Property in human body parts

A. INTRODUCTION

Considering the question of whether human body parts and tissues fall within the purview of property law involves both traditional and new thinking on theories of property and property law. It necessarily requires an exploration of precedent, as to understand the current debates around the regulation of human bodily material in the courts, one must appreciate the foundational legal position against which current decisions are made. The expanding uses of body parts, and challenges in regulation that emerged over the twentieth and twenty-first centuries, have also created new thinking on how we might understand the legal status of human biomaterials. Judicial decisions both in this country, and Australia and the United States, provide numerous examples of how property-based thinking has created a new way of regulating body parts, although not without giving rise to considerable debate in both the courts and scholarship.

This chapter is framed around two thematic questions. First, it examines why the question of whether property concepts apply to body parts has emerged. It explains how the historical development of the rule against ownership of a corpse over the seventeenth, eighteenth and nineteenth centuries constrained the ways in which later courts could address disputes over body parts. It then explores the twentieth and twenty-first century case law to outline and elucidate the numerous complex and varied challenges the use of body parts presented to the courts. Over the course of these decisions, the courts moved towards restricting the impact of the prohibition on the ownership of corpses to carve out some solutions to these challenges.

The second thematic question then naturally arises: should the law treat human body parts as property? This section critically evaluates why and how the courts drew on property law concepts in addressing these challenges, and considers whether this approach is the right way for the law to move forward. It outlines both some valuable aspects of approaching the regulation of body parts in this way, and some downsides. It also argues that in some contexts, the resort to property law principles is indicative of deeper lacunae in the law and in medical ethics and that these challenges have left the courts reeling for solutions to difficult questions about who may use human biomaterials and how.

B. WHAT ARE ‘BODY PARTS’? AND WHY ARE THEY IMPORTANT TO PEOPLE?

The law until the twentieth century was largely concerned with the status of corpses. However, in considering the uses to which human materials are put in the twenty-first century, we need to look well beyond the ‘corpse awaiting burial’ of older cases. In this chapter, the terms ‘human biomaterials’ and ‘human tissue’ refer generally to material taken from the body to be used,

encompassing whole organs and amputated limbs through to blood samples, hair, and blood, and in some contexts, gametes (ova and sperm). While there has been some specific exploration of the ownership of *genetic* material, which often means DNA extracted from human biomaterials, this chapter will not explore the very particular issues examined in that debate.[1]

It is clear from our practices around burial and prohibitions on interference with corpses, including public decency offences, that human biomaterials are considered valuable and surrounded by sensitivities. This is evident in reactions to the revelations of organ and tissue retention in the early twenty-first century, as well as in the efforts being made by Indigenous communities around the world to ensure the repatriation of human remains, so that they can be treated in a culturally appropriate manner. Recent discourse about the fate of Charles Byrne, the Irish Giant whose body was on display, offers some valuable insights into thinking around the sensitivity and importance attached by people to bodies and their parts.[2]

Running in tandem with these sensitivities, however, is the impact of human ingenuity, which has over the centuries found multiple (and rapidly increasing) uses for body parts. For centuries, real teeth and hair have been used to make replacements for those who have lost their own. From the eighteenth century onwards, the whole deceased body became profoundly valuable as an object for dissection, to reveal the mysteries of the human body. In this period, parts of bodies were removed from cadavers and expertly dissected, and then preserved to enable medical students to study their structures and come to understand the workings of the body. Many of these remain in museums to this day.

Since that time, uses have diversified and expanded. Now, human biomaterials are used in all sorts of contexts. In the context of medicine, discoveries in the field of transplantation, including overcoming the problems of rejection, meant that parts of deceased bodies could be transplanted into the living in cases of medical necessity. Living donations of kidneys, liver and lung are also possible. In fact, more than just organs can be donated, such as blood, plasma and bone marrow. Post-death, bone, skin, eyes and many other bodily structures and tissues can be removed and given to others to improve their health or even save their lives. We also use these biomaterials to make therapeutics that treat disease and other conditions.

Tissue is often removed for testing, such as when a disease is suspected, or to uncover information about a person's predisposition to a condition. This is why a blood sample is taken from almost every child and tested for a range of genetic conditions such as Phenylketonuria (PKU), as a means of

[1] Ownership of genetic material was considered by the Australian Law Reform Commission in its 2002 report, *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC Report 96). The application of *intellectual* property regimes to human biomaterials has also been considered: Justine Pila, 'Intellectual Property Rights and Detached Human Body Parts' (2014) 40 *Journal of Medical Ethics* 2.
[2] Len Doyal and Thomas Muinzer 'Should the skeleton of "the Irish giant" be buried at sea?' (2011) 343 *British Medical Journal* d7597; Orla O'Donovan, '"The Irish giant" and the questions haunting medical museums' (2023) 381 *British Medical Journal* p1221.

screening for diseases that can treated if caught early. Tissue is also taken and tested in criminal contexts (such as alcohol testing) and as part of forensic investigations. Many people have their tissue tested to determine whether they are genetically related to someone else, or as part of a search into their origins via popular services such as Ancestry.com. As such, tissue is not just a thing, but a source of intimate personal information, as well as being able to link a person to a particular place in time. Now that our biomaterials are a source of *information*, all sorts of questions about privacy and confidentiality arise, because access to our tissue can also mean access to our personal information.

Biomaterials are also a vitally important resource for medical research. Human tissue is used in a vast array of research, from studies into the function of tissues, the causes and mechanisms of disease, to exploring how stem cells could be used to treat conditions. Much of this research now entails using large *collections* of biomaterial, which when collected are referred to as biobanks or biorepositories. Such collections, like UK Biobank, are exceptionally valuable and enable unique forms of research, particularly when combined with medical information and history about the sources of that tissue.

Some tissue used in research is donated, but other materials are bought. Commercial tissue supply firms provide researchers with expertly prepared samples. These include preserved tissue, such as a section of a particular type of tumour, as well as cell lines. Cell lines – cells that have been manipulated to enable them to self-replicate indefinitely – are used in both medical research and in the manufacture of biologic drugs. Researchers use them in a huge array of contexts, such as the study of gene function, while they are also a vital tool in the bioproduction of vaccines and antibody and cell therapies.[3] Cell lines are, not surprisingly then, highly commercially valuable. In 2020, the global cell line development services market was estimated to be worth $789 million, with its value predicted to reach $2.44 billion by 2030. It has also been estimated that the global cell therapy industry passed the $1 billion mark in annual turnover years ago.[4]

It should be clear from this very brief overview that human biomaterials are in demand, and often valuable, and hence likely to be at the centre of disputes over access, use and control. While in some contexts there is little dispute or difficulty, as in the sale of hair on the internet, in other contexts, cell lines have become so valuable that they have become famous (or infamous). For instance, the HeLa cell line was crucial to the development of the Salk vaccine for polio, but was created using cells taken without consent.

While considerable attention has been paid to the research and treatment uses of biomaterial and body parts in the literature and case law, less attention has been paid to other uses, interests and values of

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[3] Hannah Balfour, 'Cell line development services market to value $2.4 billion by 2030' (*European Pharmaceutical Review*, 10 August 2021) <https://www.europeanpharmaceuticalreview.com/news/159967/cell-line-development-services-market-to-value-2-4-billion-by-2030/#:~:text=The%20market%20was%20valued%20at,but%20also%20biologic%20drug%20manufacturing> accessed 27 June 2023.

[4] See Chris Mason and others, 'Cell Therapy Industry: Billion Dollar Global Business with Unlimited Potential' (2011) 6 *Regenerative Medicine* 265, 266.

tissue. In thinking about how to regulate, the approach we favour needs to be one that can manage *all* uses, or at least produce principles that can be extrapolated to those uses. What might these other contexts be? One entirely different commercial context is the creation of artistic works from body parts and biomaterials. Marc Quinn, for example, produces sculptures using his own (and his family's) blood. *Self*, a sculpture of his own head created from 9 litres of his own blood was sold to the National Portrait Gallery for £300,000 in 2012.[5] Less an artist, more a showman, Gunter von Hagen created *BodyWorlds*, a travelling exhibition of 'plastinated' human bodies. These artistic and 'educational' works made from human flesh have become objects that are bought, sold, and given, and which can be displayed, used, possessed, damaged or destroyed: they are *things* in the world.

In other ways too, body parts are treated as things. Human remains have often been displayed, some in troubling contexts and collections. Remains taken from Indigenous communities have been on show in museums for centuries. Such collections are deeply distressing to those communities, in part because of the spiritual harms they consider them to perpetuate, and in part because of the legacy of theft and murder they represent.

From this array of uses of body parts, it should be immediately obvious that many groups and individuals will have interests in those parts, interests that are many, varied and sometimes in conflict. It is these potential conflicts and complexities with which the law must deal, and which must continue to inform how we think about regulating human materials. Within this web of interests, we see our interests as a community in access to tissue for law enforcement purposes, and for improving health via research. For relatives, they might want information about relationships or their own health, as well as having interests in the sensitive treatment of their loved one's remains. Indigenous groups and First Nations peoples have interests in bodily remains, representing their communities' interests in ensuring the bodies of their members are treated with respect and care. Researchers have interests in accessing and using tissue, and also in ensuring that access is secure. Finally, the individual from whom the biomaterials came has a multiplicity of interests: in their privacy; in learning about (or avoiding learning about) their health, future health and their relationships; in controlling access to and use of their tissue; and in potentially receiving compensation for the use of their biomaterials.

Once we recognise these interests and the numbers of interested parties, it is evident that there will be questions to answer about who can decide what is done with tissue, how access can be gained (or prevented), and how it can be sold, given, bequeathed or stolen. What control ought we to have over our bodies and biomaterials, and how much control should be available to persons other than those from whom the material was obtained? How can we fulfil the community's legitimate interests, while still protecting autonomy? Where is the balance to be struck? And once we decide how to strike it,

[5] Arifa Akbar, 'National Portrait Gallery Acquires Marc Quinn's Bloody Head' (*The Independent*, 10 September 2009), <www.independent.co.uk/arts-entertainment/art/news/national-portrait-gallery-acquires-marc-quinns-bloody-head-1785133.html> accessed 27 June 2023. See further Imogen Goold, 'Why Does it Matter How We Regulate the Use of Human Body Parts?' (2014) 40 *Journal of Medical Ethics* 3.

how can this most effectively be achieved via the law? As the analysis of the case law will demonstrate, some of these questions have already come before the courts, while others remain to be considered. We will come to this later, but we turn now to the curious history of how the current law came to be.

C. WHY HAS THE QUESTION OF APPLYING PROPERTY CONCEPTS TO BODY PARTS EMERGED?

We might wonder why the question of how property concepts apply to human body parts arises at all. People often assume that it is *self-evident* that they own their excised biomaterials and are surprised to learn that they are mistaken. The answer to the question is two-fold. One answer is that recently courts have had to engage with the question of whether biomaterials are property in more depth than one might expect because unlike almost any other corporeal object, the presumption in relation to body parts is that they are *not* chattels. The courts do not have to ponder whether a chair or a car falls within the category of things to which property concepts and laws apply, but with body parts they do, precisely because prior courts have explicitly declared that human corpses (and potentially their parts) *cannot* be property. This historical resistance is the reason this chapter will shortly proceed to journey through the early case law, because we can only understand the recent decisions if we have a clear picture of the precedents to which they have had to respond.

The second answer is intimately bound up with the first. Biomaterials are objects that are used, transferred, destroyed, sold, loaned, shared, examined, and lost. They are sometimes scarce, and often valuable. Conflicts arise over what may be done with them and by whom. In this, they are entirely similar to virtually any other item that the law, without even really thinking about it, treats as property. This fact is precisely why I and others have argued elsewhere that biomaterials *should* be treated as legal property, and it is also precisely why the courts have turned naturally to property law in the face of certain challenges. As Simon Douglas and I have commented:

> In disputes over the use and possession of the human body and its parts there has been a marked reliance on property law concepts. Judges frequently resort to the language of "ownership", "gifts", "donations", "trusts" and so on, in order to resolve disputes over the use of human biomaterials.[6]

Muireann Quigley and I have also made the point that, while for a long time property law played little role in the determination of disputes over bodies and their parts, that stance is being gradually eroded 'as the law has necessarily started to respond by utilising property discourse'.[7] It has done so because that discourse is in many ways well-suited to managing disputes over biomaterials given that those disputes resemble disputes over chattels, and also because the qualities biomaterials have (which lead to those disputes) are shared by many chattels. It is, to put it bluntly, a natural fit.

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[6] Douglas S and Goold I, "Property in Human Biomaterials: A New Methodology" (2016) 75 *Cambridge Law Journal* 478, 481.

[7] Imogen Goold and Muireann Quigley, Human biomaterials: The case for a property approach in I Goold, J Herring, L Skene and K Greasley (eds.), *Persons, Parts and Property: How Should We Regulate Human Tissue in the 21st Century?* (Hart Publishing 2014), 231.

The sections that follow explain and support this analysis, first by tracing the background to the position at the start of the twentieth century, that a corpse could not be the subject of property interests, and then by outlining the string of challenges that came before the courts over the twentieth and early twenty-first centuries that led to the shift towards the use of property concepts in cases concerning biomaterials. This latter section will use this outline to illuminate the challenges, setting the stage for the final section to assess whether this approach is desirable.

1. Historical development of the law

The story behind the fundamental position that the courts have had to grapple with over the past century has its origins in the murky history of the practice of dissection. While dissection of human bodies has been practised for millennia, for much of the Christian period in this country, it was considered a desecration of the body.[8] The prevalent belief that the body should remain whole after death to enable resurrection on the Day of Judgement meant that dissection was a fate most people hoped would not befall their corpses.[9] Problematically, however, from the fourteenth century onwards, the study of medicine increasingly relied on the examination (via dissection) of bodies to enable doctors to learn about their function. This conflict of desires about the fate of corpses is the first in a long line of disputes about what is done with bodies that marks this area of law, and forms the background to the judicial consideration of how bodies should be lawfully managed. By the eighteenth century, dissection was widespread in England, but there was lawful supply of bodies to meet it.[10] Enter the body snatchers: by the early nineteenth century, the theft of corpses was rife, particularly as cemetery workers began to organise themselves and develop relationships with anatomists and medical schools.[11] Eventually, the Anatomy Act 1832[12] was passed to address the problem, permitting those in lawful possession of unclaimed bodies to hand them over for study, as long as no relative objected. These were generally the bodies of the poor, who could not afford to bury their deceased loved ones and so did not collect their bodies. Family members were also permitted to donate the corpse of a relative, in return for burial at the expense of the anatomy school. The Anatomy Act remained in force until 1984.

Against this background, courts grappled with a series of interferences with corpses (some interred, some not), that had to be balanced against the considerable sensitivities around the fate of dead bodies. These cases, along with the writing of the classical legal scholars, lay the foundations of the law with which modern courts have had to wrestle—the rule that a corpse cannot be the subject of

[8] Caroline Walker Bynum, *The Resurrection of the Body in Western Christianity* (Columbia University Press, New York 1995) 114, as quoted in Dorothy Nelkin and Lori Andrews, 'Do the Dead have Interests? Policy Issues for Research after Life' (1998) 24 *American Journal of Law and Medicine* 261, 262.
[9] Richard Scott, *The Body as Property* (Allen Lane 1980) 13.
[10] Not until well into the eighteenth century was a regulated means of supply established, via the passage of the UK Murder Act 1752 (25 Geo 2 c 37) (Murder Act), which permitted the donation of a convicted murderer's body to the Royal Colleges for anatomical study as part of the sentence.
[11] D Gareth Jones, *Speaking for the Dead: Cadavers in Biology and Medicine* (Ashgate Publishing 2000) 45.
[12] Anatomy Act 1832 (2 & 3 Will 4 c 75).

property rights—which is often called the 'no property in a corpse' rule. The rule's origins are far from clear and its basis certainly dubious, but it nevertheless was the law for many years (and arguably still is). The rule's origins lie in *Haynes' case* (1614).[13] William Haynes dug up four bodies and removed the sheets in which they were wrapped. He then reburied the bodies. Charged with petty larceny, the question for the court was partly to whom the sheets belonged before they were taken. It concluded that the answer was whoever had owned the sheets before the bodies were wrapped in them and Haynes was found guilty.[14] As the bodies were replaced, clearly *Haynes* did not concern the taking of a body, nor its ownership. Despite this, legal commentators[15] and judges interpreted the case to mean that *the corpse itself* could not be property.[16] This misinterpretation probably arose from comments made *obiter* that

> the property of the sheets remain in the owners, that is, in him who had property therein, when the dead body was wrapped therewith; for the dead body is not capable of it.[17]

Subsequent cases confirmed this position. In *Exelby v Handyside* (1749), the body of stillborn conjoined twins was ordered to be delivered up to the twins' father for burial 'as no person had any property in corpses'.[18] In *R v Lynn* (1788), concerning the theft of a corpse from a graveyard for dissection,[19] Edward Coke's view that the corpse was *nullius in bonis* (not the property of anyone) was noted with approval.[20] In the 1857 case of *R v Sharpe*, which involved the disinterment and moving of a corpse,[21] Justice Erle stated in the Court of Appeal that:

> our law [does not] recognise the right of any one child to the corpse of its parent … Our law recognises no property in a corpse …[22]

By the end of the nineteenth century it *had*, however, been established that a person could have a right to *possession* of a body for the purpose of disposing of it.[23] Therefore, by the turn of the century, a corpse could not be 'owned' as such, but someone could have legal authority to take possession of the body and ensure it was dealt with decently and in the manner the deceased person wished.

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[13] (1614) 77 ER 1389.
[14] *Haynes' case* (1614) 77 ER 1389, 1389.
[15] Footnotes 27, 28 and 30 could be included here instead.
[16] See further Paul Matthews, 'Whose Body: People as Property' (1983) 36 *Current Legal Problems* 193, 197.
[17] *Haynes' case* (n 23) 1389. Paul Matthews has correctly stated that to cite *Haynes* thus is 'a complete perversion' of the case: 'Whose Body: People as Property' (n 24) 197.
[18] East (n 27) 652.
[19] (1788) 100 ER 395.
[20] Coke merely reported the case accurately as holding that 'the dead body is not capable of any property': E Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and other Pleas of the Crown, and Criminal Causes*, Thomas Bassett, London, 1680, 110.
[21] (1857) 169 ER 969. Though the case was not cited to the Court by counsel, it was footnoted by the Court in confirmation of the appeal: *R v Sharpe* (1857) 169 ER 969, 961, note (a).
[22] Ibid, 960 (Erle J).
[23] This position was decided in *R v Fox* and *R v Scott* in the 1840s, and confirmed in 1882 in *Williams v Williams* (1882) 20 ChD 659.

Two things are evident in this position: first, that there was deep-seated resistance in the law to allowing ownership of corpses, and second (paradoxically) that property language and concepts were being drawn on to define who was permitted to deal with a body and the limits of that permission. Before the first decade of the new century was over, the Australian courts were already faced with a challenge that this complicated position could not accommodate, and the foundations of the modern law were laid.

2. Invoked to resolve challenges

The first case to challenge the law in the twentieth century was not a new or modern use of biomaterials as a result of new scientific or research approaches. Rather, the facts closely echoed those of *Dr Handyside's* case, involving a dispute over possession of the corpse of conjoined twins. But instead of a parent, in *Doodeward v Spence* (1908),[24] it was a showman who wanted to regain possession of the corpse from the police --- they confiscated the body and the jar of spirits in which it was preserved, and then charged him with indecent exhibition of a corpse. This case made it to the High Court of Australia, and would form the foundation for three subsequent English decisions over the next century. The showman brought an action of detinue to have the corpse returned, relying on principles of property law. Questions about who could make decisions about the body and who could control it, use, and possess it were squarely before the High Court, and the law as it then stood did not provide answers.

The majority of the High Court found that the body *could* be property, but only Chief Justice Griffith really foresaw the need that later situations, uses and disputes, would create: a legal means to capture the fact that human bodies and biomaterials are used, possessed, transferred, and sold. And it is this foresight that led the position he put forward as a solution to have the crucial impact it did in shaping the approach of the courts in both Australia and England.

Justice Griffith argued that 'it [did] not follow from the mere fact that a human body at death is not the subject of ownership that it [was] for ever incapable of having an owner'.[25] While noting the weight of precedent, he held that the matter before him was effectively new and should be decided in the first instance 'in accordance with general principles of law, which are usually in accord with reason and common sense'.[26]

As the law had accepted the need to possess a body for burial, and later sanctioned possession of bodies for anatomical study, there was no common law barrier to similar arguments being made for a possessory right in other, related circumstances. Specifically, he held that one way in which such a right to possession might arise would be:

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[24] (1908) 6 CLR 406.
[25] *Doodeward v Spence* (1908) 6 CLR 406, 412 (Griffith CJ).
[26] ibid 412 (Griffith CJ).

> when a person has by lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least against any person not entitled to have it delivered to him for the purpose of burial.[27]

This statement is still known as the 'work and skill exception' to the no-property rule in both the Australian and English courts. Its power lay in its recognition of both the need for an answer when questions of possession, use and control arose, and the offering up of a simple, pragmatic solution that captured existing practices and could be flexibly applied.

Yet outside of this 'work and skill exception', the 'no property in a corpse' rule continued to impede the otherwise natural application of the law. This was raised in the Western Australian case of *Roche v Douglas* (2000),[28] in which the court needed access to a tissue sample for the purposes of determining paternity. Master Sanderson examined the law on no property in a corpse, including some of the cases examined in the next section, and stated that the principles of law should be applied 'in line with reason and good sense' and that it defied reason not to regard tissue as property as it has a real physical presence.[29] On this basis, he refused to allow the no-property rule to act as a barrier, and instead determined that the stored sample was property and so the court was authorised to access it in line with the Rules of the Supreme Court 1971 (WA). Thus, the potential barrier posed by the no property rule was not allowed to thwart the otherwise common-sense application of the laws are they were clearly intended to operate.

By contrast, it was argued that a charge of theft could not be sustained on the grounds of the no property rule in *R v Kelly* (1998).[30] Between 1992 and 1994, Anthony Noel Kelly had removed and retained numerous expertly dissected human body parts from the Royal College of Surgeons in London. Kelly (and his accomplice) were charged under the Theft Act, wherein section 1 defines theft as:

> (1) A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it…

The defendants argued that the rule against property in a corpse precluded a charge of theft as it was impossible to steal something that was not property. This argument necessitated the Court of Appeal considering both the definition of 'property' and whether the College had a right of possession. This dispute illuminates precisely one of the problems raised by the use of biomaterials, particularly when they are valuable: that the resistance to classing them as 'property' means they fall outside the legal category of things to which the notion of 'theft' applies, despite someone having clearly dispossessed

[27] ibid: he made it clear that it was 'not necessary to give an exhaustive enumeration of the circumstances under which such a right [to permanent possession] may be acquired'. This was just one example.
[28] (2000) 22 WAR 331.
[29] ibid.
[30] *R v Kelly* [1998] 3 All ER 741.

another of them. Further, it evidences the problems that arise when the law has not adequately provided answers to the question of who may possess an item (and control it) and whether they may defend that possession against others to enable them to peacefully enjoy the use of that object. In refusing to accord biomaterials the status of property, the earlier cases had seemingly denied the Court of Appeal a means of determining the issues before it. This, as will be argued later, is one of the key reasons why a clear regulatory framework is needed.

The challenges in *Kelly* demonstrate the appeal and efficacy of deploying property ideas to biomaterials, as they answer these questions. Unsurprisingly, the Court of Appeal agreed, and deployed the 'work and skill' exception proposed in *Doodeward* nearly one hundred years earlier to resolve the matter. Lord Justice Rose held that work and skill included both dissection and preservation techniques for the purposes of exhibition and teaching, and so the body parts were property and fell within the section 1.[31] On the question of possession, Lord Justice Rose simply accepted that the Royal College was factually in possession, and seemingly did not deem it necessary to consider the matter further. Kelly was convicted and sentenced to nine months in prison.

While the issues of possession, use and control were not deeply considered in *Kelly*, other cases have required the courts to engage explicitly with these questions. One such case – in which property concepts were again resorted to in an attempt to resolve another difficult situation involving biomaterials – is *AB and others v Leeds Teaching Hospital NHS Trust* (2004).[32] In late 1990s, it emerged that a number of hospitals had been retaining the organs of children who died, sometimes without adequate consent (even within the very lax framework of the Human Tissue Act 1961 (HTA)). In particular, a 2001 inquiry into practices at Alder Hey revealed that from 1988 until 1995, the retention of organs (including those of children) had been widespread, systematic, and was regularly performed without adequate consent.[33]

When the parents of these children learned of the retentions, many experienced extreme distress. For some, the matter was one of religion, feeling that their child would not go to Heaven because they had not been buried whole, while social rituals about death and notions of violation underpinned the distress of others. In some cases, the news that their deceased child's organs had been retained precipitated serious psychological harm, and two group litigation orders for their claims were made. The plaintiffs in *AB* were three sets of such parents. The plaintiffs contended that in retaining their children's organs, Leeds Teaching Hospital NHS Trust and the Cardiff and Vale NHS Trust had committed a tort they framed as 'wrongful interference with a body', and had also been negligent in obtaining consent to the post-mortems carried out. They sought damages for psychiatric injury.

[31] ibid, 741 (Rose LJ).
[32] [2004] EWHC 644 (QB).
[33] Department of Health, *The Report of the Royal Liverpool Children's Inquiry* (HMSO, 2001) 3, 28.

One of the key questions for the court was whether the hospitals were in *lawful possession* of the body parts. Justice Gage held that in each case, the hospitals did have lawful possession of the organs and tissue under the law as it was at the time, namely sections 1 and 2 of the Human Tissue Act 1961 and the Coroner's Act 1988.[34] He also accepted the existence of both the rule against property in a corpse, and the work and skill exception to the rule, stating:

> the principle that part of a body may acquire the character of property which can be the subject of rights of possession and ownership is now part of our law.[35]

He found that the work and skill exception could apply, and did give rise to a right to continued possession of the retained tissue in each case.[36] He took the view that 'to dissect and fix an organ from a child's body requires work and a great deal of skill, the more so in the case of a very small baby such as Rosina Harris',[37] as did the creation of slides, and hence both fell within the exception.[38] The application of the exception led him to conclude that the hospital (not the parents) had the right to possession of the children's body parts. While the parents should have been warned about the possibility of retention (as part of the doctor's duty of care), the fact that the post-mortems were lawful, and once removed, that the organs were in the lawful possession of the pathologists, meant that the application of work and skill subsequently gave rise to a right of continued possession. It *was* held that it was unlawful for those organs to be *used* for other purposes under the Human Tissue Act 1961, but because the Act did not provide for any cause of action for the parents for wrongful interference, there was nothing the court could do for them, though one claim for psychiatric injury was successful.

This case demonstrates a number of important things. For one, it is another example of a conflict over what can be done (and by whom) with body parts. For another, it demonstrates that property concepts are a natural method for responding to such conflicts, as this is precisely the kind of question they have evolved to address. However, as some commentators have argued, that application led to the wrong outcome, given that the parents in this context had certainly been wronged and had suffered harm, yet the application of the work and skill exception prevented them from having a basis on which to claim. The final section engages with this normative question, and whether property concepts present the right approach. But what is clear is that, again, there are conflicts and a coherent regulatory response is needed.

These questions of possession, control and use are naturally intertwined, and the intersection of those interests has created particular challenges for the United States courts in two cases, which illuminate how a lack of clarity about which parties hold rights in relation to biomaterials, and what the nature of

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[34] ibid 535.
[35] *In Re Organ Retention Group* (n 61), 541.
[36] ibid 543.
[37] *AB and others v Leeds Teaching Hospital NHS Trust* [2004] EWHC 644 (QB) [148]
[38] ibid [148].

those rights is, can produce considerable difficulties. The first is *Colavito*,[39] which concerned a directed kidney donation. When Peter Lucia died in 2002, his widow Debra tried to donate both of his kidneys on his behalf to his friend, Robert Colavito, who was suffering from end stage renal disease. One kidney was airlifted to Colavito, but was found to be damaged. His doctor asked for the other, but discovered it had been allocated to someone else. Colavito died, and his widow brought an action in conversion, arguing that the kidney was Lucia's to give, as it was his property, and that he had given that property as a gift to Colavito. In allocating it away to someone else, the organ donation network had interfered with his property rights.

The court roundly rejected this view. Importantly, the court rejected the idea that the kidney was property, not because they did not think it conceptually possible, but rather because otherwise Lucia and his widow would have had *too much control* over the fate of the kidney. This would undermine the organ donation system, which ensured that the terribly scarce resource of donor organs were allocated to those most in need and able to benefit from them. Unlike the possession cases, the key issue in *Colavito* was what rights a person had over their organs. The lens of *property* was invoked in part because it was needed to give rise to a claim in precisely the tort that relates to such concerns, namely conversion. Naturally, property is an appealing lens to use *because* it is a device that delineates who can do what with an item (and therefore who *cannot* do anything to that item).

The second useful American case is *University of Washington v Catalona*,[40] in which competing claims over the use and possession of biomaterials for the purposes of research were the central issues. Bill Catalona, a researcher and surgeon, had established a biorepository of tissue samples for research purposes which contained consensually donated samples from thousands of men.[41] Donors had signed a consent form, which usually referred to the contribution as a 'donation' or a 'free and generous gift' to the research.[42] They were told they had the right to withdraw their samples from the research, at which point they would be destroyed. When Catalona wanted to relocate to a new institution in 2003, Washington University – where the biorepository was housed – refused to allow him to take the biorepository with him, having realised the considerable value of the collection. They asserted that they *owned* the collection. In response, Catalona contacted thousands of the donors, asking them to authorise the release of their samples to him: many agreed. Despite this, and even though the samples came from their bodies, the court held that Washington was the owner of the biorepository and the samples. The men, it was held, had transferred away all their rights (via a gift) and those rights of possession vested in Washington University, so their later views on the fate of their tissue had no legal effect on the decision to retain the biorepository.

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[39] *Colavito v. N.Y. Organ Donor Network, Inc*., 8 NY3d 43, 860 NE2d 713 (2006).
[40] *Washington University v Catalona* F Supp 2d (2006).
[41] ibid, 988.
[42] ibid.

This approach diametrically opposed *Colavito* – the body parts *were* property. The similarity, however, was that in each case, the court took a view on *who* should have control, and then answered the property status question to achieve that outcome. This point leads neatly to the final case to be examined, in which the determination of property status was again driven far more by the court's desire to access a means to produce the outcome it felt was right, rather than a principled perspective on the wider questions which biomaterials' use entail. The English case *Yearworth v North Bristol NHS Trust* [2009][43] involved

Yearworth is noteworthy in part because it is the first case in this country to deal with a claim for *damage* to biomaterials held by a third party on behalf of their source. It is notable as the most recent example of courts taking a position on the status of biomaterials to enable an outcome to be achieved that otherwise would be legally impossible. The claimants were men who, prior to having treatment for cancer, had provided sperm samples to be used later if they lost fertility as a result of the treatment. These were held by Bristol Southmead NHS Trust, but were irrevocably damaged when the storage unit, in which they were held, failed due to negligence on the part of the Trust. The men suffered various psychiatric injuries, such as depression, in consequence.

The men faced a series of hurdles in seeking damages for their injuries. They needed to demonstrate that the damage to their sperm was *personal* injury; some sort of physical harm to them. Otherwise, they would only be able to claim for *pure* psychiatric injury, which is tightly constrained and for which they would not meet the criteria. The court at both instances rejected the idea that damage to their sperm constituted a personal injury, reasoning that to do otherwise would expand the concept of physical injury well beyond its logical. They appeared, then, to have no basis on which to claim. Yet given the real impact on the men when their semen was destroyed, and the admitted negligence, to deny them a remedy on such a basis would have been arguably unjust. An alternative argument was accepted by the Court of Appeal based on the contention that sperm was property. The logic of this position was as follows: if it were property, then the Trust had been the bailee (the one in possession), and was under a duty to keep it safe. When it failed in this duty a claim could be brought. Damages could then be awarded for the consequences of that breach.

To accept this reasoning, the Court of Appeal had to accept that the sperm was property. Crucially, it declined to do so via applying the 'work and skill exception', though it accepted that it existed. Instead, the court reasoned that the men held many of the rights and powers over their sperm that an owner holds over property: they could use it, destroy it, transfer it via donation, and so on. Therefore, it concluded that the men had ownership of their sperm because they created and ejaculated the sperm by their own bodies with the sole purpose of later using it for procreation. The court did have to consider whether the Human Fertilisation and Embryology Act 1990 had so circumscribed these rights that it could no longer be said the men 'owned' their sperm. It held that the erosion of their

[43] *Yearworth and others v North Bristol NHS Trust* [2009] 3 WLR 118 (Court of Appeal).

rights by the HFE Act was not such that they lost ownership of it, only that their right to use it was subject to some restrictions. It was true they were allowed to store it only with the assistance and consent of licensed persons, but the court held that,

> the significance of these inroads into the normal consequences of ownership, driven by public policy, is, again, much diminished by the negative control of the men, reflected in the provisions that the sperm cannot be stored or continue to be stored without their subsisting consent. Thus the Act recognises in the men a fundamental feature of ownership, namely that at any time they can require the destruction of the sperm.[44]

As such, it was reasonable to say they were in some sense its owner, and were dealing with it like property. Having made this leap, the Court was prepared to regard the Trust as a bailee, and from there it accepted an analogy with damages for contracts to avoid mental distress to award the men compensation for their psychiatric harm.

The case was marked by a considerable amount of legal manoeuvring in the Court of Appeal's reasoning on this point, although such manoeuvring was at least based on a degree of principle. But what we should see from this decision is that, without recourse to property, sometimes people will be left without a solution to their legitimate problem. Here, property offered the most effective and applicable solution because it availed the court of remedies already created to deal with conflicts over or possession of objects.

This overview of the various cases in which the property status of bodily tissue has been considered give a sense of the concerns that arise, encompassing questions of who may possess, control, use or access biomaterials. However, many potential questions have *not* come before the courts and so we can draw only on the limited ambit of the Human Tissue Act (2004) and Human Fertilisation and Embryology Acts (1990, 2008), and some extrapolation from the few cases, to think about how they might be answered. These include what may lawfully be done with the biomaterials (where the research and medical uses are covered legislatively, but uses beyond these largely are not); what wrong is done, if any, if valuable biomaterials are damaged or destroyed; and what rights are, or can be, transferred when biomaterials are donated, given, bought or sold. While the courts in this country and elsewhere have clearly begun to move towards regarding human biomaterials as property, the question remains: should they?

D. SHOULD BODY PARTS BE DEALT WITH AS PROPERTY?

Whether the law should deal with human biomaterials as property is a difficult question, and one which has been hotly debated for some time. This final section cannot do that debate justice, but it will raise some points in favour of the use of property principles, while noting that there are a limited number of legitimate – though not insurmountable – concerns about this approach.

1. It offers some solutions to problems

[44] *Jonathan Yearworth & ors v Bristol NHS Trust* [2009] EWCA Civ (04 February 2009) 37 [45f].

There is a good reason the courts have consistently turned to the concept of property to address conflicts in relation to human body parts: it is because property law developed to deal with exactly the kinds of conflicts to which the use of biomaterials gives rise. That does not, however, mean that we can, via the application of property principles, avoid the deeper normative questions about *who* should have control, and of what kind and to what extent. But we can put the answers to those questions into effect via property law.

This chapter is not concerned particularly with the answers to those normative questions, but rather how property might be a pragmatic means to put whatever answers we choose into practice. What we can see is that, once we decide who has control, property works well to protect it, and further that the reasons that justify the existence of such property protections apply at least as well to biomaterials as many other objects. Fundamentally, property is about use and control; about who has the right to possess these things and to determine (within constraints) what is done with them. In doing so, the law also operates as the law's mechanism for managing scarce resources that are in demand by more than one party: it resolves conflicts over who can control a thing. If it did not, then someone in possession of an item would have insecure possession. As Simon Douglas explains:

> In the absence of legal regulation, those in possession of such things are always vulnerable to being dispossessed by a more powerful party. This is something that the law tries to avoid, and it does this by allocating property rights in such things to individuals, thus imposing a legal duty on others to refrain from interfering with goods that are in a person's possession.[45]

This is, in fact, a *good thing* to have in relation to something important and special. It is exactly what you would want if you did regard something like your body parts as special, just like you want that to be the case with regard to your wedding ring, or a valuable painting you've bought.

If we think back then to our researchers, giving them stable possession is exactly what is needed to ensure they can complete their research with confidence. It is what Marc Quinn needs to protect his valuable artwork, just as it is what the *purchaser* of his work would want. And it is what the police need, as well as many others who legitimately possess and use human body parts. This approach might also do a good job of reflecting the special, personal status of biomaterials alongside their informational dimension, as it gives strong controls over them.

Where the individual is given this control, this would also reflect exactly what people mean when they use what is sometimes called 'body ownership rhetoric' in relation to their bodies or their parts. When someone says 'it's my body', what they mean is 'I control my body, I decide what is done with it, including its parts (attached or removed) both while I live and after I die'. And they are reflecting the controls we have over our living bodies, which the laws against assault and rape and so forth protect. Our choices about our living bodies are secured through these consent-based rules, and once

[45] Simon Douglas, 'Property Rights in Human Biological Material' in Goold et al (eds), *Persons, Parts and Property* (n 7), 89.

something is taken from our body, the concept of property could mirror this in giving powers to make decisions over body parts as things.

Using the concepts of property also offers clarity about what is happening in dealings with biomaterials. Without it, it is unclear, legally, what happens and what rights pass when tissue is sold (like hair) or transferred (like research samples). Although legislation outlines consent controls, outside the direct consent relationship (which applies only in the contexts to which the HTA applies), the remaining questions around theft, security and transfer remain unanswered. As a case in point, the current HTA and under-developed case law could not adequately deal with a *Catalona* situation. Given the increasing value of biomaterials, this is likely to be a genuine problem in future situations.

2. It offers some challenges

One of the strongest objections to treating body parts as property is that these robust protections can be counter-productive: someone might gain too much control, or someone might unwittingly – not realising the implications – give away control of their parts of biomaterials to somebody else. What might too much control look like? *Colavito*, *Catalona* and *AB v Leeds Teaching Hospital* might be considered very good examples, but for different reasons. If we think tissue is special to people, that they have an important link, or privacy interests in their DNA and other information being protected, or in being able always to decide what happens to part of their bodies, then this should trouble us if it can lead to the outcome in *Catalona*. There, the conceptualisation of their tissue as property gave them control, but did not and could not protect them when they gave that control entirely away. In *AB*, the people one might think had the greatest *moral* claim to the body parts in question were excluded from control because others were afforded a better claim via a property analysis. And in *Colavito*, a property approach would have undermined the vital benefits of a need-based organ allocation system. That said, these challenges are not insurmountable. We can create legislative controls on the use of property (this is far from unusual), and we can create rules that allow property to be redistributed – as the taxation system effectively does.

Another concern is that a property approach would not offer the *right* solution to certain problems. For example, Jonathan Herring has argued that a property-based approach in a case like *AB*, even if it favoured the parents, would not really have captured the wrong they suffered. It is, he suggests, inapt and also cannot be sufficiently tailored to account for the nuances of different situations (including those with highly emotive dimensions), nor the different issues that *types* of tissue raise. He argues instead for a legislative approach, drawing on some property concepts, but more specifically targeted at the issues biomaterials raise.[46] While there is something to be said for this, a major concern is that any such legislation will still have gaps, or risk needing to be so detailed as to be overwhelmingly complex. By contrast, one of the strengths of a property-based approach it would allow the courts to

[46] Jonathan Herring, 'Why We Need a Statute Regime to Regulate Bodily Material' in Goold et al (eds), *Persons, Parts and Property* (n 7), 214.

draw on and analogise from principles that have developed into a comprehensive, coherent system where gaps are found.

E. CONCLUSION

This chapter only scratches the surface of the issues raised by the use of biomaterials, and can offer only a brief sketch of how the courts have addressed them. But what it does demonstrate is that there are numerous challenges in need of a solution, and that in many contexts, turning to property concepts has successfully provided these. Though there is much that is problematic in some of these approaches, and some of the jurisprudence is certainly wanting, as a starting point, a property-based approach is ultimately to be preferred. This is true even given the differing views on *who* should control biomaterials and how, for as Simon Douglas and I have explained elsewhere, a property-based approach has the flexibility to facilitate a variety of the outcomes advocated by those who currently debate how we should deal with tissue. A trust model could allow for the kinds of community-oriented control. By contrast, increased individual control, if desired, could be achieved by the adoption of a rule of acquisition that gives the source individual initial ownership of excised tissue. Property possesses both the simplicity of form to offer conclusive answers, and the depth of jurisprudence to do so in a nuanced, well-considered manner, such that should be seen as the best way to solve a problem like how we regulate human body parts.