

# Proprietary Rights in Body Parts: The Relevance of *Moore's Case*<sup>1</sup> in Australia

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## INTRODUCTION

The decision of the California Supreme Court in *Moore v Regents of the University of California and ors*<sup>2</sup> has brought the question of whether the human body and its tissue can, or ought to be considered property, from an era of grave robbers into the hospitals and laboratories of the late twentieth century. In a variety of contexts, Anglo-Australian courts and legislatures have had to confront the issue of whether to treat the body as property. Apart from some early decisions relating to the practice of grave robbing<sup>3</sup> most of those cases have been isolated, somewhat quirky fact situations where the court has not been forced to give any sustained consideration to the broader issue of the body as property. Similarly, legislative initiatives which touch on the area have done so in a piecemeal fashion, largely because the 'body as property' issue has been incidental to the primary focus. *Moore* is interesting because the issue is squarely raised as a principal argument in the plaintiff's case.

This paper will examine how both the California Court of Appeal and the California Supreme Court dealt with the plaintiff's argument that his tissue was his property. It will also examine the approach of the Anglo-Australian common law to date, and look at how some legislative reforms have treated human tissue.

If there are problems with the way that human beings and their tissue are treated, resorting to concepts of property and proprietary interests is not the only alternative. It will be submitted that the approach of Anglo-Australian courts has been to recognise a right to possess a body or body part (and thus in some circumstances to grant, by way of a remedy, a proprietary right) only if it has been in the interests of public policy to do so. Any refusal to accord human beings or their tissue the status of property has been based therefore on considerations of public policy, rather than any difficulties in adapting concepts of property to include people's tissue. As the discussion in this paper about the various challenges facing the law in medico-legal areas will demonstrate, the question of how the law will treat human beings has always been fundamentally an issue affected by judicial perceptions of what is in the public interest and what the community is prepared to tolerate.

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<sup>1</sup> *Moore v Regents of the University of California and Ors* 793 P 2d 479 (Supreme Court of California, 1990).

<sup>2</sup> *Ibid.*

<sup>3</sup> See for example *R v Lynn* (1788) 2 TR 733; 100 ER 394.

This paper will submit that in most situations it will be contrary to the interests of public policy for the common law to recognise and enforce a right to possess a body or a body part as a proprietary right.

## PART ONE: MOORE'S CASE

### 1.1 The facts

In 1976 John Moore consulted the defendant Dr David Golde. Moore was diagnosed as suffering from hairy cell leukemia, and his condition eventually resulted in Dr Golde removing Moore's spleen in October 1976. There was no allegation by Moore that this removal was unnecessary. It seems that Golde was, prior to operation, already involved in the research in which Moore's cells were to prove so useful and that he was well aware of the potential scientific and commercial value of his research when he was consulted by Moore. In conjunction with another defendant, Shirley Quan, Golde had resolved to use part of Moore's spleen in his research. Moore was not informed of their intentions. From the reports, it seems Moore signed a routine consent to the operation, but there is no indication that he consented to any arrangements about the disposal or use of his spleen.

Between 1976 and 1983 Golde continued to treat Moore, taking blood, skin, bone marrow and sperm from him. Moore was often flown to UCLA from his home in Seattle so that Golde could perform these tests.<sup>4</sup> From the patent information, it appears that as early as 1978, Golde was publishing articles relating to his discoveries using Moore's cells, although Moore remained ignorant of any such discoveries.<sup>5</sup>

A cell-line from Moore's cells was established by Golde in 1979 and a patent was granted over the cell-line in 1981. The cell of Moore which interested the researchers was a T-lymphocyte cell, which is a type of white blood cell — and in Moore's case, because the cell was malignant, it over-produced certain lymphokines, a kind of protein, that made the genetic material responsible for producing the lymphokines easier to identify than it would be in other people's cells. However, primary cells taken from the body will die after reproducing only a few times. Golde's and Quan's skill lay in developing these primary cells into a culture — a cell-line — which would continue to reproduce these lymphokines indefinitely.

It was not until 1983 that Moore was asked to sign a consent form in relation to the continuing research. The form of the consent is shown in the appendices to the California Court of Appeal judgment.<sup>6</sup> It primarily relates to the immediate *use* of body products in research but there is a clause relating to 'rights' in any cell-lines or other products that might be developed. The clause asked the patient to voluntarily grant these rights to the University of

<sup>4</sup> 249 Cal Rptr 494, 500; 793 P 2d 479, 481.

<sup>5</sup> 249 Cal Rptr 494, Appendix A, 518.

<sup>6</sup> Id 531-2.

California. Moore circled the words '[I] do not', refusing to give his 'rights' away.<sup>7</sup>

The circling of these words on the consent form signalled a turning point for Moore: when Golde challenged his circling of the words 'I do not' in the surrender clause, Moore became suspicious and consulted a lawyer. The eventual result was a suit against Golde, the researcher Quan, the Board (the 'Regents') who administered the University, the Genetics Institute and the pharmaceutical company Sandoz with whom Golde had entered into commercial agreements in respect of products to be developed from the cell-line. Moore asserted that the market potential of these products would be approximately three billion dollars by 1990.<sup>8</sup>

Moore's suit had a variety of bases against each defendant; the one most relevant to the present discussion was an action for conversion of his cells, which appears from the pleadings to have been taken against all the defendants.<sup>9</sup> The defendants demurred to many of Moore's stated causes of action and the matter came on for hearing in this form.

The judge at first instance upheld the demurrers. The California Court of Appeal reversed this finding, holding that Moore had adequately stated a cause of action for conversion. The California Supreme Court disagreed with the Court of Appeal and found that conversion could not be alleged. On March 25, 1991, the United States Supreme Court denied Moore's petition for a writ of certiorari.

## 1.2 Court of Appeals judgment

The judgment of the majority in favour of Moore on the conversion issue was given by Rothman AJ, with a dissent by George AJ. The majority began positively by asserting that they were faced with a clean slate:

We have been cited to no legal authority, public policy, nor universally known facts of biological science concerning the particular tissues referred to in this pleading . . . which compel a conclusion that this plaintiff cannot have a sufficient legal interest in his own bodily tissues amounting to personal property.<sup>10</sup>

Just as this argument is useful to judges who wish to deny a cause of action,<sup>11</sup> so it was presented as an equally valid reason for creating new rights. The majority then examined some definitions of property; some digest based, some case based, some of which are circular — 'property is a generic term which includes anything subject to ownership',<sup>11a</sup> some of which tend to focus

<sup>7</sup> Id 531.

<sup>8</sup> 793 P 2d 479, 482.

<sup>9</sup> The form of the pleadings and the use of the phrase 'defendants' without discrimination was the subject of some adverse comment by the justices in the Supreme Court: see 793 P 2d 479, 481, fn 1.

<sup>10</sup> 249 Cal Rptr 494, 503.

<sup>11</sup> See for example, the same preliminary comment in the Supreme Court to preface the opposite conclusion: 793 P 2d 479, 487.

<sup>11a</sup> 249 Cal Rptr 494, 505.

on the argument that if you can sell it and make money from it, then it must be property. However, the majority's preoccupation seemed to be with the concept of *control* and this is developed in the judgment by reference to a number of cases concerning self-determination and the disposal of bodies after death. Their argument was that, in a variety of circumstances, courts have recognised a right of control over the human body. They did not go on to draw a connection between this right to control and traditional notions of property. By not linking the notion of control with the recognition of a proprietary right, the inquiry which the court made loses its direction. Control — often springing from mere possession and no more<sup>12</sup> (even if only possession of the land on which a chattel is found) — is an important factor in determining the existence of a proprietary right. However, the American cases concerning corpses to which the majority refer demonstrate, much as the English cases do, a purposive approach by the courts designed to ensure that there is a proper burial of the corpse. The notion of possession, its relationship with the notion of control and the issue of whether one can have possession without a proprietary right, were not discussed by the Appeal Court. The one, more factually similar, case which was cited<sup>13</sup> — *Venner v State*<sup>14</sup> — appears to contain no more than a bald assertion of the existence of proprietary rights over human waste. It does not address the question of *why* this should be so. The majority judgment thus lacks a firm conceptual basis for its decision on the property issue.

George AJ dissented on the issue of property rights and therefore whether Moore could raise conversion as a cause of action. His first source of a definition of 'property' was the California Civil Code and he appeared to take the view that the Code provides a complete definition of what may constitute property. It is obviously a view which is practical rather than conceptual,<sup>15</sup> in that the Code creates divisions of 'real' and 'personal' property and defines those terms according to lists of 'things', rather than types of rights. However, in his attempt to approach this matter in a practical way George AJ went too far. To begin with, to return to defining property as real or personal and the latter as involving 'goods or chattels' is unhelpful because it does not address the central question of what *is* a good or chattel (if those terms are to be used) and involves hopeless circularity. The end is reached at the start if one attempts, as George AJ did, to simply assert that a spleen is not within the definition of 'goods' or 'chattels', because it is not capable of being a good or chattel. He continued his codified approach by quoting from other codes which he asserted are incompatible with treating a spleen as property. Yet again he begged the question: the definitions and rules in the code simply deal with categories of *existing* proprietary rights, not with what *might* be the subject of proprietary rights. For example, if a spleen *is* capable of being

<sup>12</sup> In cases such as *McKenzie v Balchin* [1908] VLR 324; *Ranger v Giffin* (1968) 87 WN (Pt 1) (NSW) 531; cf *D&J Fowler Ltd v French* [1914] SALR 254, 263–4 per Gordon J.

<sup>13</sup> 249 Cal Rptr 494, 505.

<sup>14</sup> 354 A 2d 483.

<sup>15</sup> 249 Cal Rptr 494, 533–4.

property then it may be disposed of by a person in a will<sup>16</sup> and to say it cannot be property because property has to be capable of being disposed of by will is the worst form of circularity.

So far as policy issues are concerned, the majority judgment was directed mostly towards ensuring that patients retain control over what happens to their tissue.

A patient must have the ultimate power to control what becomes of his or her tissues. To hold otherwise would open the door to a massive invasion of human privacy and dignity in the name of medical progress.<sup>17</sup>

It is difficult to dissent from such a broad statement. However, granting a patient proprietary rights is not the only way to ensure that patients' control is respected and enforced. The human tissue legislation in Victoria, and in other Australian States offers such protection (subject to the comments in this paper on some weaknesses in the Victorian Act) and is firmly based on the notion of consent, not proprietary rights. The defendants argued that granting proprietary rights to a patient may lead that patient to, in effect, auction her or his tissue to the highest bidder.<sup>18</sup> The majority failed to answer this argument directly, preferring to point out the contradiction in the defendants' argument that they as researchers could make a profit from the tissue, but the patient could not: 'We fail to see any justification for excluding the patient from participation in those profits.'<sup>19</sup>

With respect, the justification is that which the Australian Law Reform Commission in 1977<sup>20</sup> sought to provide in its report; that the introduction of commerce into the transfer of and research into human tissue is an undesirable development. In Australia at least, there have been deliberate and consistent attempts to keep commerce out of the medical field<sup>21</sup> where it is likely to affect the methods, quality or accessibility of medical treatment. The Court of Appeal's attitude, in implying that if a researcher may make a profit, so then should the patient, is not one, it is submitted, that an Australian court would entertain with enthusiasm.

The Court of Appeal may have been uncharitable in deploring the defendants' pursuit of profit in creating the Moore cell-line. The profits would be derived from the value created in the cell-line by the grant of a monopoly through the patent. The granting of a patent itself either recognises that the inventor has produced something which has 'improved or altered useful properties' that distinguish it from what occurs in nature,<sup>22</sup> or that the inventor has

<sup>16</sup> Id 534.

<sup>17</sup> 249 Cal Rptr 494, 508.

<sup>18</sup> Ibid.

<sup>19</sup> Id 509.

<sup>20</sup> Australian Law Reform Commission Report No 7, *Human Tissue Transplants* (1977) 7-8.

<sup>21</sup> For example, the provisions of the *Human Tissue Act* 1982 (Vic) prohibiting sale of tissue; the *Infertility (Medical Procedures) Act* 1984 (Vic) s 30 prohibiting surrogate motherhood arrangements; the inability in Australia to patent a method of medical treatment: *Joos v Commissioner of Patents* (1972) 46 ALJR 438.

<sup>22</sup> See *Ranks Hovis McDougall Ltd's Application* (1976) 46 AOJP 3915, 3918.

produced a *process* for creating a naturally occurring organism.<sup>23</sup> In this case, the latter had occurred and the value (and therefore the profits) lay in the process the defendants discovered which enabled them to duplicate Moore's cells. Moore made no contribution to the discovery of that process and it is that discovery which, it is suggested, the profits will reward.

This distinction is critical to establishing a firm basis for rejecting the proprietary model in these areas. In this situation, as in many other medical research situations involving human tissue, the tissue itself (the 'raw material' if such a characterisation is preferred) is of no lasting value: it is not the source of the discoveries or advances which are made. The source of those discoveries and advances is the skill and effort of the researchers in evolving a process or technique by which the tissue can be reproduced, altered or used in a way that is beneficial on a continuing basis. To protect the process or technique, and to protect the tools used to operate that process or technique, it may well be appropriate to grant the researchers proprietary rights, whether by way of patent or otherwise. It is unnecessary and inappropriate to attempt to protect the donors of the tissue in the same way. They do not contribute intellectually or physically to the process of discovery: theirs is a contribution of the initial material, their own tissue, a thing without inherent commercial value for which they no longer have a need. The protection to which donors are entitled revolves, not around reward for skill and intellectual effort, but around ensuring that they and their bodies are not taken advantage of, nor interfered with in a way which offends human dignity. Such protection is best afforded by an insistence that consent — consent which is free, full and informed — be obtained prior to donation.

### 1.3 The decision of the California Supreme Court

The Supreme Court divided 4–2 in the appeal, and rejected the submission that Moore could plead a course of action in conversion. The majority judgment was written by Panelli J, and began with a discussion of the allegation of breach of fiduciary duty and lack of informed consent. On these allegations the majority was prepared to hold that Moore had stated a valid cause of action against Dr Golde. However, on the issue of conversion the majority differed from the majority in the Appeal Court.

The majority began their discussion of the conversion issue with a negative: that is, that no court 'has ever in a reported decision imposed conversion liability for the use of human cells in medical research.'<sup>24</sup> Not only is that an extremely narrow way in which to phrase the issue (surely it is not the *imposition* of liability which concerns a court upon a demurrer but rather the question of whether the cause of action is properly stated) but it also indicates an unwillingness by the majority to consider the issue of what can constitute property in any kind of flexible manner. Their focus was immediately on the

<sup>23</sup> See *American Cyanamid Co (Dann's) Patent* [1971] RPC 425, 448.

<sup>24</sup> 793 P 2d 479, 487.

use of cells in medical research<sup>25</sup> rather than the broader question of the body as property.

Instead of looking first at the question of what it means to call body parts ‘property’, the majority preferred to characterise the issue as an extension of ‘a very general theory of liability’, that is, an extension of conversion law much as a court might expand negligence law. With respect, this highlights the wrong set of issues. No extension to the law of conversion is proposed in the same way as courts are consistently asked to extend the law of negligence by creating new categories of duties of care. The law of conversion would not have been altered at all by a decision favourable to Moore: precisely the same elements would have to be proved as had always been required. What would have been altered was the law of *property*, that being the basis for one of the fundamental elements of conversion.

However, the majority proceeded to analyse Moore’s claim under the ‘existing law’ of conversion and outlined three grounds on which they asserted that Moore cannot be said to retain the ownership or a right to possession of his cells which would be sufficient to found a cause of action in conversion.

The first ground was that there is no precedent. With respect, this is the bay into which judges sail when they have made up their minds to deny the argument and have no inclination — whether stemming from considerations of policy or method — to reason by analogy. The majority then proceeded<sup>26</sup> to distinguish most of the other cases referred to either by the Court of Appeal or counsel as ‘privacy cases’.<sup>27</sup> This is again a selective characterisation. The ‘likeness’ cases<sup>28</sup> — which specifically call the plaintiff’s interest a proprietary one — were distinguished as not being expressly based on property law. Yet it is not apparent that they only concern a right to privacy in the United States Constitutional sense — far from it; they were in fact concerned with causes of action in tort and therefore in a very real sense the plaintiff had to satisfy the court that he had an ‘interest’ in his face. The majority then attacked<sup>29</sup> Moore’s claim of the uniqueness of his cells and used this as another ground to distinguish the likeness cases. Here the majority launched into what the dissentient Mosk J called an ‘amateur biology lecture’<sup>30</sup> which may or may not be correct.<sup>31</sup> The only basis for their assertions and information was material supplied to them by the parties which cannot, on demurrer, be considered in the same way as expert evidence presented at trial. Even if their biology is

<sup>25</sup> See for example their characterisation of the nature of Moore’s claim: id 488: ‘Moore claims ownership of the results of *socially important medical research*, including the genetic code for chemicals that regulate the functions of every human being’s immune system’ (emphasis added). To succeed in a conversion action, Moore did not have to claim ownership of the *research*, nor could he: this was clearly a product of the skill and effort of the researchers. Rather, he needed to establish ownership of the cells themselves. The ramifications of this in assessing his damages are considered below; see 1.5.

<sup>26</sup> 793 P 2d 479, 489–90.

<sup>27</sup> In particular: *Motschenbacher v R J Reynolds Tobacco Co.* 498 F 2d 821 (1974); *Lugosi v Universal Pictures* 160 Cal Rptr 323; 603 P 2d 425 (1979).

<sup>28</sup> That is, those cases dealing with the unauthorised use of a person’s picture or likeness for profit.

<sup>29</sup> 793 P 2d 479, 490.

<sup>30</sup> Id 521.

<sup>31</sup> See the sustained and cogent criticism of their attempt by Mosk J, id 521–3.

correct, as the dissentients pointed out,<sup>32</sup> it is irrelevant whether Moore's cells were unique: if they are his property they can be the same as everyone else's and still be converted. Uniqueness may have been relevant in the 'likeness' cases to the question of the *subject matter* of the interest to be protected. That is: it is the uniqueness of the face — the particular facial characteristics — which form the subject matter of the interest to be protected. That approach, however, has no relevance in a conversion action where the subject matter of the claimed proprietary interest is clear.

The majority moved on<sup>33</sup> to cases such as *Bouvia v Superior Court*,<sup>34</sup> which deals with refusal of medical treatment, and asserted that property concepts are unnecessary in such cases because concepts of fiduciary duty and informed consent cover the field adequately. With respect, this misunderstands the principles stated in *Bouvia* and other earlier decisions such as *Schloendorff v Society of New York Hospital*.<sup>35</sup> The principles in those cases have little to do with 'informed consent' in its traditional sense. The issue raised is not the nature or extent of the information that a doctor must provide to a patient prior to treatment.<sup>36</sup> Rather the cases speak to the right of self-determination; a right to decide what will happen to one's body *after* having been fully informed of all treatment options and the consequences of one's decision. It is submitted in this paper that the notion of consent may adequately protect human tissue donors, but it is not suggested that the existing principles within the Anglo-Australian law of negligence would be sufficient. Some form of legislative scheme, such as the human tissue legislation, is required.

The second ground for rejecting Moore's claim was identified by the majority as a statutory one:<sup>37</sup> namely, that the California Health and Safety Code restricts a patient's ability to deal with his or her body parts and tissues. The majority said that this provision 'eliminates so many of the rights ordinarily attached to property'<sup>38</sup> that what is left cannot amount to property. Why so? Surely the statute — in order to remove rights from a person — must be recognising that some rights do exist. It is true that Parliament will often limit both the exercise and the sphere of enforceability of proprietary interests so as to secure certain objectives. One familiar example is the *Transfer of Land Act 1958 (Vic)* which places substantial restrictions on the enforceability of unregistered equitable interests in Torrens land.<sup>39</sup> Yet the imposition of these restrictions has never been construed as altering the fundamental nature of the rights held by persons with unregistered equitable

<sup>32</sup> Id 503 per Broussard J, 521–3 per Mosk J.

<sup>33</sup> 793 P 2d 479, 491.

<sup>34</sup> 225 Cal Rptr 297. Elizabeth Bouvia was a university graduate who suffered from multiple sclerosis and wished to end her life but was unable to do so unaided. She argued that she had a right to refuse food and water and thus starve herself to death. The Court on appeal upheld her right to do this.

<sup>35</sup> 105 NE 92.

<sup>36</sup> As the somewhat misnamed concept of informed consent is concerned with when determining the scope of a doctor's duty of care: see *F v R* (1983) 33 SASR 189; *Rogers v Whitaker* (1992) 109 ALR 625.

<sup>37</sup> 793 P 2d 479, 491.

<sup>38</sup> Id 492.

<sup>39</sup> See for example *Transfer of Land Act 1958 (Vic)* ss 42 and 43.



interests: they remain proprietary rights which, outside the ambit of the Act, may be exercised and enforced in the normal manner.<sup>40</sup> To assert that Parliament, by a statute designed to limit or regulate the exercise of proprietary rights, deprives those rights of their proprietary character is to ascribe to Parliament an ulterior purpose certainly not evident on the face of the legislation. Clearly disposal of body parts has a health and safety aspect. All the Californian statute does is to alter the way an individual might otherwise exercise her or his rights to dispose of parts. Such limits must be founded on an acknowledgment that individuals may and will dispose of their body parts and tissues in a variety of ways, not all of which would be beneficial to public health and safety.

The third and final ground advanced by the majority was that the cell-line is 'factually and legally distinct from the cells taken from Moore's body.'<sup>41</sup> Again, 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.<sup>42</sup> The cell-line could not exist without Moore's primary cells. What has occurred is mere reproduction. The suggestion by the majority that the cell-line is 'legally' distinct is based upon the argument that the patent which the defendants were granted is the source of the defendant's proprietary rights in the cell-line. This may be so in the sense outlined earlier: namely, that the patent is granted over the process which has enabled a reproduction which is not able to occur naturally. However, the majority's proposition misconceives Moore's argument, in that his claims are directed towards the cells themselves, at a time prior to patenting. As Mosk J pointed out,<sup>43</sup> if the cells were Moore's property, the wrongful patenting of them (if one were to characterise the granting of the patent in that way) would not alter Moore's proprietary interest.

The three substantive grounds offered by the majority are unconvincing. The judgment failed to find any useful principle from the early common law cases; it further did not deal adequately with the issue of consent and it did not make it clear that the issue of Moore's property in his cells can be resolved without reference to the patent.

The majority characterised the policy issue as being whether conversion liability should be extended and it has already been submitted that this characterisation is incorrect. However, three policy considerations were identified as telling against imposing liability for conversion. The theme which runs through each of the policy considerations is the majority's concern that the law should protect and enhance the development of medical research because of its social utility, rather than pursuing a course which prefers the protection of individual rights.

Such individual rights are, the majority argued, well enough protected by

<sup>40</sup> For example, the holder of an unregistered equitable interest such as that arising from a specifically enforceable contract of sale might still validly assign that proprietary interest to another: *Barry v Heider* (1914) 19 CLR 197. See also *Chan v Cresdon P/L* (1989) 168 CLR 242.

<sup>41</sup> 793 P 2d 479, 492.

<sup>42</sup> See T Wells, 'The Implications of a Property Right in One's Body' (1990) 30 *Jurimetrics Journal* 371, 372.

<sup>43</sup> 793 P 2d 479, 511.

the doctrines of fiduciary duty and informed consent. However, because they deal essentially with the nature and scope of a doctor's duty of care in treating a patient, neither doctrine adequately covers the use to which a body part is put after such treatment is finished. Both concepts relate in Anglo-Australian law to the scope of a doctor's duty of care in a negligence suit. There is no suggestion in Anglo-Australian cases that this scope could extend beyond disclosure of risks associated with the treatment<sup>44</sup> to a requirement that a doctor disclose the use to which an excised body part might be put. To consider such an extension in the common law concept of informed consent<sup>45</sup> would be to take the concept out of its negligence context; that is, Australian and English courts have viewed the concept of informed consent as assisting them to determine the type, nature and extent of risks associated with or consequent upon a particular course of medical treatment, which the doctor must inform his or her patient about in order to satisfactorily discharge the duty of care to that patient. Therefore the concept's role is directly linked to the quality of the medical treatment given, rather than to any associated activities of the doctor; or, more remotely, any consequential use to which excised body tissue may be put. The only other tort in which consent is commonly raised is battery. In that tort, in the context of medical treatment, the courts have been concerned to ensure that the plaintiff is aware of the nature of the treatment and is not misled as to the type of procedure to be undertaken, rather than that the patient is made aware of attendant risks. Again, some considerable extension of this interpretation of 'consent' would be required if it were to include the necessity for a doctor to disclose his or her own associated activities or any use he or she intended to make of the patient's excised tissue. Indeed to ask that a patient rely on these notions may be to present the patient with an unfortunate and unfair choice: either consent to the treatment on the disclosed basis, including the body part being put to a particular use or, in the words of the majority, 'look elsewhere for medical assistance.'<sup>46</sup> Is this not holding the patient to ransom as effectively as the majority fear the patient might hold medical research? Perhaps no alternative treating doctor is readily available; perhaps *this* treating doctor is the acknowledged expert — many situations can be imagined where the patient may, in the majority's suggested solution, have to choose between receiving appropriate and immediate medical treatment and declining such treatment because of the doctor's planned use for the body part. The better approach, it is submitted, is to view the process as involving three entirely separate stages of consent: consent to the touching, or the treatment itself; consent to the nature and degree of the risks involved; and a separate consent to the use of tissue, using a model such as the Victorian human tissue legislation.

<sup>44</sup> The High Court of Australia has now gone some way towards clarifying the extent of a doctor's duty to disclose material risks associated with a proposed treatment: *Rogers v Whitaker* (1992) 109 ALR 625, 632 where the court adopted the views of King CJ in *F v R*.

<sup>45</sup> Whether such terminology is appropriate was questioned by the High Court in *Rogers v Whitaker*: id 633.

<sup>46</sup> 793 P 2d 479, 497.

The potential impact of patients' property claims on medical research presents real difficulties, not the least of which is the guesswork in which a court must engage to forecast any impact. The majority's concerns can be divided into two limbs: the first is whether the same volume of human tissue would be available; the second is whether the 'economic incentive to conduct medical research' would be destroyed because other parties — namely patients — might claim a share in the profits.

No evidence was provided to support the majority's clear assumption that less human tissue would be available if that tissue were treated as the property of the patient. In reality, all that the granting of such property rights would involve — in the case of removing and using human tissue — is the obtaining of an appropriate consent from the patient. It is a jaundiced view of patients faced with such requests to suggest that significant numbers of them would withhold consent out of a meanness of spirit. Nor is there any evidence to suggest that even if there were a significant reduction in the amount of human tissue available, this would adversely affect the supplies for medical research. It may be that a considerable surplus exists at the moment; or it may be that large amounts of tissue are discarded unnecessarily: all these matters are central to any complete assessment of what reduction in human tissue supply could be coped with by medical researchers, and what could not. This was not an assessment which, it is submitted, the California Supreme Court was equipped to make. The possible lack of available human tissue is, it is suggested, less disturbing than the prospect of a 'trade' in human tissue and the effects that such a trade might have on the weak or disadvantaged.<sup>47</sup>

The second limb of the majority's concerns — the economic impact of granting proprietary rights — also fails to consider several factors. The deterrent is seen to be the necessity of sharing profits with patients and the uncertainty over the 'title' to the cells once they fall into the researcher's (or the biotechnology firm's) hands. The second deterrent will surely be present in one sense whenever tissue is used by researchers. If it has been improperly obtained, then there may be a liability in *whoever* uses the tissue. Whether that liability is civil or criminal, or stemming from property law is not the issue. It is clear that all persons who deal with human tissue should be concerned that it was properly obtained. Granting or withholding property rights to the donor should not alter that concern.

The nature of the policy considerations raised by the majority is to a large extent determined by the economic focus of Golde's activities and Moore's claim: both are profit driven. Therefore the policy considerations tend to concentrate on economic effects, whereas such considerations are relevant only to a very small part of the whole issue of recognising proprietary rights in body parts. Aside from those who use such parts for profit, the increasing use of human tissue in medical research and medical treatment demands a response from the law. However, the issue is wider than a need to regulate commercial activity: the real issue is whether the law can develop an approach

<sup>47</sup> See R Scott, 'International Aspects' in 'Issues in Transplantation and Supply' *Chiron* 1992 3, 13.

to the use of the human body which is consistent with the common law's approach and coherent enough to keep pace with advances in medicine, while still protecting the dignity and autonomy of the donors of tissue. The majority judgment in the Supreme Court did not provide such an approach, in either substantive law or policy, largely because of their focus on the commercial ramifications of their decision and because of their failure to discern any principles from the early common law cases.

#### 1.4 The minority judgments in the Supreme Court

Broussard J adopted something of a middle ground. His argument — and point of dissent — was that, *before* a body part is removed, it is the patient who possesses a right to determine to what use that part will be put.<sup>48</sup> He construed the removal of a body part with informed consent as an 'abandonment' of that part.<sup>49</sup> So from the outset he was, unlike the majority, prepared to set his argument in the field of property law.

By analogy he argued<sup>50</sup> that it cannot be correct that a body part can never constitute property — if a part were stolen from a research laboratory then conversion would surely lie against the thief. The problem, he stated, is whether a *patient* can retain an interest.

His Honour failed to elaborate upon what principle the tissue in that hypothetical situation could be, or needs to be, treated as property. It is possible that the container in which the tissue was kept might become the subject of a theft charge, rather than the tissue itself: this is one interpretation of some of the English theft cases which have involved body parts.<sup>51</sup> The tissue itself having no ascertainable commercial value, this (albeit technical) approach may be preferable as it maintains the consistency of the 'no property' rule. Similarly, there would be numerous other offences, both civil and criminal, in relation to entry onto land which could provide adequate punishment and deterrence. In practice, once taken out of laboratory conditions, the actual tissue stolen will probably be of no use. A suitable deterrent to the breaking, entering and theft can surely be found by a straightforward application of the civil and criminal law without resort to the manufacture of new property rights.

Broussard J then used the *Uniform Anatomical Gift Act* as evidence that the legislature has recognised a right in a patient to determine the use of his or her body part after its removal.<sup>52</sup> This is undeniably one basis of the legislation. Control over the use of one's property is, as Broussard J pointed out,<sup>53</sup> a matter which the tort of conversion aims to protect. Broussard J therefore made an unstated assumption; that is, *because* a patient may, before removal, control the use to which a body part is put, this ability to control the use means that the body part is the property of the patient. To recognise that the tort of

<sup>48</sup> 793 P 2d 479, 499.

<sup>49</sup> Id 500.

<sup>50</sup> Id 501.

<sup>51</sup> See *R v Welsh* [1974] RTR 478; *R v Rothery* [1976] RTR 550. See also § 2.4 *infra*.

<sup>52</sup> 793 P 2d 479, 501.

<sup>53</sup> Id 502.

conversion is in part concerned with ‘unauthorized use’ is still to beg the question of whether Moore has a proprietary interest in his cells which will allow him to utilise the law of conversion at all. The unstated assumption made by Broussard J leaps over a canyon of questions: why is control an attribute which leads to a proprietary interest; why is the ability to use something evidence that the thing is one’s property? The failure of Broussard J to deal with such questions restricts the usefulness of his dissent in terms of the conceptual issues.

Mosk J was more vigorous in his dissent. He was disdainful of the majority’s first two substantive grounds and implied that the grounds indicate an unnecessarily rigid and uncreative approach to the issues. He engaged in some statutory interpretation of the Health and Safety Code<sup>54</sup> — which is not relevant to the present discussion — and then asserted that, in any event, such legislation should not be construed as making Moore’s cells incapable of being property.

He argued<sup>55</sup> that if property is viewed as a bundle of rights, an object does not lose its character as property if some of those rights are eliminated or restricted. Once stated, the correctness of this argument is clear: to take a common example; the fact that the law, for public benefit, limits the way in which I may dispose of (for example, sell) my car does not mean that I lack a proprietary interest sufficient to sue a thief who steals that car. As Mosk J said, Moore must ‘at least [have] *the right to do with his own tissue whatever the defendants did with it*’<sup>56</sup> and the statutory regime could have no impact on this.

Mosk J then took issue with the third ground of the majority opinion, making the point previously discussed that, scientifically, the cell-line may not be factually distinct from Moore’s cells.<sup>57</sup> The argument about the patent fails, asserted Mosk J, because it does not answer the claim that Moore’s ‘property’ (ie his cells) was converted long before the patent was granted.<sup>58</sup> He then addressed the effect of the patent in more detail,<sup>59</sup> which again is not relevant to the present discussion.

Before leaving the dissent of Mosk J, it is appropriate to look carefully at the last three pages of his Honour’s judgment. That section deals with the correctness — and the wisdom — of including scientific material in a judgment. This case began as a demurrer and, of course, no evidence, expert or otherwise, had been given. Yet, as Mosk J pointed out, much of the majority’s decision depends upon conclusions and inferences drawn from a reading of scientific material; for example, that the cell-line is factually distinct from Moore’s cells and that Moore’s cells are not ‘unique’. The temptation is to descend into the mass of biotechnology literature to resolve such issues, yet that is a dangerous and unnecessary exercise. The legal issue is: are Moore’s

<sup>54</sup> Id 508–9.

<sup>55</sup> Id 509–10.

<sup>56</sup> Id 510.

<sup>57</sup> Id 511.

<sup>58</sup> Ibid.

<sup>59</sup> Id 511–12.

cells (or, more broadly, are body parts) capable of being considered by the law to be property? The resolution of this issue is not dependent at all upon the nature of what Dr Golde did with Moore's cells, nor with the biological structure of the cells; nor with the characteristics or potential that those cells possess. The point in time at which the court's legal inquiry can stop is the moment when Dr Golde removed the cells from Moore's spleen; or, even earlier, the point at which Dr Golde removed the entire spleen from Moore's body. The subsequent biotechnological process which occurred is not relevant to that primary issue, although it may be important in assessing the property claims of the defendants. The course taken by the majority, however, avoided a detailed conceptual and legal inquiry and offered a solution based mostly on scientific material: *especially* upon demurrer, it is submitted that such an approach misconstrues the judicial function.

### 1.5 The US judicial response to *Moore*

To date, the Supreme Court decision in *Moore* has been neither followed nor distinguished by any other United States court considering a similar issue. However it was referred to in the case of *Brotherton v Cleveland*.<sup>60</sup> In *Brotherton*, the United States Court of Appeal had to consider a claim by Deborah Brotherton, widow of Steven Brotherton, that a coroner had wrongfully authorised the removal of her husband's corneas after an autopsy. Her argument was that she had not been accorded due process under the Fourteenth Amendment of the United States Constitution, that is, the right not to be deprived of 'life, liberty or property without due process of law'. The plaintiff claimed that the coroner's actions had deprived her of a property interest in her husband's corneas.

The Court approached the question in a more conceptual way than the court in *Moore*, beginning with the cases concerning dead bodies<sup>61</sup> which the Court viewed as recognising some kind of property rights. The Court, citing *Moore*, observed that the human body is fast becoming a valuable resource and therefore this type of issue is likely to arise more frequently. However, the Court stopped short of deciding the case on a conceptual basis. Instead they relied on the *Uniform Anatomical Gift Act* which, they stated, expressly grants to the next of kin a right to control the disposal of the body. That right, plus the limited rights to possession recognised in the dead body cases were enough, reasoned the Court, to amount to a 'legitimate claim of entitlement' to be protected under the property part of the Fourteenth Amendment. Though put in such a limited way, the judgment is nevertheless an endorsement of the argument that if rights of control, disposal or possession legitimately accrue to a person, then the object of those rights is capable of being viewed as property, if only in this case for a clearly limited purpose.

Joiner J dissented on the grounds that none of the authorities recognised a 'true' proprietary right in a dead body and that a statutory right of consent could not be equated with a proprietary right. This last point is a valid one, in

<sup>60</sup> 923 F 2d 477 (1991).

<sup>61</sup> *Id* 480-1.

that consent may be given on the basis of autonomy over one's person and that principle may be extended to the next-of-kin where the person cannot exercise any judgment.<sup>62</sup> There are many situations where one person is empowered to express consent on behalf of another, and the basis in law for the right to do so is usually agency or guardianship. It is certainly not ownership. Why should those principles be inapplicable because the person had died? It is submitted that the Court in *Brotherton* actively sought a remedy for a clearly wronged plaintiff where none ought to have been found, at least not in the field of property law.

### 1.6 The problem with substantive arguments in a conversion action

The mechanics of pleading and conducting a cause of action in conversion did not concern the Californian courts as *Moore* came to the court upon demurrer. However, trying to answer the question of how such a cause of action would be made out is a useful way of demonstrating some of the more practical legal problems associated with a decision to categorise the body as property.

Aside from establishing his proprietary interest as that of possession or a right to immediate possession,<sup>63</sup> the plaintiff must establish

- a) intentional conduct on the part of the defendant<sup>64</sup>
- b) a dealing with the property of the plaintiff which is seriously inconsistent with<sup>65</sup> the right of the plaintiff<sup>66</sup>
- c) damage.<sup>67</sup>

In a case such as *Moore's*, the conduct of the doctor in removing the tissue from the spleen was clearly intentional; indeed it formed part of a deliberate plan to make use of the tissue.

There would be numerous facts to substantiate a dealing which was seriously inconsistent with the plaintiff's rights. If the character or nature of the property is changed, this would suffice.<sup>68</sup> So, if as a matter of biology, it is correct to say that the creation of a cell-line from primary cells alters the nature of those primary cells, then this is a dealing repugnant to *Moore's* rights. Similarly, if the creation of the cell-line involved the destruction of the primary cells, this would also be enough.<sup>69</sup> Even the act of removing the cells from the spleen — and therefore preventing *Moore* from ever regaining use of them in their original form — may constitute an assertion of the rights of ownership in a way which seriously conflicted with *Moore's* rights.<sup>70</sup>

An entirely different basis would be to view the object of the proprietary rights as the spleen itself, rather than the cells, and thus to argue that as soon as

<sup>62</sup> As it was in the now famous case of *In re Quinlan* 355 A 2d 647 (1976).

<sup>63</sup> *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204.

<sup>64</sup> Id 229 per Dixon J.

<sup>65</sup> Or repugnant to: per Dixon J in *Penfolds Wines*: *ibid*.

<sup>66</sup> *Ibid*.

<sup>67</sup> *Fouldes v Willoughby* (1841) 8 M&W 540, 544–5.

<sup>68</sup> *Hollins v Fowler* (1875) LR 7 HL 757.

<sup>69</sup> *Simmons v Lillystone* (1853) 8 Exch 431, 442.

<sup>70</sup> See *Craig v Marsh* (1935) 35 SR (NSW) 323.

cells were excised from the spleen, this amounted to a use of the spleen which was not only unauthorised by Moore but which would either destroy the spleen as an entire organ, or seriously alter its nature.

That Moore might have no explicit use himself for either the spleen or the cells is irrelevant: it is the interference with possession (or the immediate right to possession) which is the gist of the tort.<sup>71</sup> Suitably then, the tort has a primarily protective function.

However, the potential (or lack thereof) for Moore himself to use the spleen or the cells may have a bearing on the question of damages. For conversion to succeed, as opposed to trespass to goods, there must be some damage suffered by the plaintiff.<sup>72</sup> Moore's primary damage is the actual loss of his body parts and tissue: how is the value of this to be assessed? Generally, damages in conversion are awarded on the basis of the full value of the property converted, unless for some reason to award the plaintiff the full value would overcompensate him or her in relation to the extent of his or her interest in the property.<sup>73</sup> Full value is usually defined as the market value<sup>74</sup> and adopting such a definition again demonstrates the difficulty of applying traditional conversion principles in this area. It could be argued that Moore's cells had no market value as these sorts of items simply are not bought and sold, therefore they are not capable of having a monetary value placed on them. The 'market value' could not in any way be tied to the potential profits to be made from the sale of products derived from the cell-line, for to do so would be to equate in value a product at the end of the manufacturing process with a raw material. Clearly, an assessment based on replacement value<sup>75</sup> is also inappropriate since replacement is not possible.

Loss of use is a further traditional basis for the assessment of damages in conversion in situations where, as a result of the nature of the goods, such a loss can be established as a special damage. Examples are lost profits where a chattel has not been available for use in a business,<sup>76</sup> or the lost opportunity of racing a horse.<sup>77</sup> It is hardly likely that a person in Moore's position could substantiate any special damage on this basis unless there was evidence that he had withheld consent to the original removal of his spleen. In any event, the manner in which such damage could be quantified is unclear.

The problems which a court would face in categorising and quantifying a plaintiff's loss indicate the inappropriateness of a tort such as conversion. Developed as it was to protect an individual's economic interests, the focus of an award of damages is on requiring the defendant, in effect, to compulsorily purchase the goods with which he has interfered.<sup>78</sup> To require courts to undertake such an assessment in an action concerning human tissue or body parts is

<sup>71</sup> *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204, 229 per Dixon J.

<sup>72</sup> *Fouldes v Willoughby* (1841) 8 M&W 540.

<sup>73</sup> *Butler v Egg & Egg Pulp Marketing Board* (1966) 114 CLR 185.

<sup>74</sup> At least, where the goods are of a type which are readily bought and sold: see *Chhabra Corp Pte Ltd v Jag Shakti (Owners) The Jag Shakti* [1986] 1 AC 337.

<sup>75</sup> *Hall (JE) Ltd v Barclay* [1937] 3 All ER 620.

<sup>76</sup> *The Edison* [1933] AC 449.

<sup>77</sup> *Howe v Teefy* (1927) 27 SR (NSW) 301.

<sup>78</sup> See W L Prosser, 'The Nature of Conversion' (1957) 42 *Corn LQ* 168, 173-4.



to ask judges to embark upon a process of commercialisation of human beings; that is, to ascribe to people an economic and commercial value based on what a 'market' would pay. Such a process is both misconceived and inappropriate. It is inappropriate because it echoes times when human beings were capable of being bought and sold, times when competitive market forces did operate to alter their 'worth' and people sued to recover for their lost value.<sup>79</sup> It is misconceived because it does nothing to further the only legitimate role of recognising proprietary rights in body parts — that of offering an individual protection against the unauthorised use of his or her body. Such a protective function is ill-served by the introduction of notions of market value or replacement value, for the fundamental basis in allowing the cause of action at all must be the recognition that human tissue and body parts are valuable primarily in an emotional and spiritual sense, as forming part of an individual human being. The attempt to assess damages within a framework of a traditional cause of action such as conversion requires too much distortion of torts principles to be of any real value.

### 1.7 Conclusion

John Moore's allegation that his tissue was his property arose out of a perceived gap in the law which failed to protect patients like Moore from the commercial excesses of their doctors. At a basic level then, the argument is that there are certain activities associated with modern medicine and medical research which will leave patients vulnerable to both commercial and physical abuse and without redress should that abuse occur, unless the human body is invested with the character of property. The tort of battery, that is, the right to sue a person for an uninvited and unreasonable touching<sup>80</sup> is not seen as offering sufficient protection. In essence this tort, not requiring proof of actual damage, sought to protect an individual's bodily integrity, rather than to compensate an individual for harm suffered. It is this very notion of bodily integrity that courts have recognised by endorsing an individual's right to self-determination in the context of the right to refuse any medical treatment at all, or to decide which medical treatment a person will undergo.<sup>81</sup> Similarly, there are now numerous examples of situations where individuals may make provision, in advance, for what will happen to their bodies in certain situations.<sup>82</sup> However, such legislative innovation cannot possibly anticipate each and every situation where an individual's bodily integrity, or his or her interest in deciding what should happen to his or her own body, is threatened. The common law significantly protects an individual from such threats by torts like battery, yet such a tort is not so helpful once consent to the relevant

<sup>79</sup> See for example *Chamberline v Harvey* (1696) 5 Mod 186.

<sup>80</sup> *Wilson v Pringle* [1987] QB 237. See also the comments by the High Court in *Rogers v Whitaker* (1992) 109 ALR 625, 633.

<sup>81</sup> *Smith v Auckland Hospital Board* [1965] NZLR 191; *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553, 560 per Kirby P.

<sup>82</sup> See for example *Medical Treatment Act 1988* (Vic); *Natural Death Act 1983* (SA); *Human Tissue Act 1982* (Vic).

contact or touching has been given.<sup>83</sup> For instance, it would not be a battery to remove an individual's diseased kidney if the individual had given a free and informed consent to that type of operation taking place;<sup>84</sup> yet the individual may strenuously object to the subsequent use of the kidney in a research project and might wish to claim damages in relation to that use.

Similarly to remove a person's corneas after death may not be a battery,<sup>85</sup> yet such an act may seriously offend and upset the relatives of the deceased, or contradict some previously expressed wish of the deceased which was not communicated to the relevant authorities. In this circumstance it might be appropriate to accord some remedy to the relatives.

What must be demonstrated, however, is that those concepts of bodily integrity and self-determination require protection in the form of the grant of a proprietary interest and that it is in the public interest to do so.

Ultimately, the Supreme Court of California in *Moore* thought not.

It is submitted that the California Supreme Court arrived at an appropriate result, but without convincing reasons. The majority's judgment did not identify a principled base at common law for the body and its tissue being incapable of classification as 'property'; nor did it satisfactorily address the policy issues for rejecting such a classification, the Court being too pre-occupied, it is suggested, with the commercial ramifications of medical research. The policy basis for a refusal to treat the body as property must, it is submitted, be wider than commercial concerns. It must be related back to those overworked, but still fundamental, concepts of human dignity and autonomy.

## PART TWO: CIRCUMSTANCES IN WHICH THE BODY MIGHT BE TREATED AS PROPERTY

Moore's conversion allegation arose because there were perceived to be circumstances in which treating the body and its tissue as property would be the only method of protecting people from the potentially exploitative behaviour of the medical profession, medical researchers or others seeking to use human tissue or body parts.

The second part of this paper will examine a variety of circumstances where it might be claimed that there is potential for such exploitation. It will consider the judicial and legislative responses to these circumstances; whether those responses have included a proprietary rights model; and whether such a model is appropriate.

<sup>83</sup> *Rogers v Whitaker* (1992) 109 ALR 625, 633.

<sup>84</sup> *Chatterton v Gerson* [1981] 1 QB 432.

<sup>85</sup> Either because of statutory authority under s 26(e) of the *Human Tissue Act 1982* (Vic) or because there is no one capable of being a plaintiff, battery being a particularly personal tort: 'every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner': Blackstone, *Commentaries on the Laws of England*, vol 3 (1st ed, Oxford, Clarendon Press, 1768) 120, and this not being a situation where the plaintiff dies *after* the cause of action has accrued: see *Administration and Probate Act 1958* (Vic) s 29(1).

## 2.1 Disposal or removal of dead bodies

Until comparatively recently, the question of ownership of a human body or body parts usually arose before a court in the context of the disposal or removal of a body after death. Usually, the defendant had either attempted to remove a body so as to make alternative arrangements for its burial, or attempted to obtain a body for dissection by those engaged in the then relatively new science of anatomy.

The attitude of the English courts appears to have been somewhat inconsistent. Matthews<sup>86</sup> traces the early cases and classical writers on the topic and concludes that the prevailing attitude of the courts — that there is no property in a dead body — is not well supported by the early authorities. One of the leading cases is *R v Sharpe*.<sup>87</sup> Sharpe was a dissenter from the Church of England and, objecting to his mother having been buried in a Church of England graveyard, he went to the graveyard and under false pretences had the grave opened. He then removed the badly decomposed body in its coffin in order to have it reburied elsewhere. Sharpe was charged with and convicted of a misdemeanour, namely breaking and entering into the graveyard and ‘unlawfully, wilfully and indecently taking and carrying away’ his mother’s body. He appealed to the Court of Criminal Appeal which affirmed the conviction, and in doing so, denied that Sharpe, as a relative of the deceased, could assert any proprietary rights over the corpse. Erle J, giving judgment on behalf of a bench consisting of Pollock CB, Willes J, Bramwell B, Watson B and himself made the general declaration that ‘[o]ur law recognises no property in a corpse.’<sup>88</sup>

Several writers have sought to nullify the effect of this statement by contending that it is *obiter*.<sup>89</sup> It is submitted that none of the reasons supporting these contentions is convincing. Matthews contends that the statement is *obiter* since the ‘no-property’ point was not taken in an earlier case of *R v Lynn*,<sup>90</sup> and *Lynn* could have been the only authority facing the court. Yet *Lynn*’s case was not cited by the court in *Sharpe* and the ground of the court’s decision was quite different.<sup>91</sup> Skegg and Magnusson contend<sup>92</sup> that the comment of Erle J is *obiter* because it serves only to explain the form of indictment

<sup>86</sup> P Matthews, ‘Whose Body? People as Property’ (1983) 36 *Current Legal Problems* 193.

<sup>87</sup> Dears & Bell CC 160; 169 ER 959.

<sup>88</sup> Id 163; 960.

<sup>89</sup> Matthews, op cit 199; R S Magnusson, ‘The Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions’ (1992) 18 *MULR* 601, 604–5; P D G Skegg, ‘Human Corpses, Medical Specimens and the Law of Property’ (1975) 4 *Anglo-American Law Review* 412, 414.

<sup>90</sup> (1788) 2 TR 733; 100 ER 395.

<sup>91</sup> In *Lynn* the court was preoccupied with ensuring that the practice of disinterring bodies for dissection was discouraged by the application of criminal sanctions: ‘common decency required that the practice should be put a stop to’: id 734; 395. No defence was offered on the same basis as it was in *Sharpe*, so the court was not asked to expressly consider the ‘no property’ issue, although it is implicit in its judgment that the court did not entertain the idea that the body itself was property to be the subject of a theft charge. Further, the defendant in *Sharpe* represented himself, and there was no appearance for the Crown (Dears & Bell CC 160, 162; 169 ER 959, 960), so it is no wonder that *Lynn*, a case decided some one hundred years earlier, was not cited to the court.

<sup>92</sup> Magnusson, op cit 604; Skegg, op cit 414.

used. It is submitted that such an interpretation takes his Lordship's comment out of context. Taken as a whole, his Lordship's comment *does* address itself to the existence or otherwise of a defence to the charge. His Lordship's primary conclusion is that:

The evidence for the prosecution proved the misdemeanour, unless there was a defence.<sup>93</sup>

His Lordship then prefaces his next comments with the words, 'We have considered the grounds relied on in that behalf . . .'<sup>94</sup> and what follows is, it is submitted, an answer to each of the grounds raised by Sharpe in his defence.

The first ground of defence was clearly that Sharpe's motives ought to make the conduct no misdemeanour. This the court rejected as unfounded in 'authority [nor] principle'. 'Neither', the court continued, 'does our law recognise the right of any one child to the corpse of its parent as claimed by the defendant'.<sup>95</sup>

The only natural and sensible way to read this sentence is as following on from the one before it, namely, as an answer to a second ground of defence put forward by the defendant. Certainly, as Magnusson points out, his Lordship goes on to state that this form of indictment is necessary to protect a grave under common law. Yet this comment could equally be construed as a statement that to allow the defence — of proprietary rights in a corpse — to succeed would defeat the purpose of the indictment, as generally the defendant would be in such circumstances, a relative of the deceased. There is no indication of how the defence was pleaded and whether the body was described as a chattel in the sense in which that word is used today. It is speculation only to suggest how the defence was argued. What is clear in the face of the judgment, it is submitted, is that Erle J's comments were indeed directed towards a defence — the second of two raised by the defendant — and it is for that reason that one of his closing statements reads:

and there is no authority for saying that relationship will *justify* the taking [of] a corpse away from the grave where it has been buried.<sup>96</sup> [emphasis added]

In summary then, it is submitted that Erle J's statement that there was no property in a corpse ought to be considered as part of the ratio of his Lordship's decision.

The second significant case is *Williams v Williams*.<sup>97</sup> Henry Crookenden had given the plaintiff instructions that his body was to be cremated after his death. Unfortunately, he was buried in the usual way, but the plaintiff had the body dug up so that it could be cremated in Italy in accordance with Crookenden's wishes. She then brought an action against his executors for her costs, and, in considering whether she was entitled to her costs, the court

<sup>93</sup> Dears & Bell CC 160, 162.; 169 ER 959, 960.

<sup>94</sup> Ibid.

<sup>95</sup> Id 163; 960.

<sup>96</sup> Ibid.

<sup>97</sup> (1882) 20 Ch D 659.

needed to consider whether she was lawfully in possession of Crookenden's body, and if so what rights this possession gave her.

Again both Matthews and Magnusson contend that the comments of Kay J in this case to the effect that there is no property in a corpse are *obiter dicta*.<sup>98</sup> Matthews's first criticism of Kay J is his Lordship's reliance on *Sharpe*'s case and his failure to distinguish the case before him as one concerning an unburied corpse and perhaps therefore involving different issues. With respect, it is not at all clear that such a distinction needs to be drawn. Clearly in both *Sharpe* and *Williams* a claim of ownership over a *dead body*, whether buried or unburied, was rejected by the court. Matthews's ground for distinction appears to be that English law (as demonstrated in *Williams*) recognises some rights of people over corpses before burial. However, it is submitted that it is clear from Kay J's judgment in *Williams* that these rights were not considered to be proprietary in nature, though what are now to us proprietary concepts were used.

The words used by Kay J need to be carefully examined. His first proposition is that 'It is quite clearly the law of this country that there can be no property in the dead body of a human being'<sup>99</sup> and as authority for this he, quite properly it is submitted, cites *R v Sharpe*. Having discussed *Sharpe*, his Lordship then moves on<sup>100</sup> to discuss the rights of executors and concludes that:

Accordingly the law in this country is clear, that after the death of a man, his executors have a right to the custody and possession of his body (although they have no property in it) until it is properly buried.<sup>101</sup>

Those two statements are put by Kay J as two 'points of law' (note the use of the words 'first' and 'second') which justify his first overall conclusion that:

a man cannot by will dispose of his dead body. If there be no property in a dead body it is impossible that by will or any other instrument the body can be disposed of.<sup>102</sup>

It is submitted therefore that it is not correct to argue as Matthews does, that Kay J's 'no property' statement can be dismissed as *obiter*. On the contrary, it is clearly presented as the second ground of his conclusion that Henry Crookenden could not dispose of his own body by will. What makes this passage of Kay J's judgment difficult is his Lordship's distinction between a right to possession (which vests in an executor) and 'property', which his Lordship states cannot vest in anyone.

If actual possession can be the foundation for proprietary rights, as we know it can, then a legally recognised right to possession must form part of a concept of property in a thing. The distinction made by Kay J may be purposive — made so as to give the executor the ability to bury the body, but no more. Yet it also demonstrates that some attributes of property — such as possession —

<sup>98</sup> Matthews, *op cit* 210–12; Magnusson, *op cit* 605–6.

<sup>99</sup> (1882) 20 Ch D 659, 662–3.

<sup>100</sup> *Id* 664.

<sup>101</sup> *Id* 665.

<sup>102</sup> *Ibid*.

which have usually been regarded by the courts as indicating a species of proprietary right,<sup>103</sup> are not always taken by the court to be conclusive evidence that a proprietary right exists, *if* the court is minded in a conceptual sense not to regard the object of that right as capable of being property.

Clearly Kay J considered that *R v Sharpe* precluded him from considering a dead body as property. There is no mention of the executor's right to possession being exclusive, although Matthews characterises the passage thus,<sup>104</sup> and Kay J's reference to *Williams on Executors*<sup>105</sup> makes it clear that his Lordship was referring to a right of possession conferred for a particular and limited purpose — that is, to secure a suitable burial. Such a right of possession is necessarily of limited duration and extent and conceivably different from a 'property' right which might be said to imply control for a duration and a variety of purposes determined by the holder of the right (subject to any contract, for example, a bailment). His Lordship's focus was not, therefore, as Matthews suggests,<sup>106</sup> on the *manner* (that is, by will) by which Crookenden tried to give Miss Williams rights over the body, but rather that Crookenden had sought to do precisely what Kay J declared the law prohibited — to give someone rights approximating to proprietary rights in a dead body. It is in pursuing this argument that his Lordship was compelled to distinguish the rights given to executors and to characterise them, it is submitted, as rights to possession of limited duration and for one particular purpose only. It is questionable whether such a distinction can be maintained given the way courts have usually characterised a right to possession,<sup>107</sup> but Kay J's attempt to make the distinction itself reveals his Lordship's conviction of the strength of the 'no property' rule and displays, at least, an attempt to circumvent that rule in the case of executors.

The third case which is generally seen as a possible authority on the issue of the body as property is the High Court's decision in *Doodeward v Spence*.<sup>108</sup> Contrary to the view of some writers, it is submitted that this case *is* helpful in shedding light on judicial attitudes to the body as property.

Doodeward had inherited the preserved corpse of a two-headed child which he exhibited to the public for profit. Spence was a police inspector who took possession of the corpse as a prosecution exhibit in a case against Doodeward. Doodeward brought an action against Spence in conversion and detainue. The case is useful because it goes some way to explaining the connection between possession and 'property', and why a right of the former kind will often lead to the acquisition of the latter.

Of the three justices, two (Griffith CJ and Barton J) concluded that Doodeward had been lawfully possessed of the specimen and therefore could bring an action against Spence in conversion and detainue.

<sup>103</sup> See *Amory v Delamirie* (1722) 1 Strange 505; 93 ER 664.

<sup>104</sup> Matthews, *op cit* 212.

<sup>105</sup> (1882) 20 Ch D 659, 664.

<sup>106</sup> Matthews, *op cit* 212.

<sup>107</sup> *The Winkfield* [1902] P 42, 55 per Collins MR; *Jeffries v Great Western Railway Co* (1856) 5 E&B 802, 806; 119 ER 680, 681: 'the person who has possession has the property' per Lord Campbell.

<sup>108</sup> (1908) 6 CLR 406.

Griffith CJ conceded<sup>109</sup> that the authorities state that ‘when a human being dies property in his body does not vest in anyone, although certain persons have duties, and perhaps rights, with respect to it.’ This qualification is reminiscent of Kay J’s exception concerning executors in *Williams* and supports the argument that the courts have viewed executors as invested with something less than a proprietary interest. Griffith CJ went on to observe that ‘the continued possession of an unburied human body after death by anyone except for the purpose of burial’<sup>110</sup> is not necessarily unlawful. The belief that such possession may be lawful is the key to his Honour’s judgment. If lawful, possession will be protected by the law. And it is this entitlement to protection which transforms possession into a species of proprietary right.<sup>111</sup> Griffith CJ then examined whether Doodeward’s possession could be unlawful in the sense of being ‘injurious to the public welfare . . . founded upon considerations of religion or public health or public decency’. In that passage Griffith CJ, it is submitted, expressed what had lain unexpressed beneath the judgments of the courts in cases such as *Sharpe* and *Williams*. That is, the reason that the law would not concede property rights over a dead body was that possession of a body in those circumstances offended public notions of religion, health and decency, and in that respect was an unlawful possession. The possession of executors, however, for the purpose of burial, was not offensive and therefore was a kind of lawful possession which the courts would protect, thereby (despite the misgivings of Kay J in *Williams*) in fact transforming such possession into a kind of proprietary right. Griffith CJ’s determinant of what makes possession lawful (and therefore capable of legal protection and in turn a species of proprietary interest) is *purpose* and in Doodeward’s case his Honour could find nothing in his purpose to make the possession unlawful.

Barton J agreed with the reasoning of the Chief Justice<sup>112</sup> so his Honour must be taken as agreeing with the Chief Justice’s propositions concerning unlawful possession, although Barton J also clearly felt that the physical appearance and presentation of the foetus were so far removed from being a ‘corpse awaiting burial’ that no case really presented itself as clear authority.<sup>113</sup>

On this view there is no difficulty in finding a clear ratio for the decision, namely that if a plaintiff can be said to have *lawful* possession of an object, then the court may recognise in that person a proprietary right over that object sufficient to found an action against one who wrongfully dispossesses the plaintiff. However, consideration needs also to be given to the dissent of Higgins J, for it is submitted that in one sense his Honour was in accord with the majority. The starting assumption of his Honour’s judgment was the undoubtedly correct proposition that the foundation of an action in

<sup>109</sup> (1908) 6 CLR 406, 411.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, 509 per Dixon J; see also *Gollan v Nugent* (1988) 166 CLR 18, 30–1 per Brennan J.

<sup>112</sup> (1908) 6 CLR 406, 417.

<sup>113</sup> *Id* 415–16.

conversion and detinue is property and therefore Doodeward needed to establish that the foetus was his property. This, Higgins J continued, included a right to possession. His Honour was adamant that 'No one can have, under British law, property in another human being — alive or dead'<sup>114</sup> and acknowledged an exception in relation to persons who have a duty to 'give the corpse decent interment'.<sup>115</sup>

It is submitted that the basis for his Honour's reasoning was the same as that of the majority in that his Honour was looking to the nature of the possession of the plaintiff and asking whether it was lawful possession, considering 'public health . . . decency or . . . religion.'<sup>116</sup> His Honour concluded, and this was where he differed from the majority, that Doodeward 'has not established any right to enforce possession',<sup>117</sup> such right of course being the foundation of a proprietary interest. The difference between Higgins J and the majority lay therefore in the types of possession which public policy — in the sense of religion, public health and decency — deemed to be lawful.

If the judgments in all three cases — *Sharpe*, *Williams* and *Doodeward* — are seen as dealing with the nature of the plaintiff's possession and the nature of any rights which flow from that possession, it is submitted that a consistent approach can be detected, one that can readily be applied to the question of the body as property in the modern context.

Possession — or the right to possession — is capable of being transformed into a proprietary interest providing the possession is lawful. The proprietary interest is in fact the remedy which the law affords to protect the plaintiff's possession. That remedy (and therefore the proprietary interest) will be withheld if the possession is not one which justifies protection:

Possession which is lawful founds a right to a remedy; possession which is unlawful does not. 'Unlawful' in this context does not necessarily mean criminal or tortious. It may describe an act or transaction which, on grounds of public policy, the law simply does not recognize as founding a legal right.<sup>118</sup>

Thus public policy is the determining factor, whether that phrase itself be used or whether it is couched in terms of 'public welfare, health or decency' as in *Doodeward v Spence*. Brennan J explains the issue further in *Gollan v Nugent*:

To say that possession is unlawful when it is injurious to the public is to say that the public policy of the law prevails over private rights otherwise enforceable by law. That is a basic policy of the law. . . .<sup>119</sup>

It is submitted that this reasoning is the foundation of the historical Anglo-

<sup>114</sup> Id 419.

<sup>115</sup> Id 422. His Honour considered a further exception in relation to mummies (at 422) which he puts on the basis that their nature has been changed by the skill of the embalmer. His Honour also appears to consider anatomical exhibits as a statutory exception, with any activity not covered by the *Anatomy Act* (1901) NSW being illegal.

<sup>116</sup> Id 423.

<sup>117</sup> Id 424.

<sup>118</sup> *Gollan v Nugent* (1988) 166 CLR 18, 31 per Brennan J.

<sup>119</sup> Id 34.



Australian judicial approach to the body as property. The courts have refused to recognise and enforce a general right to possess a human body because they believed it to be against public policy to do so. In this way, if the plaintiff's possession were not enforced and recognised by the court, he could not be said to have a proprietary interest in the body. In circumstances where a right to possession was considered lawful (that is, in accordance with public policy) such as in the case of an executor's duty to bury a body, the courts were prepared to enforce that right to possession and provide a remedy by way of a proprietary interest in the body.

This is consistent with the conduct of the English courts in respect of the slavery cases. Where slavery was considered to be lawful — in the sense that it was not seen to be contrary to public policy — the law recognised a master's right to possession of a slave and provided a remedy by way of granting the master a proprietary interest in the slave.<sup>120</sup> Yet when that possession was viewed as being contrary to public policy, no remedy to protect the possession was given and hence the decision that the master had no 'property' in the slave.<sup>121</sup>

It is submitted that this approach provides a framework within which to analyse the issue of property in the body in a modern context. Moreover, it provides authority upon which Anglo-Australian courts could rest their decision, should a case like *Moore* be presented to them.

## 2.2 Cadaveric specimens and museum exhibits

It has been argued that museums and medical schools could suffer irretrievable loss of exhibits and cadaveric specimens unless such objects are categorised as their property.<sup>122</sup> Yet if the criterion for the recognition of a proprietary right is lawful possession, lawful in the sense of it being in the interests of public policy to recognise and protect such possession, then institutions such as museums and medical schools will be protected. So long as their activities are seen to be in the public interest and are so recognised either by statute<sup>123</sup> or at common law,<sup>124</sup> then it is submitted that it would be proper for a court to afford protection to such a plaintiff's possession by way of granting a proprietary interest. There may of course be circumstances in which their possession is not in the public interest, and an example of this may be the issue of the status of Aboriginal remains held in museums.<sup>125</sup> It may be possible to argue that, in those particular circumstances, because of the methods by which the museums obtained the body parts, the wholesale opposition of the Aboriginal community at the time and the outrage that

<sup>120</sup> See *Buron v Denman* (1848) 2 Ex 167, 187; 154 ER 450, 459; *Stewart v Garnett* (1830) 3 Sim 398, 404; 57 ER 1047, 1049.

<sup>121</sup> See *Somerset v Stewart* (1772) Loff 1; 98 ER 499.

<sup>122</sup> Magnusson, op cit 613.

<sup>123</sup> For example, *Human Tissue Act* 1982 (Vic) s 32.

<sup>124</sup> *Higgins J in Doodeward v Spence* (1908) 6 CLR 406, 423 appears to sanction the practice of anatomy and therefore the possession of cadavers providing the statutory and consensual requirements have been met.

<sup>125</sup> See Magnusson, op cit 612–13.

reports of such taking engender in the community today, the possession of the museums would be considered for reasons of public policy to be unlawful and thus undeserving of protection through the grant of a proprietary interest.

### 2.3 Biotechnology products

*Moore's* case arose in the context of a biotechnology product, namely a cell-line, and it is in this area that there appears to be the most pressure for body parts to be considered as the objects of proprietary rights, because, of course, of the financial incentives and rewards.<sup>126</sup> However, the approach of Anglo-Australian law has been conservative, exhibiting a general reluctance to mix proprietary concepts with human beings. Patent law provides an example.

Although there is no obstacle to the patenting of a living organism *per se*,<sup>127</sup> the organism must be new and have improved or useful qualities from its naturally occurring counterpart.<sup>128</sup> In Australia it is not possible to patent methods of medical treatment,<sup>129</sup> and this appears to be based on ethical grounds.<sup>130</sup> This is another indication of the law's reluctance to introduce notions of trade and commerce (the granting of a patent being fundamentally directed towards economic not therapeutic activity and endeavour)<sup>131</sup> into a field whose primary concern is the health and well-being of individuals, not the generation and acquisition of profit.

A further limit is imposed by s 18(2) of the *Patents Act* 1990 (Cth), which provides that: 'human beings, and the biological processes for their generation, are not patentable inventions'. The ambit of s 18(2) is unclear. It seems from the Parliamentary Debates, more particularly in the Senate, that the Australian Democrats' initial amendment to the *Patents Act*, which became s 18, was designed to prevent the patenting of any genetic material, human or animal.<sup>132</sup> The amendment which was passed is much more restricted and was interpreted by at least one member<sup>133</sup> as relating only to IVF and cloning.

Narrowly the section can be construed as prohibiting only patents that involve cloning. Or it could be interpreted as extending to any process which

<sup>126</sup> For a review of developments in the US and an argument that commercial and proprietary interests ought to be recognised in body parts see R Hardiman, 'Towards the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue' (1986) UCLALR 207.

<sup>127</sup> *Ranks Hovis McDougall Ltd's Application* (1976) 46 AOJP 3915; in the United States the leading cases are *Re Bergy* 563 F 2d 1031 (1977); *Re Chakrabarty* 571 2d 40 (1978).  
<sup>128</sup> *Ranks Hovis McDougall Ltd's Application*, *supra* fn 127, 3918.

<sup>129</sup> Medical treatment in the sense of the cure or prevention of disease and not involving cosmetic processes: *Joos v Commissioner of Patents* (1972) 46 ALJR 438.

<sup>130</sup> See CCH looseleaf service *Australian Industrial and Intellectual Property* at para 1.3.062, p 607. But for differing approaches see *The Wellcome Foundation Ltd v Plantex Ltd and Pharmaplantex Ltd* [1974] RPC 514; *Wellcome Foundation v Commissioner of Patents* [1979] 2 NZLR 591.

<sup>131</sup> *Maeder v Busch* (1938) 59 CLR 684.

<sup>132</sup> The Democrat amendment was directed towards prohibition of the patenting of genetic material, but was not intended to affect researchers' ability to patent the processes which created that material: Senator Coulter, *Parliamentary Debates*, Senate (Cth), Vol 140, pp 1911, 2653 (August and September 1990).

<sup>133</sup> Mr Prosser, *Parliamentary Debates*, House of Representatives (Cth) Vol 173, p 2948 (October 1990).

involves the reproduction of the genetic material essential to make up a human being. An extremely wide interpretation would need to be employed if the section were to be construed as prohibiting activities such as the creation of a cell-line in *Moore's* case.<sup>134</sup> The Australian Patents, Trade Marks and Designs Office makes a clear distinction between the patentability of humans and other animals<sup>135</sup> and places no general prohibition on a patent application in respect of a 'new non-human animal'. Such distinctions indicate again that the law is not comfortable with the prospect of human beings being the objects of proprietary rights.

It is suggested that the current approach of the patents legislation and the way that the courts have approached patent issues as they relate to human beings is appropriate. Acknowledging that granting a patent has a primarily economic purpose (the proprietary right being the vehicle by which the economic purpose is protected), Anglo-Australian law has refrained from allowing human beings to be the objects of such activity. Similarly, it has insisted that procedures and activities (as distinct from products) which have a primarily therapeutic base are not appropriate subjects for patent rights.

There is no inconsistency in allowing researchers and biotechnology firms to patent (and therefore to acquire proprietary rights in) living organisms, even if they have been taken from human tissue, and yet denying the donors of the tissue proprietary rights, or indeed denying the researchers proprietary rights prior to patenting. When an object is patented, the proprietary right is either in respect of a *process* (to which there is no ethical objection) or in respect of an organism materially altered or improved in some way. The creation of a new object as the result of the application of intellect, skill and effort has never been objected to by Anglo-Australian courts.<sup>136</sup> Prior to this occurring, the researcher's possession of the human tissue ought to be no more protected by property rights than the donor's possession. There is no commercial value (and neither ought there be) in the tissue itself. The interests of the researcher or biotechnology firm can be adequately protected by other legal remedies: trespass or criminal charges in relation to uninvited entrance onto land; trespass, conversion or theft charges in relation to containers or storage facilities taken or interfered with; consequential damages claims in relation to the new resources and time required to obtain more tissue; or possibly even an economic loss claim in negligence if the interference was not intentional. The common law (and the common lawyer) are renowned for creativity; but that creativity needs to be tempered by a reminder that justice and community interest are not always best served by the introduction of new theories of liability. There is already an uneasy and sometimes ill-fitting

<sup>134</sup> The Patents, Trade Marks and Designs Office does not appear to have issued a practice note in this matter. However, in conversation with the writer the Office indicated that 'human being' would be construed as meaning an ovum after fertilisation and 'biological process' as meaning a process not requiring human intervention. For example, under such an interpretation, an IVF process would be patentable, but the embryo would not.

<sup>135</sup> See Patents, Trade Marks and Designs Office, Practice Note 1991 no 6, 'Patentability of animals'.

<sup>136</sup> *Doodeward v Spence* (1908) 6 CLR 406; see also Sackville & Neave, *Property Law Cases and Materials* (4th ed, Sydney, Butterworths, 1988) 546.

relationship between law and medicine. It would not improve that relationship to introduce a huge conceptual shift such as that involved in recognising the human body as an object of the law of property.

#### 2.4 Human tissue

Major medical advances have been made in the field of tissue and organ transplantation. How the medical profession acquires the tissue and organs needed for transplants has become a community concern.<sup>137</sup> There are fears of exploitation, especially of the poor,<sup>138</sup> of children, or of the mentally incompetent, whether that incompetence be due to mental disability or to a state of unconsciousness or coma.<sup>139</sup> The issue to be addressed in this section is whether categorising human tissue as property would assist the resolution of such concerns.

##### *i) The common law position*

There are some English criminal authorities, and some recent Australian decisions which bear on the question of the legal status of human tissue taken from a living person.

The two most relevant English criminal cases have arisen in the context of prosecutions where the defendant has sought to dispose of evidence he had been forced to provide to the police. In *R v Welsh*,<sup>140</sup> which is reported as an appeal against sentence, the defendant was charged with failing to provide a laboratory test specimen of urine and also with theft of a urine sample.<sup>141</sup> The defendant had actually provided two urine samples, but then emptied the containers down the sink before they could be tested. There was no discussion of the theft charge save that it was a 'technical offence'.<sup>142</sup> Commentators<sup>143</sup> appear to have taken the decision as supporting the proposition that body products can be considered as property. It is difficult to see, however, how a judgment on appeal against sentence only can be said to be authority for any proposition concerning the correctness of the charge itself. Further, the report does not suggest that the issue (whether urine could be property so as to be the subject of a theft charge) was raised at any stage and, therefore, if not raised by either party, it is unlikely that the judge would have turned his mind to it in the judgment. The comment in respect of a 'technical offence' might be taken in any number of ways — technical because the sample was of little value and another could be obtained, technical because the charge served no purpose if it was made out because the sample was irretrievable. Whether his Lordship

<sup>137</sup> See generally the comments by those involved in a variety of ways with transplants in 'Issues in Transplantation; Aspects of Supply' *Chiron* (1992) 3.

<sup>138</sup> *Id* 14.

<sup>139</sup> Although in Victoria many of those fears may have been assuaged by the *Human Tissue Act* (Vic) 1982.  
<sup>140</sup> [1974] RTR 478.

<sup>141</sup> There may be some question over whether urine is human tissue: see *Human Tissue Act* (Vic) 1982 s 3(1) which defines 'Tissue' as *inter alia*, 'a substance extracted from, or from a part of, the human body'.

<sup>142</sup> [1974] RTR 478, 480.

<sup>143</sup> See Magnusson, *op cit* 617; Matthews, *op cit* 223-4.

meant 'technical' in the sense of the urine being 'technically' property is by no means clear. It is submitted that to hold *R v Welsh* out as authority for anything in relation to the issues under consideration is to take the judgment further than its words and context allow.

The second case is *R v Rothery*,<sup>144</sup> where the defendant was also on alcohol-related charges, this time in respect of a blood sample which he provided, but then took with him when he was released from custody. On appeal the issue facing the court was whether the defendant in the circumstances had failed to provide a specimen under s 9(3) of the *Road Traffic Act 1972* (UK). The theft count was not under appeal. It appears from the judgment<sup>145</sup> that the subject of the theft charge was in fact 'a capsule containing a specimen of his blood' and this was the 'theft' which the court then proceeded to discuss. The wording of the theft charge is significant for it removed the necessity for the prosecution to argue, or for the court to consider, whether the blood itself could be property. The 'property' was clearly alleged to be the capsule full of the defendant's blood. Matthew's argument is that the appeal court must have been referring only to the blood and not the capsule, otherwise the theft charge would be pointless as the police no doubt owned the capsule to start with<sup>146</sup> and, since the capsule appeared to be preserved intact, charging Rothery with the theft of the capsule would make no sense.<sup>147</sup> It is conceivable that Scarman LJ treated the blood and the capsule as one entity. Thus his Lordship's reference to 'putting' the police officer in 'possession or control of it' can be read as meaning the capsule full of the defendant's blood, and not merely the blood itself. Thus the delivery of possession and control (s 501 of the *Theft Act 1968* (UK) being concerned with defining the phrase 'belonging to another') is of the capsule *and* the blood and not merely the latter. It is submitted that, to interpret Scarman J's comments as being directed only towards the blood itself is to ignore (and to assume that his Lordship also ignored) the way that the charge was framed. Even if another construction were to be given to his Lordship's comments (and it is submitted that no such construction is justified), they could only be *dicta* as the theft charge was not in dispute. In summary therefore, neither of these cases can properly stand as authority for the proposition that the criminal courts have deliberately elected to treat the human body as property, nor do they establish any pressing need for the law to do so.

Blood, as the body product perhaps most widely collected, transferred and used, does appear to be a prime candidate to be invested with the character of property. Certainly this is the approach taken recently in Australia by plaintiffs who contracted the HIV virus through donated blood, in suits against the Australian Red Cross Society. Plaintiffs have sought to use the implied warranty provisions of the *Trade Practices Act 1974* (Cth) to allege

<sup>144</sup> [1976] RTR 550 (Court of Appeal).

<sup>145</sup> *Id* 553.

<sup>146</sup> *Matthews op cit* 224.

<sup>147</sup> Although surely it would still be of some use to prosecute a defendant for an *interference* with the capsule, even if no damage was caused. The same result would be thus achieved, for tampering with the urine would inevitably involve tampering with the capsule.

that the damage they have suffered (namely, infection with the HIV virus) was caused by the supply of goods (namely blood or blood products) which were not of merchantable quality. In *PQ v Australian Red Cross Society*<sup>148</sup> McGarvie J considered a submission by the defendant that it had no case to answer in relation to these claims by the plaintiff under ss 74B and 74D of the *Trade Practices Act 1974* (Cth). His Honour ruled that there was no case to answer and in doing so clearly spoke of the blood product which the plaintiff had been transfused with as 'goods' within the meaning of those sections. These comments need to be approached with some caution as his Honour was only making a ruling on the 'no case' submission and for the purposes of that submission would have had to assume without deciding that blood could be 'goods'.

In the case of *E v Australian Red Cross Society and Others*<sup>149</sup> a similar issue faced Wilcox J. Although his Honour did not rule on whether blood or blood products could be 'goods', he did consider whether blood could constitute 'materials' in the sense of materials supplied in connection with the provision of services under s 74(1) of the Act. His Honour concluded that:

No doubt there was a time when most people would have rejected the notion that human tissue might constitute 'materials'. But that was because medical science had not yet developed techniques for making available to one person the tissue of another. Once that can be done, there is no more reason to deny to reusable human tissue the description 'materials' than there would be to deny that description to leather, intended to be made into shoes, or cat gut, intended for sutures.<sup>150</sup>

Several points need to be made. First, it is submitted that his Honour's conclusion is based on the fact that blood and blood products are now widely transferred from one person to another: that is, the ability to alienate blood has transformed blood into an article subject to supply and demand and therefore whose alienation or transfer can seriously affect the well-being of others.<sup>151</sup> Thus, like any other article capable of transfer, the conditions under which it may be transferred need to be regulated. The plaintiff sought such regulation through the consumer protection provisions of the *Trade Practices Act* and received little support from the Federal Court. Whilst Wilcox J conceded that blood might be 'materials', his Honour did not classify blood as 'goods', nor was the Full Court on appeal prepared to discuss the point.<sup>152</sup> The court's reluctance to embark on such a classification demonstrates, it is submitted, the conceptual difficulties which the common law has always had in considering bodies and body products as articles of commerce. Human blood, at least in this generation, is the most likely candidate (if any) for such a

<sup>148</sup> [1992] 1 VR 19, 40-2.

<sup>149</sup> (1991) 99 ALR 601 esp. at 645-6.

<sup>150</sup> Id 646.

<sup>151</sup> Note, however, that his Honour declined to find that the supply of blood was an act 'in trade and commerce' principally because the supply was gratuitous: id 641.

<sup>152</sup> Lockhart J, with whom Sheppard and Pincus JJ agreed, preferred to 'leave open the question [of] whether blood plasma can answer the description of "goods" for the purposes of the *Trade Practices Act.*': (1991) 105 ALR 53, 58.

classification because of its widespread use in transfusion and the treatment of other medical disorders. Although it has been viewed as separate from other types of human tissue,<sup>153</sup> the principle expressed by the Australian Law Reform Commission in 1977 needs still to be remembered, namely that:

In Australia, human tissue for transplant is habitually obtained by gift. . . . The [Australian Red Cross] Society has always obtained its blood and blood contents from voluntary donors, and expresses unequivocal support for the concept of voluntary donation and opposition to the concept of commerce in human tissue.

This notion that voluntary donation and not profit-driven commerce supports the transfer of blood in Australia is, it is submitted, evidenced in the Federal Court's refusal to apply the *Trade Practices Act* provisions to the Red Cross Society's supply of blood. Whether the grounds be that blood cannot be 'goods', or that the Society may not be a trading corporation, or that the Society does not operate in 'trade and commerce', or that there was no contract for the supply of goods or services, the overall view is that the Federal Court was reluctant to view the donation and subsequent transfusion of blood as an ordinary commercial transaction.

It is submitted that neither *E v Australian Red Cross Society* nor *PQ v Australian Red Cross Society* can be said to support the argument that human tissue is considered by the law to be property. In *PQ's* case, McGarvie J was dealing with a 'no case' submission on the question of the plaintiff being out of time, and the other elements of ss 74D and 74B were not raised for decision. In *E's* case, Wilcox J did not decide whether blood was 'goods' under s 74 and the Full Court explicitly left the question open. *E's* case in particular demonstrates an unwillingness by the Court to introduce commercial consumer protection notions into cases dealing with the donation and transfusion of blood. To assert this is not necessarily to leave institutions like the Red Cross without a remedy should their blood and blood products be damaged. The value of the storage and maintenance facilities for the blood would be recoverable, as would the cost of gathering new supplies. However, the blood itself could not be given a price. As Wilcox J said in *E's* case:

They [the third respondent] say, rightly, that in Australia it is not possible to put a price on blood plasma. Blood products are not sold in Australia.<sup>154</sup>

Unless the whole foundation of voluntary donation of blood is demolished, this will continue to be the case. And it is submitted that, until this occurs, what Wilcox J said must be correct in principle. For although blood may have

<sup>153</sup> The Australian Law Reform Commission (see Report no 7, *Human Tissue Transplants* (1977)) had originally expressed the view that blood should be treated separately from other human tissue donation: ALRC Working Paper no 5. Though the Commission changed its mind on this issue in its report (see p 17 of the 1977 Report), the Victorian *Human Tissue Act* 1972 s 6 excludes blood from the Part dealing with the donation of 'tissue' by living persons and the Act deals with it separately in Part III.

<sup>154</sup> (1991) 99 ALR 601, 645.

a value to its ultimate recipient, its 'value' in monetary terms to the collection agency is nil because they paid nothing for it. What a collection agency 'loses' in a monetary sense if its supplies are damaged or destroyed is the value of the storage and collection facilities and the cost of acquiring new supplies, both of which would be recoverable on well-established principles.

At common law then, Anglo-Australian courts have been reticent in employing a proprietary rights model as a solution to wrongs involving human tissue, and to date, such an exercise has also been unnecessary as the plaintiff or prosecution has had other existing remedies available to it.

### *ii) The legislative position: the Victorian model*

The pressing need to regulate the supply of organs and tissue for transplantation purposes resulted in the Victorian Parliament enacting the *Human Tissue Act* 1982 (Vic). It is submitted that, with one exception, the Victorian Act provides adequate protection to donors of human tissue and the introduction of a 'proprietary rights' model is unnecessary and undesirable.

In Victoria, 'tissue' is defined in s 3(1) of the *Human Tissue Act* 1982 as 'an organ, or part, of a human body or a substance extracted from, or from a part of, the human body'. By s 38 of that Act any sale of human tissue is an offence, unless made with a permit granted by the minister.

The Act provides procedures for the donation of tissue by adults (ss 7 and 8); by children in certain limited circumstances (s 15) and from dead persons (s 26(1)(c)–(e)). In the case of living adults, the donation may be of regenerative or non-regenerative tissue;<sup>155</sup> in the case of children the Act authorises only the removal of specified regenerative tissue.<sup>156</sup> The purposes for which the tissue may be removed are, in the case of regenerative tissue from living adults and any tissue from dead persons,

a) transplantation, and

b) 'other therapeutic purposes or for medical or scientific purposes'.<sup>157</sup>

In the case of non-regenerative tissue from adults and regenerative tissue from children, transplantation is the only authorised purpose.<sup>158</sup> In each case a medical practitioner may give a certificate verifying the capacity and freedom of the person to consent and verifying that the consent was, for want of a better phrase, an informed consent.<sup>159</sup> In the case of dead persons, the authority may be given by a 'designated officer' of a hospital,<sup>160</sup> or by a medical practitioner<sup>161</sup> or, in certain circumstances, by the coroner.<sup>162</sup> The giving of this authority, in conjunction with the actual consent of the person involved,

<sup>155</sup> *Human Tissue Act* (Vic) ss 7 and 8.

<sup>156</sup> Sections 14 and 15.

<sup>157</sup> Section 7; s 26.

<sup>158</sup> Section 8, s 15(1).

<sup>159</sup> Section 9, s 15(2).

<sup>160</sup> Section 26(1).

<sup>161</sup> Section 26(2).

<sup>162</sup> Section 27.



provides the legal authority for the removal of the tissue.<sup>163</sup> Section 44(1) of the Act states:

A person shall not remove tissue from the body of a person whether living or dead except in accordance with a consent or authority that is, under this Act, sufficient authority for the removal of the tissue by that person.

Penalty: 100 penalty units or imprisonment for six months, or both.

The penalties imposed are substantial. It is submitted that this section affords sufficient protection to the donors of tissue without the need to grant them proprietary rights over their tissue.

The Act in essence imposes three prerequisites on medical practitioners before tissue can be removed:

- i) that the 'nature and effect of the removal' be explained to the patient;
- ii) that the removal be for certain specified purposes;
- iii) that free consent be given by a patient with appropriate legal capacity.

Unless these prerequisites are met, the 'authority' given to remove the tissue could not be considered 'sufficient' under s 44, or even if it were, the removal would not be 'in accordance' with the authority. Further, s 44(4) makes it an offence, *inter alia*, to fail to make proper inquiries or to make a false statement on a certificate (for example, that the nature and effect of the removal had been explained when it had not). In combination, it is suggested that these sections protect donors from the possibility that their tissues will be abused or misused, or taken without consent. Criminal sanctions are, it is submitted, more appropriate than civil remedies in any event because the primary aim is to deter and punish such behaviour in the medical profession rather than to compensate donors in a financial sense for the loss of something upon which it is difficult to place a monetary value.

The submission that patients are adequately protected by a model such as the Victorian legislation is subject to one exception. The Act does not apply to the removal of tissue from a living person during an operation and the use or disposal of that tissue.<sup>164</sup> Section 42(1) states:

Nothing in this Act applies to or in relation to —

- (a) the removal of tissue from the body of a living person —
  - i) in the course of a procedure or operation carried out, in the interests of the health of the person, by a medical practitioner with the consent, express or implied, given by or on behalf of the person; or
  - ii) in circumstances necessary for the preservation of the life of the person;
- (b) the use or disposal of the tissue so removed . . .

In contrast to the particular provisions in the rest of the Act, section 42(1) casts a wide net. It appears to give substantial and flexible options for use of such tissue to those who remove tissue in the circumstances outlined. It is sub-section (b) that causes concern in situations like the one faced by John

<sup>163</sup> Sections 10 and 11, s 16, s 25.

<sup>164</sup> *Human Tissue Act* 1982, s 42(1).

Moore. The words 'use or disposal' are broad enough to cover all aspects of research, transplant and treatment involving human tissue.

The policy of an Act so clearly founded on notions of autonomy falls away shamefully in a section such as this. It seems an unnecessary concession to the medical profession in times where, as *Moore's* case demonstrates, many uses and advantages both commercial and medical, can be gained from removed tissue. Again, however, a grant of proprietary rights is not the only method of protection. A simpler and far less open-ended solution would be to redraft s 42(1) so as to require a medical practitioner to obtain a patient's consent to the use of removed tissue for medical research. If the consent cannot be obtained, whether because the operation is an emergency or for other reasons, then the tissue of that particular patient will not be available for research. In this way patients in situations such as *Moore* are given similar protection to organ donors, reinforced of course by offence provisions similar to s 44 of the Act.

## 2.5 Human embryos and foetal tissue

Circumstances involving foetal tissue and human embryos test the credibility of any proposed proprietary rights model in an extreme way. Courts, legislatures and the community already have difficulties keeping pace with medical developments in these areas and to pose the question now of whether foetal tissue and human embryos ought to become the objects of proprietary rights is to open yet another chasm of inquiry. This section will examine the policy and practical problems which a proprietary rights model might raise, and it will be suggested that the interests of all parties would be better served by continuing to adopt the notion of 'guardianship' that currently prevails in Victoria in this area.

### *i) Human embryos*<sup>165</sup>

No other type of human tissue raises as many questions as the human embryo. In fact, some might view it as a distortion of language to categorise a human embryo as a 'body part' at all. Nevertheless it has been suggested that human embryos ought to be regarded as property.<sup>166</sup> It will be submitted that the recognition of proprietary rights over human embryos is both objectionable and unnecessary.

Whilst opinions have differed and will continue to differ on the nature and status of a human embryo, there appears to be general agreement that an embryo's potential to develop into a living human being entitles it to be

<sup>165</sup> 'Strictly, the term "embryo" refers to that period of development between the fourth and eighth weeks after fertilization has occurred. However, in the debate surrounding IVF it has been used to describe the fertilized ovum.' NSW Law Reform Commission, *Artificial Conception Report 2: In Vitro Fertilization*, July 1988, xx.

<sup>166</sup> Matthews, *op cit* 226, who qualifies his suggestion by limiting it to 'genetic material' which 'does not result in the creation of a living human being' by which it must be assumed he means a child born alive. Magnusson, *op cit* 627 contends that 'it makes sense to regard the human embryo as a subject of limited property rights' subject to legislative safeguards.

treated distinctly from other human tissue.<sup>167</sup> It is this 'respect for human embryos'<sup>168</sup> which has guided the formation of limitations and regulations concerning what can be done to and with embryos. According a human embryo respect is not, it is submitted, compatible with classifying it as an object of proprietary rights. As earlier parts of this paper have demonstrated, the law has never been comfortable with the recognition of a human being, living or dead, perfect or malformed, as an object of proprietary rights because the notion of 'possessing' another another human being, in a proprietary sense, is inconsistent with principles of dignity, autonomy and respect for human life generally. The embryo may not be recognised by the law as having the legal status of a living human being until birth<sup>169</sup> but its potential to become a living human being gives it a special status, acknowledged as different even from other human tissue,<sup>170</sup> and certainly as distinct from chattels in a commercial sense. Indeed, the prospect of embryos becoming a transferable item in a commercial sense is one reason that expert committees have refused to acknowledge the role of property concepts in relation to embryos.<sup>171</sup>

Secondly, it is not necessarily correct to interpret either the use of such words as 'belong' in the reports of expert committees<sup>172</sup> or the consent provisions of various IVF legislation, as evidence that the law prefers to adopt, or has adopted, a 'proprietary' model in relation to human embryos. There have been some parallels drawn between the parent/child relationship and the donor/embryo relationship in the sense that the former may be considered guardians over the latter, the latter being unable to express in the eyes of the law any valid consent to actions undertaken by others in relation to them.<sup>173</sup> In this sense an embryo may be said to 'belong' to the persons whose gametes created it, just as a child belongs to a parent and so the parent is entrusted with the right and the responsibility of making decisions on behalf of that child. It is properly characterised as a guardianship type of relationship, not a proprietary one. The consent provisions which are fundamental to the scheme of the *Infertility (Medical Procedures) Act 1984* (Vic) are consistent with this

<sup>167</sup> See Victoria, Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilization (The Waller Committee), *Interim Report* September 1982, paras 5.7, 5.8.6; *Report on the Disposition of Embryos Produced by IVF* August 1984, paras 2.18, 3.27. Even the members of the medical profession represented on the Waller Committee (who produced a dissenting report on the issue of research on embryos) acknowledged, albeit in a somewhat self-contradictory way, that 'Sanctity of Life' principles did apply to human embryos: see pp 76-77 para C2.3 of the 1984 report.

<sup>168</sup> See B Gaze and K Dawson, 'Revising IVF and embryo research regulation in Victoria' (1992) 66 *LIJ* 995, 997.

<sup>169</sup> See *Watt v Rama* [1972] VR 353 where the court stated that a defendant's duty of care in negligence to a child who at the time of the negligent act was *in utero* arises only when the child is born; *id* 360.

<sup>170</sup> NSW Law Reform Commission, *Artificial Conception Report No 2: In Vitro Fertilization* July 1988, para 3.15.

<sup>171</sup> See the comments of the Waller Committee in its 1984 Report, para 2.8.

<sup>172</sup> For example, the National Health and Medical Research Council (NHMRC) principles, cited by the NSW Law Reform Commission in its report, *op cit* 12, the principle being expressed as: 'sperm and ova should be considered to belong to the donors'.

<sup>173</sup> See NSW Law Reform Commission Report 1988, *op cit* 88; Waller Committee Report 1984 *op cit* 27.

approach. The requirement that, for example, the donors consent to the carrying out of any 'experimental procedures' carried out on an embryo<sup>174</sup> is not because that embryo is a chattel which the donors transfer by gift to the researcher, who then obtains a set of proprietary rights over it, but rather because the fate of that embryo is 'the primary responsibility of the couple whose gametes have been used to form the embryo'.<sup>175</sup>

The consent provisions of the IVF legislation thus attempt to fulfil this guardianship role assigned to the donors. The use of the word 'responsibility' in the quotation from the Waller Committee report is significant: it is more appropriate to view the donor-embryo relationship as one involving responsibilities rather than 'rights' as such. For if the human embryo is an 'independent and unique human entity, and not . . . a mere means to an end',<sup>176</sup> then the notion of obligation, of responsibility towards that entity on the part of those whose gametes created it, is far more appropriate than a model which views the embryo as a chattel, an article of transfer which is capable of having a monetary value attached to it if it is damaged or destroyed.

Finally, a proprietary model, as well as being objectionable, is also unnecessary. Commentators have expressed concern about the position of donors if embryos should be damaged, destroyed, or interfered with in ways for which no consent has been given.<sup>177</sup>

However, the *Infertility (Medical Procedures) Act* 1984 (Vic) prescribes a series of offences which are designed to ensure that the medical profession remains within the bounds both of the Act itself and of any donors' consents which have been given.<sup>178</sup> In the absence of legislation such as the Victorian model, donors might possibly be able to rely on ordinary negligence principles if they could establish damage; perhaps damage in the nature of nervous shock or economic loss and even physical damage if the destruction of the embryos meant they would have to participate further in the IVF program in order to conceive a child. Donors might also be able to recover damages for breach of contract if the hospital and IVF team had contracted to use and dispose of the embryos according to certain terms which were not subsequently observed.

In reality, however, discussion of what legal remedies might be available (or in the case of property rights 'need' to be available) in the *absence* of controlling legislation is highly artificial. It is submitted that the history of IVF research and regulation in Victoria, and indeed throughout Australia and other common law countries, demonstrates a clear trend towards *increased* legislative intervention, not a *withdrawal* of legislative involvement. It is difficult to imagine how, given the level of community concern and interest in IVF, the medical profession in Victoria could ever return to operating an IVF program without a legislative framework. Such legislation as exists in Victoria is more appropriate than any proprietary rights model because it both embodies protection for donors and embryos by the creation of legislative

<sup>174</sup> *Infertility (Medical Procedures) Act* 1984 (Vic) s 9A.

<sup>175</sup> Waller Committee Report 1984, op cit 32.

<sup>176</sup> *Ibid.*

<sup>177</sup> Magnusson, op cit 625.

<sup>178</sup> *Infertility (Medical Procedures) Act* (1984) Vic ss 5 and 6.

sanctions, and also employs what this article has submitted is a concept of guardianship rather than ownership.

## ii) Foetal tissue

The use of foetal tissue for transplantation is still properly classed as experimental.<sup>179</sup> However, the ghoulish revelation has already been made that aborted fetuses in the US have sold for \$A6835 and could generate a four billion dollar business.<sup>180</sup> Foetal tissue is specifically excluded from Part II of the *Human Tissue Act*,<sup>181</sup> although tissue from a foetus more than 20 weeks old might be classified as tissue from a 'deceased person' under s 26 of the Act.<sup>182</sup> In that case the consent of the 'next of kin' — presumably the parents — would be required before the tissue could be used.<sup>183</sup>

The problem with considering foetal tissue as 'property' raises in combination the worst aspects of the property debate concerning other human tissue and concerning human embryos. On the one hand the debate concerns human tissue capable perhaps of playing an instrumental role in relieving patients from debilitating disease.<sup>184</sup> On the other, this tissue must be taken, not from a 'person' who has expressed valid consent to such a use for his or her tissue, but from an entity, not yet recognised by the law as a person<sup>185</sup> but with the potential to be born alive and receive that recognition. Since foetal tissue is obtained through the process of abortion, if one is to apply proprietary concepts, they ought to be applied at the stage of the abortion itself. It has been suggested<sup>186</sup> that the foetus itself cannot be said to possess the proprietary interest and that the interest must therefore rest in the mother. If she consents to the use of some tissue, is she to be seen as 'abandoning', in a proprietary sense, the remainder of the foetus so that a stranger (or finder) may assume new and enforceable rights over it? The application of such language when dealing with a human entity is unpleasant, to say the least. Is the mother to be allowed to sell the tissue? This is altogether a different issue from *Moore's* case since in these circumstance we may be dealing with the intentional destruction of a human entity<sup>187</sup> and subsequent profit from the sale of parts of that entity. It is suggested that such a scenario has even less to commend it than that already proscribed in Australian human tissue legislation, namely the sale of one's own tissue.

<sup>179</sup> See G L Morgan 'Is there a Right to Fetal Tissue Transplantation?' (1991) 10 *University of Tasmania Law Review* 129, 135.

<sup>180</sup> L Skene 'Fetal tissue and the law' Paper presented to the Monash University Centre for Human Bioethics Conference *The Fetus as Tissue Donor: Use or Abuse* 25 October 1989, Royal Australasian College of Surgeons, Melbourne, at 14.

<sup>181</sup> *Human Tissue Act* (Vic) 1982, s 5, relating to donations of tissue by living persons.

<sup>182</sup> See Skene, op cit 2.

<sup>183</sup> Unless s 26(e) applied and the next of kin could not be located. But query whether s 26(e)(ii) could apply to a foetus which is incapable of ever having expressed the objection contemplated by the sub-section.

<sup>184</sup> For example, Parkinson's disease, although it is by no means well established that there are clear benefits to patients in its use: see Morgan, op cit 133-6.

<sup>185</sup> *Watt v Rama* [1972] VR 353.

<sup>186</sup> Magnusson, op cit 628.

<sup>187</sup> That is, unless a spontaneous abortion is involved.

If foetal tissue does become a source of worthwhile and positive contributions to medical science, then a guardianship approach, much as was suggested for IVF, is more appropriate than a proprietary one. Such an approach assumes that the vexing question of the community's — and the law's — attitude on abortion has been resolved. The regular use of aborted foetuses as a source for tissue will undoubtedly rekindle the 'abortion debate', if it can ever be said to have diminished. Consent (whether it should be that of only the mother, or also the father of the foetus is a further issue) ought to be the basis on which foetal tissue is to be taken and used. However, it is consent given as a guardian, as the holder of responsibilities in relation to the foetus, not as an owner with 'dominion' and 'rights' over the foetus.

## CONCLUSION

According a person proprietary rights is but one method of protecting that person's interest in an object. There is no characteristic of human tissue which makes it intrinsically incapable of becoming property in a conceptual sense. However, granting proprietary rights over an object inevitably draws that object into the commercial arena as the value in granting such rights lies in the ability of the subject to transfer ownership of that object for reward.

The decision in respect of human bodies and human tissue thus becomes a clear policy choice: do we, as a community, want our law to allow human beings and their tissue to be drawn into the world of commerce as clearly John Moore thought they should? Historically, Anglo-Australian courts have not considered it to be in the interests of public policy that human beings (dead or alive) or parts of human beings should be able to be lawfully possessed by others. Similarly, Australian courts, legislatures and law reform bodies have not considered it desirable or appropriate that human beings and their tissue become the objects of commercial transactions.

John Moore's challenge to these traditional objections failed, largely, it is suggested, because of his desire to profit from his tissue. There is not necessarily any correlation between the need to protect people in John Moore's situation from the potential excesses of the medical profession and medical researchers and the 'right' (as John Moore perceived it) of people to be able to profit from their tissue. The former is a laudable enough aim which does not require the application of property principles; the latter is not a goal which Australian law at least has ever embraced.

Jackson<sup>188</sup> describes the division of legal systems into subjects and objects: the former being the holders of rights, interests and duties enforceable by a legal system; the latter being the 'things' in which a subject may have an interest enforceable by a legal system. If an argument such as the one Moore made were to succeed, what have until now been the 'subjects' of our legal system are threatened with becoming its 'objects'. Characterisation of human beings as objects in our legal system was not an outcome contemplated by

<sup>188</sup> Jackson, *Principles of Property Law* (Melbourne, Law Book Company, 1967) 6–7.

Jackson.<sup>189</sup> At a basic level, it is this outcome which is responsible for the common law and legislative objections to treating the body as property which this paper has discussed.

'Rights' of autonomy and self-determination and responsibilities towards other human beings or potential human beings can be adequately realised through branches of the law other than the law of property. The concept of one human being owning another is one which the Anglo-Australian courts rejected two centuries ago. It is not one which needs reviving.

<sup>189</sup> Id 7.