Chapter 9

Legal matters : claims of people from whom tissue is removed

Summary

In general, a person from whom tissue is removed has no interest in making any claim to the removed tissue. There have, however, been recent exceptions. The most celebrated is the Californian case of John Moore. Moore attempted to claim an interest in products developed by using tissue from his body on the basis that he had a property right in the tissue. The court decided that Moore had no such property rights. It left open the question whether he could claim on the basis that he had not consented to his tissue being used in this way.

English law is silent on the issue of whether a person can claim a property right in tissue which has been removed. The traditional view has been that a body is not property. This view has been the subject of recent debate, however, especially when parts of the body are concerned. The Polkinghorne Committee took the view in its report on the use of fetal tissue, that a woman having an abortion must give express and unconditional consent to the use of the tissue of the aborted fetus. The effect of the consent was that if there were any claim to the tissue, it was thereby abandoned. The Human Fertilisation and Embryology Act equally adopted a scheme of consents so as to avoid addressing the issue of property. Donors of gametes and embryos must consent to the storage and licensed use and disposal of those gametes and embryos.

The question remains open, therefore, whether in certain circumstances the English courts would uphold the claim of someone from whom tissue had been removed. Any such claim should, however, proceed on the basis of the consent given to the removal rather than any claim in property. The likely approach would be that where tissue is removed in the course of treatment, consent to the treatment will entail the abandonment of any claim to the tissue. Where tissue is voluntarily donated any claim will be based on the terms of the donation. There is one problem, however, with this approach; the case of the incompetent adult. Such a person cannot give consent whether to treatment or to any donation. A scheme based on consent cannot apply and special consideration needs to be given to the circumstances under which tissue may be removed and what claims may be made to it once removed.

Introduction

9.1 In this chapter we examine the question whether someone has or retains any claim over tissue removed from his body. There is no need here to deal with the living separately from the dead since any claim, if it exists, would be the same though enforceable in the latter case by the deceased's estate.

9.2 By way of introduction, it should be noticed that the **traditional** view is that the common law does not recognise any right of property **in a body**. This traditional view is derived from a number of nineteenth century (and earlier) cases having to do with the disposal of and interference with dead bodies. The cases refer to a dead body but the principle is thought to be equally true as regards a living body, hence slavery is unlawful. Even if these cases represent the law, it is important to analyse the scope of the traditional view and its relevance here, not least because our concern is with parts of the body rather than the body as a whole, and with claims made by the person from whom the tissue is removed rather than by others. In particular, we are anxious to determine the legal basis on which any claim could or should be based.

9.3 No claim by statute is available to the person from whom tissue is removed. Indeed, the implication of the Human Tissue Act 1961, the Human Organ Transplants Act 1989 and the Anatomy Act 1984, though it is not expressly stated, is that the tissue removed pursuant to these Acts is given free of all claims, ie is an unconditional gift. The Human Fertilisation and Embryology Act 1990 is less straightforward. Donors of gametes or embryos may impose conditions on use and may vary or withdraw any consent given. By adopting a scheme of consents, however, the Act avoids vesting any property claim in the donor.

9.4 At common law, the issue has not been tested in English law. It is instructive to enquire why the question of a claim over tissue once removed has not received legal attention. The answer seems simple. In the general run of things a person from whom tissue is removed has not the slightest interest in making any claim to it once it is removed. This is obviously the case as regards tissue removed as a consequence of treatment. It is equally true in the case of the donation of tissue whether, for example, blood, bone marrow or an organ. The word donation clearly indicates that what is involved is a gift.

9.5 It is certainly true, of course, that an appendix or gallstone may be returned to a patient who may refer to it as **her** appendix or gallstone. But this says nothing about any legal claim she may have to the appendix. In fact, in the case of the returned appendix, one view of the legal position may be as follows: the patient consents to the operation which involves the removal of her appendix; by her consent to the operation she **abandons** any claim to the appendix; on removal the appendix acquires the status of a *res* (a thing) and comes into the possession of the hospital authority prior to disposal; in response to a request by the patient that it be

returned, the hospital gives the appendix to the patient as a gift; the appendix then becomes the property of the patient.

9.6 While what has been said about the lack of interest of the patient in the fate of tissue removed from him may be true, some have enquired whether a claim to tissue which has been removed can be advanced in certain circumstances. One such circumstance is the use of fetal tissue subsequent to an abortion. Does a mother, it may be asked, have any claim to the tissue? The report of the Polkinghorne Committee did not claim to resolve the question.[1] Instead, it provided for a scheme whereby the woman has to give explicit and unconditional consent to the use of the fetal tissue before it may be used. The same scheme of consents, circumventing the need to resolve questions of property and ownership, was employed in the Human Fertilisation and Embryology Act.

9.7 But there are other circumstances in which the question posed in paragraph 9.6 may arise. In some circumstances, it could be argued, and has been by a number of commentators,[2] that tissue once removed becomes the property of the person from whom it is removed. This is to say that consent to removal does not **entail** an intention to abandon. The tissue may well, in fact, be abandoned or donated, but these imply a prior coming into existence of a *res* and the exercise of rights over it. Indeed, such an analysis is logically essential, it is argued, even if the resulting property (ie a person's assertion of a property right over the new *res*), exists merely for a moment (a *scintilla temporis*). On this view the person from whom tissue is removed must have a property right in the tissue which expressly or by implication he could waive on removal so that the property passes to another. The consequence is, of course, that if the property right were not waived, it would be retained. To return to the example in paragraph 9.5, the appendix would have become (and remained) the patient's property had she not by implication waived any right to it.

9.8 The case of *Venner v State of Maryland*[3], decided by the Court of Special Appeals in Maryland, USA, may be of assistance. Powers J held that, *"By the force of social custom . . . when a person* ***does nothing and says nothing to indicate an intent to assert his right of ownership, possession, or control over*** *[bodily]* ***material****, the only rational inference is that he intends to abandon the material"* (our emphasis). The implication of this approach is clear.

1 The legal presumption is in favour of abandonment.

---

1 Polkinghorne, J *et al* (1989) **Review of the Guidance on the Research Use of Fetuses and Fetal Material** London: HMSO

2 See, for example, B Dickens, (1992) **Living Tissue and Organ Donors and Property Law**, 8 The Journal of Contemporary Health Law and Policy, p 73 and material cited therein.

3 *Venner v State of Maryland* (1976) 354 A 2d 483 (Md CA)

2 Abandonment may be prospective.

3 Where, however, the circumstances are such that abandonment may not be presumed, it must follow that if no consent were given, or a consent expressed to be 'on terms', were given, property rights over the tissue **would not necessarily** pass but would be retained by the person from whom the tissue was removed.

9.9 It is fair to say that some support for this property approach can be derived from the various statutes already referred to. While we have seen (in paragraph 9.3) that no claim arises by reference to these statutes, the approach to tissue adopted by them may assist in understanding the current state of the common law. While the Human Tissue Act 1961 is of no assistance, both the Human Organ Transplants Act 1989 and the Human Fertilisation and Embryology Act 1990 appear to endorse a property approach. Indeed, the latter, although relying upon a scheme of consents so as to avoid the need to decide the issue of property, contemplates that the control and disposal of gametes and embryos rest with the donor(s) and allows for the transfer of the reproductive material between those having a licence to deal with them. A final statutory provision, s.25 of the National Health Service Act 1977 also seems implicitly to adopt a property approach. The section provides that:

> *where the Secretary of State has acquired:*
>
> *(a) supplies of human blood . . . or*
> *(b) any part of a human body . . .*
>
> *he may arrange to make such supplies or that part available (on such terms, including terms as to charges, as he thinks fit) to any person . . .*

The statutory language is, therefore, that of things, of property, of the reification of blood and body parts.

9.10 The Working Party of the Law Reform Commission of Canada[4] outlines this conflict between the traditional view that there is no property in a body and the view that those from whom tissue has been removed may have some claim to it:

> *Does the no-property rule encompass living donors? In Canada [and for our purposes English law can be taken to be the same] there appears to be no case that specifically addresses the issue. In cases in the United States, the courts have tended to apply the no-property rule to tissue disputes involving living donors, although there are recent trends to the contrary. . . .*

[4] Law Reform Commission of Canada (1992) **Procurement and Transfer of Human Tissues and Organs** Working Paper 66

Cases in the United States have arisen over the discarding of donated or deposited human tissue without the consent of the patient-depositor. In two cases, one involving lost eye tissue that was being examined for cancer and another involving the disposal without consent of reproductive matter in an infertility clinic, courts have avoided resolving patients' damages claims in terms of property. Instead, they have preferred to analyse them in terms of mental shock or distress to the patient. Those cases seem to suggest that some courts in the United States have extended the no-property-in-a-corpse rule to a no-property-in-bodily-parts rule.

Commentators have critiqued the no-property-in-bodily-parts tendency for living donors. Some jurisdictions significantly limit nervous shock claims. It is argued that even when nervous shock claims and damages are available, they do not address instances when the return of valuable human tissue or material is sought. The suggestion is that property concepts would better protect an individual's autonomy and person, in addition to clarifying legal rights and duties regarding the control of human tissue in particular circumstances. For example, when an institution destroys valuable human tissue without consent in a jurisdiction that limits mental damages, common law property principles concerning the destruction or spoilage of materials rightfully in one's possession might prove helpful in defining legal rights, duties and grounds of recovery.

The issue of rights and duties regarding the control and transfer of human tissues has arisen most acutely in some recent cases involving human reproductive material. While there are no reported Canadian cases on this point, an American couple was recently successful in litigating the control of and right to transfer their frozen embryo from an east-coast infertility clinic to a west-coast clinic.[5] *In France, the wife of a deceased sperm depositor argued that she had a right to her husband's frozen sperm, which he had deposited for preservation after learning that he would undergo cancer treatments that risked making him sterile.*[6] *The court expressly rejected the argument that frozen semen was property, on grounds that human reproductive material was neither inheritable nor an object of commerce. Nevertheless, it ruled that the sperm bank must return the frozen semen to the wife of the depositor, as a result of an understanding between the depositor and the sperm bank. That decision suggests that agreements between tissue banks and depositors, as reflected in well-drafted informed consent forms, might help to minimize disputes over the control of deposited tissues, in the absence of legislation or professional standards that sufficiently address the issue.*

Disputes over reproductive substances are helpful in identifying concerns and values at issue in potential disputes over other human tissue and substances. For example, the growth in tissue banking may make the rights and duties in controlling other deposited, valuable human tissue a more prominent medical-legal issue. Consent forms for autologous blood banking in Canada have referred to deposited blood in terms of property, as have professional protocols for the banking of reproductive and genetic materials in the United States.

---

5 *York and Jones* (1989) 717 F S Supp 421 (ED Va)

6 *Parpalaix v CECOS* Gaz.Pal.1984.2e sem.jur.560

9.11 So far, we have noticed the following as possible legal approaches to any claims made by the person from whom tissue is removed: either

1 consent to removal entails abandonment; or

2 on removal, property rights vest in the person from whom it is removed. It is presumed that these are abandoned, but they can be retained.

A further legal approach is to argue that tissue once removed becomes property, but at the time of its removal it is *res nullius*, ie that it belongs to no-one until it is brought under dominion (the traditional legal example is the wild animal or plant). This would reflect the traditional view of *"no property in the body"*. It would also mean that a person could not prospectively donate "his" tissue, once removed from his body. All he could do would be to consent to the removal. If this analysis were adopted, the tissue would be the property of the person who removed it or subsequently came into possession of it. The person from whom it was removed would not, however, have any property claim to it.

9.12 The current state of English law makes it unclear (at best) which of these approaches (or another) represents the law. Interest in the validity of property claims over removed tissue has, however, been rekindled because of an awareness of circumstances in which tissue has been removed and then developed in some way so as to serve as the basis for a commercial product. The *locus classicus* is the well known *Moore* case,[7] which has already been referred to (paragraphs 2.15 - 2.16 and Appendix 1). In *Moore*, the Supreme Court of California, trying a preliminary point of law, decided that Moore had no property rights in the tissue taken from his body. Although not expressed in such a way, if we impose the language that we have employed, the court appears to have found that Moore's consent to the operation entailed an abandonment of any claims over the removed tissue. Thus, he could not assert a claim in property as the basis either for objecting to the removal of his tissue or for having a share in whatever profit was gained through its use. The issue of the validity of the consent he gave to the operation and subsequent procedures then became the focus of the case.

9.13 It is not easy to predict whether an English court would adopt the Supreme Court of California's conclusion. Certainly, the reasons advanced by the majority of the court for rejecting Moore's property claim are somewhat unconvincing. The majority found that there were three *"reasons to doubt"* Moore's claim, all of which Mosk J sharply criticised in his dissenting judgment. The first was the absence of precedent. Mosk J's response was that the Supreme Court was there precisely to make law when necessary. The second was that the matter was more appropriately for the legislature, a view which Mosk J said was out of place in a decision of the

[7] *Moore v Regents of the University of California* (1990) 13P 2d 479)

highest court, one of whose roles was to develop the law. The third was that the patent granted to the University of California preempted any claim Moore might have. But, the grant of the patent did not mean, according to Mosk J, that Moore could not share in any profits arising from it. Notwithstanding these weaknesses, the **conclusion** of the Supreme Court, if not the reasoning, may recommend itself, not least because of the consequences of adopting the alternative. For, if the alternative approach were adopted, and a potential property claim recognised, the consequences could be far-reaching. Consent to even the most minor procedures would have to refer to possible property rights in removed tissue and seek a waiver of such rights. Patients might be encouraged to bargain over tissue (if thought to be unusually valuable, for example, for research). Agencies to negotiate such bargains might appear and research may be impeded in a welter of contractual arrangements.

9.14 Of the various approaches referred to, therefore, it may be that a preferable approach for the English courts would be the following:

1 It will be entailed in any consent to **treatment** that tissue removed **in the course of that treatment** will be regarded in law as having been abandoned by the person from whom it was removed;

2 tissue removed **in circumstances other than treatment,** which is **voluntarily donated**, will be regarded as a gift. Use for purposes other than those for which consent was given could give rise to a claim on the part of the person from whom the tissue was removed. Such a claim will depend on the terms of the original consent;

3 where tissue is removed voluntarily but is intended to be kept **for the donor,** for example autologous blood donations, the donor will be able to claim the tissue by virtue of the agreement under which it is kept. (The donation of gametes and embryos is subject to a specific statutory framework of consents regulating *inter alia* the giving and withdrawing of consent to use);

4 where tissue is removed without **explicit** knowledge and consent, any claim the person from whom it was removed may have as regards the subsequent use of that tissue will turn on the validity of any general consent which may have been given, ie as to whether removal and subsequent use of the tissue could legitimately be said to be implied.

9.15 From this summary it will be seen that, on the reasoning proposed, legal claims may be open to persons from whom tissue is removed. It is suggested they should properly proceed on the basis of the consent given to the procedure which resulted in the removal, or its absence, rather than a claim in property (see the reference in paragraph 9.10 above to the Parpalaix case by the Canadian Working Party). It may be important, however, to add a rider. It will be recalled that in the case of an

incompetent adult, no-one is authorised to consent on his behalf to treatment, let alone to subsequent use of left-over tissue, nor to any non-therapeutic removal and subsequent use of tissue. As regards removal in the course of treatment and use thereof, unless such use was in the patient's best interests, as, for example, being necessary for a proper diagnosis, it is difficult to see how a consent scheme can adequately deal with any claim that the adult himself, if he later regains competence, or someone else on the incompetent adult's behalf, may subsequently make concerning use of his tissue. (Removal of tissue in a non-therapeutic context and use thereof may not currently arise if the view prevails that such removal is outside the law) (paragraphs 7.9 - 7.10).

9.16 One response would be that tissue should not be removed from incompetent adults, save when it is genuinely in their therapeutic interests. Otherwise, if tissue were removed, it could be open to the adult or a *"next friend"* on his behalf to pursue a claim. The success of such a claim would depend on a court finding that there was a property right in the removed tissue which the adult, being incompetent, could not waive or abandon and which a guardian charged with acting in the incompetent adult's best interests may not be able to waive either, since to do so could be to give away something of potential value to the adult. We have earlier doubted that a court would adopt the property approach. Indeed, we would recommend that it should not. But the possibility exists. Given the legal difficulties posed by this particular situation, the optimal solution would be to legislate that no property rights inhere in a person from whom tissue is removed. This, however, would require Parliamentary time and effort.

9.17 A middle course may be to rely upon the ethical analysis advanced earlier (paragraphs 6.27 - 6.28) and propose that in the case of the incompetent adult, the courts should regard it as legally justified in the public interest to use tissue taken from an incompetent adult even though no consent can be obtained, provided, of course, that such use was itself a justifiable use. This would prevent the particular circumstances of the incompetent adult from serving as a means of resurrecting any property right in tissue. Any such proposal would, however, have to be attended by appropriate safeguards to ensure that there was no exploitation of this class of person. It will be recalled, however, that the Law Commission in its recent report doubted the current legality of such an approach (paragraph 7.9).

9.18 So far discussion of property rights has concentrated on rights over the actual tissue that is removed. It is important to recall that a person may also claim an entitlement to share in any benefits arising from the exploitation of the tissue removed and, where relevant, any consequent intellectual property rights. Abandonment and donation, however, do not ordinarily give rise to intellectual property rights. We defer a systematic examination of claims to intellectual property and patent issues until Chapter 11 (and see, in particular, paragraph 11.32).

9.19 Finally, it must be emphasised that these views and conclusions are advanced without any case law to rely upon. They are, therefore, tentative. If it is thought desirable that the law should be clarified in such a way as to reflect the conclusions reached, due attention must be given to the proper means of achieving this (paragraph 1.19).