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# Old Remedies in the Biotechnology Age: *Moore v. Regents\**

Michelle J. Burke and Victoria M. Schmidt\*\*

## Introduction

The past two decades have brought great advances in medicine and science, primarily through developments in genetic engineering. Although this bloom of biotechnology has resulted in many medical breakthroughs, it has also raised many unanswered questions. So far, the legal system has dealt with relatively few of them. More and more frequently, however, courts are being called upon to use age-old legal principles to solve new-age problems. This is well illustrated by *Moore v. Regents of the University of California* (hereafter *Moore*).<sup>1</sup>

As many know from widespread reports of this case, John Moore brought suit alleging that his physician, David W. Golde, and others with whom Golde had a financial relationship were accountable to him for income derived from economic exploitation of cells removed from his body. Golde and others named as defendants took the position that, even if everything alleged on behalf of Moore were true, he would be entitled to no relief.

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<sup>1</sup> *Moore v. Regents, U. California, 793 P.2d 479 (Cal. 1990).*

Having decided that Moore failed to allege critical facts, the trial court dismissed his complaint.<sup>2</sup> Following reversal by an intermediate appellate court,<sup>3</sup> the ultimate task faced by the Supreme Court of California was to determine whether, assuming that his allegations were true, Moore would be entitled to any relief. The majority of that court found Moore's allegations adequate to permit him to go forth with his suit and remanded the case for further proceedings.<sup>4</sup>

Although Moore's circumstances are fairly unique, his suit has been seen as raising broad policy issues that have been considered in Congressional hearings<sup>5</sup> and addressed at length in the literature.<sup>6</sup> As a result, John Moore has been lost in a forest of policy. The decision of the California Supreme Court, by excluding one of his potential remedies, has eliminated many of the larger concerns generated by the case. Unfortunately, it gave little attention to the remedies that remain. In our view a remedy of considerable vintage can be applied to achieve a just result in these particular circumstances without having much of an impact on the biotechnology world at large.

To set the stage for discussion of what we believe to be the most appropriate remedy, a constructive trust, it is necessary first to consider Moore's allegations and the analyses of Moore's legal theories as addressed in the majority, concurring and dissenting opinions.

### Facts and Procedural History

The "facts" recited herein are not ones determined by a trial, indeed, because discovery<sup>7</sup> follows only after a complaint is found adequate,

<sup>2</sup> *Id.* at 486.

<sup>3</sup> *Moore v. Regents, U. California*, 249 Cal. Rptr. 494, 501 (Cal. App. 2 Dist. 1988) — note that the intermediate decision can be distinguished from the Supreme Court by the reporter in which it appears.

<sup>4</sup> 793 P.2d. at 497.

<sup>5</sup> *The Use of Human Biological Materials in the Development of Biomedical Products: Hearing Before the Subcomm. on Investigations and Oversight of the House Comm. on Science and Technology*, 99th Cong., 1st Sess. (1985) [hereinafter *Hearings*].

<sup>6</sup> Discussed *infra* notes 96–99.

they are in many respects incomplete.<sup>8</sup> In such a situation, courts *presume* for purposes of legal discussion that alleged facts are true. Thus, the courts consider allegations only for purposes of determining whether, if true, they would entitle a plaintiff to some kind of legal relief. If they are found adequate, the plaintiff then is afforded an opportunity to prove their truth at trial.

As alleged in his complaint, in 1976, John Moore, a resident of Seattle, Washington, was diagnosed, at the University of California at Los Angeles Medical Center (“UCLA” or “Medical Center”), as having a rare form of cancer known as hairy-cell leukemia.<sup>9</sup> Along with the destruction of normal blood cells and infiltration of the bone marrow, another common characteristic of this form of cancer is the enlargement of the spleen.<sup>10</sup> Consequently, in order to “slow down the progress of his disease”,<sup>11</sup> David W. Golde, the attending physician, recommended the removal of Moore’s spleen.

At that time, Golde and Shirley Quan, a UCLA research employee:<sup>12</sup>

were aware that “certain blood products and blood components were of great value in a number of commercial and scientific efforts” and that access to a patient whose blood contained these substances would provide “competitive, commercial, and scientific advantages.”

Indeed, it is alleged that, prior to the splenectomy operation, Golde and Quan had already made arrangements to take part of Moore’s spleen to a separate research unit.<sup>13</sup> However, Moore claims never to have

<sup>7</sup> Discovery consists of pre-trial mechanisms for one party to learn facts important to preparation of the case from the other party. *See, e.g.*, Fed. Rules Civ. Pro. 26-37. *See also*, BLACK’S LAW DICTIONARY 466 (6th ed. 1990).

<sup>8</sup> 793 P.2d at 500 (Broussard, J., concurring and dissenting).

<sup>9</sup> *Id.* at 481.

<sup>10</sup> INTERNATIONAL DICTIONARY OF MEDICINE AND BIOLOGY 2476 (1986).

<sup>11</sup> *Moore*, 793 P.2d at 481. [To minimize the number of notes, repeated citations to the same location in a document are ordinarily omitted. Thus, all factual allegations between two footnotes are documented in the former.]

<sup>12</sup> *Id.*

been informed of the value of his cells prior to consenting to the operation in October, 1976.

Moore returned several times between then and September, 1983, because Golde told him this was “necessary and required for his health and well being.” At a subsequent Congressional hearing, Moore said that he dreaded these visits, because they suggested that he still was not cured.<sup>14</sup> During each visit, Golde withdrew additional samples of “blood, blood serum, skin, bone marrow aspirate, and sperm.”<sup>15</sup>

In 1983, Moore said that he could no longer afford to travel to UCLA and asked if it would be possible to undergo treatments at a closer medical facility.<sup>16</sup> Golde then agreed to fund his travel expenses.

Although, he had not previously been asked to give expressed consent to blood or tissue withdrawals during any of the preceding ten or so visits to Golde’s facilities,<sup>17</sup> in April, 1983, Moore was asked to sign a form authorizing the use of withdrawn blood for research. This was presented as a mere formality. Moore claimed that although the explanation was vague, he trusted his physician and signed the form as instructed. On the space provided on the form, Moore marked:<sup>18</sup>

I do voluntarily grant to the University of California any and all rights I, or my heirs, may have in any cell line or any other potential product which might be developed from the blood and/or bone marrow obtained from me.

During a September visit, Moore informed Golde that his parents were moving from Los Angeles, and that he would no longer have a place to stay.<sup>19</sup> Golde then agreed to pay for lodging at a posh Beverly

<sup>13</sup> *Id.* Golde gave written instructions to this effect on October 18 and 19, 1976, prior to Moore’s October 20 splenectomy.

<sup>14</sup> *Hearings, supra* note 5 at 242 (testimony of John Moore).

<sup>15</sup> *Moore*, 793 P.2d at 481.

<sup>16</sup> *Hearings, supra* note 5, at 242 (testimony of John Moore).

<sup>17</sup> *Id.* at 251–2 (statement of John Moore).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 253. Moore had been staying at his parent’s home in Los Angeles whenever he came to UCLA for “follow up” treatments.

Hills hotel. When Moore was again asked to sign a consent form, he directly asked Golde about the commercial potential of his cells. Golde indicated there wasn't any, but his demeanor and vagueness in responding made Moore suspicious. This time when Moore signed the consent form, he circled "I do not voluntarily grant..."

Within hours of that visit, Moore received a phone call from Golde informing him that he had completed the form incorrectly and requesting him to return to the Medical Center to sign another consent form. Moore said he could not. Golde's secretary then mailed the form to Moore in Seattle, with instructions on how to complete the form.<sup>20</sup> Moore did not return the form. Three months later, Golde wrote, urging Moore to sign the form and circle that he granted the University of California the rights to his cell lines. Moore did not.

Moore's uneasiness with his physician's insistence regarding the signing of the consent form, evasiveness when questioned about the commercial development of the cells, and overeager willingness to pay for his travel and lodging expenses prompted Moore to contact a lawyer.<sup>21</sup> Through their investigations, Moore's attorneys learned that Golde had developed a cell line from Moore's T-lymphocyte cells<sup>22</sup> by 1979 and had applied for a patent in 1981.<sup>23</sup> The patent, covering the cell line and various methods for using it to produce lymphokines,<sup>24</sup> issued in 1983. It named Golde and Quan as the inventors and the

<sup>20</sup> *Id.* at 255.

<sup>21</sup> *Id.*

<sup>22</sup> T-lymphocytes are white blood cells that destroy, e.g., virus infected cells. In contrast, B-lymphocytes combat bacteria and viruses in extra-cellular media. See, e.g., LUBERT STRYER, *BIOCHEMISTRY* 911 (1988). See also, *Moore*, 793 P.2d at 481 n.2.

<sup>23</sup> *Moore*, 793 P.2d at 481-2.

<sup>24</sup> Lymphokines are peptides and proteins secreted by T-lymphocytes. These hormone-like molecules direct the activities of other cells. See, e.g., STRYER, *supra* note 22, at 912.

Interferons, a species of lymphokine, bind to the membrane of other cells and induce an antiviral state leading to resistance to a broad spectrum of viruses; *id.*, at 880-1.

Regents as assignee [owner].<sup>25</sup> Also, Moore's attorneys learned that Golde, with the Regents' assistance, had negotiated agreements for commercial development of the cell line and derivative products. Under an agreement with Genetics Institute, Golde "became a paid consultant" and "acquired the rights to 75,000 shares of common stock." Genetics Institute also agreed to pay Golde and the Regents "at least \$330,000 over three years, including a pro-rata share of [Golde's] salary and fringe benefits, in exchange for ... exclusive access to the materials and research performed" on the cell line and its derivatives. In 1982, Sandoz joined the agreement, and compensation payable to Golde and the Regents was increased by \$110,000.<sup>26</sup>

Believing these facts to be true, Moore filed a lawsuit in superior court, naming Golde, Quan, the Regents, Genetics Institute, and Sandoz Pharmaceuticals as defendants.<sup>27</sup> His complaint stated thirteen causes of action,<sup>28</sup> including conversion, lack of informed consent, breach of fiduciary duty and intentional infliction of emotional distress.<sup>29</sup> Based on those theories and allegations, Moore claimed that damages for personal injury and, e.g., an interest in all products derived from those cells.<sup>30</sup>

Defendants filed demurrers<sup>31</sup> to all of Moore's causes of action.<sup>32</sup> Finding Moore's allegations inadequate in several respects, the Superior Court dismissed the complaint as to all defendants.<sup>33</sup>

<sup>25</sup> *Moore*, 793 P.2d at 482.

<sup>26</sup> According to industry reports, the market value of lymphokines was predicted to be \$3.01 billion dollars by the year 1990; *id.*

<sup>27</sup> *Id.*

<sup>28</sup> A cause of action is a situation or set of facts that entitle a person to seek a judicial remedy. *See, e.g.*, BLACK'S LAW DICTIONARY 221 (6th ed. 1990).

<sup>29</sup> *Moore*, 793 P.2d at 482, n.4.

<sup>30</sup> *See, e.g., id.* at 487.

<sup>31</sup> A demurrer challenges whether the facts presented by the plaintiff, even if true, are legally sufficient to establish the causes of action claimed in the complaint. *See, e.g.*, BLACK'S LAW DICTIONARY 433 (6th ed. 1990).

<sup>32</sup> *Moore*, 793 P.2d. at 482, n.5.

On appeal, the Court of Appeals reversed.<sup>34</sup> Finding no authority to the contrary, it held that Moore retained a property interest in his excised cells.<sup>35</sup> It also held that Moore had never consented to the way Golde used his cells.<sup>36</sup> However, the court agreed that the complaint as to Genetics Institute and Sandoz Pharmaceuticals was inadequate.<sup>37</sup>

Upon further appeal, a majority of the California Supreme Court concluded that Moore did not have a cause of action for conversion but did have a claim for breach of fiduciary duty and lack of informed consent.<sup>38</sup> In an opinion written by Justice Panellii, it reversed the intermediate court of appeal in that respect but agreed that Moore should have the opportunity to amend his complaint with regard to Genetics Institute and Sandoz.<sup>39</sup>

Subsequently, Moore sought certiori with the U.S. Supreme Court, but that court declined to accept the appeal.<sup>40</sup> Currently, the case awaits trial or possible agreement of the parties to settle.

### Analysis of the Majority View of Informed Consent and Breach of Fiduciary Duty

The majority opinion, having recited many of Moore's factual allegations and the procedural history of the case, did not immediately turn to Moore's conversion cause of action — in spite of the fact that the two lower courts had focused exclusively on it. Rather, it began by calling attention to Moore's allegations that Golde failed to disclose the extent of his research and economic interests in Moore's cells — and observing that “These allegations, in our view, state a cause of action

<sup>33</sup> See, e.g., *id.* at 486; see also, *infra*, discussion at notes 96–8.

<sup>34</sup> *Moore*, 249 Cal. Rptr. 494.

<sup>35</sup> *Id.* at 503.

<sup>36</sup> *Id.* at 510.

<sup>37</sup> *Moore*, 793 P. 2d. at 483.

<sup>38</sup> *Id.* at 480.

<sup>39</sup> *Id.* at 487.

<sup>40</sup> *Moore v. Regents*, U. California, 111 S. Ct. 1388 (1991).



against Golde for invading a legally protected interest of his patient.”<sup>41</sup>

The majority further noted that:<sup>42</sup>

Our analysis begins with three well-established principles. First “a person of adult years and in sound mind has the right... to submit to lawful medical treatment.” ... Second, “the patient’s consent to treatment, to be effective, must be an informed consent.” ... Third, in soliciting the patient’s consent, a physician has a duty to disclose all information material to the patient’s decision.

Before pursuing an analysis of this portion of the opinion, however, it will be useful, briefly and separately, to consider informed consent and breach of fiduciary duty as they are more commonly applied.

### *Informed Consent Generally*

A physician failing to obtain valid informed consent before performing a medical procedure may be liable under two possible theories, battery and negligence.<sup>43</sup> The former is for the redress of *willful*, the latter for *inadvertent*, injuries. Early decisions involving informed consent were predicated on the idea that contact by a physician in the absence of informed authorization could constitute a battery. However, courts, except in Pennsylvania and Tennessee, have now limited recovery for lack of informed consent to negligence.<sup>44</sup>

Informed consent does not require physicians to disclose every possibility of risk of which they are aware. Situations requiring immediate medical action or ones where the disclosure may unnecessarily alarm or cause adverse psychological effects to the patient receive special treatment.<sup>45</sup> Also, for example, there is no duty to disclose what is commonly known or information that would not influence the decision of the patient.<sup>46</sup>

<sup>41</sup> *Moore*, 793 P.2d at 483.

<sup>42</sup> *Id.*

<sup>43</sup> See generally, RUTH R. FADEN ET AL., A HISTORY AND THEORY OF INFORMED CONSENT (1986); Marcus L. Plante, *An Analysis of “Informed Consent,”* 36 FORDHAM L. REV. 639, 648–50 (1968).

<sup>44</sup> Jon F. Merz, *An Empirical Analysis of the Medical Informed Consent Doctrine: The Search For a “Standard” of Disclosure*, 2 RISK 27, 33 (1991).

<sup>45</sup> *Id.* at 37.

To recover for lack of informed consent, it is unnecessary to find improper *treatment*.<sup>47</sup> Compensation may be awarded even if the physician's actions fall within the usual "standard of care;"<sup>48</sup> the focus is whether the *risk* of the outcome was *disclosed*.<sup>49</sup>

Standards for disclosure vary. California, for example, uses the "prudent patient" standard for disclosure. Under that standard, patients need only convince a trial court that a reasonable *patient* would not have consented to the treatment had he or she known of the possible outcome.<sup>50</sup> Other jurisdictions focus on the physician rather than the patient and permit recovery only if undisclosed risks were ones other similarly situated *physicians* would have disclosed under the circumstances.<sup>51</sup> In the latter jurisdictions, expert testimony is required to determine whether the physician's behavior was appropriate.<sup>52</sup> In any case, patients must establish that, had they known of the risk, they would not have consented.<sup>53</sup>

#### *Breach of Fiduciary Duty Generally*

According to California law:<sup>54</sup>

Confidential and fiduciary relations are, in law, synonymous, and may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another. The very existence of such a relation precludes the party in whom trust and confidence is reposed

<sup>46</sup> *Id.* at 36-7.

<sup>47</sup> *Id.* at 33-4.

<sup>48</sup> The procedure may have been a technical success, but as a consequence the patient is left to deal with undisclosed, collateral side effects, for example hearing loss or scarring, which may be typical of even the most successful surgery.

<sup>49</sup> *Merz, supra* note 44, at 33.

<sup>50</sup> *Id.* at 35-6. *See also, e.g.,* *Cobbs v. Grant*, 502 P.2d 1 (1972).

<sup>51</sup> *Id.* at 35-6.

<sup>52</sup> *Plante, supra* note 43, at 660-1.

<sup>53</sup> In short, the omission must have caused the injury in fact. Cause-in-fact is established with a "but for" test, i.e., but for event A, event B would not have occurred.

<sup>54</sup> *Twomey v. Mitchum, Jones & Templeton, Inc.*, 69 Cal. Rptr. 222 (1968).

from participating in profit or advantage resulting from the dealings of the parties to the relation.

Whether a relationship can be characterized as “fiduciary” depends on the behavior of the parties, not on a formal label applied to the relationship.<sup>55</sup> Fiduciaries are usually forbidden from participating in transactions involving beneficiaries when they have a personal interest in the transaction.<sup>56</sup> However, a beneficiary may agree to such a transaction if there is a complete disclosure of the fiduciary’s interest and consent is free from any influence on the part of the fiduciary.<sup>57</sup>

Thus, unlike complaints seeking compensation for personal injuries following failure to obtain informed consent, complaints based on a breach of fiduciary duty ordinarily seek to transfer an economic gain from a fiduciary to a party to whom duties are owed.

*The Majority’s Discussion of Informed Consent  
and Breach of Fiduciary Duty*

The Superior Court had dismissed his complaint partly because Moore failed to allege that:<sup>58</sup>

[D]efendants knew his cells had potential commercial value *on October 5, 1975* (the time blood tests were first performed...) and *at that time* already formed the intent to exploit the cells. (Emphasis in original.)

However, a majority of the Supreme Court found it adequate for Moore to allege an undisclosed research interest at the time consent was sought for the splenectomy which was performed on *October 20*.<sup>59</sup> Also, in disagreement with the Superior Court, that court found it unnecessary for Moore to allege that the splenectomy lacked a therapeutic purpose. In the same context, it further noted Moore’s allegations that (1) Golde had established economic interests in his cells prior to withdrawals of “Bodily Substances,” (2) such withdrawals had no therapeutic purpose, and (3) Golde’s economic interests were

<sup>55</sup> *Id.* at 237–9.

<sup>56</sup> CAL. PROB. CODE § 16004(a) (West 1985); *see also, e.g., id.* § 15002.

<sup>57</sup> CAL. PROB. CODE § 16463 (West 1985).

<sup>58</sup> *Moore*, 763 P.2d. at 486 [italics in original].

<sup>59</sup> *Id.* at 485–6.

actively concealed.

Indeed, Moore alleged that, in a memo addressed to staff members, Golde formed the intent and prepared to culture Moore's cells before the splenectomy was performed.<sup>60</sup> There was even a space on Moore's consent form reserved for this type of disclosure, but it was left blank.<sup>61</sup> Moore alleges that not only did he ask repeatedly about the economic potential for his cells, but also that Golde denied the possibility and discouraged Moore from asking further questions.<sup>62</sup> Moore claims that he was unaware of Golde's undertakings until an investigation was initiated on his behalf seven years later.<sup>63</sup>

The majority in *Moore* finds such conduct actionable. Their opinion establishes that a physician has a duty to disclose all facts material to a patient's decision — regardless of whether they relate to potential adverse outcomes of a procedure or matters that could influence the physician's professional judgment.<sup>64</sup> It is the latter notion that expands the doctrine of informed consent as usually applied and brings in the idea of fiduciary duties.

A physician is certainly a fiduciary as defined above.<sup>65</sup> While the majority did not address what this might mean in terms of Moore's recovery,<sup>66</sup> we will explore that further after considering the other issue addressed by the majority.

## Analysis of the Majority View of Conversion

### *Conversion Generally*

Conversion occurs when one holds another's personal property without permission.<sup>67</sup> It began as a "gap filler" in the common law.<sup>68</sup>

<sup>60</sup> *Moore*, 793 P.2d at 481.

<sup>61</sup> *Hearings*, *supra* note 5, at 267 (statement of John Moore).

<sup>62</sup> *Moore*, 793 P.2d at 485–6.

<sup>63</sup> *Hearings*, *supra* note 5, at 243 (testimony of John Moore).

<sup>64</sup> *Moore*, 763 P.2d. at 485.

<sup>65</sup> *Supra* at note 54.

<sup>66</sup> *But see Moore*, 763 P.2d. at 485, n.10.

Early cases usually involved a finder of goods who, instead of returning them, kept or otherwise disposed of them.<sup>69</sup> Such cases could not be brought under trespass or detinue because both of those require wrongful *taking*, not wrongful *withholding*.<sup>70</sup> Conversion was later expanded to deal with both wrongful taking and wrongful withholding,<sup>71</sup> almost completely replacing trespass to personal property and detinue.<sup>72</sup> Plaintiffs prevail if they can prove that they have a right to possess property and that a defendant's interference causes loss.<sup>73</sup> Not only can plaintiffs prevail as to, e.g., finders but also as to "one who, though honestly and in good faith, purchases personal property from one having no title thereto or right to sell the same...."<sup>74</sup> Significantly, this is true even if the statute of limitations has run (expired) as to the original wrongdoer; it begins to run anew each time the property is sold.<sup>75</sup>

#### *The Majority's Discussion of Conversion*

Traditionally, courts examine prior cases and statutes for authority governing the precise legal questions involved. Failing that, they attempt to find cases or statutes that are closely analogous. In addressing possible recovery under breach of fiduciary duty and informed consent, Justice Panelli found these adequate to his needs.

However, when neither approach easily resolves an issue, a court faces a difficult choice. Should it extend authority to cover the situation

<sup>67</sup> See, e.g., BLACK'S LAW DICTIONARY 332 (6th ed. 1990).

<sup>68</sup> "Common law," as distinguished from statutory law created by legislatures, comprises principles and causes of action which derive their authority solely from earlier decisions of courts. See, e.g., BLACK'S LAW DICTIONARY 276 (6th ed. 1990).

<sup>69</sup> William L. Prosser, *The Nature of Conversion*, 42 CORNELL L. REV. 168, 169 (1957).

<sup>70</sup> *Id.* at 169.

<sup>71</sup> Prosser, *supra* note 69, at 170.

<sup>72</sup> *Id.*

<sup>73</sup> 89 C.J.S. *Trover and Conversion* §§ 3, 4, 5, 33 (1955).

<sup>74</sup> *Culp v. Signal Van & Storage*, 298 P.2d. 162, 164 (Cal. 1956).

<sup>75</sup> *Id.*

or should it leave the matter for the legislature? In either case, the legislature (constitutional issues aside) is in control, i.e., if the court extends the law and the legislature disagrees in any respect, it can enact legislation producing the outcome it believes proper.

Within this framework, the *Moore* majority found no previous decision defining the extent of property rights in excised cells.<sup>76</sup> Next, it reviewed decisions recognizing rights in privacy and publicity.<sup>77</sup> Moore's lawyers argued that if rights exist in one's likeness, they should be found in one's cells and genetic material — "something far more profoundly the essence of one's human uniqueness than a name or a face."<sup>78</sup> The court, however, was uncomfortable with analogizing to rights based on unauthorized exploitation of an individual's unique persona because basic genetic material is not unique to Moore.<sup>79</sup>

Moore's attorneys also attempted to establish rights based on a California decision upholding the right to refuse medical treatment.<sup>80</sup> There, in permitting a patient to have a feeding tube removed, the court had stated that every person of adult years and sound mind has a right to determine what shall be done with his or her body. Yet, the majority in *Moore* did not find this helpful.<sup>81</sup>

It also considered *Venner*, a Maryland case<sup>82</sup> that had influenced the Court of Appeals.<sup>83</sup> In that case, several balloons containing hashish oil had been recovered from Venner's hospital bedpan<sup>84</sup> for use as evidence. In that context, the *Venner* court had observed:<sup>85</sup>

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<sup>76</sup> *Moore*, 793 P.2d. at 487.

<sup>77</sup> *Id.* at 489.

<sup>78</sup> *Id.* at 490.

<sup>79</sup> *Id.* at 490.

<sup>80</sup> *Bouvia v. Superior Court*, 225 Cal. Rptr. 297 (1986).

<sup>81</sup> *Moore*, 793 P.2d at 491.

<sup>82</sup> *Venner v. State*, 354 A.2d. 483 (Md. 1976).

<sup>83</sup> *Moore*, 793 P.2d at 489.

<sup>84</sup> *Venner*, 354 A.2d. at 485.

<sup>85</sup> *Id.* at 498.

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....

Notwithstanding that the language seems apt, *Venner* was also found irrelevant.<sup>86</sup> Having considered such cases, Justice Panelli concluded not only that Moore was attempting to “force the round pegs of ‘privacy’ and ‘dignity’ into the square hole of ‘property,’” but also that such interests could best be protected by “fiduciary-duty and informed-consent theories.”<sup>87</sup>

Having found no cases useful for guidance, the majority looked to California statutes. The closest was one requiring:<sup>88</sup>

“recognizable anatomical parts, human tissues, anatomical human remains, or infectious wastes” to be buried, incinerated, or disposed of by any other method determined by the state department of health services after the end of scientific use.

Although the Legislature was obviously not addressing the question of a patient’s right to compensation for excised cells, the majority interpreted this statute to limit the control that patients might otherwise have over cells removed from their body.<sup>89</sup>

It found the statute to destroy too many of the rights associated with property for the remainder to be adequate to support a conversion claim.<sup>90</sup> Yet, the court states that there is:<sup>91</sup>

no need to read the statute to permit a “scientific use” which is contrary to the patient’s expressed wish. A fully informed patient may always withhold consent to treatment by a physician whose research plans the patient does not approve.

<sup>86</sup> *Moore*, 793 P.2d. at 489, 490, n.28.

<sup>87</sup> *Id.*

<sup>88</sup> CAL. HEALTH & SAFETY CODE § 7054.4 (West 1985), quoted in *Moore*, 793 P.2d. at 491.

<sup>89</sup> *Moore*, 793 P.2d. at 491.

<sup>90</sup> *Id.* at 492.

<sup>91</sup> *Id.*

It then discussed the implications of a patent's having been issued on a cell line derived from Moore's cells.<sup>92</sup> Because federal patent law will not give rights in naturally occurring substances, the court found that the patented cell line must be sufficiently different from his spleen cells to negate a finding that Moore would have a property right in that line.<sup>93</sup>

Having decided that neither case nor statutory law afforded Moore an action for conversion, the court turned to the question of whether it should extend the law. It began by stating three reasons why that should not be done:<sup>94</sup>

First, a fair balancing of the relevant policy considerations counsels against extending the tort. Second, problems in this area are better suited to legislative resolution. Third, the tort of conversion is not necessary to protect patients' rights.

In short, and in spite of strong arguments of dissenters,<sup>95</sup> it closed the Pandora's box — as reflected in the literature already generated<sup>96</sup> — previously opened by the Court of Appeals. For example, some commentators were concerned that undue focus on property interests might lead to the poor selling parts of themselves or being unable to afford treatment<sup>97</sup> — or the possibility of people being killed for their

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 493.

<sup>94</sup> *Id.*

<sup>95</sup> See, e.g., responses of the majority, 792 P.2d at 495 n.40 and at 491 n.41. See also, the special concurrence of Justice Arabian on the point, at 497.

<sup>96</sup> Only a fraction of it is relevant here. See generally, U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, OTA-BA-337, NEW DEVELOPMENTS IN BIOTECHNOLOGY: OWNERSHIP OF HUMAN TISSUES AND CELLS — SPECIAL REPORT 55 (1989).

For discussions concerning the ownership of excised tissue, see, e.g. Thomas P. Dillon, Note, *Source Compensation for Tissues and Cells Used in Biotechnical Research: Why A Source Shouldn't Share in the Profits*, 64 NOTRE DAME L. REV. 628 (1989); Jennifer Lavoie, Note, *Ownership of Human Tissue: Life After Moore v. Regents of the University of California*, 75 VA. L. REV. 1363 (1989).

For a broad discussion of the market in human "products," see, e.g., Andrew Kimbrell, *The Human Body Shop: Does America Want a 'Free Market' in Organs and Tissues?* The Washington Post, July 1, 1990, at B3.

<sup>97</sup> Henry L. Hipkens, *The Failed Search for the Perfect Analogy: More*



body parts.<sup>98</sup> Others were concerned about possible delay and increased health care costs caused by patients' attempts to negotiate higher selling prices for their cells or body parts.<sup>99</sup>

In a related vein, there were concerns, too, that access to tissues needed for research and development could be impeded because of patients' financial demands. Because research predates product sales, finding the money to meet those demands could prove difficult.<sup>100</sup>

However, still another problem with permitting Moore to recover on a conversion theory had considerable influence on the court.<sup>101</sup> Conversion imposes strict liability on third parties, and statutes of limitation<sup>102</sup> do not begin to run until purchase.<sup>103</sup> This was a major worry of the biotechnology industry leading it to urge that the Supreme Court consider the potential liability of its members for the use of even the oldest available cell lines.<sup>104</sup> Industry representatives argued that a company would risk a lawsuit every time a tissue sample or cell line with hazy or unknown origins were used. Also, they predicted that threats of suit would make researchers hesitant to continue using samples of uncertain ownership.<sup>105</sup> Were this to come to pass, it might

*Reflections on the Unusual Case of John Moore*, 80 KY. L.J. 337, 343 (1992) (questions the adequacy of existing law to address the novel problem presented in *Moore*).

<sup>98</sup> Stephen Ashley Mortinger, *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, 501 (1990) (argues that the court of appeals decision was a correct and reasonable approach to the problem of a proprietary interest in cells); *see also*, Kimbrell, *supra* note 95.

<sup>99</sup> Dillon, *supra* note 95 (discusses reasons for not compensating tissue sources).

<sup>100</sup> *See, e.g.*, Amicus Curiae Brief of the Industrial Biotechnology Association at 19.

<sup>101</sup> *See, e.g., Moore*, 793 P.2d. at 484 n.38.

<sup>102</sup> Statutes of limitations set forth the period of time within which a person must bring a particular cause of action. *See, e.g.*, BLACK'S LAW DICTIONARY 927 (6th ed. 1990).

<sup>103</sup> *Culp*, 298 P.2d. at 164.

<sup>104</sup> Brief *supra* note 100, at 19.

lead to years of effort being lost and potentially lifesaving treatments never becoming fully developed. In a related vein the industry also expressed concern about the financial burden of having to implement a nationwide title system for specimens and advise former patients of newly discovered commercial interests.<sup>106</sup>

Thus, the court analogized to a case in which the application of strict liability to pharmaceuticals had been found to be detrimental to the public welfare<sup>107</sup> and decided that finding a property interest in excised cells would be similarly unwise, stating that: "Indeed, this is a far more compelling case for limiting the expansion of tort liability...."<sup>108</sup>

Finally, as mentioned earlier, the majority was reinforced in its view by finding that any extension of the law of conversion was unnecessary to address Moore's injury.<sup>109</sup>

### Moore's Potential Remedies

#### *Remedies Discussed by Members of the Court*

One of the most interesting aspects of the Supreme Court's opinion is the way it merges traditional notions of informed consent with the law applicable to fiduciaries. Following their decision, Sanford Gage, Moore's attorney, opined that: "If breach of fiduciary trust can be proved, the potential share of damages will be greater than it would have been for innocent conversion."<sup>110</sup>

Whether this is true remains to be seen. The majority seemed to believe that liability under theories of informed consent and breach of fiduciary duty would vindicate Moore's interests. While Justice Broussard concurred in finding that Moore would have such causes of

<sup>105</sup> *Id.* at 18.

<sup>106</sup> However, for an incisive criticism of the majority's analysis of conversion, see Robert A. Bohrer, *Old Blood in New Bottles*, 9 BIOTECHNOLOGY L. REP. 251 (1990).

<sup>107</sup> *Brown v. Superior Court*, 751 P.2d 470 (Cal. 1988).

<sup>108</sup> *Moore*, 793 P.2d. at 496.

<sup>109</sup> *Id.* at 496-7.

<sup>110</sup> *Calif. Biotech Suit Survives, But Theory Dies*, Nat'l L.J., July 23, 1990, at 6.

action, he nevertheless expressed doubts about what could be recovered and offered up only the possibility of punitive damages for willful misconduct.<sup>111</sup>

For that reason, he disagreed<sup>112</sup> with strongly dissenting Judge Mosk's view that threat of suit for nondisclosure is "illusory"<sup>113</sup> or "largely a paper tiger."<sup>114</sup> To recover for lack of informed consent, the law requires a causal relationship<sup>115</sup> between a failure to inform and an injury.<sup>116</sup> That is, plaintiffs must prove that, if they had been informed of all pertinent information, they would have declined to consent. Justice Mosk argues that this unfairly prohibits patients from sharing in economic benefits derived from the exploitation of their tissues and does not punish third parties who may be more at fault than the physician.<sup>117</sup> He emphasized that "the nondisclosure cause of action accentuates the negative and eliminates the positive: the patient can say no, but he cannot say yes and expect to share in the proceeds of his contribution."<sup>118</sup>

Further, Justice Mosk believed that, under the doctrine of informed consent, it would be difficult to show damages to Moore corresponding to benefits to the defendants. The splenectomy actually improved

<sup>111</sup> Compensatory damages are those that make the plaintiff "whole." In contrast, punitive or exemplary damages focus, not on the plaintiff's injury, but on the egregiousness of the defendant's behavior. In some cases, punitive damages may far exceed compensatory damages. See, e.g., BLACK'S LAW DICTIONARY 390 (6th ed. 1990).

<sup>112</sup> *Moore*, 793 P.2d at 500.

<sup>113</sup> *Id.* at 519.

<sup>114</sup> *Id.* at 520

<sup>115</sup> Cause-in-fact is not enough; proximate cause is required. An injury is proximately caused by acts, or failures to act, whenever the injury was either a direct result of or a reasonably probable consequence of the act or omission. See, e.g., BLACK'S LAW DICTIONARY 1225 (6th ed. 1990).

<sup>116</sup> *Moore*, 793 P.2d at 519.

<sup>117</sup> *Id.* at 520-1.

<sup>118</sup> *Id.* at 520.

Moore's condition. Moreover, the inconvenience of travel, pain and discomfort of the collection of samples and emotional distress from being deceived might not amount to much in dollars. Therefore, he concluded that the difficulty of patients in recovering damages would not offer proper encouragement for physicians to adhere to proper informed consent procedures.<sup>119</sup>

### *Constructive Trusts Generally*

Constructive trusts are designed to prevent unjust enrichment by compelling the restoration of property by a wrongdoer.<sup>120</sup> The law considers a person who acquires something wrongfully to be an involuntary trustee for the benefit of the rightful owner.<sup>121</sup> The conditions required to create a constructive trust are the existence of a res,<sup>122</sup> the plaintiff's right to it, and the defendant's gain of the res by fraud, undue influence, violation of the trust, or other wrongful act.<sup>123</sup>

Traditionally, a res has been thought to be a tangible object. However, California courts have not imposed such strict interpretations of the term as to preclude the application of the constructive trust remedy in situations where it has been deemed appropriate.<sup>124</sup>

Constructive trusts are creatures of equity. In dealing with them, equity will disregard mere form, and will ascertain and act on the substance of things, regarding that as done which should have been done. The determination of whether a particular transaction is unconscionable is not governed by hard and fast rules, but is committed largely to the enlightened conscience of the individual judge, subject to the revisionary action of appellate tribunals.

<sup>119</sup> *Id.* at 518–20.

<sup>120</sup> *Blair v. Mahon*, 230 P.2d 832, 837 (1951).

<sup>121</sup> CAL. CIV. CODE §§ 2223–2224 (West 1985 & Supp. 1992).

<sup>122</sup> A “res” is property or an interest in property. It is also considered a “thing”, or an “object.” Categories include real and personal or fungible and not fungible; also, persons may be so regarded for some purposes. *See, e.g.*, BLACK'S LAW DICTIONARY 1304 (6th ed. 1990).

<sup>123</sup> *U.S. v. Pegg*, 782 F.2d 1498 (9th Cir. 1986); CAL. CIV. CODE § 2224 (West 1985 & Supp. 1992).

<sup>124</sup> *Elliott v. Elliott*, 41 Cal. Rptr. 686, 689 (4th Dist. 1964).

California courts have recognized the right of a beneficiary under a constructive trust to obtain a money judgment in lieu of a destroyed res and to recover the value of trust property commingled by a constructive trustee with his own properties, so that the identity thereof could no longer be traced.<sup>125</sup> Constructive trusts extend to property acquired in exchange for that wrongfully acquired and to profit or enhancement in value of the property traced into the trust.<sup>126</sup> Moreover, constructive trustees are obligated to account for any profits, with interest.<sup>127</sup> Yet, bona fide purchasers for value are protected.<sup>128</sup>

*Should the Constructive Trust Remedy be Available to Moore?*

Dr. Golde does not believe that what he did was wrong. "This patient and this case are extraordinary and do not represent the attitudes of all patients,' Golde said. 'I have a lot of patients, and they know all about this case.' Their reaction is 'anytime you want anything, with no strings attached,' they would supply it."<sup>129</sup> Yet, this does not answer Moore's allegations that for over seven years, Golde led Moore to believe that the treatments he recommended were solely for Moore's health and well being.<sup>130</sup> Those visits were stressful for Moore. He reported a belief that each visit would reveal that his cancer hadn't been cured.<sup>131</sup> While such emotional distress might be compensated through traditional application of informed consent, and perhaps even as a battery in these circumstances, it is highly subjective, and a constructive

<sup>125</sup> *Id.*

<sup>126</sup> *Haskel Engineering & Supply Co. v. Hartford Accident & Indemnity Co.*, 144 Cal. Rptr. 189 (2d Dist. 1978).

<sup>127</sup> CAL. PROB. CODE § 16440 (a)(2) (West 1985).

<sup>128</sup> *Weingand v. Atlantic Savings & Loan Assoc.*, 464 P.2d 106 (1970).

A bona fide purchaser is one who acquires property from someone other than the owner, for value, and without notice of the status of the title. *See, e.g.*, BLACK'S LAW DICTIONARY 1304 (6th ed. 1990).

<sup>129</sup> H. McIntosh, *Court Test of Tissue Ownership Leaves Uncertainty About Impact*, 80 J. NAT'L CANCER INST. 1270 (1988).

<sup>130</sup> *Id.*

<sup>131</sup> *Hearings, supra*, note 5, at 242 (testimony of John Moore).

trust approach would have more predictable consequences.

Although this may pose the largest difficulty, for this purpose, Moore's interest in his cells should be adequate to satisfy the need for a res. Whether or not it might be regarded as "property" for all purposes, there is no doubt that Golde and the Regents have property interests derived from his cells. The fact that they have been able to license others supports this conclusion.<sup>132</sup> Also, as Justice Broussard pointed out in dissent, if the cells had been stolen from a UCLA laboratory, there would be no question but that they would have a cause of action for conversion.<sup>133</sup>

Also, no one seems to question whether Moore had a right to decide what would be done with his cells before they were removed. As the majority states:<sup>134</sup>

There is... no need to read the statutes to permit "scientific use" contrary to the patient's expressed wish. A fully informed patient may always withhold consent to treatment by a physician whose research plans the patient does not approve.

Nor does the majority rule out the possibility that patients may retain a rights in their excised cells. While the court rejected extending the application of conversion to Moore's unique circumstance, their decision "does not purport to hold that excised cells can never be property for any purpose whatsoever."<sup>135</sup>

Further, Justice Broussard's dissenting opinion interprets the Uniform Anatomical Gift Act as giving the patient, not the physician or hospital who receives the body part, authority to designate, within the parameters of the statute, the particular use to which the part may be put.<sup>136</sup> He went on to point out that, although the statute is based on donations of organs after death, in many cases, family members donate organs to save the life of another family member. If a hospital decided to

<sup>132</sup> *Moore*, 793 P. 2d at 482.

<sup>133</sup> *Id.* at 501.

<sup>134</sup> *Id.* at 492 (footnote omitted).

<sup>135</sup> *Moore*, 793 P.2d at 493.

<sup>136</sup> *Id.* at 502.

use the organ for another purpose, no one would deny that the hospital had violated the legal right of the donor by its unauthorized use of the donated organ.<sup>137</sup> The problem, of course, is the remedy.

While a constructive trust may be placed on Moore's cells, more importantly, a constructive trust may be placed on Golde's (and the Regents')<sup>138</sup> profits from the cells. Although Golde has argued that only through his efforts did the cells become valuable, he has also acknowledged that Moore's cells were unique and that without them, his research would have been stalled. As explained in Golde's patent, the "Mo cell line"<sup>139</sup> offered the messenger RNAs for these polypeptides in relatively large amounts compared to the total amount of messenger RNA (mRNA) present.<sup>140</sup> As was also stated in the patent, because of the cumbersome nature and difficulties associated with other genetic engineering, polypeptide synthesis methods, mRNA methods are the most desirable methods for producing peptides:<sup>141</sup>

In each cell, there is continuously produced a large number of different messenger RNA molecules. Therefore, means must be provided for isolating the messenger RNA of interest from the other messenger RNA molecules. Where a messenger RNA of interest is normally produced in only small amounts, it is frequently desirable, *if not necessary*, to obtain cells which enhance the amount of messenger RNA of interest present in the cell. (Emphasis added.)

Although every human being theoretically has the genetic ability to produce lymphokine proteins, this language indicates the importance of a source of cells, i.e., a patient who produces lymphokine proteins and the lymphokine mRNAs in abundance.

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<sup>137</sup> *Id.*

<sup>138</sup> The Regents may still be liable under the theory of respondeat superior mentioned, but not discussed, in the California Supreme Court's opinion. *Moore*, 793 P. 2d at 486.

<sup>139</sup> The cell line derived from Moore's spleen cells.

<sup>140</sup> *Moore*, 249 Cal. Rptr. at 519. The patent, U.S. Patent No. 4,438,032, is reproduced in the Court's Appendix A, beginning *id.* at 518.

<sup>141</sup> *Id.* at 518.

Hairy-cell leukemia is a rare condition that affects only an estimated 250 Americans each year.<sup>142</sup> Although other cell lines from patients suffering from hairy-cell leukemia had been established, Dr. Golde could not explain why only the Mo cell line overproduced lymphokines until after 1982, when the human T-lymphotrophic virus II (HTLV-II) was identified.<sup>143</sup> Moore's cells overproduced lymphokines because they were infected with HTLV-II. Whether or not he understood at the time why Moore's cells overproduced lymphokines, Golde nevertheless recognized the advantage of access to Moore's cells. The cells were valuable in their raw state; otherwise why would he have gone to extraordinary lengths to guarantee exclusive access?<sup>144</sup>

As discussed earlier, the majority's primary concern about permitting Moore to recover for conversion appears to have been the potential impact on third parties. They seemed to be intent on avoiding the risk of appearing to require everyone who ever came into possession of human cells to verify their "consensual pedigree"<sup>145</sup> and concerned that the threat of suit would stunt important research.<sup>146</sup>

A constructive trust would not present the same concerns. "Everyone to whom property is transferred in violation of trust, holds the same as an involuntary trustee under such trust, unless he purchased it in good faith, and for a valuable consideration."<sup>147</sup> Thus, bona fide

<sup>142</sup> G.B. White & K.W. O'Connor, *Rights, Duties, and Commercial Interests: John Moore Versus the Regents of the University of California*, 8 *CANCER INVESTIGATION* 65 (1990).

<sup>143</sup> *Id.*

<sup>144</sup> See *supra* at notes 16 & 19. Golde discouraged Moore from seeking treatment locally in Seattle and arranged for Moore to come to UCLA for all treatments, thus hiding Moore's unique condition from other researchers who may have been interested in studying Moore's unique cells.

Also, the patent states: "At no time has the Mo cell line been available to other than the investigators involved with its initial discovery...." *Moore*, 249 Cal. Rptr. at 518.

<sup>145</sup> *Moore*, 793 P.2d at 487, n.16. All users of human cells would have a duty to verify that the samples they use were obtained by proper informed consent.

<sup>146</sup> See *supra* note 107 and accompanying text.



purchasers, i.e., pharmaceutical companies and others who purchased rights in the cell line without knowledge of any improper behavior, would be insulated from liability.

### Conclusion

Requirements of full disclosure attempt to level the playing field. Informed consent, alone, appears inadequate to deal with physicians who would abuse their position of trust for financial gain.

Ideal legal remedies hold individuals responsible for their wrongful behavior but have limited effects on others. Imposing a constructive trust for breach of fiduciary duty seems ideal in the hopefully rare circumstances of *Moore*.

Unlike conversion, breach of fiduciary duty and constructive trust require less analysis. The focus is on the behavior of a fiduciary, not the value of the property. Unlike informed consent, recovery is unlikely either to be hindered by a need to show that a procedure would have been refused or to be rendered uncertain by the need to assess damages. While *Moore* is entitled to the latter, he is also entitled to any benefits acquired by *Golde* and his employer through any abuse of trust that *Moore* can prove at trial.



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<sup>147</sup> *Blair*, 230 P.2d at 836.