who had taken it.

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[39] Thorpe and Butler-Sloss L.JJ. agreeing.
[40] This is, of course, in sharp contrast to the American position, as mentioned earlier.
[41] Clerk and Lindsell on Torts, (17th ed., 1995), at para. 1350.
[42] (17th ed., 1995), at p. 653.
[43] See further, Skegg, P.D.G., "The No Property Rule and Rights Relating to Dead Bodies", (1997) Tort L. Rev. 222, at p. 224, who argues that this would be "a very significant qualification of the no property rule". As he rightly points out, there would be little sense in drawing a legal distinction between bodies awaiting burial or cremation which have been embalmed and those which have not.
[44] See, the interesting discussion in Roger S. Magnusson, "Proprietary Rights in Human Tissue", in *Interests in Goods*, (ed. Palmer and McKendrick), (1993), at pp. 248-249, in relation to the trade of Aboriginal body parts.
[45] (1884) 12 Q.B.D. 247.
[46] (1908) 6 C.L.R. 406, (High Court of Australia). See also, the early case of *Herring v. Walround* (1682) 2 Ch. Cas. 110; 22 E.R. 870, (embalmed bodies of Siamese baby twins) and *Exelby v. Handyside* (1749) 2 East P.C. 652, (two female dead infants joined together at the stomach).
[47] Griffith C.J. and Barton J., Higgins J. dissenting.

In *Doodeward*, some work and skill had been bestowed on the foetus so that an action in detinue was allowed by a majority[48] of the court. In the *Dobson* case, however, (referred to above), the Court of Appeal, whilst recognising that the point was "properly arguable", held on the facts that the deceased's brain had not undergone a "process or application of human skill" (despite being fixed in paraffin prior to its eventual disposal) to bring it within the *Doodeward* principle. In *Dobson*, the deceased (a woman aged 22) had collapsed at work and later died from brain tumours at a hospital run by the defendant health authority. During a post-mortem examination, the deceased's brain was removed, preserved in paraffin by the doctor who conducted the autopsy, and later delivered to the hospital for storage. The Court of Appeal concluded that the mere fixing of the deceased's brain in paraffin (for the limited purpose of preserving it until the coroner's determination of the deceaed's cause of death) did not transform it into an item of "property" the right to possession of which belonged to the next of kin[49]. In the words of Peter Gibson L.J.[50]:

> "There is nothing in the pleading or evidence before us to suggest that the actual preservation of the brain after the post mortem was on a par with stuffing or embalming a corpse or preserving an anatomical or pathological specimen for a scientific collection or with preserving a human freak as a double-headed foetus that had some value for exhibition purposes."

From the above-cited passage, it appears that it is not just a matter of what is done to the body or body part but also the purpose for which the work or skill is carried out. The suggestion is that the application of skill must convert the corpse (or relevant part) into a new object with a function or use beyond that of a mere body (i.e., as a specimen for medical collection or exhibition). It was the absence of this feature which distinguished the case from the *Doodeward* decision. Although Peter Gibson L.J. stated in his judgment that "in the present state of the English authorities there is no property in a corpse"[51], it is noteworhty that he did not identify any of these decisions (apart from *Williams v. Williams*[52]), none of which in any event would have been binding on the Court of Appeal.

The leading English authority is now *R. v. Kelly/R. v. Lindsay*[53], where the defendants had been convicted of the theft of about 35 human specimens (including three human heads, part of a brain, six arms, ten legs or feet, and parts of three human torsos) from the Royal College of Surgeons during the period from 1991 to 1994. The first defendant, an artist, made casts of the

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[48] The leading judgment was given by Griffith C.J.. Barton J. (the second member of the High Court) limited the right of action in detinue to a still-born foetus only emphasising that, as a general rule, an unburied corpse was not capable in law of becoming the subject of property. In his view, a still-born foetus did not fall within the no-property rule because it was not the corpse of a once-living person. There was, therefore, no objection to recognising it as property under the common law. The third member of the Court, Higgins J., dissented, being of the firm view that no one could have property in another human being (whether alive or dead). In his view, "the only lawful possessor of a dead body is the earth": *ibid*, at p. 423.

[49] The assumption in Peter Gibson L.J.'s judgment is that the plaintiffs would have owned the deceased's brain if the requisite work had been done on the brain. It has been suggested that this is wrong unless the brain was theirs before the work was done. Where the specimen belongs to no one at the time of work, "the doer of the work ought to acquire the proprietary interest in it": see, [1997] Med. L. Rev. 110, at pp. 113-114.

[50] [1996] 4 All E.R. 474, at p. 479.

[51] [1996] 4 All E.R. 474, at p. 478.

[52] (1882) 20 Ch. D. 659.

[53] [1998] 3 All E.R. 741, (CA).

various parts, some of which were later exhibited in an art gallery. The second defendant was employed at the College as a junior technician and was asked by the first defendant to remove the various specimens for his artistic work. Neither defendant intended to return the specimens, many of which were buried in a field. Part of a leg was found in the first defendant's attic and the remaining parts were found in the basement of a flat belonging to friends. All the specimens in question had been preserved or fixed by the College staff or other medical agencies. They were all subject to a regular scheme of inspection, preservation and maintenance, and most of them had been the subject of further work by prosection, whereby they had been expertly dissected so as to reveal, in highlighted form, the inner workings of the body. There was evidence that the preparation of the specimens by prosection would have involved many hours, even weeks, of skilled work.

The Court of Appeal, upholding the convictions, held that the common law rule that there was no property in a corpse was firmly established in English law, but subject to the exception (discussed in *Doodeward* above) that if a dead body or its parts had undergone a process of skill with the object of preserving it for the purpose of medical or scientific examination or teaching purposes, it thereby acquired a usefulness or value and was, accordingly, capable of becoming property and of being stolen. Moreover, the Court held that the College had sufficient possession of the various specimens for the purposes of s.5(1) of the Theft Act 1968 which provided that "property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest . . ." The defendants' argument that the College was not lawfully in possession of the specimens was dismissed as being irrelevant on the basis that the 1968 Act did not distinguish between lawful and unlawful possession for the purposes of an offence of theft.[54]

Interestingly, the Court of Appeal also recognised that the common law did not stand still and that it might be open to a future court to hold that body parts were property even without the acquisition of different attributes if, for example, they were required for use in an organ transplant. In the words of Rose L.J, (giving the judgment of the court)[55]:

> " . . . the common law does not stand still. It may be that if, on some future occasion, the question arises, the courts will hold than human body parts are capable of being property for the purposes of s.4 [of the Theft Act 1968], even without the acquisition of different attributes, if they have a use or significance beyond their mere existence. This may be so if, for example, they are intended for use in an organ transplant operation, for the extraction of DNA or, for that matter, as an exhibit in a trial."

The notion that human body parts may be capable of being property on the ground of their "use" or "significance beyond their mere existence" is thought-provoking, not least because it paves the way for accepting that bodily parts may be owned and be capable of transfer as a commodity subject to product liability and legal protection against theft, damage and commercial exploitation. Although some emphasis is placed in the *Doodeward* case on the usefulness or value of the object in question[56], it seems unnecessarily restrictive to limit proprietary status to

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[54] See, *R. v. Turner (No. 2)* [1971] 2 All E.R. 441, (CA). See further, Commentary, [1998] Med. L. Rev. 247, at pp. 251-253.

[55] [1998] 3 All E.R. 741, at p. 749.

[56] See the judgment of Griffith C.J., who refers to the fact that the body "had acquired an actual pecuniary value": *ibid*, at p. 415. Barton J. also alludes to the body having a "considerable monetary value": *ibid*, at p. 416.

items having significant commercial value or utility. The so-called "value rule" has not been applied in the context of the theft of property and is not reproduced in the Theft Act 1968.[57] It would be naive to suggest that it is possible to identify from all the component parts of the human body those that are "useful" or "valuable" and those that are not. The fact is that scientific research and medical education may require access to a variety of tissue substances ranging from the human brain or heart to surgical waste. Samples may be minute or even microscopic and, in many cases, discarded once tested or examined. Although useful for medical research, they may have no intrinsic commercial value. To deny legal status to such material on grounds of lack of commercial value would seem unduly limiting and contrary to the furtherance of many scientific and medical projects which rely heavily on human body samples and tissue.

It is also not entirely clear, on the present state of authorities, what degree of work is required to transform the dead body (or its parts) into an item of property under the *Doodeward* exception. It seems that mere preservation is not sufficient but, paradoxically, this was all that had been done to the still-born baby in *Doodeward*. In *Dobson*, as we have already seen, Peter Gibson L.J. declined to give proprietary status to the deceased's brain on the grounds that its preservation in paraffin was not "on a par with stuffing or embalming a corpse or preserving an anatomical or pathological specimen for a scientific collection or with preserving a human freak". The reference to "stuffing or embalming" is surprising given that most bodies awaiting burial undergo some form of embalming process. If this is to form the appropriate criterion for applying the exception, then most corpses will fall within it and the *Dobson* decision will have made very substantial inroads into the no-property rule. This, clearly, was not intended. As we have seen, the more likely interpretation of this passage is that the process of skill must give rise to a new object with a use of its own. As one commentator has observed: "it is the deliberate creation of a novel item which justifies the common law in conferring proprietary status on the 'item' in order to give legal protection to the artificer as reward for his expended effort."[58] At common law, if A's goods were changed into a different species the product was held to belong to the operator and no longer to A.[59] Similar reasoning, it is submitted, applies in the context of work done on a dead body so as to change its nature into a "nova species" capable of being owned by the doer of the work.

The decision in *Kelly* also raises the possibility that a *living* person whose body could be described as being of scientific or medical interest (for example., a person with no hands or arms) might be able to dispose of his body effectively by will. As we have seen, the current English rule is that a testator cannot effectively give directions as to the disposal of his body in his will. The rationale is that there is no property in the body and hence no right to direct the manner of its disposal following death. But if there is sufficient property in a third person in respect of anatomical objects to support an action in conversion, there is considerable scope for arguing that there is also property in the testator (as a "living specimen") sufficient to permit the disposal of his body (or part of it) by will. This is already implicitly recognised under the Anatomy Act 1984 and the Human Tissue Act 1961, mentioned earlier[60].

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[57] The fact that the object of theft has little or no intrinsic value is no defence, but may be relevant to mitigation of sentence. See further, [1976] Crim. L.R. 329, 330.

[58] See, Commentary, [1998] Med. L. Rev. 247, at p. 250.

[59] See generally, P. Matthews, "Specificatio in the Common Law", (1981) 10 Anglo-American Law Review 121.

[60] Interestingly, s.32 of the Human Tissue Act 2004 prohibits commercial dealings in human material intended for transplantation but, by s.32(9)(c), it does not apply to "material which is the subject of property because of an application of human skill".

PARTS AND PRODUCTS OF A LIVING HUMAN BODY

Whatever the legal position may be in respect of dead bodies, there appears to be no justification for applying the no-property rule to human material (for example, hair, skin, bone marrow, blood, etc.) and body parts (i.e., limbs and internal organs) from living bodies. The decision in *Kelly/Lindsay* confirms that proprietary rights can exist in cadaveric and anatomical specimens on the basis that it is the work of preservation which changes the specimen so that it acquires the characteristics of property. This, as we have seen, forms only a limited exception to the common law rule and does not provide a legal basis for accepting property rights in human parts and products from live donors.[61]

There are undoubtedly some rights to possession of such material already recognised by the English courts.[62] A good illustration is the right to possession vested in the police of a blood or urine sample given by a person pursuant to the statutory provisions of the Road Traffic Acts. Such products are, clearly, capable of theft from the police when they have statutory possession. Presumably, such material can also be stolen from the provider of it.[63] Thus, in *R. v. Herbert*[64], the defendant was convicted of stealing hair, cut without consent from the head of a girl passenger in the defendant's car. It was argued that hair was not "property", at any rate until severance from the head on which it was growing, but the defendant was nonetheless convicted. There are other cases which establish the proposition that bodily products are the subject of property and capable of theft: *R. v. Welsh*[65] (theft of urine sample) and *R. v. Rothery*[66] (theft of blood sample). In *Welsh*, the accused was convicted of theft for pouring down the sink a urine sample which he had given to the police in compliance with the Road Traffic legislation. In *Rothery*, the accused provided a specimen of blood for a laboratory test and pleaded guilty to a charge of theft of the specimen.

The disposal of surgical waste, however, during a medical operation is legally justified on the ground that the patient has implicitly licensed its destruction or disposal as an integral part of the medical procedure to which he (or she) has validly consented. This "presumption of abandonment" is implicitly recognised in s.44 of the Human Tissue Act 2004, which provides that it is lawful for surgical material to be dealt with as waste. The point has also been the subject of American case law. In *Venner v. State of Maryland*[67], Powers J. said that:

> "It is not unknown for a person to assert a continuing right of ownership, dominion, or control, for good reason or for no reason, over such things as excrement, fluid waste, secretions, hair, fingernails, toenails, blood, and organs or other parts of the body, whether their separation from the body is intentional, accidental, or merely the result of

[61] Nor, indeed, would it apply to anatomical specimens which had not been the subject of any process of skill (eg., bodily parts preserved in formalin or paraffin).
[62] See, P.D.G. Skegg, "Liability for the Unauthorized Removal of Cadaveric Transplant Material", (1974) 14 Med. Sci. & Law 53.
[63] See generally, A.T.H. Smith, "Stealing the Body and its Parts", [1976] Crim. L.R. 622 and T. Harper, "Body Snatchers", (1976) 126 New L.J. 1007.
[64] [1961] J.P.L.G.R. 12.
[65] [1974] R.T.R. 478, (appeal against sentence).
[66] [1976] R.T.R. 550.
[67] (1976) 354 A. 2d 483, (Md. Ct. of Spec. Apps.), at p. 498-499.

> normal body functions . . . By the force of social custom, we hold that when a person does nothing and says nothing to indicate an intent to assert his right of ownership, possession, or control over such material, the only rational inference is that he intends to abandon the material".

In *Moore v. Regents of University of California*[68], the Court of Appeal of California concluded that the essential element was the intention to abandon. In other words, the owner of the property abandoned must be entirely indifferent as to what may become of it or as to who may thereafter possess it. In the absence of evidence of any contrary intent or agreement, the reasonable expectation of a patient regarding tissue removed in the course of a surgery is that it may be examined by the doctor for treatment purposes and then promptly (and permanently) disposed of by some appropriate means (usually incineration). Consequently, any use to which there is no consent, or which is not within the accepted understanding of the patient, should constitute an actionable conversion.

In the case of *Browning v. Norton Children's Hospital*[69], the Kentucky Court of Appeals emphasised that the patient has to take the initiative to express a specific reservation over surgically removed tissue prior to the operation in order to render the hospital a bailee of such material. On this reasoning, human hair discarded at a hair salon would become the property of the hairdresser in the absence of any express demand by the customer to retain it for his (or her) personal use. In such a case, as with surgical waste, the presumed abandonment is into the legal control of another, as opposed to rendering the property a *res nullius.*[70] Moreover, as with express abandonment (i.e., without reservation or conditions constituting a bailment), the transmission falls be characterised as an outright gift to the immediate recipient. Because the donor is deemed to have extinguished his or her interest in the abandoned material, there would be no right of redress if the material is subsequently the subject of commercial exploitation by the recipient or it's successor(s) in title. To revert to the example of the hairdresser, if he uses his sifted floor sweepings to produce wigs for commercial sale to the public, there seems little likelihood that his customers would be legally entitled to benefit from his financial gains.[71] The point has already arisen specifically in the context of human tissue used in biotechnological engineering. The view of at least one American court[72] is that a donor of tissue is not entitled to share in the profits of a commercially successful biotechnological product engineered from the donor's tissue. The rationale is that such material is the subject of gift regardless what use is subsequently made of it. This approach may be questioned on the basis that, whilst a donor may be happy to part with tissue for a number of therapeutic and philanthropic purposes (including medical treatment and research), he may be less inclined to do so where the recipient is to reap a significant financial benefit from its manufacture into a commercial valuable product or commodity.

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[68] 249 Cal. Rptr. 494 (1988), (Court of Appeal of California).

[69] (1974) 504 S.W. 2d. 713, (Ky. C. A.).

[70] See the observation in *Haynes' Case* (1614) 12 Co. Rep. 113: "A man cannot relinquish the property he hath to his goods unless they be vested in another". In other words, the law abhors a vacuum.

[71] But using body parts to make artefacts may be held to constitute the common law offence of outraging public decency: *R. v. Gibson* [1990] 2 Q.B. 619, (CA), where a freeze-dried human foetus was used to make earrings displayed in an art galllery open to the public.

[72] *Moore v. Regents of the University of California* 793 P. 2d (1990) 479, (Supreme Court of California).

GENETIC MATERIAL

Complex legal questions arise in regard to genetic material such as ova and sperm. A landmark American case in this area is *Hecht v. Superior Court*[73] where the California Court of Appeals held that a testator had an ownership interest in his sperm which amounted to a right in property under state probate law. In this case, the testator had directed in his will that his sperm (which he had stored in a sperm bank) was to be given to his girlfriend. When he died, his children sought a court order to have the sperm destroyed on the grounds that this would further good public policy by preventing both the birth of fatherless children and the disruption of the family by after-born children. His girlfriend, on the other hand, argued that the sperm should be distributed to her because it was gifted to her when deposited in the sperm bank or, alternatively, bequeathed under the testator's will. The Court of Appeals, distinguishing the earlier case in *Moore v. Regents of the University of California*[74], discussed below, held that the testator had an expectation of retaining an interest in the sperm (unlike Mr Moore who had no such expectation of exercising control over his excised spleen cells) and, consequently, it was capable of constituting property for the purposes of devise and probate jurisdiction. The emphasis of the decision lies in the judicial recognition that genetic material should be used as the donor intended. This has already been recognised in other American decisions.[75]

However, the suggestion that donors have proprietary rights with respect to ova and sperm (including the resultant embryos) is not universally accepted. There is a growing consensus that property concepts have no place in a consideration of issues which focus on the embryo as a genetically unique human entity possessing rights of self-determination. On this reasoning, the respective property rights of the donors are treated as extinguished at the moment of conception when a "genetically new human life organised as a distinct entity oriented towards further development"[76] comes into being. The problem with this approach, however, is that it fails to recognise the continuing rights of the recipient beneficiary (i.e., the mother) who does have the legal power to abort her pregnancy subject to statutory[77] limits. Indeed, under English law, the foetus "cannot have any right of its own at least until it is born and has a separate existence from the mother".[78] If the foetus has no legal personality separate from its mother, it is difficult to argue that the human embryo has separate legal status following fertilisation. Some of the American case law is also illuminating in this field. In *Del Zio v. Manhattan's Columbia Presbyterian Medical Center*[79], a medical department, without consent, had destroyed the contents of a test-tube containing a couple's fertilised egg. The Court declined to uphold a

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[73] 20 Cal. Rptr. 2d 275 1993, (California Court of Appeals).

[74] 793 P. 2d (1990) 479, Supreme Court of California).

[75] See, for example, *Davis v. Davis* (1992) 842 S.W.2d 605 (Supreme Court of Tennessee), holding that the parents of frozen pre-embryos had a decision making authority, an interest in the nature of ownership, to order their disposition; and (1989) *York v. Jones* 717 F. Supp. 421 (District Court for the Eastern District of Virginia), holding that the donors of gametes have the right to decide their disposition within medical and ethical guidelines.

[76] See, Senate Select Committee on the Human Embryo Experimentation Bill 1985, *Human Embryo Experimentation in Australia*, Report (1986), para. 2.21.

[77] See, in particular, the Abortion Act 1967.

[78] *Paton v. Trustees of B.P.A.S.* [1979] Q.B. 276, at p. 279, *per* Baker P.; *C v. S* [1988] 1 Q.B. 135, (C.A.); *Re F (in utero)* [1988] Fam. 122, (C.A.); and *R. v. Tait* [1990] 1 Q.B. 290, (C.A.). *Cf*: the Congenital Disabilities (Civil Liability) Act 1976, which makes provision for civil liability in the case of a child being born disabled in consequence of some person's default.

[79] Noted in G. Dworkin and I. Kennedy, "Human Tissue: Rights in the Body and Its Parts", [1993] Med. L.Rev. 291, at p. 301, n.36.

tortious claim for destruction of property in favour of a personal remedy for severe emotional distress. Similarly, in *Davis v. Davis*[80] the Supreme Court of Tennessee refused to characterise the human embryo as a person because this categorisation was restricted to individuals who had been born alive. To classify the embryo as a "person" would conflict with the State's statutory law (for example, on abortion). Nor could the embryo be properly classified as property. The only relevant American decision, namely, *York v. Jones*[81], which takes a contrary view, was distinguished on the basis that in that case it had been *assumed* that the disputed embryo was property for the purposes of a detinue claim. The Court in *Davis* did, however, recognise that the donors had an interest in the embryo (which had been cryogenically preserved and stored in a fertility clinic) "in the nature of ownership" in so far as they had decision-making authority concerning the disposition of the embryo. According to *Davis*, therefore, disputes involving the disposition of embryos produced by *in vitro* fertilisation fell to be resolved, in the fist instance, according to the preferences of the gamete-providers.[82]

In England, human reproductive technology is regulated by the Human Fertilisation and Embryology Act 1990 but, significantly, the Act does not consider the proprietary status of the human embryo. What is apparent, however, is that the storage of gametes and embryos, and the use of gametes for *in vitro* fertilisation, may only be lawfully carried out with the effective consent of both donors and beneficiary.[83] It is apparent, therefore, that to some extent, a proprietary model has been adopted with respect to the rights of donors and/or intending beneficiaries in order to control the way such embryonic tissue is stored or subsequently used for fertilisation or research. The Act assumes that such human tissue is amenable to transfer and disposal in so far as it is treated as if it were a *res* (albeit not capable of being the subject of ordinary commerce) but does not resolve the central question of who owns donated sperm and ova prior to fertilisation.

The issue of whether sperm can be the subject of ownership has, however, been considered recently by the Court of Appeal in *Yearworth*.[84] In this case, six cancer patients were being treated at a hospital run by the Trust. Due to the risk of the treatment on their fertility, the men banked sperm samples at the hospital, which had a fertility unit licensed under the 1990 Act. The sperm was damaged when the equipment storing them failed. The patients brought proceedings for negligence claiming damages for psychiatric injury and mental distress brought about by the loss of their sperm samples. One of the issues before the Court of Appeal was whether the sperm was property capable of being owned, at common law, by the producer of it. Although the Court felt no difficulty in concluding that the storage of the sperm in liquid nitrogen was an application of work and skill (in the *Doodeward* sense) which conferred on it a substantially different attribute, it preferred to base its decision on the broader footing that, for the purposes of their claims in negligence, the claimants had actual ownership of the sperm. Lord Judge CJ (giving the judgment of the Court) was "not content" to see the common law develop by way of "an exception to a principle, itself of exceptional character, relating to the ownership of a human

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[80] (1992) 842 S.W. 2d 605, (Supreme Court of Tennessee). See further, Commentary, "Frozen Embryos: Legal Status, Disposition and Control", [1993] Med. L. Rev. 273.

[81] (1989) 717 F. Supp. 421, (District Court for the Eastern District of Virginia).

[82] It has been argued that vesting decision-making control in the couple gave them, in effect, a "form of quasi-ownership or pseudo-propriety interest" in the frozen embryo: "What was this power if not that of an owner over his property?": see, Commentary, "Frozen Embryos: Legal Status, Disposition and Control", [1993] Med. L. Rev. 273, at p. 277.

[83] See, Schedule 3.

[84] *Yearworth v. North Bristol NHS Trust* [2009] EWCA Civ 37.

corpse."[85] In his view, "such ancestry does not commend it as a solid foundation". Moreover, the *Doodeward* exception gave rise to anomalies:

> "Why, for example, should the surgeon presented with a part of the body, for example, a finger which had been amputated in a factory accident, with a view to re-attaching it to the injured hand, but who carelessly damages it before starting the necessary medical procedures, be able to escape liability on the footing that the body part had not been subject to the exercise of work or skill which had changed its attributes?"[86]

Although the 1990 Act confined the provision of human reproductive treatment services to persons licensed under the Act and controlled the activities of licence-holders (so that donors were prohibited from dealing with their sperm as they wished), this did not amount to a derogation from ownership. In this connection, there were already numerous examples of legislation that limited a person's ability to use his property without eliminating his ownership of it.[87] In addition, the 1990 Act provided that the Trust required informed consent from the claimants before it could do certain acts with the sperm. Thus, the claimants could direct that the sperm not be used in a certain way – this negative control over their sperm's use remained absolute. Moreover, it was also significant that the sperm could not be continued to be stored without the claimants' subsisting consent. The 1990 Act, therefore, recognised in the claimants a "fundamental feature of ownership", namely, that they could require the destruction of the sperm at any time. The upshot was that, although the Trust had been entrusted with various statutory *duties* in relation to storage of the sperm, etc, it was only the claimants who had any *rights* in relation to it.

Although the claim in negligence failed in this case (because damage to the sperm was held not to constitute personal injury to the body), it was apparent that the claimants had an alternative cause of action against the Trust under the law of bailment. In this connection, the Trust had clearly taken possession of the sperm and assumed responsibility for its careful storage. Moreover, since breach of bailment was similar to breach of contract, the claimants' loss could include damages for psychiatric injury and mental distress as a foreseeable consequence of the breach. Quite apart from the actual outcome, however, the decision is highly significant in its re-analysis of the common law's approach to the issue of ownership of parts or products of a living body.

BIOTECHNOLOGICAL PRODUCTS

The legal status of tissue donated for biotechnological research is even more uncertain. In the United States, the issue was addressed in the celebrated case of *Moore v. Regents of the University of California*[88], where the majority of the Supreme Court of California held that a

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[85] *Ibid*, at para.45.
[86] *Ibid*, at para. 45.
[87] The Court of Appeal cited a land owner's ability to build on his land or to evict his tenant at the end of the tenancy or a pharmacist's ability to sell his medicines.
[88] 793 P. 2d (1990) 479, (Supreme Court of California). See, generally, B.M. Dickens, "Living Tissue and Organ Donors and Property Law: More on Moore", (1992) 8 Journal of Contemporray Health Law and Policy 73. There has been a huge volume of American legal literature on the *Moore* decision.

donor of tissue could not share in the profits of a commercially successful biotechnological product engineered from the donor's tissue.

The tissue in question (the patient's spleen) was removed as part of the standard procedure for treating hairy-cell leukaemia and later used in the production of a unique cell-line for commercial exploitation. It was estimated that the market potential for the derivative products from the cell-line would be in the region of $3 billion by 1990. Despite this profit potential, the majority of the Supreme Court concluded that the extension of the tort of conversion to cover unauthorised use of human tissue in biotechnological research was not warranted for reasons of public policy[89] and that any extension of the tort in this way should be effected by appropriate legislation. On this analysis, the donor retains no property interest in the donated tissue once it has been removed – the removal of the tissue being treated as a gift by the donor to the donee institution. However, the Court's ruling also implicitly recognised the need for property in human tissue as a basis for protecting donated tissue from theft or damage by third parties. On this basis, therefore, any unauthorised removal of tissue from the donee institution would constitute theft and an interference with goods actionable under the civil law. The reader may consider this conclusion somewhat ironic given that Mr Moore, the donor, was emphatically denied any proprietary right to develop and exploit the commercial potential of his own tissue. An alternative argument, canvassed by Magnusson[90], is that property rights can be regarded as being created in favour of the research institution through the process of biotechnological research itself, rather than at the time tissue was removed from the donor. This is, essentially, the same principle which emerges from the *Kelly/Lindsay* decision, namely, that a bodily part can become the subject of property where it has undergone a "process of human skill" thereby acquiring some usefulness or value.

Whatever rationale is eventually adopted for the conferment of legal status on such material, it is submitted that human tissue donated for biotechnological research should be regarded as property and thus capable of transmission by gift, sale or bailment. The potential for commercial exploitation of such material is obvious. As we have seen, although the donor may not have proprietary rights in the donated tissue, it may well be that the donee institution will acquire a property interest in such material once it has undergone a process of research. This may provide a cogent reason for according the institution the financial benefit derived from engineered products which have been processed in this way, although a more equitable solution may be to divide the financial gains between donor patient and donee institution. This was the view put forward by Mosk J. in his strong dissenting judgment in *Moore*, who cogently argued that recognising a donor's property rights would prevent unjust enrichment by giving monetary rewards to the donor and researcher proportionate to the value of their respective contributions.[91] In his view, a patient retained proprietary rights over excised cells unless he had abandoned them and that it would be "inequitable and immoral" not to allow Mr Moore a share of the profits arising from an enterprise to which his "contribution . . . [was] absolutely crucial".

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[89] The majority of the Court felt that extending conversion liability in this way would have a devastating effect on biotechnological research.

[90] See, (1983) 36 Current Legal Problems 193, at p. 259.

[91] The donor's share in the profits may be small, bearing in mind the amount of work and skill employed in the development of the biotechnological product: see further, P. Matthews, "Freedom, Unrequested Improvements, and Lord Denning", [1981] C.L.J. 340.

CONCLUSION

It is submitted that the common law "no property rule" can no longer be supported in the context of the modern case law. There is now a strong argument that human body parts and products of the living human body should be given full legal status as property capable of transfer by gift or bailment, as well being the subject of product liability and legal protection against theft, damage and commercial exploitation. Property law, it is submitted, affords valuable protection to donors and patients in so far as it provides accountability for the use and (more importantly) misuse of such material. The significance of the recent Court of Appeal decision in *Yearworth* is that the Court of Appeal has recognised openly that that parts or products of the human body may the subject of proprietary status even without the acquisition of different attributes or a use or significance beyond their mere existence.

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