Chapter 10

Legal matters : claims of users

Summary

Does someone who makes use of human tissue have any claim over the tissue? More specifically, can a body, or part of a body once separated, be viewed as the property of the user? Traditionally, the law has held that human corpses are not property. There is, however, a duty to effect a decent burial and a corresponding right to possession of the corpse for that purpose. In rare cases, urine and blood samples needed for sobriety tests have been removed from police stations. These have led to convictions for theft, indicating that body waste and tissue may be treated as property. Whether anatomical specimens of human tissue can be considered property has been the subject of much debate. The law remains unclear on this issue.

Despite the lack of clarity, it is probable that the user of tissue acquires at least the right to possess, and probably a right of ownership over, the tissue. The question then arises whether the law recognises any limitations on the users of tissue as to what can be done with it. One important issue is that of commercial dealing in human tissue. Statutes restrict commercial dealing in organs, gametes and embryos. The legality of commercial dealings in other tissue is not clear, and some clarification is desirable.

Introduction

10.1 In Chapter 9 we discussed whether or not the person from whom tissue is removed may have a property right in the tissue. Whatever view is taken, it does not follow that the user (broadly defined) has no such right. The tissue once removed comes into the possession of the remover and may then be passed to others. The nineteenth century doctrine that a body may not be property would suggest, however, that no possessory nor property right vests in the user of a body or, arguably, parts of a body. In this chapter we examine the claims users may have over human tissue.

10.2 The Canadian Working Party helpfully summarised the background to the doctrine of no property in a body as follows:

> *Both the common and the civil law have traditionally maintained that the human corpse is not the subject of property. The sacrosanct nature of the dead human body understandably traces much of its origins to religious custom. The* ***Civil Code of Lower Canada*** *refers in burial matters to dead bodies as "sacred by their nature." Similarly, the*

common law no-property rule is traced to sixteenth- and seventeenth-century English case law and Sir Edward Coke's commentary that burial matters were within the domain of the Church, and the burial of cadavers is nullis in bonis (among the property of no one). As the courts of England began to hear matters formerly within the jurisdiction of the courts of the Church, they imported Coke's statement into English jurisprudence concerning dead bodies.

Despite the no-property rule, the common and civil law still recognized a number of interests that continue to enjoy legal protection today. For example, although the common law did not grant an absolute right to the control of one's body after death through one's will, it and the civil law have long recognized one's right to a decent burial. To effect the deceased's right to a decent burial, the law imposed on the deceased's executor or family a duty of burial and a corresponding right to possession of the decedent's body for burial:

> *In Canada [as in England], this duty of burying a dead body falls upon the executors of the deceased's estate. In the absence of a will naming executors, the right to possession for burial goes to the surviving spouse . . . If no spouse survives, the right belongs to the next of kin.*

Some courts and jurisdictions refer to the right of possession as a "quasi-property" right. It empowers spouses or the next of kin who are wronged by interference to sue for damages. The essence of such suits is damages for injury to the emotional or mental tranquillity of the next of kin, in the legal form of the wrongful infliction of emotional distress. Thus, instances of interference with the right of possession arise in diverse cases, including the negligent handling or transporting of dead bodies, the withholding of a body for payment of funeral expenses, the unauthorized removal of hair from the deceased by a funeral home, the withholding of a body for an unreasonable length of time to determine organ donor status and the mutilation of the deceased during the course of an unauthorized autopsy.

10.3 The early twentieth century Australian case of *Doodeward v Spence*[1] is often cited as authority for the no property rule. *"There can be no property in a human body, dead or alive. I go further and say that if a limb or any portion of a body is removed that no person has a right of property in that portion of the body so removed"*, per Pring J. On appeal to the High Court of Australia the judgment of Griffith CJ in the New South Wales Court of Appeal decided that if some work was carried out on the body part, for example to preserve it, which changed the part, then it could acquire the characteristics of property and be subject to property rights.[2]

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1 *Doodeward v Spence* (1908) 6 CLR 406

2 The case is described in Skegg, P. (1976) **Human Corpses, Medical Specimens and the Law of Property** 4 Anglo-American Law Review 412 as follows:

> *[The case of Doodeward v Spence involved an action for conversion] and detinue . . . [of] the corpse of a two-headed child. The child had died before birth in New Zealand 40 years earlier, and its mother's doctor had taken the body away with him. He preserved it in a bottle of spirits, and kept it in his surgery as a curiosity. On his death the specimen was sold by auction. The successful bidder was Doodeward's father, from whom it passed to Doodeward. The bottle and its contents were seized under warrant, for use in*

10.4 By contrast to the view of Pring J, Stephen expressed the view[3] that anatomical specimens could constitute personal property. More recently, as Magnusson points out[4] *"there are a handful of English decisions in which human tissue has been treated as property."* He cites criminal cases where a defendant was convicted of theft (as well as assault) when he cut a quantity of hair from a woman's head[5], where a defendant poured a urine sample he had given to establish his sobriety down the sink and was convicted of theft[6], and where the defendant was convicted of theft when he removed the blood sample, taken for the same reason, from the police station[7]. The last two cases, albeit that the point was not directly discussed in either case, suggest that property vested in the police. Admittedly, two of these cases involve hair and urine, neither of which are, strictly speaking, tissue, but if they are treated as property, *a fortiori*, so would what we define as tissue by virtue of its identification as an organised collection of cells and the tangible quality such identification

criminal proceedings, in which Doodeward was prosecuted for publicly exhibiting the specimen for gain, 'to the manifest outrage of public decency'. At the conclusion of the prosecution, in which Doodeward had pleaded guilty, the judge refused to order that the corpse be handed back to him. Doodeward then commenced proceedings to recover it. He was non-suited in a District Court on the ground that there was no property in the subject matter of the action. He appealed, first to the Supreme Court of New South Wales, as the District Court of Appeal, and then to the High Court of Australia. By the time the case reached the High Court, the bottle and spirits had been returned to him. However, the corpse was retained at the University Museum, on behalf of the defendant, a Sub-Inspector of Police.

In the High Court, all three Judges accepted that immediately after death a corpse is not the subject of property. However, the Judgment of Griffith, CJ, with which the other judge who made up the majority expressed his agreement, can be interpreted as laying down that a corpse can be so changed that it becomes the subject of property. Griffith, CJ, took the view that, at least in Australia, it was not necessarily unlawful to retain a corpse for a purpose other than immediate burial. He laid down a proposition which applied to those cases where a person had, by the lawful exercise of work or skill, so dealt with a corpse in his lawful possession that it had acquired some attributes differentiating it from a mere corpse awaiting burial. In these cases, he said, the person acquires a right to possession of the corpse or part thereof - at least as against anyone who is not entitled to have the object delivered up to him, for the purpose of burial. Griffith, CJ, said he did not know of any definition of property which was not wide enough to include such a right of permanent possession. He said that, so far as this right constituted property, a corpse or part thereof is capable by law of becoming the subject of property. Applying his principle to the case before him, Griffith, CJ, said that the evidence showed that the body had come 'not unlawfully' into the doctor's possession, that ' some -perhaps not much - work and skill had been bestowed by him upon it', and that it had acquired an actual pecuniary value. He allowed the appeal.

3 Stephen, J F (1883) **History of the Criminal Law of England**

4 Magnusson, R S (1992) **18 Melbourne University Law Review** p 601, at 616

5 *Herbert* (1961) **25 J Criminal Law** 163

6 *R v Welsh* [1974] RTR 478

7 *R v Rothery* [1976] RTR 550

suggests.[8] Finally, it must be recalled that Broussard J in his dissenting opinion in the *Moore* case (paragraphs 9.12 - 9.13), wrote that *". . . the majority's analysis cannot rest on the broad proposition that a removed part is not property, but . . . on the proposition that a* ***patient*** *retains no ownership interest in a body part once the body part has been removed"* (our emphasis).[9]

10.5 Reflecting on the lack of clarity in English law, Professor Peter Skegg examined the question of whether anatomical specimens and tissues are the subject of property. Discussing *Doodeward v Spence* nearly 20 years ago, he wrote:

> *One drawback of Griffith, CJ's principle is the difficulty of its application. If the principle were adopted in England, it would no doubt apply to Egyptian mummies in museum collections and probably also to shrunken heads, or heads which had been tattooed after death. But much more difficult would be the question of whether it would apply to anatomical specimens, and tissues and organs awaiting transplantation. If the English courts were prepared to apply the principle in the same way as the majority of the High Court of Australia in Doodeward v Spence these objects might very often be considered the subject of property. However, when dealing with an object on which no more labour or skill had been expended than was on the corpse in Doodeward v Spence, which had simply been placed in spirits, an English court might favour the approach of the dissenting Judge in Doodeward v Spence. He said that "No skill or labour has been exercised on it; and there has been no change in its character." It would be better to find a principle which applies more naturally to parts taken from corpses for medical purposes, and indeed, in some circumstances to whole bodies. To find such a principle, it is desirable to look to Scots law.*
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> *Scots institutional writers, and dicta in the Court of Justiciary in Dewar v H M Advocate [1945 JC 5] support the view that in Scots law a corpse is the subject of property (and can therefore be stolen), until such time as it is buried or otherwise disposed of. Buried corpses are now perfectly adequately protected by the common law crime exemplified in R v Sharpe (1857) Dears & B 160 at 163, which is the English equivalent of the Scots crime of violation of sepulchres. Where English law is inadequate is in the rather limited protection it extends to corpses or parts of corpses prior to burial or cremation. This inadequacy could be overcome by the courts taking the view that, until such time as a corpse or part thereof is buried, cremated, or otherwise disposed of, it is the subject of property. Unburied corpses, and anatomical specimens and transplant material removed from corpses, would then be protected by, amongst other things, the crime of theft and the tort of trespass to goods.*
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> *It would be desirable for the English courts to go further than Scots authority yet does, and take the view that it is only while corpses or the remains of corpses are buried, or dispersed following cremation, that they are not the subject of property. This would enable the courts to extend more effective legal control, not only over corpses awaiting burial and cremation, but also over ashes which had not been buried or dispersed, and human remains which had been disinterred.*

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[8] See further Matthews, P. **Whose Body? People as Property** [1983] 36 Current Legal Problems 193

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

10.6 The continued absence of clear legal authority admittedly leaves the law uncertain. It is suggested, however, that common sense as well as the common law require that the user of tissue acquires at least possessory rights and probably a right of ownership over tissue once removed. It cannot plausibly be argued that University College London does not own Bentham's skeleton. *Mutatis mutandis*, a hospital which has tissue in its possession, for example for transplant, has such property rights over the tissue as to exclude any claim of another to it, as does a coroner or pathologist who has carried out a post-mortem and retains body parts for examination. Equally, it would follow, they have the right to recover the tissue if it were taken without permission. The same must also be true of those who operate a tissue bank or an archive of specimens used for research or teaching.

10.7 To conclude that the user acquires property rights over removed tissue does not, of course, mean that the user can then do whatever he likes with the tissue. English law is familiar with the notion of constraints on what an owner may do to or with property. A dog is a chattel, but it cannot lawfully be harmed gratuitously. A tree is property but, if subject to a conservation order, must be dealt with in a particular way. In the case of tissue which has been removed, the question arises as to whether the law recognises any limitations on the exercise of property rights and if so, what. Perhaps the limitation of greatest concern to us has to do with commercial dealing in tissue.

Commercial dealings

10.8 We have seen that the Human Organ Transplants Act 1989 (HOTA) makes commercial dealing in organs (as defined) a crime (paragraph 7.3). Internationally, there is a growing body of legislation and other guidance that prohibits commercial dealing, or trafficking, in organs (paragraph 2.21). Equally, s.12(e) of the Human Fertilisation and Embryology Act 1990 provides that *"no money or other benefit may be given or received in respect of any supply of gametes or embryos unless authorised by directions."* By directions made by the Human Fertilisation and Embryology Authority (HFEA Directions 1991/2) individual donors of gametes may be paid up to a maximum of £15 for each donation plus any reasonable expenses incurred. Provision for the payment of donors of gametes is a reflection of existing practice when the HFEA was established. The value of any payment is limited by the HFEA, however, and the intention is eventually to phase out payment completely.[10] Licence-holders who supply other licence-holders with gametes or embryos may only be paid their reasonable expenses. The effect of these provisions is to prevent trade in human gametes and embryos. Directions by the Secretary of State for Health, pursuant to s.25 of the National Health Service Act 1977 (paragraph 9.9), restrict

[10] Human Fertilisation & Embryology Authority (1993) **Second annual report** p 29

charges made by blood transfusion centres for blood and blood derivatives to reasonable handling charges, with no charge to be made for the blood or derivatives.[11]

10.9 Apart from these specific statutory provisions, does the common law regard tissue as something *extra commercio*, ie would commercial dealings be regarded in law as having no force? Would a court, in other words, declare any purported commercial contract to be a contract contrary to the public interest, *(contra bonos mores)*. It is by no means clear whether commercial contracts dealing with, for example the purchase of blood or other tissue, are currently entered into and if they are whether, if challenged, they would be upheld in law. Thus the true question for the law is whether some line can be drawn identifying those arrangements which are acceptable and those which are not, perhaps by analogy with the prohibition of commercial dealings of HOTA or HFEA or s.25 of the NHS Act 1977. It may be noted that the Recommendation on Human Tissue Banking of the Council of Europe's Directing Committee on Public Health specifically recommends that all activities associated with the banking of human tissue *"should be carried out by non profit-making institutions*".[12] Arguably, in keeping with the ethical analysis offered in Chapter 6, (paragraphs 6.38 - 6.40), the distinction which suggests itself is between non-profit making arrangements involving intermediaries, such as tissue banks, which could be accepted as lawful, and profit making open-market arrangements, which could be regarded as having no legal validity. Clearly, some kind of clarification is desirable.

10.10 Additionally, as has been noted, there are problems, particularly in the area of intellectual property rights, which are associated with the commercial advantage which a user may derive from the use of tissue. Advances in biotechnology have increased the consequent desire to protect the commercial investment in, and potential for profit from, developments using human tissue. This makes the concern of the users of tissue for some clear guide as to their rights that much more pressing. We return to this in detail in Chapter 11.

[11] National Blood Transfusion Service, National Health Service Act 1977, Directions of Handling Charges (1992)

[12] Recommendation N° R(94)1