

This response was submitted to the consultation held by the Nuffield Council on Bioethics on Give and take? Human bodies in medicine and research between April 2010 and July 2010. The views expressed are solely those of the respondent(s) and not those of the Council.

Heather Widdows and Sean Cordell

Question 29

Response to the Nuffield Consultation Document by Heather Widdows and Sean Cordell, University of Birmingham, UK Question 29 of the consultation paper asks: "What degree of control should a person providing bodily material (either during life or after death) have over its future use? If your answer would depend on the nature or purpose of the bodily material, please say so and explain why." Taking as an example the Yearworth case mentioned elsewhere in the paper (Section 6), we make two responses. Firstly, the kind of control a person should have over their bodily material depends crucially on the purpose and context of their providing it to a third party. Secondly, the legitimacy of a person's control over the usage of their bodily material should not entail or depend on the claim that the material is their 'property'; at least not in anything like the legal sense of the term. In the Yearworth case, six men stored their sperm prior to undergoing treatment for cancer in case they proved to be infertile after the treatment. The sperm was not properly stored and as a result was inadvertently destroyed. The men sued the NHS Trust that stored the sperm, losing in the first instance but subsequently having their claim upheld by the Court of Appeal. There is no doubt that the men had a reasonable expectation of control over the future potential use of their sperm, and that the NHS had a corresponding duty to meet this expectation and failed to do so. Furthermore, it is clear that they and/or their future interests suffered as a result of and hence that they deserved compensation in some form. However, we contend that the basis on which compensation was awarded in the ruling, namely that the men's property – their sperm – had been damaged, is erroneous and undesirable in terms of its possible consequences. To begin with the question of control: In this particular kind of case, persons should have control over the material's future use by virtue of the circumstances under which it was stored. This is unlike other cases, for example the donation of blood for medical emergencies (e.g. to the NHS). In the blood donation case, whilst there are constraints here on usage that are inherent in the transaction, such that e.g. the blood be used only for medical purposes, a blood donor relinquishes most if not all control of their blood, by virtue of providing it for usage on as yet unspecified procedures or persons. This is not so in the Yearworth case, where the express purpose of the men's providing the sperm was to facilitate their use of it, post chemotherapy, according to their will. Control over bodily material was in this case quite legitimately presupposed by the context in which the men provided it and the NHS stored it. However, that the men were entitled to exercise control over their sperm in this way does not support the judgment that the sperm was their 'property': nor vice versa, i.e. a property judgment is not needed to recognize the fact that the men should have control over the material. On the contrary, the specific nature of this case renders a proprietary analysis unsuitable. Underlying the

'property' ruling is the notion that the proprietor has a right to compensation in the case of it being damaged or destroyed by a third party – as one would if one's car or furniture was so damaged or destroyed. To deem the sperm 'property' in this way is seemingly to deem it 'transferable' material in the legal sense, and under this view, it would seem that the NHS destroyed property with which they had been entrusted or been 'loaned'. However if it is the right to control one's bodily material which is supposed to bring with it a legitimate claim to property, then in this case it invites the possibility of similar property claims from others. In this way it could be argued, for example, that the NHS had a similar kind of property claim over the material – albeit perhaps a temporary one – due to the exclusive control which they had over it whilst it was stored. For in this particular case, the sperm, having left the men's bodies, remained viable only by virtue of its being stored by this third party and their agreement to do so. And if control over bodily material somehow entails a property claim on it, then it seems that the NHS also had the foundations of such a claim. Thus, where this kind of ownership conception in general already controversial in the case of body part per se (and where traditionally in law there has been 'no property in the body'), it is particularly problematic in the case of a body part that is no longer physically part of or 'possessed' by its body, is no longer at the disposal of the person in whose body it resides, and which has – in these property terms – been temporarily transferred to a third party. A different way of conceiving property in this context is as a 'bundle of rights'. This view of property rights may be a plausible one to take in some cases, a most famous example being John Moore's in the USA, where his (ultimately unsuccessful) claim to 'property' might best have been seen as a claim to benefits and profits derived from a lucrative cell line which a third party had taken from Moore's spleen. Here, the rights that come into play under the term 'property' are primarily to do with benefits accrued from future usage of the material, to which the original donor, arguably, has an entitlement. However, given the details of the Yearworth/NHS case, the problems discussed above do not go away with the adoption of a bundle of rights account. This is because the particular 'bundle' of rights relevant to this case are those to do with the relation between the men and the reason they provided the sperm, rather than with entitlement to share in future benefits gained by a third party to whom bodily material was given. Taking the 'bundle' view of property in the Yearworth case, it might be thought that property should be seen as the men's set of rights to (i) possess (ii) use (iii) manage the material as they saw fit. But as we have seen, regarding (i), insofar as the men could be held to possess the material, it had in this case been relinquished or transferred temporarily to the NHS. Similarly the rights to use (ii), and management (iii), appear to be at the very least shared between the men and the NHS (and at most temporarily abrogated: i.e. transferred by the men to the NHS). To reiterate, compensation for the destruction of the men's sperm was entirely appropriate. However, it is more plausible to think that a reasonable expectation of the men – of a preservation of their control over the sperm – was not honoured than it is to assert that their 'property' was destroyed. And in light of the concerns

about property we contend that, in cases such as Yearworth's, the moral force of the claim to have control over bodily material is in the reasonableness of the men's expectations as regarding their intentions, and a corresponding duty of the NHS to honour those expectations. Moreover, because the Yearworth judgment itself looks for the grounds for compensation in precisely the wrong place – in destruction of property rather than in a breach of trust, contract or failure to deliver what the men could reasonably expect of the NHS – it risks continuing a trend towards the commodification of body parts and, arguably, therefore in many cases the commodification of persons. This is to say that talk of and judgments in terms of ownership in cases of this kind – even for good intentions and to bring justice – can encourage us to think of parts of people as exchangeable things and use accompanying market rhetoric. This claim about the tendency to commodification is of course a general and contested one, but it has a particular focus in this case. For here, the problem is not simply that a legal precedent has been set which sets in motion a train of other such judgments that in turn promote commodification: that may or not be the case. Rather, if the distinction between control and property just outlined is correct, then the Yearworth case does not accommodate analysis in terms of property at all. Hence, if the ruling sets a precedent, it has set it at the 'inappropriate' end of the property judgment spectrum along which other less clear, more or less appropriate, cases might lie. To be clear, the objection to the ruling is not a dubious argument by which this particular judgment – possibly benign in itself – sits at the top of a 'slippery slope' toward commodificatory attitudes and practices. Rather, it sees the judgment as already at the foot of the slope. This final point also serves to reject one possible defence of the Yearworth judgment, namely that whilst the concept of property may be conceptually misapplied, its applicability can nevertheless be redeemed to some extent by its practical simplicity or neatness.