

Abstract

Have you ever stopped to consider what happens to the blood, biopsy or similar sample you give in a hospital setting, or even in your doctor's surgery? In particular, have you ever stopped to ask: do I still own the sample? Probably, like most people, you would dismiss the question; you gave the sample for a diagnostic test and, your diagnosis is the extent of your interest in the sample's fate *per sae*.

But how would your view change if, on closer examination of the consent form, your doctor had assumed all rights to your sample? Add to this the real possibility of the sample being added to a tissue bank at the hospital where you received treatment. Then assume that a researcher extracts part of your DNA from the sample, only to find that it has a valuable medical application; they earn millions in patent royalties, while you the patient get nothing directly in return. Judicial statements about the sanctity of the body, along with the insistence from most jurists that it may not be classified as property, suggest that the researcher does not own the tissue upon which they build their economic gain, but does this broad statement of principle meet the modern realities of gene science and commerce?

While aiming to acknowledge and balance public and private interests, my principal objective with this thesis is to argue for an individual's property rights in their body. Neither medical ethics nor legal principle provide a sound basis for ensuring that the

interests of the donor (often unknowing) of human tissue are placed above the interests of the researcher, or the interests of a future public who may benefit from that donation. As someone with a disability who has felt more like an object of amusement and puzzlement to medical and scientific community than anything else (least of all a human being) I wish to give the medical profession a different perspective on why they ought be more respectful of the rights of the subjects of their science. In doing so, I hope to trigger a different legal and ethical framework for medical research and practice.

With the increasing sophistication surrounding our knowledge of genes, and our ability to exploit them both to serve good therapeutic ends, as well as make some people wealthy, has the common law kept pace with scientific reality? The short answer is no. The longer answer involves working out how the common law, as bound as it is by precedent, can successfully adapt to meet a significant challenge of the twenty first century.

I suggest that most patients would consider the sample they gave to their doctor as still being intimately related to them for if not, then why accept that the subsequent diagnosis relates to them? Indeed, one may put it this way; if you removed it from me, it is still me, if not in situ then in substance. The law's dealing with these issues of moral principle and economic interest is somewhat more complex, as we shall see.

I believe that the law and the medical community need to specifically address a patient's or research participant's ability to claim a share of the economic return from the use of their tissues. This is particularly if the donor of tissue is faced with continual medical expenses, thanks to a chronic condition. This is part of the general thesis that the interests of the donor (owner?) of the tissue ought to be paramount, and that the recipients of that tissue in effect receive it on trust.

Introduction

In this thesis, I set out to consider how the common law looks at the human body, as a means for advancing the debate I outline above. This is done in order to establish how principles of property might relate to the body or body parts, cells or cellular information. Our cells, and particular the DNA within them, are becoming increasingly valuable to medical science, particularly with the identification of the entire code of the human genome.

Large amounts of DNA are now held under patent, and there are large repositories of tissue samples in hospitals and universities. As these are accessed by doctors and other scientists for teaching and research purposes, one question that arises is "what are the interests of the original donor?" Perhaps, as is suggested later, many people would not be too concerned by this question. But what if your DNA profile showed you had a higher than average probability of acquiring a serious, or even fatal disease?

The discovery of a hereditary condition could drastically curtail your life choices and/or ambitions, as well as access to other services like medical care and insurance. Or what if there were an economic benefit available from the use of your tissue? What duty is owed to you by those who take and use your genetic material?

Whilst the focus of this study is the Australian common law position, the doctrinal consideration of these issues in our jurisdiction is relatively sparse, and so I have drawn from the international jurisprudence of property and the body in this discussion. This is reflective of judicial practice of drawing ideas from other jurisdictions when attempting to plot new pathways into complex issues.

If you do have a serious condition, be prepared to have little or no control over the tissue, blood or other bodily samples you may provide to your doctor. A key US case which came before the California Supreme Court in 1990 provides the backdrop for much of the discussion that follows. This judgment in *Moore* on how a diseased spleen (once removed from the patient) could be so readily disassociated, not only physically, but legally and scientifically from the patient, is notable for its powerful dissenting opinion, arguing how the patient should have benefited from research. This case will be juxtaposed with an Australian case, relating to a child who sustained lifelong injuries while still in the womb. As will be seen in both matters, they may well deal with people at different ends of life and the medical spectrum, but both *Moore* and the child named *Harrington* lost something in a different way; the opportunity for a better life, due to the acts of others.

Indeed, both Justice Mosk in California and Justice Michael Kirby of the High Court provide dissents, in the two separate cases half a world and several years apart from each other. Despite this, each case poses vital policy questions in terms of how our medical and scientific communities, and wider society, treat potentially vulnerable litigants. Some of these questions need to include whether our failure to invoke property principles in relation to the human body has actually protected the poor, sick or underprivileged from having organs harvested for profit by doctors and patent holders. Alternatively, the question could be one of whether the prohibitions outlined below are denying needy people an opportunity to restore their health and/or secure their financial position, through obtaining a financial reward for participation in research.

In answering these questions the first issue is to identify the law as it stands. This is where we begin to see that a broad prohibition on ‘ownership’ of the human body (as we might any other piece of real property, such as a house or a car), both conflicts with and reflects a diverse variety of social norms and religious or ethical views. Our increasing knowledge of the human body at a cellular and molecular level should cause us to reflect about some of the assumptions held about rights to the body. This questioning must come, as evidence presented shows that religion and ethics are not static qualities. Indeed, as will be shown, Justice Kirby has openly challenged his judicial colleagues on how religious views may be affecting their objectivity; and whether certain religious or moral imputations were appropriate in the judicial determinations of a secular country.

Notionally our legal frameworks reflect the Christian traditions of our culture. It is not my intention to make religion *per se* a key argument in this thesis. Rather, it is one of the prisms through which one can understand the legal, social and moral context of the human body. Other religions such as Islam or Buddhism have their own perspectives. Longer-established traditions, such as those of the Australian Aborigines, American Indians and Canadian tribes, hold to definite notions of what is sacred. This is expressed in terms of the connectedness to tribal lands, spiritualism and ancestors. These peoples show a different view of humanity both in the world as Westerners understand it, but also as part *of* the natural and spiritual world. This is reflected in a series of customary claims, and modern jurisprudence has begun to wrestle with in its recognition of Native Title. I will consider this perspective upon property and the body.

In many ways these older concepts can compliment ideas of classic liberalism and individual freedom; John Locke proves to be an ally in making my argument for an individual having property in their own body. Ultimately, however, while drawing on the work of others, including modern day lawyers and academics with similar concerns to mine – that individuals have little say over the fate of tissue samples they give to researchers, doctors and hospitals.

The ground I aim to break is to propose a legal argument for reasonable and beneficial property rights of individuals in their own bodies. To do this I will consider the

potential to adapt Native Title jurisprudence to my needs, and consider controversial topics including slavery. I will also consider how science is increasingly giving us the potential to not only improve human survival rates from serious diseases, but also to positively select our DNA so that certain afflictions will not occur. Some may ask how many of these developments are positive and, how much restraint will be put on individuals' rights to choose not only preferred health outcomes, but genetic traits for themselves or their children.

The current state of the law

The current state of the law reflects the social history of values about people that have been informed by religion, the jurisprudence of property, and social exigencies. The values and principles are not always readily reconciled, but they do reflect an evolution over time, as society changes. In this first part of the paper I will trace elements of this evolution. This exploration will necessarily involve a number of issues where a single underlying common principle about ownership of the body is difficult to discern.

The common law does not generally see the human body as a form of property. For a range of social, moral and practical reasons many of the participants in debates about the handling of tissue samples, human organs, blood donations and the like, a

proprietary model is frowned upon. In its report *Essentially Yours*, the Australian Law Reform Commission (ALRC) noted that:

The traditional position under the common law was that a human corpse could not be the subject of property rights. This rule gained general support in a number of English cases and was generally accepted throughout the 19th century.¹

This same report also asserts that there is a lack of Australian statute law on the question of property in tissue samples and further that there is yet to be a definitive judicial pronouncement on the subject.² However, my research indicates a long history of judicial statements and common law potential precedents (or at least informative *obiter dictum*). In particular, I will show that there is English case law in the 1990s citing the Australian High Court, while US Circuit Court judges in New York will be shown referring to Lord Coke and Blackstone's *Commentaries* to resolve the question of whether a patient awaiting kidney transplant could assert proprietary rights in the kidney of a deceased donor.

¹ Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia - Report*, Volume 1, ALRC Report No. 96, Commonwealth of Australia (March 2003) 527.

² See *ibid.*

Intention

One of the key factors in determining how will view someone's dealing with the human body, is to consider a person's intention. Usually, the intention will be that of the executor's to bury the deceased. This will be conducted in a legal framework where, as was asserted in *Kelly*, there can be no property in a body, except where:

a human body or body part has undergone a process of skill by a person authorised to perform it, with the object of preserving for the purpose of medical or scientific examination or for the benefit of medical science.³

Against this principle, before the Court of Appeal in England in 1998, Kelly and his co-accused Lindsay unsuccessfully sought to have their convictions for theft of body parts overturned. Kelly was an artist who had been given access to the anatomy laboratories of the Royal College of Surgeons to draw anatomical pictures. Lindsay, a technician, had assisted Kelly to remove certain limbs, skulls and other organs from the laboratories so that the latter could take casts of them and use these casts in his own artistic displays. This was done without the knowledge or consent of the College. As part of their bid to overturn convictions at first instance, the appellant's claimed that the College had no proprietary rights in either whole cadavers or body parts. If this were true, then their convictions for theft failed for the want of there

³ *Regina v Kelly; Regina v Lindsay* [Court of Appeal] [1999] QB 621, 2001 The Incorporated Council of Law Reporting for England & Wales, 3 (Rose L.J).

being any aspect of property in the things removed from the laboratories. The trial judge had directed the jury that the common law did not recognise proprietary qualities in the human body except in the application skill exception, noted above. As Kelly and Lindsay found, it certainly did not extend to alleged artist works.

The intention of a person in possession of a cadaver will therefore be critical in determining how the common law will view their behaviour. How the material is obtained and how it then treated and/or disposed of will also be of critical importance, as will wider public policy issues. It clearly would not have helped the defendants' case when Kelly conceded that he did not seek permission from the College for the removal of (or his subsequent work on) the organs; Lindsay also agreed that he had not sought permission to remove the organs on Kelly's behalf, as neither defendant thought such permission would be granted.⁴ This suggests that both had a degree of insight into the fact that they were certainly reaching the bounds of social norms and possibly overreaching them.

Social importance of the body and modernity

The emergence of the Enlightenment, the Industrial Revolution and modern scientific methodology did not see the disappearance of human notions of the sacred or divine in relation to the person. During the 19th century public controversies arose in the US

⁴ See *ibid.*, 4.

and Great Britain over the robbing of grave sites, particularly of the poor or black people. As noted by Bazelon, theft became such a problem that wealthy Britons and Americans ‘bought sturdy coffins and plots in a churchyard or cemetery guarded by night watchmen.’⁵ Courts and legislators in both countries were forced to act in the face of a large public outcry. Anatomy laws were passed which provided doctors and the emerging modern medical schools with access to the remains of convicted murderers and those who died whose bodies went unclaimed by families for burial purposes.

However, the dissection of the body still contradicted long held historic and cultural norms, with punishment by dissecting felons dating from the time of Henry VIII and being reserved for ‘the most heinous kind of criminal homicide.’⁶ This reflected much mediaeval thinking about the body and the afterlife in theology. For one to successfully make the transition from this world to the next, the preservation of the deceased remains as an anatomically complete unit (whenever possible) was seen as essential.⁷

To a degree, this type of rationale remained current in the 19th century despite the advance of science, with an editorial in *Harper's New Monthly Magazine* published in 1854 declaring that:

⁵ Emily Bazelon, *Grave Offence*, Stories, July/August 2002, Legal Affairs, <http://www.legalaffairs.org/issues/July-August-2002/story_bazelon_julaug2002.msp > at 14 July 2007.

⁶ Ibid.

⁷ See Dorothy Nelkin, and Lori Andrews, *Do the Dead Have Interests? Policy Issues for Research after Life*, American Journal of Law and Medicine, 1998; 24, 2/3; Health Module, 262

Science may prove, ever so clearly, that there is nothing there but carbon, and oxygen, and lime,...but all this can never eradicate the sentiment we are considering. It (the human body) enters too deeply into our laws of thinking, our laws of speech, our most interior moral and religious emotions.⁸

Such a standard continues to have an impact on judicial thinking throughout the western world. New York's Court of Appeals decided as recently as 2006 that a patient awaiting kidney transplant could not assert a proprietary interest in a friend's organ, despite the fact that it has been gifted to him for the purposes of his surgery by his friend's widow. In *Colavito v New York Organ Donor Network, Inc., et al.*, one kidney which was initially deemed suitable for transplant was subsequently found to be medically unsuitable. However, by this stage the second kidney had been provided to another transplant patient. Ms Colavito (in right of her by then late husband) sued, claiming hospital authorities had unlawfully converted his property. To sustain this action though the appellant had to show that he had a property right in his friend's organs in the first place.

This was a concept the Court refused to accept, relying rather on the precedent of Lord Coke's dictum from the 1700s that 'a corpse has no value'.⁹ The US Court

⁸ Ibid, 264.

⁹ *Patricia Colavito, as Personal Representative for Robert Colavito, Deceased, Appellant, v New York Organ Donor Network, Inc., et al., Respondents*, New York Court Of Appeals, 2006 NY Int. 161, 2006 NY Slip Op 09320, Decided on December 14, 2006, No. 106 (Rosenblatt, J).
<http://www.law.cornell.edu/nyctap/106_0161.htm> at 7 January 2007.

further relied on Sir William Blackstone's confirmation of this position in his *Commentaries* to the effect that:

heirs have no property right in the bodies or ashes of their ancestors, 'nor can [an heir] bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains, when dead and buried'.¹⁰

US precedent was also cited to demonstrate that the only times the courts would recognise a limited right of an individual to possess a cadaver were for the purposes of burial of the deceased. The only time such an interest could be seen as in any way pecuniary was when family members could receive damages for the negligent disposal, loss or desecration of a body. Our court system in Australia is bound by similar principles, and our jurists do look to pervasive opinions in other common law countries, all of which are modelled on the British court hierarchy and the doctrine of precedent.¹¹

Inconsistency

In the common law's historic development there are inconsistencies and contradictory principles in relation to proprietorship of humans. Whilst it is asserted that one cannot

¹⁰ Ibid.

¹¹ See Sally Anne Frazer, *How to Study Law*, The Law Book Company Limited (1993), 10.

claim proprietary rights in a human body, yet both common and Canon Law once held that a woman lost all elements of her individual legal identity upon marriage. While this did not make her liable for her husband's crimes or debts, this legal fiction, justified on the scriptural basis of woman coming from man's rib cage meant that the law as stated by *Bracton* was that a wife 'was 'under the rod of her husband', who was both her sovereign and her guardian'.¹² It was not until 1981 that English common law acknowledged a separate legal person-hood for married women. According to Baker, this had little to do with the emancipation of women, but rather overcame a legal anomaly whereby 'husband and wife would not commit the tort of conspiracy'.¹³ However, guardianship by its nature imports a duty to protect and care for someone, so a wife retained legal protection from injury or other seriously harm. In this respect, strong proprietary and non-proprietary tensions existed in the understanding of matrimony.

Contrast this with English common law's ability, drawing on the same body of precedent, to emancipate black African slaves. Lord Denning, in his book *The Due Process of Law* relates the judgement of Lord Mansfield in the 1772 case of *Somerset v Stewart*. Stewart, a slave trader had brought Somerset to England in the belief that English law would recognize his ownership of the slave as comparable to feudal villeinage. However, Somerset's writ of habeas corpus was upheld by Lord Mansfield, who said:

¹² J H Baker, *An Introduction to English Legal History*, 3rd ed., Butterworths, (1990), 551.

¹³ *Ibid.*

Villeinage, when it did exist in (England) differed in many particulars from West India slavery. The lord never could have thrown the villein into chains, sent him to the West Indies, and sold him there to work in a mine or in a cane field. At any rate, villeinage has ceased in England and it cannot be revived. Every man who comes in to England is entitled to the protection of English law, whatever oppression he may heretofore have suffered and whatever may be the colour of his skin. The air of England is too pure for any slave to breathe. Let the black go free.¹⁴

An important question arising from these two examples is how we can reconcile the contradictions where one annunciation of the common law will severely limit an individual's autonomy and freedom of choice, while another annunciation from the same body of law will guarantee another's freedom? Are Lord Mansfield's comments relevant to the question of ownership and control your own body, or parts of that body, for whatever purposes you see fit?

Part of the answer may actually come from Baker. A woman's loss of individual legal identity was based on the principle that marriage created 'two souls in one flesh'.¹⁵ The common law is adept at creating such fictions to suit the circumstances. For example, while marriage saw a fusion of identities, the emergence of the corporation saw the law acknowledge a separation between the legal identity of the company and that of its human proprietor. In the 1897 case of *Solomon v Solomon & Co. Ltd*, the

¹⁴ Lord Denning, *The Due Process of Law*, Butterworths, (1980), 159.

¹⁵ Baker, above n 12, 551.

House of Lords rejected unsecured creditors claims against Mr Solomon after his company had gone into liquidation. While creditors had argued that the company was a sham and more of an agent for Mr Solomon himself, their Lordships rejected the notion that a company could not be incorporated even if it was under the ‘overwhelming influence (of one proprietor) entitled practically to the whole of the profits’.¹⁶

This position was affirmed in the 1961 case of *Lee v Lee's Air Farming Ltd*, where Lee's widow successfully sought the workers' compensation payments owing to Mr Lee when he died in an accident. While the New Zealand Court of Appeal rejected the notion that Mr Lee could be both the principal and agent of his firm, the Privy Council accepted that there were two legal identities and that the corporation remained competent and liable.¹⁷

It is not as if a formal separation between physical and legal identity dates only from the Industrial Revolution. A constitutional monarch, such as Queen Elizabeth II is at once a natural person and also a legal institution. The capacity for her to have ‘two bodies’ was settled in antiquity and most clearly enunciated, according to Flint, in *Calvin's Case* of 1608. Here the bodies were identified as a natural body and, the body politic consisting of the Crown and other institutions of government.¹⁸ Could a

¹⁶ Paul Redmond, *Companies and Securities Law: Commentary and Materials*, LBC Casebooks, 2nd ed., The Law Book Company Ltd, (1992), 169.

¹⁷ See *ibid.*, 170-171.

¹⁸ See David Flint, *The Role of the Sovereign*, Upholding the Australian Constitution: Proceedings of the Eighteenth Conference of The Samuel Griffith Society, Vol. 18, Chapt. 7, The Samuel Griffith

similar dualism be found which allows an individual to be at once their own sovereign and guardian, to invoke Baker's words?

Certainly, the argument can be bolstered, if you see sovereignty and 'self-guardianship' as at least partly synonymous with autonomy. Again, Blackstone's *Commentaries* are cited by Hardcastle as authority for the principle that every person has a right to the 'legal and uninterrupted enjoyment'¹⁹ of his body. This stance is reflected in the common law's approach to assault; a claim which can be sustained however slight the degree of non-consensual contact (or battery) was between people.²⁰

Consent

Equally, the common law will still consider some acts related to the body between consenting adults are illegal. For example, in the case of *Brown*,²¹ the House of Lords rejected an appeal from five men who had been charged with various counts of assault and grievous bodily harm, after the police seized a videotape of the group committing sadomasochistic acts upon each other. None of the parties complained, but were charged and convicted anyway. The majority led by Lord Templeman found that the

Society, 2006, <<http://www.samuelgriffith.org.au/papers/html/volume18/v18chap7.html>> at 23 August 2007.

¹⁹ Rohan Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control*, Hart Publishing, Oxford and Portland, Oregon, (2007) 16.

²⁰ See *ibid*, p. 19.

²¹ [1993] 2 All ER 75 (HL).

actions were illegal, despite consent between the parties. For His Lordship, the matter turned upon the policy consideration of society being able to protect itself from certain types of violence, because:

(in) principle there is a difference between violence which is incidental and violence which is inflicted for the indulgence of cruelty. The violence of sado-masochistic encounters the indulgence of cruelty by sadists and the degradation of society. Such violence is injurious to the participants and unpredictably dangerous. I am not prepared to invent a defence of consent for sado-masochistic encounters which breed and glorify cruelty and result in offences under (the criminal law).²²

Alternatively, for the minority, Lord Mustill surveyed much of the same case law. While sharing the majority's revolt at the appellant's behaviour he observed that consent to harm was but one element in the decided cases, as was hostility. His Lordship was concerned not to have the courts adjudicating upon private sexual acts, while further noting that, if the policy concern was to limit the spread of the AIDS virus, such a view faced a real difficulty because:

²² David Brown, David Farrier, David Neal and David Weisbrot, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales*, 2nd ed., The Federation Press, (1990), 805.

the principal cause for the transmission of this scourge, namely consenting buggery between males, is now legal.²³

In this context, Lord Mustill also cautioned against the courts intervening to find individuals culpable for their behaviour simply because many in the community saw certain behaviours as ‘repulsively wrong’. His Lordship reasoned that was not in and of itself sufficient for prosecution.²⁴

‘Repulsively wrong’

When the ALRC turned to the question of proprietary rights in the human body, it was presented with a range of arguments which could be neatly paralleled to Lord Mustill’s ‘repulsively wrong’ categorisation in *Brown*. In its report *Genes and Integrity: Gene Patenting and Human Health*, the ALRC noted that patenting of the human genome and human tissue samples offended many people because they saw one individual’s (or corporation’s) ability to own part of another living person as a threat to the latter’s autonomy and dignity. A related theme is the argument that there is something ‘special’ about the human body and its genetic code which is incompatible with concepts of ownership.²⁵

²³ Ibid, 811.

²⁴ See *ibid*, 810.

²⁵ See Australian Law Reform Commission, *Report - Genes and Integrity: Gene Patenting and Human Health*, Report 99, Commonwealth of Australia, (June 2004), 72.

There are a number of counter-arguments to the position, encompassing scientific, legal, moral and ethical positions all of which the common law is capable of encompassing. Firstly however, we must come to grips with what we are dealing with: the human body. An author and former editor of *The Economist* magazine Matt Ridley is cited approvingly by scientist James Martin for his description of human DNA as:

like a book with 23 chapters-one for each of our 23 pairs of chromosomes, which make up the gene material (macromolecule) found in the nuclei of cells. Each chapter is divided into sections-genes. You have about 30,000 genes. A typical gene has about 10,000 letters (called 'nucleotides' or 'bases,' each of which can be one of four combinations...It is amazing to think that the entire 23-chapter book is coiled up in the DNA double-helix molecule in every cell of your body.²⁶

It may be amazing, but it is also explainable as a code. Martin asserts that it is analogous to a 'digital (computer program), we can edit as though we were using word-processing software'.²⁷ It is not my purpose to engage in a pseudo-religious argument about whether this denudes the human person or the human form of a 'special' moral or societal status. It is appropriate to observe that computer program is subject to copyright law, although whether the human DNA program is subject to copyright law is a more complex question to answer.

²⁶ James Martin, *The Meaning of the 21st Century: A Vital Blueprint for Ensuring our Future*, Eden House Project Books, Random House Australia (Pty) Ltd, (2006), 153.

²⁷ *Ibid*, 154.

The human body itself cannot be copyrighted. A popular artist of the 1980s, Mr Stuart Goddard (aka Adam Ant) sought relief against a company which had distributed a range of old posters of him, which they had altered to reflect a new image the artist had launched, which included painted lines on his face. In the Court of Appeal, Lawton LJ quickly disposed of the submission that the makeup on Goddard's face was a painting. His Lordship concluded that a painting was something, applying the ordinary meaning of the phrase, permanently rendered to canvas. As soon as the makeup was removed that claimed failed, Lawton also noting that copyright in the 'painted lines' could not be sustained because:

It is only when they (the painted lines) are put on Mr Goddard's face that anything particularly relevant to Mr Godard comes into existence.²⁸

Arguably, much the same thing happens when tissue samples, organs and by necessity the DNA of which they are composed are removed from people. The Royal College of Pathologists of Australia (RCPA) complained to the ALRC that the patenting of DNA meant others could own, trade and profit from the natural occurring building blocks of an individual's life, thus 'gene patents rob individuals of their natural ownership of their genetic material'.²⁹ However, as pointed out by a number of other

²⁸ *Merchandising Corp of America Inc v Harpbound Ltd*, Court of Appeal [1982] F.S.R. 32, extracts cited in Kathy Bowrey (ed.), *Law 310: Property in Law and Equity*, Book 5, Macquarie University School of Law, Macquarie University, (1998) 94.

²⁹ Australian Law Reform Commission, *Gene Patenting and Human Health: Discussion Paper*, Discussion Paper 68, Commonwealth of Australia, (February 2004), 71.

parties who provided submissions to the ALRC, patent holders have a limited ‘bundle of rights’ that are not entirely synonymous with ‘ownership’.³⁰

In particular, GlaxoSmithKline noted that the DNA which was the subject of patents was complementary DNA or cDNA. While it is a copy of naturally occurring DNA, it lacks several gene sequences and rarely occurs in the natural environment.³¹ The patents office in Australia, Intellectual Property Australia (IP Australia) advised the ALRC that it, along with comparable institutions around the world, accepted the isolation of cDNA by scientists created a novel or new product capable of being patented.³²

Prior to isolation

If this is the state of the law when it comes to tissues and organs separated from people, then it is worth inquiring what the common law (and to the necessary subsidiary degree, statute law) says about the status of biological material prior to separation from an individual. Here, we can say that the earlier cited assertion of the RCPA is true; individuals do have ownership of their bodies. Hardcastle cites US authorities to demonstrate that people can lay claim to tissues, excrement and other parts of their bodies which may be removed by them or expelled by natural processes.

³⁰ See *ibid.*

³¹ See *ibid.*, 140.

³² See *ibid.*

The key component is that the individual concerned makes an immediate claim upon the sample taken. For example, in the case of *Venner v State of Maryland*³³ the police seized balloons filled with hashish found in Venner's faeces. On appeal, the Court found the seizure was legal and, noted that it was normal for people to abandon such materials. On this basis:

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 rationale inference is that he intends to abandon the material.³⁴

This leaves open the possibility that people who consent to provide tissue samples, blood and other products could continue to assert their ownership and control, by only handing samples over with caveats attached to their provision. Such a contract may be annulled by the *Human Tissue Acts* in Australia which ban the sale of organs *per se*. While the ALRC notes that research participants may receive 'some form of control or benefit, in exchange for (their) participation'³⁵ this clearly does not extend to a claim of beneficial ownership. The categories of legal or real persons who may claim title to a patent does not include the research participant who provided the tissue sample.³⁶

³³ 554 A 2d 483 (Md App 1976).

³⁴ Hardcastle, above n 19, 95.

³⁵ Australian Law Reform Commission, *Genes and Integrity: Report*, above n 25, 73.

³⁶ See *ibid*.

Does the interposition of a company alter the situation?

However, there may still be means by which a research participant could assert some rights. The most obvious route would be by establishing a proprietary company and providing a tissue sample as an agent of the firm. This would take advantage of the legal distinction which was upheld in *Lee's* case between the legal identities of a firm as juxtaposed to its proprietor, even if the proprietor was both the agent and principal.

This may present challenges for the research scientist or doctor who is obtaining the sample, as they will likely work for a hospital, university or other research institution, who will have a legal claim over their work. The physician will have ethical responsibilities to their patient as to the standard of care provided. However, should the patient insist that any tissue taken becomes the property of their company the doctor is unlikely to have the authority to agree. It is settled in law that rights to any invention, product or creation devised in the course of an employee's work, is the property of the employer. Further, it is clear that it is generally unimportant as to whether the nature of that work involved a high degree of skill or solely physical labour, as shown by a leading formulation of the test from Viscount Simon in *Sterling Engineering Co v Patchett*. His Lordship said:

It appears to me that it is ... an implied term, though not written at large, in the contract of service of any workman that what he produces by the strength of his arm or the skill of his hand or the exercise of his inventive faculty shall become the property of his employer.³⁷

While this is applicable as a general principle, courts will and have looked beyond these points in individual cases, where for example, the claim is clearly a restraint of trade, is being applied over things created by someone while not engaged in employment or where the employer is making an ambit claim over indeterminate things because the terms of an employment contract are written too broadly to be considered reasonable.

In a paper on intellectual property and researchers employed by universities, Ann Monotti notes just such a case. In *Electrolux v Hudson*,³⁸ a shopkeeper was required by the electrical company to assign to it anything he may have invented during the period of his employment. Whitford J found such terms unenforceable because:

First, the...defendant was not employed to make any invention or discovery...Secondly, the invention was made outside working hours and without the use of the employer's materials. Thirdly, the covenant itself was

³⁷ [1955] AC 534, 544.

³⁸ [1977] FSR 312, 320.

too broad in its potential application to an immense diversity of possible inventions.³⁹

The question would necessarily arise as to whether the researcher was, on behalf of their institution, authorised to enter into a contractual arrangement with a proprietary company regarding a tissue sample? From a statutory perspective, the answer is negative because Section 32 of the *Human Tissue Act 1983 (NSW)* specifically states that a person must neither offer, nor enter in a contract for valuable consideration (beyond incidental costs of provision) in exchange for tissue.⁴⁰ As a matter of statutory interpretation, the term ‘person’ refers to both real and legal persons (i.e.: corporations).⁴¹ Yet, both academics like Alexandra George and jurists like Justice

³⁹ Ann Monotti, *Who Owns My Research and Teaching Materials My University or Me?*, Sydney Law Review, [1997] SydLRev 24, <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/SydLRev/1997/24.html?query=university%20of%20newcastle%20and%20engineering>> at 24 January 2005.

⁴⁰ The section states:

32 Trading in tissue prohibited

(1) A person must not enter into, or offer to enter into, a contract or arrangement under which any person agrees, for valuable consideration, whether given or to be given to any such person or to any other person:

- (a) to the sale or supply of tissue from any such person’s body or from the body of any other person, whether before or after that person’s death or the death of that other person, as the case may be, or
- (b) to the post-mortem examination of any such person’s body after that person’s death or of the body of any other person after the death of that other person.

Maximum penalty: 40 penalty units or imprisonment for 6 months, or both.

(2) Subsection (1) does not apply to or in respect of the sale or supply of tissue if the tissue has been subjected to processing or treatment and the sale or supply is made for the purpose of enabling the tissue to be used for therapeutic purposes, medical purposes or scientific purposes.

(3) Subsection (1) does not apply to or in respect of a contract or arrangement providing only for the reimbursement of any expenses necessarily incurred by a person in relation to the removal of tissue in accordance with this Act.

(4) Where the Minister considers it desirable by reason of special circumstances so to do, the Minister may, by instrument in writing, approve the entering into of a contract or arrangement that would, but for the approval, be void by virtue of subsection (5), and nothing in subsection (1) or (5) applies to or in respect of a contract or arrangement entered into in accordance with such an approval.

(5) A contract or arrangement entered into in contravention of this section is void.

<http://www.austlii.edu.au/au/legis/nsw/consol_act/hta1983160/s32.html> as at 3 April 2010

⁴¹ See Joseph R. Nolan and Jacqueline M. Nolan-Haley (eds), *Black’s Law Dictionary*, 6th ed., St. Paul Minn. West Publishing Co., 1990, 1142.

Mosk can speak of self-ownership. Additionally, as will be shown, a corporate entity may prove a useful entity in which to hold the property rights.

The Lockean ‘exception’

Despite apparent statutory prohibitions, there may still be a way to employ property concepts to allow individuals to ‘own’ their bodies. Alexandra George notes that John Locke asserts in his *Two Treatises on Government* that ‘every man has a property in his own person’.⁴² While labelling this the ‘Lockean exception’ to the general prohibition against ownership of a living human organ or body, in an attempt to apply classical natural law theory she ends up with a concept that is comparable to the application of skill exception, as outlined by Rose LJ in *Kelly*. For while it is argued by Locke that by applying his labour, a man can take things out of the state of nature and claim a proprietary right over the thing he has altered,⁴³ this still leaves the question of the status of the unaltered human body. George herself concedes this by saying that for proprietary principles to apply, a third party’s labour is needed to make it ‘body part plus’.⁴⁴

⁴² Alexandra George, *Property in the Human Body & its Parts: Reflections on Self-Determination in Liberal Society*, EUI Working Paper LAW No. 2001/8, European University Institute, Florence, Department of Law, Alexandra George 2001, 23, <<http://www.iue.it/PUB/law01-08.pdf>> at 7 January 2007.

⁴³ See *ibid.*, 23-24.

⁴⁴ *Ibid.*, 23.

At this point, one could make all manner of appeals to classical liberalism and the principle of the autonomous, free willed individual necessarily having a right to own, control and potentially sell parts of their body for valuable consideration. George argues that in a purely liberal society, conforming to Lockean principles that this would be the case, but for a variety of social and political reasons, legislators and courts have fettered individual discretion.⁴⁵

These fetters make it challenging to sustain a clear rationale for a broad proprietary right in the human body. The advance of science, as well as the growing value of tissue both as a diagnostic and economic resource, makes such a study essential. The argument above shows that the law recognises proprietary elements in tissue, as result of someone applying their skills to in some way alter the material. In this light, it is noteworthy that in a leading Australian authority, the High Court permitted the retention of a two-headed baby, which had been stillborn and then preserved in a bottle of spirits. It had subsequently been placed on public display by its ‘owner’. In response, a police officer seized the bottle and the ‘owner’ sought its return. Where the NSW Supreme Court had dismissed the action, the High Court accepted that the preserved specimen had ‘acquired some attributes differentiating it from a mere corpse awaiting burial’.⁴⁶ Near the end of his judgement, Griffith CJ also suggested that the degree of skill needed to transform the legal status of tissue was not great.⁴⁷

⁴⁵ See *ibid.*, 14-15.

⁴⁶ *Doodeward -v- Spence* [1908] HCA 45; (1908) 6 CLR 406, 414 (Griffith CJ)
[http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/HCA/1908/45.html?query=property in the human body](http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/HCA/1908/45.html?query=property%20in%20the%20human%20body) -->> at 25 July 2006.

⁴⁷ See *ibid.*, 415.

This case is useful for other reasons, but I can only return to it after exploring some other areas of law and legal history, which will aim to put some of the elements of *Doodeward* in a new light. A developing area of the law in Australia and comparable overseas jurisdictions is privacy. This is a concept understood in terms of both tort law and statutory law. Further, the ALRC has noted in its most recent review of Australia's legislative and related regulatory schemes regarding privacy, that the public while wishing to see medical research advance, is concerned that the privacy of individuals' medical records be protected.⁴⁸ According to research conducted by the Department of Health and Ageing, the public saw that protection coming from a patient record being 'de-identified'⁴⁹ for the purposes of research or study.

Recalling Ridley's earlier cited definition of the genome as being like a book or computer program, it is understandable why the ALRC, responding to public demand that material used for research be de-identified, recommended that genetic samples be legislatively considered 'sensitive' personal information. This meant that in all but a few exceptional cases health care providers were required to gain a patient's consent to take a sample and then only apply the sample for the purpose (or test) for which it was obtained.⁵⁰ Also, the ALRC clearly saw that there was a 'value' even if it could not be expressed in dollar terms, ascribed by the public to their genetic information.⁵¹ As a result, it was considered that the definition of 'health information' in the *Privacy*

⁴⁸ See Australian Law Reform Commission, *Review of Privacy: Issues Paper 31*, Commonwealth of Australia, October 2006, 437.

⁴⁹ *Ibid.*

⁵⁰ See Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108, Commonwealth of Australia, (May 2008), 2057-2058.

⁵¹ For current purposes I am using genetics as an equivalent to 'body', 'organ' or 'tissue'.

Act 1988 (Cth) not broad enough in its language, to cover all possible scenarios in which genetic testing may be applied. In particular:

This might arise where the information is not about health, disability or the provision of a health service—as in the case of parentage or forensic testing—or because it is not about the health or disability of an existing individual—as may sometimes be the case with genetic carrier testing, where the information is primarily about the health of future children.⁵²

Privacy

In response to these concerns, the Commonwealth Government introduced the *Privacy Legislation Amendment Act 2006 (Cth)*, specifically dealing with genetic information and its ability to show an individual's (and by extension biological relatives) risk of suffering particular illnesses.⁵³ It can be seen however, that the common law was moving in a similar direction, with the courts acknowledging a growing scope of privacy.

For example, it was once held that a duty of confidence in a personal relationship was fairly well restricted to the institution of marriage. However, as social conventions

⁵² Australian Law Reform Commission, *For Your Information*, above n 50, 2059.

⁵³ *See* *ibid.*

and norms have changed, courts recognised that people had a variety of living arrangements and UK jurisprudence accepted that a sexual relationship per se was something which, in most cases, was high on the list of matters considered confidential. The shift in judicial emphasis was from the formal nature of a relationship (i.e.: marriage) to a more substantive consideration of intimacy. It also increasingly became clear that absent a more traditional or formal institutional approach, the range of people who might be expected to respect a confidence could increase. As was stated Viscount Browne-Wilkinson in *Stephens v Avery*⁵⁴

The mere fact that two people know a secret does not mean that it is not confidential.⁵⁵

Here, a third party had disclosed details of a lesbian relationship involving a married woman.⁵⁶ While UK common law is now interpreted in light of the European Convention on Human Rights reflected in the *Human Rights Act 1998* (UK), the obvious corollary is to ask whether tissue samples or organs, and the DNA they contain could be regarded as sufficiently intimate that a similar duty of confidentiality applies, even when the organ or tissue sample is removed from the patient. Clearly, the ALRC was sufficiently concerned to call for the *Privacy Act* to be amended so that genetic information was explicitly included as ‘health information’. From the

⁵⁴ [1988] Ch 449, 454.

⁵⁵ Case cited in Des Butler, *A Tort of Invasion of Privacy in Australia?*, Melbourne University Law Review, [2005] MULR 11, <<http://www.austlii.edu.au/au/journals/MULR/2005/11.html>> at 29 December 2008.

⁵⁶ See *ibid.*, at endnote 66 in His Lordship’s judgment.

quotation cited earlier, their concern was not only about people currently living, but the potential impact of genetic testing on *future children*.⁵⁷

This point in and of itself raises questions, which will be addressed later. For now, the case law generally shows that to sustain an action for breach of privacy, an applicant must show that the respondent disclosed information in circumstances where the maintenance of confidentiality would reasonably be expected and, the disclosure can fairly be expected to embarrass or humiliate the victim.

A leading Australian case on the matter is *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*.⁵⁸ *Lenah* was denied injunctive relief against the Australian Broadcasting Corporation (ABC), after the broadcaster had received and broadcast part of a tape showing the operation of the firm's factory, which processed possums for meat export. While *Lenah* claimed that broadcast of the film would seriously damage its business and, emphasised that persons unknown had trespassed on its property to obtain the footage, there was no evidence to link the ABC to the illegal activity. It was not suggested that the ABC held copyright in the film, and ultimately, it was found that corporations could not initiate action for breach of privacy because it is not a natural person and, following American precedent from which the High Court saw no reason to depart, a corporation is 'is not capable of emotional suffering.'⁵⁹

⁵⁷ See Australian Law Reform Commission, *For Your Information*, above n 50, 2059

⁵⁸ [2001] HCA 63 (15 November 2001).

⁵⁹ *Ibid.*, at 127 (Gummow and Hayne JJ quoting *NOC Inc v Schaefer* 484 A 2d 729 at 730-731 (1984)).

However, it was stated by Gummow and Hayne JJ (with whom Gaudron J agreed) that the failure to establish a tort of privacy in this case did not preclude its development in the future. Their Honours though, felt that this would be

best achieved by looking across the range of already established legal and equitable wrongs.⁶⁰

So where could this come from, and could it be used to help us overcome the hurdles to us owning ourselves? The first clue might actually come from the judgement of Callinan J, who helpfully outlines elements identified by William Prosser to a tort of invasion of privacy as including:

Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.⁶¹

Could it be said that someone who acquires an organ or tissue sample has acquired another's name or likeness? As referred to by Martin⁶² and confirmed in other

⁶⁰ Ibid., at 132.

⁶¹ Ibid., at 323 (Callinan J).

⁶² Martin, above n 26.

references⁶³ each cell in the human body contains a replica of all the genetic material that makes us who we are. If this at first might seem to be pushing the bounds of humanity too far, then consider the dissenting judgement in *Doodeward*, where Higgins J insisted that the preserved baby was a body due a burial. More specifically, His Honour insisted that the creature's humanity was not dependent on it having taken a breath, nor having reached the foetal developmental stage of primitive streak (where twinning of the ova is no longer possible and a primitive nervous system begins to develop). Rather, Higgins J dismissed the 'primitive streak' line as a 'vulgar opinion'⁶⁴ and preferred the construction of *Taylor on Medical Jurisprudence* where it was argued that at all stages, cells which ultimately combine to create a new being, have an innate quality of being life in their own right.⁶⁵

Innate qualities

It is important to point out that Higgins J was in the minority and that there is a body of both scientific and legal opinion which would dispute him.⁶⁶ However, it may be that considering some aspects of Higgins's viewpoint may help us secure property

⁶³ See e.g. Russell Korobkin, *Autonomy and Informed Consent* *In Non-therapeutic Biomedical Research*, 54 *UCLA Law Review* 605 (2007), 607 <<http://ssrn.com/abstract=967818>> at 6 February 2007.

⁶⁴ [1908] HCA 45 at 29 (Higgins J).

⁶⁵ See *ibid*.

⁶⁶ For a summary of the ethical issues see House of Representatives Standing Committee on Legal and Constitutional Affairs, *Human Cloning: scientific, ethical and regulatory aspects of human cloning and stem cell research*, Parliament of the Commonwealth of Australia, August 2001, 94-96; for a discussion of the legal issues consider *Watt v Rama* [1972] VR 353 Supreme Court of Victoria (Full Court), extracts cited in Harold Luntz and David Hambly, *Torts: Cases and Commentary*, 4th edition, Butterworths, 1995, 403-405, where while the Court found a negligent driver did have a duty of care to an injured, unborn baby and that this duty "crystallised" at birth. This shows the importance of a live birth at law.

rights in the human body. Firstly, while acknowledging exceptions in favour of scientific research and museums, His Honour also noted that where diseased limbs or growths were taken from the living this was done ‘after an operation by the surgeon with the consent, express or implied, of the...patient’.⁶⁷ However, he would not have extended the principle to recognise any ability for a patient to buy or sell an organ, nor another to purchase it. Higgins J saw the only form of ‘special property’ one could have in another’s deceased body came in the obligation to make burial arrangements, while he presumed that those who had tissues removed were content to abandon them.

While in many instances this will be true, as noted earlier by Hardcastle, there may be an ability to retain dominion over removed tissues, so long as a person makes a clear and immediate election to do so.⁶⁸ Ultimately, Higgins J is clearly concerned that returning the preserved baby’s body to the appellant implicitly confers some proprietary status upon it, while necessarily suggesting the police officer who seized it committed an offence. Seeking to do neither, His Honour found for the later but equally thought that in the circumstances:

if the body is to remain unburied, I do not see why the University Museum is not as much entitled to it as the plaintiff.⁶⁹

⁶⁷ [1908] HCA 45; (1908) at 32 (Higgins J).

⁶⁸ Hardcastle, above n 19, 95.

⁶⁹ 1908] HCA 45, above n 64, at 33 (Higgins J).

However, the case can still be distinguished given that neither party sought the return of a sample of their own body tissue, but rather the small and deformed specimen of another. Therefore, *Doodewood* confirms the law as previously described, accepting that the tissue had been altered by means of preservation. The challenge is how to move these arguments forward. Ironically, an examination of slavery may provide clues as to how to proceed.

The jurisprudence of slavery

Through contemporary eyes, slavery is considered cruel, inhumane and criminal, with Australia making slavery a statutory offence by way of the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999 (Cth)*. The only judicial pronouncement on slavery in Australia came in 2008 with the case of *The Queen v Tang*.⁷⁰ Subsequently commentary naturally focussed on the deplorable conditions under which women from developing countries in Asia (in this instance, Thailand) were brought to Australia and forced to work in brothels, under conditions that were so oppressive and demanding they were found to be enslaved. The Human Rights Commission, while noting the importance of prosecuting people smugglers was also of the opinion that ‘victim support and prevention have taken a back seat to prosecutions.’⁷¹

⁷⁰ See, [2008] HCA 39, <[http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2008/39.html?query=title\(the%20queen%20%20and%20%20tang\)#fn1](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2008/39.html?query=title(the%20queen%20%20and%20%20tang)#fn1)> at 31 July 2009.

⁷¹ Elizabeth Broderick, *Slavery in 21st Century Australia - A Human Rights Challenge: Modern Day Slavery in Australia: The Queen v Tang*, October 2008,

In terms of emerging genetic technologies could a similar question be posed; namely, has common law been willing to shield patent holders rights at the expense of patients and/or research participants. It is useful at this point to consider the leading US case on property interests and the human body of *Moore v Regents of University of California*.⁷² In this case, a leukemia patient realised over several years that his physician had been profiting from the samples he provided by patenting them, or rather, the therapeutic chemicals that could be obtained from them. Mr. Moore became concerned when his physician, Dr. Golde, sent him documents asking him to hand over rights to his tissues. Initially, Mr. Moore apparently (if reluctantly) agreed to do this, but as he stated publicly later:

'It's, like, you don't want to rock the boat... You think maybe this guy will cut you off (from treatment), and you're going to die or something.'⁷³

Furthermore, all Justices of the California Supreme Court held that Mr Moore had not given informed consent for research to be conducted on his samples.⁷⁴ In making this finding, the majority accepted that the doctor had failed in his fiduciary duty to advise Moore of other scientific and economic interests which could potentially impact on

<http://www.hreoc.gov.au/about/media/speeches/sex_discrim/2008/20081014_slavery.html> at 31 July 2009.

⁷² Eric E Johnson, *51 Cal.3d 120 Supreme Court of California, July 9, 1990*, Copyright 2008, <<http://www.eejlaw.com>> <http://www.eejlaw.com/materials/Moore_v_Regents_T08.pdf> at 3 August 2009.

⁷³ Rebecca Skloot, *Taking the Least of You*, New York Times Magazine, Published: April 16, 2006, 6 <<http://www.nytimes.com/2006/04/16/magazine/16tissue.html>> at 6 December 2006.

⁷⁴ See Johnson, above n 72, 1 (Panelli J.).

treatment decisions.⁷⁵ Despite finding that a fiduciary duty existed, on policy grounds they limited Moore's claim to that of informed consent, even as the concurring Justice Broussard agreed that an action for conversion could be maintained. This was specifically because Dr. Golde failed to advise Mr. Moore of an intention to retain a sample and conduct further work on it.

Broussard J stated in particular, that he felt his brother Justices had lost sight of the fact that without informed consent the surgery to remove Moore's spleen was illegal; the corollary was that the *Moore* case could be distinguished on its facts and would not act as a detriment to research which used 'the resources of existing cell repositories'.⁷⁶ These were kept in situations where, presumably, legal, informed consent has been obtained and patients had an opportunity to either choose how their samples were managed, or were not concerned by the issue and, had abandoned their samples.

But for all this discussion of 'informed consent', it is worth asking just how 'informed' consent can be and, how many of the 'choices' made by medical patients (or research participants) could be described as free. This is emphasised by the above quoted words of Moore himself, who did not want to 'rock the boat' for fear of losing access to treatment for his leukemia. So how close do these disparities of power between a doctor and patient bring us to notions of slavery? This might initially sound

⁷⁵ See *ibid.* 4-5.

⁷⁶ *Ibid.*, 21.

like an unreasonable question, but a comparison of the *Moore* and *Tang* cases brings to light important similarities.

The *Tang* case provides a useful summary, both of the contemporary international response to slavery and the elements required for proving it at law. Looking to the 1926 Slavery Convention⁷⁷ (the Convention) Gleeson CJ noted that it not only prohibited any legal recognition of slavery, but also aimed to eliminate the incidence of slavery.⁷⁸ Therefore, a person could not neither be declared a ‘chattel’ or piece of property nor treated as such, without offending international law and custom, as well as Australian common law.⁷⁹ His Honour, referring to precedent from the Hague trials concerning the former Yugoslavia, cited conditions of slavery as:

including control of movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.⁸⁰

Interestingly, Gleeson CJ observed that the superior or Appeals Chamber of The Hague did not believe that a lack of consent was an essential element of the offence of

⁷⁷ To which Australia is a party.

⁷⁸ See [2008] HCA 39, at 33 (Gleeson CJ).

⁷⁹ See *ibid.*, at 28.

⁸⁰ *Ibid.*

slavery.⁸¹ Arguably, applying this construction to the *Moore* case, even if you assume that there was a degree of consent which made the surgery a lawful act, it might still be possible to find that Mr Moore had been ‘enslaved’ by Dr. Golde. This argument needs to be understood in light of some careful qualifications which Gleeson CJ puts around the legal definition of slavery.

Firstly, declaring behaviour to be slavery requires the finder of fact to be satisfied that conduct went beyond oppressive employment conditions, to such degradation that it reduced a person to ‘the kind and degree that would attach to (them) a right of ownership’.⁸² Secondly, his Honour also warned against reading the use of the word ‘including’ in The Hague’s jurisprudence as inviting an expansive definition. In light of the terms of the Convention, it rather allows courts to consider unconscionable contractual arrangements which include ‘any or all’⁸³ of the indicia of slavery.

Was Mr. Moore enslaved?

It is clear that Mr. Moore had a fear of death, were he not to follow the instructions of his California-based doctor. At first this is not remarkable, except when consulting the footnotes of the Supreme Court’s judgment.⁸⁴ Justice Mosk observes that Mr. Moore asked Dr. Golde repeatedly about commercialisation of his samples, while also

⁸¹ See *ibid.*

⁸² *Ibid.*, at 33.

⁸³ *Ibid.*, at 31.

⁸⁴ These are not included with all available copies of the reasons.

inquiring as to whether his post-surgical monitoring and testing could be conducted in Seattle? Both requests were denied, with the physician claiming that continued testing in California was necessary for Mr. Moore's health, while further asserting that there were no economic gains.⁸⁵

Both assertions were untrue; for the period Moore accepted them however, he was arguably under a degree of psychological control (he was concerned for his health), and Dr. Golde was able to exercise exclusive control over his tissue samples, as Moore travelled compliantly between Seattle and California for several years. In this, there is a demonstration of a degree of control over the physical environment (i.e.: a University of California medical research laboratory), where the tests took place.

Some may say that this still bears no comparison with the *Tang* case, where poor, vulnerable women were brought into Australia to work in the sex industry. As related in the leading judgment of Gleeson CJ the women had their (fake) passports confiscated, were required to work for extended hours (in order to pay off large debts), which required them to work and live within the confines of the brothel. On the rare occasions they were let outside, the women were closely supervised by the brothel's management.⁸⁶

⁸⁵ See Louisiana State University's (LSU's) Law Centre, *Fiduciary Duty of Researchers - the Spleen Case - Moore v. Regents of University of California*, 793 P.2d 479 (Cal. 1990), Case Compliments of Versuslaw, © 1998 VersusLaw Inc., at 309, footnote 14a (Mosk J.).

<http://biotech.law.lsu.edu/cases/consent/Moore_v_Regents.htm> at 5 August 2009

⁸⁶ See [2008] HCA 39, at 16 (Gleeson CJ.).

However, it is worth considering the judicial use of the qualifiers ‘any or all’ in establishing the indicia for slavery, as well as the question of degree to which an individual had been reduced to an article of property. In Moore’s case, Dr Golde agreed to pay for airfares and hotel accommodation to ensure he kept coming to California.⁸⁷ Having your travel and accommodation expenses paid is not degrading, but then any prudent agriculturalist can be certain to spend time and money investing in an improved crop or stock yield. Arguably, Dr. Golde was protecting and maintaining a substantial property holding in much the same way as a farmer would do. He was also regularly ‘tilling the biological soils’ as it were, with Moore returning to Los Angeles ‘every few months (to provide) bone marrow, blood and semen’.⁸⁸

It could also be argued that Dr. Golde was periodically keeping Moore in a gilded cage; something the physician could afford to do, with the value of cell lines derived from Moore’s spleen estimated to have a potential market value of \$3 billion.⁸⁹ Similarly, while the trial judge in the *Tang* case acknowledged that the Thai prostitutes were provided with food and medical care, the hours they were required to work, for which they received little or no payment, meant that they were enslaved by being ‘effectively restricted to the premises’.⁹⁰ In the *Moore* case, it was not necessary for Dr. Golde to have effective physical control of his patient; so long as no other physicians ran tests on tissue or blood samples and, Moore himself continued to believe that his care needs could only be met by the doctors in California.

⁸⁷ See Skloot, above n 73, 6.

⁸⁸ Ibid.

⁸⁹ See *ibid.*, 7.

⁹⁰ [2008] HCA 39, at 16 (Gleeson CJ).

Proximity

It is clear that Dr. Golde still needed Moore, not only for Mr. Moore's therapeutic benefit, but to continue the scientific work. Thus, Dr. Golde arguably kept Mr Moore legally proximate to the substances being derived from the cell line, which was derived from his spleen and continued to have some research objectives in taking samples from him. Therefore, could Moore have argued that while there was medical necessity in removing his spleen (otherwise the leukaemia would kill him), he lost an economic opportunity arising from the abnormal organ's chemical content?

There are at least three legal questions to be overcome. The first is the limited scope for claims of economic loss at law; the second is the point at which a human organ becomes capable of being held as property, while the third is how far you can stretch a chain of causation so that an organ potentially retains a legal connection to the host from whom it was removed?

Economic loss cases allow third parties to recover damages when the negligence of another, caused damage to a party unrelated to an incident. However, as Gibbs J stated in *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemsted'*⁹¹ plaintiffs had to demonstrate truly exceptional circumstances which not only overcame the general

⁹¹ (1976) 136 CLR 529

rule against recovery of economic loss, even where the loss is foreseeable.⁹² The critical point of difference is where:

the defendant has knowledge or means of knowledge that the plaintiff individually, and not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence⁹³

Gibbs J eschewed any suggestion that he was laying down a formula surrounding economic loss, rather relying on comments in an earlier English case from Lord Diplock, who felt that economic loss was a matter to be established on a careful analysis of the facts of each individual case.⁹⁴

These opinions are at once helpful and problematic at the same time. From the *Moore* case it is clear that Dr. Golde knew his patient was ‘special’. The chemicals in Moore’s blood were rare, so the patient could not be described as a member of an ‘unascertainable class’ to use Gibbs J’s terminology. It is also clear that the surgery itself was conducted competently, as the patient lived postoperatively for over two decades⁹⁵ and, it is debatable whether Dr. Golde ever saw Mr. Moore as potentially suffering an economic loss. Indeed, had it been accepted by the Court that the spleen continued to be Moore’s ‘property’ after extraction, Dr. Golde might have argued that

⁹² See Harold Luntz, and David Hambly, *Torts: Cases and Commentary*, 4th edition, Butterworths (1995), 849.

⁹³ *Ibid.*

⁹⁴ See *ibid.*

⁹⁵ Mr. Moore died in 2001. See Skloot, above n 73, 9.

his surgical intervention to restore Mr. Moore's health was sufficient restitution to negate any civil claim. However, this would have had to been in response to their Honour's finding Moore had a proprietary claim, which the majority did not. This was despite an Appeal Court ruling in Moore's favour, on the basis of California statutory law pertaining to human research participants. From this 1978 law the Appellate Court found that people had 'ultimate power to control what becomes of (their) tissues.'⁹⁶

The majority at Appeal recognised that most patients would accept diseased tissues or organs, once removed, would be buried or incinerated by hospital authorities. This was comparable with the 'limited right of possession' held by executors to allow them to bury the deceased. In conducting research however, Dr. Golde converted the organ into a valuable scientific and economic resource, for which formal consent was required. Judge Rothman, writing the majority, said that Moore could not be presumed 'to be indifferent to whatever use might be made of (his spleen).'⁹⁷ It is noteworthy then, that Dr Golde was concerned enough to have repeatedly requested that his patient to sign consent forms, where Moore specifically agreed to:

⁹⁶ Ibid., 8.

⁹⁷ George J. Annas, *Whose Waste Is It Anyway? The Case of John Moore*, The Hastings Center Report; October 1988; 18, 5; Research Library, 38, <http://proquest.umi.com.ezproxy.une.edu.au/pqdweb?index=3&did=1659089&SrchMode=2&sid=2&Fmt=6&VInst=PROD&VType=PQD&RQT=309&VName=PQD&TS=1261793742&clientId=20804> > at 26 December 2009.

voluntarily grant to the University of California 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.⁹⁸

If there was no concern about Mr. Moore holding any rights over his tissue, then one would have to ask why the consent form was couched in those terms. Additionally, Skloot observes that Mr Moore was still being asked to sign such forms seven years after his surgery.⁹⁹ Despite these factors and the Appeal Court's ruling, the California Supreme Court was reluctant to find in favour of Moore, beyond the grounds noted earlier; that he had not had the opportunity for fully informed consent, as Dr. Golde had not informed him of what was to be done with his spleen and subsequent tissue samples. Beyond this the majority insisted that Mr. Moore could not claim any continuing link with his 'excised cells (because) laws governing such things...deal with human biological materials as objects sui generis'.¹⁰⁰

In many ways, it could be argued that the majority took comfort in a narrower reading of applicable US statutory law and precedent. Where the Appeal Court had accepted that Moore could have an ongoing interest in tissues removed that were not subsequently incinerated or buried, the Supreme Court majority believed that this would 'hinder research by restricting access to the necessary raw materials'.¹⁰¹ Their judgment, argued at once that human tissue as being in a class of its own legally,

⁹⁸ Skloot, above n 73, 6.

⁹⁹ *See ibid*

¹⁰⁰ Louisiana State University's (LSU's) Law Centre, above n 85, at 72 (Panelli J).

¹⁰¹ *Ibid.*,

enunciating a list of tissue types, suggesting that all such things of tissue fall into the unique category, regardless of the factual circumstances.¹⁰² Simultaneously, unique tissues were no more than the ‘raw materials’ of science. Arguably, this meant that the elements of Mr. Moore’s spleen became greater than the sum of the whole. While Moore was denied any claim over his excised spleen (or the proceeds of research derived from it) the Supreme Court was still willing to find that the leukaemia cells could be patented, not only because of the scientific effort involved in extracting the cells but also given that:

(l)ymphokines...have the same molecular structure in every human being and the same, important functions in every human being's immune system.¹⁰³

This shows that their Honours were prepared to distinguish between leukemia cells on the basis of their uniformity, but not, for example, the cells of Moore’s spleen itself vis-à-vis the cancer cells. The spleen was uniquely Moore’s and it contained his DNA; remembering Martin’s earlier cited comments, each cell of our body contained informational analogous to a computer code.¹⁰⁴ Much of this code we share with the rest of humanity, but there are elements which define our individuality. This can be shown by the consequences of transplanting a donated organ into its recipient; the latter will need to ‘take drugs or shots to make (their) immune system tolerate foreign

¹⁰² See *ibid.*, at 72

¹⁰³ *Ibid.*, at 75-76.

¹⁰⁴ See Martin, above n 26, 153.

material'.¹⁰⁵ As such organs or tissues removed from their source retain the 'living record' of the source's innate genetic qualities.

Thus, while Dr. Golde applied surgical skill in removing Moore's spleen and then having lymphokines extracted from it, the *Kelly* formulation of finding property in an organ only where a specimen has been preserved for medical science may need to be reviewed and modified. As things stand, it could be argued that there are a number of anomalies in the current reasoning. The first would appear to be that once tissue is separated from a living individual, that individual has no rights to the substance itself, following *Moore*.¹⁰⁶ Simultaneously however, it is the point at which tissue becomes separated from the body that it becomes capable of attaining a proprietary character. This is demonstrated by Lord Bingham's comments in *R v Bentham*¹⁰⁷ where His Lordship insisted that people could not own themselves as ownership required physical separation.¹⁰⁸ Hardcastle explains this rationale by suggesting that the separation of tissue provides 'the necessary normative distancing (to avoid) the classification of the whole human body as property'.¹⁰⁹

¹⁰⁵ Elizabeth Finkel, *Stem Cells: Controversy at the frontier of science*, ABC Books for the Australian Broadcasting Corporation, (2005), 160.

¹⁰⁶ Louisiana State University's (LSU's) Law Centre, above n 85, at 70-71(Panelli J)

¹⁰⁷ [2005] UKHL 18.

¹⁰⁸ See Hardcastle, above n 19, 127-128.

¹⁰⁹ *Ibid.*, 147.

An injunction of sorts

Had Moore known of the potential value of his spleen prior to its removal, he may have been able to rely on the earlier cited commentary from *Venner*, by insisting that it was not his intention to abandon the organ? Failing this, it is at least possible that the Mareva Jurisdiction could have been of some assistance. This jurisdiction, whose development is attributed to Lord Denning was recognised in 1975, largely in response to the growing international dimension to trade and commerce, which permitted debtors to readily move and dispose of assets, before creditors had received relief. Relying on section 45(i) the *Supreme Court of Judicature (Consolidation) Act 1975 (UK)*, Denning found it possible to grant a temporary injunction and appoint a receiver ‘in all cases in which it appears to the Court to be just or convenient to do so’.¹¹⁰

Notably however, this jurisdiction still concerns physical assets and, there are significant barriers to accessing it. This pertains to whether a court is satisfied that there is a ‘real risk’¹¹¹ of a debtor disposing of assets beyond the limits of a jurisdiction, to defeat a creditor’s claim. It is conceded that Dr. Golde did not take Moore’s spleen outside the US and that the California Supreme Court refused to recognise any claim that the Moore retained any property in his spleen. However, given the advance of science and the increasing ease with which samples and indeed,

¹¹⁰ *Riley McKay Pty Ltd v McKay*, Court of Appeal of the Supreme Court of New South Wales [1982] 1 NSWLR 264, cited in Michael Tilbury, Michael Noone and Bruce Kercher, *Remedies: Commentaries and Materials*, LBC Casebooks, The Law Book Company, (1993), 787.

¹¹¹ *Ibid*, 791.

whole organs, can be taken from the human body, a Mareva-style jurisdiction would help in allowing the common law to traverse the ‘normative distance’ referred to by Hardcastle¹¹² between the human body, tissue samples and property. After all, Mareva itself came out of an acknowledgement in the words of Lawson LJ in 1979 that:

Nowadays defaulting on debts has been made for the foreign debtor by the use of corporations ... By a few words spoken into a radio telephone or tapped out on a telex machine bank balances can be transferred from one country to another within seconds can come to rest in a bank which is untraceable, even if known, such balances cannot be reached by any effective legal process.¹¹³

Transposing concepts such as default with tissue removal, debtor with doctor and telex with medical technology, it is possible to see a basis for a Mareva jurisdiction but for the element of property. The Appeal Court in *Moore* took the first step when it acknowledged the link between academia, research and commercialisation. Concluding a retreat in scientific altruism, the majority saw the case as demonstrating researchers’ increasing willingness to make use of the patent as a means of generating profits. From this point, their Honours saw no ‘justification for excluding patients

¹¹² See Hardcastle, above n 19, 128.

¹¹³ *Third Chandris Shipping Corp v. Unimarine S.A.* [1979] Q.B 645 at 670, 671, cited in Michael Tilbury, Michael Noone and Bruce Kercher, *Remedies: Commentaries and Materials*, LBC Casebooks, The Law Book Company, (1993), 790.

from participation in those profits.’¹¹⁴ Thus, might it be said that Dr. Golde defaulted on a debt he implicitly owed to Moore, particularly when the physician became aware of the value of Moore’s spleen? Furthermore, given that the majority in the California Supreme Court conceded that they were making a legal policy choice when overturning the decision of the Appeal Court,¹¹⁵ we should ask whether these grounds are sufficient to be compelling. Then, there is the question of identify alternative rationales and their degree of persuasiveness.

The tort of conversion

The majority in the California Supreme Court specifically ruled against Moore’s claim that Dr. Golde was liable in tort law for an act of conversion; this being:

An unauthorised assumption and exercise of the right of ownership over goods or personal chattels of another, to the alteration of their condition or the exclusion of the owner’s rights.¹¹⁶

Rather unconvincingly, their Honours asserted that as Mr. Moore did not expect to retain the diseased organ after surgery, he could not claim any ongoing interest.¹¹⁷ As

¹¹⁴ Annus, above n 97, 38.

¹¹⁵ Louisiana State University’s (LSU’s) Law Centre, above n 85, at 86-93 (Panelli J).

¹¹⁶ Nolan and Nolan-Haley, above n 41, 332.

¹¹⁷ See Louisiana State University’s (LSU’s) Law Centre, above n 85, at 70-71 (Panelli J).

stated earlier, had Mr. Moore known the organ's true value, he may well have made preoperative arrangements differently. For current purposes, it is worth noting the contrast between the Appeal Court's preparedness to acknowledge scientific research as a commercial enterprise and the Supreme Court's insistence that scientific research is a public good, the samples which supply it being neither property a participant can claim, nor expect scientists 'to investigate the consensual pedigree of each human cell sample used in research'.¹¹⁸

Yet consent is usually a critical question in both civil and criminal matters, as well as research ethics. The Supreme Court may well be accused of not only being highly particular about its characterisation of the nature of science, but also the nature of property. This contestable nature of 'what property is' has been highlighted by George,¹¹⁹ who in reviewing a book by Laura S. Undercuffler discusses at length the latter's argument that property is a social construct. Part of Undercuffler's justification for claiming property is more of a social norm than a readily discernable legal reality is an assessment of US Supreme Court cases where she distinguishes between a 'common' view of property and an 'operative' concept.¹²⁰ The former is described as emphasising classical notions of autonomy and individuals maintaining their private interests, undisturbed. The latter view calls for greater intervention or interference with property rights in the public interest, or at least when such an interest is perceived to be at stake. However, George points out that Undercuffler is not making a case about over regulation in the modern state, but rather that:

¹¹⁸ Ibid., at 64 (Panelli J).

¹¹⁹ See Alexandra George, *The Difficulty of Defining 'Property'*, Oxford Journal of Legal Studies, Vol. 25, No. 4 (2005), 793–813, <<http://ssrn.com/abstract=916279>> at 29 December 2008.

¹²⁰ See *ibid.*, 799.

members of regulatory societies hold multiple conceptions of the legal power of property, some of which follow traditional understandings of property and some of which adopt new meanings ... the resulting property rights are socially constructed phenomena that result from independent social, political and economic forces, and the likely outcome of any claim to property rights can only be predicted by examining the meaning and power of 'property' in that context.¹²¹

It is clear from *Moore* that there are multiple and contestable views of property and that the majority judgments of the Appeal and Supreme Courts took the common and operative routes respectively, to use Undercuffler's distinction. It is then necessary to ask whether the common law can resolve this conflict, so that the 'value' of organs to both researchers, the patient or research participant and to the public interest (if there are wider interests at stake) can be determined consistently.

Remembering that the ALRC looked to history to find that there could be no property in a corpse,¹²² it is also noteworthy that the Commission has refused to pursue a common law or property-based approach in a succession of discussion papers and reports. In *Essentially Yours*, while acknowledging the jurisprudence of *Kelly* and *Doodeward*, a more detailed articulation of property rights (which may give individuals some form of claim) was described as a proposal whose 'drawbacks ... are

¹²¹ *Ibid.*, 800.

¹²² See Australian Law Reform Commission, *Essentially Yours*, above n 1, 527-528.

considerable and outweigh the benefits at this time'.¹²³ Again, in keeping with the majority in *Moore*, the ALRC sought to avoid placing additional responsibilities on scientists, characterising the participation of individuals in research as based on altruism and a communal or public interest in the progress of research and medicine.¹²⁴

This was followed by the discussion paper *Gene Patenting and Human Health*. In this document, while recognising demands from individual research participants for greater involvement in and derivation of benefits from research, the ALRC considered that any joint venture or other so-called benefit-sharing arrangements were 'better addressed outside the patent system'.¹²⁵ The Commission's position of relying on a series of contractual agreements arising from ethical review makes partial sense when you consider its parallel view that patent rights should be held by those with the greatest capacity to develop them.¹²⁶

Having a capacity to develop research generally infers the involvement large public institutions and/or large corporations. According to the Australian Research Council (ARC) owing to Australia's small population and equally small private research and development base, various patent holders, including public institutions such as universities, often need to look overseas for companies capable of taking a piece of

¹²³ Ibid, 534.

¹²⁴ See *ibid*, 534-535.

¹²⁵ Australian Law Reform Commission, *Gene Patenting and Human Health: Discussion Paper*, above n 29, 78.

¹²⁶ See *ibid*, 334.

research and turning it into a commercial product.¹²⁷ Add to this an acknowledgement that not all researchers will have the business skills and know how to identify and exploit a commercial opportunity, so that the so-called Cambridge model where patents are held by individual researchers¹²⁸ would be ineffective and, you have a conception of research and development where decisions are made and benefits distributed at the institutional level.

The ALRC would undoubtedly defend its position by citing research from the Organisation for Economic Cooperation and Development (OECD). In 2003, the OECD had released a report entitled *'Turning Science into Business: Patenting and Licensing at Public Research Organisations'* in which it highlighted a number of economic and social benefits flowing from an institutionalised approach to research, including scale, the possibilities for interdisciplinary study and, ultimately giving industry the confidence to invest.¹²⁹ To achieve the later objective, the institutional model was seen to provide:

greater legal certainty for firms interested in exploiting research results, (lowering) transaction costs for partners and (encouraging) more formal and efficient channels for knowledge and technology transfer.¹³⁰

¹²⁷ See *ibid*, 326.

¹²⁸ See *ibid*, 331.

¹²⁹ See *ibid*, 330.

¹³⁰ Organisation for Economic Cooperation and Development, *Turning Science into Business: Patenting and Licensing at Public Research Organisations*, (2003), 11, cited in Australian Law Reform Commission, *Gene Patenting and Human Health: Discussion Paper*, above n 29, 331.

Again, Underkuffler's 'operative' conception of property appears to be prevalent, both with the OECD and the ALRC. But even if this is the case, attempting to identify where the 'common' view of property might be preferred, or even that major economic and legal institutions may have erred in their rationale is a potentially useful exercise. This is largely due to the inherent contradiction between the law seeking to preserve the body's integrity and in some cases sanctity on the one hand, while allowing commercial exploitation of individual organs and cells on the other.

Narrowing the distance

It is to be remembered that Hardcastle noted the common law's placing great importance in putting normative distance between a tissue sample and a complete human body.¹³¹ However, it could be argued that our modern day knowledge of genes, as a cellular code unique to each individual has substantially reduced that distance. A person could carry a gene with mutations, which may either be recessive or expressive. If it is expressed then it will have an impact on the health of the person concerned, as well an increased likelihood of any off-spring being affected. Equally, if two people who carry a recessive gene mutation have a child, there is an increased chance of this mutation being expressed.

¹³¹ See Hardcastle above n 19, 147.

However, it is necessary to be cautious in determining just how much new, useful and thus, potentially valuable information genetic technology gives us. With only a few extreme exceptions, such as Huntington's disease, an individual's susceptibility to illness will not be determined by a particular gene alone.¹³² Rather, multiple genes, plus environmental factors including an individual's dietary and exercise habits will combine to determine their susceptibility to particular diseases. As noted by the ALRC in its report *Essentially Yours*:

(T)he impact of genes upon our lives is a gradual, partial, blended sort of thing. You are not tall or a dwarf ... you are somewhere in between. You are not wrinkled or smooth, but somewhere in between.¹³³

The true significance of genes emerges when, as observed by the US National Human Genome Research Institute, and cited approvingly by the ALRC that:

The DNA sequences of any two people is some 99.9 percent identical. The variations, however, may greatly affect an individual's disease risk.¹³⁴

This may initially suggest that genetic and/or cellular information is significant only to a select group of persons with vulnerabilities to specific diseases. However,

¹³² See Australian Law Reform Commission, *Essentially Yours*, above n 1, 119-122.

¹³³ *Ibid*, 118.

¹³⁴ *Ibid*, 120.

recalling Finkel's observation that all transplantation patients have to remain on immunosuppressant medication post surgery,¹³⁵ it is clear that the organs transplanted retain (to invoke Undercuffler's distinction) common or individualistic features which have to be managed by an operative intervention, to suppress the immune system of the recipient. Hardcastle further acknowledges that while it has been convenient for the law to assign property in detached specimens (to avoid declaring a whole human body to be property) 'there is no logical necessity for the law to recognise the creation of property rights in the detachment of biological material'.¹³⁶

If there is ultimately 'no logical necessity' to vest property rights in detached material, what room exists to maintain a legal connection between a detached cellular/tissue sample and its source? Furthermore, would it really offend so many norms and principles of modern law, economics or social policy to find property rights in the human body itself? I think not, and believe there are a number of elements in the existing law which allow this to be achieved.

The *Mabo* decision

The High Court's determination in *Mabo v Queensland*¹³⁷ overturned the concept of *terra nullius* in Australian law. Until 1992, the Australian continent had been presumed at settlement (at least at law) to be vacant and unclaimed, so that there was

¹³⁵ Finkel, above n 105, 160.

¹³⁶ Hardcastle above n 19, 146.

¹³⁷ [No 2] (1992) 175 CLR 1.

no legal impediment to the British Crown assuming dominion over the entire land mass.

After *Mabo*, Aboriginal peoples were recognised as British subjects, who also had pre-existing rights to lands they had once occupied, but been dispossessed of over time. As described by Noel Pearson, in *Mabo* the High Court achieved a compromise, which he explained colloquially as:

the whitefellas get to keep everything they have accumulated, the blackfellas should now belatedly be entitled to whatever is left over. The imperative flowing from the *Mabo* decision in 1992 was the swiftest, unambiguous and ungrudging delivery of that remainder to the indigenous peoples entitled to that belated recognition.¹³⁸

Drawing the analogy between land rights and the human body, the next question to ask is how we can apply principles of Native Title law to how common law conceives the human body and how property law relates to organs and/or cellular information. The first and perhaps most important is that there can be many forms of ownership and that they need not vest in a single individual or legal entity. For example, Samantha Hepburn suggests that the notion of the Crown holding absolute

¹³⁸ Noel Pearson, *The High Court's Abandonment of 'the Time-Honoured Methodology of the Common Law' In Its Interpretation of Native Title in Mirriuwung Gajerrong And Yorta Yorta*, Sir Ninian Stephen Annual Lecture 2003, University of Newcastle Law School, 17 March 2003, 5 <<http://www.capeyorkpartnerships.com/downloads/noel-pearson-papers/interpretation-of-native-title-in-mirriuwung-gajerrong-and-yorta-yorta.pdf>> at 8 April 2007.

sovereignty over all land in the colony of New South Wales (and thus, Australia) at the time of settlement was a fiction which allowed the Crown to become ‘the universal owner of all land to the exclusion of indigenous occupants’.¹³⁹

Arguably, patients and tissue sample donors like Mr Moore could justifiably claim that both common and statute law have deliberately excluded them in a similar fashion. This is because in the indigenous understanding, property is neither exclusive nor entirely physical, but can embrace spiritual, historical and other contexts. Sean Brennan highlights a section of Brennan J’s judgment in *Mabo*, where His Honour conceded that native title rights could not be readily itemised, but would largely depend on local, traditional customs held by individuals and/or groups; in this way it was ‘both ownership and something more fact-specific’.¹⁴⁰

This may well have parallel’s with George’s attempted application of Lockean principles of property as ‘body part plus’.¹⁴¹ Ultimately however, George concludes that the application of property principles will not extend beyond separated tissues altered by another person’s skill; other sociological, ethical, political and moral values cause the state to limit a person’s ability to deal with their body as property. The

¹³⁹ Samantha Hepburn, *Feudal Tenure and Native Title: Revising an Enduring Fiction*, Sydney Law Review, Vol. 3, [2005], 11-12 <<http://www.austlii.edu.au/au/journals/SydLRev/2005/3.html>> at 23 February 2008.

¹⁴⁰ Sean Brennan, *Native Title and The ‘Acquisition of Property’ Under The Australian Constitution*, Melbourne University Law Review, Vol. 2, [2004], 3 <http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/MULR/2004/2.html?query=nativ> at 7 July 2007.

¹⁴¹ George, above n 42, 23.

basis for this reluctance is the practical and philosophical implications of property as ‘creating certain incidents in the form of rights to buy and sell’.¹⁴²

However, I disagree; a fear that the poor, disabled and other needy people will be exploited and coerced into selling their organs, this does not necessarily preclude the common law from using a property paradigm to decide who has legal authority over detached organs and tissue samples. Nor does the use of property principles necessarily imply the absence of protection for vulnerable people.

Rather, again drawing on *Mabo*, two things become clear. Firstly, *Mabo* showed that despite colonial Governors and Parliaments legislating to make vast land grants while conveniently ignoring the land’s occupation by indigenous peoples,¹⁴³ the common law could still find residual native title rights in so-called ‘wastelands’ where no post-settlement title grant had been made by the Crown.¹⁴⁴ Secondly, arising from a subsequent native title case, *Wik*,¹⁴⁵ the High Court found that native title could coexist with ‘some large areas of land covered by pastoral leases and national parks’.¹⁴⁶ Therefore, despite legislative and judicial pronouncements, there may be limited ‘ownership and fact specific’ circumstances (to invoke Brennan J’s words) where people can own their detached organs and tissue samples as property; this holding could potentially coexist with the patents held by scientists and doctors.

¹⁴² *Ibid.*, 74.

¹⁴³ See Hepburn, above n 139, 12. Hepburn argues that English common law could have acknowledged Aboriginal prior possession of land.

¹⁴⁴ See *ibid.*, 8

¹⁴⁵ *Wik Peoples v Queensland* (1996) 187 CLR 1

¹⁴⁶ Pearson, above n 138, 5

Recasting property law

To argue that there is a *Mabo/Wik* equivalence when it comes to finding property rights for individuals in their detached organs and tissues is not as intellectually or jurisprudentially difficult as you might believe. Firstly, Hepburn is quite clear that notions of the Crown claiming absolute sovereignty over Australia and dispossessing the original inhabitants had far more to do with Imperial expansionist policies than any true transplantation of feudal concepts, whereby the King was the principal Lord.¹⁴⁷ If medieval feudal notions had applied, then the outcome would have been very different, because:

(in) Norman England, many land holdings were left undisturbed after the conquest of William I; the Crown acquired power as a sovereign to grant land to others, rather than universal ownership over *all* land. Many Saxons continued to retain allodial ownership over unalienated land. There was nothing particularly unusual about this, as the common law has an established history of upholding the validity of customary law and practices that have been undertaken since time immemorial. Furthermore, it was well established that the mere assumption of sovereignty should not necessarily disturb established proprietary principles.¹⁴⁸

¹⁴⁷ See Hepburn, above n 139, 3-4.

¹⁴⁸ Ibid, 13.

Similarly, if custom and multilayered ownership concepts could run through feudal land tenure, there seems little reason why similar principles could not be applied to organs and tissues. Then people could start truly 'own' their tissues. The first potential ground could be to ask whether from either a legal or philosophical viewpoint a person can reasonably be required to alienate that 0.01 percent of DNA code which makes them a unique individual to a third party. Equally, in Mr. Moore's case, while he may not have initially known that his spleen contained valuable compounds, might it have been found that he retained a form of native title.

This could potentially be based on coexistence, using *Wik* as a partial precedent. The *Wik* case concluded that native title continued to exist, even where some pastoral leases and national parks also existed.¹⁴⁹ This coexisting title was set aside if the Crown was found to have exercised its radical title (instead of the supposed pre-*Mabo* absolute version) to grant tenure to another party. According to Brennan the Crown grant was valid, even where the grantee never actually took possession of the land;¹⁵⁰ this appears to argue a contrary line to one of Pearson's key criticisms of the common law handling of native title being that:

¹⁴⁹ See Pearson above n 138, 5

¹⁵⁰ See Brennan above n 140, 10

(t)he common law is only concerned to presume possession in those who are in occupation.¹⁵¹

This can, to some extent, be resolved. However, for current purposes, it is arguable that just as there was a residual ability for native title to survive alongside certain Crown grants, there might also be the ability to find residual property rights for individuals in their bodies. Therefore, while Dr. Golde succeeded in arguing that the mixing of his labour was sufficient to vest patent rights in the University of California, there were potentially other matters which could have been raised, to press the claim of Mr. Moore and other patients.

Policy considerations

Firstly, for any patient who undergoes a therapeutic procedure like Mr. Moore, there is a good deal of time and effort involved, both physically and emotionally. As noted earlier, the *Human Tissue Acts* prevent individuals financially benefiting from tissue donation.¹⁵² The reasonableness of this position can be challenged on several grounds which specifically relate to the ALRC's insistence (and that of others) that to make

¹⁵¹ Noel Pearson, *Where We've Come From And Where We're At With The Opportunity That Is Koiki Mabo's Legacy To Australia*, Mabo Lecture, Native Title Representative Bodies Conference, Alice Springs 3 June 2003, 10 <http://www.capeyorkpartnerships.com/downloads/noel-pearson-papers/where-weve-come-from-and-where-were-at-030603.pdf>> at 8 April 2007

¹⁵² See Australian Law Reform Commission, *Genes and Integrity*, above n 35, 73.

human cells or organs tradable commodities ‘may engender a lack of respect for human life and dignity’.¹⁵³

But this may not be the full story. From a purely economic standpoint, individuals and groups of people made tradeoffs between their own safety and other factors, such as cost, convenience, enjoyment and the amount of risk they are prepared to tolerate to further a (presumably legal) activity, such as contact sport. Indeed, some economic and legal commentators have gone on record to suggest that the value of a human life is 2 million English pounds.¹⁵⁴

Assuming for the sake of argument that Mr. Moore had this sort of calculation put in front of him, he is still very likely to consent to surgery, in line with the common law dictum (associated with ‘wrongful life’ cases in Australia and overseas) that a reasonable chance at continued life was better than certain death from a spleen riddled with leukaemia. However, the *Moore* case also shows that while the patient received a therapeutic benefit, not all of his surgeon’s motives were altruistic; a point not lost on the California Appeal Court when it ruled in Moore’s favour.¹⁵⁵

Might a reasonable patient therefore, choose a different course of action? This could involve a patient agreeing with their physician than any material kept from surgery for

¹⁵³ Ibid, 71.

¹⁵⁴ See Carsten Gerner-Beuerle, *Calabresi, Posner, And Some Common Areas of Confusion: The Value of Life in Law and Economics*, London School of Economics and Political Science, 17 February 2009, Social Science Research Network, 6 <<http://ssrn.com/abstract=1345583>> at 17 February 2009

¹⁵⁵ See Annus, above n 97, 38.

research purposes, was still something they held a beneficial interest in, and expected a return from, once the doctor has realised a certain return from his specialist skills and labour. While this would clearly be illegal under the *Human Tissue Acts*, as mentioned earlier, Hardcastle identified the US case of *Venner* as providing support at common law for a person who promptly asserted their desire for ownership of separated tissues.¹⁵⁶ Leaving aside the statutory bar, could an equally rational but determined patient potentially forestall surgery (even if it is a supposedly lifesaving intervention) to ensure interests in potential valuable but separated tissues are preserved. In this act, it could be said that a person was bargaining life against nonexistence (i.e.: death). This invites an immediately analogy with the case law surrounding actions for ‘wrongful life’.

Attempting to develop my argument about how individuals can potentially secure property rights in their own body via the jurisprudence of wrongful life, presents both complications and opportunities. The most important complication is that majorities in the High Court of Australia have made clear their reluctance to accept ‘wrongful life’ as a cause of action, because comparing life with nonexistence is considered as something that cannot be ‘legally cognisable damage’.¹⁵⁷ Its relevance is twofold; firstly, the High Court has demonstrated its continued adherence to notions of the sanctity of all human lives, even those punctuated by severe disability and chronic ill-health. Secondly, the Court pointedly refuses to see death as an alternative it can countenance.

¹⁵⁶ See Hardcastle, above n 19, 95.

¹⁵⁷ *Harrington v Stephens* [2006] HCA 15 at 239, 83 (Crennan J.)
<<http://www.austlii.edu.au/au/cases/cth/HCA/2006/15.txt>> at 19 March 2010

For example, in the most recent Australian case of *Harrington*,¹⁵⁸ the plaintiff alleged that the negligence of her mother's paediatrician had meant the mother was not counselled to obtain an abortion. The effect of the plaintiff's mother being exposed to rubella caused the plaintiff to be born with serious physical and mental disabilities which required lifelong care. Justice Crennan, relying on English and US precedents, claimed that permitting an action for wrongfully life would implicitly devalue the lives of those with disability and thus be at odds with 'countervailing public policy supporting the preciousness of human life'.¹⁵⁹

Kirby J in dissent (and Mason P at Appeal) saw the question in terms of both medical negligence and, how the plaintiff would now cope with a life of serious disability, without compensation. As such, Kirby J dismissed the idea that the case was a policy choice between life and death because philosophically 'death is not an event of life (and it) cannot be lived through'.¹⁶⁰ Following this reasoning, patients like Mr. Moore are not strictly making a 'life or death' choice when consenting to surgery, though they may well exercise a choice to extend their life via medical intervention. However, arguably this need not be their only motivating factor.

As stated earlier, medical patients (and possibly research participants) spend time and effort dealing with their infirmities. While some will feel they have little choice but to

¹⁵⁸ See generally, *ibid.*

¹⁵⁹ *Ibid.*, at 232, 80 (Crennan J.).

¹⁶⁰ *Ibid.*, at 78, 27 (Kirby J.). Justice Kirby drew his observation from Ludwig Wittgenstein's *Tractatus Logico-Philosophicus*, (1958) at 185 [6.43II].

deal with their illnesses, there will still be an economic ‘opportunity cost’ in terms of other endeavours they might have spent their time on; particularly when it comes to participating in research. As a consequence, it may be reasonable to ask, whether the commercialisation of research (exemplified by the *Moore* case) leaves open an equitable question as to why participants should be presumed to be altruistic actors, when many researchers and/or their employing institutions are seeking commercial applications.

Time and effort

In this respect, Robert P. Merges provided a useful discussion of a 1990s copyright case, *Lotus v Borland International*.¹⁶¹ The dispute was over whether the applicant could restrain the respondent from using its spreadsheet program as a basis for writing other useful related software. The Court determined that Borland’s programming was of sufficient difference and originality for there to have been no copyright breach. Merges point however, is to highlight a concurring judgment which underlines the importance of there being common access to technology. In his opinion, Justice Boudin was concerned to limit the extent of *Lotus’s* ability to prevent other’s accessing its code, because he recognised the program’s true value over time was its ability to facilitate others ‘in learning the (Lotus) menu and in building their own mini-programs—macros—in reliance upon the menu.’¹⁶²

¹⁶¹ 49 F.3d 807 (1st Cir. 1995).

¹⁶² *Ibid.*, at 819

Merges argues that the *Lotus* case demonstrates that there are ways that the common law could develop notions of ‘group’ property rights. Using the internet as an example, he suggests that there are two main forms of group holdings – ‘add-on’ and ‘original’.¹⁶³ The former is exemplified by the many websites where fans, of say, Elvis Presley, contribute some content to a third party’s webpage. Meanwhile, the latter form includes virtual environments such as Wikipedia whose pages are ‘created by dispersed users from the ground up’¹⁶⁴ It could conceivably be argued that the modern day human being is an expression of the former construction, with the 0.01 percent differential in each individual, being our unique ‘add-on’ to the biological software program that is human DNA.

Relating this back to someone like Mr. Moore, Dr. Golde removed from his patient a defective piece of hardware (to continue the computing analogy); his spleen. The cells within this organ contained a complete software record; the DNA from which the physician was able to extract rare, valuable and patentable cell lines and chemicals. Accepting for argument’s sake the calculation suggested earlier, that the value of a human life was 2 million English pounds,¹⁶⁵ after travel and living expenses in California, why should Moore not have had some claim over the balance of potential royalties of \$3 billion dollars.¹⁶⁶ After all, without his continued acquiescence in providing samples post-surgery, Dr. Golde’s successful research may have been significantly hampered.

¹⁶³ See Robert P. Merges, *Locke for the Masses: Property Rights and the Products of Collective Creativity*, Hofstra Law Review, 5 January 2009, 102

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323408# as at 29 October 2009.

¹⁶⁴ *Ibid.*, 103.

¹⁶⁵ See Gerner-Beuerle, above n 154, 6.

¹⁶⁶ See Skloot, above n 73, 7.

Mr. Moore spent a great deal of his time, if not his intellectual effort, in making the research possible. It is noteworthy that Merges's article talks about many Lotus macro program writers investing 'time and effort';¹⁶⁷ but this compound phrase is never aggregated into its component parts to discuss whether its two elements have a value in their own right. This is unfortunate because as Latham observes 'the age old belief that time is money has found new relevance'.¹⁶⁸

Of course, Latham was talking about the newly emerging digital economy, where at once many people can be connected across the globe, via satellite, internet and telephone. They can all work on a particular technical issue or problem which needs quick resolution, such as a computer virus. Yet, in another sign of disaggregation a growing number of these engineers, web designers and the like are not employees of big firms, but operate their own businesses as independent consultants and franchise owners whose productive capacity is 'then delivered to the market by large scale enterprises'.¹⁶⁹ The 'currency' in these transactions is information, transmitted across the globe at increasing speed and at all hours; to the extent that Mark Latham suggests information itself is more important to many businesses than plant and production.¹⁷⁰

¹⁶⁷ Merges above n 163, 106.

¹⁶⁸ Mark Latham, *Civilising Global Capital: New thinking for Australian Labor*, Allen & Unwin, 1998, 77

¹⁶⁹ *Ibid.*, 76

¹⁷⁰ *See ibid*

To maintain the economic analogy, Mr. Moore's condition meant that his body produced a large amount of lymphokines, 'a normally scarce set of substances in the immune system'.¹⁷¹ Usually, the relative scarcity of something will be vital in determining its market value. However, even though Dr. Golde was able to extract valuable biomedical information from Moore's spleen, the law would not oblige the doctor to remunerate his patient. The Supreme Court insisted that lymphokines had the same molecular and functional capacity across humanity, appearing to forget that 0.01 percent of any lymphokine could belong to no-one except Mr. Moore; and that Moore's abnormal pancreatic cells were unique on a second front for their over-production of the sought after lymphokines. As Justice Mosk observed in dissent:

In attempting to expound (the) science the majority run two serious risks. First, because they have no background in molecular biology the majority may simply misunderstand what they are reading, much as a layman might misunderstand a highly technical article in a professional legal journal. Indeed, I suggest the majority have already fallen into this very trap, since some of their explanations appear either mistaken, confused, or incomplete...The second risk is that of omission. The majority have access to most of the legal literature published in this country; but even if the majority could understand the medical literature, as a practical matter they have access to virtually none of it. This is demonstrated by the fact that every one of the medical articles now relied on by the majority came into their possession as

¹⁷¹ Ron Lee Meyers, *Book Review of 'Body Parts' Property Rights and the Ownership of Human Biological Materials by E. Richard Gold - Washington, D.C.: Georgetown University Press. 1996*, Harvard Journal of Law & Technology, Volume 10, Number 2 Winter 1997, 369 <<http://jolt.law.harvard.edu/articles/pdf/v10/10HarvJLTech369.pdf>> as at 19 July 2006.

reprints furnished to this court by one of the parties to this lawsuit -- obviously not an unbiased source.¹⁷²

Obviously, I run a similar risk in trying to expound a new legal position, though with an additional 20 years of legal, scientific and technological information to draw upon, as well as the internet to assist with access to specialist information, I can attempt to avoid such errors. Arguably, the majority's significant omission in *Moore* is to treat a lymphokine cell (or any cell) as a generic object when its DNA profile will show from whom it came.

The likely objection from researchers like Dr. Golde is that Moore himself applied no skill, as per the test in *Kelly*, to the extraction of lymphokines or the creation of cell-lines. However, the patient, being part of a definable group of persons with hairy cell leukaemia, consented to major surgical procedure to remove a diseased organ. This, along with subsequent tests and samples, facilitated his doctor's research. It is open to debate however, whether any application of skill is necessary, to make tissue the subject of property. Hardcastle notes that in a 1995 report entitled '*Human Tissue: Ethical and Legal Issues*,' the UK's Nuffield Council on Bioethics¹⁷³ drew on elements of Roman Law which have survived in the English common law tradition, to

¹⁷² Louisiana State University's (LSU's) Law Centre, above n 85, at 246 - 247

¹⁷³ This is an independent body funded by a number of trusts and headed by a Council comprising many professions including doctors, lawyers, theologians, philosophers and other academics. Amongst its aims is to encourage public debate and discussion of scientific advances, to avoid undue concern and prompt regulatory authorities as may be required. See Nuffield Council on Bioethics website 'About us,' <http://www.nuffieldbioethics.org/go/aboutus/page_2.html> as at 2 April 2010.

suggest that the first person to possess a separated biological sample was its ‘owner.’¹⁷⁴

While this avoids the application of skill test, it necessarily presumes that the tissue previously belonged to no-one and further (to employ Locke’s terminology), it was in a state of nature. Both of these propositions do not stand up to scrutiny. Firstly, in the Australian context, *Mabo* signalled the end of *terra nullius* as an accepted legal maxim. On a similar basis one can argue that *res nullius* is equally fictitious in relation to tissue samples; modern science can tell us the origin of a sample. Thus, to deny that Mr. Moore’s spleen is any less his spleen because it has been removed is about as sensible as claiming Australia was not inhabited prior to 1788.

Secondly, the Lockean conception of property relied on people coming out of pre-historic savagery, mixing their labour with land and joining together for their mutual prosperity.¹⁷⁵ While it is clear the Dr. Golde laboured to remove Moore’s spleen, neither man could be described as being ‘in a state of nature’. Nor was the spleen itself unpossessed; until excision it had been part of Mr. Moore for his entire life. While acknowledging this line of argument dismisses Lord Bingham’s earlier cited position that finding property in human tissue required a normative distance between an individual and a sample,¹⁷⁶ it may be time to revisit such notions and ask whether they meet modern legal needs.

¹⁷⁴ See Hardcastle, above n 19, 130

¹⁷⁵ See Merges, above n 163, 107.

¹⁷⁶ See Hardcastle, above n 19, 147.

Finding property for the individual

I come to this task with the notion that it is both possible and desirable, in some cases, for individuals to find property in their own body. Locke is at once useful in this task because of the historic context of his writings and, the implications of his rationale for private property. Firstly, Locke was writing against the backdrop of a society which maintained the belief that all property ultimately belonged to the King, who was God's representative on Earth.¹⁷⁷ Locke's thesis necessarily turned much of that on its head, because for him human community and government arose out of a need to manage the property rights people were already asserting. God had already created the state of nature where all property belonged to all of humanity, in common. Due to the impractical nature of trying to seek all of humanity's permission to mix your labour with communal property, the institution of private property:

works in part because it empowers a single person or entity—a unique legal *focal point*—to make decisions regarding the use and disposition of a particular asset.¹⁷⁸

¹⁷⁷ See Merges, above n 163, 106

¹⁷⁸ *Ibid.*, 109.

Locke's arguments at once dispose of the need for a monarch to be the holder of all property in a realm, while also seeking to provide a basis to keep in check the rivalries between people as to beneficial ownership of an item.¹⁷⁹ Tibor Machan further argues that Locke's property paradigm is essentially utilitarian and that, in the modern day, virtuous generosity (and not a Judeo-Christian ethic) is sufficient to explain why people are motivated to aid the needy, who have little or no property.¹⁸⁰ These observations are important for two reasons; firstly, they support Hepburn's earlier cited argument that the English Monarch was a feudal Lord, with duties to pre-existing landholders in his realm.¹⁸¹ This rationale provides for the recognition of Native Title and, it may well provide for a form of title for each individual in our own body. Certainly, we can now ask whether private property can have more than one legal foci point. As a matter of common practice we know that a piece of Blackacre property can be encumbered with a range of easements, caveats, mortgages and the like, by a range of real and incorporated persons, as well as the State.

Secondly however, Machan makes the concept of a Devine Being an optional component to our understanding of property. This has both advantages and disadvantages. As discussed earlier, for indigenous peoples, a quasi-religious or spiritual connectedness to land plays a key role in Native Title claims. In western culture, religion and/or spiritualism has a far more contested position. Indeed, there is compelling evidence for understanding Australia's civic spaces as predominantly and appropriately secular.

¹⁷⁹ See Tibor R. Machan, *Self-Ownership & the Lockean Proviso*, 6 <<http://mises.org/journals/scholar/Machan9.pdf>> as at 22 July 2006.

¹⁸⁰ See *ibid.*, 6-7

¹⁸¹ See Hepburn, above n 139, 13.

For example, Professor Helen Irving of Sydney University cites section 116 of the Constitution, in its prohibition of the Commonwealth establishing or requiring its officers to submit to any religious observance or examination.¹⁸² She argues that section 116 was the product of concern by Australia's founders that official recognition of any religion could lead to intolerance by providing a legal excuse for persecution of those practising a faith other than that publicly sanctioned. It is significant to reflect that Edmund Barton, our first Prime Minister, stated that Australia's 'whole mode of government, the whole province of the State is secular'.¹⁸³

This view is contested by Elizabeth Kotlawski, who notes that the first Australian Parliament was opened with a prayer and that State Governors have historically proclaimed a number of holy days.¹⁸⁴ Kotlawski also relies on judicial acknowledgement of Christianity, highlighting colonial jurisprudence as well as a 1992 judgment in the Victorian Supreme Court describing this nation as 'predominantly a Christian country'.¹⁸⁵

Whatever one's personal view of religion, the disparity of opinion should make us all pause and consider whether the invocation of the theological in judicial opinion or

¹⁸² Helen Irving, *Australia's foundations were definitely and deliberately not Christian*, Sydney Morning Herald, 3 June 2004 <<http://www.onlineopinion.com.au/view.asp?article=2272>> as at 30 September 2006.

¹⁸³ Ibid.

¹⁸⁴ See Elizabeth Rogers Kotlawski, *Southland of the Holy Spirit: A Christian history of Australia*, Christian History Research Institute, published by Dr Graham McLennan, 1994, 14-15.

¹⁸⁵ Ibid, 287.

public policy is appropriate? Recalling Justice Crennan's ruling in *Harrington*, which in part invoked notions about the precious nature of human life¹⁸⁶ and paralleling this with similar sentiments expressed to the Australian Law Reform Commission about the 'special' nature of the human body,¹⁸⁷ it would seem there are still quasi-religious sentiments in judicial and public policy pronouncements.

These sentiments may be preventing a more pragmatic approach to the management of public health and chronic illness. These were issues in the forefront of Kirby J's reasoning when he said that Miss Harrington's negligence claim against her doctor should succeed, in part because:

(A)warding damages in a case such as this would provide the plaintiff with a degree of practical empowerment. Such damages would enable such a person to lead a more dignified existence. They would provide him or her with a better opportunity to participate in society than he or she might otherwise enjoy where the burden of care and maintenance falls on the disabled person's family, on charity or on social security.¹⁸⁸

¹⁸⁶ See [2006] HCA 15 at 232, 80 (Crennan J.).

¹⁸⁷ See Australian Law Reform Commission, *Report - Genes and Integrity*, above n 25, 72.

¹⁸⁸ [2006] HCA 15 at 122 (Kirby J.).

Notably, prior to these remarks, Kirby J had also commented that in his view, the majority opinion relied in part on religious views and, not the secular law the Court was sworn to uphold.¹⁸⁹

While he was not complaining of medical negligence, might Mr. Moore (and other patients like him) be able to claim a bounty from their participation in research to meet either their ongoing care needs, or a range of prior expenses directly related to the onset of their illnesses. Despite this potential benefit, in Australia and comparable nations, the relevant *Human Tissue Acts* prevent valuable consideration being exchanged for tissue; as exemplified by section 32 of the NSW legislation highlighted earlier.¹⁹⁰

To continue the analogy with Native Title, a comparison may well be drawn with the impact of the passage of the *Native Title Act 1993 (Cth)*. From his speeches and writings Pearson (along with others) had clearly hoped that the legislation would secure the *Mabo* judgment from attempts by hostile State Parliaments to legislatively annul the common law ruling.¹⁹¹ What happened was something quite different in Pearson's view; instead of purely preserving the common law position, the *Native Title Act* transformed a common law jurisprudence into a rigid application of statutory law, because in cases subsequent to *Mabo*:

¹⁸⁹ See *ibid.*, at 100 (Kirby J.)

¹⁹⁰ See *Human Tissue Act 1983 (NSW)*, above n 40, s.32

¹⁹¹ See Pearson, above n 138, 8; See also Pearson above n 151, 4

The High Court has taken the legislation as the starting point and the ending point for interpreting native title.¹⁹²

Pearson made this argument while also pointing out that the Commonwealth Government had gone to some length both in drafting the legislation and introducing the Bill into Parliament to say that the common law principles enunciated in *Mabo* were maintained alongside the enactment.¹⁹³ This might be viewed as somewhat unreasonable on Pearson's part, because as observed by Frazer in the hierarchy of sources of law, statutory provisions prevail over common law rulings.¹⁹⁴

However, whereas Frazer might at once appear to foreclose the application of common law on either Native Title or the prospect of finding property in the human body, she acknowledges that the courts' interpretation of statutory and common law can change over time. A notable example of this in the Australian context is the *Franklin Dams* case¹⁹⁵ of 1983, where the State of Tasmania's plan to build a dam was found to be inconsistent with the Commonwealth's acceptance of responsibilities under international heritage conventions. The Commonwealth legislated to bring the relevant convention into Australia's domestic law and, the Court concluded the effect of the federal law was to 'override the State's rights'.¹⁹⁶

¹⁹² Pearson, above n 138, 9

¹⁹³ See *ibid.*, 15 - 16

¹⁹⁴ See Frazer, above n 11, 18

¹⁹⁵ *Commonwealth v Tasmania* (1983) 158 CLR 1.

¹⁹⁶ Frazer, above n 11, 15

This is in contrast with a view taken by the High Court in 1973¹⁹⁷ that even though the United Nations' *Charter* had been placed in the schedule of an enactment, the Act itself had not clearly stated that the *Charter* was to be part of Australia's domestic law.¹⁹⁸ Further, relying on precedent expounded by Dixon J, it was concluded that 'generally, no power resides in the Crown to compel (subjects) to obey the provisions of a treaty'.¹⁹⁹

The *Human Tissue Acts*

In a similar context, it is arguable that the interpretation of the *Human Tissue Acts* could be just as subject to interpretive change. For example, the NSW legislation was first enacted in 1983. Furthermore, there appear to some points of vulnerability in the statutory language, which given what we now know scientifically, may allow a shift in thinking about the human body and its tissues that is as significant as *Mabo* was for indigenous land rights.

Firstly, the definition in section 4 of the Act seems only to consider a sample of tissue organ at the point of removal.²⁰⁰ Once it is removed and a researcher applies their skill to change it however slightly, the item becomes a new thing at law, as we have seen in

¹⁹⁷ See *Bradley v Commonwealth* (1973) 128 CLR 557

¹⁹⁸ See Martin Dixon and Robert McCorqudale, *Cases and Materials on International Law*, 3rd edition, Blackstone Press Limited, 2000, 130 – 131.

¹⁹⁹ *Ibid.*

²⁰⁰ The definition states that 'tissue' includes an organ, or part, of a human body and a substance extracted from, or from a part of, the human body.

cases such as *Doodeward*. But this is now potentially a weakness that can be exploited. A tissue sample, to a small degree altered by the act of removal and preservation, will still bear the DNA code of its source. In any event, as Mosk J observed in *Moore*:

(I)t does not follow that the researcher who obtains (tissue) must necessarily remain ignorant of any limitations on its use: by means of appropriate recordkeeping, the researcher can be assured that the source of the material has consented to his proposed use of it, and hence that such use is not a conversion. To achieve this end the originator of the tissue sample first determines the extent of the source's informed consent to its use -- e.g., for research only, or for public but academic use, or for specific or general commercial purposes; he then enters this information in the record of the tissue sample, and the record accompanies the sample into the hands of any researcher who thereafter undertakes to work with it...As the Court of Appeal correctly observed, any claim to the contrary 'is dubious in light of the meticulous care and planning necessary in serious modern medical research'²⁰¹

Something immediately noticeable about this quote is that Mosk J never imports any notions of divinity or tissue having any other 'special' qualities. He frames the question as one of consent, contract and accountability; whether removal has altered

²⁰¹ Louisiana State University, (LSU's) Law Centre, above n 85 at 204 (Mosk J.).

the tissue does not form a key component in his deliberations. The consent of the patient who provides the tissue frames the contract the sample storage facility enters with a researcher, who is accountable for their use of the sample as per the terms of the agreement.

Mosk J attempts to support this line of argument with reference to US patent law, by suggesting that Mr. Moore is analogous with a joint inventor. However, His Honour concedes the flaw in this argument is that the patient did not bring his intellectual skills to Golde's research.²⁰² It was Golde who extracted and patented the cell-lines, not his patient.

Mining rights

However, Mosk J's point is that without Mr. Moore the research itself may not have been possible. This argument was not accepted by the majority, and still may not be successfully argued. Nonetheless, there are some compelling arguments for a re-evaluation of the position. Firstly, given the anticipated returns on patented cell-lines like Mr. Moore's, an analogy with mining for precious metals is persuasive. Meyer, Piper and Rumley survey how, post *Mabo* and *Wik* indigenous communities have been able to assert some limited Native Title rights over minerals and substances like ochre.

²⁰² See *ibid.*, at 191 (Mosk J.).

This is because just as the recognition of Native Title had seen the Crown acknowledge pre-existing title to land, the ownership of precious metals under the ground were also more likely to become part of a Native Title claim. The authors explain that at common law, property owners are entitled to the surface areas of the land, the soils and minerals beneath, as well as the airspace above. The only specific reservation was that ‘property in gold and silver (the ‘royal minerals’) was vested in the Crown by...royal prerogative’.²⁰³

To establish whether the Crown had made any further reservations to itself, or issued land grants to settlers (in the Australian context) that would extinguish Native Title, it is necessary to refer to the *Crown Land Acts* or *Mining Acts* in the various State jurisdictions. In general, the legislation needed to be considered in terms of whether it was retrospective or prospective, how it dealt with any pre-existing titles and whether the Crown had reserved for itself simply the royal minerals, or other minerals as well.²⁰⁴

If we accept for arguments sake that tissues and organs are analogous to minerals, then it may be possible to step round the provisions of the *Human Tissue Acts*. These

²⁰³ Gary D Meyers, Chloë M Piper, and Hilary E Rumley, *Asking The Minerals Question: Rights In Minerals as an Incident of Native Title*, [1997] AILR 28, 29
<<http://www.austlii.edu.au/au/journals/AILR/1997/28.html>> as at 7 July 2007.

²⁰⁴ See *ibid.*, 32 – 35. The authors discuss the various Colonial/State legislative regimes and their impacts on Native Title.

define tissue as something which has been ‘extracted’²⁰⁵ for the human body. Arguably, prior to the point of extraction, a bodily organ or other tissue would not be subject to the Act. Indeed, the legislation is silent on the prospective assignment of such things and, as Mosk J noted, the US anatomical gift legislation only banned payment for tissues used in transplantation or therapy. As such, he concluded that payment for the use of tissue for research purposes did not contravene the law.²⁰⁶

While the earlier cited case of *Colavito* might be used to rebut such a claim given its invocation of Coke and Blackstone in defence of the ‘no property’ in a body argument,²⁰⁷ the case can nonetheless be distinguished from *Moore*. This is because *Colavito* concerned an organ meant for transplantation, which would by definition come under the anatomical gift legislation.

Equally however, as much as Blackstone might be invoked to uphold the ‘no property’ principle, Hardcastle also cites him as authority for the view that people have ‘uninterrupted enjoyment’²⁰⁸ of their bodies. As indicated earlier, Hardcastle acknowledges that Blackstone was speaking in terms of a person’s right to feel safe from battery or assault. Nonetheless, a similar concept could be employed in the modern day to suggest enjoyment of returns from the bounty of science. Again, drawing on Native Title jurisprudence, it has been found that indigenous peoples can

²⁰⁵ *Human Tissue Act 1983 (NSW)*, s.4.

²⁰⁶ Louisiana State University, (LSU’s) Law Centre, above n 85, at 217 – 218 (Mosk J.).

²⁰⁷ See generally 2006 NY Slip Op 09320, above n 9.

²⁰⁸ Hardcastle, above n 19, 16.

continue to enjoy traditional hunting and fishing rights on their lands in the modern day.

Significantly however, it has been found in Canadian jurisprudence that such rights change in the context of the society in which they exist. For example, in a series of cases before the Canadian Supreme Court, the Justices were asked to determine the legality of various Aboriginal Peoples taking of fish stocks, in commercial quantities and, at times in contravention of licence restrictions, while claiming traditional fishing rights. The majority decided in *Gladstone*²⁰⁹ that so long as a customary activity had been a significant cultural practice prior to European contact, then it would be recognised as an existing right.²¹⁰ The only further qualification was that the practice had continued, regardless of whether modern technology had altered its form.²¹¹ This point was underlined by comments in both US and Canadian judgments that to restrict traditional owners to catching game via pre-industrial or pre-contact methods. For example in the US, Myers, Piper and Rumley cite the case of *United States v Michigan*²¹² in which the Court stated:

[t]he Indian's right to fish, like the Aboriginal use of the fishery on which it is based, is not a static right. (and) may be exercised utilising improvements in fishing techniques, methods and gear.²¹³

²⁰⁹ See generally *R v Gladstone* [1996] 4 CNLR 65.

²¹⁰ See Myers, Piper, and Rumley, above n 203, 22

²¹¹ See *ibid*, 21.

²¹² See (1979) 471 F Supp 192

²¹³ Myers, Piper, and Rumley, above n 203, 17

Changing our view of the human body

In a similar vein, I would postulate that the right to full legal and uninterrupted enjoyment of one's body could, in contemporary society, extend to obtaining direct benefit from one's body. After all, if you are a recognised sportsman or woman, or a catwalk model, you receive payment for your physique, athleticism or beauty. While this takes effort and preparation, there is also some degree of natural aptitude or genetic disposition.

Professor Julian Savulescu, Professor of Practical Ethics at Oxford University has advocated using genetic technologies to enhance humanity's capabilities. He told the *National Press Club* in 2005 that to an extent this was already being done when embryos for IVF implantation, which were tested for genetic mutations which heighten the risk of developing certain diseases or abnormalities.²¹⁴ However, his argument was not only that we should use genetic technologies to avoid disease, but to find way to improve all of humanity's access to what might loosely be termed 'the good life'. This is not just a concept of material comfort but also an abundance of personal attributes which:

²¹⁴ See Julian Savulescu, *National Press Club National Australia Bank Address*, Wednesday, 8 June, 2005, 5 <<http://www.asmr.org.au/MRW/NPCTRSC05.pdf>> as at 13 November 2009

philosophers have...called 'all purpose goods' - goods that are good no matter what kind of life you want to lead. Intelligence, memory, self-discipline, foresight, patience, sense of humour, optimism. These may all have a biological contribution.²¹⁵

Savulescu suggests that there may be a positive duty to exploit such biological knowledge. He likens a failure to do so with deprivation of food from a child, which has the capacity to retard growth and development.²¹⁶ The common law has found a place for positive duties, many would say increasingly so; this extending to third parties. A famous case is *Donoghue v Stevenson*,²¹⁷ where a café customer sued the manufacturer of a ginger beer who contents had been contaminated. While Lord Atkin was the only Law Lord to find a duty of care between the beer bottle manufacturer and Mrs Donoghue, his dissent has become persuasive. This is because, according to Luntz and Hambly, Atkin 'converted the geographic contingency of neighbourhood (into) a far more conceptual proximity'.²¹⁸ From Lord Akin's conception of proximity, I want to ask the question: Who is my neighbour? In asking this question, it is useful to remember that Lord Atkin's answer was:

²¹⁵ Ibid., 6

²¹⁶ See *ibid.*, 5

²¹⁷ [1932] AC 562 (HL)

²¹⁸ Luntz and Hambly, above n 92, 123.

Persons who are so closely and directly affected by my act that I ought to have them in contemplation ...when I am directing my mind to the acts or omissions called into question.²¹⁹

While this test is founded in the tort of negligence, it is arguable that the ‘good neighbour’ principle has an application when it comes to property rights and the human body. Firstly, in relation to Mr Moore, while Mosk J sought to have him considered as akin to a joint venturer in Dr. Golde’s research, but none of the Justices seem to have considered exactly *how* a share of the profits could have benefited Moore. This contrasts with Kirby J in *Harrington* who discussed the need to make Miss Harrington’s disability more bearable for her and less of a financial impost on either her family or the community.²²⁰ Skloot advises that after his surgery Moore settled in Seattle and sold oysters for a living,²²¹ however, he died at just 56 years of age.

It can be argued that given his condition when he first saw Dr. Golde, Mr Moore achieved many more productive years of life than he otherwise would have had. However, one can speculate on how much better those years might have been had Mr Moore enjoyed some of the patent royalties generated by cells originating from his body. In *Harrington*, Kirby J suggests that an alternative to the emotive label of ‘wrongful life’ is ‘wrongful suffering’; though he notes that many courts do not

²¹⁹ *Ibid.*, 124.

²²⁰ *See* [2006] HCA 15 at 122 (Kirby J.).

²²¹ *See* Skloot, above n 73, 6.

support the distinction.²²² However, it is worth asking whether Mr. Moore experienced any ‘wrongful suffering’ as a result of either having his spleen removed and retained without his knowledge,²²³ or in the belated knowledge that his suffering with a cancerous spleen were now earning others significant profits.

Despite criticism of ‘wrongful suffering’ as a concept, it may prove useful in acting as one of the tests in determining what Mr. Moore was owed as a percentage of royalties from the cell-lines. In her judgment in *Harrington*, Crennan J noted how the Supreme Court of Israel had dealt with a wrongful life claim by a seriously disabled child ‘by employing...a legal fiction as a comparator, namely life as a healthy child’.²²⁴ By the same reasoning, it may well be possible to compare Mr. Moore with a healthy comparator, even though the majority in *Harrington* dismissed the idea as ‘the erection of a fiction’.²²⁵

And, while it is clear that Dr. Golde is not responsible for him being afflicted with leukaemia, the doctor could well be seen to have had a material impact on Moore’s quality of life, both during and after surgery. Firstly, the continuation of a professional doctor/patient relationship is assured by the nature of the group of blood and bone marrow diseases known as leukaemia. The disease requires ongoing treatment which

²²² See [2006] HCA 15 at 6 (Kirby J.).

²²³ See Skloot, above n 73, 6. Prior to surgery, Mr. Moore ‘signed a consent form saying that the hospital could “dispose of any severed tissue or member by cremation”’ (emphasise added).

²²⁴ [2006] HCA 15 at 236 (Crennan J.)

²²⁵ *Ibid.*, at 202 (Callinan J.).

on average can be eight months in duration, but (as in Mr. Moore's case) can extend over several years.²²⁶

The Leukaemia Foundation's²²⁷ fact sheets also do not talk in terms of current technology curing the disorder, but rather that improvement in medical knowhow allowing improved survival rates over a certain number of years, post diagnosis.²²⁸ Post diagnosis, a doctor's performance of his or her duties is critical to a patient. This is because, as Savulescu observed, we all place an intrinsic value on our health. Being healthy is readily contrasted with disease and illness, because the latter situation effects 'how far we can achieve our (life) goals'.²²⁹

Any serious, chronic illness, like leukaemia, would have an impact on someone's life goals. It is worth asking whether a neighbour, even one providing effective therapeutic treatment like Dr. Golde, has any additional duties towards his patient. Lord Atkin's formulation encompassed both acts and omissions and, in this light, it is noteworthy that the first time Mr. Moore was asked to sign an authority vesting all his samples in the University of California was seven years after removal of his spleen; and then the document was handed to him by a nurse.²³⁰ Mosk J noted the delay in

²²⁶ See The Leukemia Foundation, *Fact Sheet: The Diseases*, 3 <http://www.leukaemia.org.au/fileadmin/dl-docs/factsheets2/FactSheet_LF_The_Diseases.pdf> as at 11 April 2010.

²²⁷ On the bottom of its fact sheets The Leukemia Foundation states: 'The Leukaemia Foundation is the only national not-for-profit organisation dedicated to the care and cure of patients and families living with leukaemias, lymphomas, myeloma and related blood disorders. 1800 620 420 | www.leukaemia.org.au'

²²⁸ See The Leukemia Foundation, above n 226, 3.

²²⁹ Savulescu, above n 214, 6.

²³⁰ See Skloot, above n 73, 6.

time²³¹ and, what is also noteworthy is the fact the Dr. Golde did not give such an important document to Mr. Moore personally.

This could be regarded as an omission under the good neighbour principle. Equally, as a professional, a doctor has particular duties to his patient to take reasonable care to disclose relevant information. The High Court articulated the extent of this duty in *Mutual Life & Citizens' Assurance Co Ltd v Evatt*.²³² Mr Evatt complained that he had lost considerable investments based on representations made by *Mutual Life* that a third company was stable. The Court found that professional advisers do have a responsibility to take reasonable steps to ensure their clients are making decisions in an informed manner. This is because, as explained by Barwick CJ:

(W)henever a person gives information or advice to another...upon a serious matter and particularly a matter of business, and the relationship of the parties is such that...the speaker realises or ought to realise he is being trusted (it follows that he) comes under a duty of care both to utilise with reasonable care the information (and exercise) judgment.²³³

It is arguable that Dr. Golde did not exercise the level of care required in the doctor/patient relationship. Some may say that the parole evidence rule effectively barred Mr. Moore from mounting a successful suit; leaving to one side for the

²³¹ See Louisiana State University, (LSU's) Law Centre, above n 85, at 186 – 187 (Mosk J.).

²³² [1968] HCA 74.

²³³ Luntz and Hambly, above n 92, 821.

moment, the majority's aversion to finding property in human tissue. However, the general prohibition against oral evidence being used to reinterpret the terms of a written contract has its exceptions. Most notably, these include 'fraud, duress or mutual mistake.'²³⁴ Skloot had earlier quoted some public remarks of Mr. Moore to the effect that he was concerned about losing treatment if he 'rocked the boat'.²³⁵ Therefore, had the majority in the Californian Supreme Court been prepared to entertain Mr. Moore's claim for an interest, they may well have concluded that he signed the consent form under duress, concerned for the continuity of his care.

To bolster this argument, the ethics of Dr. Golde's behaviour could be challenged. James Zion notes that in relation to taking tissue samples from indigenous peoples, scientists in North America have recognised the need to take particular care not to offend traditional cultural beliefs. Using the Navajo Indians as an example, this deference extends to what modern Westerners may dismiss as 'superstitions'.²³⁶ In drafting its *Model Ethical Protocol for Collecting DNA Samples*, the North American Regional Committee of the Human Genome Diversity Project called on researchers to:

²³⁴ Nolan and Nolan-Haley, above n 41, 1117.

²³⁵ See Skloot, above n 73, 6.

²³⁶ James W. Zion, *Traditional Indian Law, The Intellectual Property Regime, and the Protection of Indigenous Genetic Materials*, International Institute for Indigenous Resource Management Roundtable, Denver, Colorado, June 4-5, 2001, 17.
<<http://www.iiirm.org/publications/Articles%20Reports%20Papers/Intellectual%20Property/Zion,%20Genetic%20Tradlaw2001-06-10.pdf>> as at 26 September 2006.

(assure) subjects and groups from whom materials may be taken that such will not be used for bad purposes and that no witchcraft is involved.²³⁷

The ALRC has acknowledged similar concerns from Australian indigenous communities about both the respect for, and cultural significance of, tissue samples provided to researchers.²³⁸ While Zion observes that the North American protocol does not formally have the force of law, he believes it ‘might provide leverage in litigation’.²³⁹

While not suggesting that Mr. Moore could have automatically called on a protocol relating to indigenous persons, a consideration of molecular science points to all of humanity’s similarities, rather than our differences. As stated earlier, we all share about 99.9 percent of our genes.²⁴⁰ Additionally, in relation to the Indian community alone, Zion points to mass migrations throughout history. By following literature on chromosome markers, he found research which linked a:

Native American Y chromosome haplotype to the immediate ancestor shared with present-day Siberians and to an older common ancestor shared with Caucasoids (Europeans and Indians).²⁴¹

²³⁷ Ibid., 17 – 18.

²³⁸ See Australian Law Reform Commission, *Genes and Integrity: Report*, above n 25, 74 – 77.

²³⁹ Zion, above n 236, 18, footnote 100.

²⁴⁰ See Australian Law Reform Commission, *Essentially Yours*, above n 1, 120

²⁴¹ Fabricio R. Santos, Arpita Pandya, Chris Tyler-Smith, Sergio D. J. Pena, Moses Schanfield, William R. Leonard, Ludmila Osipova, Michael H. Crawford & R. John Mitchell, *The Central Siberian Origin*

Zion himself was concerned about such information being taken out of context to try and deny that there were any truly native peoples.²⁴² He also raised some questions about the research methodology and sample size.²⁴³ Nonetheless, it is not my aim to argue one or other native people in or out of existence. Rather, it is our genetic makeup that makes us all neighbours and proximate to one another, to employ Lord Atkin's formula.

With this in mind, it is possible to go back to the doctor/patient relationship of Mr. Moore and Dr. Golde, asking whether the doctor ever truly considered how an old principle of law from Blackstone could continue to stand in the face of growing scientific knowledge. The fact that 'the no property principle' withstood the *Moore* suit was not for want of trying by Mosk J. His Honour observed that the Mo cell-line was named after Mr. Moore; because 'but for the cells of Moore's body...there would have been no Mo cell line'.²⁴⁴ In saying this, his Honour did not seek to underplay any of the scientific effort to extract the cells,²⁴⁵ but also wished to emphasise the important causal link between Mr. Moore and the Mo patent.

This causal link is important for a number of reasons. Firstly, Mr. Moore only discovered the patent when he became suspicious enough of Dr. Golde's activities to

for Native American Y Chromosomes, 64 AM. J. HUM. GENET. 619 (1999), extract cited in Zion, above n 236, 9.

²⁴² See Zion, above n 263, 10 – 11.

²⁴³ See *ibid.*, 10.

²⁴⁴ Louisiana State University, (LSU's) Law Centre, above n 85, at 188 (Mosk J.).

²⁴⁵ See *ibid.*

consult a lawyer.²⁴⁶ It would not appear that Dr. Golde ever felt legally or ethically bound to inform his patient of the patent application, or its potential value. Clearly, such knowledge would have put Mr. Moore in a strong bargaining position regarding ongoing treatment, as well as other potential benefits.

Secondly, Skloot reports that Mr. Moore specifically asked Dr. Golde whether his samples were being used for any financial gain, and Golde denies this,²⁴⁷ such an obvious untruth leads to the conclusion that you can set aside the parole evidence rule. A partial defence might be that the doctor had not yet realised anything from the unlicensed patent, although he had clearly taken many of the preparatory steps by entering contracts with a number of biotechnology firms.²⁴⁸

Thirdly, if Moore's cells had not been valuable or rare, there would have been little point going to trouble of lodging a patent application. In any event, it becomes arguable that Mr. Moore lost an opportunity to enjoy a return from the unique nature of the cell-line derived from his cells, due to a potentially deliberate misstatement from Dr. Golde. Under these circumstances however, the comments of Mason, Wilson and Deane JJ in *Gates v City Mutual Life Assurance Society Ltd*²⁴⁹ appear apt. Their Honours said at 11 - 13:

²⁴⁶ See Skloot, above n 73, 7.

²⁴⁷ See *ibid.*, 6 – 7.

²⁴⁸ See *ibid.*, 7.

²⁴⁹ (1986) 160 CLR 1.

If...reliance [on the defendant's representation] has deprived [the plaintiff] of the opportunity of entering into a different contract...on which he would have made a profit then he may recover that on the footing that it is part of the loss he has suffered...under the inducement of the representation.²⁵⁰

While their Honours go on to specifically state that the burden of proof is very much on the plaintiff to show that he would have acted differently,²⁵¹ it is not hard to think of Mr. Moore (or any patient) acting differently, if they knew that \$3.5 million in stocks were being offered, while returns could reach \$3 billion.²⁵² Even a relatively small fraction of these amounts could bring a chronically ill person a measure of comfort and financial security. Perhaps, it would even allow them a degree of 'unrestricted enjoyment' of holidays and other activities they may have had to forgo, while say their leukaemia was not in remission.

Again, here it is useful to reflect on Kirby J's at once practical and compassionate approach to the cost of disability in *Harrington*.²⁵³ Combining this with Savulescu's observations about the intrinsic value of health along with the 'all purpose goods,' you begin to see a class of patients like Mr. Moore and Miss Harrington, as both having lost opportunities due to the representations of others. It could be argued that Mr. Moore has not been injured, as he had removed from his body a spleen that would have killed him, whereas Miss Harrington faced a life of functional deficits and

²⁵⁰ Luntz and Hambly, above n 92, 844.

²⁵¹ See *ibid*.

²⁵² See Skloot, above n 73, 7.

²⁵³ See [2006] HCA 15 at 122 (Kirby J.).

ongoing medical care. It could further be argued that the real injustice of *Harrington* is that had the patient taken a breath in her own right before being seriously disabled, the legal outcome could have been very different, drawing on a case such as *Sharman v Evans*.²⁵⁴

In that case Miss Evans had been injured in a car accident due to negligence of Mr. Sharman, and the questions before the High Court revolved around whether lower courts had erred in fact or law as to the awarding of damages. In undertaking quite an extensive examination of the law, the Justices necessarily identified the rationale for both the award of and calculation of monetary damages.

The common law's cautious advance

Recent case law from both the United Kingdom and Australia can be argued as demonstrating a potential means to reconcile the questions of individual ownership, alongside the advancement of science and the placement of monetary values on tissues. In the case of *Yearworth and others v North Bristol NHS Trust*²⁵⁵ several men sued the National Health Service Trust for negligence, over the failure of Southmead Hospital to appropriately store and preserve semen samples. These samples were

²⁵⁴ (1977) 138 CLR 563.

²⁵⁵ [2010] QB 1.

provided prior to commencing treatment for cancer, given the likelihood of infertility as a result of therapy.²⁵⁶

At the Court of Appeal, the men sought to have the denial of their claims at first instance overturned. Amongst other grounds, they alleged that the semen was their personal property, which had been destroyed by the failure of hospital authorities to store it at the right temperature. This relied in part, on a principle already identified in *Venner* that a person must assert a continuing interest in separated bodily substances. Counsel for the appellants asserted that as their clients' intention was to use the preserved semen to father children in the event that cancer treatment made them infertile, then the link was made.

While *Venner* itself was not cited, a 1993 decision in the German Federal Court of Justice was highlighted, as it dealt with an almost identical situation of semen samples being rendered unusable due to negligent storage. In that case, the court concluded, relying on civil law, that:

(B)odily parts...which were extracted from the body with a view to their future [use], rather than to their abandonment, retained a functional unity with the body, such that injury to them would constitute physical injury.²⁵⁷

²⁵⁶ See *ibid* at 8 – 10 (Lord Judge CJ, Sir Anthony Clarke MR, Wilson LJ).

²⁵⁷ See *ibid* at 21.

While such reasoning potentially resolves the ‘normative distance’ question, common law authorities show a continuing reluctance to consider separated body parts or others samples as having an ongoing legal significance or value to those who provide them. Or at least that is how it initially appears.

In *Yearworth* their Lordships make an early statement of principle that a live individual may neither be owned by another, nor can one “possess” his body or any part of it’.²⁵⁸ However, as the judgment progresses this position is increasingly qualified. Firstly, individual autonomy and legal protection from assault and battery are acknowledged as caveats.²⁵⁹ Proceeding through a discussion of Coke’s *Commentaries*, while considering *Doodeward* and *Moore*, their Lordships seek to distinguish *Kelly*, on the basis that with the advance of science and medicine, they saw the ‘exercise of work or skill [exception as] not entirely logical’.²⁶⁰

In coming to this position the judges sought to put the men’s semen in a wider legal framework. They said that ‘ownership’ was a wide concept which included a range of claims over tangible and intangible types of property. In particular, they highlighted that ownership could involve ‘a right to use’²⁶¹ without this necessarily being equivalent to a right to possess. Nonetheless, their Lordships cite academic authority to argue that *possession* was one of 11 criteria which could be applied to determine

²⁵⁸ Ibid, at 30.

²⁵⁹ See *ibid*.

²⁶⁰ Ibid, at 45 (d)

²⁶¹ Ibid, at 28.

ownership of property.²⁶² Therefore, the claimants in *Yearworth* did not have to possess their sperm in order to have a right to use it.

This reasoning intersects with the application of skill test, when the application of skill by an appropriately trained professional falls below the reasonably expected standard for that professional and, as a consequence, a party loses a right to use property. Their Lordships provide the example of a surgeon negligently damaging a finger he was supposed to reattach to an injured hand prior to microsurgery, escaping liability because work and skill had yet to be applied to the digit's reattachment.²⁶³

Their Lordships decided that this potential anomaly in the application of skill test left the common law in uncertainty. They proceed to qualify the ownership of tissue around a *Human Tissue Act* requiring professional medical intervention to guide the proper access and use of the material.²⁶⁴ They then ask whether the health service in *Yearworth* was bailee to the claimants' semen samples? Considering legal authority, the judges conclude that the National Health Service was a gratuitous bailee which took possession of the semen samples, imposing upon its medical agents:

[a] duty...to take such care of [the samples] as is reasonably to be expected of a person with such skill.²⁶⁵

²⁶² See *ibid.*

²⁶³ See *ibid* at 45 (d).

²⁶⁴ See *ibid* at 45 (f).

²⁶⁵ *Ibid* at 48 (g).

This authority was cited with approval by the Supreme Court of Queensland in *Kate Jane Bazley v Wesley Monash IVF Pty Ltd.*²⁶⁶ In the Queensland matter, Ms Bazley sought to have the Wesley Monash IVF clinic continue to preserve her deceased husband's semen for later artificial insemination into her. The difficulty for the clinic was that Mr Bazley had left no written authority as to what was to be done with his sample in the event of his death, as was required by the clinic's policy.²⁶⁷ Without written directions, the semen would ordinarily be allowed to perish.

As an executor of her late husband's estate, Ms Bazley sought orders that the semen be preserved as part of the property of the estate. In granting a temporary order, the court accepted not only that the IVF clinic was bailee, but that for as long as Mr. Bazley's estate paid the appropriate storage fee, the executor was the bailor.²⁶⁸ In finding this, the Supreme Court was necessarily finding that property interests could be held in the human body.

In coming to this conclusion, White J followed the *Doodeward* majority in finding that it was not inherently illegal to retain a corpse (or in the current case, semen samples) for a purpose other than burial and, that a corpse could assume elements of property.²⁶⁹ However, concurring with a number of subsequent cases including *Yearworth*, his Honour concluded the *Doodeward* no longer represented current

²⁶⁶ [2010] QSC 118.

²⁶⁷ See *ibid* at 10 (White J).

²⁶⁸ See *ibid* at 33.

²⁶⁹ See *ibid* at 18.

scientific understanding.²⁷⁰ In resolving this problem, White J looked at a range of case law, including US guidance pertaining directly to women's access to the preserved semen of their deceased husbands or partners. This survey strengthened the view that the human body, or parts of it, can become property. White J notes the case of *Hecht v Superior Court of Los Angeles County (Kane)*²⁷¹ in which Lillie PJ addresses the nature of semen's property in terms of its biological potential. Her Honour said:

(T)he decedent's interest in his frozen sperm vials, even if not governed by the general law of personal property, occupies 'an interim category that entitles them to special respect because of their potential for human life'²⁷²

While the claimants in *Yearworth* sought compensation for the anguish and depression caused when advised their semen samples had perished, it is notably that action is not based on a financial calculation of the value of an organ or sample per se. Arguably, the one significant exception is the *Moore* case, where Mr. Moore sought a portion of the royalties earned from the Mo cell line derived from his spleen.

As noted in *Yearworth*, common law principle indicates that an individual may not own themselves.²⁷³ This suggests that the property-in-the-self which Hardcastle said

²⁷⁰ See *ibid* at 18.

²⁷¹ (1993) 20 Cal Rptr 2d 275.

²⁷² *Ibid*, at 846.

²⁷³ See [2010] QB 1 at 30.

provided people with ‘legal and uninterrupted enjoyment’²⁷⁴ of their bodies, is limited to uses prescribed by common law precedent, legislative action and, those both permitted and supervised by medical practitioners or scientific researchers.

Therefore, while both *Yearworth* and *Bazley* provide a fairly clear guide to human tissue’s capacity to become property capable of ownership, it would be incorrect to say that the common law has moved that far. It has acknowledged the growing capacity of science to isolate, preserve and, where appropriate implant material for purposes such as fertilisation for procreation.

It is also noteworthy that the *Yearworth* judgement clearly quarantines any consideration of the use of tissues for reward or financial gain, the parties to the case having agreed ‘that the sperm had no monetary value’.²⁷⁵ This is in part a reflection of ethical and religious norms in Western societies concerning the sanctity of the human body (consider the dissenting opinion in *Doodeward*), as well as a concern that any claims which the men had over their semen were not alienable while the claimants were alive. That is, a ‘right to use’ could not be construed as an ability to ‘sell’ or ‘enslave’ ourselves or others.²⁷⁶

But for all the careful dictum and distinctions which the common law constructs, little effort is required to find real evidence of a market in various human tissues.

²⁷⁴ Hardcastle above n 19, 16.

²⁷⁵ [2010] QB 1 at 16.

²⁷⁶ See *ibid*, at 30.

Furthermore, there are advocates including medical practitioners, who argue persuasively that the failure to provide financial compensation to tissue donors is unreasonable and, discourages some who would otherwise contribute to life saving organ donor programs and/or research, from doing so. It is to these issues we now turn.

The appropriateness of monetary calculations

Dealing with the question of money is a vital issue if we are aiming to secure common law property rights in the human body. Many people will find such an idea objectionable on two grounds; firstly, any use of property law principles in relation to the body will evoke, in some cases, parallels with slavery. Secondly, property by its nature is alienable and, laws like the *Human Tissue Acts* are aimed in part at preventing the trade in human organs. As noted earlier, to permit trade is seen by some to diminish respect for the significance of human tissue.²⁷⁷

However, there are dissenting views, with senior Canberra nephrologist Gavin Carney telling the *Sydney Morning Herald* in 2008 that people in Australia on dialysis and transplantation waiting lists should be able to buy a healthy kidney.²⁷⁸ He justified this position on the basis of low rates of organ donation in Australia, the numbers dying

²⁷⁷ See Australian Law Reform Commission, *Genes and Integrity*, above n 35, 71.

²⁷⁸ See Kate Benson, *Sell your kidney for \$50,000, says specialist*, *Sydney Morning Herald*, May 5, 2008, 1 <<http://www.smh.com.au/news/national/sell-your-kidney-for-50000/2008/05/04/1209839456231.html>> as at 5 May 2008.

while waiting for a kidney and, still others who were prepared to go overseas and purchase an organ for up to 30,000 dollars on the black market.²⁷⁹

While other commentators, ethicists and clinicians like Professor Jeremy Chapman of the International Transplantation Society labeled the idea ‘dreadful and wrong’²⁸⁰ it is to be wondered just how much those dying of kidney failure would care for that opinion; and whether this opposition is a measured policy response or in part a ‘repulsively wrong’ reaction as in the case of *Brown*.²⁸¹ Some might think it was too risky to step into a Third World unregulated organ-trading marketplace, while others like patient Ibrahim El-Sheikh will see a flight to Pakistan as his only hope because, in his words:

I am dying and no one here (in Australia) is helping me.²⁸²

It is clear then that some people judge the personal and financial risk to be worthwhile. Having said this, it is not my aim to try to come to any conclusions about the morality, or otherwise, of Ibrahim’s decision. Rather, it is to demonstrate that people are making both economic and quality of life choices which are turning parts of the human body into a commodity right now. For Ibrahim, it was the suffering of

²⁷⁹ See *ibid.*

²⁸⁰ *Ibid.*, 2.

²⁸¹ See David Brown, David Farrier, David Neal and David Weisbrot, *Criminal Laws*, above n 22, 810. If you will recall, the House of Lords was called upon to determine whether sadomasochistic activities between consenting males, in private, breached the criminal law.

²⁸² Kate Benson, above n 278, 1.

his wife and two young children as he became sicker every day, as well as the length of the kidney transplant waiting list, which made him act.²⁸³

Again, it is not within the scope of this paper to look at the morality of the transaction. Rather, we need to concentrate on the property issues and the question of loss. Referring to the negligence situation in *Sharman*, the High Court was of the opinion that monetary compensation was appropriate for damage including the permanent loss of physical abilities, future opportunities and, the need for lifelong care. Specifically, Gibbs and Stephen JJ observed:

That the learned trial judge should have engaged in a close scrutiny of each head of detriment was...inevitable; that in doing so he should seek to evaluate the detriment in money terms is a necessary consequence of the fact that it is only by recourse to these terms that the plaintiff can be compensated.²⁸⁴

If money is seen as the obvious tool of restitution in cases of restitution for negligence resulting in actual bodily harm, then it might be asked in a modern and generally secular society, why this could not be applied in a case where a person suffered the ‘detriment’ of losing an organ or other tissues. It is noteworthy that the *Cato Institute*

²⁸³ See Kate Benson, *Transplant tourist sees one way out*, Sydney Morning Herald, May 5, 2008, 1 <<http://www.smh.com.au/news/national/transplant-tourist-sees-one-way-out/2008/05/04/1209839456298.html>> as at 18 April 2010.

²⁸⁴ Luntz and Hambly, above n 92, 531.

in the US released a paper during 2007 on the proper compensation of living tissue donors.

In it, Dr. Arthur J Matas, a transplant surgeon, advocated that a system be established which included elements such as providing long term health care and other insurance for donors. As well, other incentives could include a fixed, government mandated, sum of money, or the payment of house, car or education loans.²⁸⁵ Dr. Matas saw a continued ban on private sales as being essential and argued that the long term support services being made available would make the system unattractive to poor foreign nationals who were looking to fly into the US or other developed countries in an effort to make some quick money. This is because only in suitably developed countries can ‘long-term donor health care and long-term follow-up care...be guaranteed’.²⁸⁶

While arguably such a scheme is not fool-proof, the fact that it is government run and anticipates a range of pre-transplant tests and screening examinations, which would include mandatory six month antiviral testing, provides some safeguards. Equally, if the process takes some months, Dr. Matas argues that this provides a period for reflection ‘allowing the donor time to evaluate whether the benefits warrant the risks’.²⁸⁷

²⁸⁵ See Arthur J. Matas, *A Gift of Life Deserves Compensation: How to Increase Living Kidney Donation with Realistic Incentives*, Policy Analysis, No. 604 November 7, 2007, Cato Institute, 4 <<http://www.cato.org/pubs/pas/pa-604.pdf>> as at 22 March 2008.

²⁸⁶ Ibid

²⁸⁷ Ibid., 5.

Ultimately, the *Cato* paper,²⁸⁸ along with the *Herald* articles pointed to earlier, show a serious lack of organs for transplantation. Dr. Matas seeks to have this controlled by a tightly regulated regime of incentives; noticeably, while his list includes direct monetary compensation, it also considers a number of in-kind advances, such as the payment of loans.

As such, there is a view that the market can manage human tissues. Admittedly, this appears to be partly driven by the lack of tissue donated altruistically, but nonetheless something certainly needs to be done to raise the number of organs available for transplant. I tend towards a market based approach in other areas of medicine as well, including research. The treatment of Mr. Moore as a virtual non-participant in the development of the Mo cell shows a blind spot in the Anglo-American legal tradition (of which Australia is a part) where the courts will compensate for injury and loss of function, as in *Sharman*, but cannot deal with *Moore* in a comparative fashion. When a further opportunity exists in the context of *Yearworth*, the judiciary will acknowledge physiological distress caused by the loss of a tissue sample²⁸⁹ as grounds for damages, but ascribe no inherent, direct monetary value to the tissue itself. As shown earlier, *Yearworth* concentrated on the claimants intention to use the sperm to father children; an opportunity lost when the samples perished.

Some may argue that it is simply not possible to see *Sharman*, *Moore* or *Yearworth* as similar on the facts alone. It could be said that Ms Sharman sought to recover given

²⁸⁸ See *ibid.*, 2 – 3.

²⁸⁹ See [2010] QB 1 at 10.

the physical damage to her body, while Mr. Moore sought to profit from his initial medical misfortune and, the *Yearworth* claimants sought to have their lost opportunity for progeny recognised. None of these objectives is necessarily bad and indeed, starting a family is actively promoted by government policy throughout the Western world. Additionally, in drawing any conclusions, we should pause to remember Kirby J's view in *Harrington* about the true cost of disability, both to individuals and to society.²⁹⁰ Mr. Moore, Miss Evans and Miss Harrington would have all been faced considerable medical costs. For Mr. Moore however, the opportunity existed to defray some or all of these costs by gaining a share in the returns from research on the Mo cell-lines. The Matas proposal goes some of the distance by acknowledging that someone has donated something of significance and, reimbursing them with far more than travel costs and living expenses.

Far from devaluing human tissue, I suggest that this is proper and commensurate with what is being given, even though it does not take us to the point of ownership. However, Dr. Matas and Kirby J are both conscious of putting some safeguards in the process of accessing and using any financial award; Kirby noted that in North America courts have ordered that damages received on behalf of (and for the benefit of) children be placed in trusts.²⁹¹ Similarly, Dr. Matas describes his proposal as providing organ donors with a 'menu of options (offering) each (individual) with something that has personal value'.²⁹² And, as noted earlier, a fixed cash payment is only one of those options.

²⁹⁰ See [2006] HCA 15 at 122 (Kirby J.).

²⁹¹ See *ibid.*, at footnote 291 (Kirby J.).

²⁹² Matas, above n 285, 5.

Regardless, some will still see any involvement of property and the marketplace as inappropriate concepts to be applied to possession, use or disposal of human tissue. For example, in Ron Lee Meyer's review of E. Richard Gold's book *Body Parts*, Meyers observes that Gold believes that:

the admission of any good into the discourse of property law signals the foreclosure of any means of understanding the good other than through the logic of economics.²⁹³

Meyers goes on to outline Gold's belief that there are other unquantifiable and intangible values which should surround the human body. Again here, we find references to altruistic provision of tissue for transplant or research, based on our shared humanity.²⁹⁴ While these are noble sentiments, Dr. Matas points to research that suggest apparent altruistic giving can be prompted by a number of factors, not all of which are positive. This can range for seeking positive recognition, to feelings that has been pressed into giving.²⁹⁵

While the counterargument would be that allow property and commercial interests into this area could make matters that much worse, a response from Dr. Matas is that

²⁹³ Meyers, above n 171, 373

²⁹⁴ See *ibid.*

²⁹⁵ See Matas, above n 285, 11 – 12.

neither positive or negative consequences can be predicted, because no-one has been prepared to authorise a clinical trial.²⁹⁶ The reluctance to establish a trial is no doubt due, in large part, to the illegality of the acts proposed. Nonetheless, reflecting on Mr. Moore's case, this comment by Dr. Matas as to the reality of altruistic giving of kidneys is telling:

(C)urrently everyone but the donor already benefits financially from a transplant (physicians, coordinators, hospitals, recipients).²⁹⁷

Again, some may be offended that donors might expect to gain financially from tissue donation, be it for clinical or scientific purposes. Locke may even be pointed to, with the caveat he placed on private property ownership. He said each individual's ability to acquire private property was based on a reciprocity where each person leaves 'enough and as good in common...to others'.²⁹⁸ Of course, what qualifies as 'enough' is a particularly tricky question.

Providing for my neighbour

Prior to arriving at any sort of answer though, we need to accept that tissue donors like Mr. Moore, as well as the kidney donors Dr. Matas discussed, currently receive

²⁹⁶ See *ibid.*, 5.

²⁹⁷ *Ibid.*, 6.

²⁹⁸ Machan, above n 179, 1.

nothing beyond their living expenses and related medical expenses for what they give. The acceptability of this stance, morally, ethically and legally could change over time. A parallel can potentially be drawn with society's view of prostitution, which involves the sale of bodily services, rather than an organ or tissues, for money.

Our society's view of prostitution has changed significantly over time. For instance, in the 1950s the British Government established the Wolfenden Committee, which reviewed the law with regard to both homosexuality and prostitution. The *Brown* case discussed earlier showed the review's impact, as Lord Mustill conceded that 'buggery between males is now legal'.²⁹⁹ In relation to prostitution, the Committee saw the practice's regulation as being a practical question of what steps were necessary to maintain civil order and protect vulnerable groups like children, from things that were offensive. Beyond that, the Committee did not believe that it was:

the function of law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour (because)...(u)nless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with sin, there must remain a realm of private morality and immorality which is...not the law's business.³⁰⁰

²⁹⁹ Brown, Farrier, Neal and Weisbrot, above n 22, 881.

³⁰⁰ *Report of the Committee on Homosexual Offences and Prostitution*, extracts cited in J. M. Kelly, *A Short History of Western Legal Theory*, Clarendon Press – Oxford, 1993, 444.

This position was sharply criticised by an English judge Sir Patrick Devlin. He insisted, much like Kotlawski, that the law was underpinned by a Judeo-Christian ethic; even if adherence to Christian observance was declining.³⁰¹ Nonetheless, on this basis, Devlin insisted the law could no less seek to detect and punish prostitution, than it would pursue matters of treason or sedition.³⁰² Commentators including H. L. A. Hart labeled Devlin's stance as paternalistic, dismissing his analogy to subversion as greatly overstated and, suggesting the Wolfenden recommendations demonstrated the peaceful, progressive advancement of society.³⁰³

It is noteworthy that Dr. Matas echoes Hart's criticism of Devlin, in characterising the ban on compensation for kidney donation as a paternalistic act, which 'ignores the need to respect individual autonomy'.³⁰⁴ Some people will always view the provision of an organ with some expectation of a return as reprehensible. It is their right to hold such opinions, based on whatever moral, ethical or religious views to which they adhere. However, for all his criticism of property law and commerce as providing a one dimensional model for understanding of the value of human organs, writers such as Gold are unable to take us beyond the majority position in *Moore*. As related by Meyers, Gold's conclusion is to leave the question of how to appropriately value organs and tissues to legislators. This is because in Gold's opinion, courts are:

³⁰¹ See J. M. Kelly, *A Short History of Western Legal Theory*, Clarendon Press – Oxford, 1993, 444.

³⁰² See *ibid*, 445.

³⁰³ See *ibid*, 446.

³⁰⁴ Matas, above n 285, 6.

unlikely to alter their conceptions of property law sufficiently, or sufficiently quickly, to accommodate the current progress in biological research.³⁰⁵

This flies in the face of the ruling of the Appeal Court in *Moore*, a majority of whose judges were prepared to acknowledge Mr. Moore's claim.³⁰⁶ In response to the ruling at appeal though, the California Supreme Court majority based their opinion on what Debra Mortimer characterised as a very narrow point of law; the fact that no precedent existed for principle of conversion being applied to human tissue.³⁰⁷ As we saw earlier, the majority were content to argue that because Mr. Moore did not expect to retain his spleen post surgery, he could not claim a proprietary interest post-facto.³⁰⁸ Thus, author E. Richard Gold erred when he claimed that it was judicial ideas around property that needed to change;³⁰⁹ rather it was the preparedness of some judges to admit the concept of property into a debate about the human body, in the first instance.

Scientific 'monopoly'

In taking this stance, judicial officers (and others) are necessarily providing scientists with a considerable financial subsidy, in not permitting research participants to share

³⁰⁵ Meyers, above n 171, 375.

³⁰⁶ See Annus, above n 97, 38.

³⁰⁷ See Debra Mortimer, *Proprietary Rights in Body Parts: The Relevance of Moore's Case in Australia*, Monash University Law Review, Vol 19, No 2, 1993, 222

<<http://www.austlii.edu.au/au/journals/MonashULawRw/1993/10.pdf>> as at 25 April 2010.

³⁰⁸ See Louisiana State University, (LSU's) Law Centre, above n 85, at 70 - 71 (Panelli J.).

³⁰⁹ See Meyers, above n 171, 375.

in financial gains. Whether the ALRC, universities and physicians like it or not, they are implicitly making a value judgment about human organs. In recognising these things as *sui generis* while simultaneously allowing scientists to possess a highly valuable form of property, via the patent system, there is potential for what Matas described as ‘paternalism’ to be construed as a form of ‘protectionism’.

Tariffs did play an important role in Australia’s economic development, but they also permitted many inefficient firms to prosper, shielded from international competition. By the same token, the OECD’s earlier cited insistence that scientific research and its commercialisation was best achieved by institutions like universities³¹⁰ can be challenged. Firstly, the evidence supporting the theory that institutions are best placed to commercialise research, be it genetic or otherwise, is mixed. While Australia’s universities are acknowledged to have put great efforts into improving their level of research commercialisation during the last decade or so, there is still a level of concern that:

professional business development management within the research enterprise is critical and generally lacking in Australia.³¹¹

³¹⁰ See Organisation for Economic Cooperation and Development, *Turning Science into Business: Patenting and Licensing at Public Research Organisations*, (2003), 11, cited in Australian Law Reform Commission, *Gene Patenting and Human Health: Discussion Paper*, above n 29, 331.

³¹¹ Health and Medical Research Strategy Review Committee, *The Virtuous Cycle: Working Together for Health and Medical Research* (1998), 128, extracts cited in Australian Law Reform Commission, *Genes and Integrity*, above n 25, 421.

This view is reinforced by author and former academic Dr Jenny Stewart, who has written that our universities have not been subject to the same level of reform and restructuring as the State and Federal bureaucracies, in the past twenty years. As a result, they can lack the financial and business acumen which would tell them if a commercial venture, based on a piece of research, is actually turning a profit. She asserts that this has left our universities with ‘financial reporting and management...systems (which) are simply not up to the task’.³¹² Even if this is only true in some circumstances, the question arising is clear. Do current laws prohibiting medical patients and research participants from taking a proprietary interest in their own bodies actually protecting them, or alternatively, is an unintended consequence the protection of some otherwise marginal attempts at commercialisation, by ill-equipped academics.

Some will say that this is a harsh analysis of Australia tertiary institutions, hospitals and other research faculties. They could point out, for example, that many biotechnology innovations are not developed, due to insufficient funds to demonstrate a commercial application in which business is prepared to invest.³¹³ On this basis, it has also been argued that without the prospect of a monopolistic return from patentability, many entrepreneurs would not see biotechnology as a worthwhile investment.³¹⁴

³¹² Dr. Jenny Stewart, *Decline of the Tea Lady: Management for Dissidents*, Wakefield Press, 2004, 70.

³¹³ See Australian Law Reform Commission, *Gene Patenting and Human Health: Discussion Paper*, above n 29, 532.

³¹⁴ See *ibid.*, 534.

In a case such as Mr. Moore's, it is to be wondered just how essential the monopoly of patentability is, when considering the substantial sums that were both made and projected to be earned by all except the patient.³¹⁵ Mr. Moore did not, via his suit, succeed in garnishing any of these returns, and given this, it is interesting to consider Dr Matas's suggestion that the current regulatory regime surrounding organ transplants may be artificially constraining the supply of tissue 'by those who have a vested interest in promoting transplants'.³¹⁶

Similarly, you could argue that those with investments currently in scientific and medical research have a vested interest in maintaining control over any intellectual property that may accrue from their work. To an extent this is reasonable, given the cost of developing biotechnology discoveries to the point of a practical application and, the fact that, as mentioned above, many projects fail due to lack of funds.³¹⁷ Additionally, the ALRC observes that it is 'express government policy to increase private funding of research and Australia's record in commercialisation'.³¹⁸ The Commission goes on however, to draw on international surveys, to acknowledge significant public disquiet about who does the research, and what intentions they may have. In particular:

(i) in the absence of Australian data, empirical evidence about public attitudes to research in the United Kingdom (based on a) survey conducted by the

³¹⁵ See for example, Mortimer, above n 307, 219.

³¹⁶ Matas, above n 285, 4.

³¹⁷ See Australian Law Reform Commission, *Gene Patenting and Human Health: Discussion Paper*, above n 29, 532.

³¹⁸ Australian Law Reform Commission, *Essentially Yours*, above n 1, 438.

Human Genetics Commission...found that levels of public trust in the responsible use of human genetics information varied markedly...In particular, respondents trusted academic scientists more than pharmaceutical companies.³¹⁹

The monopoly versus fairness

Perhaps, with the *Moore* case showing a major university willing to enforce its patent rights and their exclusivity, even against the person who provided the sample which led to the Mo cell line, people may have to re-evaluate their view of academic scientists and institutions. This is not necessarily the fault of Australian institutions, as they are being encouraged to take a more commercial posture, thanks to government policy. However, some serious concerns were expressed about the misuse of patents, in a 1993 *Four Corners* program *Patently a Problem*, aired on ABC television.³²⁰ An Australian company, Genetic Technologies Limited (GTG) was going to various institutions, including hospitals, universities and government, insisting that GTG was due a licence fee because it held patents over a significant amount of non-coding DNA.³²¹

³¹⁹ Ibid., 438 - 439.

³²⁰ See generally Jonathan Holmes, *Transcript: Patently a Problem*, *Four Corners*, broadcast 11 August 2003, ABC Television, <<http://www.abc.net.au/4corners/content/2003/transcripts/s922059.htm>> as at 27 April 2010.

³²¹ See *ibid.*, 4 -5.

Non-coding DNA is that part of our genetic code which is allegedly ‘inactive;’ it does not determine who or what we are in terms of hair colour, susceptibility to disease, or any other factor. Yet it makes up 95 percent of our DNA.³²² This material was believed to be of no significance and little value. On GTG’s version of events, as explained to *Four Corners*, the company spent 20 million dollars on proving the hypothesis of researcher Dr Malcolm Simons. Simons argued that there was an order to non-coding DNA and that its structure allowed it to ‘be used to predict mutations in the active, coding part of (a) gene’.³²³

But was this finding a patentable process or product which was worthy of a patent? Many eminent scientists from around the globe said ‘No’, as Simons research was conducted in the late 1980s while a number of notable geneticists interviewed by *Four Corners* said Simons’ alleged discovery was accepted as fact in the scientific community in the early 1980s.³²⁴ Nonetheless, the patents were granted by the US Patent Office, leading to widespread concerns from scientists across the globe that the expensive of paying licence fees to GTG would close many research ventures. In particular, journalist Jonathan Holmes noted that in New Zealand, GTG’s efforts to enforce its patent rights were seen to involve ‘sums of money (that) could jeopardise the entire genetic testing system (in that country)’.³²⁵

³²² See *ibid.*, 2.

³²³ *Ibid.*, 3.

³²⁴ See *ibid.*

³²⁵ *Ibid.*, 8.

Ultimately, this may well be an overstatement of the problem. The ALRC acknowledged that it was aware of some evidence from an empirical study by D. Nicol and J. Neilson suggesting that patent licence fees may be inhibiting research.³²⁶ However, the Commission concluded that patent holders do discriminate between academic and commercial research in charging licence fees. It highlighted GTG's 2003 agreement with Sydney University to allow the University to access non-coding DNA patents for a fee 'several thousand-fold less than for...pure commercial entities'.³²⁷ Furthermore, the ALRC also received some evidence that royalties from patent licensing can provide an important source of funds for reinvestment into research.³²⁸

Striking a balance

As with most areas of law, as in life, a balance needs to be struck between the justifiable interests of patent holders and the wider public interest in research. To an extent, patent holders are doing this when providing public institutions with access to patented material at reduced fees. However, this is still an institutional arrangement; individuals *may* benefit if the research project they contributed to ultimately finds funding for commercialisation and is transformed into a treatment or end-product.

³²⁶ See Australian Law Reform Commission, *Genes and Integrity*, above n 25, 299.

³²⁷ *Ibid.*, 305.

³²⁸ See *ibid.*, 299.

In this context, it is vital to bring the discussion back to a person like Mr. Moore. We could ask: just how neighbourly (to invoke Lord Atkin's words) do universities, corporations, hospitals and other researchers have to be, towards patients and others. An argument can be made that the universities and corporations who currently hold about two thirds of all patents issued in Australia³²⁹ have a responsibility, not just to the wider general public (referring to the publicly funded bodies), but to actively benefit their research participants.

This argument could in part be based on the views of Drs Leslie Cannold and Luigi Palombi. Writing in *The Age* newspaper, these authors argue that patents on human genes monopolise a common good which 'is the birthright of all humanity, not the private property of a corporation'.³³⁰ This harks back to the concern of Gold, about liberal economics and private property not being adequate measures of all humane values, relating to either our bodies or our genes.³³¹

However, liberal market economics cannot be divorced from either legal or public policy questions, including those surrounding the human body. Prostitution and homosexuality are classic examples discussed earlier, of practices which moved from criminal sanction to polite tolerance, if not approval. People will and do sell sex for monetary return and, if this is tolerated, is it really that much further to go, legally or theoretically, to say people can sell certain organs? Matas would say not, arguing that:

³²⁹ See Figure 16-2, *ibid.*, 409.

³³⁰ Dr Leslie Cannold and Dr Luigi Palombi, *Patent rubbish for companies to own genes*, *The Age*, April 27, 2010, 2 <<http://www.theage.com.au/opinion/society-and-culture/patent-rubbish-for-companies-to-own-genes-20100426-tn7n.html>> as at 29 April 2010.

³³¹ See Meyers, n 171, 373.

(i)n general, ‘with few constraints, people make personal decisions on what they wish to buy and sell based on their own values’, and should be allowed to do so.³³²

And this is not as if there is a lack of precedent with regard to organs and tissues. Skloot relates the case of Ted Slavin, who was an American haemophiliac in the 1950s. In those days, blood was not screened for a variety of diseases, including hepatitis B. Mr. Slavin had received multiple batches of hepatitis contaminated blood. When he was diagnosed in the 1970s, he recognised that his blood serum was valuable and could provide information which would ultimately lead to a cure for hepatitis. In the interim though, Ted Slavin needed financial support during the times his hepatitis deteriorated, preventing him from working. So, according to Skloot, Mr. Slavin:

started contacting laboratories and companies and asking if they wanted to buy his antibodies. They said yes in droves (so) Slavin started selling his serum for as much as \$10 a (millilitre) — at up to 500 (millilitres) per order — to anyone who wanted it.³³³

³³² M. B. Gill and R. M. Sade, *Paying for Kidneys: The Case against Prohibition*, Kennedy Institute of Ethics Journal 12, No. 1 (2002):17–45, extract cited in Matas, n 263, 6.

³³³ Skloot, above n 73, 12.

As noted by Skloot though, Mr. Slavin had several advantages over Mr. Moore. Firstly, Slavin knew his blood was valuable prior to its removal, which would overcome the objection of the majority in *Moore* that a person cannot have ongoing interest in separated tissue.³³⁴ Importantly though, Mr. Slavin acted in a time when legislation, such as California's *Uniform Anatomical Gifts Act* was relatively new, and its provisions had not been tested in court. Its counterpart in NSW, the *Human Tissue Act*, would not be enacted until the 1980s.³³⁵

Another element which was in Slavin's favour in the 1970s was his dual purposes in making his blood available for research. He not only sought financial support for his own needs, but also to charitable ends. This was Mr. Slavin decided that:

he wanted somebody to cure hepatitis B. He called the National Institutes of Health for a printout of every hepatitis B researcher. On that list, he found Baruch Blumberg, a researcher at the Fox Chase Cancer (Centre), who had won a Nobel Prize for discovering the hepatitis B antigen and who created the blood test that diagnosed Slavin's disease. Slavin figured that if anybody was going to cure hepatitis B, it would be Blumberg. So he sat down and wrote a letter: Dear Dr. Blumberg, he said, I'd like you to use my tissues to find a cure for hepatitis B. I'll give you all the antibodies you could need. And I'll do it free.³³⁶

³³⁴ See Louisiana State University, (LSU's) Law Centre, above n 85, at 70 (Panelli J.).

³³⁵ See for example Section 32 of the *Human Tissue Act 1983 (NSW)* above n 40.

³³⁶ Skloot, above n 73, 12 – 13.

As noted by both Skloot in her article and Mosk J in his judgment in *Moore*, donors could avoid the question of sale by characterising any payments made as being other than for the organ itself.³³⁷ Beyond this, the combined effect of the legislative emphasis on patient autonomy, along with Mosk's telling observation that the California law related to the organs of the dead and *not* the living.³³⁸ It is noteworthy that Mr. Slavin's activities were never challenged in a court of law, nor did he ever have to file a case to sue for payment for provision of his blood. It is worthwhile to reflect how much this might have been based on the ingenuity of his approach, as well as the view taken of his personal commitment to curing hepatitis B. Arguably however, Mr. Slavin's actions would have still been found unlawful by the judges in *Yearworth*, on the basis that a person cannot possess themselves.³³⁹ Their Lordships did not go on to qualify the principle with a 'public interest' or 'benevolence' test, which might have covered a person like Ted Slavin and his involvement with research.

By contrast, Mr. Moore made no apparent claims in his case that he specifically wanted compensation, so that he could go and fulfil some noble ambition, such as curing leukaemia. No doubt, if he did so that would have been admirable, but it is not clear that on any law, that such action is essential. Indeed, as observed earlier, the

³³⁷ See *ibid.*, 12.

³³⁸ See Louisiana State University, (LSU's) Law Centre, above n 85, at 136 - 137 (Mosk J.).

³³⁹ See [2010] QB 1 at 30.

Wolfenden Committee³⁴⁰ was conscious that there was a sphere of individual morality on which the law should not pass judgment.

Inconsistencies

However, drawing that distinction is fraught with difficulty. On the one hand, there would appear to be an underlying view that any trade in organs or tissues is repugnant. For example, Mortimer observes that in its 1977 report *Human Tissue Transplants*, the ALRC (then the Law Reform Commission) expressed the view that the exchange of human tissue for profit would be ‘an undesirable development’.³⁴¹ She then goes on to list a range of legislative enactments which are broadly aimed at preventing commercial trade in human tissues.³⁴² However, the decisions of parliaments are but one element to the law and, as noted by Skloot, just because such a trade is banned does not prevent ‘there (being) a thriving market’.³⁴³

Speaking more broadly, there is a market for medical treatments, products and other services we deal with as patients, citizens and taxpayers. For instance, a cornerstone of public health care in Australia is the Pharmaceutical Benefits Scheme (PBS), which provides subsidised prescriptions to many people and, is particularly important to the elderly, those on fixed incomes and, people with complex conditions. In 2002, the

³⁴⁰ *Report of the Committee on Homosexual Offences and Prostitution*, extracts cited in Kelly, above n 278, 444.

³⁴¹ Mortimer, above n 307, 221.

³⁴² See *ibid.*, 221, footnote 21.

³⁴³ Skloot, above n 73, 12.

Commonwealth Government's first *Intergenerational Report* showed that the PBS had more than doubled its impact on revenues, as a percentage of Gross Domestic Product (GDP) in the 1990s³⁴⁴ Projections contained in the report showed this growth would continue, to the point where it was expected that the PBS was predicted to outstrip all other components of health spending by 2041-42, and do so by a significant margin.³⁴⁵

It is worth remembering that the products subsidised by the PBS are developed and manufactured by pharmaceutical companies, often multinational in their structure. Therefore, it could be argued that it is unrealistic to indefinitely quarantine human tissue from commercial transaction, when other areas of our health, both as individuals and communities, are affected by private commercial interests.

Furthermore, there are two obvious ironies in the position that the common law takes in relation to the body. Firstly, it could be argued that a person has more control over their body in death, than they do in life. This is because, under the *Human Tissue Acts*, in cases where the cause of death is not suspicious, if the deceased has made a decision about whether or not to consent to an autopsy, their wishes will prevail, even over those of their next of kin.³⁴⁶ In the analysis of Professor Prue Vines:

³⁴⁴ See The Hon. Peter Costello, *Intergenerational Report 2002-03: 2002-03 Budget Paper No.5*, Commonwealth of Australia, 14 May 2002, 8 <<http://www.treasury.gov.au/contentitem.asp?NavId=012&ContentID=378>> as at 6 September 2005.

³⁴⁵ See *ibid*, 9.

³⁴⁶ See Prue Vines, *The Sacred and the Profane: the Role of Property Concepts in Disputes About Post-Mortem Examination*, University of New South Wales Faculty of Law Research Series, [2007] UNSWLRS 13, 9 <<http://www3.austlii.edu.au/au/journals/UNSWLRS/2007/13.html>> at 24 April 2010.

This regime is clearly based on a view that the deceased's autonomy should prevail...It could also be argued that it is based on the idea that the individual's choice should outweigh societal need for more generalised scientific information. This suggests that the emphasis on the deceased individual's autonomy is premised on the view that that individual has a priority.³⁴⁷

One could well ask why there is not a greater degree of comity between the treatment of the living and the dead, be it with regard to statute or common law. Part of the answers comes from our view of the living as having personalities, which are incapable of being reduced to items of property, without denuding people of something which essentially makes them human. However, while Vines acknowledges these objections, she points out how broad property is as a term. It can include physical objects, as well as other legal or cultural relationships, which relate to 'sacred things and non-sacred things, tradeable things and non-tradeable things'.³⁴⁸ This may be seen as an answer to E. Richard Gold; property as a concept may include a commercial transaction, but depending upon the nature of a relationship, this is not essential. In fact Vines makes this point explicitly when she states that 'thing-ness and commodification'³⁴⁹ are not synonymous.

³⁴⁷ Ibid.

³⁴⁸ Ibid., 5.

³⁴⁹ Ibid

Vines proceeds to show that with the same pragmatism which gave most deceased persons the last word on autopsy, the same degree of practicality prescribes the need for an executor in death. An individual's body is objectified or commodified sufficiently, to allow the executor to make decisions on the deceased's behalf, with the caveat that this authority will be used to facilitate a decent burial. Recalling Higgins J's railing against the display for public amusement of a two-headed baby preserved in a jar in *Doodeward*,³⁵⁰ it can be seen that mistreatment of the dead incurs social sanction, with the potential for criminal punishment as well.³⁵¹

What we see here is that property law has a number of competing objectives and policies when it comes to the human body. A deceased person will have a legal area of autonomy as to autopsy, as they simultaneously become a form of quasi-property in the care of their executor. If these concepts can exist side by side, it is difficult to understand how, in particular, the needs of scientific inquiry can take precedence over the wishes of the living, as the majority was content to assert in *Moore*.³⁵² This stands in contrast to the comments of Vines, where the needs of science are secondary, when it comes to the wishes of the deceased.

³⁵⁰ See [1908] HCA 45 at 29 (Higgins J).

³⁵¹ See Vines, above n 346, 7.

³⁵² See Louisiana State University, (LSU's) Law Centre, above n 85, 19 – 20. (Panelli J.).

What sort of property?

Perhaps the mistake in *Moore* by Mr. Moore and his legal team was to largely accept their opponent's notion of property, as something which one can buy and sell, and make money from. On an intellectual level, this left them open to E. Richard Gold's charge that property equates to an economic value, and little else.³⁵³ While they cannot be entirely criticised for this, as *Sharman* indicates that restitution will be by monetary award,³⁵⁴ there were other possibilities.

The first was to draw on elements of Native Title law, in the US and other countries. Certainly, if a case like *Moore* was being litigated now, this could provide a rich though novel line of argument. Both Zion³⁵⁵ and the ALRC³⁵⁶ have been noted above for their discussion of the sensitivities surrounding the use of tissue samples from indigenous persons, given the cultural significance this is likely to have. If this is true for an indigenous person, their clan, or tribe, an argument could be mounted as to why cultural reasons might apply for people living in a western European liberal legal tradition. Vines identifies in her paper that an autopsy can be objected to on religious grounds.³⁵⁷ She also acknowledges the medieval view that the physical integrity of the body was critical to the afterlife and the ultimate hope of resurrection.³⁵⁸ However,

³⁵³ See Meyers, above n 171, 373.

³⁵⁴ See Luntz and Hambly, above n 92, 531

³⁵⁵ See Zion, above n 236, 17 – 18.

³⁵⁶ See Australian Law Reform Commission, *Genes and Integrity: Report*, above n 25, 74 – 77.

³⁵⁷ See Vines, above n 346, 7.

³⁵⁸ See *ibid.*, 2.

more importantly, our western society of today is generally based on secular liberal values. These are broadly identifiable as:

strongly individualistic and very much based on the idea of the individual as a property owner. That property includes one's body which, when one is alive, can be hired out for labour and used in whatever way one pleases, so long as one does not interfere with others' equivalent rights.³⁵⁹

This would seem very much to hark back to a theorist like Locke, which is significant for two reasons. Firstly, while liberal democracy is the dominant cultural tradition in Australia, the US and the UK, just because the grouping is large does not mean it is impossible to define its members. Therefore, as much as Mr. Moore was part of an identifiable group of people suffering from leukaemia, he may also be identifiable as an American Caucasian male imbued with the western legal tradition, of 'life, liberty and the pursuit of happiness'.³⁶⁰ With this culture's emphasis on individualistic property ownership, it would not appear to relate to an 'unascertainable group'³⁶¹ of persons, to borrow Gibbs J's words in the *Caltex* case³⁶² mentioned earlier.

Some may argue that this group is really too big to be a class. However, a possible response could be that even Gibbs himself was at pains to point out that he was not

³⁵⁹ Ibid.

³⁶⁰ *Declaration of Independence*, July 4, 1776,

<<http://www.ushistory.org/declaration/document/index.htm>> as at 1 May 2010.

³⁶¹ See Luntz and Hambly, above n 92, 849

³⁶² See generally, (1976) 136 CLR 529.

setting strict rules; the construction of a class in claims of economic loss might well be said to be as inexact as ‘the uncertain role of instinct and...general ideas of fairness’³⁶³ applicable in personal injury cases.

Furthermore, if all of humanity was to look at our genetic heritage, we would be reminded that we share 99.9 percent of our DNA in common.³⁶⁴ As such, for our bodily processes to work effectively, we are all joint inventors (to use Mosk J’s analogy³⁶⁵), sharing much common property. To demonstrate what this means in practice, you need only to go to Zion’s observations about how geneticists can trace the American Indian back to common ancestors with Siberians, as well as Indians and Europeans.³⁶⁶

Therefore, perhaps at the genetic level, asserting cultural differences and special requirements, when dealing with tissue samples, becomes too problematic. Indeed, it could begin to look like racism, or at the very least, racial profiling in the wrong hands. As Vines observes, the law can be a pragmatic instrument, which is now required to do several things.

³⁶³ (1977) 138 CLR 563 (Gibbs and Stephen JJ) extracts cited in Luntz and Hambly, above n 92, 531.

³⁶⁴ See Australian Law Reform Commission, *Essentially Yours*, above n 1, 120.

³⁶⁵ See Louisiana State University, (LSU’s) Law Centre, above n 85, 190. (Mosk J.).

³⁶⁶ See Fabricio R. Santos, Arpita Pandya, Chris Tyler-Smith, Sergio D. J. Pena, Moses Schanfield, William R. Leonard, Ludmila Osipova, Michael H. Crawford & R. John Mitchell, *The Central Siberian Origin for Native American Y Chromosomes*, 64 AM. J. HUM. GENET. 619 (1999), extract cited in Zion, above n 236, 9.

A notion of fairness

Firstly, there is a question of fairness, which in large part, the *Moore* majority did not address. It related to the quantum of money made by Dr. Golde and the University of California from the Mo cell-line patent. It has already been stated that this was worth up to \$3 billion.³⁶⁷ However, there is doubt over whether the patent should have been granted. In a recent case, the company Myriad Genetics sought patent some genes, which in a diagnostic test showed a woman's susceptibility to breast cancer, the New York District Court found the application invalid.³⁶⁸

One of the reasons the patent was annulled concerned the failure of the company to show that they had extracted the genes in their natural form, and then done something to them, in order that the genes had new or novel qualities. This had not occurred, and the Court held that the DNA as it existed in nature and that which Myriad had claimed to isolate were similar, in that they both retained a 'nucleotide sequence (which is) critical to DNA in its native and isolated forms'.³⁶⁹ Myriad's response was to argue that the Court should look only to differences between natural occurring DNA, versus the subject of its patent.

³⁶⁷ See Skloot, above n 73, 7.

³⁶⁸ See generally, *Association for Molecular Pathology, et al., v United States Patent and Trademark Office, et al.*, 09 Civ. 4515, Case 1:09-cv-04515-RWS Document 255 Filed 03/29/2010 <http://graphics8.nytimes.com/packages/pdf/national/20100329_patent_opinion.pdf> as at 30 March 2010.

³⁶⁹ *Ibid.*, 125.

However, the Court itself pointed to Federal and Supreme Court authority which indicated that a patent application should be considered ‘as a whole’.³⁷⁰ If the Mo patent was put to the same tests, it would fail. This was because while cells had clearly been extracted from Mr. Moore’s diseased spleen and they had been cultured, nothing has been done that made them into a recognisably new substance. Mortimer explains that while Dr. Golde may have applied an innovative means of extraction, as for the cells themselves:

it is a question of correct biology whether the cell-line is factually distinct: the cells in the cell-line are identical to Moore's primary cells. The cell-line could not exist without Moore's primary cells. What has occurred is mere reproduction.³⁷¹

If the Mo application as a whole, largely showed that what was being replicated was also produced in nature, then the patent should have been overturned, and the Appeal Court’s ruling upheld. As has been noted earlier however, Mortimer suggested that the majority in the Supreme Court took a particularly narrow approach to the questions before them.³⁷² This was especially in relation to conversion, where asserting that Mr. Moore did not anticipate any ongoing interest in his spleen, quickly ended that line of enquiry.

³⁷⁰ Ibid., 126.

³⁷¹ Mortimer, above n 307, 225.

³⁷² See *ibid*, 222.

Yet, relying on the case of *Gates* you could argue that Mr. Moore repeatedly relied on the professional assurances of Dr. Golde. The doctor gave assurances that Moore's samples were not being used for financial gains, yet knowingly misled his patient for a number of years, as earlier confirmed by Skloot.³⁷³ Given the apparent weakness of the patent itself, this potentially leads us in a number of directions.

Reconsidering conversion

Firstly, there is the question of conversion itself. A potential means of approach is to bring Native Title and western individualistic traditions together. Accepting the human body as being capable of consideration as property, it is useful to remember that Canadian and US Courts have found that it is entirely consistent with traditional fishing and hunting rights for methodology to adapt with changing technology. This extends to the point where, if a practice such as fishing was a major aspect of community life in time preceding European contact it will likely be recognised as a tradition which can be exercised in contemporary times. Not only that, it can be pursued with modern equipment. An example of these principles in operation was the case of *R v Gladstone*, where the Supreme Court of Canada was satisfied that the Heiltsuk people:

³⁷³ See Skloot, above n 73, 6 – 7.

had demonstrated an Aboriginal right to sell [the spawn] to an extent best described as commercial.³⁷⁴

The one notable practical caveat on these traditional commercial practices was that they had to be conducted in accord with existing environment protection legislation, in order to properly conserve natural resources.³⁷⁵ As such, while traditional owners were allowed to make a living, there was equally an obligation to respect natural resources as part of the common property of all.³⁷⁶ It is worth asking whether this principle, as outlined in the US case of *United States v State of Washington*³⁷⁷ could be used as an analogy, for what might have been a preferable outcome in *Moore*. That is, if American Indians have a duty to share the bounty of the environment with non-indigenous Americans, then parity would suggest that Dr. Golde and his associates had a comparable duty to share their profits with Mr. Moore. The first ground for such a claim would be the general notion and instinct for fairness, referred to by Gibbs and Stephens JJ in *Sharman*. Meanwhile, *Gates* is precedent for the argument that Mr. Moore was misled by Dr. Golde. Indeed, as Mr. Moore sought assurances that his samples were not being used for financial gain, the actions of the doctor were clearly willful.

³⁷⁴ [1996] 4 CNLR 65 at 78, extract cited in Meyers, Piper and Rumley, above n 203, 22.

³⁷⁵ See Meyers, Piper and Rumley, above n 203, 47, footnote 176.

³⁷⁶ See *ibid.*

³⁷⁷ 506 F Supp. 187, 192 (WD WA, 1980)

The California Court majority was prepared to acknowledge that Mr. Moore had been misled, in that Dr. Golde had not disclosed the full range of his interests.³⁷⁸ Arguably, this failure to disclose allowed Dr. Golde and the University to enjoy substantial financial returns from the Mo cell line. From both his court action and queries to Dr. Golde about financial returns, it is arguable that Mr. Moore never intended that his samples become economically valuable. If this is the situation, then Moore's counsel may have been better advised to emphasise an argument of unjustified enrichment. As explained by Lord Hope in the House of Lords:

The essence of the principle is that it is unjust for a person to retain a benefit which he has received at the expense of another, without any legal ground to justify its retention, which the other person did not intend him to receive.³⁷⁹

Contrasting Mr. Moore with Mr. Slavin, it is easy to see how Dr. Golde has retained a significant benefit. It may be disputed however, if this benefit came at the cost of Mr. Moore. Arguably, Mr. Moore could potentially claim an economic loss, contrasting himself with Slavin (if he knew about the matter).

³⁷⁸ See Louisiana State University, (LSU's) Law Centre, above n 85, 106 – 108. (Panelli J.).

³⁷⁹ *Hasell v Hammersmith and Fulham London BC* [1992] AC 1 (CA) at 408 cited in Francesco Giglio, *A Systemic Approach to 'Unjust' and 'Unjustified' Enrichment*, Oxford Journal of Legal Studies, Vol. 23, No. 3 (2003), 469

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Common law will only be willing to push precedent so far. Francesco Giglio notes a further English case about a consignment of cigarettes which were delivered to a warehouse, from which they were stolen.³⁸⁰ The recipients paid for the goods even though they had been stolen. The payment was made so that the recipients could maintain their credit facilities with the supplier firm. Action was then taken to recover the payment. Once the account was paid however, the supplier had no further responsibilities at law. In particular, they could not be compelled to return the money, which on the face of it they had received as due payment for goods. It was always open to the parties to agree that the transaction was frustrated when the goods were stolen, but the supplier was not legally obliged to do so. The limitations of unjust enrichment were summarised by Lord Goff was that when he said in *Lipkman Gorman*:

A claim to recover money at common law is made as a matter of right; and even though the underlying principle of recovery is the principle of unjust enrichment, nonetheless, when recovery is denied, it is denied on the basis of legal principle.³⁸¹

Applying this to *Moore* suggests that as there can generally be no property in a body, then it is likely that a claim for unjust enrichment would fail, on legal principle. It may still be possible to ask though, whether Dr. Golde did enough to preserve the medical resource of the Mo cell line, drawing on the principles on how to properly

³⁸⁰ See *CTN Cash and Carry v Gallaher* [1994] 4 All ER 714 (CA) (Lord Hope) cited in *ibid.*, 479 – 480.

³⁸¹ *Lipkman Gorman v Karpnale* [1991] 2 AC 548 at 578 (Lord Goff) cited in *ibid.*, 479.

exploit the natural environment, as discussed in *United States v State of Washington*. The fact that Dr. Golde managed to preserve the cell line, suggests that he did.

In doing this, Dr. Golde demonstrated he had a use for the tissue, whereas (once the spleen was removed) Mr. Moore could not claim a practical use for it. The spleen was only functional to Mr. Moore was when it was in his body, and as damages are assessed in monetary terms, Mortimer observes that it is debatable as to how one arrives at a value for a diseased, excised organ.³⁸² Under these circumstances, it is difficult to determine what the plus in ‘the body part plus’ formula of George would be, for individuals who sought to maintain property rights in their own bodies.

Reflecting on *Yearworth*, the formulation may well be limited to body part (or sample), plus right of use; under appropriate medical supervision. This view forecloses the possibility for monetary reward in exchange for a sample. Such a view relies in part on the wide definitions of ‘ownership’ offered by *Yearworth* and ‘property’ provided by *Bazley*, where White J turns to the *Acts Interpretation Act* 1954 (Qld) for guidance.³⁸³ This, along with numerous common law authorities, suggests that no individual person will be able to claim an exclusive interest in a tissue sample; including the individual from which the sample came.

³⁸² See Mortimer, above n 307, 232.

³⁸³ See [2010] QSC 118 at 15

Conclusion

Ted Slavin's preemptive action to enter contracts before his blood was extracted, shows the kind of initiative people will have to show to overcome two forces. The first is the continuing resistance of jurists to the notion of property in the human body. The second concept is an overwhelming belief amongst jurists that scientific research should be largely unfettered by costs, such as paying research participants a percentage of the returns from innovation. Indeed, researchers can have access to samples in tissue banks without ever having to locate, or seek the consent of those who provided the samples.

In Australia, we have a strong individualistic cultural drawn from the Enlightenment. We also have an ancient Aboriginal culture, which provides an image of the flexibility of the common law. Part of my aim in accessing that jurisprudence is to suggest that there is a residual we will always hold in ourselves. Justice Mosk recognised this in *Moore* and, while it may be inappropriate to say Mr. Moore was enslaved by a long term research arrangement with Dr. Golde, he certainly felt a degree of duress to continue participating in the research.

In my opinion, Dr. Golde acted unethically and unreasonably. I also came to this paper thinking that an argument could readily be marshaled, in order to find property in the human body. This is not realistically possible without a significant change in

judicial attitudes. This change needs to focus on moving the understanding of the human body, from one of inviolability and, in some cases, divinity, to a pragmatic view of the scientific and economic value of a biological machine run by the software of DNA. With the emphasis on individual autonomy suggested by Matas, such reform would be readily distinguishable from slavery. However, a Matas-like position would likely be contrary to the prohibition of 'self possession' as identified in *Yearworth*. Focusing on a 'right of use' clearly offered their Lordships a position where they could be seen to justly deal with the *Yearworth* claims, while also following precedent in not disturbing the doctrine against self possession.

Until this reasoning is overturned by a suitably novel (but as yet unlitigated case), the common law will continue to see detached human tissue as property, principally of those who detach and preserve them. The hospital patients, research participants and others who provide these samples will have to be mindful to either voice their ongoing interest, rely on the context of the donation as providing an ongoing right of use, or hope that an institutions' guidelines are generous in their acknowledgement of a participant's contribution.

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