

1

Introduction

IMOGEN GOOLD, KATE GREASLEY, JONATHAN HERRING and
LOANE SKENE

Over the last four decades, the question of whether proprietary rights ought to be exercisable in relation to human body parts has been a matter of ongoing debate in both the Anglo-Australian courts and the academic literature, with legal academics, philosophers, ethicists and sociologists, among others, weighing in on a wide range of questions raised in the debate. A series of decisions in the UK and Australian courts have fuelled this debate, evidencing a movement towards some acceptance of limited property rights in some kinds of tissue. The Australian High Court decision in *Doodeward v Spence* (1908) saw the common law recognise that at least a possessory interest in human tissue could arise following the lawful application of work and skill to preserve it. A string of cases in the 1990s and early 2000s cemented the place of this ‘exception’, while parallel statutory regulation came in the form of the new Human Tissue Act (UK), enacted in 2004 as a result of extensive organ-retention inquiries, most notably at the Alder Hey and Bristol hospitals. The new Act included a provision to mirror the *Doodeward* exception, lending it legislative force.¹

The law’s position, therefore, seemed fairly certain but remained highly contested, with many criticisms raised by commentators on all sides of the body-ownership debate. In 2009, the decision by the UK Court of Appeal in *Yearworth and others v North Bristol NHS Trust* (2009) brought a new dimension to the debate by supporting a move towards a broader, more principled basis for finding (or rejecting) property rights in tissue. Consequently, the debate over whether human bodies and their parts should be governed by the laws of property has accelerated.² In the light of the *Yearworth* decision and a number of Australian

¹ Human Tissue Act 2004, s 32(9)(c). Shaun Pattinson has argued that, in fact, the whole of the Act takes a property approach, while Jonathan Herring and P-L Chau argue that the provision reflects an assumption that biomaterials are not generally property. J Herring and P-L Chau, ‘My Body, Your Body, Our Bodies’ 15 *Medical Law Review* 34; SD Pattinson, ‘Directed Donation and Ownership of Human Organs’ (2011) 31(3) *Legal Studies* 392–410.

² See, eg S Harmon and G Laurie, ‘*Yearworth v North Bristol NHS Trust*: Property, Principles, Precedents and Paradigms’ (2010) 69(3) *Cambridge Law Journal* 476–93; N Prialux, ‘Managing Novel Reproductive Injuries in the Law of Tort: The Curious Case of Destroyed Sperm’ (2010) 17(1) *European Journal of Health Law*, 81–95; SHE Harmon, ‘*Yearworth v North Bristol NHS Trust*: A Property Case of Uncertain Significance?’ (2010) 13(4) *Medicine, Health Care and Philosophy* 343–50; C Hawes, ‘Property

decisions that arguably follow a similar approach, a collection of chapters on the many issues raised within this debate seemed timely.³ This was particularly the case given the increasingly broad range of ways in which human biomaterials are used, and the new values they have acquired, as many of the chapters in this collection evidence.⁴

In this collection, we bring together legal academics, philosophers and sociologists from both the UK and Australia to delve into the detail of the merits or otherwise of a property approach to the regulation of human biomaterials. The collection comprises an assortment of contributions that address the broad doctrinal and theoretical questions, and also drill down into some of the highly specific legal issues implicated in the body-ownership debate. However, we wanted to do more than merely present a collection of views on the question of whether property law is the right mechanism for regulating human biomaterials. From the start, we committed ourselves to a collaborative process, in which all authors would be invited to review one another's work with a view to promoting cross-fertilisation of ideas across the chapters. Authors were also encouraged to reference one another's work, and respond to arguments put forward by other contributors to the collection. Our goal, through this collaborative process, was to produce a collection that encapsulates the body-property debate, and allowed contributors both to present their views, and address those with whom they both agreed and disagreed.

Why Property?

We have called our collection *Persons, Parts and Property: How Should We Regulate Human Tissue in the Twenty-First Century*, putting the property question at the front and centre. Many of the chapters in this collection, however, eschew what we call a 'property approach' to the regulation of biomaterials, preferring the law of consent, or a new legislative scheme.⁵ Why, then, did we make the application

Interests in Body Parts: *Yearworth v North Bristol NHS Trust* (2010) 73(1) *MLR* 130–40; L Skene, 'Proprietary Interests in Human Bodily Material: *Yearworth*, Recent Australian Cases on Stored Semen and Their Implications' (2012) 20(2) *Medical Law Review* 227–45; J Wall, 'The Legal Status of Body Parts: A Framework' (2011) 31(4) *Oxford Journal of Legal Studies* 783–804; M Pawlowski, 'Property in Body Parts and Products of the Human Body' (2009) 30 *Liverpool Law Journal* 35. See also R Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (Oxford, Hart Publishing, 2007); RN Nwabueze, 'Donated Organs, Property Rights and the Remedial Quagmire' (2008) 16 *Medical Law Review* 201; C Fabre, *Whose Body is it Anyway? Justice and the Integrity of the Person* (Oxford, Oxford University Press, 2008); AV Campbell, *The Body in Bioethics* (Oxford, Routledge-Cavendish, 2009); D Dickenson, *Body Shopping: Converting Body Parts to Profit* (London, Oneworld Publications, 2009).

³ *Bazley v Wesley Monash IVF* [2010] QSC 118; *Jocelyn Edwards; Re the estate of the late Mark Edwards* [2011] NSWSC 478.

⁴ See also Imogen Goold, 'Why Does It Matter How We Regulate the Use of Human Body Parts?' (2014) 40 *Journal of Medical Ethics* 3.

⁵ By 'property approach' we mean recognising that biomaterials can constitute items of property at law, and hence individuals can exercise property rights in relation to them.

of property concepts the focus of our collection? The reasons are in part historical. The roots of Anglo-Australian case law lie in string of cases beginning (some argue) in the seventeenth century. Goold and Quigley trace this line of cases in their chapter. By the nineteenth century an entrenched prohibition on regarding the human corpse as an item of property had emerged, often referred to the ‘no property in a corpse’ rule. However, in the early twentieth century the High Court of Australia took the first step away from this approach when faced with the question of how to deal with a claim in detinue for the return of a two-headed foetus preserved in a jar that had been used as an exhibit for some decades. In a landmark decision that has attracted a great deal of attention (and criticism), the court held that the showman who exhibited it had sufficient possessory rights to maintain his claim, and that a corpse of this kind could be subject to such rights if the application of lawful work and skill had transformed it into something other than a corpse awaiting burial.⁶ This approach would later become known as the ‘work and skill exception’ to the prohibition on the ownership of a corpse.

There was little development in the Anglo-Australian jurisprudence until a series of challenging situations came before the UK courts from the mid 1990s onwards. Over the course of these decisions, detailed in Goold and Quigley’s chapter, the ‘work and skill’ exception was cemented as good law in the UK.⁷ These cases attracted considerable academic attention, not least because of the unclear ambit and jurisprudential foundations of the exception. During this period it became increasingly apparent that the regulatory frameworks in both countries were insufficiently broad to effectively manage the expanding uses of human tissue, and the reactive approach of the courts in the cases that came before them was creating as many problems as it was solving. By gradually introducing a partial property approach, the UK courts were being swayed by the appeal of dealing with biomaterials as property without (understandably) accounting for the wider context in which their decisions were operating. These problems were exacerbated by the burgeoning use of biomaterials in research, the new challenges raised by markets in those materials, and the increasing privacy concerns created by more widely and cheaply available genetic testing. New uses for biomaterials in the fields of stem cell research, the growing culture of biobanking and the emergence of commercial ventures offering direct-to-consumer testing and storage of umbilical cord blood fostered an ever more complex matrix of issues. In Australia, the Human Tissue Acts that had been passed in the early 1980s to manage organ transplantation were becoming dated. Similarly, following the organ retention revelations of the early 2000s, the UK’s 1967 Human Tissue Act was clearly in need of overhaul to bring it into line with modern views on the appropriate way to regulate biomaterials. However, like the Australian legislation, it was drafted to cover a particular context (the research context) and as a reaction

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

⁷ *Dobson and another v North Tyneside Health Authority and another* [1996] 4 All ER 474; *R v Kelly* [1998] 3 All ER 741; *AB and others v Leeds Teaching Hospital NHS Trust* [2004] EWHC 644 (QB).

to a newly recognised concern (the retention of organs). In both jurisdictions, an effective, comprehensive regulatory scheme was sorely lacking.

This lacuna was tested when, in 2008, six men sought compensation for the psychological harm they suffered upon learning that the semen they had stored to preserve their fertility before undergoing radiation treatment had been negligently destroyed. The facts of *Yearworth* are explored in detail in (among others) Skene's chapter in this collection, and they will not be rehearsed here. The case drew attention from the academic community for two main reasons. First, as already noted, it arguably represented a step towards a more broad-based property approach.⁸ Secondly, it brought the limitations of the current framework to the fore, as the Court of Appeal found itself faced with the lacunae many commentators had been highlighting in the preceding years, unable to accommodate the men's claim within damages for personal injury or breach of contract. It dealt with the problem by finding that the men could be considered to have property rights in their semen, and hence could bring a claim in bailment. It explicitly moved away from the 'work and skill exception' and adopted what some consider a more principled approach to determining when property rights over biomaterials might be found.

The *Yearworth* decision influenced the Australian courts in a number of other cases concerning the use of semen, holding in each that the widow of a deceased man could be entitled to possession of the man's stored semen for use in reproductive treatment.⁹ As Skene points out in this collection, 'in both of those cases, as in *Yearworth*, the judges discussed the application of principles of bailment, which in turn involved a finding that bodily material can be property and that people may sometimes have property rights in their own bodily material'.¹⁰

In contrast to the judicial approach in these cases, the legislative frameworks in both Australia and the UK are arranged around the principle of consent to use of biomaterials, providing direction on what kinds of uses of biomaterials are permitted and when the consent of the person from whom they were taken will be required for that use. As the case law continues to develop alongside these legislative instruments, a growing tension has emerged. As they continue to diverge in their approach, the law has become less coherent in its attempts to manage all the many and varied ways in which biomaterials are used, and the numerous conflicts that arise over that use. It is for this reason that this collection focuses on the notion of property, because we are coming increasingly closer to a situation in which these tandem approaches cannot work together effectively. If the courts continue down the path they appear to have chosen, the case law will diverge still further from the legislative frameworks in place, and conflicts between the two are

⁸ See Goold and Quigley, ch 15 in this volume, but also cf Luke Rostill, 'The Ownership That Wasn't Meant To Be: *Yearworth* and Property Rights in Human Tissue' (2014) 40 *Journal of Medical Ethics* 14.

⁹ *Bazley v Wesley Monash IVF Pty Ltd* [2010] QSC 118; *Jocelyn Edwards*; *Re the estate of the late Mark Edwards* [2011] NSWSC 478; see also, *Re H, AE (No 2)* [2012] SASC 177; *Re Section 22 of the Human Tissue and Transplant Act 1982; ex parte C* [2013] WASC 3.

¹⁰ Skene, ch 15 in this volume.

inevitable. For example, we can already see how this divergence may have implications. The Human Tissue Act in the UK recognises the work and skill exception, but is silent on the potentially wider basis for finding that human biomaterials are property developed in *Yearworth*. It is, therefore, not clear whether biomaterials found to be property in accordance with the decision in *Yearworth* will fall within section 36(9) of the Act. We may well see further conflicts if the courts' approach to the rights of individuals over their tissue do not reflect the provisions of the legislation, such as those uses for which consent is (and is not) required. It is also untenable to develop two regulatory approaches that are meant to work together, but increasingly divergent on the essential question of the legal status of biomaterials.

A question one might ask at this point is why the courts have chosen to go down the path of a property approach. Some of the chapters in this collection explore this point, outlining some of the appeal of property law as a means of regulating biomaterials. Douglas, Goold and Quigley, and to some extent Stewart et al, present a case for a property approach, arguing variously for the applicability of property as means of regulating dealings over a thing. Conversely, Skene, Wall and Herring draw out some of the problems with a property approach.

Themes

With these concerns in mind, the chapters in this collection work through the issues currently facing us in this area. The body as property debate ranges over numerous areas of concern: ownership rights in gametes, organ shortages, donations, sale of body parts and black markets, and technological advancements with the use of cell lines and patenting problems. The debate is also engaged with philosophical questions about the nature of the self and personal identity, and how these affect how we should deal with biomaterials. The chapters in this collection cover many of these issues, including research use of human tissue, organ markets, patent issues, moral rights and the law relating to tissue, banking of tissue and umbilical cord blood, and biobanking.

Questions about how to appropriately regulate human tissue often centre around its use in the medical research context. Three chapters in this collection provide valuable discussions of this aspect of the debate. Nicol et al provide an overview of the ethical and legal issues raised by the use of human tissue in the research context, and consider how the property law model might apply there. They examine the various ways that human tissue is used in research, with particular focus on newly emerging technologies. Following a description of the existing ethical and legal frameworks for regulating the use of human tissue in research, they provide an introductory critical analysis of the pros and cons of the current regulation, followed by an exploration of the extent to which property law

would provide a more or less suitable framework for regulating research uses of human tissue.

Stewart et al build on this background by introducing a particular area of growing concern: biobanking. As they note, in the twentieth century the practice of biobanking has grown to become a major component of education and research in the healthcare sector. However, the practice raises a number of ethical and legal concerns including issues of consent, problems of unanticipated findings, and issues of control and access. They argue that applying the law of gifts is essential to unpacking the problems of biobanking. Stewart et al outline another area of key, current interest: umbilical cord blood (UCB) banking. Such banking raises particularly vexed issues because of the interplay of public and private interests. While both public and private researchers have interests in the access to UCB, so too do individuals who may want to store UCB for their own benefit. They consider the question of how we should balance these various demands on UCB, arguing that the best model to draw upon is to treat the public UCB bank as a form of public property similar to Crown land, mineral resources, timber or native fauna. Dickenson picks up on the possibility of a commons approach to biomaterials when she examines the aim of the online genetic testing service 23andMe to create a research biobank from the tissue samples sent in by its customers and from the subsequent epidemiological and lifestyle questionnaires that customers are also asked to complete. She argues that the notion of the commons, and of the 'corporate commons' in particular, could be seen as a powerful and practical tool for ensuring that restrictive genetic patenting does not impede rather than assist clinical biomedicine.

These chapters begin to demonstrate how the debate around regulation of human biomaterials is interwoven with multiple, complex themes. The first is the importance of consent and the autonomy of the person who is the source of the biomaterials. The second is the tension between these concepts and the demands of the community, which has an interest in the benefits of research. We can also include the research community and various kinds of commercial ventures in this area of tension. Concerns about commercialisation and commodification are also important themes that cut across much of the debate in this area. For some, property is synonymous with commodification, and hence worries about treating parts of people as commodities are also criticisms of taking a property approach. Worry about the harm that will result from allowing financial exchanges for human materials are a key issue in the debate over regulation. The ethics of commercial markets in biomaterials is explored in Greasley's chapter.

We might wonder why the body–property debate has continued so long without resolution. Why is there such a divergence of views? It is important to note is that while there is disagreement about the *way* to regulate, for the most part there is not a great deal of disagreement over the *goals* of regulating. Most commentators agree that there is a need protect and promote individual autonomy in relation to human biomaterials, although they disagree on the extent of such protection. It is also widely agreed that supporting medical research is important.

Such research requires access to biomaterials, and few in the debate would argue that we should prevent access entirely. It is when these demands conflict that some explanation of the divergence can be seen. A strong commitment to individual autonomy in this context can lead to a desire for legal controls that ensure individual, rather than community needs, determine when access to biomaterials can be obtained. It is on this basis that some, such as Herring, resist a property approach, on the ground that it may (depending on the incarnation) place individual control over tissue above other demands. It is concerns of this kind that lead some, such as Dickenson, to argue for conceptualising biomaterials as a community resource in some contexts.

However, the main reason for the divergence within the debate rests on differences of opinion about which is the best legal mechanism to balance these competing demands; and there is no easy answer to this, as the chapters in this collection demonstrate. For example, while some, such as Herring, argue that a legislative framework might be the most effective solution given that it can be shaped to accommodate the particular issues raised by human biomaterials, Bennett Moses rightly flags some of the problems that beset the creation of new regulatory schemes. Conversely, Douglas and others in this collection point to the logic of including biomaterials in the scheme of legal protections that manage our dealings with things. While this point stands, it is rightly open to the concerns raised elsewhere in this collection about the problematic implications of so doing, of the kind explored by Skene and Wall. Bennett Moses addresses some of the concerns about imposing a property framework on biomaterials, arguing that the application of property law will not necessarily lead to the kind of dire outcomes, such as markets in organs, that some suggest.

There is also the question of what should be driving our approach to the issues in this area. Should it be pragmatism? Should we take an instrumental approach that promotes the best outcomes for research or for the community? Or is it more important to produce a framework that is underpinned by coherent jurisprudence? What is the relevance of the ethical debate around issues such as the harms of commodification, or the value of altruism? There are many ways of framing the questions in this debate, and many ways of approaching them.

Perspectives

The issues arising can (and should) be considered from a range of perspectives. From a legal perspective, we can consider the regulatory questions at the macro-level, thinking about the extant legal frameworks that could accommodate rights in human bodily material, and the obstacles that might be encountered when employing them for this purpose. To this end, some in this collection, such as Skene, consider the application of existing frameworks based on consent and privacy, while others, such as Quigley and Goold, Douglas and Stewart et al, approach

the question from the other side, analysing the potential application of property principles. Herring proposes deploying a specifically targeted legislative framework. In addition to such overarching explorations, some chapters in this collection also focus on the fine-grained detail of some of the legal questions. For example, Nwabueze directs his attention to the question of remedies, while Goold provides a detailed analysis of the application of the concept of divesting abandonment and Stewart et al consider the application of the law of gifts.

Approaching the regulatory question purely from a legal perspective will be insufficient in the context of human biomaterials. Tissue removed from the human body is, for many reasons, not like anything else. It has symbolic significance. It has psychological significance, as the experience of the aftermath of Alder Hey made abundantly clear. It carries personal information about the person from whom it was taken, and about their family members. How we treat that tissue arguably has implications for how we think about and treat people. Therefore, it is important to take account of the ethics of how we deal with biomaterials, and our regulatory approach should be reflective of the many values inherent in those materials, as well as our own values as a community. Herring and Dickenson both touch on these aspects of community value in their chapters, with Herring also arguing that only legislation can really provide a sufficiently nuanced approach to adequately reflect and protect the complex personal and social interests in body parts. In opposition, Goold and Quigley argue that property can capture such interests, and in some instances provide better protection.

It was never our intention to produce a collection that came to a single, agreed conclusion. But we also wanted to do more than simply present a range of views and leave it to the reader to choose from among them. We hoped to explore our areas of disagreement, but also to discover points on which we concurred, or might be able to come to some consensus. In the conclusion, we draw together the perspectives in this collection and distil these areas of agreement and otherwise to present a number of potential approaches to the question of how to regulate biomaterials. We hope that, in doing so, we have taken a step closer to resolving this debate, and so come nearer to finding a means for the law to manage the many interests in, and uses of, biomaterials in a manner that best captures all of our concerns and goals.