

Being and Owing:  
The Body, Bodily Material and the Law

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# Abstract

## Being and Owning: The Body, Bodily Material and the Law.

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The purpose of this Thesis is to determine which set of private law rules ought to apply to the use and storage of bodily material. I recommend that the most appropriate legal approach is through a combination of property rights and duties of confidentiality. The suggestion is that where a healthcare institution obtains possession of bodily material, their possession of the material may give rise to property rights in the material. In addition, where an individual retains entitlements in bodily material that is held by a healthcare institution, the entitlements of the individual ought to be protected through the imposition of duties on the healthcare institution that are akin to duties of confidentiality.

This recommendation is the product of two main inquiries. The first inquiry concerns which entitlements individuals and institutions ought to be able to exercise in separated bodily material. This involves an investigation into which aspects of the relationship between a person and their body can also be found in the relationship between a person and their separated bodily material. It also involves an assessment as to which societal interests can be served through allocating entitlements in bodily material to healthcare institutions, and how to resolve the conflict between individual and societal interests in the use and storage of bodily material.

The second main inquiry concerns the way in which different branches of private law are able to protect entitlements in things. I identify that property rights, rights of bodily integrity and privacy are similar insofar as they protect entitlements through the exclusion of others. Property rights are nonetheless distinct as property law concerns rights that can exist independently of the rights-holder. The recommended approach follows from connecting the different entitlements in bodily material that ought to obtain legal protection with different ways an entitlement may be afforded legal protection.

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# Introduction

We are a complex combination of *things*; genes expressing, cells dividing, neurons firing, muscles twitching. We are also more than just a complex combination of things. We are also People; things that attract moral attention. When a part of the body is separated from a Person or when a Person dies, the separated bodily material or the body of the deceased retains some of the features that it had when it was integrated with the Person whilst other features that we associate with being a Person are absent in the bodily material. A philosophical question is whether an item of separated bodily material or a dead body retains any features that attract moral attention. If not, then the bodily material is just a thing, akin to any other object in the world.

This Thesis addresses the corresponding legal question to this philosophical question. That is, whether items of separated bodily material (including the bodies of deceased persons) ought to be treated as items of property or whether bodily material ought to obtain some other status under the law. Describing this inquiry in terms of the ‘legal status’ of bodily material is merely shorthand for the assessment of which areas of law ought to govern the legal relationships between persons with regards to bodily material.<sup>1</sup>

There are two overarching themes in this Thesis. The first theme is the complication of the two concepts of *Persons* and *things* that the use and storage of separated bodily material introduces. At various points throughout this Thesis we will be considering how various things fall into the gap between the idea of the Person and mere objects in the world. The second theme is the method of deconstructing ideas of ownership and property into concepts that can form a basis of comparison with other branches of law, and then reconstructing a recommendation as to how the law ought to operate by using the same concepts.

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<sup>1</sup> “[P]roperty is not things but rights, rights in or to things”, CB Macpherson, ‘The Meaning of Property’ in *Property: Mainstream and Critical Positions* (Basil Blackwell, 1978) 2.

Allow me to explain the basic structure of this deconstruction and reconstruction. The analysis in this Thesis unfolds through five main concepts. The first concept is an *entitlement*, which concerns an aspect of a relationship between a person and a thing. So that when Matthew drinks his bottle of wine, Mark determines where his artwork is exhibited, Lucy sells her croissants and Joanna discloses her medical history to her physician, they are exercising entitlements in things.

The second concept is a *justification*, which arises where there are sufficient reasons for a way a person ought to be able to exercise an entitlement in a thing. For instance, Matthew may drink his wine because it maximizes utility and Lucy may sell her croissants because it is an efficient means of distributing resources. Part A of this Thesis will introduce these first two concepts with reference to the law on the use and storage of separated bodily material. Part B will then undertake the task of determining which entitlements in bodily material can be justified.

The exercise of entitlements enable various different activities, preferences and choices. We can group these activities, preferences and choices into different types. The third concept, an *interest*, represents the different ways we can characterise the exercise of an entitlement. Although Mark controls his artwork in a functionally similar way to the Joanna's control of her personal information, the control of these things nonetheless protects different types of preferences and choices.

The fourth concept concerns how the law protects entitlements in things. Different *rights* can be employed to protect entitlements in structurally different ways. Which rights are employed will depend upon the interests that the entitlement represents. Part C will set out the two main distinctions between the types of interests that may arise in bodily material and outline the structure of rights that follow from these distinctions.

The final concept is that of *rules*. These represent categories that exist in the law that are shaped by a particular structure of rights. Property law, for instance, represents a set of rules and procedures that protect entitlements in things in a particular way. Negligence and privacy are other sets of rules

that operate through a particular structure of rights. Part D will determine which structure of rights, and which set of rules, ought to govern the use and storage of bodily material.

I will argue here the novel duties of confidence, coupled with existing statutory provisions, represent the most appropriate sets of rules for addressing the relationship between individuals and healthcare institutions with regards to bodily material. Whereas property law ought to govern the relationship between healthcare institutions and third parties with regards to bodily material. In order to arrive at the recommendation, we must work through a series of prior decisions as to: which entitlements in bodily material can be justified, what types of interests does the exercise of these entitlements represent, and which set of rights ought to be employed to protect the entitlements in bodily material.

Finally, allow me to clarify some terminology that is presumed in the body of this Thesis. This Thesis is concerned with the use and storage of 'separated bodily material.' This includes any part of the human body, from the smallest cell to the largest organs, that has been detached or extracted from the body as well as the body and bodily material of deceased persons. The focus will be on the use and storage of this material in the medical context, where there is potential for therapeutic, diagnostic, scientific and educational application of the material (to the exclusion of the forensic or artistic application of the material). We will also narrow our focus to the material dimension of separated bodily material (to the exclusion of the informational dimension of the material).

Those who are concerned with the use and storage of separated bodily material are described as progenitors, closely concerned persons, co-participants in therapy and healthcare institutions. A 'progenitor' is the person from whom the bodily material originates from, a 'closely concerned person' is family member or friend of a deceased person who is recognised as to be in a "Closest Qualifying Relationship" with the deceased under the Human Tissue Act 2004,<sup>2</sup> and a 'co-participant in therapy' is someone who shares with a progenitor an intention to use an item of bodily material for medical

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<sup>2</sup> Human Tissue Act 2004, Section 27(4).

treatment. These are all collectively referred to as 'individuals'. A healthcare institution is an organisation that is licensed under the Human Tissue Act 2004 or the Human Fertilisation and Embryology Act 1990 to procure, use or store human tissue, gametes or embryos.

# Part A: Ownership and the Law

## Chapter One: The Deconstruction of Ownership

When describing the relationship between a Person and their things, we tend to describe the relationship as an ‘ownership’ relationship. Moreover, when discussing the law relating to a Person and their things, we often use the terms ‘ownership’ and ‘property’ interchangeably. The main purpose of this Chapter is to deconstruct the idea of ‘ownership’ and separate the idea of ‘ownership’ from the idea of ‘property’. In addition to introducing a framework for understanding what ownership is, a further aim of this Chapter is to introduce a distinction as how the legal protection of a relationship of ownership can be justified. Both these analytical structures will be introduced with reference to the law on the use and storage of bodily material.

I will argue in this Chapter that understanding ownership as a ‘bundle of rights’ provides a useful initial framework through which we can view the law on the use and storage of separated bodily material. By using Honoré’s taxonomy of ownership, it is possible to identify where the Courts and Legislatures have been willing on some occasions, and unwilling on others, to recognise ‘incidents of ownership’ in bodily material. However, as our survey of the law will indicate, it is necessary to revise and clarify some of the features of the taxonomy in order for us to continue to use the taxonomy as our most basic analytical framework.

I suggest that other commentators have applied the taxonomy to the ownership of bodily material too readily; without sufficient care as to *how little* the ‘bundle of rights’ framework can tell us about the legal status of separated bodily material. The crucial feature of ‘ownership’ that is highlighted in this Chapter is that ‘ownership’ is distinct from ‘property’. In many occasions, we are able to conflate ownership with property because all instances of property involve instances of ownership (ownership being a necessary condition for there being property). However, ownership itself does not give rise to property (ownership being an insufficient condition of there being property). As JW Harris notes, “the

essentials of a property institution are the twin notions of trespassory rules and the ownership spectrum”.<sup>3</sup> Property only arises where there is a particular set of legal rules and procedures that are applied to protect ownership. Moreover, non-proprietary rules may also be applied to protect ownership so that non-proprietary incidents of ownership may arise in the law. We must therefore treat ownership and property as distinct concepts.

I will also argue that ‘incidents of ownership’ (or ‘entitlements’) in a thing may be justified in either a pre-social or social analysis. A pre-social analysis justifies entitlements in things with reference to the attributes and characteristics of the person. A social analysis justifies entitlements in things with reference to the state of affairs that will result from the exercise of the entitlement. As we shall see, difficulty arises when pre-social and social analyses produce conflicting accounts as to who ought to be able to exercise entitlements in bodily material.

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<sup>3</sup> JW Harris, *Property and Justice* (Clarendon Press, 1996) 5.

# Section One: The Ownership of Bodily Material

Here I will introduce two frameworks that both concern the relationship between an individual (or institution) and separated bodily material. The first framework divides up the idea of ‘ownership’ into a number of different ‘incidents of ownership’ or ‘entitlements’. Each entitlement represents a relationship with a thing that may be afforded a form of legal protection. This forms the ‘Bundle Picture’ of ownership. The second framework is a distinction between the ways in which an entitlement may be justified. In other words, the second framework concerns different reasons for why an entitlement ought to obtain legal recognition. This forms a distinction between two types of ‘analyses’ or ‘justifications’. We will then use these two initial frameworks as a way of viewing the law on the use and storage of separated bodily material. I will explain the current law as consisting of five strands of legal authority: the no property rule, the work or skill exception, legislative rights and duties, the new basis under *Yearworth*, and the posthumous use cases.

## a. Two Initial Frameworks

### i. The ‘Bundle Picture’

Disputes as to the storage and use of separated bodily material have been couched in terms of claims of ownership. Let us therefore take the concept of ownership as a starting point of our inquiry. Honoré’s seminal essay ‘Ownership’ provides a useful way of elucidating the composition of ownership.<sup>4</sup> Honoré identified eleven “standard incidents” of “the liberal concept of full individual ownership” which are each constitutive of, but not necessary to, the concept of ownership.<sup>5</sup> These incidents are:<sup>6</sup>

- (i.) The right to possess: to have exclusive physical control over the object;

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<sup>4</sup> AM Honoré, ‘Ownership’ in *Making Law Bind: Essays Legal and Philosophical* (Clarendon Press, 1961) 161-193.

<sup>5</sup> AM Honoré, ‘Ownership’ (n4) 162.

<sup>6</sup> AM Honoré, ‘Ownership’ (n4) 125-130.

- (ii.) The right to use: to exercise personal use of the object;
- (iii.) The right to manage: to determine how and by whom the object is used;
- (iv.) The right to income: to derive a benefit from foregoing personal use of the object;
- (v.) The right to capital: the power to alienate and liberty to consume the object;
- (vi.) The right to security: insurance that the person will remain owner of the object;
- (vii.) The rights of transmissibility: the ability to transfer the rights of ownership to another (hereafter the 'the right to transfer');
- (viii.) The right to absence of term: presumption of indeterminate length of ownership;
- (ix.) The duty to prevent harm: inability to use the object in harmful ways;
- (x.) The liability to execution: liable to have the object or asset seized in payment of debt; and
- (xi.) The incident of residuary: rights may expire or be abandoned so as to vest in someone else (hereafter 'reversionary right').

According to Honoré, the concept of ownership consists of a 'bundle' of different relationships between a person and an object. 'Ownership', under this taxonomy, arises when there are a sufficient number of incidents of ownership.<sup>7</sup>

Given the variety of different contexts in which instances of 'ownership' arise, the malleability of the view that ownership is 'a bundle of rights' is one reason why it has been applied to the use and storage of separated bodily material. As Goold notes:

With flexibility comes the ability to adapt to novel forms of property, of which human tissue may be one. This complexity also highlights the conceptual heart of

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<sup>7</sup> AM Honoré, 'Ownership' (n4), 165; later commentators have adopted Wittgenstein's concept of family resemblance to describe the relationship between the 'incidents of ownership': L Wittgenstein, *Philosophical investigations* (Anscombe GEM, tr. Oxford: Basil Blackwell, 1968) 32. See M Quigley, 'Property and the Body: Applying Honoré' (2007) 33 *Journal of Medical Ethics*, 631.

property law, namely that it aims to recognise and regulate conflicting interests and relationships.<sup>8</sup>

The bundle view also enables us to deconstruct disputes as to the ‘ownership’ of bodily material into an organizational structure that identifies the specific aspect or ‘incident’ of ownership that is being contested. As Quigley argues:

The normative framework of the model can help us to move on from abstract disputes about ownership itself and to identify what issues really divide us when considering dilemmas about the use and control of our bodies and their parts that have arisen in the new quasi-commercial climate surrounding human tissue.<sup>9</sup>

It is for these reasons that ‘ownership’ is employed here as an organizational structure because it is able to capture a common thread running throughout the different legal disputes that we will consider here whilst still isolating the specific content of the dispute in each case.

## ii. Pre-social and Social Justifications

In addition to identifying which entitlements in bodily material that may arise in a separated bodily material, we also need to consider the basis upon which such entitlements may obtain legal recognition. This task of justifying entitlements in things, often analysed in the context of justifying private property rights, has a rich heritage from which a wide range of justificatory techniques have been developed. For instance, we may want to recognise an ‘incident of ownership’ in a thing on the basis of:

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<sup>8</sup> I Goold, ‘Sounds Suspiciously like Property Treatment: Does Human Tissue Fit within the Common Law Concept of Property?’ [2005] *UTSLRev* 3; (2005) 7 *UTS Law Review* 62, 63.

<sup>9</sup> M Quigley, ‘Applying Honoré’ (n7) 632.

individual liberty,<sup>10</sup> where a person's 'self-ownership' may be extended beyond the person so that their own personal liberty also extends into the ownership of things;

the maximisation of utility,<sup>11</sup> where the optimal amount of aggregate happiness, welfare or utility is achieved by a particular allocation of entitlements;

the moral development of the person<sup>12</sup> or their personality,<sup>13</sup> where, in order for a person's 'will', personality or subjectivity to have moral value it must be exercised, manifest or expressed through entitlements in things;

the investment of work or skill,<sup>14</sup> where a person applies work or skill in an object, the investment of that work or skill justifies the exercise of entitlements in the object;

economic efficiency<sup>15</sup>, so that entitlements are allocated in a way that is likely to lead to optimal market judgments; or

the distributional outcomes,<sup>16</sup> where entitlements in specific goods (or the wealth the entitlements represent) are allocated in accordance to distributional patterns desired by society or social institutions.

However, as Getzler does, we can distil these (and other) various theories, down to two types of analysis:

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<sup>10</sup> R Nozick, *Anarchy, State and Utopia* (Oxford: Basic Books, 1974); A Carter, *The Philosophical Foundations of Property Rights* (Harvester Wheatsheaf, 1989) 38 -51.

<sup>11</sup> J Bentham, *The Theory of Legislation* [1802] (C.K. Ogden (ed.), Kegan Paul, Trench, Trubner & Co., 1931); A Carter, *The Philosophical Foundations of Property Rights* (n10) 51-64.

<sup>12</sup> TH Green, *Lectures on the Principles of Political Obligation* [1895] (Longmans Green & Co. 1941); A Carter, *The Philosophical Foundations of Property Rights* (n10) 101-113.

<sup>13</sup> GWF Hegel, *Philosophy of Right* [1821] (Oxford University Press, 1967); A Carter, *The Philosophical Foundations of Property Rights* (n10) 89 -101; J Waldron, *The Right to Private Property* (Clarendon Press, 1988).

<sup>14</sup> J Locke, *Two Treatises of Government* [1689] (Peter Laslett (ed.), Cambridge University Press, 1988); Carter, *The Philosophical Foundations of Property Rights* (n10) 12-26.

<sup>15</sup> H Demsetz, 'Toward a Theory of Property Rights' [1967] *American Economic Review* 347; G Calabresi and ADMelamed, 'Property Rules, Liability Rules and Inalienability' [1972] *Harvard Law Review* 1089.

<sup>16</sup> G Calabresi and AD Melamed, 'Property Rules' (n15) 1098-1102.

There is a notion of property as presocial, a natural right expressing the rights of persons which are prior to the state and law, this being the view of Hugo Grotius, Samuel von Pufendorf, John Locke, Immanuel Kant, and Georg W. F. Hegel; and there is a notion of property as social, a positive right created instrumentally by community, state, or law to secure other goals - the theory of Thomas Hobbes, David Hume, Adam Smith, Jeremy Bentham, Emile Durkheim, and Max Weber.<sup>17</sup>

Other commentators have articulated a similar distinction. For Hart, a natural right is a right “which all men have if they are capable of choice; they have it *qua* men and not only if they are members of some society or standing in some special relation to each other”.<sup>18</sup> Rawls gives a slightly wider account of natural rights as claims which “depend solely on certain natural attributes the presence of which can be ascertained by natural reason pursuing common sense inquiry. The existence of these attributes and the claims based upon them is established independently from social conventions and legal norms”.<sup>19</sup>

An entitlement may therefore be justified in a pre-social analysis, which considers whether an entitlement in a thing can be justified with reference to the natural attributes or characteristics of the person. If justified on this basis, such ‘natural rights’ can be said to express, through the entitlement, the rights that a person has *as a person*.

Alternatively, an entitlement may be justified in a social analysis, which considers whether an entitlement in a thing can be justified with reference to the state of affairs that the exercise of the right will produce. These ‘instrumental rights’ use the entitlement *as a means to* produce a desirable state of affairs.

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<sup>17</sup> J Getzler, ‘Theories of Property and Economic Development’ (1996) 26.4 *Journal of Interdisciplinary History* 639, 641.

<sup>18</sup> HLA Hart, ‘Are There Any Natural Rights?’ (1955) 64.2 *The Philosophical Review* 175-191, 175; J Christman, ‘Can Ownership be Justified by Natural Rights?’ (1986) 15.2 *Philosophy and Public Affairs* 156, 157-158.

<sup>19</sup> J Rawls, *A Theory of Justice* (Harvard University Press, 1971), 505; J Christman, ‘Natural Rights’ (n18)157-158.

We therefore have two basic frameworks: the *entitlements* than an individual or institution may have in an item of separated bodily material, and the *justifications* for why an individual or institution ought to have the entitlement(s). We can turn to the law on the use and storage of separated bodily material and identify which entitlements the law recognises, and why.

## **b. The Law on The Use and Storage of Bodily Material**

The law currently recognises some ‘incidents of ownership’ in some items of separated bodily material. I will describe the current law as consisting of five strands of authority: (i) the common law presumption that there is ‘no property in the body’, (ii) the ‘work or skill exception’ to the no property rule, (iii) incidents of ownership that have a statutory basis, (iv) the Court of Appeal decision in *Yearworth*<sup>20</sup> that provides a new basis for the recognition of property rights and (v) the ‘posthumous use’ cases. Throughout this discussion we will be able to identify where incidents of ownership arise in the law, this will then prompt us to subtly revise the concept of ownership.

### **i. The No Property Rule**

The development of the common law in separated bodily material has been against the backdrop of the ‘no property rule’. The common law rule originates from eighteenth century case law dealing with grave robbing cases.<sup>21</sup> It is likely that the rule is the product of a misunderstanding of the earliest ratios, which were primarily concerned with jurisdictional relationship between the ecclesiastical and civil courts.<sup>22</sup> Since only the ecclesiastical courts had jurisdiction over corpse buried on consecrated ground - at the exclusion of the common law courts - a corpse was described as *nullius in bonnis* (‘property of no one’).<sup>23</sup> A common law rule thus emerged, so that in the subsequent grave robbing

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<sup>20</sup> *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37, [2010] QB 1; see M Quigley, ‘Property: The Future of Human Tissue?’ (2009) 17 *Medical Law Review* 457; C Hawes, ‘Property Interests in Body Parts: *Yearworth v North Bristol NHS Trust*’ (2010) 73 *Modern Law Review* 130; SHE Harmon and GT Laurie, ‘*Yearworth v North Bristol NHS Trust*: Property, Principles, Precedents and Paradigms’(2010) 69.3 *Cambridge Law Journal* 476.

<sup>21</sup> PDG Skegg, ‘Human Corpses, Medical Specimens and the Law of Property’ (1975) 4 *Anglo-American Law Review*, 412; PDG Skegg, ‘The “No Property” Rule and Rights Relating to Dead Bodies’ [1997] *Tort Law Review* 222, 222-229.

<sup>22</sup> M Pawlowski, ‘Property in Body Parts and Products of the Human Body’ [2009] *Liverpool Law Review*, 35, 36.

<sup>23</sup> PDG Skegg, ‘The “No Property” Rule’ (n21) 222-229.

cases, a dead body is not capable of being subject to theft because, at the common law, ‘there is no property in the human body’.<sup>24</sup>

It is because of the ‘no property rule’ in the common law that the majority of the Supreme Court of California in *Moore v Regents of the University of California*<sup>25</sup> rejected a patient’s claim in conversion for non-consensual use of his spleen cells. The patient consented to the removal of the spleen cells for therapeutic reasons. His physician then developed a cell-line from the spleen cells. The physician then patented the cell-line and sold the exclusive license to the patent. The patient successfully claimed that his physician’s failure to inform him of the use of the extracted cells was a failure to obtain informed consent and thus a breach of confidence.<sup>26</sup> Duties of confidentiality required that the patient be able to exercise his right to determine how, and by whom, his spleen cells are used, thereby affording the patient the right to authorise use of the bodily material for particular purposes.

However, the patient was unsuccessful in his claim that he had property in his body so as to enable an action in conversion and claim a share of the profits from the license agreement.<sup>27</sup> The Majority of the Supreme Court considered that there were two policy considerations “of overriding importance”.<sup>28</sup> The first was the “protection of a competent patient’s right to make autonomous medical decisions”.<sup>29</sup> For the Majority, this consideration was adequately addressed through the imposition of duties of confidence. The second concern was that the extension of tort liability “threatens to destroy the economic incentive to conduct important medical research”.<sup>30</sup> It was this second concern that was a major factor in the Majority’s decision to deny the claim in conversion. As I will explore in the next Section, there is an important distinction between the considerations that were

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<sup>24</sup> M Pawlowski, ‘Property in Body Parts’ (n22) 36.

<sup>25</sup> *Moore v Regents of the University of California* 793 P.2d 478 (Cal. 1990); *Yearworth v North Bristol NHS* (n20) [39].

<sup>26</sup> *Moore v Regents of the University of California* (n25) 128-135.

<sup>27</sup> *Moore v Regents of the University of California* (n25) 135 - 150.

<sup>28</sup> *Moore v Regents of the University of California* (n25) 143.

<sup>29</sup> *Moore v Regents of the University of California* (n25 ) 143.

<sup>30</sup> *Moore v Regents of the University of California* (n25) 147.

relevant to the patient's rights in determining the "general state of the object"<sup>31</sup> (control rights) and the considerations that were relevant to the patient's right to obtain a benefit from the use of the object (an income right).

In terms of incidents of ownership, *Moore* illustrates a judicial unwillingness to recognise income rights in separated biological material yet a recognition that a patient should nonetheless have the right to authorise the use of the material. In terms of justificatory techniques, *Moore* illustrates how a patient's right to make "autonomous medical decisions"<sup>32</sup> provides a *pre-social* basis for having the right to authorize the use of bodily material, whereas *social* considerations mitigated against affording the patient the right to profit from the use of the bodily material.

Further examples from the United States illustrate the operation of the 'no property rule'. Consider the conflict that arose in *Greenberg*<sup>33</sup> where researchers obtained intellectual property rights in the isolated gene that is responsible for Canavan disease. The intellectual property right gave the researchers exclusive rights to determine whom, and upon what terms, another individuals or institutions can use the isolated gene. The exclusivity of the intellectual property right, the donors argued, circumvented the purpose for which they participated in the research by providing bodily material and personal information. The donors' understanding was that "any carrier or prenatal testing developed in connection with the research...would be provided on a affordable and accessible basis... and would remain in the public domain".<sup>34</sup> The donors' claim in conversion failed since the claimants did not have a proprietary interest in their tissue samples or their genetic information.<sup>35</sup> Similarly, in *Washington University*,<sup>36</sup> the donors of tissue had no recognisable property interest in their donated

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<sup>31</sup> J Christman, 'Distributive Justice and the Complex Structure of Ownership' (1994) *Philosophy and Public Affairs* 225, 232.

<sup>32</sup> *Moore v Regents of the University of California* (n25) 143.

<sup>33</sup> *Greenberg v Miami Children's Hospital*, 1064, 264 F.Supp.2d. 1066.

<sup>34</sup> *Greenberg v Miami Children's Hospital* (n33) 1067.

<sup>35</sup> *Greenberg v Miami Children's Hospital* (n33) 1075: "the facts alleged do not sufficiently allege the elements of a *prima facie* case of conversion, as the Plaintiffs have not alleged how the Defendants' use of the Registry in their research was an expressly unauthorized act."

<sup>36</sup> *Washington University v Catalona* 437 F.Supp.2d 985 (Dist. Ct. Missouri, 2006).

bodily material and therefore retained no ability to determine how the material, or the research of the material, is managed.

Hence, the common law presumption is that progenitors do not have a proprietary interest in their bodily material. Duties of confidentiality may provide some protection of the right of progenitors to authorise or consent to the use and storage of material, and (as we shall see) statutory duties may also provide for certain rights of authorisation and management. Nonetheless, the medieval rule that there can be no property in the body continues to operate at common law.

## ii. The Work or Skill Exception

There are, however, exceptions to the no property rule. The first exception originates from the decision of High Court of Australia in *Doodeward v Spence*<sup>37</sup> where it was held that were 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, that person acquired a right to possession of the corpse or part, at least as against anyone who was not entitled to have it delivered up to them for the purposes of burial.<sup>38</sup>

The Court of Appeal of England and Wales adopted the work or skill exception in *Dobson v North Tyneside Health Authority*.<sup>39</sup> The Court identified two avenues for acquiring possession entitlements in another's biological material: the work or skill exception and the right of possession as a corollary of the duty of interring the body imposed on next of kin of the deceased.<sup>40</sup> However, neither avenue was pursued successfully in this case. The minimal work or skill that was applied to the biological material

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<sup>37</sup> *Doodeward v Spence* (1908) 6 CLR 406.

<sup>38</sup> *Doodeward v Spence* (n37) 414.

<sup>39</sup> *Dobson and another v North Tyneside Health Authority and another* [1996] 4 All E.R. 474.

<sup>40</sup> *Dobson and another v North Tyneside Health* (n39) 478, quoting *Clerk and Lindsell on Torts* (17th ed., 1995) 653 [13-50]: 'the executors or administrators or other persons charged by the law with the duty of interring the body have a right to the custody and possession of it until it is properly buried'.

(the preservation of the brain in fluid) was insufficient for the ‘application of skill’ exception<sup>41</sup> and the duty to intern the body had expired upon the burial of the deceased body.<sup>42</sup> The decision in *Dobson* is authority for two propositions concerning the right to possession: that there is a threshold requirement for the ‘application of skill’ exception and that the right to possession may arise as the corollary of the duty to intern.

This work or skill exception was later successfully applied in *R v Kelly*.<sup>43</sup> The Court of Appeal in *R v Kelly* recognised that an institution may have a right to possession in body parts for the purposes of the Theft Act 1968. In *R v Kelly*, an artist obtained, without permission, a number of body parts from the Royal College of Surgeons and was charged with theft. It was submitted in the Court of Appeal that, according to the common law ‘no property rule’, body parts are not capable of being property so that the Royal College did not have a relevant possessory interest in the body parts for the purpose of Section 1 of the Theft Act 1968.<sup>44</sup>

However, the Court held that there is an established exception to the ‘no property rule’ so that “where a corpse, or part of a corpse, had undergone a process or application of human skill designed to preserve it for medical or scientific examination, it acquired a value and became property for the purposes of the Theft Act 1968”.<sup>45</sup> As a result, the application of human skill through the dissection and preservation of separated bodily material may grant the applier of skill the right to possession of the material.

This notion of the recognition of ownership entitlements through the application of human skill also appears in Section 32(9)(c) of the Human Tissue Act 2004 (hereafter ‘the HTA’, discussed further

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<sup>41</sup> *Dobson and another v North Tyneside Health* (n39) 479.

<sup>42</sup> *Dobson and another v North Tyneside Health* (n39) 479.

<sup>43</sup> *R v Kelly / R v Lindsay* [1998] 3 All ER 741.

<sup>44</sup> *R v Kelly* (n43) 745: “Section 1(1) says: “A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it ... Section 5(1) provides: ‘Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest ...”

<sup>45</sup> *R v Kelly* (n43) 750.

below). Section 32(9)(c) states that “controlled material” that “is the subject of property because of the application of human skill” is exempted from the prohibition of commercial dealings in human tissue.<sup>46</sup>

The fact that the HTA confines the work or skill exception to “controlled material” gives rise to an important interpretative point. As Hardcastle explains,<sup>47</sup> the original clause (clause 29 of the Human Tissue Bill) prohibited commercial dealing in all “relevant bodily material”. The definition of “*relevant bodily material*” included any bodily material which consisted of, or included, human cells. The prohibition against commercial dealings in the legislation was limited to “*controlled material*”, which is defined in Section 32(8) as consisting of, or including, human cells, removed from the human body, that are *intended to be used for the purpose of transplantation*. The explanation for the change was that:

it was never our intention to interfere with commercial activities that had been lawfully and ethically carried out for many years. We therefore propose to amend the Bill to confine the offenses connected with advertising and supply of human tissue for reward for transplantable tissue only.<sup>48</sup>

The appropriate interpretation is that the prohibition of commercial dealing contained in Section 32 is limited to material that is intended to be used for transplantation. Section 32(9)(c) then provides an exception to the prohibition, so that the application of work or skill may provide the applier of work or skill an income right in bodily material that was intended to be used for transplantation.

Despite emerging as a settled exception to the ‘no property rule’, there are inconsistencies in the formulation of the work or skill rule in the law. The application of the rule in *Dobson*<sup>49</sup> and *Kelly*<sup>50</sup>

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<sup>46</sup> Human Tissue Act 2004, Section 32(1).

<sup>47</sup> R Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (Hart Publishing, 2009) 113-116.

<sup>48</sup> Hansard HC Col 115 (28 June) (Ms Winterton); R Hardcastle, *Law and the Human Body* (n47) 113.

<sup>49</sup> *Dobson and another v North Tyneside Health* (n39) 479.

<sup>50</sup> *R v Kelly* (n43) 746.

required a sufficient level of work and an intention to create a novel item. In contrast, the rule formulated in *Doodeward*,<sup>51</sup> (discussed in *Re Organ Retention*),<sup>52</sup> and codified in Section 32 of the HTA, requires the mere application of work or skill. Moreover, the work or skill rule has recently been the subject of a wider criticism by the Court of Appeal. The Court in *Yearworth* described the rules as “not entirely logical” and identified occasions where incidents of ownership that ought to be recognised in body parts where the exercise of work or skill had not changed its attributes.<sup>53</sup> The Court stated that they were “not content to see the common law in this area founded upon”<sup>54</sup> the work or skill rule, which may indicate the beginning of the end for the common law rule that was successfully applied in *Kelly*. As we shall see, the Court of Appeal in *Yearworth* developed a new basis upon which property rights in bodily material may arise.

### iii. Legislative Rights and Duties

In contrast to the piecemeal developments in case law, two pieces of legislation regulate extensively two classes of separated bodily material. Namely, the HTA, which governs the removal, storage and use of human material from deceased persons and the storage and use of human material from living people, and the Human Fertilisation and Embryology Act 1990 (as amended and supplemented by the Human Fertilisation and Embryology Act 2008, hereafter ‘the HFEA’) which regulates the storage and use of gametes and embryos. Here we will consider the events that lead to the High Court decision in *Re: Organ Retention*,<sup>55</sup> the subsequent legislative changes under the HTA, and consider how the HFEA and HTA governs the use and storage of bodily material.

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<sup>51</sup> *Doodeward v Spence* (n37) 414.

<sup>52</sup> *In re: Organ Retention Group Litigation* [2004] EWHC 644; *AB and others v Leeds Teaching Hospital NHS Trust and another* [2004] EWHC 644 [148].

<sup>53</sup> *Yearworth v North Bristol NHS* (n20) [45(d)].

<sup>54</sup> *Yearworth v North Bristol NHS* (n20) [45(d)]. For further criticism of the application of work or skill rule see R Hardcastle, *Law and the Human Body* (n47) 129.

<sup>55</sup> *Re: Organ Retention* (n52)

## *Re: Organ Retention*

The HTA was passed to update the Human Tissue Act 1961 in the wake of the Alder Hey and Bristol scandals where, in the course of numerous post mortems, organs of deceased children had been removed, stored and disposed of.<sup>56</sup> Although the parents had consented to the post mortems, the organs of the children had been removed, retained and subsequently disposed of without their knowledge.

In *Re Organ Retention*, some of the parents of the children sought damages for unlawful interference and negligence causing psychiatric injury. However, under legislation at the time (the Human Tissue Act 1961), Section 2(2) required no more than consent to a post mortem being obtained without further explanation. This means that if the post mortem “was for the purpose of establishing or confirming the cases of death or investigating the existence or nature of abnormal conditions” pursuant to Section 2(1), then no further consent was required.<sup>57</sup> The removal and retention of the organs was lawful and the claims for unlawful interference were unsuccessful. Only one of the three claims in negligence were successful because only one claimant (Mrs Shorter) was able to show the physicians’ breach of their duty of care caused her psychiatric injury.<sup>58</sup>

It is important to note that the claims in *Re: Organ Retention* were not property claims. As we will explore this throughout this Thesis, describing the relationship between the parents and their newly deceased infants as a property relationship is troublesome. It is arguable that the language of ownership is also problematic since it implies a relationship between two separate entities: the person (owner) and the thing (owned-thing). In the next Section I will suggest a terminological change (from ‘incidents of ownership’ to ‘entitlements’). This is also intended to demarcate a subtle conceptual point: that having

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<sup>56</sup> K Liddell and A Hall, ‘Beyond Bristol and Alder Hey: The Future of Regulation of Human Tissue (2005) *Medical Law Review* 170; K Mason & G Laurie, ‘Consent or Property? Dealing with Body Parts in the Shadow of Bristol and Alder Hey’ (2001) *Modern Law Review* 710.

<sup>57</sup> *Re: Organ Retention* (n52) [536].

<sup>58</sup> *Re Organ Retention* (n52) [267]: “Mrs Shorter did suffer some measurable and quantifiable psychiatric injury resulting from the discovery by her of organ retention.”

an ‘entitlement’ in bodily material does not suggest a ‘bright-line’ distinction between the person and the body or bodily material, nor does it reduce the body or bodily material to merely an owned object.

The public controversy that followed from the incidents at Alder Hey and Bristol illustrate the potential incomparability with pre-social and social accounts of ownership. A pre-social analysis identifies the importance of the relationship between parents and newly deceased infants to the parents and would suggest that they retain control over the bodies and body parts of their children. A social analysis identifies the social value of using bodily material for diagnostic, education and research purposes and would suggest that healthcare institutions ought to obtain the right to possess and use the body parts of deceased persons.

### *The HTA and HFEA*

The HTA strengthened the consent requirements for the removal, storage and use of human tissue in an attempt to reach a more satisfactory compromise between the individual interests that a pre-social analysis identifies and wider healthcare interests that a social analysis identifies.

Section 1(1) to (3) of the HTA requires that the storage, use and removal of human tissue may be lawful provided that it is done with the “appropriate consent” and pursuant to a schedule 1 purpose. As a general principle,<sup>59</sup> consent must be given, the consent must correlate with the intended use of the material, and the intended use must be a permissible use as set out in schedule 1 of the Act. These requirements of lawful possession are fortified by the offense provisions. The result is that under Section 5(1) of the HTA it is an offense to do any activity listed in Section 1(1) to (3) without the “appropriate consent”, and under Section 8(1) it is an offense to use or store tissue for a purpose other

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<sup>59</sup> There are eight instances under the Human Tissue Act 2004 where consent is not required for the storage or use of human tissue. The main exception is where the material is stored for a Schedule 1, Part II Purpose under the Human Tissue Act 2004. See J Herring, *Medical Law and Ethics* (4th ed. Oxford University Press, 2011) 419.

than a “qualifying purpose”. Under Section 16, the use and storage of human bodies and human tissue also requires a license from the Human Tissue Authority.<sup>60</sup>

Similarly, the HFEA confers on healthcare institutions the right to use and store gametes and embryos provided that the healthcare institution obtains “effective consent”<sup>61</sup> from the progenitor and that the use of the material is pursuant to purposes under a license granted to the healthcare institution.<sup>62</sup> Sections 5 to 8 of Schedule 3 of the HFEA set out the various instances of storage, use and removal that may be permissible provided there is the “effective consent”.<sup>63</sup> Under the Section 41 HFEA, it is an offense to perform activities that are not in accordance with a license or that are prohibited by Sections 3, 3A and 4 of the Act.

In terms of ‘incidents of ownership’ that constitute the ‘Bundle Picture’ of ownership, there are three important features of these statutory schemes. The first is that healthcare institutions may obtain the right to possess and use bodily material provided the content requirements and licensing requirements are met. The effect of these requirements is to limit the right of possession to healthcare institutions where bodily material is being retained for therapeutic, diagnostic, scientific or educational purposes. The statutory right to possess bodily material for these purposes therefore only arises in favour of healthcare institutions (as licensed institutions).

The second important feature is the way the statutory schemes require ‘consent’ for particular categories of intended use of bodily material but do not enable the progenitor or closely concerned person to prescribe particular conditions on the use of the material beyond the category of use that is

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<sup>60</sup> Activities that require licensing under Human Tissue Act 2004, Section 16(2): “(a) the carrying-out of an anatomical examination; (b) the making of a post-mortem examination; (c) the removal from the body of a deceased person...of relevant material of which the body consists or which it contains, for use for a scheduled purpose other than transplantation; (d) the storage of an anatomical specimen; (e) the storage...of—(i) the body of a deceased person, or (ii) relevant material which has come from a human body, for use for a scheduled purpose; (f) the use, for the purpose of public display, of— (i)the body of a deceased person, or (ii) relevant material which has come from the body of a deceased person.”

<sup>61</sup> Human Fertilisation and Embryology Act 1990, Sections 1 to 4 of Schedule 3.

<sup>62</sup> Human Fertilisation and Embryology Act 1990, Schedule 2.

<sup>63</sup> Human Fertilisation and Embryology Act 1990, Sections 1 to 4 of Schedule 3.

consented to. We can term this as a *right of authorisation* (a limited form of the right to manage that also includes the transfer of other entitlements).

Whether the right of authorisation arises may depend on the type of bodily material and its intended use. Under the HTA, where human tissue is not longer needed for the patient's own care or therapeutic benefit, the material may be stored for the purposes of clinical audit, education or training related to human health, monitoring or quality assurance. Otherwise, under the Code of Practice, the "appropriate consent" required by the HTA ought to satisfy the elements of "valid consent".<sup>64</sup> This involves measures that ensure that the transferor has the "legal capacity to make the decision", is fully informed as to the transfer, and is acting voluntarily.<sup>65</sup> Similarly, for donors of reproductive material, the HFEA Code of Practice suggests that "effective consent" requires sufficient information to be afforded to the donor so that they understand the purpose and implications of the procedure, and that they also receive information about their ability to withdraw and the opportunity to receive counseling.<sup>66</sup>

The consent procedure for the use of the body or tissue of a deceased person also has specific requirements. Where the deceased had expressed their consent or objection to the use of their body, their expressed views will be determinative. Where there is no indication of the deceased's wishes, it is possible for a representative to have been appointed who may determine whether the body, or its parts, is donated.<sup>67</sup> In the absence of the deceased themselves determining whether their body can be used, and in the absence of there being a nominated representative, the person who is in the "closest qualifying relationship" can determine whether the body is used. Section 27(4) identifies the priority of relationships, such as: (a) spouse or partner, (b) parent or child, (c) brother or sister, (d) grandparent or

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<sup>64</sup> Department of Health, *Reference Guide to Consent for Examination or Treatment* (2nd ed, 2009) 7.

<sup>65</sup> Nuffield Council on Bioethics, *Human Bodies: Donation for Medicine and Research* (October 2011), 56; Department of Health, *Reference Guide to Consent for Examination or Treatment* (n64) 11.

<sup>66</sup> Human Fertilisation and Embryology Authority, *Code of Practice* (8th ed. 2009) § 5; Nuffield Council on Bioethics, *Human Bodies: Donation for Medicine and Research* (65) 61.

<sup>67</sup> Human Tissue Act 2004, Section 4.

grandchild, down to (h) friend of longstanding. As we shall see, for some commentators, these pre-social rights of authorisation give undue weight to the wishes of the deceased and their family and friends in light of the wider ‘social’ interests in the lives that could be saved through the greater availability of donated organs.

Beyond the ability to authorise the use of separated bodily material, the progenitor may extract bodily material to donate to healthcare institutions. This is the exercise of the right to transfer. As we have seen, the above consent procedures prescribe the conditions for a legally valid transfer. The third feature of the statutory schemes is the way the HTA and HFEA also limit the content of the transfer. The limits on the content of the transfer concerns both the bodily material this is being transferred and any benefit provided in exchange of the material. There are limits as to which items of bodily material can be transplanted as well as requirements that transferors are assessed as to their “medical suitability” for the transfer of the material.<sup>68</sup>

In terms of the benefits that may be provided in exchange for bodily material, Section 32 of the HTA prohibit the commercial transfer of “controlled material”<sup>69</sup> and Section 12(1) of the HFEA 1990 prohibits the payment of any money “given or received in respect of any supply of gametes or embryos”.<sup>70</sup> Yet, the Human Fertilisation and Embryology Guidelines permit payments reimbursing “all reasonable expenses incurred...in connection with donating gametes or embryos” and payments “compensating the donor for their expenses and loss of earnings”.<sup>71</sup> Moreover, Section 32(7) of the HTA provides that it is not an offence under the Act to make payments to a donor to human tissue to

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<sup>68</sup> Human Tissue Authority, *Code of Practice 2* (2009) [59]; Human Tissue Authority, *Code of Practice 6* (2009) [49]; Human Fertilisation and Embryology Authority, *Code of Practice* (2009) [11]; Nuffield Council on Bioethics, *Human Bodies: Donation for Medicine and Research* (n65), 74

<sup>69</sup> Human Tissue Act 2004, Section 32.

<sup>70</sup> Human Fertilisation and Embryology Act 1990, Section 12(1):“The following shall be conditions of any license granted under this Act...(e) that no money or other benefit shall be given or received in respect of any supply of gametes, embryos or human admixed embryos unless authorised by Directions...”,

<sup>71</sup> Human Fertilisation and Embryology Authority, *Code of Practice* (2009) [13.2] - [13.4]: “Gamete and embryo donation Directions: Centres may compensate sperm donors a fixed sum of up to £35 per clinic visit. Centres may compensate egg donors a fixed sum of up to £750 per cycle of donation. Where a prospective egg donor does not complete the cycle, the centre may compensate the egg donor on a ‘per clinic visit’ basis.”

compensate for expenses incurred or loss of earnings.<sup>72</sup> So that a progenitor has a *right to transfer*, and may also be financially compensated for the transfer of bodily material (*transfer-for-value*), but may not exercise a fully-fledged *right to income* with regards to their bodily material.

### *Evans*

As we have noted, under the HFEA, the storage of an embryo or the storage and use of gametes requires both the consent of progenitor and for the reproductive material to be stored and used in pursuant to a license. As the Court of Appeal decision in *Evans v Amicus Care* illustrates,<sup>73</sup> the HFEA provides the progenitors of reproductive material the right to manage and use their reproductive material through a series of consent requirements. *Evans* concerned a couple who attended a fertility clinic. The claimant (Ms Evans) was diagnosed with ovarian cancer and the couple sought In Vitro Fertilization (IVF) and produced, then stored, a fertilized embryo. After an operation that successfully removed the cancer from the claimant's ovaries she was unable to conceive naturally, but her (now former) partner (Mr Johnson) then withdrew his consent before she could use the stored fertilized embryo.

Because the HFEA drew clear distinctions between acts of creation, storage and use, the Court held that the policy of the Act was to ensure continuing consent of both parties from the commencement of treatment to the point of implant.<sup>74</sup> As a result, Mr Johnson was “entitled to withdraw his consent with the effect that withdrawal was to prevent both the use and continued storage of the embryo fertilized by the sperm”.<sup>75</sup> Putting it in terms of incidents of ownership, both parties

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<sup>72</sup> Human Tissue Act 2004, s32(7): References in subsections (1) and (2) to reward, in relation to the supply of any controlled material, do not include payment in money or money's worth for defraying or reimbursing (a) any expenses incurred in, or in connection with, transporting, removing, preparing, preserving or storing the material, (b) any liability incurred in respect of — (i) expenses incurred by a third party in, or in connection with, any of the activities mentioned in paragraph (a), or (ii) a payment in relation to which subsection (6) has effect, or (c) any expenses or loss of earnings incurred by the person from whose body the material comes so far as reasonably and directly attributable to his supplying the material from his body.

<sup>73</sup> *Evans v Amicus Healthcare Ltd and others* [2004] EWCA (Civ) 727.

<sup>74</sup> *Evans v Amicus Healthcare* (n73) [36].

<sup>75</sup> *Evans v Amicus Healthcare* (n73) [41].

had a right to manage, alienate and use the fertilized embryo. However, in cases of conflicting interests in ‘mixed’ bodily material, the interest of one progenitor needs to be prioritised above the other.

The Court’s prioritisation of Mr Johnson’s management interest in the fertilized embryo that led to Ms Evans’ submission to the European Court of Human Rights<sup>76</sup> that the requirement of continued bilateral consent for the use and storage of the fertilized embryo was a violation of the Ms Evans’ right under Article 8 of the European Convention on Human Rights to respect for her private life.<sup>77</sup> Both Courts recognised that Ms Evans’ Article 8 right had to be viewed against Mr Johnson’s competing Article 8 right. Since “motherhood could surely not be forced on Ms Evans and likewise fatherhood surely cannot be forced on Mr Johnson”,<sup>78</sup> it was held that Ms Evans’ right “to respect for the decision to become a parent in the genetic sense should [not] be accorded greater weight than [Mr Johnson’s] right to respect for his decision not to have genetically related child with her”.<sup>79</sup> Therefore, as between competing rights in the bodily material, the policy in the HFEA to prioritise the right to alienate over the right to use was held to be consistent with Human Rights norms.

#### iv. *Yearworth* and the New Basis

However, the HFEA was unable to account for the scenario that arose in *Yearworth v North Bristol NHS*.<sup>80</sup> Perhaps the most significant deviation from the ‘no property rule’, Court of Appeal recognised property rights in the semen of six cancer patients. Since their chemotherapy treatment could affect their fertility, the patients had acted on the advice of clinicians and produced samples of semen, prior

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<sup>76</sup> *Evans v United Kingdom* (2008) 46 EHRR 34 (Grand Chamber).

<sup>77</sup> European Convention on Human Rights, Article 8: (1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

<sup>78</sup> *Evans v Amicus Healthcare* (n76) [111]

<sup>79</sup> *Evans v United Kingdom* (n76) [90]. See M Ford, ‘*Evans v United Kingdom*: What Implications for the Jurisprudence of Pregnancy?’ (2008) 8 *Human Rights Law Review* 171, 173.

<sup>80</sup> *Yearworth v North Bristol NHS* (n20).

to their treatment, that were to be frozen and stored for possible future use. Unfortunately, the liquid nitrogen in the hospital storage tanks fell below the requisite level and the semen thawed and expired.

The six men sought remedies in the Court of Appeal for personal injury, negligence and bailment. They were unable to prove on the balance of probabilities that they suffered a non-proprietary loss under negligence,<sup>81</sup> so they were limited to seeking damages for direct personal injury or damage to property. The Court held that it would be a “fiction” to hold that “damage to a substance generated by a person’s body, inflicted after its removal...constituted a personal injury”,<sup>82</sup> and hence, the claim for personal injury also failed.

However, the proprietary actions in negligence and bailment succeeded. Crucially, property rights in the separated bodily material were recognised for the purpose of these two actions because the Court identified that the patients each had two key ‘incidents of ownership’ in the semen (management and use). The basis for recognising these two incidents of ownership was combination of the patients’ rights pursuant to the statutory provisions in the HFEA and judicial observations as to the relationship between the men and their semen since. This culminated in a five-fold explanation for why the men owned their semen, since:

- (i) by their bodies, they alone generated and ejaculated the sperm.
- (ii) The sole object of their ejaculation was that it might later be used for their benefit...
- (iii) ...the Act recognises in the men a fundamental feature of ownership, namely that at any time they can require the destruction of the sperm.
- (iv) ...no person, whether human or corporate, other than each man has any *rights* in relation to the sperm which he has produced.

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<sup>81</sup> *Yearworth v North Bristol NHS* (n20) [10].

<sup>82</sup> *Yearworth v North Bristol NHS* (n20) [23].

- (v) ...the precise correlation between the primary, if circumscribed, rights of the men in relation to the sperm, namely in relation to its future use, and the consequence of the Trust's breach of duty, namely preclusion of its future use.<sup>83</sup>

The HFEA afforded the patients' rights in the semen which were consistent with their relationship with the semen given that no other individual or institution had competing rights to the semen. Even though the HFEA limits the rights exercisable in the semen, so as to limit the bundle to only a few incidents of ownership, "the Court of Appeal took the view that the limits imposed by the HFEA upon the claimants' right to use their stored sperm were not sufficiently extensive to prevent their having property rights in that sperm," in essence, giving "weight to the *negative* control of the claimants".<sup>84</sup> It was because the Court of Appeal could map two incidents of ownership onto the factual scenario, that was partially structured by statutory rights and duties, that the Court was willing to find that the patients *owned* their semen.

It was almost then a *fait accompli* that their ownership be vindicated by successful property actions. Yet, as I will explain, this shift from ownership to property is not an inevitable shift and I aim to show in this Thesis that there are alternative means to legally protecting entitlements in bodily material.

## v. Posthumous Use

Another emerging exception to the 'no property rule' is that property rights may arise in the reproductive material of the deceased person in order to facilitate the use of the material by the partner of the deceased. An example of this exception first appeared in California, in *Hecht v Superior Court of Los Angeles County*,<sup>85</sup> where a deceased man, who had stored sperm, had "sufficient decision making

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<sup>83</sup> *Yearworth v North Bristol NHS* (n20) [45(f)].

<sup>84</sup> S Green, 'The Subject Matter of Conversion' (2010) *Journal of Business Law* 218, 239.

<sup>85</sup> *Hecht v Superior Court of Los Angeles County* (1993) 20 Cal. Rptr. 2d 275; *Yearworth v North Bristol NHS* (n20) [40].

authority in relation to the sperm for it to amount to “property” for the purposes of the State’s Probate Code”.<sup>86</sup> The semen was then transferred to the deceased’s partner as part of his estate.

Similarly, in decision of the Supreme Court of Queensland in *Bazely*,<sup>87</sup> the claimant’s husband had stored semen for the purpose of reproductive therapy. However, the husband died without leaving any written directive about the semen. It was held by the Supreme Court that “both in law and in common sense, [the conclusion] must be that the straws of semen currently stored with the respondent are property, the ownership of which vested in the deceased while alive and in his personal representatives after his death”.<sup>88</sup> The Court, with general reference to the decision in *Yearworth*, the rule in *Doodeward*, and the right to possession as the corollary of the duty to inter, reasoned that where a person has lawfully applied work or skill to a human body or part “that it has acquired some attributes differentiating it from a mere corpse awaiting burial” the person obtains the right to possession as a property right.<sup>89</sup> As a result, the deceased’s entitlements in his semen were property rights and the wife of the deceased was able to obtain these property rights through the operation of Section 8 of the Queensland Succession Act 1981 (Qld).

The Supreme Court of New South Wales in *Re: Edwards*<sup>90</sup> also afforded stored semen the legal status of property so that the widow of the deceased progenitor could obtain possession of the semen. The crucial difference between the extractions in *Re: Edwards* and the extraction in *Bazely* is that in the former case the semen was extracted from a comatose patient by court order.

The reasoning of the Supreme Court revolved around three key propositions. First, the Court was satisfied that the widow had a limited right to possess the bodily material as the corollary of the

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<sup>86</sup> *Yearworth v North Bristol NHS* (n20) [40].

<sup>87</sup> *Bazely v Wesley Monash IVF Pty Ltd* [2010] QSC 118.

<sup>88</sup> *Bazely v Wesley Monash IVF* (n87) [33].

<sup>89</sup> *Bazely v Wesley Monash IVF* (n87) [18].

<sup>90</sup> *Jocelyn Edwards; Re the estate of the late Mark Edwards* [2011] NSWSC 478

duty to inter.<sup>91</sup> Yet, it was also held that the widow had right to the semen that “extends beyond that which she would have as administrator” of the estate.<sup>92</sup> Second, the semen had the status of property because of the application of work or skill rule in extracting and storing the bodily material, and it became *her* property because it the semen was extracted “for *her* purposes”.<sup>93</sup> The third stage of the reasoning concerned the application of Section 21 of the Assisted Reproductive Technology Act 2007 (NSW). Section 21 prohibited the “supply” of semen to another person without the progenitor’s consent.<sup>94</sup> By viewing the claim as the assertion of the right to the possession of property as against the healthcare institution, the Court was able to describe the transfer of possession as a ‘relinquishing’ of the semen rather than a ‘supply’ of the semen.

Returning to England and Wales, the Court of Appeal decision in *ex parte Blood*<sup>95</sup> offers an interesting comparison to *Re: Edwards*. In *Blood*, the widow of the deceased also sought the right to use the deceased’s semen which was removed when he was in a comatose state prior to his death. Although the widow may have had management and (limited) possession entitlements in the deceased body, it was held that there was insufficient evidence for the Court to infer that the deceased had consented to the use of his reproductive material by his partner. Nonetheless, the partner of the deceased eventually obtained the right to use semen. This is because the Court of Appeal<sup>96</sup> later quashed the decision of the Human Fertilisation and Embryology Authority to refuse her application on the grounds that it was inconsistent with her right to receive medical treatment in another European Union state. Since this later decision of the Court of Appeal was determined by her rights under the

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<sup>91</sup> *Re: Gray* [2000] QSC 390; *Re: Edwards* (n90) [41] -[42].

<sup>92</sup> *Re: Edwards* (n90) [90].

<sup>93</sup> *Re: Edwards* (n90) [91] [emphasis added].

<sup>94</sup> Assisted Reproductive Technology Act 2007 (NSW), Section 21: “An ART provider must not supply a gamete or an embryo to another person (including another ART provider) except with the consent of the gamete provider and in a manner that is consistent with the gamete provider’s consent.”

<sup>95</sup> *R v Human Fertilisation and Embryology Authority, ex parte Blood* [1997] 2 All ER 687.

<sup>96</sup> *R v Human Fertilisation and Embryology Authority ex parte Blood* [1999] Fam 151.

European Community Treaty, it has been observed by the Court of Appeal in *Yearworth* that it “casts no significant light”<sup>97</sup> on the related private law issues.

In terms of incidents of ownership, two recent Australian decisions illustrate the potential for partners of deceased persons to obtain the right to use reproductive material once the material is conceived of as a property right, even where the progenitor did not consent to the extraction. In terms of Honoré’s taxonomy, I suggest that *Bazely* would be better conceptualized as representing the exercise of reversionary rights. According to this view, since the rights of the progenitor (as per *Yearworth*) have expired, they may vest in the co-participant in assisted reproductive therapy.

Despite the no property rule governing the common law status of separated bodily material, a series of recent decisions that depart from the no property rule indicate a growing judicial willingness to recognise property rights in bodily material. As the law currently stands, I would suggest that the law is reaching a tipping point between departing from the no property rule and continuing with the presumption against the recognition of property rights, albeit with limited exceptions. The aim of this Thesis is to show that although a full departure from the no property rule is likely, a full departure is not inevitable as there are rules and procedures that can be developed in place of property law.

### *Section Summary*

Although the ‘no property rule’ sets out a presumption against the recognition of property interests, this has not precluded legislation and equitable duties from recognising incidents of ownership. Moreover, there are two exceptions - at common law - to the no property rule: the work or skill rule and the new basis as provided by the Court of Appeal in *Yearworth*. The law can therefore be accurately described as an uneasy “hybrid” between property and consent “paradigms”.<sup>98</sup> Moreover, with the

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<sup>97</sup> *Yearworth v North Bristol NHS* (n20) [37].

<sup>98</sup> JK Mason and GT Laurie, ‘Consent of Property’ (n56) 725: “such a hybrid model is seriously incongruous, and this is so precisely because it is a hybrid, for it rejects a property model in favour of consent and, at the same time, takes as its starting premise the actual or possible existence of legal property rights in human parts.”

addition of the ‘new basis’ for property rights identified in *Yearworth*, property law appears to have been nominated as the leading common law candidate to govern the use and storage of bodily material.

In terms of the early stages of our analysis, it is sufficient that we extract from this survey of the law the ‘incidents of ownership’ or ‘entitlements’ in bodily material that are recognised in the law:

- (i) a right to authorise: under the statutory requirements of “appropriate consent” or “effective consent,” or as facilitated by duties of confidence;
- (ii) a right to manage: as facilitated by statutory multiple consent requirements for acts of storage and use;
- (iii) a right to transfer: as enabled by the statutory consent requirements, or where property rights arise in the bodily material;
- (iv) a right to transfer-for-value: compensation payments permitted by statute;
- (v) a right to possession: vesting in the executor of the estate as the corollary of the duty to inter or vesting in healthcare institutions conditional upon obtaining consent and exercising possession pursuant to licensed purposes;
- (vi) a right to use: as facilitated by statute conditional on the progenitors consent or where property rights arise in the bodily material; and
- (vii) a right to income: in “controlled” human tissue that has been the subject subject to the application work or skill.

Although the Bundle Picture is a useful tool that enables such a synopsis of the law, it nonetheless does little more than than group the various legal disputes under a single heading of ‘ownership’. We shall now turn to consider how the Bundle Picture needs to be revised.

## Section Two: From Ownership to Entitlements

The advantage of viewing the current law through the lens of ownership - as understood as a bundle of rights - is that we are able to view claims to the commercial profit from spleen cells, the possession of preserved body parts, the control of organs of deceased infants or the use of fertilized embryos, within the same frame of reference. Yet, we need to be careful with how we apply the Bundle Picture and appreciate how little it achieves in terms of the overall aim of determining the appropriate legal status of separated bodily material. In this Section, I recommend that we subtly reconfigure the Bundle Picture by making four observations:

- (i) that ownership is not a standalone legal concept;
- (ii) that ownership is not a unitary bundle of rights;
- (iii) that ownership is a system of priority; and
- (iv) that incidents of ownership do not imply a duality between the owner and owned-thing.

These revisions represent a subtle conceptual change that is necessary if we are to continue to use the Bundle Picture as our most basic framework. To demarcate these revisions, I will in subsequent chapters avoid discussing claims in terms of ‘ownership’, ‘owners’ or ‘incidents of ownership’. Rather, the bundle will consist of ‘entitlements’ which may be exercised by ‘entitlement-holders’.

### i. Ownership is not a Standalone Legal Concept

Some commentators doubt the value of using the concept of ownership. According to Swadling:

it is title and not ownership which English law protects. Despite what the layman might think, there is no concept of ownership in English law.<sup>99</sup>

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<sup>99</sup> W Swadling, ‘Unjust Delivery’ in A Burrows and A Rodger, *Mapping the Law: Essays in Honour of Peter Birks* (Oxford University Press, 2006) 281.

Swalding is right that the concept of ownership - as a standalone concept - does not feature in the legal system. Consider how, in the above survey of the law, all the claims to ownership are packaged in a particular legal form: the patient in *Moore* alleged a breach of confidence and brought an action for conversion, an action under the Theft Act 1968 was brought in *Kelly*, the parents in *Re: Organ Retention* made particular claims in negligence and unlawful interference, the parties in *Evans* sought a particular interpretations of their statutory rights under the HFEA, the patients in *Yearworth* succeeded in their claims for breach of bailment and negligence, and so on. The claims were all ultimately concerned with ownership (but not all concerned with property), but to claim to have an incident of ownership, the claim had to be packaged within a set of legal rules and procedures.

This is also true for more settled instances of ownership. As Honoré himself observed, legal remedies such as ejection and specific restitution protect an owner's exclusive control so as to uphold the owner's right to possession.<sup>100</sup> Similarly, the legal rules and procedures that authorise an entitlement-holder to license and consent to acts regarding the object, make contracts regarding the object and transfer the legal title of the object.<sup>101</sup> These rules and procedures enable the owner to exercise entitlements; to determine how and by whom the object is used, to benefit from foregoing personal use and to transfer the object.

The main limitation of using the concept of ownership as an analytical tool is that incidents of ownership are incidents of legal rights, duties and liabilities only insofar as the legal system provides rules and procedures for protecting the relationship between the owner and the thing. The difficulty in identifying ownership as a concept in English law is in separating the *entitlement* from the *rule* that protects that entitlement. Since each entitlement is paired with a legal action, it is difficult to conceptually separate the entitlement from its method of protection. It could be said that ownership is a pre-legal concept; that ownership may feature in legal reasoning but it is not a standalone legal

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<sup>100</sup> AM Honoré, 'Ownership' (n4) 166.

<sup>101</sup> AM Honoré, 'Ownership' (n4) 176.

concept. Therefore, under this framework so far, to say that someone is an owner of a thing, is merely to say that the individual has particular entitlements in the thing that the law – somehow – protects.

It is now possible to clarify the relationship between ownership and property: whereas ownership represents the relationship between a person and a thing, property represents a set of legal rules that protects the ownership relationship *in a particular way*. All instances of property rights include incidents of ownership. For instance, for the Crown to successfully allege theft in *Kelly* it needed to be established that the Royal College of Surgeons had a right to possession (which they were able to through the work or skill rule) whereas the claim in *Dobson* for negligent damage to property failed since the claimants could not establish an incident of ownership. Ownership, therefore, is a *necessary* condition of there being property.

Crucially, however, ownership is *not a sufficient* condition of there being property. Rights of possession, management and use can be exercised in bodily material without the use of property law. Duties of confidentiality can facilitate a patient's authorisation for whether, and for what purposes, their bodily material is used. Moreover, statutory rights and duties govern the lawful storage and use of bodily material as well as the rights of the progenitor and closely concerned persons in relation to the storage and use of the material. Compare *Yearworth* with *Evans*. In the Court of Appeal decision in *Evans*, the entitlements were governed by the HFEA. Under the HFEA, when the claimant (Ms Evans) and the respondent (Mr Johnson) stored their bodily material with the licensed healthcare institution (Amicus Healthcare) they retained a right to determine how, and by whom, it is used and they retained the right to use the material at a later time. The Amicus Healthcare then obtained a right to possess the material.

This is the same allocation of entitlements as between the claimants (the cancer patients) and respondents (North Bristol NHS Trust) in *Yearworth*. The difference is that in *Evans* the interference with an individual's entitlements triggered statutory liability under the HFEA so that the ownership entitlements of Ms Evans, Mr Johnson and Amicus Care were facilitated by statutory rights and duties.

Difficulty emerged when the entitlements of Ms Evans and Mr Johnson came into conflict and one set of entitlements had to be prioritised. Whereas, in *Yearworth*, remedies were sought through property rules, since the HFEA did not have liability provisions concerning the type of misuse of the semen yet the Court nonetheless considered that North Bristol NHS Trust should be legally responsible for misuse of the semen.

The Bundle Picture remains a useful basic framework, yet note how little is achieved by placing the law within this particular organisational structure. In contrast, other commentators have equated Honoré's taxonomy of ownership with property. For instance, Rao argues that:

If society permits a part of the body to be separated from the person and alienated to others or seized by the state, that part of the body constitutes "property", regardless of the legal label attached to it.<sup>102</sup>

Yet statutory provisions, and potentially other common law rules, are able to facilitate the transfer of bodily material to another, or permit public authorities to obtain, or seize, bodily material. By permitting this, it does not follow that there is a recognition of property in body parts, it is merely a recognition of entitlements in body parts. It is a further question, and not just a question of labeling, how these entitlements are legally protected. Further examples of this equivocation include Goold in 'Sounds Suspiciously like Property Treatment',<sup>103</sup> where Goold adopts Honoré's eleven incidents of ownership, describes it as "The Eleven Incidents of Property" and then shows how is possible to fit separated biological material into Honoré's framework, to conclude that "human tissue is aptly suited to having property status, and that...[m]ore generally...at the conceptual level, there are few legal difficulties with viewing human tissue as property". However, as I have argued, ownership is a necessary but insufficient condition of property and it is thus an insufficient account of property to merely apply Honoré's account of ownership.

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<sup>102</sup> R Rao, 'Property, Privacy and the Human Body' (2000) 80 *Boston University Law Review* 359, 460.

<sup>103</sup> I Goold, 'Sounds Suspiciously Like Property Treatment' (n8) 62.

The same equivocation between property and ownership, can be found in Quigley's article, 'Property and the Body'<sup>104</sup> and Dickenson in 'Property in the Body: Feminist Perspectives'. Dickenson's analysis of property draws "on the accepted characterisation in the common law of property as a bundle of rights"<sup>105</sup> without consideration of particular character of property rules that, along with bundle of ownership, is the accepted characterisation of property. Whilst Quigley asserts that, "with the support of the most complete theory of property that we can have", we can say when it comes to my body that "I own that or that is my property".<sup>106</sup>

Again, Honoré provides a theory of *ownership* and to have recognised ownership interests in an object or resource is not the same as that object or resource being *property*. By identifying incidents of ownership in separated bodily material, we are merely identifying a relationship between the person and the object that is being exercised or ought to be exercised. Incidents of ownership represent a functional relationship between a person and a thing, that may attract legal protection. Entitlements do not, themselves, represent a proprietary relationship (or any other legal relationship). It is only when a particular system of rules and procedures are applied to the ownership relationship does ownership become property. In Part C of this Thesis, we will be concerned with the the particular system of rules and procedures that give rise to property rights and the rules and procedures that give rise to other branches of private law.

## ii. Ownership is Not a Unitary Bundle

When ownership is outlined as a list of eleven rights, it gives the appearance of a general equality between each right (or entitlement). Since each right is constitutive of, but not necessary to, the concept of ownership, it would also appear that 'ownership' exists where a sufficient number of (any of the) incidents of ownership arise.<sup>107</sup>

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<sup>104</sup> M Quigley, 'Applying Honoré' (n7) 631-634.

<sup>105</sup> DL Dickenson, *Property in the Body: Feminist Perspectives* (Cambridge University Press, 2007) 12.

<sup>106</sup> M Quigley, 'Applying Honoré' (n7) 633.

<sup>107</sup> JW Harris, *Property and Justice* (n3) 126.

Yet, when the Bundle Picture is applied to any particular context, particular entitlements arise as more important or as more controversial than others. This suggests that there is a structure within the bundle of entitlements that we ought to identify. Following JW Harris<sup>108</sup> and Christman,<sup>109</sup> I suggest that we ought to view the bundle of entitlements as a spectrum of entitlements or as categories of entitlements.

### *Ownership as a Spectrum*

JW Harris describes a spectrum that ranges between “mere property” and “full blooded ownership”.<sup>110</sup> The concept of mere property amounts to “some open end set of use-privileges and some open ended set of powers of control over uses made by others”.<sup>111</sup> Or, in terms of Honoré’s taxonomy, mere property includes possession, use, management and capital entitlements. In contrast, full-blooded ownership entails “prima facie, unlimited privileges of use...unlimited powers of control and transmission”,<sup>112</sup> *viz.* the full bundle of Honoré’s incidents of ownership.

Entitlements may be added to ‘mere property’ so that particular instance of ownership moves towards the full-blooded end of the ownership spectrum. Equally, interests may be subtracted from full-blooded ownership so that instance of ownership becomes a slightly weaker instance of ownership. The ownership spectrum, for both JW Harris and Munzer,<sup>113</sup> maps directly onto degrees of property.

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<sup>108</sup> JW Harris, *Property and Justice* (n3) 27 - 30, 126.

<sup>109</sup> J Christman, ‘Distributive Justice’ (n31) 226; J Christman, ‘Self-ownership, Equality and the Structure of Property Rights (1991) *Political Theory* 28, 29.

<sup>110</sup> JW Harris, *Property and Justice*, (n3) 27.

<sup>111</sup> JW Harris, *Property and Justice*, (n3) 27.

<sup>112</sup> JW Harris, *Property and Justice*, (n3) 30.

<sup>113</sup> SR Munzer, *A Theory of Property* (Cambridge University Press, 1990) 47.

## *Ownership Categories*

Similar to the ownership spectrum, Christman's prescribes 'categories of ownership'.<sup>114</sup> Christman suggests that since "different aspects of property rights tend to perform different functions and serve different individual and societal interests",<sup>115</sup> entitlements can be divided into four entitlement categories.

The first category concerns control rights (here described as *control entitlements*). Control entitlements enables the right-holder to be the "primary arbitrator over what is to be done with a thing".<sup>116</sup> This is the same collection of interests as JW Harris' "mere property" and hence includes Honoré's possession, use, management and capital interests.

In addition to control entitlements, an entitlement-holder may also have an *income entitlement* in an object (the second rights-category). An income entitlement only encompasses Honoré's right to income and enables the right-holder to derive a benefit in exchange for her relinquishing one or more of her control-entitlements.<sup>117</sup>

The third category, *derivative entitlements*, are the logical extensions of control rights and includes Honoré's security interest, transmissibility interests and the right to the absent term.<sup>118</sup> The fourth category, *structural necessities*, consists of the rights and duties that are necessary in order for the structure of ownership to be consistent with the rights and duties from other areas of the law. Hence, structural necessities include Honoré's duty to prevent harm, liability to execution and the incident of residuary.<sup>119</sup>

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<sup>114</sup> J Christman, 'Distributive Justice' (n31) 226.

<sup>115</sup> J Christman, 'Distributive Justice' (n31) 226.

<sup>116</sup> J Christman, 'Self-ownership' (n109) 29.

<sup>117</sup> J Christman, 'Self-ownership' (n109) 29.

<sup>118</sup> J Christman, "Distributive Justice' (n31) 231.

<sup>119</sup> J Christman, "Distributive Justice' (n31) 231.

Christman argues that control rights and income rights perform fundamentally different functions, serve different interests, and concern different factors. We will explore this distinction further in Chapter Three and it will become fundamental to the analysis of which entitlements individuals and institutions ought to have in separated bodily material. This is because the difference in the function of the entitlements, and the difference in the factors that give content to the entitlements, require different explanations or justifications for why a control or income entitlement ought to be recognised. The institution of property can be described as having the twin functions of “governing both the use of things and the allocation of social wealth”,<sup>120</sup> and the two functions represent a a different set of normative choices about the object or resource.

For example, recall the two main policy considerations discussed in *Moore*. The patient’s right to authorise the use of his spleen cell concerns the relationship between the patient and his bodily material. The Supreme Court of California held that this aspect of control is concerned with values of “dignity” and “privacy” and recognised that the patient ought to be afforded this degree of control.<sup>121</sup> In contrast, the patient was not afforded the right to derive income from the use of the spleen partly because of the consequences that the recognition of income rights in favour of the progenitor would have on the commercial incentives in the biotechnology sector.<sup>122</sup>

Entitlements of control and entitlements of income perform different functions and concern different interests, and this important distinction is obscured if we were to view ownership as a unity concept. Were all entitlements to be viewed as having a general equality, the temptation would be add the right to income to the existing bundle without appreciating functional difference between control and income entitlements.

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<sup>120</sup> JW Harris, *Property and Justice* (n3) 26.

<sup>121</sup> *Moore v Regents of the University of California* (n25)139-40.

<sup>122</sup> *Moore v Regents of the University of California* (n25) 143-144.

## *Non-unitary Views*

JW Harris's account creates a spectrum between two significant poles: mere-ownership and full-blooded ownership. Whereas, under Christman's theory, four categories of entitlements represent different types of entitlements we can have in an object. I would suggest that these two different non-unitary views of ownership are nonetheless consistent with one another. Like the light spectrum, we can focus on categories of colour (red, blue, green) or focus on particular incremental developments in the spectrum. The differences in approach reflect the different aims of their respective analyses.

The purpose of Christman's analysis of ownership concerns the means of justifying the legal protection of entitlements. The division between control entitlements and income entitlements represents a fundamental distinction as to the different functions that entitlements perform and the different factors that entitlements concern. In Part B (Chapters 2 and 3) we will be concerned with identifying which entitlements in bodily material ought to attract legal protection. Hence we will be operating within Christman's framework during this part of the Thesis and will accordingly divide the next two chapters between an assessment as to which control entitlements in bodily material can be justified (Chapter Two) and whether income entitlements in bodily material can be justified (Chapter Three).

I would add that the right to transfer also performs a subtly different function to other control entitlements and sits - perhaps uneasily for Christman's schema - between control entitlements and income entitlements. This is because, whereas control entitlements only concern the relationship between "an owner's set of preferences ...and the general state of the object owned"<sup>123</sup>, the ability to transfer entitlements to another introduces the ability to forego entitlements in favour of another person obtaining the entitlements, and it is this additional power that may require an additional explanation for why an entitlement-holder can transfer their entitlements. We can, however, for the purposes of Part B, treat the right to transfer as akin to the right to alienate (so that it is treated in

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<sup>123</sup> J Christman, 'Distributive Justice' (n31) 232.

Chapter Two as a control entitlement) and treat the right to transfer-in-exchange-for-value as sufficiently similar to the right to income (and will be discussed in Chapter Three).

In Part C (Chapters 4 and 5), we will be concerning the legal structure of property law. This is a task that is more akin to JW Harris' project in *Property and Justice* and Munzer's project in *A Theory of Property*. Hence we will return to thinking of ownership as a spectrum, and treat the right to transfer as a structural feature of the way that property law protects entitlements in things. Why an entitlement-holder can or cannot transfer their entitlements does require an explanation beyond the considerations that feature in the justification of control rights, but this explanation is more appropriately provided in the context of Part C of this Thesis.

### c. Ownership is a System of Priority

There remains two minor revisions of the Bundle Picture necessary as part of the deconstruction of ownership. The first concerns identifying an 'owner'. Under Honoré's taxonomy, an 'owner' arises where there is a sufficient number of incidents of ownership. Yet consider the difficulty in identifying the 'owner' of tissue from a deceased person under the HTA. A healthcare institution may obtain the right of actual possession of the material and the HTA sets out a hierarchy of persons who may authorise the storage and use of the body. If the retention of the body is not authorised, the executor may obtain the immediate right of possession of the body. The bundle of ownership is fragmented in terms of who may exercise which entitlements and in terms of which parties have priority with regards to the same entitlement.

This difficulty is not unique to the use and storage of bodily material. For example, consider the right to possession under bailment. In a bailment relationship, the right to possession will be held by two persons; the bailor retains the immediate right to possession whilst the bailee obtains the right to actual possession of the object. Although there are two possessory rights, the bailor has a superior

possessory right.<sup>124</sup> In contrast, during a *fixed term* bailment, the bailor retains a reversionary right to possession whilst the bailee obtains the immediate and actual right to possession of the object.<sup>125</sup> The single entitlement - possession - may be fragmented into a hierarchy of rights.

Moreover, in a contractual relationship, a licensee may obtain a temporary right to use the thing whilst the licensor may retain the superior or reversionary rights of possession and use whilst also determining how and by whom the thing is used. Where a progenitor consents to the storage of their bodily material for their own future use, the healthcare institution obtains the right to actual possession whilst the right of the progenitor to use the material can be understood as a superior or reversionary right to possession. It is even possible for one 'owner' to be guilty of theft of their own property; in *R v Turner (No 2)*, the registered owner of a car was guilty under the Theft Act 1968 because he appropriated the car when it was in fact in the possession of a garage.<sup>126</sup> In this case, the garage had a legally protected right to the possession of the car whilst the registered owner had the remaining bundle of ownership.

Ownership is therefore often diffused between a number of 'owners'. Although the law protects various entitlements, the law does not necessarily recognise an (absolute) owner of the asset, object or resource. The concept of ownership in English law is best understood as a system of "priority of entitlement[s]" and not "a system of identifying absolute entitlement".<sup>127</sup>

As a result of this diffusion of 'incidents of ownership', there is no necessity in finding a sufficient number of 'incidents of ownership' in order to find an 'owner'. It is enough, for our purposes, to identify incidents of ownership and identify the relative priority between the incidents.

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<sup>124</sup> S Green, 'Understanding The Wrongful Interference Actions' (2010) *Conveyancer and Property Lawyer* 15, 23; NE Palmer, *Bailment* (3rd ed. Sweet & Maxwell, 2009) 2: "The essence of bailment is possession ... The doctrine is confined to personal property and denotes a separation of the actual possession of goods from some ultimate or reversionary possessory right... the central theme of every standard bailment is the carving out, by the bailor, of a lesser interest than his own"

<sup>125</sup> S Green, 'Understanding The Wrongful Interference Actions' (n124) 23.

<sup>126</sup> *R v Turner (No 2)* [1971] 2 All ER 441.

<sup>127</sup> *Waverley Borough Council v Fletcher* [1996] QB 334 (Auld J) 345: "the English law of ownership and possession, unlike that of Roman law, is not a system of identifying absolute entitlement, but of priority of entitlement."

Ultimately, by adopting the language of ‘entitlements’ we can avoid the ambiguity of the ‘owner’. Under the approach taken here, there are ‘entitlement-holders’, and where there is more than one entitlement-holder, one entitlement-holder will exercise a priority over the other. It is therefore sufficient for our understanding of *ownership* that we are able to identify an entitlement-holder or a priority of entitlement-holders.

#### iv. Entitlements Do Not Imply a Duality

Finally, some may resist the ownership framework as a starting point for analysis as it treats the body, or a body part, as an owned-thing. For instance, Rao argues against the propertisation of separated bodily material because, *inter alia*, “property theory severs the body from the person who owns it, whereas privacy theory maintains the two as indivisible and inextricably intertwined”.<sup>128</sup>

Rao is correct that property (conceptually) severs the owner from the owned-thing (as I will explain in Chapter Four). Yet, as I have suggested above, ownership and property are distinct concepts. I suggest that it does not follow from Honoré’s taxonomy of ownership that an owned-thing is necessarily severed from the owner. For example, personal information can be possessed (insofar as the owner may have exclusive physical control over the information), managed, used and transferred. Privacy can therefore be the object of ownership entitlements – it can be an owned-thing – whilst remaining ‘indivisible and inextricably intertwined’ with the person.

We experienced this unease with the language of ‘ownership’ when discussing *Re: Organ Retention*. The parents of the deceased children sought to establish their right to determine how the body of their deceased children is treated; they sought to vindicate rights in relation to the bodies of the children. Yet, to describe their claims as one of the right to ownership reduces the bodies of the deceased infants to ‘an owned thing’. Since the language of ownership may imply an owned-thing and may imply a separation between the owner and owned-thing, the language of ‘entitlements’ is to be preferred.

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<sup>128</sup> R Rao, ‘Genes and Spleens: Property, Contract, or Privacy Rights in the Human Body?’ (2007) 35 *Journal of Law, Medicine and Ethics* 371.

Since very little is achieved by placing the law within this particular organisational structure of ownership as a bundle of rights, very few normative or structural commitments follow from recognising that an individual or institution has entitlements in separated bodily material. The distinction between *what we protect* and *how we protect it* ought to better enable commentators, like Rao, to oppose the propertisation of the human body. This is because, under the approach offered here, property rights in separated bodily material do not necessarily follow from entitlements in separated bodily material; we may recognise a set of entitlements but employ a different set of legal rules and procedures to protect the entitlements.

## Chapter Summary

In this Chapter I outlined the concept of ownership as a bundle of various different ‘incidents of ownership’ and applied this framework to the law on separated bodily material. The current case law represents successful attempts to obtain legal protection of entitlements in separated bodily material as well as just as many unsuccessful attempts to obtain recognition of an entitlement. The conception of ownership as a bundle of rights has enabled us to view these instances of ownership through a common framework.

However, in order to continue with this framework as the most basic framework for our analyses, it is necessary to clarify that: (a) incidents of ownership (or entitlements) must be paired with a particular legal structure in order for a claim to ownership to be a legal claim, (b) ownership is best viewed as either a spectrum of entitlements or as consisting of categories of entitlements, (c) entitlements operate through a system of priority, and (d) entitlements do not imply a duality between the entitlement-holder and the thing.

The key component of this revision of the concept of ownership is to identify how little is achieved by applying the Bundle Picture to the law on the use and storage of separated bodily material. We have merely identified what entitlements can arise in bodily material and how some of these entitlements can be protected. In order to be able to prescribe the appropriate legal status of separated

bodily material, two significant tasks remain: we must determine which entitlements in separated bodily material can be justified and how these entitlements ought to be legally protected.

To aid in the task of determining which entitlements ought to be recognised in bodily material, I also introduced in this Chapter a distinction as to how an entitlement in a thing may be justified: either with reference to the attributes and characteristics of the entitlement-holder (a pre-social justification) or with reference to the state of affairs that the exercise of the entitlements will produce (a social justification). We know from the survey of the law on the use and storage of bodily material that individuals or institutions may claim the right to: (i) authorise, (ii) manage, (iii) transfer, (iv) transfer-for-value, (v) possess, (vi) use and (vii) profit from bodily material. We shall now turn to assess which of these entitlements in bodily material can be justified in a pre-social analysis, which of these entitlements can be justified in a social analysis, and which entitlements have priority where the two justificatory techniques allocate entitlements in incompatible ways.

## Part B: Entitlements and Justifications

### Chapter Two: Control Entitlements

The purpose of this Chapter is to assess which control entitlements an individual or institution ought to be able to exercise in separated bodily material. This is a normative inquiry that seeks to identify the relationships between individuals or institutions and bodily material that are important enough to attract legal protection. Since this Chapter is concerned with justifying the legal recognition of entitlements in separated bodily material, we will also be concerned with the distinction between the two types of analyses that can justify entitlements in things. Hence, we will undertake both a *pre-social analysis*, which concerns the attributes and characteristics of the person (independent of institutional or collective aims) and a *social analysis*, which concerns the state of affairs introduced through the recognition of the entitlement.

It is because our pre-social analysis pertains to the attributes and characteristics of the person with regards to their body and bodily material, that this Chapter will engage in a philosophical analysis of the relationship between a person and their body. We will approach this philosophical analysis using two different philosophical methodologies. In Section One, we will employ an analytical methodology. Under this approach to the person-body relationship, it is difficult to identify a basis upon which individuals ought have entitlements in bodily material given the competing social interests in the material. In Section Two, we will adopt a phenomenological approach to determining the relationship between the person, their separated bodily material or their body after their death. In adopting a phenomenological approach to the person-body relationship, it is possible to identify a particular bundle of control entitlements that an individual ought to be able to exercise in bodily material.

# Section One: An Analytical Inquiry

This Section assesses which of the ‘control entitlements’ individuals and institutions ought to be able to exercise in bodily material. This concerns which entitlements in bodily material can be justified in a pre-social analysis, which can be justified in a social analysis, and - where a conflict arises between these two types of analyses - how the conflict ought to be resolved. In particular, the analysis in this Section adopts a particular ‘analytical’ methodology. Essentially, the ‘analytical’ (or ‘empirical’) methodology adopted in this Section divides the world into *subjects* (things that attract moral attention) and *objects* (things that do not attract moral attention). In the next Section, I will employ a phenomenological methodology which divides up the world in a fundamentally different way.

## a. Pre-social Analysis

In determining which entitlements ought to be recognised in separated bodily material, let us begin by assessing whether any entitlements can be justified with reference to the attributes and characteristics of the person, thereby identifying whether any ‘natural rights’ to bodily material arise. Since we are concerned here with the entitlements that follow from our respect for the attributes and characteristics of a person then we must have a clear understanding of the duties we owe to another, and in particular, the duties we owe to another in respect to their body. I will set out here an orthodox understanding of the duties we owe to another. These duties, as I will explain, follow from an ‘analytical’ account of the moral value of the Person which is grounded in the neuro-biological properties of the Person’s body.

### i. Respect for the (neuro-biological) Person

The four bioethical principles developed by Beauchamp and Childress<sup>129</sup> encapsulate a wealth of ethical thought and are said to provide “a simple, accessible and culturally neutral approach to thinking

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<sup>129</sup> TL Beauchamp and JF Childress, *Principles of Bioethics* (Oxford University Press, 1989).

about ethical issues in healthcare”.<sup>130</sup> According to this approach, there are four basic moral commitments:

- (i) Respect for autonomy: allow for an individual’s “deliberated self rule”<sup>131</sup>
- (ii) Beneficence: promote the well-being and welfare of the individual
- (iii) Non-maleficence: do no harm to the individual
- (iv) Justice: “act on the basis of fair adjudication between competing claims”<sup>132</sup>

Drawing upon these principles, it is possible to provide numerous accounts of why we respect the relationship between a person and their (attached) body. One way of justifying the duties we owe another with regards to their (attached) bodies is through the ‘respect for autonomy’. As Rendtorff suggests, autonomy can be understood as a “principle of self-legislation of human beings in the same human world”.<sup>133</sup> Interpreters of Kant<sup>134</sup> suggest that what distinguishes human beings from the rest of the world, and gives individuals an intrinsic value,<sup>135</sup> is their capacity to reason and for such reasoning to “transcend the brute animality of nature”.<sup>136</sup> This capacity to formulate and execute “rationally motivated moral action”<sup>137</sup> is how we become *Persons*, and only *Persons* have the status of being *ends-in-themselves*.

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<sup>130</sup> R Gillon, ‘Medical Ethics: Four Principles Plus Attention to Scope’ (1991) *British Medical Journal* 184.

<sup>131</sup> R Gillon, ‘Four Principles’ (n130) 184.

<sup>132</sup> R Gillon, ‘Four Principles’ (n130) 185.

<sup>133</sup> JD Rendtorff, ‘Basic Ethical Principles in European Bioethics and Biolaw: Autonomy, Dignity, Integrity and Vulnerability - Towards a Foundation of Bioethics and Biolaw’ (2002) 5 *Medicine, Healthcare and Philosophy* 235, 236.

<sup>134</sup> There is disagreement as to whether Kant’s account of autonomy in *Groundwork of the Metaphysics of Morals* justifies an individual’s self-ownership. See RS Taylor, ‘A Kantian Defense of Self-Ownership’ (2004) 12 *The Journal of Political Philosophy* 65.

<sup>135</sup> TM Powers, ‘The Integrity of Body: Kantian Moral Constraints on the Physical Self’ in Mark J Cherry (ed.) *Persons and Their Bodies: Rights, Responsibilities, Relationships*, 209-231 (Kluwer Academic Publishers, 1999) 215.

<sup>136</sup> TM Powers, ‘The Integrity of Body’ (n135) 214.

<sup>137</sup> TM Powers, ‘The Integrity of Body’ (n135) 213.

The principle of ‘self-legislation’ follows from persons being treated as ends-in-themselves. The self-legislation principle requires that persons are able to develop their own rules, standards and judgments (‘rationally motivated rules’) and be able to live their lives in accordance with these rules (‘rationally motivated action’). Being treated as a *means*, rather than an *end-in-themselves*, bypasses the ‘rationally motivated rules’ stage of ‘self-legislation’ by causing action that is not the product of the agent’s reasoning, but rather, caused by external forces. To deny someone the opportunity to determine how their life is lived is to deny their rational capacity, thereby denying the property that separates them, as a person, from the rest of the world. According to the principle of autonomy, “a human being’s quality of being his own master”,<sup>138</sup> stems from the capacity to reason.

If the principle of self-legislation requires that an individual’s actions are motivated by their own ‘rational rules’, then complete control and authority over one’s body is necessary to ensure that the actions performed by the body are autonomous actions. To ensure autonomous action, we must provide the individual control and authority over their own body. Hence, it is possible to justify the ‘self-ownership’<sup>139</sup> of the body through the principle of autonomy when one proceeds from the proposition that subjectivity (that which attracts moral duties) is connected to the capacity to reason, and is exercised through the body. As Kant observes:

Our life is entirely conditioned by our body, so that we cannot conceive of a life not mediated by the body and we cannot make use of our freedom except through the body.<sup>140</sup>

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<sup>138</sup> I Kant, *Metaphysics of Morals* (MJ Gregor ed. Cambridge University Press, 1996) 30.

<sup>139</sup> This expression that individuals are the “self-owners” or “self-proprietors” of their bodies has become “a sort of legal shorthand, a rhetorical device, which serves to accentuate the fullness of the rights enjoyed by persons in relation to themselves and others” (MJ Davis & N Naffine, *Are Persons Property? Legal Debates about Property and Personality* (Aldershot: Ashgate, 2001) 5); So that arguments from ‘self-ownership’ can be understood as the notion “that each person enjoys, over himself and his powers, full and exclusive rights of control and use” (Gerald Cohen, *Blackwell Dictionary of Western Philosophy* (Blackwell, 2004) 630).

<sup>140</sup> I Kant, *Lectures on Ethics* (Harper & Row, 1963) 147-148.

The ‘self-ownership’ of the body can be justified because of the value of autonomous action and the necessity of autonomous action being exercised through the body.

An alternative means of justifying the ‘self-ownership’ of the body is through a principle of liberty derived from the well-being or preferences of the individual (beneficence and non-maleficence). This approach differs from the above justification since “happiness”, or well-being, “is desirable, and the only thing desirable, as an end; all other things being only desirable as a means to that end”.<sup>141</sup> The focal point of this second justification is thus the happiness, well-being or utility of the individual rather than the individual’s rational capacities.

For instance, JS Mill (in *Utilitarianism* and *On Liberty*) develops ‘rules of justice’ that are “certain classes of moral rules, which concern the essentials of human well being”.<sup>142</sup> These rules of justice thus identify and protect what Mill considers to be the most central elements of well-being or utility.<sup>143</sup> The most basic of these rules are the ‘right to security’ and the ‘right to liberty’. Mill describes liberty as:

Framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow-creatures, so long as what we do does not harm, even though they think our conduct foolish, perverse, or wrong.<sup>144</sup>

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<sup>141</sup> JS Mill, *Utilitarianism* [1861] Vol. 10, 234 in W Donner, ‘A Millian Perspective on the Relationship between Persons and Their Bodies’ in *Persons and Their Bodies* (Kluwer Academic Publishers, 1999) 58.

<sup>142</sup> JS Mill, *Utilitarianism* [1861] Vol. 10, 250-251; JS Mill, *On Liberty*, Vol. 18. 27 in W Donner, ‘A Millian Perspective’ (n142) 61.

<sup>143</sup> “[O]ne of the principle ingredients of human happiness, and quite the chief ingredient of individual and social progress”; JS Mill *On Liberty* [1859] 261 in CC Gauthier, ‘Philosophical Foundations of Respect for Autonomy (1993) 3.1 *Kennedy Institute of Ethics Journal* 22, 25.

<sup>144</sup> JS Mill, *On Liberty* [1859] 226 in CC Gauthier, ‘Philosophical Foundations’ (n143) 25.

Hence, if we assume that the individual is the best arbiter of their own preferences, interests and utility, then the basic right of liberty promotes happiness or well-being by ensuring that, for an individual, “over himself, over his own body and mind, the individual is sovereign”.<sup>145</sup>

Mill’s system of justice is merely illustrative of how an individual’s sovereignty, or self-ownership, over their body can be justified with primary reference to the well-being, utility or happiness of the individual. Essentially, the concept of self-ownership is desirable, or morally justifiable, because it is a means of promoting happiness or human well-being by providing the individual with security, control and authority over, their own body.

Notice that the basis for the ownership or sovereignty over the attached body stems from the neuro-biological processes of the person. That without the cognitive ability to formulate ‘self-legislation’, or without the neuro-biological capacity to experience pain or pleasure, there would not be a normative basis to recognise the self-ownership of the (attached) body. In a similar vein to Foster’s re-introduction of dignity into bioethics,<sup>146</sup> I will eventually suggest in this Chapter that “these two lenses have sufficient resolution to expose the nuances of tissue-ownership problems”.<sup>147</sup> The limitations of reducing the moral status of the person to their neuro-biological processes emerge when we start to consider the detached body.

## ii. The Problem of Detachment

Recall the *Evans* scenario. If Ms Evans had the fertilised embryo implanted in her, then her right to bodily integrity - her ‘self-ownership’ - would have enabled her to carry the embryo, and become a biological mother, despite the wishes of Mr Johnson. Instead, the embryo was separated and a different “kaleidoscope of interest and rights” emerged.<sup>148</sup> In particular, Mr Johnson’s interest in the embryo

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<sup>145</sup> JS Mill, *On Liberty* [1859] 224 in W Donner, ‘A Millian Perspective’ (n141) 62.

<sup>146</sup> C Foster, *Human Dignity in Bioethics and Law* (Hart Publishing, 2011)

<sup>147</sup> C Foster, Dignity and the Use of Body Parts (2012) *Journal of Medical Ethics* (forthcoming, published online 14 August 2012) 1.

<sup>148</sup> M Ford, ‘Evans v United Kingdom’ (n79) 181.

was “full-bodied and capable of defeating those of” Ms Evans.<sup>149</sup> What *Evans* demonstrates is that, in law and in conventional bioethics, *separation* matters.

Separation occurs in two main scenarios: death, where the neuro-biological capacities are no longer present in the body of the person,<sup>150</sup> and the extraction or removal of bodily material, where a Person (and their neuro-biological processes) remain but the bodily material is absent of any neuro-biological capacities.

For some, “the notion of interests surviving death is incoherent, as there is no one who can be harmed at the point that any wrongful setback of interests occurs”.<sup>151</sup> J Harris, in a similar vein, argues that only “relatively weak” and non “person-affecting” interests persist in a person’s deceased body.<sup>152</sup> According to J Harris, “respect for persons has two distinct dimensions: 1. respect for autonomy; and 2. concern for welfare”.<sup>153</sup> These ‘dimensions’ are the same moral foundations to the above account of self-ownership. J Harris suggests that none of these interests persists after the death of the individual because the bases of the ‘respect for persons’ are no longer applicable:

autonomy involves the capacity to makes choices, it involves acts of the will, and the dead have no capacities – they have no will, no preferences, wants nor desires, the dead cannot be autonomous and so cannot have their autonomy violated.<sup>154</sup>

In short, any interests that the deceased may have had in their body, died with them. They are non-person-affecting in the sense there remains no person with rational capacities or welfare interests

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<sup>149</sup> M Ford, ‘Evans v United Kingdom’ (n79) 183.

<sup>150</sup> See Department of Health, *A Code of Practice for the Diagnosis of Brain Stem Death* (1998); J Herring, *Medical Law and Ethics* (n59) 747.

<sup>151</sup> E Partridge, ‘Posthumous Interests and Posthumous Respect’ 91 *Ethics* 243; D Price, ‘Property, Harm and the Corpse’ in B Brooks-Gordon (ed.) *Death Rites and Rights* (Hart Publishing, 2007). 199-217.

<sup>152</sup> J Harris, ‘Law and Regulation of Retained Organs: the Ethical Issues’ (2002) 22 *Legal Studies* 527, 548.

<sup>153</sup> J Harris, ‘Law and Regulation of Retained Organs’ (n153) 530.

<sup>154</sup> J Harris, ‘Law and Regulation of Retained Organs’ (n153) 531.

that the interests can attach to.<sup>155</sup> Since our moral obligations toward the Person stem from the person's autonomy or welfare, without these attributes it is not possible to identify why there are any moral obligations to treat a deceased's body in any particular way. If the body is absent the capacity to experience welfare or to be directed by an autonomous will, the body is like any other object in the world that requires little moral attention.

A similar analysis can be applied to separated or extracted material. Although when biological material is extracted there remains an autonomous and welfare-capable person from which the material was taken, the detachment – as we saw in *Evans* - nonetheless changes the normative analysis. The duties we owe the person and their attached body cannot be naturally extended to create the same duties we owe the person and their detached body parts. This is because separated bodily material does not contain any of the neuro-biological properties that give rise to moral duties; the material is no longer the immediate apparatus of pain, pleasure or autonomous action.

We need to, somehow, bridge the gap between the autonomy or welfare of the person, and the separated bodily material. That is, since separation prevents us from merely transplanting the analysis of our respect for the person to our analysis of body parts, we need to show why our respect for the person can be extended to somehow include respect for their ownership entitlements in separated bodily material.

### iii. Bridging the Gap I: The Living Subject and Object

There is a growing body of commentary that implies that property rights in separated biological material can be justified with sole reference to interests and attributes of the person. These commentators argue that property rights, as representing a significant or full bundle of entitlements, in separated bodily material follow from our respect for the person and their body. For instance, Boulier argues that if society views the body of an individual as their property, logic and justice requires that

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<sup>155</sup> J Harris does note that we respect some wishes of the deceased but we do this “in order to have confidence that our own wishes will be implemented.” J Harris, ‘Law and Regulation of Retained Organs’ (n153) 546.

property rights are recognised in the separated body parts;<sup>156</sup> and Quigley, purporting to have “the most complete theory of property” behind her, argues that our ‘self-ownership’ “raises, at least, the strong presumption that we own our body’s separated parts and products”.<sup>157</sup> Mason and Laurie also doubt whether there is “any reason in principle why we should not own our own bodies?”<sup>158</sup>

Yet, as I have argued, the analysis of ‘self-ownership’ or ‘bodily integrity’ cannot simply be engrafted onto the analysis of entitlements in separated bodily material. The detachment of the bodily material from the person calls for a different analysis. I will briefly assess here three main strategies that are employed to justify the recognition of entitlements in bodily material as ‘natural rights’.

### *Original Acquisition*

Despite the separation of the bodily material from the person, it is intuitive that the material nonetheless ought to still *belong* to the person to whom material was attached to. The bodily material *was* part of the person - they were the first to acquire possession of the material - and this ‘original acquisition’ may be an event sufficient to ground their entitlements of control in the material. It is at least arguable that the progenitor of the bodily material ought to have entitlements in the bodily material because they were first to ‘acquire’ the material. Hardcastle, for instance, argues that “detachment plus intention [to use the materials as property]” itself ought to be a “property creating

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<sup>156</sup> W Boulier, ‘Sperm, Spleen and Other Valuables: The Need to Recognise Property Rights in Human Body Parts’ (1994-1995) *Hofstra Law Review* 693. 717: “At some level, it makes perfect sense to call one’s body one’s property, and on this ground alone commentators have suggested that the law make this recognition. If this is indeed the general view in society, logic and justice seem to argue for the recognition of a property right”.

<sup>157</sup> M Quigley, ‘Applying Honoré’ (n7) 631-634: “So it seems that when it comes to my body, I can say, with the support of the most complete theory of property that we can have, that “I own that” or “that is my property”. We can each claim to have “full liberal ownership of our bodies”, and to have property rights in our own bodies. This also raises, at least, the strong presumption that we own our body’s separated parts and products”.

<sup>158</sup> JK Mason and GT Laurie, ‘Consent to Property’ (n56) 724: Mason and Laurie refer to the Medical Research Council, *Working Group on Human Tissue and Biological Samples for Use in Research: Report of the Medical Research Council Working Group to Develop Operational and Ethical Guidelines* (1999) [2.2.1.]: “it was more practical and more attractive from a moral and ethical standpoint to adopt the position that, if a tissue sample could be property, the original owner was the individual from whom it was taken.”

event”.<sup>159</sup> The main reason provided by Hardcastle is that “property rights created on detachment represent a natural extension of the right to bodily integrity”.<sup>160</sup>

We have seen that there are sufficient moral reasons for why the (attached) body of the person ought to be treated as the ‘self-ownership’ of the individual, the challenge here is to identify whether there are moral reasons sufficient to ground our duties to respect the progenitor’s entitlements in separated bodily material. The progenitor’s original acquisition, it must be assumed, is the basis for why Hardcastle recommends that the progenitor is entitled to control the material.

The problem with the Original Acquisition basis of entitlements is that it does not explain why acquisition or possession is an act or event that can place others under duties to refrain from using a resource.<sup>161</sup> The self-ownership of the attached body imposes duties on others because of the duties of respect for autonomy or respect for welfare. Yet, this duty to respect the entitlements of the first acquire in separated bodily material is, at best, an unfamiliar moral duty.<sup>162</sup> This is because it remains unexplained why the mere fact that person (A) possessed resource (r) *first* is able to ground a duty on person (B) not to use resource (r). The priority in time in possessing resource (r) first, over possessing resource (r) second, appears to be the basis for why person (A) ought to obtain entitlements in the resource (r) instead of person (B).

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<sup>159</sup> R Hardcastle, *Law and the Human Body* (n47) 151.

<sup>160</sup> R Hardcastle, *Law and the Human Body* (n47) 147: “Recognising that property rights are created on detachment represents a natural extension of the right to bodily integrity. Before separation, biological materials remain part of the human body. The law provides protection for the human body, and such protection is enforceable generally against other members of society. It would seem inconsistent if the act of detachment changed biological materials from material fully protected by law into material receiving no legal protection whatsoever. The law can provide protection to physically detached biological materials by employing the ‘bodily integrity principle’. To do this, it is necessary to create property rights”.

<sup>161</sup> J Simmons, ‘Original-Acquisition Justifications of Private Property’ (1994) 11 *Social Philosophy and Policy* 63 summarises the contention advanced by a number of sceptics: “[Original Acquisition] arguments normally entail that persons can, by their acts of acquisition, deliberately create for others universal moral duties of forbearance and noninterference with respect to holdings of possibly scarce resources. Such a power (to create significant moral burdens for others at will) is “radically unfamiliar” and “repugnant” to us, and it is therefore a power of which we should be highly suspicious. Needless to say, we should be equally suspicious of any argument which purports to justify such a power for individuals.”

<sup>162</sup> J Waldron, *A Right to Private Property* (n13) 265-71.

For example, Matthew has cancer cells removed from his body. These particular cells are scientifically useful because they can, under ordinary conditions, divide an infinite number of times. Mark, a healthcare professional, is in possession of the cells and wants to develop a cell line. The mere fact that Matthew was first in possession of the cells appears to be an insufficient reason for why Mark, who is second in possession of the cells, is unable to use the bodily material.

Prior embodiment, or first acquisition, is not a sufficient basis for establishing entitlements in separated bodily material. Detachment severs the bodily material from its neuro-biological function, thereby introducing a “new kaleidoscope” interests and considerations.<sup>163</sup> Prior embodiment itself, and the reasons for why we respect the bodily integrity or self-ownership of the person, are unable to explain why the progenitor continues to have entitlements in separated bodily material.

### *The Application of Work or Skill*

Recall the first exception to the ‘no property rule’ that permits the creation of entitlements where there has applied a sufficient level of work or skill to the bodily material. This work or skill exception has since been affirmed into English common law, in *Kelly, Dobson* and *Re Organ Retention*, and in statute law, under Section 32 of the HTA.

Here we will briefly consider two explanations of the rule. The different accounts of the rule also reflect the disagreement of legal scope of this exception.<sup>164</sup> The first account of why the applier of work or skill becomes the owner of the object suggests that each person *owns* their labour, that when a person applies work or skill to an object they *mix* their labour with the object, and the object therefore

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<sup>163</sup> M Ford, ‘Evans v United Kingdom’ (n79) 181.

<sup>164</sup> As above (see n49 to n52), whereas *Dobson* and *Kelly* require a sufficient level of work and an intention to create a novel item, the rule formulated in *Doodenard*, (discussed in *Re Organ Retention*), and codified in Section 32 of the Human Tissue Act 1004, requires the mere application of work or skill.

contains something of the applier of work or skill.<sup>165</sup> I will merely identify here two reasons why, I suggest, *the mixing argument* does not succeed in establishing that the unilateral act of applying labour to an object justifies the recognition of ownership entitlements.

First, the labour or personality of applier of work or skill is not being mixed with the object. When, for instance, human tissue is set in a resin slide, semen is frozen in liquid nitrogen, or even when genes are isolated through a polymerase chain reaction, one object (the bodily material) is mixed with another object (the resin, the nitrogen, the enzyme), and it is the labour that is doing the mixing. At best, when work or skill is applied to an object, the applier of skill is ‘mixing their mixing’.<sup>166</sup>

More fundamental is the assumption that the relationship between the person and their labour is a relationship that then extends into the object. Certainly, each person has a liberty over his or her labour. That is, each person has authority over his or her actions at any time. But there is no reason why our duties to respect person’s liberty over their actions (in the past) extend to ground a duty to respect a person’s ownership in an object (now). As Waldron argues, “ownership in this sense has no relevance *now* to labour that has been freely expended in the past”.<sup>167</sup> The mere (past) use of labour to mix objects is insufficient to justify entitlements in one of the objects.

Perhaps the ‘work or skill, and *attribute*’ exception is a more plausible basis for the recognition of entitlements since it requires more than just the exercise of labour. According to this version of the exception, where the application of work or skill means that the bodily material changes in character or acquires new attributes then the applier of work or skill obtains entitlements in the material. This is

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<sup>165</sup> J Waldron in ‘Two Worries About Mixing One’s Labour’ 33 *The Philosophical Quarterly* 39 reconstructs Locke’s argument from *Two Treatises of Government* as follows: “(1) A person who labours on an object mixes his labour with that object. (2) But that person owns the labour which he mixes with the object. (3) So the object which has been laboured on contains something which the labourer owns. (4) To take the object out of the labourer's control without his consent would violate the entitlement mentioned in (2) and (3). (5) Therefore, no one may take the object out of the labourer's control without his consent. (6) But this amounts to an entitlement in the labourer over the object. (7) Thus, a person who has laboured on an object is entitled to that object.”

<sup>166</sup> J Waldron, ‘Two Worries About Mixing’ (n165) 41.

<sup>167</sup> J Waldron, ‘Two Worries About Mixing’ (n165) 44.

because the work or skill has produced something, and the labourer – it is argued – ought to be able to reap the rewards of their effort in producing something new.

The work or skill exception is that it only goes some of the way to link the rights of the person (as a person) to the object. There is a link between the applier of work or skill and the object since when a brain is preserved, or a cell extracted from tissue, the object acquires a new attribute through the intentional actions of the person. It could be said that the gap between person and object is partially bridged by the person introducing a new attribute to the object *through* them. The attributes of the object cannot be account for without reference to the person who applied *their* skill and labour.

Yet, this account of ownership based upon the single causal link between actions of the person and the attributes of the object is over-inclusive. We frequently introduce new attributes in objects through our intentional actions without requiring that we are rewarded for our efforts. Take Nozick's well-known objection to the Lockean argument:

why isn't mixing what I own with what I don't own a way of losing what I own rather than gaining what I don't? If I own a can of tomato juice and spill it in the sea so that its molecules mingle evenly throughout the sea, so I thereby come to own the sea, or have I foolishly dissipated my tomato juice?<sup>168</sup>

Creating a new attribute in the object, or the act of mixing two objects, is itself insufficient to explain why the object is brought within the sphere of the applier of work or skill instead of the work or skill forming part of the external world.

It is possible for an aspect of the person to be extended or invested into an object, but more is required than the mere application of skill, and something more is also required than the creation of a

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<sup>168</sup> R Nozick, *Anarchy, State, and Utopia* (n10) 175.

new attribute, to establish a sufficient link between a person and an object to justify entitlements in that object on the basis of our respect for the person.

### *The Conjunction of Two Wills*

The work or skill exception goes some, but not all, of the way to bridging the gap between object and subject. The Hegelian account of ownership, as adopted by Waldron in *The Right to Private Property*, is able to fully bridge the gap.

Hegel describes the individual as having an “inherently individual will” which is “purely abstract”.<sup>169</sup> Hegel argues that in order to develop an individual’s personhood, the individual’s ‘will’ must develop a “content of determinative ends”.<sup>170</sup> The will has ‘content’ when the will (or subjectivity) is manifest in the external world<sup>171</sup> so that “a person must translate his freedom into an external sphere in order to exist as Ideal”.<sup>172</sup> In other words, the will of the individual, or the content of their personhood, cannot exist in the abstract; rather, it needs to be expressed through engagement with the external and physical world.

The way in which an element of personality or subjectivity is expressed in an object is described by Waldron as involving “something like the conjunction of two relations between my will and the [object]”<sup>173</sup> or a “nexus of dual relations between the will and object, object and will”.<sup>174</sup> Starting with the first relationship between the will and the object, Hegel suggests that an object becomes ‘affected by the will’ when the object acquires an attribute or characteristic, because of the use or possession of the object, “which can only be explained in terms of the working will”.<sup>175</sup>

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<sup>169</sup> GWF Hegel, *Philosophy of Right* (AW Wood ed. Cambridge University Press: 1991) [34].

<sup>170</sup> GWF Hegel, *Philosophy of Right* (n170) [34].

<sup>171</sup> GWF Hegel, *Philosophy of Right* (n) [34]; MJ Davis and N Naffine, *Are Persons Property* (n139) 4-5.

<sup>172</sup> GWF Hegel, *Philosophy of Right* (n170) [41].

<sup>173</sup> J Waldron, *The Right to Private Property* (n13) 369.

<sup>174</sup> J Waldron, *The Right to Private Property* (n13) 370.

<sup>175</sup> J Waldron, *The Right to Private Property* (n13) 369.

However, we frequently alienate objects that have characteristics that can only be attributed to our will without a sense of alienating an element of our personhood or subjectivity. What is required for the object to be expressive of our personality is for the object to affect the will. This is the second relationship of the nexus. An object affects the will by enabling a certain state of affairs, that the individual desires or ‘wills’ to exist, that would otherwise not exist without the object. It is when an object is affected by the will through acquiring a new characteristic and the object affects the will by enabling a new state of affairs that the will is mixed with, or investing into, the object. A Hegelian basis for entitlements in bodily material would suggest that:

- (i) where the material acquires an attribute that can only be explained ‘in terms of the working will’; and
- (ii) where that attribute introduces an intended state of affairs, entitlements in the material may arise because the will, or subjectivity, of the individual, needs to be expressed through engagement with the external and physical world.

The Hegelian analysis aligns well with the ‘new basis’ set out by the Court of Appeal in *Yearworth*. In particular, the conjunction of two wills mirrors the non-statutory premises in the five-fold explanation, that:

- (i) by their bodies, they alone generated and ejaculated the sperm.
- (ii) The sole object of their ejaculation was that it might later be used for their benefit...<sup>176</sup>

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<sup>176</sup> *Yearworth v North Bristol NHS* (n20) [45(f)].

Or, in Hegelian language: (i) the semen acquired an attribute “which can only be explained in terms of the working will”<sup>177</sup> and (ii) the semen enables an intended state of affairs that would otherwise not exist without the object.

This Hegelian interpretation of *Yearworth* provides a promising approach to the recognition of entitlements in bodily material and may address some of the “unanswered questions” following the decision of the Court of Appeal identified by Harmon and Laurie. For instance, non-reproductive tissue may be approached in the same manner,<sup>178</sup> so that use entitlements in the tissue are retained where the purpose of the extraction is that the tissue ‘might later be used for their benefit’ or for the benefit of a co-participant in therapy.<sup>179</sup> The scope of the progenitors rights<sup>180</sup> are limited to the rights necessary to attempt to achieve the intended ‘state of affairs.’ In *Yearworth*, the scope of the rights were limited to management and use entitlements. As I will explain in the next Chapter, the scope of the progenitors rights cannot, on this basis, include the right to “participate in bio-markets”.<sup>181</sup>

### *Blurring the Boundary*

The Hegelian basis is able to “bridge the gap” between object and subject but it does so in a way that blurs “the boundary, between the self and the world, between what is inside and outside, between what is subject and object”.<sup>182</sup> We need to therefore be careful as to how we characterise the Hegelian basis.

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<sup>177</sup> J Waldron, *A Right to Private Property* (n13) 369

<sup>178</sup> SHE Harmon and GT Laurie, ‘Property, Principles, Precedents and Paradigms’ (n20) 486-7: “How should non-reproductive tissue be approached?”

<sup>179</sup> SHE Harmon and GT Laurie, ‘Property, Principles, Precedents and Paradigms’ (n20) 487: “What about material taken for transplantation into another or back into oneself?”

<sup>180</sup> SHE Harmon and GT Laurie, ‘Property, Principles, Precedents and Paradigms’ (n20) 487: “What is the scope of originators’ rights to treat with their own body and parts?”

<sup>181</sup> SHE Harmon and GT Laurie, ‘Property, Principles, Precedents and Paradigms’ (n20) 487: “What, now, is the potential for originators of tissue to participate in bio-markets?”

<sup>182</sup> MJ Radin, ‘Reconsidering Personhood’ (1995) *Oregon Law Review* 423, 426; MJ Davis and N Naffine, *Are Persons Property* (n139) 7.

It is possible to interpret the Hegelian relationship between the subject and the external object as a relationship that is “constitutive” of the subject. As Ferguson explains, the Hegelian subject:

always has to go outside itself to know what is inside; by seeing itself reflected in the world it discovers relations *constitutive* of itself.<sup>183</sup>

In which case the Hegelian basis is akin to the phenomenological approach developed in the next Section, which may form the basis of recognising entitlements in bodily material, but (as I will explain in Chapters Five and Six) ought not give rise to property rights.

The alternative interpretation, and the interpretation that will be presumed here, is that the relationship between subject and object is ‘contingent’. It can be described as ‘contingent’ since there is no necessary association between the subject and object. This is because the existence of the relationship is dependent upon certain circumstances outside of the relationship itself (the new attribute and the new state affairs). For example, although Lucy may see her personality or subjectivity expressed in an external object (a house, a wedding ring, a position of employment), it is equally possible for Joanna to have entered into, or to subsequently enter into, the same relationship with the house, wedding ring, or position of employment through the conjunction of two wills. We could also describe this relationship as ‘anonymous’ since the relationship with the object can be transplanted from one subject to another (from Lucy to Joanna).

This distinction between constitutive and personal relationships with things, and contingent and anonymous relationships with things, is an important distinction for this and subsequent chapters. We will also call upon the Hegelian basis throughout this Thesis as a sound example of how a pre-social analysis can justify some features of property rights. It is sufficient for our purposes that the Hegelian basis for the recognition of entitlements provides a plausible basis for bridging the gap between the

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<sup>183</sup> KE Ferguson, *The Man Question: Vision of Subjectivity in Feminist Theory* (University of California Press, 1993) 41 [emphasis added].

person and their separated bodily material and that the Hegelian basis can be interpreted as forming a constitutive or contingent relationship between a person and a thing.

#### iv. Bridging the Gap II: The Dead Body

As outlined above, since the dead body no longer contains the neuro-biological capacity that grounds our moral duties, the dead body becomes like any other object in the world and attracts no particular moral attention. It follows that the requirement of consent for posthumous organ retention or transplantation, from the deceased or their parents, relatives or friends, is “more like extending a courtesy than respecting a right”.<sup>184</sup> In terms of entitlements, there appears to be no basis to justify control entitlements vesting in the source of the bodily material since no significant interests persist posthumously. It is only if there are no competing interests in the body (such as donation or research interests)<sup>185</sup> that the deceased, their representative or closely concerned person, will have a type of ‘residual’ or ‘default’ control right over the body.

According to Brazier, there are normative bases for respecting posthumous interests and the wishes of the deceased’s family and friends. One basis is borne out of a respect for a plurality of values in society. It is because we have respect in our society for the “Orthodox Jew, or Muslim, or Hindu family or members of the Brethren”, that those who “embrace the primacy of science and rationality” do not impose their views on others, instead, each individual retains posthumous interests in their bodies.<sup>186</sup> In addition, McGuinness and Brazier suggest that another basis for respecting the wishes of the friends and family is the emotional response of those close to the deceased. It is because of the “important role the body may have in the grieving process”, McGuinness and Brazier argue, that “the views of the family should be given serious consideration”.<sup>187</sup>

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<sup>184</sup> J Harris, *Law and Regulation of Retained Organs* (n153) 546.

<sup>185</sup> J Harris, *Law and Regulation of Retained Organs* (n153) 541-542.

<sup>186</sup> M Brazier, ‘Retained Organs: Ethics and Humanity’ (2002) 22 *Legal Studies* 550, 566.

<sup>187</sup> M Brazier & S McGuinness, ‘Respecting the Living Means Respecting the Dead Too’ (2008) *Oxford Journal of Legal Studies* 297, 315.

For McGuinness and Brazier, duties to the body of a deceased can be justified for those embedded in a particular cultural setting or belief system, or those who will emotionally suffer from being unable to control the body of the deceased. McGuinness and Brazier draw a distinction between two senses of the person: a ‘person’, in terms of “the everyday use of the word in a descriptive sense”,<sup>188</sup> which remains after death and a ‘Person’, in terms of “the morally normative use of the concept.” According to McGuinness and Brazier, after death the Person “may no longer be there in any real sense”.<sup>189</sup> In the criminal law context, Feinberg employs a similar argument to suggest that there are posthumous interests that arise simply by being able to name the person, and refer to ‘their interests’.<sup>190</sup>

Hence, McGuinness and Brazier, like Harris, accept that after death there remains no ‘Person’, ‘in a real sense’, that attracts moral consideration. Yet, in opposition to Harris, McGuinness and Brazier contend that friends and family have interests in how the ‘person’ is treated. McGuinness and Brazier are correct in the later contention, but not for the reasons given. The difficulty with these accounts of posthumous interests is that they are premised upon the emotional or religious commitments to a fictional – or not ‘real’ – person. The normative weight that we ought to assign to such interests must therefore be much less than the interests that the remainder of society have in treating other people in a ‘real sense.’

Nonetheless, there is a normative basis for why closely concerned persons ought to be able to manage how the body of a deceased person is used and treated, or obtain possession of the body in order to inter the deceased. The entitlements arise because of strongly held feelings that, if interfered with, will cause emotional distress for those in the grieving process. McGuinness and Brazier are right

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<sup>188</sup> M Brazier & S McGuinness, ‘Respecting the Living’ (n187) 315.

<sup>189</sup> M Brazier & S McGuinness, ‘Respecting the Living’ (n187) 315.

<sup>190</sup> *C.f.* J Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (Oxford University Press, 1984). 83: “we have interests while living about what happens when we die... all interests are the interests of some persons or other, and a person’s surviving interests are simply the ones that we identify by naming *him*, the person whose interest they were. He is of course at this moment dead, but that does not prevent us from referring now, in the present tense, to his interests.” See also J Herring, “Crimes Against the Dead,” in *Death Rites and Rights* (151) 232.

to identify these feelings that ought to attract serious consideration, but note here that we are again concerned with the happiness or emotional distress of the friends and family. Even if we are guided by moral duties to maximise happiness and minimise distress, then I have doubts as to whether the interests of friends and family have the greatest moral weight.

## **b. Social Analysis**

### **i. Instrumental Rights**

As the events at Alder Hey and Bristol (that lead to the *Re Organ Retention* litigation) illustrate, the interests that a person has in controlling the use of their own bodily material, or the bodily material of a deceased loved one, are not the only interests involved. Institutions use bodily material for therapeutic, diagnostic, scientific and educational purposes.<sup>191</sup> These institutions are given entitlements in bodily material because their use of the material produces socially desirable outcomes.

However, these ‘societal interests’ often come into conflict with the interests of progenitors and closely concerned persons. Here we will briefly consider whether there is a sound basis for these institutions having entitlements in separated bodily material and also consider how to adjudicate between the interests of individuals and the interests of these institutions.

It is difficult to doubt the moral value - or perhaps moral imperative - of using separated bodily material (such as blood, bone marrow, organ tissue or entire organs) to sustain the life of another. If the moral value of the body follows from the neuro-biological functions of the body, then we are under a moral obligation use any bodily material that is not sustaining a neuro-biological function for the benefit of those in need of bodily material to sustain their neuro-biological process. For instance, even if our moral duties are only in part shaped by the consequences of an act (in terms of welfare, happiness or utility), then the potential to prolong the life of a patient through a kidney transplant, creates significant impetus to allocate entitlements in kidneys to the institutions that coordinate and perform kidney transplants.

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<sup>191</sup> See Human Tissue Act 2004, Schedule 1.

Similarly, the value of physicians and medical researchers being able to use material in a clinical context for diagnostic gain is equally incontestable. The potential to isolate the genetic sequences that are connected to cancerous cells, the ability to determine causes of death, to further identify the characteristics of a diseases, conditions or environmental factors that cause illness, suffering and death, are important - and life saving - features of the provision of healthcare. According to the Chief Medical Officer:

There have been many occasions in the past where the study of tissue after death had led to discoveries in medical science which have resulted in the saving of lives and the relief of suffering.<sup>192</sup>

Beyond solely diagnostic aims, the use of biological material for wider research purposes (for which there are a wide variety of purposes) also has a social value insofar as medical research is the basis upon which more is known about our physiological condition and tools for diagnosis and treatment are developed. As Korn has argued, (albeit in the context of the United States):

Inadequate attention has been given to scientific opportunity, the individual, family and societal burdens of major, chronic diseases, and the rich prospects of public benefit that are now in sight as a result of 50 years of generous public investment in biomedical research. As a consequence, the debate has distorted the delicate equipoise that must always be respected in research involving human subjects by an excessive focus on private interest at the expense of public benefit.<sup>193</sup>

In essence, healthcare institutions having entitlements in separated bodily material may be justified on the basis of the therapeutic treatment that can be provided to patients, the knowledge

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<sup>192</sup> Department of Health, *Annual Report of the Chief Medical Officer* (2001) 6; J Herring, *Medical Law and Ethics* (n59) 413.

<sup>193</sup> D Korn, 'Contribution of the Human Tissue Archive to the Advancement of Medical Knowledge and the Public Health' in United States' National Bioethics Advisory Commission, *Research Involving Human Biological Materials: Ethical Issues and Policy Guidance* (1999), 23.

obtained from diagnostic use of bodily material and the developments that follow from using bodily material in medical research. To transfer an organ, to diagnose a blood condition or to identify the genetic features of cancerous tissue, requires the legal power to possess, manage, transfer and use the bodily material. Hence, in order for these institutions to use the biological material for therapeutic, diagnostic and research purposes they need to obtain a large bundle of control entitlements.

## ii. Instrumental Rights *vis-a-vis* Natural Rights

Where this instrumental argument attracts opponents is where the bundle of entitlements held by the institution is to the exclusion of the interests of that progenitors or closely concerned persons have in determining how, and by whom, the material is used.

Take organ donation as an example. The requirement of authorisation for posthumous organ donation limits the availability of organs and bodily material for use in often lifesaving treatment or valuable medical research. If healthcare institutions were to have a right to possess, manage, transfer and use separated bodily material, unencumbered by consent requirements, then healthcare institution could provide more treatment for more patients. It is the moral value of the consequences healthcare institutions possessing and controlling human organs that prompt Spital and Taylor to argue that the removal of cadaveric organs for transplantation ought to be a routine practice. that bypasses the need for the patient's consent on the basis that:

when one can save an endangered person at little or no risk to oneself, rescue is morally obligatory.<sup>194</sup>

Since it is largely indisputable that the consequences of cadaveric organ transplantation are morally desirable, routine or compulsory transplantation becomes a question of the relative moral weight attached to the interests of the donor and the state of affairs that routine transplantations would

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<sup>194</sup> A Spital and JS Taylor, 'Routine Recovery of Cadaveric Organs for Transplantation: Consistent, Fair, and Life-Saving (2007) 2 *Clin J Am Soc Nephrol* 300, 303.

create. For Harris,<sup>195</sup> Spital and Taylor,<sup>196</sup> the posthumous donor has – at best – a weak interest in what happens to his or her body. This weak interest is easily outweighed by the consequences of routine transplantation so that transplantation becomes morally obligatory.

Fabre offers a similar approach. According to her “principle of sufficiency”,<sup>197</sup> people who “have less than what they need for a minimally flourishing life have a claim to surplus resources”.<sup>198</sup> Applied therefore to bodily material, “the needs of the sick should, in principle at least, be met by the confiscation of organs from the dead and even from the living” providing the confiscation does not jeopardise the donor’s prospects of a flourishing life.

Wilkinson disagrees that the principle of sufficiency requires the confiscation of bodily material.<sup>199</sup> A contentious feature of Fabre’s arguments is her characterisation of bodily material as “surplus resources”.<sup>200</sup> Wilkinson argues that when:

people take resources out of common stock we owe compensation to everyone else.

By contrast, people do not appropriate their own bodies.<sup>201</sup>

Our relationship with our body is arguably dissimilar to the relationship with our other valuable resources that we own and control. It therefore follows for Wilkinson that:

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<sup>195</sup> J Harris, ‘Law and Regulation of Retained Organs’ (n153) 546.

<sup>196</sup> A Spital and JS Taylor, ‘Routine Recovery of Cadaveric Organs for Transplantation’ (n194) 302.

<sup>197</sup> C Fabre, ‘Reply to Wilkinson’ (2008) 14 *Res Publica* 137, 140: “if the materially needy have a right against the well-off that the latter transfer some of their income to them, then the medically needy have a right against the healthy that the latter transfer some of their body parts to them.”

<sup>198</sup> TM Wilkinson, ‘The Confiscation and Sale of Organs’ (2007) 13 *Res Publica* 327, 328: “Fabre claims that justice includes a principle of sufficiency and she argues from this principle to the confiscation of body parts. Sufficiency says that people who have less than what they need for a minimally flourishing life have a claim right to surplus resources. A minimally flourishing life is an autonomous life, so it is more than a life where basic needs, such as for food and shelter, are met.

<sup>199</sup> TM Wilkinson, ‘The Confiscation and Sale of Organs’ (n198) 328.

<sup>200</sup> TM Wilkinson, ‘The Confiscation and Sale of Organs’ (n198) 328.

<sup>201</sup> TM Wilkinson, ‘The Confiscation and Sale of Organs’ (n198) 332.

there is then no obvious inconsistency with endorsing coercive taxation of material resources while rejecting coerced transfer of body parts or personal services.<sup>202</sup>

Fabre recognises that she will ultimately reach an impasse with those who value bodily integrity in its own right (as something in addition to the role the body has in enabling human flourishing).<sup>203</sup> In other words, her argument assumes a conception of the body where its task is limited to promoting a minimal standard of welfare and enabling autonomous action.

Upon such an assumption, Fabre is right to question why the bodily integrity of one person should outweigh the needs of others. The fundamental point is that if we characterise the body as having normative value merely because of the neuro-biological functions of the body, then the therapeutic, diagnostic and educational uses of the body - to further the provision of healthcare and maximise aggregate welfare and autonomy of others - will outweigh the interests the person has in their own body, or the interests that grieving friends and family have in the deceased body.

### iii. Contingent Bodily Material

We can describe this view of the body that has been developed so far as 'contingent and anonymous'. It is 'contingent' because there is no necessary connection between the person and the normative function of their body (in sustaining neuro-biological functions of welfare or cognition). It follows that the function of the body is also 'anonymous' since the normative function of bodily material can be - literally - transplanted from one person to another.

If our respect for the Person is derived from the neuro-biological capacities of the Person then the relationship between the Person and their body is a contingent and anonymous relationship. The

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<sup>202</sup> TM Wilkinson, 'The Confiscation and Sale of Organs' (n198) 332.

<sup>203</sup> C Fabre, *Whose Body is It Anyway?* (Oxford University Press, 2006) 110; TM Wilkinson, 'The Confiscation and Sale of Organs' (n198) 333: "To hold that bodily integrity is valuable in its own right, she thinks, produces an impasse. Someone who thought it so would not be persuaded by her arguments that justice can require confiscation, and she does not know what to say to such a person, except that, if both bodily integrity and a minimally flourishing life are independently valuable, it is not clear why bodily integrity should outweigh the needs of potential recipients for organs."

bodily material and dead bodies become “common stock”<sup>204</sup> or “surplus resources”<sup>205</sup> and it becomes difficult to justify why the progenitor or closely concerned person ought to have an interest that is greater than societal interests in the provision of healthcare and the furtherance of biomedical science.

Since separated bodily material can perform the function of promoting welfare and enabling autonomous action for persons other than the progenitor or concerned persons, there is no reason why the progenitor or representative ought to have priority when the welfare or autonomy needs of potential recipients of bodily material, and the wider societal interest in biomedical research, is substantial. For instance, to return to Brazier and McGuiness’ contention, if we are only concerned with the minimisation of emotional distress, then I would suggest that avoiding the distress of patients dying on the organ transplantation waiting-list is, in the aggregate of cases, likely to be more important than avoiding the distress of denying closely concerned persons the ability to determine whether the deceased’s organs are used for therapeutic purposes. As Harris argues:

If we can save or prolong the lives of living people and can only do so at the expense of the sensibilities of others, it seems clear to me that we should. For the alternative involves the equivalent of sacrificing people’s lives so that others will simply *feel* better or not feel so bad, and this seems nothing short of outrageous.<sup>206</sup>

Hence, given the significant moral weight of the instrumental argument for recognising institution’s possession, management and use entitlements, Fabre is right to question why the interests of one person should outweigh the greater interests of others.

As far as the interests that have been formulated so far in a pre-social analysis, Harris, Fabre, Spital and Taylor are right that needs of one person (or their posthumous representatives) to control

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<sup>204</sup> TM Wilkinson, ‘The Confiscation and Sale of Organs’ (n198) 322.

<sup>205</sup> TM Wilkinson, ‘The Confiscation and Sale of Organs’ (n198) 328.

<sup>206</sup> J Harris, *Wonderwoman and Superman: The Ethics of Human Biotechnology* (Oxford University Press, 1992) 100.

what happens to their biological material often pale in comparison to wider social needs of recipients of donated material or the potential for further medical research. However, if we were to accept that our respect for the person is premised upon *more* than merely their neuro-biological capacities, then there may arise interests that a person has in their body than cannot be easily outweighed by the needs of others.

### *Section Summary*

This Section has attempted to identify which control entitlements individuals and institutions ought to be able to exercise in bodily material by considering a conventional conception of the moral duties we owe an individual and their body and the competing societal interest in the use of bodily material for therapeutic, diagnostic and research purposes. Entitlements may arise in favour of an individual on a Hegelian basis, and entitlements may arise in the dead body because of socio-cultural and psychological reasons.

However, since this ethical analysis is only concerned with moral duties that follow a person's neuro-biological properties (maximisation of welfare or the promotion of autonomy), the entitlements that arises are entitlements in an anonymous and surplus resource. The moral duties of maximising welfare and promoting autonomy are then are best served by allocating control entitlements to healthcare institutions at the exclusion of individual interests.

## Section Two: A Phenomenological Inquiry

We have so far viewed the body as having a normative dimension insofar as the body promotes welfare and enables autonomous action. We have also been concerned with bridging the gap between the normative features of the person and separated bodily material. Here I will introduce an alternative way of viewing the normative dimension of the body; as an object that is ‘for-itself’ and ‘for-others’. The method here is to divide up the world up into *things* and ask which things in the world attract moral consideration. This alternative view has two important consequences. First, it changes the way in which natural rights (from a pre-social analysis) are balanced against instrumental rights (from a social analysis). Second, in later chapters, it significantly influences the way in which some entitlements in bodily material ought to be given effect to in law.

### a. A Phenomenological Methodology

Here I will introduce a shift in philosophical methodology. The discussion so far has been premised upon “binary categories” of the Person and the other, the Person and their body and the Person and things. The aim here is to “break down”<sup>207</sup> or dissolve these binary categories. For instance, Harmon and Laurie eloquently describe the body as “essential...[a]s a nexus of human value, on the one hand, and vessel of instrumentalisation, on the other”.<sup>208</sup> The aim here is to close the gap in the contrast provided in the Harmon and Laurie description, so that we cannot understand value of the human body and the instrumentalism of the human body as being held in separated hands.

Let us start by exploring the idea of the ‘Person’ or ‘Subject’. We have become used to thinking of ourselves as having a personal level existence, which is characterised by subjective appearances, feelings, and perceptions, as well as having a sub-personal existence, on which level we regard ourselves as made up of physiological systems that carry out their functions unbeknown to us or ‘in the dark’. We

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<sup>207</sup> M Shildrick, ‘Beyond the Body of Bioethics: Challenging the Conventions’ in *Ethics of the Body: Postconventional Challenges* (MIT Press, 2005) 3.

<sup>208</sup> SHE Harmon and GT Laurie, ‘Property, Principles, Precedents and Paradigms’ (n20) 476.

even sometimes refer to felt pains, despair and unhappiness as neurological or chemical processes occurring in our brains, as if they were somehow separate from or external to ourselves.

If we focus on our neuro-biological features, our subjectivity becomes, as Husserl puts it, an enigma.<sup>209</sup> So too, our perceptual lives become compromised. As Zahavi and Gallagher put it, “[t]he assumption has frequently been that the phenomenon [consciousness] is something merely subjective, a veil or smoke screen that conceals the objectively existing reality”.<sup>210</sup> Carruthers<sup>211</sup> and Metzinger,<sup>212</sup> for instance, regard the experience of personal *unity* as masking the reality of a federation of sub-personal, modular systems all working independently of one-another. Thus, my lived experience of my body, from an analytical perspective, becomes a kind of veil or smokescreen over the actual, physiological truths that constitute my being. In other words, from an analytical perspective, my lived experience becomes an unhelpful mediator between the subject (me) and the world (things).

Phenomenology is the study of what gets overlooked by the analytical perspective, namely, our first-person experience of the world or our ‘perceptual lives’.<sup>213</sup> It aims to uncover the phenomenological conditions for what might be described as ‘having a world’, or ‘being there’.

Here we must make a careful distinction. The analytical approach would seek to satisfy the conditions for being a conscious subject through identifying the physiological systems that realise experience. These conditions would take the form of causal constraints describable in non-phenomenal terms (a complete neurological account of the nervous system, for example). The phenomenologist, in

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<sup>209</sup> E Husserl, *The Crisis of the European Sciences* (Evanston, Ill., Northwestern, 1974) 5.

<sup>210</sup> D Zahavi and M Gallagher, *The Phenomenological Mind* (Routledge, 2008) 21.

<sup>211</sup> P Carruthers, ‘The Illusion of Conscious Will’ (2007) *Synthese* 159, 197-213.

<sup>212</sup> T Metzinger, *Being No One* (MIT Press, 2003).

<sup>213</sup> We should take caution here to avoid a common fallacy. Phenomenology urges us not to imagine that we live in our heads (which is a dogma inherited from Cartesianism) but to regard ourselves as “so many empty heads turned upon the selfsame world” (Merleau-Ponty, *The Phenomenology of Perception* (Routledge, 2003)) or, as Sartre puts it, “consciousness has nothing of its own” (JP Sartre, *The Transcendence of the Ego* (Routledge, 2004)). Thus, phenomenology is concerned with the *world*, and it makes a claim about the nature of the world: the world is first and foremost the *site* or the space in which our perceptual lives unfold.

contrast, believes that the *way* the world appears to conscious subjects is governed by a set of intentional structures that delimit how objects can make themselves manifest. For instance, Husserl famously insisted that if God wished to view a cube, he must do so from only *one* vantage point: for it is essential to how cubes make themselves manifest that the presented side occludes the non-presented. Phenomenological truths are significant and important to us because, at the risk of belabouring the obvious, no object can become the topic of science without it somehow making itself manifest to conscious observers. This is Husserl's 'Principle of Principles':

Every kind of object that is to be the object of rational discourse, or prescientific and then scientific knowledge, must manifest itself in that knowledge, thus in consciousness itself, and allow of being brought, in accordance with the sense of all knowledge, to *givenness*.<sup>214</sup>

'Phenomenological truths' are the set of conditions that limit and make possible conscious experience of a world. These truths, the phenomenologist contends, remain ignored and overlooked by analytical methods of inquiry precisely because these methods cannot be used to investigate *how* objects appear (or make themselves manifest) in our experience of the world. If phenomenological truths are part of our world, then they not only underscore physical truths, chemical truths, and biological truths, but they describe the relationship between world and subject, that is, they describe *ourselves*, not as detached minds, communing with the world instrumentally through bodies, but *as* living bodies that are capable of taking up intentional relations to the world.

#### i. Respect for the (*embodied, attitude bearing*) Person

Following from this shift in methodology, I outline two preliminary claims about the person. These are:

- (A) Persons are essentially attitude bearing things; and
- (B) Persons are embodied.

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<sup>214</sup> E Husserl, 'Philosophy as Rigorous Science' (2002) *The New Yearbook for Phenomenology and Phenomenological Philosophy* 249, 259.

I will then make two substantive claims about the body:

- (C) The body pulls itself into a person through *self-ascription*; and
- (D) The body exists not only for-itself, but *for-others*.

The purpose in highlighting these four claims is to establish some reasons for believing that one's subjectivity just *is* the co-operation of one's body as a whole in meeting the social, practical, and theoretical problems that the intersubjective world poses to it. Once we recognize persons as being identical to an intentional interchange between our bodies and the world, we should see that we cannot treat individual parts of living bodies as anonymous and contingently related to the mental life of a subject.

#### *A. Persons are Essentially Attitude Bearing Things.*

Merleau-Ponty tells us in the opening lines of *Phenomenology of Perception* that “we are through and through composed of relations to the world”.<sup>215</sup> No sooner does a human subject come into existence than does the world demand that we take some attitude towards it. Rage, confusion, rejection, happiness, jubilation, indifference; from birth to death we never fail to have some attitude towards some aspect of our situation. The attitudes that we take towards the world are said to *intend* an aspect or object within the world.

Think of the way a swimmer throws her body into the shape of a dive, or the way a person with poor sight pulls her entire body into trying to find the optimal perspective on a statue viewed in dim light. Attitudes *pervade* the body of the organism, and they are our sole means of relating to the world as subjects. When we dislike a person, our body assumes the attitude of dislike *towards* the intended individual. The same with love, indifference, and rejection. An organism that cannot adopt even the faintest of attitudes towards its environment (not so much as a shiver at the touch of a cold metal bar) is no longer a subject.

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<sup>215</sup> M Merleau-Ponty, *Phenomenology of Perception* (Routledge: 2003) iv.

The world demands that we take up attitudes towards it. This is called our *existential* situation, because it is both the condition for our existence and the nature of our existence. We cannot escape the burden of these attitudes because our existence is *thoroughly* composed of these relations; there is no non-relational inner space to which we might retreat.<sup>216</sup>

### *B. Persons are Embodied*

*Who*, or *what*, then takes up an attitude? The way in which we answer this question informs how we understand the relation between a person and their body.

The body is, in Husserl's terms, "an organ of the will".<sup>217</sup> To explore this, let us take playing the piano as an example. Following Haugeland,<sup>218</sup> if forming an intention to play Rachmaninoff's third piano concerto involves my mind formulating a set of rational intentions into instructions which are then communicated to my fingers, then conceivably we can uphold that the mind (or what is essentially 'me') *ends* at the point where *rationality* is converted into *instructions*. For my fingers might be replaced with another person's fingers, or mechanic substitutes, or the signals might be converted into a virtual world where I play a virtual piano, and this would not change or affect my intention (attitude) beyond changing whether or not it *succeeds*.

As Merleau-Ponty, and Haugeland have both argued, however, this simple picture whereby intentions on the 'mind' or 'person' side are converted to instructions on the 'body' or 'world' side is an inaccurate picture. As Dreyfus argues, in learning a skill, we develop 'muscular gestalts' or 'muscle understanding'. For Merleau-Ponty, "it is the body that understands in the acquisition of habit".<sup>219</sup> The

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<sup>216</sup> M Merleau-Ponty, *Phenomenology of Perception* (n215) 11: "...there is no inner man, man is in the world, and only in the world does he know himself".

<sup>217</sup> E Husserl, *Cartesian Meditations* (1982). 97; E Husserl, *Ideas Pertaining to a Pure Phenomenology and to a Phenomenological Philosophy* (1989), 159 in SK Toombs, "What Does it Mean to be Somebody? Phenomenological Reflections and Ethical Quandaries" in MJ Cherry (ed.) *Persons and Their Bodies: Rights, Responsibilities, Relationships* (Kluwer Academic Publishers, 1999). 73

<sup>218</sup> J Haugeland, *Having Thought: Essays in the Metaphysics of Mind* (Harvard University Press, 1998)

<sup>219</sup> M Merleau-Ponty, *Phenomenology of Perception* (n215) 167.

idea is that, through habitual training, my body becomes increasingly responsive and expert at certain tasks. But the way that it does so is wholly idiomatic (for it depends wholly on how I go about acquiring the skill in question).

Hence, the mind and the muscles learn to work *as a unity* in approaching the task of playing the piano, for instance. The mind cannot merely send instructions downstream, as if it didn't matter *who* or *what* carried them out. The downstream signals are incomplete *without* the information about how to play Rachmaninoff's piano concerto that are contained within the muscles and nerve endings of my fingers. We only get a full-fledged attitude once we treat the person and the body as one thing, and not as a subsystem within an instrumental body.

We extend beyond the piano example. If "I am in love with Lucy" is the attitude that I have currently adopted towards the world, then it would seem to follow that *I* am the thing (the entity) that has that attitude. But loving Lucy *necessitates a bodily* attitude. I might understand the idea of loving Lucy, but in order to maintain an attitude - that is, a relation or engagement with the world - I must throw my whole being into loving Lucy in the same way that I must throw my whole body into a dive or a dance. My body cannot be merely *instrumental* to my having the attitude *loving Lucy*. Rather, *I* must be *my body*, not merely a subsystem of my body, but rather an *embodied* thing that loves Lucy.

Since a Person is an embodied attitude-bearing thing, it follows that the key dimension of the body is that it is *for-itself*. That is to say, the body is the way in which the person forms attitudes toward, and intentional relations with, the world. The body is *for-itself* since the body *cope*s with the demands of the world (the coldness of a steel bar), engages in *projects* in the world (of learning to play Rachmaninoff), and engages with *others* in the world (loving Lucy). We will consider shortly what constitutes the body that is *for-itself*.

### C. *The Body-for-Others* <sup>220</sup>

We have so far focused on how the body realizes and maintains attitudes through the body. The body is therefore *for-itself* (the way in which the person copes with, and engages with, the world). The body has another dimension: it is also *for-others*.

The human body is *innately* social: long before a human organism ever acquires the concept of 'person' or 'mind' and applies this concept both to herself and to others, her body has established a wide array of habitual motor responses that are social in nature: the mirroring of a smile or a frown as the employment of a rudimentary gesture of discontent, and perhaps most significantly, the capacity to distinguish joint attentiveness to an object from non-joint attentiveness.<sup>221</sup>

We can find prime examples for this claim in mutual affect regulation in infants. As Merleau-Ponty notes,<sup>222</sup> infants, shortly after birth (Taylor Carman<sup>223</sup> cites cases of within 42 minutes of birth), are capable of imitating the facial gestures of persons. But infants are arguably incapable of *recognising* (or conceptualising) the face of the other as open-mouthed, or as squinting, or (after three months) as smiling. The embodied gestures of the infant do not count as communication (the infant has no concept of herself or of the other person as being *persons*) but neither should we say that mutual affect regulation is wholly outside the realm of social interactions. The phenomenological view on mutual affect regulation is that this phenomenon ('event' or 'occurrence') shows better than any other example how social existence is not a top-storey phenomenon, governed wholly by rationality. Rather, intersubjectivity is founded upon and constituted by the pre-rational life of the body. Carman expresses Merleau-Ponty's insight in the following way:

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<sup>220</sup> The body-for-others is a term introduced by Sartre in *Being and Nothingness* to describe the *visibility* of the body JP Sartre, *The Transcendence of the Ego* (Routledge: 2004). Merleau-Ponty (n215) greatly advanced the idea beyond Sartre's treatment, and we will here be mainly concerned with Merleau-Ponty's discussion of the communality of the body .

<sup>221</sup> N Eilan, "Consciousness, Self-Consciousness and Communication in Merleau-Ponty" (ed. T Baldwin) *Reading Merleau-Ponty* (Routledge: 2007), 118-138.

<sup>222</sup> M Merleau-Ponty, *The Primacy of Perception* (Evanston, Ill, Northwestern University Press: 1964).

<sup>223</sup> T Carman, *Merleau-Ponty* (Routledge: 2008) 135.

Others are present to us, just as we are present to ourselves, in a bodily way *before* we are able to conceive of either them or ourselves as minds standing in relations of mutual distrust, suspicion, or uncertainty.<sup>224</sup>

The idea is that the body is the “medium of social perception”,<sup>225</sup> a medium that is not made social only by association with cognition. Before I recognize Matthew’s behaviour *as* anger, my body has already adopted the attitude of indignation, or defensiveness, or of mutual anger. I may be clued in by my body immediately about the fact that Matthew is angry and that I am indignant; or Matthew’s anger and my own indignation may be opaque to me. As Merleau-Ponty puts it, “it [the anger] was lived, not known”.<sup>226</sup> For the anger to be *lived* is for my body to take up that attitude (anger) towards another person; for the anger to be *known* is for it to be consciously transparent, to be available to myself as a reasoning agent.

An important result of this treatment is the possibility that a person can sustain pre-rational relations to others even after the loss of most or even all of her cognitive capacity. A second important result is that the body can sustain motor attitudes towards others, engage in states of mutual love or anger or affect regulation, without being *transparent* at the level of self-consciousness. Thus, it is not essential to one’s being hurt or being fearful of some other person that one be conscious of *oneself* as being fearful or of being hurt.

The body therefore exists, not only for itself but also for others; as the medium of social life. Using a large range of physiological facts, Herring and Chau suggest that each body is physiologically interconnected, and interdependent on, other bodies, that each body is constantly interacting and dependent upon the wider environment for survival. Their conclusion is that “our bodies are not just

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<sup>224</sup> T Carman, *Merleau-Ponty* (n223) 136.

<sup>225</sup> T Carman, *Merleau-Ponty* (n223) 137.

<sup>226</sup> M Merleau-Ponty, *The Phenomenology of Perception* (n215) 443.

ours”.<sup>227</sup> Instead, “our bodies are leaky”.<sup>228</sup> The analysis of Herring and Chau illustrates how our bodies are physiologically leaky; our bodies are independent and connected to other bodies and the physical environment. The phenomenological analysis here illustrates how our bodies are ‘metaphysically leaky’ insofar as aspects of our “us” are found in our bodies and aspects of “us” are also found in our relationships with other people.

When a person dies, their body remains. Although the body is no longer *for-itself* (no longer able to formulate attitudes toward the world), the body remains as *for-others*. Hence, when a dead body enters into my world of experience, since my body and the deceased's remain as the media for social life, I may develop an attitude towards the body, on a pre-rational and rational level. These *attitudes* are, as above, constitutive of my existence.

The deceased person therefore remains as a morally relevant concept and the rights of the friends and family of the deceased as to how the body of the deceased ought to be treated also have a sound normative basis. This is because our existence is thoroughly composed of intentional relations with the world, which develops our social existence on a rational and pre-rational level between an experiencing thing and other experiencing things. The social life, between the deceased and their family and friends, may continue even when the deceased no longer experiences the world because the deceased is still part of the inter-subjective world of the family and friends.

Since our understanding of our own existence is often with reference to our place in the intersubjective world - as the father of Matthew, as the son of Mark, as the husband of Lucy, or as friend of Joanna - we have a particular relationship with the bodies of Matthew, Mark, Lucy and Joanna, and these relationships help constitute who we are. These relationships are developed through both pre-rational and rational interactions between the embodied-self and the embodied-Matthew, the embodied-Mark etc. Moreover, these relationships are apprehended by us to be sufficiently intimate or

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<sup>227</sup> J Herring and P-L Chau, ‘My Body, Your Body, Our Bodies’ (2007) 15 *Medical Law Review* 34.

<sup>228</sup> Herring & Chau, ‘My Body, Your Body’ (n227) 34, term coined by Shildrick; M Shildrick, *Leaky Bodies and Boundaries: Feminism, Postmodernism and (Bio)ethics* (Routledge, 1997).

important relationships so that these relationships are internalised; they develop from being a feature of my experience of the world to being a feature of my identity and existence in the world.

Hence, the existence of Matthew, Mark, Lucy and John, particularly their bodies as the media of social interaction, forms a fundamental part of not only my experience of the world but also my existence in the world. Contrary to Foster's dignity-based approach to organ retention,<sup>229</sup> the parents' relationship with the organs of their children are not secondary to an overreaching duty to maximise human flourishing.<sup>230</sup> Rather, the relationship with the bodily material as moral value as being constitutive of the parents existence in the world.

These attitudes towards, or relationships with, the body of the deceased, may also include body parts. As the Bristol Inquiry Interim Report explains:

For the parents of a recently deceased child, human material, certainly substantial specimens such as organs and parts of organs and even smaller parts are still thought of as an integral part of the child's body and, thus, are still the child.<sup>231</sup>

Provided that the attitude toward the body or body part is an attitude directed towards the person, so that an organ is thought of as part of the child, the body or body parts remain the medium of social experience.

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<sup>229</sup> C Foster, 'Dignity and the Use of Body Parts' (n147) 2: "Nor is this really about the parents' autonomy. The parents will be upset because they were denied the opportunity to exercise their autonomy in a way which accorded with their view of how their child's body should be treated. It is the appropriateness of the treatment that is really at stake, and that, in turn, is conditioned by the parents' view of the propriety of dealing with human bodies in general. The parents' autonomy is distinctly secondary to the overwhelming perceived importance of 'doing the right thing' in relation to human beings."

<sup>230</sup> C Foster, *Human Dignity in Bioethics and Law* (n146) 15: "I propose a version of the consequentialist approach. The consequence to which one should look is the net amount of dignity - the net amount of objective human thriving - left by the proposed action or inaction. One should view the subject of one's ethical or legal analysis not as the patient, or the doctor, or society, or anything else, but as the transaction that constitutes the whole bioethical encounter."

<sup>231</sup> Bristol Inquiry Interim Report, *Removal and Retention of Human Material* (2000) [33].

Hence, my existence is the sum of my relations to the world and to others, such that the world and others partly constitute my own existence as Matthew, or as Mark. The reasons for recognising the interests of friends, carers, and family is not based upon respect for a plurality of religious or cultural beliefs, or even the emotional or *psychological* distress that may result from ignoring the wishes of friends and family. We ought to respect these rights because an aspect of the deceased's daughter is tied into the relationship between the deceased mother and her daughter and their bodies are the physical medium through which this relationship developed *and continues*.

More precisely, we ought to respect these rights because (a) a person is the sum of their intentional ties to the world, (b) these ties are constituted by our own living body and the bodies of others (c) deceased bodies can *continue* to figure in and be included in the world *as* persons by the very persistence of those attitudes that are responsive to and about the deceased.

This provides a normative basis for why closely concerned persons ought to be able to exercise a degree of control over how the body of their deceased loved-one is treated. As the law currently affords, closely concerned persons ought to have the (i) right to *authorise* the use of the body or bodily material of the deceased and may exercise the (ii) right to *possession* as the corollary of the duty to inter.

This account of why closely concerned persons ought to be able to exercise entitlements over the body and bodily material of a deceased person differs from the socio-cultural and emotional account that was considered in the previous Section. Under this phenomenological account, the deceased person remains as a morally relevant concept and the relationships between friends and family and the dead person are 'personal' and 'constitutive'. It is 'personal', as opposed to anonymous, because the body of the deceased continues to function as the medium of social experience for those particular relationships. It is 'constitutive', rather than 'contingent', because the normative function of the body (medium of social experience) is both connected to the family and friends of the deceased and the relationship with the deceased helps constitute the experience and existence of the friends and family (as mothers, as daughters, as husbands or as wives).

#### D. The Body is Self-ascribed.

As we have seen from (B), the body is *for-itself*. It is what formulates attitudes and intentional relations with the world. Yet, we must ask, *what* is (and what is not) the body that is *for-itself*. To address this, let us briefly consider the idea of the ‘self’ that figures in both the idea of ‘self-ownership’ and the ‘body-*for-itself*’.

The idea of the ‘self’ can be taken as a structural feature of consciousness. For example, the fact that objects far away look small and objects close at hand look big is a structural feature of the visual field. If the consciousness is the sum total of your awareness (modes of awareness including the visual, auditory, unspoken thought, tactile, and so on) then the ‘self’ is what appears intimately in field of awareness. So that the “the lived body is owned in the sense that it is apprehended as belonging to the experiencing subject”.<sup>232</sup>

However, we need to be slightly more sophisticated in our account of the self. As Bortolotti and Broome<sup>233</sup> have rightly argued, we do not want to uphold that just because some part of my body figures in my experience or awareness, that it is presented as *part of me* or *'of me'*. A more useful concept of ‘self-ownership’ or ‘for-itself’ might be one that admits the possibility of a feeling entering a person’s awareness and yet not inviting or motivating that person to ascribe that feeling to themselves as our normal feelings do.<sup>234</sup> For example, some feelings of love, or fear, or of anxiety may not to be presented to us as stemming from our person, but may seem instead to invade or inhabit our experience from elsewhere. As Merleau-Ponty observes, “there are imaginary sentiments to which we are committed sufficiently for them to be experienced, but insufficiently for them to be authentic”,<sup>235</sup> where authenticity is a matter of that feeling motivating me to *ascribe* it to my person, my self.

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<sup>232</sup> SK Toombs, “What Does it Mean to be Somebody?” (n217) 78.

<sup>233</sup> L Bortolotti and M Broome. “A Role for Ownership and Authorship in the Analysis of Thought Insertion (2009) 8.2 *Phenomenology and the Cognitive Sciences* 205

<sup>234</sup> L Bortolotti and M Broome, ‘A Role for Ownership and Authorship in the Analysis of Thought Insertion’ (n233) 211

<sup>235</sup> M Merleau-Ponty, *Phenomenology of Perception* (n215) 444.

Thus, for instance, in the case of inserted thoughts: “One evening one thought was given to me electrically that I should murder Lissi”.<sup>236</sup> We do not wish to say that the patient feels a sense of *ownership* of this thought, as it is the *alienness* of the thought that requires explanation. But how can the patient experience the thought from the first-person yet fail to feel that the thought occurs ‘for her?’ By saying that thoughts only feel like one’s own insofar as they motivate self-ascription, we can accommodate the apparent incoherency.

The suggestion here is that the body is able to unify itself through a self-presentation that motivates the subject to treat these limbs, gestures and movements as her own. A large part of such self-ascription is motivated simply by that body part *fitting in* to my projects and retaining what Merleau-Ponty terms a ‘practical field’. For instance, the practical field of my fingers may include the capacity to play Rachmaninoff, or at least involvement in the project of learning to play Rachmaninoff. We can even thus explain phantom limb syndrome:

To have a phantom arm is to remain open to all the actions of which the arm alone is capable; it is to retain the practical field which one enjoyed before mutilation. The body is the vehicle of being in the world, and having a body is, for a living creature, to be intervolved in a definite environment, to identify oneself with certain projects and be continually committed to them.<sup>237</sup>

These only are projects for a person insofar as that person retains a practical field. Thus, a body is not merely a sum total of matter that obeys instructions from a subsystem mind, and to chip away at the unity of the body is to chip away at the unity of the person herself. The body gains a practical field through habit-forming responses, which necessitate muscle understanding. The body only sustains the practical field through a readiness to *unify* its responsiveness to the world, and this readiness to unify

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<sup>236</sup> K Jaspers, *General Psychopathology* (7th ed. Manchester University Press, 1963) 580.

<sup>237</sup> M Merleau-Ponty, *Phenomenology of Perception* (n215) 94.

results in a self-presentation of the body that motivates self-ascription of the body's limbs and gestures to the person.

Therefore, from a phenomenological perspective, the living body comes into its own through *self-ascription*; that what makes up the sole, unified body is the responsiveness to the task of coping with, and engaging in, the world. Recall from (B) that our existence is constituted by forming intentional ties with the world, such ties can be understood as “tasks” and include “coping” with the demands of the world (shivering at the touch of a cold of steel bar), engaging in “projects” in the world (of learning to play Rachmaninoff), and engaging with “others” in the world (loving Lucy). It follows that a body part, if it continues its responsiveness to the task of coping with, and engaging in, the world, can be ascribed as being part of the living body.

According to this view of the self-ascribed body, physical separation does not necessarily change the relationship between the person and their body provided the body part is still functionally unified with the body in its responsiveness to the task of engaging or coping with the world. Alternatively, if a body part no longer forms part of the person’s responsiveness to a task, then it is no longer part of the ascribed body.

Under the phenomenological approach prescribed here, where the bodily material retains a (a) function unity with the attached body ((b) in terms of it’s responsiveness to a task), the relationship between the person and their separated material ought to be treated in a similar way to the relationship between the person and their body. This provides a normative basis for why the progenitor of bodily material ought to be able to retain (i) *management* and (ii) *use* entitlements in their material. Rather than extending the idea of self-ownership out, into the external, the approach here suggest that some items of bodily material may remain within the sphere of the person. These entitlements are therefore also ‘personal’ and ‘constitutive’. Just as the attached body is necessarily associated with the person and helps constitute the persons experience of the world, and existence in the world, so too does bodily material that retains the function of being-*for-itself*.

Moreover, where the (b) task of engaging or coping with the world is an attempt at co-therapy (such as assisted reproductive therapy or inter-vivos transfer), a co-participant ought to also have an interest in the material. Although the progenitor may exercise management and use entitlements over the material, a co-participant may obtain a (iii) reversionary use entitlement in the material. Where the progenitor dies, the use-entitlement may fully vest in the co-participant.

Note that under this phenomenological account, the progenitor has a very narrow bundle of entitlements. Where bodily material does not retain a functional unity with the body, so that the bodily material is not retained for a progenitor benefit, there is no basis for why the progenitor ought to nonetheless control the bodily material. In such circumstances, the bodily material becomes a 'surplus resource'. We are also unable to find a normative basis for respecting the wishes of the deceased under an analytical or phenomenological account. The underlying problem of detachment remains in both analyses. That is, the dead person has no interests; a dead person does not exercise autonomy, does not experience welfare, does not cope or engage with the world. Although it is tempting to argue that a 'project' may extend beyond a person's experience (so that one of Matthew's projects is to donate his body to science), the difficulty is in identifying the normative basis of an 'intentional tie' between the world and a non-experiencing thing.

We now have a sense of the entitlements in bodily material that ought to arise in separated bodily material in a pre-social analysis. Fundamentally, these entitlements are 'personal' and 'constitutive' entitlements.

## **b. Pre-social and Social Analyses**

This characterisation of the person-body relationship as 'constitutive' or 'personal' follows from a phenomenological account of the body that forms the foundation for a number of key propositions formulated in this Thesis. The first proposition is that if we characterise entitlements in the body as 'constitutive' - as part of the person - then the conflict between the pre-social and social analyses is resolved differently than under the analytical account of the person-body relationship.

Recall that the reason why the rights of progenitors and closely concerned persons formulated under the analytical approach were outweighed by institutional and societal interests is because the body or bodily material is conceived of as objects, 'common stock' or 'surplus resources'. The normative dimension of the body was limited to sustaining welfare and enabling cognition (neurobiological processes). This normative dimension was 'contingent and anonymous' since no priority can be given to the progenitor or closely concerned persons.

However, under the phenomenological approach taken here, the normative functions of the body, even after detachment, may continue to be within the realm of the Person. The body is *for-itself* and bodily material may retain a functional unity with the person. The body is also *for-others*, and continues to be the medium of social experience do after death of the person.

The body is also a valuable resource and it is a legitimate social aim to further provide therapeutic treatment and enable research by making bodily material available. Moreover, it may be legitimate to achieve social aims using common stock or surplus resources. Yet, just as our attached body is not a surplus resource, nor is bodily material that is *for-itself* or *for-others*. This is why I suggest that, despite the social demand for bodily material, the entitlements in bodily material that is *for-itself* and *for-others* cannot be outweighed by competing societal interests.

Equally, where material cannot be viewed as *for-itself* or *for-others*, the material ought to be used to further social aims. This means that where bodily material neither retains a functional unity with the body or functions as the medium of social experience, healthcare institutions ought to be able obtain a large bundle of entitlements in the material without the need for authorisation from the progenitor or a closely concerned person. In essence, outside the categories of *for-itself* and *for-others*, individuals retain no interests in the material dimension of their bodily material.

## Chapter Summary

We are now able to prescribe the control entitlements that individuals and institutions ought to be able to have in bodily material. In terms of entitlements in dead bodies, I have suggested that closely concerned persons ought to have (i) the right to *authorise* the use of the body or bodily material of the deceased and may exercise (ii) the right to *possession* as the corollary of the duty to inter. Yet, contrary to the current legal approach, I have also suggested that there is no normative basis for why the wishes of the deceased should determine how their body is treated.

In terms of entitlements in extracted or detached material, I have argued that where the bodily material retains (a) a function unity with the attached body (b) in terms of its responsiveness to a task, the progenitor of the material ought to retain (i) *management* and (ii) *use* entitlements in their material. Where (b) the task is co-therapeutic, a co-participant in therapy may obtain a (iii) reversionary-use entitlement in the material. Where the bodily material is neither for-itself nor for-others, contrary to the current legal approach, individuals retain no entitlements in the material and healthcare institutions may obtain (i) *possession*, (ii) *management*, (iii) *transfer* and (iv) *use* entitlements in the material without the need for authorisation.

This particular allocation of entitlements follows from two propositions advanced in this Chapter. First, if we understand our duties to the Person in terms welfare and autonomy, the social value in healthcare institutions exercising entitlements in bodily material outweigh any individual interests in the material. Second, if we understand the body as *for-itself*, *self-ascribed*, and *for-others*, then progenitors and closely concerned persons ought to have a limited set of entitlements in bodies or bodily material.

## Chapter Three: Income Entitlements

This Chapter will determine whether the bundle of entitlements an individual or institution may have in bodily material ought to include income entitlements. This requires a separate analysis from the discussion of control entitlements in the previous Chapter since control entitlement and income entitlements represent “two importantly different aspects of ownership which must be considered separately and justified according to contrasting considerations”.<sup>238</sup> In this Chapter I will explain further this distinction between control and income entitlements.

In determining whether the exercise of income entitlements in bodily material can be justified, we will engage in both a pre-social and social analysis. I will argue here that it is not possible to justify income entitlements in a pre-social analysis since a gap will always emerge between what is being justified (the ability to obtain a monetary benefit in exchange for an entitlements) and the basis of the justification (the attributes and characteristics of the person).

It may nonetheless be possible to justify the recognition of income rights in a social analysis. There are two limbs to the social analysis. First, it may be the case that a consequence of recognising income entitlements in bodily material is that it will increase the availability of bodily material for socially valuable therapeutic, scientific and educational purposes. I will argue here that, assuming the accuracy of the empirical claim, this raises a *prima facie* argument in favour of the recognition of income rights in bodily material. However, the second limb concerns the wider consequences of an established practice of bodily material being sold or transferred for a financial gain. Through the reconstruction of a collection of arguments against a market in bodily material, I argue that the gain in terms of the greater availability of bodily material is a gain obtained from the ‘exploitation’ of those in financially constraining circumstances.

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<sup>238</sup> J Christman, ‘Self-ownership, Equality and the Structure of Property Rights’ (n109) 28.

## Section One: A Pre-Social Right to Income

### a. Rights Categories and ‘Contrasting Considerations’

Following Christman, we have separated our attempts to justify control entitlements in bodily material from our attempts to justify income entitlements in bodily material. This is because the difference in the function of the entitlements and the difference in the factors that give content to the entitlements, require different explanations for why a control or income entitlement ought to be recognised.

Let us consider the basis upon which we can distinguish income entitlements from control entitlements. Control entitlements concern the relationship “between an owner’s set of preferences – her will – and the general state of the object owned”.<sup>239</sup> The right to income concerns the transfer of entitlements in exchange for value. The difference between the categories of entitlements is the benefit that is provided in exchange for the transfer of the entitlement. This benefit – the price paid in exchange for the thing – is determined by a set of additional factors, such as the abundance or scarcity of the particular resource. These additional factors are dependent on a structure that is external to the entitlement-holder, the recipient of the entitlement, and the rules protecting the entitlements. This external structure is made up of a set of economic and social conditions. It is this external structure that determines the benefit (*i.e.* the price) that is given in exchange for use of the object. The value that is derived from exercising an income rights is therefore determined by factors beyond the thing, the transferor and transferee.

This connection between the value that is derived from exercising an income entitlement and the distribution of resources in society is two-fold. The first connection is that the relative abundance or scarcity of a resource (and the presence or absence of transaction costs in acquiring the resource) determines what a possessor of the resource may obtain in exchange for the resource. This is a

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<sup>239</sup> J Christman, ‘Distributive Justice’ (n31) 232

“synchronic connection”.<sup>240</sup> For example, if kidneys and blood were both tradable commodities, the income received for the sale of a kidney would be higher than for the equivalent amount of blood because of the scarcity of the resource and the willingness of purchasers to pay for the kidney. In such cases, the income received is a result of the current distribution of resources and hence the rights-holder receives a benefit that is the product of a range of factors external to the object and external to the rights-holder.<sup>241</sup>

The second connection is a “diachronic connection”.<sup>242</sup> It is because of the recognition of income rights that goods can be lawfully exchanged and a new pattern of resource distribution is created. Income rights, or the absence thereof, affect the future distribution of resources by “directing (or allowing) the distribution of goods to flow in some direction or other”.<sup>243</sup> The ability to acquire a good in exchange for a market-determined price has a significant effect on who has which resources, and hence, determines the future landscape of the distribution of resources in society. To return to the kidneys example, the recognition of income rights in a kidney would lead to a different (for better or worse) allocation of kidneys in society since they could be freely exchanged as a commodity.

## **b. Self-ownership, Labour and the Right to Income**

A feature of our ‘self-ownership’ of our (attached) body is that we have the freedom to use our body however we like, provided it is not harming others. This freedom extends into all spheres of life, including the economic sphere. So that, since “the autonomous individual is also very much an economic individual” the individual “is free to contract for his labour in the market place”.<sup>244</sup>

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<sup>240</sup> J Christman, ‘Distributive Justice’ (n31) 228.

<sup>241</sup> J Christman, ‘Distributive Justice’ (n31) 232.

<sup>242</sup> J Christman, ‘Distributive Justice’ (n31) 228.

<sup>243</sup> J Christman, ‘Self-ownership, Equality and the Structure of Property Rights’ (n109) 32-33.

<sup>244</sup> B Bennett, *Health Law's Kaleidoscope: Health Law Rights in a Global Age* (Ashgate, 2008) 95.

Hence, we are able to derive income from the use of our bodies as a feature of our autonomy and an intuitive analogy arises between using the body in performance of a paid employment arrangement and using the transfer of bodily material to gain an income. For instance, as Savulescu observes:

People have a right to make a decision to sell a body part. If we should be allowed to sell our labour, why not sell the means to that labour? If we should be allowed to risk damaging our body for pleasure (by smoking or skiing), why not for money which we will use to realise other goods in life?<sup>245</sup>

The similarity between the sale of the body part and paid labour is that the self-owner exercises their freedom to make choices regarding their body<sup>246</sup> and the body is used as a tool to perform a task for which the body-owner is paid. However, I will argue here that income rights cannot be justified in a pre-social analysis, that is, as a right formulated with sole reference to the interests and attributes of the person.

Let us start with the presumption that we are ‘self-owners’ of our own attached body. As mentioned above, this expression that individuals are the “self-owners” or “self-proprietors” of their bodies has become “a sort of legal shorthand, a rhetorical device, which serves to accentuate the fullness of the rights enjoyed by persons in relation to themselves and others”.<sup>247</sup> Arguments from ‘self-ownership’, can therefore be understood as drawing upon the notion “that each person enjoys, over himself and his powers, full and exclusive rights of control and use”.<sup>248</sup> As self-owners we may smoke, go skiing, be photographed or paint a portrait.

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<sup>245</sup> J Savulescu, ‘Is the Sale of Body Parts Wrong?’ (2003) 29 *Journal of Medical Ethics* 138.

<sup>246</sup> B Bennett, *Health Law’s Kaleidoscope* (n244) 95.

<sup>247</sup> MJ Davis and N Naffine, *Are Persons Property?* (n139) 5.

<sup>248</sup> G Cohen, *Blackwell Dictionary of Western Philosophy* (n139) 630.

Yet, few of us obtain a financial reward from smoking, skiing, being photographed or even painting a portrait, essentially because there is an abundance of smokers, skiers, models and artists. To say that I have the right to freely direct my body or to use skills or talents, or to say that I may agree with another that I will direct my body, skills and talents in a particular way, does “not entail that I thereby have also have the right to benefit from the exchange of skills in any way available”.<sup>249</sup> The right to obtain a benefit from the use of the body does not automatically follow the rights contained in the idea of self-ownership.

Why then do commentators presume that reasoning can work in the other direction; that not affording the right to income to the use of the body is inconsistent with the idea of self-ownership? As Christman argues, “preventing me from reaping these increased benefits [from the use of my talents] does not *ipso facto* prevents me from controlling my life”.<sup>250</sup> Rights of control and the right to income are fundamentally distinct rights. We may justify the self-ownership of the attached body with reference to liberty, autonomy or self-determination because self-ownership is concerned with the exclusivity of control and use of the body. In contrast, in order to justify the right to income, we must be concerned with considerations beyond the moral attributes and characteristics of the person. That is, social considerations as to the current and desired distribution of wealth and resources.

Those who try to justify the right to sell bodily material as flowing from the rights of self-ownership obscure the distinction between considerations that are relevant to rights of income and rights of control by focusing on the *process* of selling a body part. As Savulescu puts it, “[p]eople have a right to make a *decision* to sell a body part”.<sup>251</sup> By focusing on the preferences and choices with regards to the state of the object - the decision whether to sell the body part - the income right appears to fall into the ambit of self-ownership. Yet, decisions as to the general state of the object, such as whether the body part is extracted, retained, or transferred for therapeutic or research purpose, are decisions

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<sup>249</sup> J Christman, ‘Self-ownership, Equality and the Structure of Property Rights’ (n109) 32-33.

<sup>250</sup> J Christman, ‘Self-ownership, Equality and the Structure of Property Rights’ (n109) 34.

<sup>251</sup> J Savulescu, ‘Is the Sale of Body Parts Wrong?’ (n245) 138 [emphasis added].

that may be afforded to the progenitor with reference to liberty, autonomy or self-determination. The move from the ‘decision to transfer a body part’ to the ‘decision to sell a body part’ only involves the introduction of a financial reward in exchange for the transfer. To say that someone has the right to sell a body part, as something beyond affording them the right to transfer a body part, is to say that they have a right to the *outcome* of the transfer: the financial reward. By focussing on the process of exercising an income right, proponents of a natural right to income rights can only be justifying the right to transfer bodily material.

### **c. The Conjunction of Two Wills and the Right to Income**

If we are unable to ground the right to income in the idea of self-ownership, perhaps we may be able to justify the right to income with a more sophisticated account of why individuals ought to ‘own’ things that is nonetheless still a pre-social analysis of ‘ownership’. Let us take Waldron’s use of the Hegelian basis of entitlements in *The Right to Private Property*<sup>252</sup> as an example of a successful basis for justifying the recognition of control entitlements and consider whether it is able to connect the right to income with the attributes and characteristics of the person.

Waldron offers an argument for the recognition of property rights which assumes that the Hegelian-owner of a thing also owns its *value*.<sup>253</sup> Waldron explains the basis of property rights in terms of a dual relationship between will and object. The second of the two relationships between the object and will requires that the object is capable of introducing a state of affairs that is willed, or intended, by the individual. Hence, if an object acquires new attributes through the intentional acts of an individual, and the individual does so intending a state of affairs where the object can be alienated in exchange for an income, then income entitlements may become a legitimate part of the Hegelian account of property.

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<sup>252</sup> J Waldron, *The Right to Private Property* (n13) 343- 423.

<sup>253</sup> JW Harris, *Property and Justice* (n3) 245.

For instance, Joanna - a baker - may bake three-dozen croissants with the intention of selling them. The sugar, butter and flour has acquired new attributes through the intentional acts of Joanna and now the croissants can introduce a new state of affairs, in this case, the state of being exchanged for income. Similarly, Lucy may extract an ovum with the intention of selling it; in such a case there is also an arguable dual relationship between will and object.

### *The Connection Between Entitlements and Justifications*

To explain why the above Hegelian argument cannot succeed, allow me to make a preliminary point. That is, in any pre-social analysis there needs to be a connection between the attributes and characteristics of the person that demand our respect (the justification) and the relationship with the object that is being asserted (the entitlement). Otherwise, the explanation for why an individual is an entitlement-holder is over-extensive; it recognises more entitlements than the justification can support.

According to the Hegelian basis, the respect for the person includes the respect for the connection between the person and object created by the conjunction of the two wills. If, for example, you have in your possession an object which invokes poignant memories, my respect for you would involve a respect for your sentimental relationship to that object. In terms of entitlements, you would have a right of possession of the sentimental object and I would be under a correlative duty to respect your possession. My respect for you requires the recognition of an entitlement that is necessary for your manifestation of personhood in the external world.

“But this respect”, Cater argues, “should not be confused with property rights”.<sup>254</sup> We may use property rights to require the respect for someone’s rights of possession, use or management, but it does not follow that the need to ‘extend oneself’ into the external world gives rise to a full bundle of ownership entitlements, and income entitlements in particular. The entitlements that we ought to recognise are determined by the necessary conditions for the expression of personhood, and therefore the content of the ownership-bundle is circumscribed by the *reasons* for recognising the entitlement.

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<sup>254</sup> A Carter, *The Philosophical Foundations of Property Rights* (n10) 137.

On one hand, I respect your exclusive rights of possession over your sentimental object because your exercise of possessory rights is necessary for your personhood to be expressed through the sentimental object. In this case, an exclusive right of possession is able to protect the ‘conjunction of two wills’ by ensuring that you are able to retain access to poignant memories. I would not, on the other hand, have to recognise your right to transfer the sentimental object. Were you to have such a right, there would be a dislocation between the entitlement and the reason for the entitlement.

What this example attempts to illustrate is that the entitlement that an individual has in an object is limited to the entitlements that are necessary in order for the Hegelian individual to ‘express their personhood’ or sustain the ‘conjunction of two wills’. Otherwise, without the connection between the entitlement and reason for the entitlement, justification is over-extensive and there is no reason for the imposition of a duty on others to respect the entitlement.<sup>255</sup>

### *The Missing Step in the Connection*

The reason why it is not possible to formulate a right to income in a pre-social analysis is because there will *always* be a disconnect between the income entitlement and the pre-social basis for entitlements in things. Recall the distinction between control and income entitlements. Control entitlements concern the preferences and choices *vis-a-vis* the state of the thing or object, whereas income entitlements concern a range of factors external to the ownership relationship, such as the demand for the resource, transaction costs and the distribution of the resource in society.

To justify the recognition of an income entitlement, requires consideration of the factors that determine the content of the entitlement, and the Hegelian basis of ownership only concerns factors that relate to the individual's will and the attributes of the object owned. Therefore there is a gap between factors concerning the justified thing (income entitlements) and the factors used in the justification (the person and the object).

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<sup>255</sup> A Carter, *The Philosophical Foundations of Property Rights* (n10) 101.

When it comes to income rights – the recognition of the entitlement to gain an income from alienating other interests in the object – it is difficult to see the necessary connection between the expression or manifestation of personhood and the acquisition of money. As JW Harris remarks (quoting Waldron):<sup>256</sup>

In what sense can cash or bank accounts constitute objects which can be seen, over time, to be “registering the effects of the willing”?

In other words, it is difficult, if not impossible, to identify an element of personhood or subjectivity that, in order to be expressed in an external object, requires the recognition of an income entitlement in that external object. Moreover, the content of an income right (or the ‘value’ of the asset or resource) is determined by factors external to the entitlement holder. Again, a gap emerges between the factors in *what needs to be explained* and the factors in a possible (pre-social) *explanation*.

#### **d. The Structural Problem with the Pre-social Right to Income**

The gap always emerges because of a structural gap between income entitlements and pre-social reasons. As above, the content or value of an income right is dependent upon the distribution of resources in society. As a result, it appears contradictory to have a *natural* right to an entitlement, which has value only insofar as the distribution of resources in society *gives* it value. The content or value of the right is “distributionally determined”,<sup>257</sup> yet natural rights are only concerned with the attributes of the person and are thus “distributionally blind”.<sup>258</sup>

There is “a missing step in the justification – between the right to act freely and the entitlements to...benefit in a certain distribution of goods”.<sup>259</sup> The problem is that income entitlements cannot

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<sup>256</sup> JW Harris, *Property and Justice* (n3) 245.

<sup>257</sup> J Christman, ‘Distributive Justice and the Complex Structure of Ownership’ (n31) 231.

<sup>258</sup> JW Harris, *Property and Justice* (n3) 246.

<sup>259</sup> J Christman, ‘Can Ownership be Justified by Natural Rights?’ (n18) 173.

follow from the attributes and characteristics of the person, independent of social aims. Rather, social considerations, external to the attributes and characteristics of the person, are required to bridge the gap between the individual and their body, and income entitlements. Christman summarises the contention:

The components of ownership that comprise of personal control and consumption of a resource must be justified according to importantly different considerations from those that justify the right to gain income from the resource...the source of the justification for income rights, however, will necessarily be principles that govern the pattern of distribution of goods in the economy, considerations which are not reducible to individual interests.<sup>260</sup>

Therefore, income entitlements are necessarily social. To find a justification for the recognition of income entitlements, we must turn to a social analysis.

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<sup>260</sup> J Christman, 'Distributive Justice and the Complex Structure of Ownership' (n31) 230; see also J Christman 'Can Ownership be Justified by Natural Rights?' (n18) 174.

## Section Two: A Social Right to Income

If the right to income is necessarily a social right, let us consider whether income entitlements in separated bodily material can be justified in a social analysis, that is, with reference to the state of affairs that the recognition of the right would produce. Although there are settled commercial practices in non-transplantable bodily material between healthcare institutions, disagreements arise as to whether a monetary reward (beyond compensation of expenses and loss of earnings) ought to be afforded to individuals in exchange for their bodily material. We will focus on this disagreement.

There are two limbs to the claim that the exercise of income entitlements in bodily material can be justified with reference to the consequences that the exchanges in bodily material will produce. First, is the suggestion that more bodily material will become available for those who need bodily material.<sup>261</sup> The social value of there being more bodily material available for therapeutic and research purposes cannot be overstated. As the Nuffield Council for Bioethics has observed:

three people die every day while waiting for an organ transplant; many fertility clinics are not able to meet requests for treatment involving donor eggs or sperm; and research organisations cite difficulties in accessing bodily material as a key factor limiting research progress.<sup>262</sup>

We must therefore assess whether it is true that recognising income entitlements in separated bodily material will increase the availability of material. If so, this will create a justification, at face value, for the recognition of income entitlements.

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<sup>261</sup> TM Wilkinson, 'The Confiscation and Sale of Organs' (n198) 336.

<sup>262</sup> Nuffield Council on Bioethics, *Human Bodies: Donation for Medicine and Research* (October 2011) 3.

The second limb of the claim is that there is also a benefit, or at least no harm, to potential sellers.<sup>263</sup> There may be other consequences beyond the greater availability of the resource that may negate or limit the face value benefit of the exercise of income entitlements in separated bodily material.

Unfortunately, we are poorly positioned to identify the likely beneficial and harmful consequences of permitting the transfer of bodily material in exchange for monetary gain. This inquiry - as to how a new structure of incentives will change social behaviour - is ultimately an empirical inquiry, and such an inquiry is outside the methodological scope of this Thesis. We can nonetheless, 'from our armchairs' look into related studies, and assess other arguments, in order to sketch out the appropriate structure of this inquiry.

### **a. The Greater Availability of Bodily Material**

We are concerned here with motivations that underlie the decision to, and the decision not to, transfer or donate bodily material to a healthcare institution. Such decisions by individuals are shaped by "reasons for action" or 'motivations', and we can presume that these motivations operate as "the premises of an argument the conclusion of which is that there is reason for the agent to perform the action or that he ought to do it".<sup>264</sup> 'Motivations' may include beliefs as well as facts. To use Raz's example, carrying an umbrella would be justified on basis that "it is either the fact that it will rain or my belief that it will which would be cited as the reason".<sup>265</sup>

When considering the motivations that lead to the action of donation, or not donating, bodily material, we ought to view motivations as having two relevant features: the motivation may either be extrinsic or intrinsic and the motivation may be elastic or inelastic. We must then consider how the introduction of a monetary reward affects these motivations.

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<sup>263</sup> TM Wilkinson, 'The Confiscation and Sale of Organs' (n198) 336.

<sup>264</sup> J Raz, *Practical Reason and Norms* (Oxford University Press, 1999) 15.

<sup>265</sup> J Raz, *Practical Reasons and Norms* (n264) 17.

## *Elasticity of Motivations*

An elastic motivation is one that is responsive to changes in the monetary gain involved in the action, whereas an inelastic motivation is unresponsive to a change in monetary reward. To illustrate how the existing reasons for not donating biological material may or may not be responsive to the prospect of monetary gain, let us consider the motivations for action regarding the decision to donate the organs from a deceased relative and the decision to donate blood. Discussion of these studies is merely intended to provide illustrations of the types of motivations and reasons that are relevant to the structure of the overall inquiry.

Turning first to organ donation, the main reasons for not donating as identified by Sque and others,<sup>266</sup> and Siminoff and others,<sup>267</sup> concern:

- i. Protecting the body: the relatives perceive a duty of guardianship to protect intrusions into the body and fear that donation would disfigure the body.
- ii. Expressed or reported views of the deceased: the relatives believe that the deceased did not want to donate organs.
- iii. Observable death: the relatives feel a need to witness the 'observable' death of the deceased and want to be present, for example, for when the ventilator is switched-off.
- iv. Stamina; the relatives feel that the patient and/or the family have been through enough pain and discomfort.

Coupled with these reasons, the studies also indicate factors associated with relatives' decisions not to donate the organs of the deceased:

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<sup>266</sup> M Sque, T Long, S Payne *et al.* 'Why Relatives Do Not Donate Organs for Transplants: 'Sacrifice' or 'Gift of Life'? (2008) 61(2) *Journal of Advanced Nursing* 134

<sup>267</sup> L Siminoff, MB Mercer, G Graham *et al.* 'The Reasons Families Donate Organs for Transplantation: Implications for Policy and Practice' (2007) 62 *J Trauma* 969

- i. Misunderstandings; concerning definition of death and the organ donation process.
- ii. The circumstances of the death; the timeliness and insensitivity of the discussion.
- iii. Dissatisfaction and distrust; the relatives feel unsatisfied with the quality of care that the deceased received and/or do not trust the healthcare or organ donation system.

I suggest that the reasons above are inelastic motivations. That relatives' perceived duty of guardianship, for instance, is unlikely to be displaced or outweighed by the prospect of monetary gain, nor would the reported wishes of the deceased be given less weight in the decision making process if the relatives could receive monetary reward. Furthermore, these reasons for not donating may also be absolute motivations, that is to say, that no countervailing reason (such a monetary gain) could override the existing reason for action.<sup>268</sup>

The introduction of payment for organ donation may even strengthen some of the factors associated with non-donation. For instance, the perceived 'insensitivity of the discussion' may be compounded by the discussion of monetary reward for the body or bodily material of the deceased, and the relatives' distrust of the organ donation system or healthcare system may also be strengthened if donation or healthcare system is perceived as promoting a commercial, rather than altruistic, exchange.

In contrast, the reasons for inaction with regards to blood donation are illustrative of a different type of motivations that inform the decision to refrain from donating a deceased's organs. Studies by

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<sup>268</sup> J Raz, *Practical Reasons and Norms* (n264) 27.

Harrington and others,<sup>269</sup> Schieber and others,<sup>270</sup> and Gillipse and Hillyer,<sup>271</sup> suggest that the main reasons for potential blood donors for not donating blood are:

- i. Inconvenience and access; no convenient place for the potential donors or donate, opening hours are inconvenient.
- ii. Fear of needles and physical reaction; potential donors fear needles, and fear that they will feel noxious, or suffer bruising or other physical reactions from the donation process.
- iii. Time constraints and length of process; potential donors are deterred by the time the donation process takes relative to their available time.

The other common factors associated with refraining from donating blood are:

- i. Lack of information; potential donors misunderstand the eligibility criteria and risks associated with donation.
- ii. Treatment by staff; potential repeat donors identify the treatment by blood donation staff as a factor that deters them from donating again.

Here, potential *elastic* motivations surface. In particular, the inconvenience in accessing blood donation facilities and the time loss in donating blood, I suggest, could be perceived as being adequately compensated by payment for the donated blood.

The comparison between the reasons for not donating the organs of a deceased relative and not donating blood illustrate the difference between elastic and inelastic motivations; that some reasons for

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<sup>269</sup> M Harrington, MR Sweeney, K. Bailie *et al.*, 'What Would Encourage Blood Donation in Ireland?'(2007) 92 *Vox Sanguinis* 361–367.

<sup>270</sup> GB Schreiber, KS Schlumpf, SA Glynn *et al.*, 'Convenience, the Bane of Our Existence, and Other Barriers to Donating' (2006) 45 *Transfusion* 545.

<sup>271</sup> TW Gillespie and CH Hillyer, 'Blood Donors and Factors Impacting the Blood Donation Decision (2002) 16.2 *Transfusion Medicine Reviews* 115.

not donating may be irresponsive to the prospect of monetary gain, such as a perceived duty of guardianship, whereas some reasons for not donating may be cancelled out or overridden by the monetary gain, such as the inconvenience of donating. In order to argue that bodily material ought to be able to be exchanged for monetary value, it is necessary to show that the existing reasons for inaction are elastic reasons, so that monetary gain will motivate more people to transfer their bodily material.

### *Motivational Crowding*

We ought to also distinguish *extrinsic* from *intrinsic* motivations. Where the motivation, is the “underlying preference...for the reward associated with performing the task” or action,<sup>272</sup> then the motivation is an extrinsic motivation. Whereas, were someone “to perform an activity when one receives no apparent reward except the activity itself”,<sup>273</sup> the person is intrinsically motivated to perform the action.

We are interested in this distinction because there is a legitimate concern that the introduction of extrinsic motivations (monetary reward) will harm existing intrinsic motivations (or ‘altruism’), not as an abstract moral or social value but as an environment in which donors of tissue, gametes, organs and blood are currently motivated to donate. This is a pragmatic concern that the introduction of an extrinsic reward will make those who are motivated by the intrinsic reward less likely to donate.

At face value, it would appear that since a market in bodily material creates more choices - to donate or to sell bodily material - people *retain* the option to act altruistically and *gain* the option to be financially rewarded for the act. However, there may be ‘a harm to altruism’ because of the “crowding out” of the intrinsic motivation through the “systematic interactions between intrinsic and extrinsic motivations”.<sup>274</sup>

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<sup>272</sup> BS Frey and R Jegen, ‘Motivation Crowding Theory’ (2001) 15.5 *Journal of Economic Surveys* 589, 591. Following EL Deci, ‘Effects of Externally Mediated Rewards on Intrinsic Motivation (1971) 18 *Journal of Personality and Social Psychology* 105.

<sup>273</sup> BS Frey and R Jegen, ‘Motivation Crowding Theory’ (n272) 591.

<sup>274</sup> BS Frey and R Jegen, ‘Motivation Crowding Theory’ (n272) 591.

Titmuss' *A Gift Relationship*<sup>275</sup> indicated that this may be the case with regards to blood donation. Although the method employed in the original study can be criticised,<sup>276</sup> recent studies have identified a crowding out effect in payment for blood<sup>277</sup> as well a large number of laboratory and field studies in a range of aspects of social life, including studies into: the readiness to accept the locality of nuclear waste repositories, the willingness by patients to take their prescribed medicine, and the adherence to the time schedule at daycare centres.<sup>278</sup>

The problem arises because intrinsic motivations can be affected by external intervention. External interventions on an action (such as the introduction of monetary reward) may 'crowd out' the intrinsic motivations, so that the change in the nature of the action makes it no longer possible to derive the intrinsic reward from performing the action. Alternatively, the external intervention may 'crowd in' the intrinsic motivation, so that the intrinsic reward is affirmed or made more substantial by the change in the nature of the action.

There are two possible explanations for the 'crowding out'. The external intervention can be explained as an instance of "impaired self-determination", where "an agent perceives an external intervention as reducing their self-determination" since the agent is "forced to behave in a specific way by outside intervention".<sup>279</sup> Alternatively, the crowding out may be the result of "impaired self-esteem" where "outside intervention carries the notion that the actor's [intrinsic] motivation is not acknowledged" or unable to be exercised.<sup>280</sup>

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<sup>275</sup> RM Titmuss, *A Gift Relationship: From Human Blood to Social Policy* (Allen & Unwin, 1970).

<sup>276</sup> FL Rapport and CJ Maggs, 'Titmuss and the Gift Relationship: Altruism Revisited' (2002) 40(5) *Journal of Advanced Nursing* 495.

<sup>277</sup> C Mellström and M Johannesson, 'Crowding Out in Blood Donation: Was Titmuss Right?' (2008) 6(4) *Journal of the European Economic Association* 845.

<sup>278</sup> See BS Frey and R Jegen, 'Motivation Crowding Theory' (n272) 596 - 606; See also BS Frey and F Oberholzer-Gee, 'The Cost of Price Incentives: An Empirical Analysis of Motivation Crowding-Out' (1997) 87.4 *The American Economic Review* 746

<sup>279</sup> BS Frey and R Jegen, 'Motivation Crowding Theory' (n272) 594.

<sup>280</sup> BS Frey and R Jegen, 'Motivation Crowding Theory' (n272) 594.

In terms of our current inquiry into the likely consequences of a market-based exchange in separated bodily material, let us consider the main reasons given by the relatives of deceased persons to donate the organs of the deceased:<sup>281</sup>

- i. Altruism; the belief that the organs can help those in need.
- ii. Trust in the service; a positive attitude toward the organ donation system.
- iii. Means of coping with death: that the sense of loss is slightly lessened by the possibility that another may benefit from the organ.
- iii. Surplus Resources: the belief that the organ was no longer needed.

Whereas the main reasons for blood donors for donating are:<sup>282</sup>

- i. Awareness; donors believe they are helping people, and are aware of the need for donated blood.
- ii. Trust in service: donors trust the blood donation service.
- iii. Advertising and general pressure; donors, through advertising or general social pressures, are persuaded to donate blood.
- iv. Personal contact or personal request; the donors contact with a particular person (either a recipient, donor or health professional) persuades them to donate blood.

The altruism that features in both cases, and is in fact the most common reason given for cases of donation, is a paradigmatic example of an intrinsic motivation. The donor in each case receives only the benefit of performing the action of donating and no additional or external benefit. When the predominate reasons for donating biological material represent intrinsic motivations to donate, the critical question for any change to the donation environment, such as the introduction of monetary

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<sup>281</sup> M Sque, T Long, S Payne *et al.* 'Why Relatives Do Not Donate Organs for Transplants' (n266); L Siminoff, MB Mercer, G Graham *et al.* 'The Reasons Families Donate Organs for Transplantation' (n267).

<sup>282</sup> M Sque, T Long, S Payne *et al.* 'Why Relatives Do Not Donate Organs for Transplants' (n266); L Siminoff, MB Mercer, G Graham *et al.* 'The Reasons Families Donate Organs for Transplantation' (n267).

incentives, is whether the external intervention will ‘crowd out’ or ‘crowd in’ the existing intrinsic motivations.

A concern is that the intervention of a monetary reward may change the way that the current donor perceives their own action of donating, so that receiving a monetary reward forces the donor to behave in a particular way (impaired self-determination). Alternatively, the donor may feel that the provision of financial reward, even if it is not claimed, obscures the acknowledgement of their act of donating being an altruistic or self-less act (impaired self-esteem).

Hence, there is a possibility that monetary incentives for ‘donation’ of bodily material will prevent existing donors from donating. Where there is motivational crowding out, unless the financial incentives induce more non-donors to donate than it ‘crowds out’ current donors, the financial incentive will not cause the greater availability of biological material for research and therapeutic purposes.

### *The Prima Facie Argument*

Meeting the need for bodily material, to further provide treatment and advance research, is an important social aim. If financial incentives were able to achieve this aim, then this would provide a sound *prima facie* basis for recognising income entitlements, or the right to transfer-for-value. It is *prima facie* basis because we must also acknowledge concerns that may negate or limit the benefits of using financial incentives.

Financial incentives will only help achieve this social aim if (in the aggregate of cases) the motivation to transfer bodily material is an elastic motivation, so that the introduction of financial reward will make the transfer of bodily material more likely. There is also a concern that the introduction of financial incentives will ‘crowd out’ the intrinsic motivations under which individuals currently donate their bodily material (or authorise the use of another’s body).

The inquiry into the likely consequences of transferors obtaining a monetary benefit in exchange for their bodily material is ultimately a sociological inquiry. To demonstrate how this structure of this inquiry ought to operate, consider a study by Edmond and Scheib<sup>283</sup> which concerns whether payment for semen would alter the decision of potential donors to donate, and if so, for what purposes. The study investigated whether a US\$45 payment for semen would make potential semen donors less or more likely to ‘donate’ for research purposes or for the reproductive use by another. The survey found that for donation with the prospect of reproductive use, 15% of the sample would donate without payment and 37% of the sample would donate for the \$45. This suggests that the motivations for donating semen for reproductive use are (for some potential donors) elastic motivations. Whereas, for donation for research use, 68% of the sample would donate as a volunteer and 65% of the sample would donate for the payment. This illustrates a high degree of intrinsic motivation to donate for research purposes that is either generally unresponsive to monetary gain or (for a small number) intrinsic motivation that is crowded out by extrinsic reward.

In sum, it may be possible to justify the exercise of income entitlements in a social analysis. Such a justification would need to show that motivations to donate are elastic motivations and that any gain increase in new ‘donors’ would not be off-set by a decrease in those who were willing to donate for intrinsic reasons.

## **b. Objectification and Exploitation**

Following on from the assumption that a market in bodily material is likely to increase the availability of body material, the aim here is to assess whether there is a harm that can be associated with a market in bodily material that is sufficient to justify the current prohibition of commercial dealings in bodily material that is intended for transplantation.

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<sup>283</sup> JE Scheib and M Emond, ‘Why Not Donate Sperm? A Study of Potential Donors’ (1998) 19 *Evolution and Human Behaviour* 313.

There are two dimensions to the sale of bodily material. First, the sale of a bodily material involves the transfer of the material. We may be concerned with potential harms associated with transfer of bodily material but, given there is an existing practice of material being donated for therapeutic, scientific and educational use, these concerns will not be new concerns. The second dimension concerns payment. This concerns a change from the current practice of transferors being financially compensated for the costs incurred in donating the bodily material<sup>284</sup> to provide a monetary reward for the material or allowing the private agreement between the transferor and recipient to determine the price that is paid for the material. Identifying the harms associated with this change from compensation to monetary benefit will require a lengthy analysis.

### i. Concerns with Transfer

If commercial dealings in human tissue, organs and reproductive material were to be permitted, it is likely the existing procedures that prescribe the conditions for a valid transfer and limit the bodily material that can be safely transferred will remain in place. In particular, the statutory schemes prescribe consent procedures for the transfer of bodily material. The purpose of these consent procedures is to ensure that the transferor has the legal capacity to consent, that the consent obtained reflects an informed, voluntary and autonomous decision is being exercised by the transferor.

In addition to concerns as to the authenticity of consent, the transfer of bodily material also raises concerns relating to the welfare of the transferor and the ultimate recipient of the material. Hence, “a key factor in all regulatory schemes is that of safety”.<sup>285</sup> This limits which items of bodily material can be transplanted as well as requiring that transferors are assessed as to their “medical suitability”.<sup>286</sup> The aim of which is to safeguard the welfare of the transferor. Welfare concerns also

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<sup>284</sup> Human Fertilisation and Embryology Authority, *Code of Practice* (n68) [13]; Human Tissue Act 2004, Section 32(7)

<sup>285</sup> Nuffield Council on Bioethics, *Human Bodies: Donation for Medicine and Research* (n65) 74.

<sup>286</sup> Human Tissue Authority, *Code of Practice 2* (2009) [59]; Human Tissue Authority (2009) *Code of Practice 6* (2009) [49]; Human Fertilisation and Embryology Authority, *Code of Practice* (2009) [11]; Nuffield Council on Bioethics, *Human Bodies: Donation for Medicine and Research* (n65) 74.

necessitate that the bodily material that is being transferred meets qualitative standards so that the ultimate recipient of the material is not harmed by the procedure.

The assumption here is that if commercial dealings in bodily material were to be permitted, legitimate concerns as to the legal authenticity of consent, welfare of the transferor and suitability of the material for its intended purpose, will nonetheless be accounted for by the application of existing statutory limits on the right to transfer material.

## ii. Concerns with Income

We ought to narrow our focus to concerns that are associated with the exercise of income entitlements rather than concerns that are associated with the exercise of the right to transfer bodily material. Provided that legal controls are employed to ensure that the transferor of bodily material consents to the transfer and is not harmed by the transfer, and that material intended for transfer satisfies qualitative standards, there may nonetheless be sufficient reasons why a transferor of material ought not be able to obtain a monetary gain, beyond compensatory expenses, from the transfer.

I will argue here that there are ‘wider concerns’, outside of the two parties to the transaction, associated with the operation of a market in bodily material. I will consider here, at length, two sets of arguments that oppose a market in bodily material on the basis that even where participants in the market consent to the transfer, the effect that this has on a category of persons outside the transaction is harmful to the extent that a market ought not be established. Both sets of arguments share a fundamental structure, that: an activity creates or reinforces attitudes about a category of persons which is either harmful in itself or causes an associated harm.

The first set of arguments suggests that a market in bodily material will create or reinforce the attitude that others are a “repository of body parts”<sup>287</sup> which either amounts to ‘objectification’ or

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<sup>287</sup> SR Munzer, ‘Uneasy Case Against Property Rights in Body Parts’ (1994) 11 *Social Philosophy and Policy* 259, 274; see also SR Munzer, ‘Kant and Property Rights in Body Parts’ (1993) 6 *Canadian Journal of Law & Jurisprudence* 319.

increases the likelihood of the objectifying treatment of others. The second set of arguments suggests that a market in bodily material will create or reinforce pressure on those living in poverty to sell their bodily material which is either harmful itself<sup>288</sup> or will lead to associated harms. It is the combination of these two arguments that provides the basis for why a market in bodily material, or the provision of financial reward in exchange of bodily material, would be 'exploitative'. As a result, I argue that transferors ought not to obtain a monetary reward, beyond compensation, in exchange for their bodily material. Both these arguments will be introduced with reference to analogous scenarios.

### *Objectification*

Consider a scenario where Lucy consents to participate in violent and misogynistic pornographic acts that are recorded and distributed for viewing. Here the treatment is consensual and Lucy suffers no harm from her participation. Yet, we may nonetheless say that the activity is harmful. Alternatively, consider if Joanna were to participate in a photography shoot for *Vogue* magazine. Her participation is also consensual, and it is also images of her body that are recorded and distributed for viewing, but we may be less willing to say that this activity is harmful. Let us identify why it is that we may want to prohibit the exercise of Lucy's, and not Joanna's, choice.

In both scenarios the participant is - consensually - being used as an object. However, using someone as an object is not, itself, morally problematic. As L Green explains, "we must treat others as instruments, for we need their skills, their company and their bodies".<sup>289</sup> Just as we are unable to escape our own embodiment, we cannot interact with other another without interacting with their bodies (their objectivity).

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<sup>288</sup> S Rippon, 'Imposing Options on People in Poverty: The Harm of a Live Donor Organ Market (2012) *Journal of Medical Ethics* (forthcoming, published online June 28, 2012); PM Hughes, 'Exploitation, Autonomy, and the Case for Organ Sales' (1998) 12.1 *International Journal of Applied Philosophy* 89.

<sup>289</sup> L Green, 'Pornographics' (2000) 8(1) *Journal of Political Philosophy* 27, 45-6.

What is morally problematic is when we treat someone as a *mere* object. This occurs when we bypass, disregard, or ignore another's *subjectivity* (their autonomy, welfare or perhaps their dignity<sup>290</sup>) when we use, or interact with, them.<sup>291</sup> Reducing someone to a *mere* object is inconsistent with their moral status as 'Person' because *mere* objectification is the denial of the subjectivity of the person, and it is the person's subjectivity that separates the person from other objects in the world. Hence, the general moral principle arises:

(1) The Objectification Principle: persons ought not to be equated with their bodies because it is the denial of their subjectivity.

Yet, Lucy's subjectivity is not being by-passed. As a participant she consents to the activity. However, the concern with Lucy's participation in violent and misogynistic pornographic acts is that it is an activity that demonstrates misogyny and mere objectification, and in doing so creates or reinforces attitudes of misogyny and mere objectification. The activity does this by treating the participant *as if* she has no subjectivity. The actions that are undertaken can create or reinforce attitudes towards the particular participant, and the category of persons the participant may represent (women in this example), that are *inconsistent* with the subjectivity of the participant or the category of persons. As MacKinnon explains:

in pornography, women desire disposition and cruelty. Men...create scenes in which women want to be bound, battered, tortured, humiliated and killed. Or merely taken and used. Women are there to be violated and possessed, men to violate and possess us.<sup>292</sup>

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<sup>290</sup> C Foster, *Human Dignity in Bioethics and Law* (n146) 8: "It is classic Kantian instrumentalism. She is a thing, not a person: a means to the end of their gratification, not an end in herself. That enhances the flourishing neither of her, nor of the boys, nor of other girls they might see, nor of society at large."

<sup>291</sup> See: C MacKinnon, *Feminism Unmodified* (Harvard University Press, 1987) 173; A Dworkin, 'Against the Male Flood: Censorship, Pornography, and Equality' in D Cornell (ed.), *Oxford Readings in Feminism: Feminism and Pornography* (Oxford University Press, 2000) 19, 30; L Green, 'Pornographies' (n289) 44.

<sup>292</sup> C MacKinnon, *Feminism Unmodified* (n291) 148.

Even though the treatment of a person may be consensual, the attitudes that the treatment portray in the activity may create attitudes that are both objectifying and inconsistent with the subjectivity of the person and the category of persons that are represented. These attitudes fall below a moral standard as to how we ought to *view* one another.

Arguably, an attitude toward a person as an object, itself, does not *deny* their subjectivity and reduce them to an object. An attitude itself does not constitute a harm. Yet, some opponents of pornography, such as MacKinnon,<sup>293</sup> Vadas<sup>294</sup> and Laughton<sup>295</sup> argue that consumption of pornography *constitutes* an objectifying act (a harm) since pornography is “sex between people and things, human beings and pieces of paper, real men and unreal women”.<sup>296</sup> In essence, MacKinnon and Vadas suggest a correspondence between the treating *people as things* and treating of *things as people*. So that *treating* objects as people is an equivocation between object and subject that it is - itself - morally problematic treatment.

Saul, in her article ‘On Treating things as People’,<sup>297</sup> explains why the constitutive claims of MacKinnon and Vadas are unsuccessful. The problem with the constitutive claim in pornography, according to Saul, is that using things (pornography) as people (women, in this example) only objectifies women if the user, through using the thing, views women as *only* the function that the thing has (sexual gratification). It is only a reduction to their objectivity if it creates or affirms the attitude that women are only providers of sexual gratification.<sup>298</sup>

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<sup>293</sup> C MacKinnon, *Only Words* (Harvard University Press, 1993) 109, in E Papadaki, ‘Feminist Perspectives on Objectification’ (2010) *Stanford Encyclopedia of Philosophy*.

<sup>294</sup> M Vadas ‘The Manufacture-for-use of Pornography and Women's Inequality’ (2005) 13(2) *The Journal of Political Philosophy* 174.

<sup>295</sup> R Laughton, ‘Sexual Solipsism’ (1995) 23(2) *Philosophical Topics* 181

<sup>296</sup> C MacKinnon *Only Words* (n293) 109

<sup>297</sup> JM Saul, ‘On Treating Things as People: Objectification, Pornography, and the History of the Vibrator’ (2006) 21.2 *Hypatia* 45

<sup>298</sup> In response to Saul’s dismissal of the constitutive claim it is possible to argue that some pornography - of the kind MacKinnon described above - perhaps does this: it creates an attitude that denies the subjectivity of women and views women as having only *a* function.

Alternatively, some opponents of pornography argue that objectifying attitudes lead to objectifying *treatment*, so that there is a moral impetus to regulate pornography because it is one of the causes of the objectifying treatment. Laughton argues that pornography causes men to use (treat) women as mere-objects.

As a matter of human psychology, when men sexually use objects, pornographic artifacts, as women, they tend to use real women as objects. One weaker variant of this causal claim might be restricted to a subset of pornography... As a matter of human psychology, when men sexually use objects as women, and those objects are pornographic artifacts, *whose content is violent or misogynistic*, then they will tend to use real women as objects.<sup>299</sup>

Hence, opponents of pornography can formulate a *causal* claim: an act which reinforces or creates objectifying attitudes ought to be prohibited because they cause objectifying treatment. So that pornography to objectifying treatment is what car manufacturing is to road accidents; the existence of one (significantly) increases the likelihood of the other. Alternatively, opponents of pornography may formulate a *constitutive* claim: that treating things as people is equivalent to treating people as things. Both claims follow from the premise that viewing or treating someone in a manner that equates the person with their bodies falls below a normative baseline for attitudes and conduct.

### *Objectification and the Sale of Bodily Material*

The same type of argument that is used to oppose pornography is used to oppose commercial dealings in bodily material. By building on Kant's objections to the sale of body parts, Munzer develops an argument akin to (1) The Objectification Principle in his "uneasy case against property rights in body parts".<sup>300</sup> The problem that Munzer identifies with the commodification of bodily material is that

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<sup>299</sup> R Langton, 'Sexual Solipsism' (n295) 181.

<sup>300</sup> SR Munzer, 'Kant and Property Rights in Body Parts' (n287); SR Munzer, 'Uneasy Case Against Property Rights in Body Parts' (n287)

it postulates that the person is somehow commensurable or comparable with a price. When Kant argues against the sale of a body part in *Groundwork*, he claims:

in the kingdom of ends, everything either has a price or a dignity. If it has a price, something else can be put in its place as an equivalent; it is exalted above all price and so of not equivalent when it has dignity.<sup>301</sup>

The suggestion here is that viewing someone in monetary terms – as something that can be equivalent to, or commensurate with, other objects or commodities – is viewing someone in a matter that is inconsistent with their ‘dignity’ (or subjectivity). The two attitudes, an *attitude of dignity* and an *attitude of price*, are inconsistent attitudes. Creating a market in separated bodily material, Kant would suggest, creates attitudes that are inconsistent with attitudes of dignity. Hence, the moral concern that underlies Munzer’s “uneasy case against property rights in body parts” emerges, that under some market arrangements, the language of the market:

might distort the way in which people view themselves and others. They might tend to see persons as repositories of body parts with a market worth rather than entities with a Kantian dignity.<sup>302</sup>

Chadwick also expresses a similar concern:

one undesirable consequence of the selling of our bodies is that it contributes towards a society in which the bodies of persons are regarded as resources. The action of selling one’s own body contributes to the prevailing ethos of everything being for sale, everything having a price.<sup>303</sup>

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<sup>301</sup> I Kant, *The Groundwork of the Metaphysics of Morals* [1786] (MJ Gregor ed. Cambridge University Press, 1996) 42-43.

<sup>302</sup> SE Munzer, ‘Uneasy Case’ (n287) 286.

<sup>303</sup> RF Chadwick, ‘The Market for Body Parts: Kant and Duties to Oneself’ (1989) *Journal of Applied Philosophy* 129, 137.

Similar to above, we may be concerned with an activity (a market transaction in bodily material) because it creates or reinforces an attitude that ‘persons’ are ‘repositories of body parts with a market worth’ which offends against the principle that ‘people ought not be equated with things because it is a denial of their subjectivity.’

Yet, the participants in a market transaction are participating consensually. There is no denial, disregard or by-passing of the subjectivity of any party to the transaction. Moreover, the transfer of bodily material is concerned with the use of objects - blood, kidneys, gametes or bone marrow - that at least appear to be merely *objects*. It would follow that the purchase of blood, kidneys, gametes or bone marrow are acceptable instances of objectification because the transaction involves the consensual exchange of mere objects.

Munzer foresaw this as a problem with his Kantian reasoning.<sup>304</sup> The mistake, he explains, is to presume that “what is true of the whole must be true of its parts”.<sup>305</sup> For instance, an attitude towards bodily material, (such as an ovum, blood, or sperm) is not necessarily an attitude towards the progenitor of the bodily material. It may be impermissible to view a person in terms of monetary value, but it may nonetheless be permissible to view bodily material as an item of commercial value.

To avoid this “fallacy of division” we need to distinguish “between isolated sales and frequent exchanges in the market”.<sup>306</sup> It is the frequent exchanges in the market that create or reinforce a view that a category of persons are “repositories of body parts with a market value” or that “bodies of persons are regarded as resources”.<sup>307</sup> It is this attitude toward a category of people (potential vendors),

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<sup>304</sup> Munzer uses a combination of two strategies to avoid the criticism. The ‘integration strategy’ observes that “the unified organisation of body parts, of various kinds, makes up the living human body” and a ‘derived status strategy’ suggests that the status of the body part is derived from status of the body of the whole through the function it performs in sustaining the whole organism. See SR Munzer, ‘Uneasy Case’ (n287) 276.

<sup>305</sup> SE Munzer, ‘Uneasy Case’ (n287) 275.

<sup>306</sup> SE Munzer, ‘Uneasy Case’ (n287) 277.

<sup>307</sup> SE Munzer, ‘Uneasy Case’ (n287) 286; RF Chadwick, ‘The Market for Body Parts’ (n) 137

and not the actors in a particular transaction, that is troublesome because such an attitude directed towards a category of people is inconsistent with their status as Persons.

The further difficulty is in identifying the harm in merely seeing or viewing a person as an object. As Chadwick asserts, “[m]orality is concerned with how we treat each other”.<sup>308</sup> Munzer’s ‘uneasy case’ is based upon objectifying attitudes: the ‘way in which people view themselves and other’. The way in which we view each other may fall below certain normative standards but it may not, by itself, be harmful. We may be then tempted to make a causative or constitutive claim: that a market in bodily material will create objectifying attitudes that are *constitutive* of objectification or that there is a likely *causal* link between the objectifying attitude and objectifying treatment.

Even if we accept that objectifying attitudes are morally problematic, for the constitutive claim to succeed it needs to be shown, *as per* Saul,<sup>309</sup> that the attitude that is created from frequent exchanges in the market is an attitude that *denies* the subjectivity of the person. It is difficult to see how, even in the most under-regulated market, exchanges in bodily material will give rise to the attitude that progenitors of biological material *only* have the function of ‘growing’ biological material for ‘harvest’. Just as we may admire an objective features of a model in *Vogue*, that does not mean we view models as only having the objective feature (to the exclusion of their subjectivity). We may view another as a source of bodily material - from which we can benefit from the use of - but provided we do not view another as *only* a source of biological material, our attitude is not an attitude that *constitutes* objectification.

Alternatively, a causative claim would suggest that frequent commercial exchanges in bodily material will create objectifying attitudes that are likely to give rise to instances of objectifying treatment. For instance, we may have a legitimate concern that in an environment where spleen cells have therapeutic or commercial value, a patient’s physician may view the patient as a repository of valuable cells. Further, this objectifying attitude towards the patient may then affect the *treatment* of the

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<sup>308</sup> RF Chadwick, ‘The Market for Body Parts’ (n303) 137.

<sup>309</sup> JM Saul, ‘On Treating Things as People (n297) 45-61.

patient, so the patient has cells extracted and further blood tests taken which, unbeknown to the patient, are unrelated to the patient's treatment for hairy-cell leukaemia.<sup>310</sup> In essence, treating the patient as a repository of body parts. We have therefore seen how the therapeutic value of separated bodily material can create the conditions where a person is treated as a mere object.

However, even if a market in bodily material increases the likelihood of objectifying treatment of patients, the current legal safeguards that address consent and welfare concerns (above) are able to safeguard against such treatment. Assuming that such safeguards will be effective, we have *not yet* identified a harm that can be associated with a market in bodily material. We have, nonetheless, identified a *prima facie* harm: that an objectifying attitude is *prima facie* harmful, or falls below a normative standard. The creation or affirmation of an attitude, by itself, may not be concern sufficient to prohibit an activity, but the attitude that equates a person with their bodies may form the premise of an argument, the conclusion of which is that an activity ought to be prohibited.

### 'Imposing Options'<sup>311</sup>

Consider a scenario where Matthew, a victim of domestic violence, is given the option of whether his partner and perpetrator of the violence, Mark, is prosecuted for the violence inflicted upon him. In such a scenario, the availability of a new option may place Matthew in a worse position than if the choice was not afforded to him to the extent that there is sufficient reason not to afford Matthew the option. In contrast, consider another scenario where Lucy is given the option to provide her share in the home as a guarantee for a bank loan to her partner, Joanna. In this scenario, Lucy may pressure Joanna to provide the guarantee and thereby reduce Lucy's legal interest in the property without Lucy obtaining any financial benefit. Yet, provided that Lucy is fully informed of the transaction and agrees to the transaction, no concerns arise with providing this option to Lucy.

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<sup>310</sup> *Moore v Regents of the University of California* (n25).

<sup>311</sup> S Rippon, 'Imposing Options' (n288).

What is concerning about the first scenario is the application of pressure on Matthew to exercise the option in a particular way. This is pressure that would not be applied to the person but for the availability of the option. As Rippon explains, a “new ‘option’ can thus easily be transformed into a social or legal demand, and it can drastically change the attitudes that others adopt towards you”.<sup>312</sup> This explanation is premised upon Dworkin’s idea of ‘responsibility’, which is able to connect the ‘availability of a new option’ with the ‘attitudes that others adopt toward you’:

Once I am aware that I have a choice, my failure to choose now counts against me. I now can be responsible, and be held responsible, for events that prior to the possibility of choosing were not attributable to me. And with the fact of responsibility comes the pressure (social and legal) to make “responsible” choices.<sup>313</sup>

The option to prosecute Mark, or the option to provide security for Joanna’s personal loan, provides a new option, and the decision whether to exercise the new option is something which Matthew and Lucy must account for. It is because of the availability of the new option that attitudes about Matthew or Lucy may be formed, so that Matthew may be viewed as a means-of-avoiding-prosecution or Lucy is view as a means-of-obtaining-a-loan, and pressure on Matthew and Lucy to exercise the new option in a particular way may arise.

There may be various instances where the option to prosecute, or the option to provide security, may be exercised in a way that does not cause concern. Pressure may not be asserted on the decision-maker or the decision-maker may not feel constrained by his or her circumstances. The difficulty is that the availability of the choice to a category of people (and the exercise of the choice by some) changes the attitudes adopted towards a category of people. The attitude towards victims of domestic violence is changed from being viewed as independent of the prosecution process to being part of the prosecution process. This gives rise to:

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<sup>312</sup> S Rippon, ‘Imposing options’ (n288) 2.

<sup>313</sup> G Dworkin, ‘Is More Choice Better Than Less?’ (1982) 7 *Midwest Stud Philos* 47, 61.

(2) The Pressure Principle: the availability of an option to a category of persons changes the attitudes directed towards the category of persons.

So far, Matthew's and Lucy's scenarios share the same features: they both concern the availability of new options to a category of persons that changes the attitudes directed towards the category of persons.

### *Exploitation*

I suggest that the pressure asserted on Matthew is *exploitative*, whereas the pressure asserted on Lucy is not. To start, let us outline the idea of 'exploitation'. A exploits B if A "takes unfair advantage" of B.<sup>314</sup> The first element of exploitation is that A must obtain a benefit from the transaction. The second element is that the transaction must be, in some way, unfair.

What constitutes an '*unfair* advantage' can either be a procedural or substantive unfairness. A procedurally unfair advantage will amount to exploitation where B's consent or agreement to the transaction is vitiated by duress (where A obtains a benefit from 'illegitimate' pressure being asserted on B by A) or by fraud (where A obtains a benefit from B in an intentionally dishonest or deceptive way). These are recognised categories where A's actions in the transaction between A and B makes the benefit obtained by A exploitative.

A transaction may be substantively unfair where the transaction is a "zero sum game" so that the "exploiter gains what the exploitee loses".<sup>315</sup> More contentious is the notion of "mutually advantageous exploitation", where the transaction between A and B is substantively unfair despite both A and B obtaining a benefit from the transaction. For example, take a pharmaceutical company that ordinarily

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<sup>314</sup> A Wertheimer, 'Exploitation' in EN Zalta (ed.) *Stanford Encyclopaedia of Philosophy* (Stanford University, 2009) § 2.

<sup>315</sup> JF Tormey, 'Exploitation, Oppression and Self-Sacrifice' (1974) 5 *Philosophical Forum* 206, 207: "Exploitation necessarily involves benefits or gains of some kind to someone ... Exploitation resembles a zero-sum game, viz. what the exploiter gains, the exploitee loses; or, minimally, for the exploiter to gain, the exploitee must lose."

sells a particular anti-viral drug for £10. There is an outbreak of an influenza virus and the anti-viral drug is the only available drug able to treat and prevent the virus. The pharmaceutical company immediately increases the price of the drug to £100. The transaction between a patient and the pharmaceutical company is nonetheless still mutually beneficial (the patient receives treatment, the pharmaceutical company receives payment), but the transaction can be nonetheless described as exploitative.

There are two features to why the pharmaceutical company is exploiting the patient. First, what contributes to this mutually advantageous transaction being an exploitative transaction is the substantive unfairness of the exchange. Yet, to describe the exchange of £100 for an anti-viral drug as an *unfair* exchange is only possible with reference “a normative baseline as to how much the parties ought to gain”.<sup>316</sup> The increase in price is likely to be considered to be a gain by the pharmaceutical company that is an unfair or unacceptable gain. But such an assertion is only possible if we have a ‘baseline’ to what would be a fair or acceptable gain.

The second feature is background circumstances of the patient. It is because the patient needs medical treatment that such a substantively unfair exchange is possible. In other words, it is the constraining circumstances of the patient that enable the pharmaceutical company to obtain the unfair benefit. The pharmaceutical company is obtaining a benefit out of the limited set of options that the patient has available to them. Such a substantively unfair exchange coupled with the constraining circumstances of the patient amounts to the pharmaceutical company *taking an unfair advantage* of the patient.

We can therefore say, that for substantively unfair (but mutually advantageous) exploitation:

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<sup>316</sup> A Wertheimer, ‘Exploitation’ (n314) § 3: “This suggests that we cannot evaluate the fairness of a transaction solely by comparing the gains of the parties. Rather, we must measure the fairness of their gains against a normative baseline as to how much the parties ought to gain.”

A is exploiting B where A obtains a benefit that is unfair with reference to a “normative baseline” and that the transaction is only possible because of the constraining circumstances of B.

I suggest that similar features may arise in a *procedurally* unfair transaction that makes the transaction exploitative even where it does not fit into recognised categories of duress or fraud (where A is the *cause* of the exploitation). Let us return to Matthew’s option to waive the prosecution of Mark. What makes Matthew’s scenario troubling is the combination of two features that explain why the pressure on Matthew can be described as ‘exploitative’.

The first feature is the attitude that the pressure on Matthew embodies. The pressure on Matthew is pressure to excuse the mistreatment of him. This reflects an attitude that Matthew’s right to be free from physical abuse is somehow a subservient right; that his right lacks priority. This is a *prima facie* harmful attitude since it is an attitude that disregards Matthew’s autonomy, welfare, experiences and feelings. In other words, the attitude falls below a normative baseline of attitudes. Such rights of bodily integrity arise (to borrow Rippon’s language) because of “the peculiar importance to human beings of our having fully autonomous veto control over any physical incursions...by other people”.<sup>317</sup> Compare this with the pressure applied on Lucy to provide security for the loan. We find it socially acceptable that two people, who are presumably financially co-dependant, may limit the property interest of one so as to further the financial interests of the other. Unlike the attitude directed toward Matthew, the attitude directed toward Lucy is not a harmful or unacceptable attitude. Fundamentally, the difference between the pressure can only be explained with reference to a ‘normative baseline’ of acceptable forms of pressure.

The second feature that differentiates the two scenarios is the circumstances of the decision-maker. What makes Matthew’s circumstances distinct from Lucy’s is that, that the additional option arises because of ‘constraining circumstances’; it is because that Matthew is a victim of domestic

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<sup>317</sup> S Rippon, ‘Imposing Options’ (n288) 3.

violence that Matthew is given the option for Mark to be prosecuted. In other words, the discretion to prosecute would not arise *but for* the acts of violence, so that the option to prosecute the domestic violence only arises where the decision maker is a victim of domestic violence.

We can therefore say, that for procedurally unfair exploitation:

(3) The Exploitation Principle: A is exploiting B where A obtains a benefit from pressure on B that is unfair or harmful (with reference to a “normative baseline”) and that the pressure only arises because of the constraining circumstances of B.

Note that under this explanation, A is not the applier of the unfair or harmful pressure. A is only benefiting from the pressure. I accept that “where A has played no direct causal role in creating those circumstances, where A has no special obligation to repair those conditions”.<sup>318</sup> To that extent, A is not culpable for benefiting from the circumstances of B. However, this does not undermine the claim here that: A ought not to be able to benefit from a transaction that is exploitative since B is nonetheless being exploited.

### *Exploitation and Bodily Material*

Let us return to a market in bodily material. Consider a scenario where Joanna, because of her impoverished circumstances, decides to sell her kidney to provide for the needs of her family. Rippon argues that:

because people in poverty often find themselves either indebted or in need of cash to meet their own basic needs and those of their families, they would predictably find themselves faced with social or legal pressure to pay the bills by selling their organs,

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<sup>318</sup> A Wertheimer, ‘Exploitation’ (n314) § 3.

if selling organs were permitted. So we would harm people in poverty by introducing a legal market that would subject them to such pressures.<sup>319</sup>

As we know from (2) the Pressure Principle, the options available to persons form a basis for our attitudes towards them. So that, since Joanna has the option to sell her kidney, Joanna would be under pressure to sell her kidney and such a pressure would not be applied if the option was never available to her.

The difficulty here is articulating the “harm” that would be inflicted by introducing a market in bodily material. Rippon argues that:

*social or legal pressure to sell an organ* is harmful to people, and that it is harmful to them in a way that makes it reasonable not to permit a system that would predictably lead to such harms.<sup>320</sup>

Rippon is concerned with psychological effect of the social or legal pressure to exercise the option to sell an organ. The harm here is the “psychic costs” or emotional distress of the donor knowing that her family’s impoverished circumstances could be elevated if she was to exercise the option. So that the claim is that the pressure on Lucy, or the attitudes directed toward Lucy, constitute a harm. However, this harm is only a *prima facie* harm, similar to Munzer’s unease, it concerns “attitudes that human beings have toward themselves and others”.<sup>321</sup> Such attitudes are concerning, but by themselves, do not provide a basis to prohibit the activity. Alternatively, even if we accept that the social and legal pressure constitute a harm in the form of ‘avoidable emotional distress,’ we must consider whether the greater availability of organs that may follow from a market exchanges actually

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<sup>319</sup> S Rippon, ‘Imposing Options’ (n288) 4.

<sup>320</sup> S Rippon, ‘Imposing Options’ (n288) 3.

<sup>321</sup> SR Munzer, ‘Uneasy Case’ (n287) 269.

reduces the totality of avoidable emotional distress through prolonging the lives of those in need of an organ transplant.

I would suggest that harm is better located in the content, rather effect, of the pressure, to the extent that the concerns raised by Rippon can be reconfigured to amount to the claim that a market in bodily material is exploitative.

In terms of the first limb of (3) The Exploitation Principle, the option to sell bodily material contributes to the attitude that a person can be understood in terms of the monetary value of their body. Moreover, according to the pressure principle, for a category of people (people living in poverty), there will be pressure to exercise this option, and this pressure embodies the attitude that they ought to view their bodies in terms of monetary value. This pressure is unacceptable or *prima facie* harmful pressure since it is an attitude that equates the person with their bodies. This is contrary to (1) The Objectification Principle which forms a 'normative baseline' for our attitudes to others. Like the attitude that Matthew's right to be free from physical violence is a subservient right, like the attitude that Lucy is a merely a sexual object, and unlike the attitude that Lucy ought to provide security for her partner's loan, the attitude that Joanna ought to undergo "physical incursions"<sup>322</sup> and use her body as repository of valuable parts, in order to alleviate financial pressure, is an attitude that falls below a normative baseline.

The second limb of exploitation argument, that a market in bodily material pre-supposes constraining circumstances, requires further explanation. As discussed above, in order for the argument for a market in bodily material to succeed in establishing that such a market will increase the availability of bodily material, those who would otherwise not donate material would need to be motivated by the monetary reward available under a market in bodily material. If motivations are *elastic*, then the monetary reward would motivate those living in financially constraining circumstances in a way that is proportionate to their financial depravity. Hughes and Rippon speculate that if organs could only be

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<sup>322</sup> S Rippon, 'Imposing Options' (n288) 3.

sold by those who earn 60% or 80% of the medium income, there would be no supply in the organs market. As Rippon argues:

Those who want to sell their organs are not generally motivated by the promise of obtaining luxury goods such as holidays, recreational flying lessons or cases of fine wine, but by economic desperation.<sup>323</sup>

Those who are motivated to extract and transfer bodily material for monetary gain are likely to be those who are living in financial deprivation. The suggestion here is that a market in bodily material needs, or pre-supposes, that a category of people are living in financially constraining circumstances in order for the market to achieve the aim of increasing the availability of bodily material. Hughes explains in response to Dworkin:

Very few, if any, people above the lower 40% excluded from the market would ever wish to sell an organ (as Dworkin himself recognizes), so the effect of the “paternalistic” measure he assumes nobody would agree to would be to eliminate not only the poor from the market, but the market itself. This means, of course, that the poor are essential to the existence of a market in organs, which in turn means that for such a market to achieve one of the chief ethical goods Dworkin says (partly) justifies its existence (namely, increasing available organs), it is necessary that the poor participate as the vendors of the organs.<sup>324</sup>

The benefit obtained from a market in bodily material (the greater availability of bodily material) is only obtained because people are living in financially constraining or impoverished circumstances and because those who are in such circumstances are under pressure to view their body as a repository of

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<sup>323</sup> S Rippon, ‘Imposing Options’ (n288) 3.

<sup>324</sup> PM Hughes, ‘Exploitation, Autonomy, and the Case for Organ Sales’ (n288) 94, responding to G Dworkin, ‘Markets and Morals: The Case for Organ Sales’ in *Morality, Harm, and the Law* (Westview, 1994) 155.

spare resources. Hence, I suggest that such a market in bodily material can be understood as exploitative. The argument can be articulated as follows:

(1) The Objectification Principle: the attitude toward B that B is a ‘repository of body parts with a market value’ is an attitude that falls below a ‘normative baseline’.

(2) The Pressure Principle: the availability of the option to sell bodily material to a category of persons creates or reinforces the attitude (that B is ‘repository of body parts with a market value’).

(3) The Exploitation Principle: A is exploiting B where A obtains a benefit from pressure on B that is unfair (with reference to a ‘normative baseline’) and that the pressure only arises because of the financially constraining circumstances of B.

Given that a market in bodily material is exploitative, I suggest that the content of the exchange ought to be limited to payments that compensate, but not reward, the transferor. The exploitative nature of a market in bodily material provides sufficient basis to continue to prohibit commercial dealings in bodily material.

### *Degrees of Intervention*

The argument for the exercise of income rights in bodily material was premised upon the claim that providing a monetary reward in exchange for the transfer of bodily material will increase the availability of bodily material. Yet, I have also argued here that if a monetary reward is provided so as to incentivise more people to transfer bodily material, the greater availability of bodily material will be the product of exploitative pressure that is asserted on those living in financially constraining circumstances. This basis for prohibiting a market or reward based system for encouraging the transfer of bodily material does not preclude lesser degrees of incentives provided by healthcare institutions. For instance, The Nuffield Council on Bioethics recommends in their report ‘Human Bodies:

Donation for Medicine and Research’ an ‘intervention ladder’ with a series of six levels of public intervention, ranging from:

Rung 1: information about the need for the donation of bodily material for others treatment or for medical research;

Rung 2: recognition of, and gratitude for, altruistic donation, through whatever methods are appropriate both to the form of donation and the donor concerned;

Rung 3: interventions to remove barriers and disincentives to donation experienced by those disposed to donate;

Rung 4: interventions as an extra prompt or encouragement for those already disposed to donate for altruistic reasons;

Rung 5: interventions offering associated benefits in kind to encourage those who would not otherwise have contemplated donating to consider doing so;

Rung 6: financial incentives that leave the donor in a better financial position as a result of donating.<sup>325</sup>

The suggestion by the Nuffield Council is that where the “health need” is not being met by current forms of intervention, a higher level of intervention may be justified, provided there is consideration as to: the welfare of the donor, the welfare of other closely concerned individuals, the potential threat to existing donation systems, the risk of increasing social inequalities, and the professional responsibilities of the health professionals involved.<sup>326</sup> The transfer of bodily material may be in exchange for value, but whether the exchange is a “purchase”, “reward”, “remuneration”,

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<sup>325</sup> Nuffield Council, *Human Bodies: Donation for Medicine and Research* (n65) 167- 170.

<sup>326</sup> Nuffield Council, *Human Bodies: Donation for Medicine and Research* (n65) 169.

“reimbursement” or “compensation” depends on the level of public intervention required to meet the need for the resource and other public policy concerns.<sup>327</sup>

This recommendation aligns with a number of key ideas discussed in this Chapter. First, the reason why a financial reward ought to be introduced only where there is a health need that cannot otherwise be met is because the underlying justification for recognising the ability to obtain a monetary benefit in exchange for bodily material is a social (rather than a pre-social) justification. It follows that if the current level of intervention is resulting in insufficient rates of donation, then there is legitimate scope to increase the level of intervention, and *vice versa*. Since the right to transfer-for-value has an instrumental basis, the only source of objection to, and the only source of justification of, the exercise of the right is with reference to the consequences that the exercise of the right produces.

Second, the recommendation expresses concern as to the effect financial incentives will have on existing structures for donating. It is possible that the introduction of extrinsic reasons to transfer bodily material (rungs 5 and 6) will ‘crowd out’ intrinsic reasons. If so, it is only if the increase of instances of ‘donation’ caused by the introduction of extrinsic reasons is greater than the decrease of instances of donation caused by the crowding out of intrinsic reasons that there will be a net gain in the availability of organs.

The Report recommends providing “associated benefits” (rung 5) and “financial incentives” (rung 6) to incentivise transfer. According to The Nuffield Council, “the ‘benefits in kind’ envisaged in rung 5 are benefits that are closely associated with the donated material, as in, for example, the covering of cremation costs where bodies have been donated for medical education”. Since such

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<sup>327</sup> Nuffield Council, Nuffield Council, *Human Bodies: Donation for Medicine and Research* (n65) 2: “Payment: a generic term covering all kinds of transactions involving money, and goods with monetary value, whether those transactions are understood as recompense, reward or purchases; Recompense: payment to a person in recognition of losses they have incurred, material or otherwise. This may take the form of the reimbursement of direct financial expenses incurred in donating bodily material (such as train fares and lost earnings); or compensation for non-financial losses (such as inconvenience, discomfort and time); Reward: material advantage gained by a person as a result of donating bodily material, that goes beyond ‘recompensing’ the person for the losses they incurred in donating. If reward is calculated as a wage or equivalent it becomes remuneration; Purchase: payment in direct exchange for a ‘thing’ (e.g. a certain amount for a kidney, or per egg).”

benefits are not a financial reward, it is unlikely that the availability of the option will create pressure on those in financially constraining circumstances nor create a transaction that changes the nature of donation for those acting altruistically.

In terms of the arguments raised in this Section against commercial dealings in bodily material, rung 6: “financial incentives” causes concern. According to the Council:

where the intervention involves a direct payment of money or equivalent, it is an essential pre-requisite that the payment is understood, by all parties, in terms of reward to the *person* for their act of providing bodily material, rather than a purchase of material itself.<sup>328</sup>

The Council is attempting to avoid the harm in understanding a person in terms of ‘a repository of valuable parts’. This is a laudable aim, that can only be achieved if the amount of financial reward is directly tied to quantifiable losses incurred through the process of transaction. This is because, even if the parties to the transaction could understand the payment as a payment for the time, effort and discomfort expended on the extraction and transfer of bodily material, this understanding between the two participants does not prevent the availability of the option to transfer bodily material for value from being understood by a wider category of persons as an option to use the body parts as a fungible commodity. As discussed above, we ought to be concerned with the effect of an ‘established practice’ of transfers of bodily material for monetary reward rather than isolated transactions between participants who view that monetary reward as reward ‘to the *person* for their act’. To avoid attitudes that equate the body with a price, we ought to limit the monetary payment to compensation of the losses incurred in the act of providing the material.

I therefore suggest that, although increasing the amount of monetary reward that may be provided in exchange for bodily material *may* increase the availability of bodily material for therapeutic,

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<sup>328</sup> Nuffield Council, *Human Bodies: Donation for Medicine and Research* (n65) 170.

scientific and educational use, donors of bodily material ought to only be compensated for the time and expenditure that is directly associated with their donation. This is because a market in bodily material, or even the provision of monetary reward of bodily material, is likely to amount to a form of pressure (that is below a normative baseline of acceptable pressure) on a category of people (those who are in financially constraining circumstances) to transfer or sell bodily material. Although individuals and institutions may benefit from this pressure, the benefit is the product of an 'exploitative' process.

## Chapter Summary

The purpose of this Chapter has been to determine whether income entitlements ought to be added to the bundle of entitlements that individuals may obtain in bodily material. I have argued here that it is not possible to justify a pre-social right to income. This is because there will inevitably be a gap between what is being justified (obtaining a financial benefit from the transfer of bodily material) and considerations available to the justification (the attributes and characteristics of the person).

However, it may be possible to justify a social right to income. A social justification would need to show that the introduction of a monetary reward would produce a socially desirable outcome, such as the greater availability of bodily material. I have argued here that such an outcome may follow from the exercise of income rights provided that motivations to transfer bodily material are elastic motivations and that existing intrinsic motivations are not crowded-out by the introduction of extrinsic motivations.

Yet, despite the possibility of this benefit, I have argued that transferors of bodily material should only be financially compensated, and not financially rewarded, for their bodily material. If exploitation is obtaining a benefit in an unfair way, the societal benefit of the greater availability of bodily material will ultimately be a benefit that is unfairly obtained from those living in impoverished circumstances. It follows that individuals ought to only be able to transfer bodily material for-value, provided that the value provided for the material is limited to compensating the individual.

## Part C: Interests and Rights

### Chapter Four: Exclusion and Interaction

We have identified the entitlements in separated bodily material that ought to be recognised. We must now consider which set of legal rules is the most appropriate set of rules to protect the exercise of these entitlements. Property law represents the most common, but not the only, set of rules that governs the use of things. The purpose of the next two chapters is to identify the conceptual and structural features of the way property law protects entitlements in comparison to other branches of private law.

By ‘conceptual features’ I mean the different ways in which the law characterises an entitlement due to the social or moral assumptions about the relationship between the entitlement-holder and thing. As Underkuffer explains, property is a volatile concept that is constructed by a “complex package of normative choices”.<sup>329</sup> The concept of property, therefore, is constructed by our normative understanding of property; the values that we attach to the institution or concept.

We are therefore shifting our attention from entitlements to *interests*, in an attempt to identify how different areas of law (such as conversion, trespass to goods, reversionary injury, bailment, negligence, trespass to the person, confidentiality and the emerging tort of privacy) characterise entitlements in things. The aim here is to unpack the assumptions that lie behind these private law categories. We will then consider the ‘structural’ features that follow from these conceptual assumptions. This will provide us with a doctrinal account of the *rights* that are actionable under different branches of private law.

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<sup>329</sup> LS Underkuffer, *The Idea of Property: Its Meaning and Power* (Oxford University Press, 2003) 11. As A George notes in ‘The Difficulty in Defining Property’ *Oxford Journal of Legal Studies* 25.4 (2005) 793, 795-796: “Underkuffer criticises other scholars for tending to ignore the socially constructed and volatile nature of property or for acknowledging and then ending their inquires, and for assuming that their readers share a workable understanding of property...important recent monographs on property include Stephen Munzer, Margaret Jane Radin, Jim Harris, J.E. Penner and Jeremy Waldron. None of these scholars have adopted a social constructivist approach as covertly as Underkuffer, but it is unfair to accuse them of ignoring such a possibility or assuming their readers share a common understanding or ‘property’.”

In this Chapter, I will argue that entitlements can be characterised as either *exclusionary interests*, representing open-ended entitlements that are protected by an exclusionary boundary, or *interactive interests*, where entitlements and responsibilities are allocated between parties to an interaction. Three structural features follow an entitlement being characterised as an exclusionary or interactive interest. These structural features concern:

- the basis of the right: whether the right arises because of the relationship with the thing or because of the relationship with the duty-bearer;
- the content of the right: whether the right concerns the relationship with the thing or the value that can be derived from the thing; and
- the content of the primary duty: whether the duty on the duty-bearer concerns conduct that causes interference with thing or concerns the standard of conduct undertaken by the duty-bearer.

This understanding of the structural features of the relevant branches of private law will enable us to identify in Chapter Six the structural features that the law that governs the use and storage of bodily material ought to adopt.

# Section One: Interests in Things and Interests in Activities

The first conceptual distinction is between ‘interests in things’ and ‘interests in activities’. Although all legal interests concern a combination of things, persons and activities, this distinction is in terms of the *focal point* through which the law views the legal relationship between persons. I will argue that where an entitlement in a thing is treated as enabling an open-ended set of activities, the law focuses on the exclusion of others from the thing (exclusionary interests). Whereas, if an entitlement in a thing concerns a particular action or activity, the law focuses on the particular entitlements and responsibilities that are allocated between parties involved in the interaction or activity (interactive interests).

## a. Property and Boundaries

Property rights represent a form of legal protection that is perhaps more robust than any other set of common law rules. For Blackstone, property rights represent a:

sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.<sup>330</sup>

Although this may be overstating the legal force of property rights, it remains the case that property interests are interests that attract an ‘exclusionary form’ of legal protection. It is sufficient for our purposes to unpack the package of ‘normative choices’ about property that have given rise to this characterisation of property interests as exclusionary interests. It is not the place here to critically analyse whether these are adequate reasons to justify the priority of the property rights-holder over

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<sup>330</sup> W Blackstone, *Commentaries on the Laws of England* (facsimile ed.1979) [1765-69] in C Rose, ‘Canons of Property Talk, or, Blackstone’s Anxiety’ (1998-1999) 108 *Yale Law Journal* 601.

competing interests.<sup>331</sup> The purpose of this discussion is to therefore identify what package of normative choices lie behind this feature of property.

The “boundary approach” to property has been constructed by some commentators in opposition to the “bundle-of-rights” view of property.<sup>332</sup> This conflict is avoidable. As I have argued, the Bundle Picture is a conception of ownership (not property) and, as I will explain, the ‘Boundary Picture’ is a particular characterisation of the entitlements that constitute the bundle. In other words, the bundle view pertains to the entitlements that may be recognised, and where these entitlements are protected by property law, their method of protection is through the idea of an exclusionary boundary. The boundary approach, therefore, concerns the way in which property law characterises and protects the bundle of entitlements.

I suggest that there are three normative assumptions behind property interests being exclusionary interests. The main contention is that entitlements that give rise to proprietary interests are open-ended entitlements and that the protection of these entitlements necessitates the ‘exclusion’ of all others. I will also suggest that rights with regards to the body are also exclusionary interests, which can be justified using the same set of assumptions.

### i. “Purposely Dealing with Things”

The first assumption that underlies the boundary approach is that entitlements in things represent an interest in “purposely dealing with things”.<sup>333</sup> When an entitlement-holder has possession of an item of property, the possession entitlement *enables a set of activities* that the rights-holder may

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<sup>331</sup> For wider criticism see: J Nedelsky, ‘Law, Boundaries, and the Bounded Self’ in Post (ed.) *Law and the Order of Culture* (1991) 140; C Rose, ‘Property as Storytelling’ in *Property and Persuasion* (1994) 154; C Rose, ‘Takings’ and the Practices of Property’ in *Property and Persuasion* (1994) 165; M Robertson, ‘Reconceiving Private Property (1997) 24 *Journal of Law and Society* 200; J Boyle, ‘The Second Enclosure Movement and the Construction of the Public Domain’ (2003) 33 *Law and Contemporary Problems* 302.

<sup>332</sup> L Katz, ‘Exclusion and Exclusivity in Property Law’ (2008) 58 *University of Toronto Law Journal* 275, 276: “The bundle-of-rights approach has been roundly criticized by modern proponents of a much older view of ownership as an open-ended sphere of liberty preserved by the right to exclude others from a particular thing (an exclusion-based or ‘boundary approach’).”

<sup>333</sup> JE Penner, *The Idea of Property in Law* (Oxford University Press, 1997) 71.

engage in. For example, if Lucy possesses land (thing), she is able to grow wheat on the land (activity); if Matthew possesses a toothbrush (thing), he may brush his teeth with his toothbrush (activity).

The assumption operates so that the focal point of the entitlement is the *thing* (the land, the toothbrush) that enables a set of *activities*. The opposing assumption is that the entitlement-holder has an interest in an action or activity, that may involve a thing, but activity remains the focal point. For example, Lucy may have an interest in sowing seeds (activity) on her land (thing); Matthew may have an interest in brushing his teeth (activity) with his toothbrush. In these examples, the focal point is the activity, but that activity nonetheless involves the use of things.

## ii. Open-ended Set of Activities

However, as Penner observes, “it is difficult in the extreme to quantify the many uses one can make of one’s property”.<sup>334</sup> Rather than cataloguing the possible ways in which an entitlement can be exercised, or the ways in which an object can be purposively dealt with, we can conceive of our interests in things as an interest in an open-set of activities.<sup>335</sup> The exercise of the entitlement in any activity is presumptively permissible and protected from interference. For example, Lucy may grow barley on her land or may graze cattle on her land, Matthew may clean his bathroom tiles or his silverware with his toothbrush. The exercise of the entitlements in the thing enables an open-ended set of activities.

Accordingly, if property concerns entitlements in things that enable a set of activities, the further assumption here is that the law is unwilling or unable to identify the set of activities that attract protection. In other words, the relationship with the thing cannot be reduced to a set of activities that

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<sup>334</sup> JE Penner, *The Idea of Property in Law* (n333) 71.

<sup>335</sup> JW Harris, *Property and Justice* (n3) 160: “The possessory owner has a prima facie privilege to do anything in relation to his land which the dominant culture of his society accords to a landowner. The set of privileges entailed is not a total set, because everywhere some things are excluded. It is, however, an *open-ended set*, since its present content could never be exhaustively listed: and it is a fluctuating set, because cultural assumptions about what an owner may do vary.” [emphasis added]

the thing enables. The interest therefore becomes an interest in an “indefinite and undefinable” set of activities.<sup>336</sup>

The characterisation of entitlements as open-ended also follows from an economic analysis of property interests. For instance, Merrill and Smith provide a cost-based analysis for why entitlements that are open-ended is “typical of ownership”.<sup>337</sup> Property rules are used to protect entitlements for reasons of economic efficiency. For Smith, “the preference for property rules can be understood as a response to the information costs that shape other aspects of entitlement delineation”.<sup>338</sup>

Property rules reduce information costs through an ‘exclusion strategy’ by communicating the simple message of “keep out” so that an undefined set of activities is protected without “officials needing to know what these activities may be”.<sup>339</sup> It follows that “owners” of property “have open-ended choices of how to invest in or consume the asset”.<sup>340</sup> Without having to inquire into whether Matthew uses his toothbrush to clean his teeth, bathroom tiles or his silverware, Mark knows not to use Matthew’s toothbrush.

In contrast to the ‘exclusion strategy’, the ‘governance strategy’ of specifying valid and legally protected activities introduces, according to Smith and Merrill, “greater information costs that typically outweigh the benefits of the greater precision governance rules provide”.<sup>341</sup> Given the “complexity of interactions between actors” each strategy, according to Smith, reduces interactions into “modules” (or

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<sup>336</sup> JE Penner, *The Idea of Property in Law* (n333) 72: “The exclusion thesis is a statement of the driving analysis of property in legal systems. It characterizes property primarily as a protected sphere of indefinite and undefined activity, in which an owner may do anything with the things he owns.”

<sup>337</sup> L Katz, ‘Exclusion and Exclusivity in Property Law’ (n332) 280.

<sup>338</sup> HE Smith, ‘Property and Property Rules’ (2004) 79 *New York University Law Review* 1719, 1753: “for reasons of information cost it is often advantageous and almost inevitable that rights will be delineated by means of what I have called an “exclusion strategy.” Such a strategy relies on rough and low-cost signals that are not tied to use in order to protect indirectly a large and unspecified set of uses.”

<sup>339</sup> HE Smith, ‘Property Rules’ (n338) 1728.

<sup>340</sup> HE Smith, ‘Property Rules’ (n338) 1719.

<sup>341</sup> L Katz, ‘Exclusion and Exclusivity in Property Law’ (n332) 280.

“manageable chunks”).<sup>342</sup> Property law, and the exclusion strategy, “initially focuses on things” whereas tort law and the governance strategy “takes more direct aim at acts and activities”.<sup>343</sup> Other areas of tort law, for instance, may protect the activity of sowing seeds or brushing teeth, so that Lucy’s interest in growing wheat is protected by duties on Lucy’s neighbor, Joanna, restricting the use of herbicides and Matthew’s interest in the activity of brushing his teeth is protected by duties imposed on toothpaste suppliers to provide a safe product.

Whether it be a feature of our relationship with things or as an information-cost saving device, the first two stages in moving from the Bundle Picture to the Boundary Picture is that property interests represent an interest in “purposely dealing with things” that giving rise to a sphere of “indefinite and undefined activity” where each entitlement is an open-ended entitlement.<sup>344</sup>

### iii. The Exclusion of Others

The third assumption concerns the way in which the law protects this sphere of ‘indefinite and undefined activity’. It is difficult to give legal protection to an open set of activities. Instead of positively identifying particular and preordained uses of property that are protected under the law (the governance strategy), the “contours” of a property right are provided by duties imposed on others.<sup>345</sup>

The effect of focusing on interference rather than entitlements is to carve out a boundary around the sphere of “indefinite and undefined activity”<sup>346</sup>. According to Katz, “we might better characterise a

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<sup>342</sup> HE Smith, ‘Modularity and Morality in the Law of Torts’ (2011) 4.2 *Journal of Tort Law* 1, 2: “Both property and torts solve the information cost problem with in rem rights in similar ways, by chopping up the world of interactions between parties into manageable chunks – modules – that are semi-autonomous.”

<sup>343</sup> HE Smith, ‘Modularity and Morality in the Law of Torts’ (n342) 1: “The main difference between property and torts is in their basic unit of analysis: property initially focuses on things and works out from there, whereas tort law takes more direct aim at acts and activities (which I will lump together as “actions”), in the sense that it focuses on conduct that potentially causes injury to others.”

<sup>344</sup> JE Penner, *The Idea of Property in Law* (n333) 72.

<sup>345</sup> JE Penner, *The Idea of Property in Law* (n333) 72: “The right to property is that normatively protected part of our interest in using property, and that part, i.e. that fraction of our uses of property, is determined by the extent to which others must exclude themselves from our property. Thus we are provided with the specific contours of the property right over the many different things that can be objects of property.”

<sup>346</sup> JE Penner, *The Idea of Property in Law* (n333) 72.

boundary approach as a theory of non-ownership” since the contours of the property right are focused on excluding others from using the object or resource so that “an owner is the last person standing after the exclusion of everyone else.”<sup>347</sup> In order to protect our interest in open-ended entitlements, the law constructs an exclusionary boundary of “negative liberty”.<sup>348</sup>

As Penner explains, these ideas of “purposely dealing with things” and “exclusion” are correlative, because of:

the social setting in which we live, and the ways in which things of this world are typically used, we see that any meaningful right to use is the opposite side of the coin to the right to exclude.<sup>349</sup>

This accords with the political heritage of property rights. The function of a property interest can be viewed as a means of ensuring a sphere of “sanctity and authority for” an individual’s “decision making over resources”<sup>350</sup> in opposition government control or third party interference. Property rights have been described as the protectorate of the “troubled boundary” between “state and individual”<sup>351</sup> or between individual and others since, it is argued, “property [is] the ideal symbol” for personal autonomy “for it [can] both literally and figuratively provide the necessary walls to separate oneself from others”.<sup>352</sup>

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<sup>347</sup> L Katz, ‘Exclusion and Exclusivity in Property Law’ (n332) 277.

<sup>348</sup> JE Penner, *The Idea of Property in Law* (n333) 73. *C.f.* “negative control” identified in *Yearworth v North Bristol NHS* by S Green, ‘The Subject Matter of Conversion’ (n84) 239: “the Court gave much weight to the *negative* control of the claimants; that is, the fact that their sperm could neither continue to be stored, nor used for any purpose, without their consent.”

<sup>349</sup> JE Penner, *The Idea of Property in Law* (n333) 71.

<sup>350</sup> D Denman, *The Place of Property: A New Recognition of the Function and Form of Property Rights in Land* (Berkhamsted: Geographical Publications Limited, 1978) 3, in L Fraser, ‘Property Rights in Environmental Management: The Nature of Resource Consents in the Resource Management Act 1991’ (2008) *New Zealand Journal of Environmental Law* 145, 158.

<sup>351</sup> C Reich, ‘The New Property’ (1964) 73 *Yale Law Journal* 733, 739.

<sup>352</sup> J Nedelsky, ‘Law, Boundaries and the Bounded Self’ (1990) 30 *Representations* 162, 168.

Property rights construct a boundary to protect the sphere of undefined activity that gives ascendancy to the right-holder's entitlements *vis-a-vis* other parties. Crucially, the legal boundary is constructed around the item or property itself, and this allows "strangers to interact with each other in a rule governed way, though their dealings are not personal in any respect".<sup>353</sup> Property, as Reich describes:

draws a circle around the activities of each private individual or organization. Within that circle, the owner has a greater degree of freedom than without. Outside he must justify or explain his actions, and show his authority. Within he is master and the state must justify any interference.<sup>354</sup>

Hence, proprietary interests are interests that fall under the protection of an exclusionary boundary where the entitlements are open-ended entitlements and those outside the boundary must justify any interference with the entitlements.

A consequence of the boundary approach is an *inequality* between rights-holder and duty-bearer. The rights-holder, within the boundary, may engage in an undefined set of activities, whereas, the duty-holder, outside the boundary is excluded from any activity with regards to the thing. In contrast, where the law focuses on actions and activity, a 'bilateral approach'<sup>355</sup> approach apportions rights and responsibilities between participants in an action or activity from a starting point of 'basic equality'.

If we are to characterise proprietary interests as *exclusionary* interests, let us be careful as to what exclusionary means in this context. It is not the preclusion of anyone else from having entitlements in

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<sup>353</sup> JE Penner, *The Idea of Property In Law* (n333) 30.

<sup>354</sup> C Reich, 'The New Property' (n351) 739.

<sup>355</sup> HE Smith, 'Modularity and Morality in the Law of Torts' (n342) 17: "One of the most striking features of tort law.. is its bilateral structure. Tort claims run between a right holder and a duty bearer."

the property (since there may be subsidiary and reversionary interest holders),<sup>356</sup> it is the preservation of the owner's position of the owner's exclusive "agenda-setting authority"<sup>357</sup> which is a "position that is neither derived from nor subordinate to the position of others with respect to that resource".<sup>358</sup>

## **b. Bodies and Boundaries**

Proprietary interests are not the only exclusionary interests in the legal system. Our interests in our bodies are also exclusionary interests. As Smith notes:<sup>359</sup>

tort law treats the acts and activities surrounding bodily integrity and reputation in [a way] which bears some resemblance to the...exclusion strategy in property

I will suggest that the body is also a sphere of undefined activity that is protected by an exclusionary boundary by tracing the same development from the Bundle Picture to the Boundary Picture.

### **i. Purposefully Dealing with the Body**

It can be said that we are 'self-owners' of our 'attached' body insofar as we have a large bundle of entitlements with regards to our body. As we have seen, there are various different ways of justifying the self-ownership of the body, such as self-ownership being as necessary feature of autonomous action, as the most efficient means of maximising welfare or utility or as the medium through which intentional ties are formed with the world. The body therefore represents a *thing* that enables a *set of activities* that the self-owner may engage.

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<sup>356</sup> L. Katz, 'Exclusion and Exclusivity in Property Law' (n332) 275: "So long as others – whether they be holders of subsidiary property rights or strangers to the property – act in a way that is consistent with the owner's agenda, they pose no threat to the owner's exclusive position as agenda setter."

<sup>357</sup> L. Katz, 'Exclusion and Exclusivity in Property Law' (n332) 289.

<sup>358</sup> L. Katz, 'Exclusion and Exclusivity in Property Law' (n332) 297, 315. See also JE Penner, *The Idea of Property in Law* (n333) 74: "The right to property is like a gate, not a wall. The right to property permits the owner not only to make solitary use of his property, by excluding all others, but also permits him to make a social use of his property, by selectively excluding others, which is to say by selectively allowing some to enter."

<sup>359</sup> HE Smith, 'Modularity and Morality in the Law of Torts' (n342) 16.

For example, Matthew has an interest in knowing the risks associated with a medical procedure. At face value, Matthew has both an interest in controlling invasions into his body (a thing) and has an interest in the procedure (an activity). Matthew's interest in his body is a legally protected interest, whereas the law is much less willing to legally protect his interest in the outcome of the procedure. The focal point of Matthew's interests in his body remains the control of the body (the thing), rather than the particular activities that the body is involved in.

## ii. Open-ended Set of Activities

The set of activities that the self-owner may engage in is an open-ended set. This is because the body, in pursuit of various different personal aims, objectives, standards and values, can be used in an undefinable number of different activities. Similarly, the relationship with the body is not reducible to a set of activities that the body enables. For example, Matthew may consent to the physical contact by playing rugby, may consent to the physical intrusion in a medical procedure, or consent to physical contact in sexual intercourse, or none of these activities. The point is that all of these activities, and many others, are shaped around Matthew's 'self-ownership'.

Like the exercise of entitlements in property, it is difficult to completely audit the many uses one can make of one's body. Hence, the best way to conceive of the idea of self-ownership is as a sphere of presumptively permitted activity. Limits may be prescribed as to what (harmful) activities are impermissible, but the presumption remains that as between a person and their own body, the idea of self-ownership is a sphere of undefined activity.

## iii. Exclusion of Others

The way in which the law protects these open-ended entitlements in the body is by focusing the legal attention on the sources of interference rather than the exercise of entitlements of use and control. The contours of the right to bodily integrity, for instance, are provided by the conduct of others that is prohibited.

Since the body exists in a social context involving interactions with strangers and others who engage in activities that may interfere with the bodily sphere, in order to protect the open-ended entitlements in the body the law excludes others. To borrow Katz's characterisation, it is a theory of non-ownership - or negative ownership - insofar as the self-owner is that person standing following the exclusion of everyone.<sup>360</sup> Consider Penner's comparison between duties *in rem* and bodily integrity:

The contours of the right to exclude others from one's body are the product of legal and moral ingenuity in recognizing appropriate general duties *in rem*....The right to property, as much as the right to bodily security, is determined by the extent to which the law of wrongs will treat certain acts and omissions as causing a significant harm to the interest, and for that reason impose a duty on people generally.<sup>361</sup>

The rights of self-ownership are therefore exclusionary; like Riech's conception of property, outside the exclusionary boundary, 'one must justify or explain his actions' to justify the interference with the bodily sphere that is presumptively impermissible. Inside the boundary, the exercise of entitlements is presumptively valid and protected since the self-owner exercises their autonomy and preferences through the exercise of entitlements in their body. The need for a person's consent for any intrusion into the bodily sphere and the degree of control a person has over personal information, each represent a legal exclusionary boundary around a sphere of undefined and indefinite activity.

Property is nonetheless a more familiar instance of exclusionary interests, and this is why the describing the body-as-property has a persuasive appeal by pulling rights of the body into the established exclusionary boundaries of proprietary protection. This picture, of exercising an authority over the body that is an exclusive authority insofar as it "is neither derived from nor subordinate to the position of others",<sup>362</sup> portrays the interests we have, or ought to have, in our own (attached) body.

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<sup>360</sup>L Katz, 'Exclusion and Exclusivity in Property Law' (n332) 277.

<sup>361</sup> JE Penner, *The Idea of Property in Law* (n333) 74.

<sup>362</sup> L Katz, 'Exclusion and Exclusivity in Property Law' (n332) 297.

This is why the idea of property protecting our entitlements in our body has an appeal and why property rights and personality rights share a conceptual feature.

In sum, property rights and rights in the body share three important common features. They are both (i) principally concerned with the use of things, to the extent that (ii) entitlements in the body and property enable an open-ended set of activities. As a result, the law protects these open-ended entitlements by (iii) focusing on the potential sources of interference with the entitlement. This ‘boundary approach’ protects exclusionary interests. In contrast, a ‘bilateral approach’ focuses on particular actions to activities, apportioning entitlements and responsibilities between parties in an interaction. The entitlements under the bilateral approach represent interactive interests.

## Section Two: The Boundary and Bilateral Approaches

We can now turn to consider the particular structure of the branches of private law that could be employed to protect entitlements in separated bodily material. I will suggest here that property rights-based actions (such as conversion, trespass to goods and reversionary injury), as well as personal rights-based actions (such as trespass to the person and the emerging tort of privacy), represent exclusionary interests and therefore benefit from the structure of ‘the boundary approach’. In contrast, the remaining branches of private law (negligent damage to property, negligence causing personal injury, and bailment and the traditional doctrine of confidentiality) embody structural features developed out of both the boundary and bilateral approaches.

### a. The Basis of the Right

For some, “the defining characteristic of a property interest is that it is enforceable against third parties”.<sup>363</sup> The structure of property rights includes “trespassory protection” which operates by imposing “on anyone other than the owner a duty not to interfere without the owner’s consent”.<sup>364</sup> This structure of protection can be contrasted with “transactional protection”, which is “a facet of a relationship established by the transaction creating the right in question”.<sup>365</sup> This distinction can also be understood as between “direct rights” which are rights that arise “against [the defendant] because of [the defendant’s] own conduct”, and “pre-existing rights”, which are rights that are enforceable against the defendant independently of the defendant’s conduct.<sup>366</sup>

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<sup>363</sup> J Hill, ‘The Proprietary Character of Possession’ in E Cooke (ed.) *Modern Studies in Property Law* (Hart Publishing, 2001) 22.

<sup>364</sup> JE Penner, *The Idea of Property in Law* (n333) 128.

<sup>365</sup> JE Penner, *The Idea of Property in Law* (n333) 128.

<sup>366</sup> B McFarlane, *The Structure of Property Rights* (Hart Publishing, 2008) 20-22.

Despite various formulations of the distinction, there is convergence as to “the *effect* of a property right”:<sup>367</sup> that the right is *prima facie*<sup>368</sup> enforceable against an open set of persons since the success of the action “does not depend on there being a pre-existing relationship between the holder of the right and the person infringing it”.<sup>369</sup>

It is true, that for some property rights, the basis for the correlative duty is the property right itself. It is a right that exists because of the right-holder’s relationship with the thing is the source or basis of the duty imposed on the duty-bearer. This right can be described as “pre-existing” because the right-holder’s interest in the thing existed prior to the interaction with the duty-bearer. This particular legal structure follows from entitlements being characterised as exclusive interests. Since exclusive interests represent a sphere of “indefinite and undefined activity”, the correlative duties are not derived, or determined by any particular activity related to the object or resource. It follows that the duties correlative to the right follow from the right-holder’s relationship with the thing itself, so that the rights arise prior to any particular transaction.

As we shall see, under other branches of private law, a duty on the duty-bearer arises because of a particular relationship, transaction or interaction between the rights-holder and duty-bearer. This right can be described as arising “directly” against the duty-bearer because of the relationship between the two actors. Direct rights follow from characterising an entitlement as an interactive interest. Since interactive interests are concerned with the apportionment of rights and duties between parties to an activity, transaction or interaction, the duty imposed on the duty-bearer arises ‘directly’ out of the activity, transaction or interaction.

However, there also exists a middle ground between pre-existing and direct rights which I will term ‘latent rights’. Latent rights arise, like pre-existing rights, because of the relationship between the

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<sup>367</sup> B McFarlane, *The Structure of Property Rights* (n336) 139 [emphasis added].

<sup>368</sup> As B McFarlane, *The Structure of Property Rights* (n336) at 179 explains, the right is *prima facie* enforceable given the possibility that the defendant has a defence to a property rights claim.

<sup>369</sup> JE Penner, *The Idea of Property in Law* (n333) 128.

right-holder and the thing. Yet, there may be circumstances that mitigate against the imposition of duties on an open set of persons. For example, consider the main anxiety in recognising a right under conversion in *Moore* expressed by the Supreme Court of California:

Since conversion...imposes liability on all those into whose hands the cells come, whether or not the particular defendant participated in, or knew of, the inadequate disclosures that violated the patient's right to make an informed decision.<sup>370</sup>

The concern with exclusionary interests giving rise to pre-existing rights is that this may impose an unfair burden on third parties. Although exclusionary interests concern the relationship between the rights-holder and the thing, the legal protection of the exclusionary interest will always be in the context of the legal relationship between rights-holder and duty-bearer.

Where the interest in the thing is the right to actual possession, duties are imposed on an open set of persons not to interfere with the right to possession. We can justify the full use of the exclusionary boundary because of the ease with which third parties can identify that they are under a duty not to interfere with the right to possession. However, where the interest in the thing concerns non-possessory rights, latent rights re-adjusts the balance between the rights-holder and duty-bearers by limiting the correlative duty to circumstances where the duty-bearer knew, or ought to have known, of the interest of the rights-holder. For instance, where property that is the subject of beneficial interests is transferred, and the transfer is in breach of the trust, the recipient of the property will hold the property subject to the beneficial interests where the recipient knew or ought to have known that the property was transferred in breach of a trust<sup>371</sup> (provided that it satisfies an overarching criterion of unconscionability).<sup>372</sup> Hence, notice of an interests in the property provides a basis to impose a duty that a third party would not otherwise be expected to perform.

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<sup>370</sup> *Moore v Regents of the University of California* (n25) 144.

<sup>371</sup> *Eagle Trust plc v SBC Securities* [1993] 1 WLR 484.

<sup>372</sup> *BCCI v Akindale* [2001] Ch. 437, 455: "all that is necessary is that the recipient's state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt."

## i. Pre-Existing Rights

Actions for conversion, trespass to goods, reversionary injury, theft and trespass to the personal all concern pre-existing rights, the effect of which is to impose a duty on an open set of persons. For example, since the body parts acquired by the defendant in *Kelly* were deemed to be items of property, Section 1 of the Theft Act 1968<sup>373</sup> prohibited the defendant from “dishonestly appropriating” the body parts. It did not matter who the defendant in *Kelly* was, the circumstances of the transaction, nor his or her relationship with the Royal College of Surgeons, the duty was imposed as the corollary of recognising the College’s proprietary right in the body parts.

Similarly, under an action for conversion, provided the claimant has the immediate right to possession,<sup>374</sup> an open set of persons are under a duty not to deprive the full benefit of the right.<sup>375</sup> Also, under trespass to goods, where the claimant has actual possession,<sup>376</sup> an open set of persons are under a duty not to directly interfere with goods. Rights of bodily integrity also share this structural feature with these personal property actions. The duty not to threaten the application of force to the body, the duty to avoid intentional and non-consensual contact, and the duty not to interfere with the free movement of the body, are all imposed on an open set of persons independent of any interaction between the rights-holder and duty-bearer.

## ii. Direct Rights

In contrast, negligence and the traditional doctrine of confidentiality formulate direct rights against particular duty-bearers. Even where there is a recognised property right, an action for

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<sup>373</sup> Theft Act 1968, Section 1(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...”

<sup>374</sup> S Green, ‘Understanding The Wrongful Interference Actions’ (n124) 19-20: “trespass and conversion...are available only to the individual with the immediate possessory right in an asset, and not to anyone with a superior proprietary, but lesser possessory, interest.”

<sup>375</sup> S Green, ‘Understanding The Wrongful Interference Actions’ (n124) 20: “conversion is available not just against anyone who still has possession of the converted asset, but against anyone who ever has interfered with a claimant’s possessory rights over it.”

<sup>376</sup> S Green, ‘Understanding The Wrongful Interference Actions’ (n124) 19 - 20

negligence interference with the item of property requires a series of factual findings that concern the relationship between the rights-holder and the duty-bearer. Similarly, actions for breach of confidence, or negligence causing personal injury also require a particular transaction, relationship or interaction to form the basis of a duty.

For instance, in *Moore*, the claimant's entitlement to manage the use of his spleen cells ought to have been facilitated by the duties owed to him by virtue of the relationship between him as the as a patient and the defendant (as his physician).<sup>377</sup> However, in *Greenberg*, the donors were unable to establish that a fiduciary duty applied to the researchers, the court finding that "[t]here is no automatic fiduciary relationship that attaches when a researcher accepts medical donations and the acceptance of trust".<sup>378</sup>

In *Yearworth* both the successful action for negligent damage to property and the unsuccessful action for negligence causing distress were contingent upon the NHS Trusts owing a duty of care to the claimants.<sup>379</sup> Similarly, in *Re: Organ Retention* the claimants had to establish that a duty of care arose in the context of hospital post-mortems, or more precisely; that a doctor could owe a duty of care to the mother after the death of her child that concerns the post mortem examination of the child's body.<sup>380</sup>

An action in bailment, like in negligence and confidentiality, only arises where there is a particular bailment relationship.<sup>381</sup> Hence, the Court of Appeal in *Yearworth* also held that obligations on

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<sup>377</sup> *Moore v Regents of the University of California* (n25) 128-132.

<sup>378</sup> *Greenberg v Miami Childrens'* (n33) 1017.

<sup>379</sup> *Yearworth v North Bristol* (n20) [13].

<sup>380</sup> *Re: Organ Retention* (n52) [170] –[206], [206]: “Once the doctor-patient relationship is established, as I hold it is, in my view, the clinician owed a duty of care when seeking consent for a post-mortem examination. Although the statutory duty is to ensure non-objection, that must, in my judgment, involve some explanation of to what the parents are being asked not to object. Again, in my opinion, that must involve some explanation of the procedures of a post-mortem of which the removal and retention of organs is a relevant part. In the circumstances, I hold that the duty of care extended to giving the parents an explanation of the purpose of the post-mortem and what it involved including alerting them to the fact that organs might be retained.”

<sup>381</sup> TW Merrill and HE Smith, ‘The Property / Contract Interface’ (2001) 101 *Columbia Law Review* 183.

defendant arose because they took possession of the semen in circumstances that “involve[d] an assumption of responsibility of the safe keeping of the goods”.<sup>382</sup> The finding of a bailment relationship requires also a factual inquiry into the circumstances of the transfer of possession that took place between the claimant and defendant.

### iii. Latent Rights

The duties of confidentiality that protect a persons interest in his or her privacy is an area of law that developed from requiring direct rights to an intermediate position between pre-existing and direct rights. This traditional formulation of a breach of confidence required that the information “must have been imparted in circumstances importing an obligation of confidence”.<sup>383</sup> An action for breach of confidence was therefore originally only actionable against a set of persons who fell into the relationship of confidence. Yet, this requirement that rights of privacy arise as direct rights has evolved. The catalyst for this change has been the “horizontal application” of the Human Rights Act 1998 to the law of confidential information.<sup>384</sup>

Prior to the Human Rights Act 1998, “it remained the case that there had to be something over and above the quality of the information itself in order to impose an obligation of confidentiality”.<sup>385</sup> In other words, the information not only needed to have a personal or confidential quality about it, but also circumstances in which the defendant acquired the information had to be circumstances which a duty of confidence could be imposed on the defendant.

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<sup>382</sup> *Yearworth v North Bristol NHS* (n20) [48(c)]: “Thus “the obligation arises because the taking of possession in the circumstances involves an assumption of responsibility for the safe keeping of the goods”: see the advice of the Privy Council in *Gilchrist Watt and Sanderson Pty. Ltd v. York Products Pty. Ltd* [1970] 1 WLR 1262 at 1268H.”

<sup>383</sup> *Coco v AN Clark* [1969] RPC 41, 42: “The information itself...must have a necessary quality about it...It must have been imparted in circumstances importing an obligation of confidence...and a detriment is suffered from the unauthorised use of the information.”

<sup>384</sup> G Philipson, “Transforming Breach of Confidence: Toward a Common Law Right to Privacy under the Human Rights Act” (2003) *The Modern Law Review* 726, 728.

<sup>385</sup> G Philipson, “Transforming Breach of Confidence” (n384) 743.

However, since the introduction of the Human Rights Act 1998 the courts have started to dilute the second element of confidentiality in an attempt to give greater protection to a claimants right to family and private life under Article 8 of the ECHR. Here I will briefly mention three of these cases. In *Venables v News Group Newspapers*,<sup>386</sup> the Court granted an injunction that prohibited the publication of any information that could identify, or the location of, two youth offenders released from prison. The Court was explicit in the injunction that the duty not to distribute the information did not depend on the circumstances through which the information was received. In effect, the court “granted an injunction against the world”<sup>387</sup> and suspended, for this case, the second element of confidential information.

Although the approach in *Venables* can arguably be confined to its own facts, subsequent case law has also reduced the requirement of a duty of confidence. For instance, the Court of Appeal in *A v B plc* suggested that:

a duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows or ought to know that the other party can reasonably expect his privacy to be protected.<sup>388</sup>

Although the court in *A v B* still maintained the requirement of a duty of confidence, as Philipson identifies, the “re-working” of the element “opens up the possibility that such an expectation of privacy could arise simply on the basis of the obviously private nature of the information itself”.<sup>389</sup> Hence, where there quality of the information is particularly personal, this quality in the information will itself impose a duty on persons who acquire the information. The House of Lords in *Campbell v MGN*<sup>390</sup> affirmed the reformulation of the second element. Lord Nichols observed that confidentiality:

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<sup>386</sup> *Venables and another v News Group Newspapers* [2001] 1 All ER 908

<sup>387</sup> G Philipson, ‘Transforming Breach of Confidence’ (n384) 744-5.

<sup>388</sup> *A v B plc* [2003] 3 WLR 542, 551.

<sup>389</sup> G Philipson, ‘Transforming Breach of Confidence’ (n384) 746.

<sup>390</sup> *Campbell v MGN* [2004] UKHL 22.

has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. In doing so it has changed its nature...Now the law imposes a 'duty of confidence' whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential.<sup>391</sup>

This shift in the law of confidential and personal information has made the right to privacy operate more like property rights-based actions insofar as the relationship between the rights-holder and the personal information may be sufficient to ground duties of confidence even where there is no interaction or transaction between rights-holder and duty-bearer, *provided* that the duty-bearer knows or ought to have known of the 'confidential quality' of the information. Hence, under the 'the emerging tort of privacy', the circumstances of how the information is parted, and received, are *relevant to* whether the claimant has 'reasonable expectation of privacy', but the interaction *is not required* in order for the right to privacy to arise.

We therefore have three bases upon which a right may arise. A right may be a pre-existing right that is premised upon the relationship between the right-holder and the thing. Alternatively, a right may be direct right, arising through the interaction between the rights-holder and the duty-bearer. Finally, it may be a latent right, primarily concerning the relationship between the rights-holder and the thing but is only actionable against persons who are or ought to be aware of the interest.

## **b. The Content of the Right**

The second structural feature concerns the content of the right. If I have a right to possess a thing, different branches of law will protect different dimensions of my right of possession. I suggest there is a structural distinction between branches of law that protect "original" dimension of a right and branches of law that protect only the "derivative" dimension of a right.<sup>392</sup> This distinction can also

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<sup>391</sup> *Campbell v MGN* (n390) [14].

<sup>392</sup> S Green, 'Rights and Wrongs: An Introduction to the Wrongful Interference Actions' in D Nolan and A Robertson (eds), *Rights and Private Law* (Hart Publishing, 2012) 538.

be understood in terms of torts that are “actionable *per se*” and torts that are “actionable upon proof of damage”.<sup>393</sup> However, here the language of ‘damages’ is reserved for a separate inquiry as to the remedial response of the law to the interference of the (original or derivative) rights of the rights-holder. As Nolan explains, “the issue of the damage sufficient to establish a cause of action should not be confused with the harms for which recovery is permitted once the cause of action has been established”.<sup>394</sup>

The ‘original’ dimension of an entitlement concerns the relationship between the rights-holder and the thing. For instance, Matthew may have a possession entitlement so that they have physical control, or the right to obtain physical control, over a painting. Mark may have a management entitlement over the painting so that Mark is able to determine how and who uses the object. Lucy may have the right to transfer all of the entitlements to the painting to another person. These are “right[s] to the subject matter”<sup>395</sup> since they concern only the relationship with the thing.

When someone is deprived of an ‘original entitlement’ they suffer – generally speaking – a loss. The loss they suffer, however, is intangible. Depriving Matthew of his rightful possession of the painting, disregarding Mark’s valid instructions as to the use of the painting or preventing Lucy from transferring the entitlements to another, are all instances of interference with the relationship between entitlement-holder and thing. Yet, it is difficult to quantify the harm done, or loss suffered, that is caused by merely disrupting the relationship between the Matthew, Mark, Lucy and the thing.

In such situations of interference, Matthew and Mark will often be able to identify a tangible loss that follows from the deprivation of the original entitlement; it is because the Matthew was deprived of possession of the painting that Matthew could not participate in the exhibition, it is because, contrary to Mark’s instructions, the painting was exposed to regular sunlight that the painting is discoloured and

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<sup>393</sup> D Nolan, ‘New Forms of Damage in Negligence’ (2007) 70(1) *Modern Law Review* 59, 60: “The first is the rather obvious observation that some torts are actionable *per se* and some are actionable only on proof of damage.”

<sup>394</sup> D Nolan, ‘New Forms of Damage in Negligence’ (n393) 61.

<sup>395</sup> S Green, ‘Rights and Wrongs’ (n392) 538.

has depreciated in value, it is because Lucy could not transfer the painting overseas Lucy could not benefit from a lucrative contract.

These tangible losses are the “derivative” dimensions of entitlements.<sup>396</sup> The tangible value of having entitlements consists of having derivative entitlements in the object, resource or asset; the ability to display a painting, to preserve a painting, or to profit from the sale of a painting. In short, an interest *in* the subject matter.<sup>397</sup>

Protection of both the original and derivative dimension of an entitlement follows from the entitlement being characterised as an exclusionary interest. Since exclusionary interests concern the exercise of open-ended entitlements, interference with the relationship between the person and thing is *itself* an intrusion into the sphere of protected activity. Depriving someone of their rights of possession or acting inconsistently with their instructions as to the use or care of the object, are actionable wrongs. For exclusionary interests, the law performs a “qualitative” assessment to determine that “either an individual has had a right infringed, or he has not”.<sup>398</sup> If the right has been infringed, then the individual can recover for the loss in original and derivative entitlements.

In contrast, where an interactive interest arises, the law is concerned with the particular activity of participating in an exhibition, preserving a painting or selling a painting; the relationship between rights-holder and thing is not viewed as sufficiently important *itself* to attract legal protection; only particular actions, preferences or choices that follow from the ownership relationship are legally protected. Here the law is protecting particular activities or interaction and performs a ‘quantitative assessment’ of whether the claimant’s interest in the activity or interaction was interfered with by the defendant.<sup>399</sup>

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<sup>396</sup> S Green, ‘Rights and Wrongs’ (n392) 538.

<sup>397</sup> S Green, ‘Rights and Wrongs’ (n392) 538.

<sup>398</sup> S Green, ‘Rights and Wrongs’ (n392) 536.

<sup>399</sup> S Green, ‘Rights and Wrongs’ (n392) 536.

## i. Original Rights

Conversion, reversionary injury, trespass to goods and trespass to the person all concern original rights. We can identify the content of the right by looking to losses that are recoverable under these actions. Under Section 3 of the Torts (Interference with Goods) Act 1977, the relief available for wrongful interference with the possession or control of goods is either:<sup>400</sup>

- (a) an order for delivery of the goods, and for payment of any consequential damages;
- (b) an order for delivery of the goods, but giving the defendant the alternative of paying damages by reference to the value of the goods, together in either alternative with payment of any consequential damages; or
- (c) damages.

Recoverable losses include both loss from the interference with the good and losses consequential to (or derived from) the interference with the good. The key observation that S Green provides is that consequential loss “whilst potentially recoverable, is not necessary for the action to succeed, since this is not its primary concern”.<sup>401</sup> Rather, the primary concern of personal property law is relationship with the thing. Wrongful interference with goods is therefore, *by definition*, concerned with “damage to goods *or* to an interest in goods”.<sup>402</sup> In other words, to succeed in a claim in conversion, trespass, or reversionary injury, it is sufficient to show that the loss suffered concerned interference with the possession or control relationship with the thing. As Stevens explains, “There need be no loss *consequent* upon the defendant’s interference”.<sup>403</sup>

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<sup>400</sup> Torts (Interference with Goods) Act 1977, Section 3(2).

<sup>401</sup> S Green, ‘Understanding The Wrongful Interference Actions’ (n124) 21.

<sup>402</sup> Torts (Interference with Goods) Act 1977, Section 1(d) [emphasis added].

<sup>403</sup> R Stevens, *Torts and Rights* (Oxford University Press, 2007) 66.

Trespass to the person also concerns original rights. To succeed in claim for assault, battery or unlawful detention, it is sufficient to show that there was the threat or the application of force to the body or the deprivation of the free movement of the body. The intrusion into the sphere of ‘self-ownership’ is itself sufficient for an action in tort, without having to show a loss derived from the interference. As Herring explains that in the medical context, unlike a claim in negligence causing personal injury, “in a case of battery there is no need to show that a patient suffered loss because the battery will be itself a legal wrong”.<sup>404</sup>

Although negligence actions have so far been characterised as protecting interactive rather than exclusionary interests, negligent damage *to property* nonetheless concerns original rights. This is because claims in negligent damage to property have “dual sources of rights and duties”,<sup>405</sup> so that negligence provides a *basis* for a defendant’s duty not to interfere with an existing asset (a ‘direct-duty’), yet the “existence and content” of the existing rights in “is determined by the law of property”.<sup>406</sup> This means that the *content of the right* concerns both the original and derivative dimensions of the entitlement. Or, as Stevens explains, “damages for negligent damage to property are concerned with the vindication of rights, and not with compensation for loss”.<sup>407</sup> An action for negligent damage to goods therefore represents an overlap between the recognition of existing property rights (the content of the right) and the right to recover for losses that are caused by wrongful conduct (the basis of the right).

I also suggest that confidentiality with regards to personal information has developed to recognise the interference with original entitlements as an actionable loss. Although in the traditional formulation of the requirements for a breach of confidence in *Coco v Clark*, Justice Megarry stated that “there must have been an unauthorised use of information *to the detriment* of the party communicating

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<sup>404</sup> J Herring, *Medical Law and Ethics* (n59) 152.

<sup>405</sup> S Green, ‘Rights and Wrongs’ (n392) 541.

<sup>406</sup> S Green, ‘Understanding The Wrongful Interference Actions’ (n124) 16: “Once the action has been triggered by a breach of the relevant duty, the process then involves a consideration of the content of the claimant's right.”

<sup>407</sup> R Stevens, *Torts and Rights* (n403) 73. See also D Nolan, ‘New Forms of Damage in Negligence’ (n393) 61: “The fourth point is that physical harm to the claimant’s person or property clearly constitutes actionable damage for negligence purposes, though the boundaries of the concept of physical damage are not always clear.”

it”,<sup>408</sup> Justice Megarry in the same judgment left open whether this requirement was necessary.<sup>409</sup> Lord Keith in *Guardian No 2* then broadened the detriment requirement to recognise, what has been termed here, ‘original loss’:

So I would think it a sufficient detriment to the confider that information given in confidence is to be disclosed to persons whom he would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way.<sup>410</sup>

Hence, unauthorised disclosure of confidential information *itself* may be sufficient detriment to satisfy the third requirement of a breach of confidence. There have been further suggestions that it is unnecessary to show ‘detriment’ for breaches of *medical* confidentiality,<sup>411</sup> so that the emerging tort of privacy appears to protect the relationship between the confider and the information without the confider having to show a loss that was derived from the interference with the relationship of control.

## ii. Derivative Rights

“The problem”, that S Green identifies, “is that the original right is alien to the law of torts as it is native to the law of property”.<sup>412</sup> Whereas property rights-based actions recognise that the deprivation of original entitlements, the remaining torts are generally unwilling to recognise the intangible loss that is suffered from (merely) the interference with the relationship between rights-holder and thing.

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<sup>408</sup> *Coco v AN Clark* (n383) 47 [emphasis added].

<sup>409</sup> *Coco v AN Clark* (n383) 48; R Arnold, ‘The Protection of Confidential Information in the Human Rights Era: Two Aspects (2007) 2.9 *Journal of Intellectual Property Law & Practice* 599.

<sup>410</sup> *A-G v Guardian Newspapers (No 2)* [1988] UKHL 6, [256].

<sup>411</sup> See *Bluck v Information Commissioner* (2007) 98 BMLR 1, [15].

<sup>412</sup> S Green, ‘Rights and Wrongs’ (n392) 538: “The law relating to wrongs is more comfortable with having something tangible to remedy, than it is with protecting the very existence of relationships, since the latter is more usually the province of the laws of contract and property.”

Unlike property-based actions or trespass to the person, “to succeed in a claim in negligence it must be shown that the patient suffered some harm”.<sup>413</sup> The effect of this reluctance of non-property based rules to identify loss from deprivation original entitlements is to add an extra remedial hurdle. The two negligence claims in *Yearworth* are illustrative of the difference in approaches to actionable loss. Their claim for negligence causing injury or distress failed because they could not prove that, on the balance of probabilities, that damages to the semen interfered with their ability to conceive a child.<sup>414</sup> That is, they failed to prove a harm or loss in a derivative sense.

In order for the claim for negligent damage to property to succeed, the claimants needed to prove that they had legal ownership or possessory title to the property concerned at the time the loss or damage occurred. Once the semen in *Yearworth* was conceived of as items of property, the claimants were able to succeed in their negligence claim since they were able prove interference with their ‘legal ownership or possessory title’.<sup>415</sup> That is, interference with an ‘original’ right.

As the law currently stands, the willingness of property rules to identify actionable loss is strength of property law as a tool for protecting ownership entitlements in separated biological material. A distinction therefore exists between property-based actions, which recognises loss in the deprivation of an (intangible) original entitlement, and loss-based actions, that require proof of loss in a (tangible) derivative entitlement. It is this distinction that was the driving force behind the recognition of property rights in semen in *Yearworth*.

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<sup>413</sup> J Herring, *Medical Law and Ethics* (n59) 152.

<sup>414</sup> *Yearworth v North Bristol NHS* (n20) [24]: “The determination under challenge was to the effect that the decision in *Gregg v Scott* [2005] UKHL 2, [2005] 2 AC 176, compelled a conclusion that, unless the men were to demonstrate a greater than even chance that the lost sperm could have been used in order to achieve conception, then, irrespective of any recovery of their natural fertility, they could not claim in respect of such physical damage to their overall ability to become fathers as was wrought by the so-called personal injury.”

<sup>415</sup> *Yearworth v North Bristol NHS* (n20) [25]: “In order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred.” per Lord Brandon in *Leigh and Silavan Ltd v Aliakmon Shipping Co. Ltd* [1986] AC 785 at 809F.

For Nwabueze, it is this feature of the common law that makes the use of property rules for regulating the donation of organs necessary if “only to avoid the remedial hurdle of proving a contemporaneous...loss in negligence”.<sup>416</sup> Nwabueze correctly identifies that in instances where an organ for donation are misdirected, misapplied or maliciously destroyed, it is difficult to find an actionable loss under non-property based rules. His quasi-proprietary solution is to avoid the remedial hurdle of “proving the existence of a physical or pecuniary injury necessary to ground an action in negligence...by attributing to the claimant a quasi-property right” in the biological material.<sup>417</sup>

Our second structural distinction is therefore concerned with the content of the right. Exclusionary interests give rise to rights that concern the relationship between the person and the thing, as well as any benefits derived from the relationship. It follows that the interference with goods, the person or personal information is itself sufficient to prove an actionable loss. In contrast, the rights and duties stemming from interactive interests only concern the activities derived from the use of a thing, so proving an actionable loss creates a ‘remedial hurdle’.

### **c. The Content of Duties**

The third structural feature that we are concerned with is the content of the duty. Where a right arises, a correlative duty will also arise so as to protect the right. Yet, what constitutes inconsistent conduct - or what constitutes a breach of the underlying duty<sup>418</sup>- varies between branches of private law. In other words, legal rules differ in terms of the type of interference that is sufficient for a successful claim against the defendant.

Here we are concerned with a distinction between singular and alternative duties (the distinction is conventionally described as between strict and fault-based duties). ‘Strict’ duties impose a singular

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<sup>416</sup> RN Nwabueze, ‘Donated Organs Property Rights and the Remedial Quagmire’ (2008) 16 *Medical Law Review* 201, 205.

<sup>417</sup> R N Nwabueze, ‘Remedial Quagmire’ (n416) 205.

<sup>418</sup> JL Coleman, ‘Theories of Tort Law’ EN Zalta (ed.) *Stanford Encyclopaedia of Philosophy* (Stanford University, 2009) § 2: “The conventional understanding of the difference between fault and strict liability goes astray precisely because it distinguishes the breach of the duty from the fault requirement. The better view is that the difference between fault and strict liability is a difference in *the content of the underlying duty of care*” [emphasis added].

duty not to undertake voluntary action that interferes with the rights of the rights-holder.<sup>419</sup> In contrast, there are alternative success conditions for the duty-bearer under a ‘fault-based’ duty since the duty-bearer succeeds in performing the duty by not interfering with the rights of the rights-holder (performing their “obligation to succeed”) or by causing interference but doing so ‘innocently’ (by performing their “obligation to try”).<sup>420</sup> Singular duties are concerned with the outcome of the duty-bearers voluntary conduct, whereas alternative duties are concerned with the combination of the outcome of the duty-bearer’s conduct and the standard of conduct undertaken by the duty-bearer.

The difference between singular and alternative duties can be clearly seen in circumstances where a loss is caused by the conduct of the interferer despite the interferer taking the required precautionary steps. Where singular duties are imposed, provided the conduct was voluntary, the loss is shifted to the interferer regardless of fault. Where there are alternative duties and neither of the parties are at fault, the rights-holder bears the loss.<sup>421</sup> It becomes a vexed question of which, out of two ‘innocent’ parties, ought to suffer the loss.<sup>422</sup>

A criticism of singular duties is that they concern only the agency or autonomy of one of the two parties to the interaction. Where the interferer is not at fault, to nonetheless shift the loss onto them is to disregard their agency in taking the reasonable care and precautions in attempting avoid causing a loss. It creates a “basic inequality” insofar as an interferer is liable for voluntary conduct that intrudes into the protected sphere of activity, and thus “the interests of [the entitlement-holder]

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<sup>419</sup> P Cane, ‘Causing Conversion’ (2002) 118 *Law Quarterly Review* 544.

<sup>420</sup> J Gardner, ‘Obligations and Outcomes in the Law of Torts’ in P Cane and J Gardner (eds) *Relating to Responsibility: Essays for Tony Honoré* (Hart Publishing, 2001) 10: “An obligation to succeed is a straightforward obligation to  $\phi$ , for the performance of which only one’s actually  $\phi$ ing matters, never mind what steps one takes (if any) with a view to  $\phi$ ing. An obligation to try is the converse case: only the steps one takes with a view to  $\phi$ ing are relevant to whether one performs the obligation, never mind whether one actually  $\phi$ s thereby.”

<sup>421</sup> E Weinrib, *The Idea of Private Law* (Harvard University Press, 1995), 174: “Even in a fault system, individuals may be required to bear the costs of accidents that are not their fault – if neither litigant is at fault, the system is designed so that the faultless victim bears the cost.” See also AM Honoré, ‘Responsibility and Luck’ (1988) *Law Quarterly Review* 104.

<sup>422</sup> J Coleman, ‘The Morality of Strict Tort Liability’ in *Markets, Morals, and the Law* (Cambridge University Press, 1988) 180-182

unilaterally determine the contours of what is supposed to be a bilateral relationship of equals”.<sup>423</sup> Singular duties provide, as Weinrib argues, “extreme solicitude for the plaintiff’s rights”.<sup>424</sup>

We can understand this ‘extreme solicitude’ as following the three assumptions that lie behind the boundary approach to property and the body. If we accept the set of assumptions that justify entitlements in property and the body as representing spheres of undefined activity then it follows that the interferer - the one that caused an intrusion into the sphere - ought to bear the loss despite taking reasonable precautions. This is why the relative “force of interests” - that underlie the priority given to the interests of the rights-holder over the circumstances of the duty-bearer - shapes the content of the duty.<sup>425</sup> Hence, one way to understand the imposition of singular duties is by treating the intrusion into the sphere of undefined activity as ‘a wrong thing’, despite the absence of ‘wrong doing’ (an unjustified wrong thing).<sup>426</sup>

In contrast, the legal protection of interactive interests - that delineate the rights and duties associated with an activity or interaction - can be understood as starting from a position of ‘basic equality’ between the parties in the bilateral relationship and requires a finding of fault in order to attribute the loss to the interferer.

## i. Singular Duties

Let us therefore consider the type of interference that is sufficient for a successful property rights-based action. Trespass to goods requires direct and wrongful interference with the claimant’s goods whereas an act conversion requires more: it must amount to the appropriation of full benefit of the claimant’s entitlements.<sup>427</sup> In *Arora*, for example, the respondent’s interference with the cell-line

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<sup>423</sup> E Weinrib, *The Idea of Private Law* (n421) 179-180.

<sup>424</sup> E Weinrib, *The Idea of Private Law* (n421) 179-180.

<sup>425</sup> JL Coleman, ‘Theories of Tort Law’ (n418) § 2.

<sup>426</sup> J Gardner, ‘Wrongs and Faults’ in AP Simester, *Appraising Strict Liability* (Oxford University Press, 2005) 55-6.

<sup>427</sup> S Green, ‘Rights and Wrongs’ (n392) 528-9.

amounted to conversion since the respondent exercised total, albeit brief, control over the cell-line in a way that was wholly inconsistent with the claimant's entitlements.<sup>428</sup>

The duties in these property rights-based actions differ in terms of the *degree* of interference (from interference with, to the deprivation of, the rights-holders entitlements). Yet, the content of the duties concern conduct that is inconsistent with the rights of the rights-holder. The duties all have a *singular* success condition for performing the duty.<sup>429</sup> That is to say, the only way of performing the duty under these property rights-based actions is to not undertake voluntary conduct that directly interferes with, or appropriates, the goods. Note that although Lord Nichols in *Kuwait Airways* describes conversion in terms of "deliberate" conduct,<sup>430</sup> the conduct need only be deliberate in "the sense that the [interferer] deliberately performed the act"<sup>431</sup> and not in the sense that the interferer deliberately or intentionally interfered with the rights of the rights-holder.<sup>432</sup>

Singular duties are also imposed under trespass to the person. A battery is committed where the defendant intentionally causes physical contact.<sup>433</sup> The intention required concerns only the deliberateness of the conduct, and not an intention to cause the harm that follows from non-consensual contact. The duty imposed under battery is therefore a singular duty not to undertake an action that causes non-consensual physical contact.

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<sup>428</sup> *US v Arora* 860 F.Supp. (1994) 1091, 1097-1100.

<sup>429</sup> JL Coleman, 'Theories of Tort Law' (n418) §2.

<sup>430</sup> See *Kuwait Airways Corp v Iraqi Airways Co and anor (Nos 4 & 5)* [2002] UKHL 19, [2002] 2 AC 886 (Lord Nicholls) [39] "Conversion of goods can occur in so many different circumstances that framing a precise definition of universal application is well nigh impossible. In general, the basic features of the tort are threefold. First, the defendant's conduct was inconsistent with the rights of the owner (or other person entitled to possession). Second, the conduct was deliberate (not accidental). Third, the conduct was so extensive an encroachment on the rights of the owner as to exclude him from use and possession of the goods."

<sup>431</sup> S Green, 'Rights and Wrongs' (n392) 532.

<sup>432</sup> P Cane, 'Causing Conversion' (2002) 118 *Law Quarterly Review* 544: "The fundamental point is that conversion consists of conduct inconsistent with the owner's rights regardless of the intention with which it is done."

<sup>433</sup> FA Trindale, 'Intentional Torts: Some Thoughts on Assault and Battery' (1982) 2 *Oxford Journal of Legal Studies* 211, 220: "In battery what is required is intentional contact not an intention to do harm - and it is not correct to say that trespass can only be brought for the direct physical infliction of harm."

Duties of confidentiality are also singular duties of non-disclosure. Yet, unlike the duties of non-interference under property and trespass to the person, the duty of non-disclosure is a duty that covers any disclosure, whether it is intentional or inadvertent disclosure, of confidential information.<sup>434</sup> This is an even stricter standard since conduct of the duty-bearer need not be deliberate conduct in order for the duty-bearer to have breached the duty of confidence owed to the rights-holder.

Duties of confidence may *appear* to be fault-based duties since the duties may arise upon knowledge of the rights-holder's reasonable expectation of privacy. However, the requirement of knowledge concerns how the duty arises, and does not concern how the duty is performed. The content of the duty of confidentiality is a singular duty of the non-disclosure of confidential information which provides only a singular success condition for the performance of the duty. The stringency of this protection of personal information reflects the relative importance of the privacy interests of the rights-holder *vis-a-vis* the interests of the duty-bearer who has actual or constructive knowledge of the rights-holder's privacy interest. Such an approach affords "extreme solicitude" for the rights of the rights-holder.

## ii. Alternative Duties

For actions in negligence, whether it is negligence causing damage to property, or physical or psychiatric injury, the content of the duties imposed concerns both the standard of care taken by the duty-bearer and interference with rights of the rights-holder. These duties under negligence have alternative success conditions for performing a particular duty: either the defendant satisfies the duty by not causing harm or satisfies the duty by causing harm despite taking the required precautions and care.<sup>435</sup>

For example, to succeed in their claim in bailment and for negligence damage to property, the claimants in *Yearworth* were required to show that as the NHS Trust failed to take reasonable steps to

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<sup>434</sup> *A-G v Guardian Newspapers (No 2)* (n410) 34.

<sup>435</sup> JL Coleman, 'Theories of Tort Law' (n418) §2.

safe guard their proprietary or possessory interest in the stored semen.<sup>436</sup> Similarly, the claimants in *Re: Organ retention* were required to show that healthcare professionals, by adopting a practice where the details of the post moterm examination of deceased children are not provided to the parties “without thought to the individual circumstances of each parent or family” was a breach of their duty of care to the parents.<sup>437</sup>

The fundamental point is that claims in negligence and bailment need to establish both that the health care institution (the defendants) did the ‘wrong thing’ (breached their duty of care) and did ‘something wrongful’ (caused emotional distress or damage to property);<sup>438</sup> the content of the duty is two-fold. In contrast, regarding trespass to goods and trespass to the person, it is enough to show that the defendant did something wrongful (direct interference with the right to possession or deliberate contact).

### *Dual sources*

An important feature of personal property law and of law protecting bodily integrity is that it benefits from dual sources of law. An item of property is protected by duties of non-interference under conversion and trespass as well as duties of care under negligence and bailment. Similarly, trespass to the person prohibits physical contact (that may cause personal injury) and negligence imposes liability were a breach of a duty of care causes personal injury.

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<sup>436</sup> *Yearworth v North Bristol* (n20) [49]: The unit acquired exclusive possession of the sperm. (d) The unit held itself out to the men as able to deploy special skill in preserving the sperm. (e) Analogously to its admission in relation to the claims in tort, the Trust admits that, if the unit was a bailee of the sperm, it was in breach of the duty of care consequent upon the bailment. (f) The unit extended, and broke, a particular promise to the men, namely that the sperm “will be stored ... at minus 196°C ...”, quoted at [6(c)(ii)] above.”

<sup>437</sup> *Re: Organ Retention* (n52) [562].

<sup>438</sup> J Gardner, ‘Wrongs and Faults’ (n426) 55-6: “distinction between doing the wrong thing and doing something wrongful is of pervasive importance in most developed legal systems...the mere fact that someone was justified (=not wrong) in acting wrongfully does not mean that one did not act wrongfully, and does not by itself block one’s liability to pay reparative damages to those whom one wronged”, *cf.* with JL Coleman in ‘Theories of Tort Law’ (n418) §2: “The fault requirement is thus an aspect of the underlying duty, not a reflection on the character of the defendant’s action.”

The two types of duty are complementary. On one hand, duties of non-interference address voluntary or ‘deliberate’ conduct that is inconsistent with the rights of the rights-holder and “negligence, on the other hand, covers those situations in which there has been on the part of the defendant no conduct which could be classed as voluntary, and yet which nonetheless interferes with the” rights of the rights-holder.<sup>439</sup>In contrast, the content of duties of confidence concern any conduct that is inconsistent with the rights of the rights-holder. This provides a stringency of protection greater than the combined duties under property law.

In sum, duties of non-interference may arise because of the “relative force” of the exclusionary interest. Singular duties of ‘deliberate’ non-interference arise under actions for conversion, trespass to goods, trespass to the person, and singular duties of (deliberate or inadvertent) non-disclosure arise under duties of confidentiality. Duties of care may also arise under bailment and negligence. Such duties require from the duty-bearer either the non-interference with the rights of the rights-holder or performance of sufficient precautionary measures to avoid interference with the rights of the rights-holder.

## Chapter Summary

Since the exercise of entitlements *in things* gives rise to an undefinable set of activities, the law adopts a ‘boundary approach’ to the protection of our entitlements in property and the body. This boundary has three structural features: pre-existing rights, original rights and singular duties of non-interference.

However, there are areas of law that deviate from the boundary approach. Where the law focuses on the bilateral structure of an action or activity, rights may arise ‘directly’ out of a transaction or interaction, the content of the right concerns the activity that is enabled through the use of a thing, and the duty imposed on others is an alternative duty of either non-interference or a standard of behaviour. Although both the boundary and bilateral strategies are employed to protection personal and

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<sup>439</sup> S Green, ‘Understanding The Wrongful Interference Actions’ (n124) 25.

proprietary interests, the boundary approach is best able to protect our *interests in things*. It is the stringency of protection that is provided by the boundary approach under property law that explains the motivation to treat items of bodily material as items of property.

The purpose of this Chapter has been to identify the conceptual and structural features of property law as compared to other branches of law that could govern the use and storage of bodily material. This conceptual and structural framework will enable us, in the next Chapter, to prescribe how the law ought to govern the use and storage of bodily material. To conclude this Chapter, let us consider how the above conceptual and structure distinction enables us to better understand how the law on the use and storage of bodily material has developed.

The first structural feature of property law introduced here describes property rights as pre-existing rights. A pre-existing right is exercisable against an open set of persons. This explains the employment of the common law work or skill exception. In both *Doodeward* and *Kelly*, the work or skill exception was applied so as to ground a right of possession that was enforceable against the defendants independent of any particular transaction or interaction. It was this particular structural feature of property rights that has motivated the first main exception to the no property rule. Consider also the main concern expressed by the Court in *Moore* with finding property rights in the spleen cell: property rights “impose liability on all those into whose hands the cells come.”<sup>440</sup> It was also pre-existing feature of property rights that also, in this instance, affirmed the ‘no property rule’.

I also suggested here that property rights protect ‘original rights’ in a thing, so that interference with the relationship with item of property is itself sufficient for the claimant to show an actionable loss. It is this feature of property rights that motivated the recognition of property rights in *Yearworth*. Since the patients were unable to show that the inadequate storage of the semen caused a consequential loss (opportunity to conceive), the success of the claim depended upon establishing an actionable loss by showing that inadequate storage deprived them of their “legal ownership or possessory title” under

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<sup>440</sup> *Moore v Regents of the University of California* (n25) 114.

property law.<sup>441</sup> By convincing the Court to treat their semen as an item of property, the claimants were able to show that the inadequate storage of their semen caused a “physical deprivation”.<sup>442</sup> It was ultimately this physical deprivation - or interference with an ‘original right’ - that enabled the claimants to succeed in their claim against the NHS Trust.

The difference between strict duties of non-interference (under conversion, trespass to goods, confidentiality and trespass to the person) and the alternative duties under (negligence and bailment), has not been central to the development of the law on the use and storage of separated bodily material. It is nonetheless illustrative of the difference between singular duties of non-interference and duties of care, which are applied to protect property and bodily integrity in tandem.

There is an attraction to pulling entitlements in bodily material into the ‘boundary approach’ and to treat such entitlements as exclusionary interests. The structure of rights that is afforded to exclusionary interests means that the rights are exercisable against an open set of persons, there is a dimension of material deprivation so as to more easily establish an actionable loss, and the duties imposed on others may be a more stringent duty. This ‘boundary approach’ may be an appropriate approach to the legal protection of entitlements in separated bodily material.

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<sup>441</sup> *Yearworth v North Bristol* (n20) [25].

<sup>442</sup> RN Nwabueze, ‘Remedial Quagmire’ (n416) 206.

## Chapter Five: Anonymity and Personality

We have an understanding as to why some entitlements give rise to exclusionary interests or interactive interests, and how the structures of different branches of private law are shaped by protecting these different interests. Yet, as we have seen, property interests are not the only exclusionary interests. We must now identify how *personal* rights and interests differ from *property* rights and interests.

I will argue in this Section that the conceptual difference between personal and property interests can be understood in terms of whether the activities, preferences and choices that the entitlements in a thing enable can exist independently of the entitlement-holder. I will then identify two structural features that follow from this conceptual divide. These concern:

- the content of the remedial duty: whether remedies aim to correct the misallocation of entitlements or aim to distribute benefits and burdens on a criterion of merit; and
- the transferability of the right: whether the right can be freely transferred to another, transferred under certain conditions, or is non-transferable.

This conceptual and structural distinction will enable us to grasp why not all entitlements in things ought to be treated as property rights; essentially, because property law provides inadequate legal protection of activities, preferences and choices that cannot exist independently of the entitlement-holder.

## Section One: Dependent and Independent Interests

So far, the protection of entitlements in items of property appears conceptually and structurally similar to the protection of entitlements in the (attached) body and personal information. We interfere with these entitlements when we transgress past the legal boundary constructed by pre-existing rights, original rights and singular duties. Yet, there are nonetheless conceptual and structural differences between someone's property on one hand, and their body and privacy on the other hand. For instance, despite sharing some conceptual and structural features, there remains a difference between the disposition of property in a bailment relationship and the disposition of information in a relationship of confidentiality, and a difference between trespass to goods and trespass to the person. The purpose of this Section is to identify what separates 'property rights' from 'personal rights.'

### a. The Separability Thesis

#### i. Transferability

For Munzer, the "most useful criterion" for distinguishing "property rights" from "personal rights" is "transferability".<sup>443</sup> If rights are conferred on an entity to protect their interests and choices, then according to Munzer:

Personal rights are...rights that protect interests or choices other than the choice to transfer. Property rights are rights that protect the choice to transfer.<sup>444</sup>

Moreover, within the concept of property rights there is a distinction between weak property rights, which protects gratuitous transfers, and strong property rights, which protects transfer for value.<sup>445</sup> Hence, for Munzer, the distinction between property and personal rights maps onto JW Harris' ownership spectrum.<sup>446</sup> Once the collection of entitlements moves along the spectrum, past

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<sup>443</sup> SE Munzer, *A Theory of Property* (n113) 47.

<sup>444</sup> SE Munzer, *A Theory of Property* (n113) 48.

<sup>445</sup> SE Munzer, *A Theory of Property* (n113) 49.

<sup>446</sup> JW Harris, *Property and Justice* (n3) 27.

control entitlements to include transfer entitlements, mere property arises. Moving further along the ownership spectrum to include income entitlements, the owned-thing becomes (strong) property.

Munzer's conceptual divide between property and personality is a workable starting point. Munzer is correct that property interests are transferable and personal interests are non-transferable, but this distinction as to what can be done with entitlements is a structural distinction, which reflects a deeper distinction as to how we characterise the exercise of entitlements. We must also consider *why* the concept of property can be distinguished from the concept of personality by the criterion of the ability to transfer entitlements.

## ii. Separability

According to Baroness Hale in *OBG v Allan*:

The essential feature of property is that it has an existence independent of a particular person: it can be bought and sold, given and received, bequeathed and inherited, pledged or seized to secure debts, acquired (in the olden days) by a husband on marrying its owner.<sup>447</sup>

It is because property rights exist independently of a particular rights-holder that allows property to can be transferred through sale, gift, inheritance or as security. This characterisation of property accords with Penner's Separability Thesis, which provides a slightly subtler tool as compared to Munzer's approach for differentiating property from personality. According to the Separability Thesis:<sup>448</sup>

Only those 'things' in the world which are contingently associated with a particular owner may be objects of property; as a function of the nature of this contingency, in

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<sup>447</sup> *OBG v Allan* [2007] UKHL 21 (Baroness Hale) [309].

<sup>448</sup> JE Penner, *The Idea of Property in Law* (n333) 111.

theory nothing of normative consequences beyond the fact that the ownership has changed occurs when an object of property is alienated to another.<sup>449</sup>

It therefore follows that:

A necessary criterion for treating something as property...is that it is only contingently ours; we must show why it is ours because it might well not have been.<sup>450</sup>

This Separability Thesis is similar to the Transferability Thesis insofar as property rights can be transferred, and transferred for value, because there are normative consequences from the change in entitlement-holder. Although personal rights *can* be taken away from the rights-holder, there are normative consequences from acquiring from another person a right that is necessarily (rather than contingently) associated with that person. What the Separability Thesis adds is an explanation *why* some ownership relationships are non-transferable. That is, because the preferences and choices that are enabled by some ownership relationships are connected to the particular owner. A recipient of these entitlements is unable to exercise the entitlements qualitatively in the same way. Whereas, in property relationships, the preferences and choices are only contingently associated with the owner and are therefore easily transferable.

To assist in the task of differentiating between personal and property rights, Penner provides two questions that test the nature of separability:<sup>451</sup>

- i. Is the owner still the same person if he no longer has this thing because it is taken away from him or destroyed?

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<sup>449</sup> JE Penner, *The Idea of Property in Law* (n333) 111.

<sup>450</sup> JE Penner, *The Idea of Property in Law* (n333) 111-112.

<sup>451</sup> JE Penner, *The Idea of Property in Law* (n333) 113.

ii. Does a different person who takes on the relationship to the thing stand in essentially the same position as the first person?

For instance, Joanna has personal rights to her bodily integrity and privacy, and has property rights to her wine collection and a painting. If Joanna were to be deprived of her personal rights: (i) Joanna's interests and choices would be altered in a way that affects her directly and fundamentally; the interference with her bodily integrity and privacy there would be an intrusion into Joanna as a person. Furthermore, (ii) Lucy could not acquire and exercise the same preferences and choices that Joanna exercises in her bodily integrity or personal information. The loss suffered by Joanna would be asymmetrical with the gain obtained by Lucy. The relationship between Joanna and her interests in her bodily integrity and privacy is a relationship that is particular to her; it cannot be substituted nor can another person adopt the relationship.

Whereas, if Lucy was to deprive Joanna of her property rights: (i) Although Joanna's preferences and choices are set back and constrained by the absence of her wine and painting, the absence of her wine or paintings would not alter Joanna's personhood and (ii) Lucy is able to acquire and exercise the same interests and choices regarding the wine and painting that Joanna had prior to her. Lucy's gain would be symmetrical with Joanna's loss. Apart from shifting the entitlements in the wine and painting from Joanna to Lucy, there are *no further normative consequences* of depriving Joanna of her preferences in, and choices regarding, her wine and painting *as property*. The *content* of the relationship is the same. The relationship between Joanna and her wine and painting is a contingent relationship; it can be substituted for other goods and another person can adopt the same relationship with the goods.

There are therefore two ways of describing the same distinction. Penner's criterion of whether there are 'normative consequences from change in rights-holder' accurately maps the boundary between property and personality by focusing on instances of transfer or interference. We can also understand the distinction between property and personality in terms of the character of preferences and choices that the entitlements enabled. Where the exercise of entitlements give rise to preferences

and choices that are “contingently associated with a particular owner”<sup>452</sup> or exist “independent of a particular person”,<sup>453</sup> then such entitlements represent *anonymous interests*. Whereas, if the exercise of entitlements give rise to preferences and choices that are necessarily associated with a particular person or cannot exist independently of the particular person, then such entitlements represent *personal interests*. I will use these two descriptions can be used interchangeably.

## **b. “Contested Commodities”**

The conceptual division between property and personal rights may not appear to be a clean division. Some argue that there are some ownership relationships that do not easily fit into either category. For example, consider Radin’s ‘property for personhood’, which are items of property that are characterised by “coexistent commodified and noncommodified understandings”, which she describes as giving rise to “incomplete commodities”.<sup>454</sup> Radin uses housing - “a sanctuary needed for personhood”<sup>455</sup> - and employment as examples of incomplete commodification.<sup>456</sup> Explaining our relationship with our employment, Radin suggests that:

For many of us, work is not only the way we make our living, but it is also part of ourselves. What we hope to derive from our work, and the personal importance we attach to it, are not understandable entirely in monetary terms, even though we demand and accept money. The ideals about work seem to be part of our conception of human flourishing.<sup>457</sup>

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<sup>452</sup> JE Penner, *The Idea of Property in Law* (n333) 111.

<sup>453</sup> *OBG v Allan* (n447) [309].

<sup>454</sup> MJ Radin, *Contested Commodities* (Harvard University Press, 1996) xiii; MJ Radin, ‘Property and Personhood’ (1982) 34 *Stanford Law Review* 957; CH Harrison, ‘Neither Moore nor the Market: Alternative Models for Compensating Contributors of Human Tissue’ (2002) 28 *American Journal of Law & Medicine* 77, 90.

<sup>455</sup> MJ Radin, ‘Property and Personhood’ (n454) 995.

<sup>456</sup> M J Radin, “Market Inalienability” (1987) 100 *Harvard Law Review* 1849, 1918.

<sup>457</sup> MJ Radin, ‘Market Inalienability’ (n456) 1918-1919.

Radin is correct that there are incomplete commodities. Yet, these contestable cases that Radin presents nonetheless represent anonymous interests. It is still possible for Joanna to stand in the same position as Lucy regarding Lucy's wedding ring, family home or employment. Although it is more difficult than with other commodities, Joanna can leave her job, sell her ring and home, and Lucy can obtain her job, buy her ring and her home. In such cases, although the ring, job or home are 'vehicles' or 'sanctuaries' for personhood, they are nonetheless contingent vehicles or sanctuaries.

Recall that Radin's explanation for why we ought to be entitled to these contested commodities was a Hegelian explanation. By attempting to connect the Hegelian individual to property rights, Radin creates a paradox in her own work:

The paradox within Radin's work is that it sets property against property. The self is understood as a function of property, and this propertised self is in turn expected to protect against the commodity form of the person.<sup>458</sup>

The central difficulty with the Hegelian account of property is showing a sufficient close link between the personhood of person ( $A$ ) and the object ( $b$ ) so as to justify why  $A$  ought to have entitlements into  $b$ , whilst simultaneously also showing a sufficient separation between the personhood of  $A$  and the object ( $b$ ) so the object ( $b$ ) can be treated as an item of property. If entitlements are justified because of the intimate connection between person and thing, then such entitlements are appropriately characterised as personal interests. Yet, as we saw in Chapter Two, if the entitlements in bodily material are only contingently associated with the person, then such entitlements are unlikely to survive the trade-off between social and pre-social analyses.

Nonetheless, we have conceptual distinction between *anonymous* and *personal* interests. This can be understood in terms of whether the entitlements in a thing enables preferences and choices that are

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<sup>458</sup> MJ Davis & N Naffine, *Are Persons Property* (n139) 9.

contingently, or necessarily associated with the entitlement-holder. Upon this criterion, even 'contestable commodities' represent anonymous interests.

## Section Two: Remedial Duties and Rights of Transfer

It is now possible to outline two structural features that follow from entitlements enabling preferences and choices that are either dependent upon, or independent of, the entitlement-holder. I will suggest here that property interests, as anonymous interests, give rise to transferable rights and corrective remedial duties, whereas personal interests concern non-transferable rights and redistributive remedial duties.

### a. The Content of the Remedial Duty

I will argue here that it is because property interests represent anonymous relationships between a rights-holder and a thing, the content of remedial duty is a ‘corrective’ duty. Corrective justice can be understood as “the maintenance and restoration of the notional equality with which the parties enter the transaction”<sup>459</sup> and is therefore concerned with how a wrongful interaction or “transaction is reversed, undone or counteracted.”<sup>460</sup> According to Weinrib, this species of justice “has become central to contemporary theories of private law”.<sup>461</sup>

In contrast, the duty for remedying interference with personal interests is best viewed as ‘redistributive’. The aim of redistributive justice is to divide the benefits and burdens among several potential entitlement holders in “accordance with some criterion that compares the relative merits” of the potential entitlement-holders.<sup>462</sup> More specifically, distributive justice may be guided by compensatory principles, retributive principles, or a combination thereof. I will then suggest that, in terms of the damages awarded under tort and personal property law, the difference between the aims of corrective and distributive justice map onto the distinction between special damages and general damages.

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<sup>459</sup> EJ Weinrib, ‘Corrective Justice in a Nutshell’ (2002) *The University of Toronto Law Journal* 349.

<sup>460</sup> J Gardner, ‘What is Tort Law For? Part 1. The Place of Corrective Justice’ (2011) *Law and Philosophy* 1, 9

<sup>461</sup> EJ Weinrib, ‘Corrective Justice in a Nutshell’ (n459) 349.

<sup>462</sup> EJ Weinrib, ‘Corrective Justice in a Nutshell’ (n459) 349.

## i. The Continuity (and Discontinuity) Thesis

Gardner provides a “Continuity Thesis” which explains the centrality and dominance of corrective justice in private law.<sup>463</sup> The Continuity Thesis, I suggest, would also add analytical depth to Coleman’s attempt to connect corrective justice specifically to property rights.<sup>464</sup> According to the Continuity Thesis, entitlements are allocated by an “initial norm of justice.” In addition to being a *ground* for allocation (provides a criterion for the determining the distribution of the entitlements),<sup>465</sup> the initial norm of justice is a *reason* for the allocation; it provides a normative underpinning for why the entitlements are distributed in a particular way<sup>466</sup> and gives rise to a *primary obligation* to respect the allocation.

### *Corrective Justice*

Remedies come into play when this primary obligation is not performed. According to Gardner, even when the primary obligation is not performed, so that the norm of justice is not adhered to, the reasons that underlie the norm of justice persist so as to still require adherence to the norm:

While an obligation is either performed or not performed, those reasons in favour of the action that contribute to its obligatoriness can each be conformed to more or less perfectly.<sup>467</sup>

*Enter* corrective justice. In cases where it is no longer possible to perform the primary obligation “one can often nevertheless still contribute to the satisfaction of some or all of the reasons that added

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<sup>463</sup> J Gardner, ‘What is Tort Law For? Part 1’ (n460) 27.

<sup>464</sup> JL Coleman, ‘Corrective Justice and Property Rights’ (1994) 11 *Social Philosophy and Policy* 124. JL Coleman’s central thesis is that (136): “The rights sustained by corrective justice must be ones that justify their enforcement against infringements and invasions by the actions of others, *even if they would not be enforceable against the actions of a state seeking to implement the correct allocation of property rights under the best available theory of distributive justice.*”

<sup>465</sup> J Gardner, ‘What is Tort Law For? Part 1’ (n460) 27.

<sup>466</sup> J Gardner, ‘What is Tort Law For? Part 1’ (n460) 27.

<sup>467</sup> J Gardner, ‘What is Tort Law For? Part 1’ (n460) 30.

up to make the action obligatory”.<sup>468</sup> Hence, the remedial obligation arises to rectify the loss caused by the failure to observe the primary obligation. For Gardner, “the normal reason why one has an obligation to pay for losses that are wrongfully occasioned” – to rectify the loss – is that “it constitutes the best available conformity with, or satisfaction of, the reasons why one had the [primary] obligation”<sup>469</sup> or, for Coleman, conforms to the “locality of local justice”.<sup>470</sup>

Corrective justice, by requiring the reversal of wrongful transactions, reallocates the entitlements back to the arrangement required by the primary obligation (which reflects the allocation determined by the initial norm of justice). If the initial norm of justice requires that Joanna is in position A, and if Lucy then wrongfully causes Joanna to be in position B then the primary obligation on Lucy to respect Joanna-in-position-A still applies and requires Lucy to put Joanna back into position A.

The assumption here is that there are no normative consequences of interaction beyond the misallocation of entitlements. The initial norm of justice is applicable because it is possible to restore misallocation of entitlements, or restore the preferences and choices that the entitlements enabled. In such cases, the remedial obligation can easily be performed: since Joanna had a perfectly good bicycle, which Lucy converted or negligently destroyed, the damages Lucy ought to pay is the cost of a replacing Joanna’s perfectly good bicycle or repairing Joanna’s bicycle to its original state. Damages can repair the loss because they are able to substitute for loss by either compensating for the loss in value or restore damaged goods, thereby returning the parties to the initial allocation of entitlements, and adhering to the initial norm of justice.

One of the key features of property interests is the way in which they remedy interference with entitlements by restoring, as near as possible, the initial allocation of the entitlements. This is possible because property law is concerned with preferences and choices that are contingent to the person, so

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<sup>468</sup> J Gardner, ‘What is Tort Law For? Part 1’ (n460) 33.

<sup>469</sup> J Gardner, ‘What is Tort Law For? Part 1’ (n460) 33 -34.

<sup>470</sup> JL Coleman, ‘Corrective Justice and Property Rights’ (n464) 133: “the local understanding of a more general norm.”

that when an entitlement is interfered with, the law is merely charged with restoring the allocation of entitlements. In essence, the law takes aim at restoring the entitlements, and presumes that the restoration of the preferences and choices that the entitlements enable will follow.

### *Redistributive Justice*

However, where there are normative consequences beyond the misallocation of entitlements the aims of corrective justice are inapplicable. This is because corrective remedial duties, which concern the restoration of entitlements through damages, are unable to address the normative consequences beyond the misallocation of entitlements.

In such circumstances, distributive justice surfaces as the natural alternative to corrective justice as the remedial aim of the law. Recall that distributive justice is concerned with dividing entitlements between persons in light of the relative merits of the potential entitlement-holders. When remedies are determined by a distributive justice norm, the remedial response is essentially a second, and almost *carte blanche*, allocation.

The crucial difference between distributive justice and corrective justice is that corrective justice reallocates the entitlements in attempt to adhere to the *initial* norm of justice and reverse the wrong done, whereas distributive justice reallocates the entitlements in accordance with a *new* norm of justice. The reason why a distributive, rather than a corrective justice, approach is applicable where personal interests arise is because mere restoration of the entitlements will not remedy or address the particular preferences and choices that the entitlements enabled.

For example, Lucy may be deprived of possession or control of a miscarried foetus or deceased infant, Joanna may be unable to undergo assisted reproductive therapy due to inadequately stored ovum, or bone marrow donated from Matthew to Mark may be misdirected or destroyed. Corrective justice is inapplicable for two reasons. First, in the case of Lucy and Joanna at least, it is not possible to restore the allocation of entitlements (as required by the initial norm of justice). Second, monetary

damages are unable to substitute for preferences and choices that have been forgone because of the interference with their entitlements. Rather, the appropriate remedial response is to award damages in accordance to a new norm of justice.

The new norm of justice (under the principle of distributive justice) may nonetheless resemble, in some regards, the initial norm of justice. As Gardner explains, although the Continuity Thesis does not apply to irreparable losses, some of the “implications of the continuity thesis are preserved in the norms regulating general damages”.<sup>471</sup> In other words, although damages for pain, suffering or distress do not represent an attempt to restore the wronged party to the original pattern of entitlements, there may be a ‘corrective spill over’. There is spill over insofar as the loss suffered by the wronged party is relevant in terms of determining the relative merit of the parties in the second allocation. Hence, distributive justice may take on *compensatory* aims.

The new norm of justice is able to embrace a wider range of considerations. In addition to compensation for pain, suffering and distress, the new norm of justice may also adopt *retributive* aims. For instance, as Radin explains, the aim of the damages may be to express public recognition of the infringing party’s fault rather than providing a benefit equivalent to the wronged party’s loss:

Compensation can symbolise public respect for rights and public recognition of the transgressor’s fault by requiring something important to be given up by one side and received on the other, even if there is no equivalent of value possible.<sup>472</sup>

Hence, the infringing party’s role in causing the loss and the loss suffered by the wronged party, may be important considerations for determining damages under a distributive justice approach. The aim of the remedial duty for personal interests seeks to allocate a set of benefits and burdens, in response to the wrongful interference, in light of the relative merits of the parties. This is because, to

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<sup>471</sup> J Gardner, ‘What is Tort Law For? Part 1’ (n460) 1.

<sup>472</sup> MJ Radin, ‘Compensation and Commensurability’ (1993) *Duke Law Journal* 56.

use Penner's terms, there are normative consequences above and beyond the mere misallocation of entitlements from the interference with personal interests that the law ought to be able to address.

## ii. Special and General Damages

I have suggested here that a corrective remedial duty takes aim at restoring the entitlements, and presumes that the restoration of the preferences and choices that the entitlements enable will follow, whereas distributive duties are better able to address losses in terms of personal preferences and choices. This difference between the aims of corrective and distributive justice maps onto the distinction between special damages and general damages awardable under tort and property law.

Recall that we are attempting here to identify the *content of the remedial duty*, or, in other words, attempting to identify what losses are recoverable. This is a separate from our earlier inquiry into the *content of the right*, or, in terms of the language of negligence, assessing whether the claim is actionable *per se* or actionable upon proof of damage.<sup>473</sup> Even if the claim is actionable *per se* (infringement of an original right), we nonetheless still need to identify what losses are recoverable (determine the content of the remedial duty). Equally, if the claim is actionable upon proof of damage, we nonetheless still need to identify what types of losses qualify as proof of damage. The distinction between special and general damages that is explored here, and that correlates with the distinction between corrective redistributive justice, concerns the content of the remedial duty.

### *Pecuniary Loss*

Since the remedial aim of property law is corrective, 'special damages' are awarded so that "the plaintiff is placed, as far as money can do it, in the same place as if the loss had not been inflicted on him".<sup>474</sup> Accordingly, where property is destroyed or damaged, the reasonable cost of replacement or repair will be recoverable, including any loss of profits from profit earning property. The remedial

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<sup>473</sup> D Nolan, 'New Forms of Damage in Negligence' (n393) 61: "the issue of the damage sufficient to establish a cause of action should not be confused with the harms for which recovery is permitted once the cause of action has been established."

<sup>474</sup> NE Palmer (ed), *Interests in Goods* (2ed. LLP, 1998) 548.

measure under conversion is subtly different. The full market value of the good is recoverable which is said to reflect “the action enforcing an involuntary purchase by the converter”.<sup>475</sup>

In *Arora*, for instance, two types of damages were awarded. The cost of replacement and repair to flasks and laboratory equipment was awarded (\$176.78).<sup>476</sup> Although, as a successful action in conversion, the market value of the cell-line was recoverable, it was held that since the cell-line had limited extrinsic or market value, so that the costs of recreating the cell-line were also awarded (\$273.52).<sup>477</sup> The assumption here is that losses suffered from interference are can be corrected by damages. This is valid assumption where property law governs anonymous interests. Since anonymous interests represent preferences and choices that have no particular association with the entitlement-holder, the loss suffered from the interference with the entitlements can be said to be commensurable with the award of damages.

### *Non-Pecuniary Loss*

However, interference with property rights may, in some circumstances, harm personal interests. In such circumstances, non-pecuniary loss may be recoverable where a claimant can succeed in his or her claim for psychiatric injury or emotional distress.<sup>478</sup> Otherwise, “[e]motional responses to unpleasant experiences of even the most serious type do not found a claim for damages”.<sup>479</sup>

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<sup>475</sup> NE Palmer, *Interests in Goods* (n747) 548.

<sup>476</sup> *US v Arora* (n427) 1110.

<sup>477</sup> *US v Arora* (n427) 1110.

<sup>478</sup> As JK Mason and GT Laurie note in ‘Property or Consent’ (n56) 728: “The action for negligence can also provide a remedy to relatives who have suffered nervous shock – but this requires evidence of psychiatric disease, not mere upset or hurt to feelings” which they compare with the “US position where damages for infliction of emotional distress and negligent handling of a corpse are recoverable by relatives if the body of a deceased family member is mistreated: *MacKay v US* (1993) 8 F 3d 826 and *Gonzalez v Metro Dade City Health Trust* (1995) 651 So 2d 673.”

<sup>479</sup> *RK v Oldham NHS Trust* [2003] Lloyd’s Rep Med 1 (QB) [20]; R Mulheron, ‘Rewriting the Requirement for a “Recognised Psychiatric Injury” in Negligence Claims’ (2012) *Oxford Journal of Legal Studies* 77. See also D Nolan, ‘New Forms of Damage in Negligence’ (n393) 61: “a distinction should be made between forms of harm which are never actionable in negligence, and those which are actionable only in certain limited circumstances. Emotional harm falling short of a recognised psychiatric illness is in the former category; recognised psychiatric illnesses themselves are in the latter (along with pure economic loss).”

In order to succeed in a claim for psychiatric injury, two particular elements need to be established. “The first hurdle”, according to Lord Bridge in *McLoughlin v O’Brian*, “is to establish that [the loss suffered is], not merely grief, distress or any other normal emotional, but a positive psychiatric injury”.<sup>480</sup> This means that the loss suffered must satisfy either the American Diagnostic and Statistical Manual of Mental Disorders or the International Statistical Classification of Mental and Behavioral Disorders.<sup>481</sup>

The second hurdle is foreseeability. Under negligence, an award for damages in respect of a psychiatric injury is only recoverable under subject to proof of causation and foreseeability.<sup>482</sup> Similarly, the damages awardable for breach of bailment are governed by contractual principles that require that the non-commercial loss be a “a major or important part of the object”<sup>483</sup> of forming the bailment relationship. This requirement, as applied by the Court of Appeal in *Yearworth*, amounts to a requirement that the psychiatric injury be “foreseeable consequent upon the breach of duty” which the claimants in *Yearworth* were able to satisfy.<sup>484</sup> In contrast, in *Re: Organ Retention*, although Mrs Harris succeeded in establishing that the healthcare professionals owed her a duty of care, that was breached, the claim in negligence failed since it was held that the psychiatric injury that she suffered was not foreseeable.<sup>485</sup>

If a loss cannot satisfy the criteria for identifying a psychiatric injury, damages for emotional distress may be recoverable. Yet, “English law does not currently recognise the infliction of emotional

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<sup>480</sup> *McLoughlin v O’Brian* [1983] 1 AC 410 (HL) 431; R Mulheron, “Recognised Psychiatric Injury” in *Negligence Claims*’ (n479) 80.

<sup>481</sup> R Mulheron, “Recognised Psychiatric Injury” in *Negligence Claims*’ (n479) 84.

<sup>482</sup> *Attia v. British Gas* [1988] 1 QB 304; *Yearworth v North Bristol NHS* (n479) [55].

<sup>483</sup> *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732 (Lord Steyn) [24].

<sup>484</sup> *Yearworth v North Bristol NHS* (n20) [54]: “whether for the purposes of his claim in tort or in bailment, each man indeed needs to establish – as set out at [52(d)] above – that his psychiatric injury or distress was a reasonably foreseeable consequence of the breach of duty.”

<sup>485</sup> *Re: Organ Retention* (n52) [259] “Mrs Harris is a primary victim. She is not precluded from bringing a claim against the defendants for psychiatric injuries in negligence. But because I have found that the psychiatric injury suffered by her was not foreseeable her claim does not succeed. If I had found that the psychiatric injury suffered by her was foreseeable.”

distress as a separate cause of action”,<sup>486</sup> rather a claimant must satisfy the elements of another action and then attempt to add to the damages an award for emotional distress.

There are two notable features about the way in which property law address non-pecuniary loss. First, the claimant must prove a causal link between the loss and the breach of duty, and prove that the loss suffered was foreseeable. Second, unless the claimant can satisfy the requirements of a psychiatric injury, damages for emotional distress alone are not recoverable. Where a personal interest is harmed, to obtain a remedy under property law, claimants must satisfy the additional elements of - what is treated as - an extra-ordinary remedial measure.

### *General Damages*

Special damages are therefore able to remedy pecuniary loss, and under particular circumstances, award damages for non-pecuniary loss as an extra-ordinary remedial approach. In contrast to this, ‘general damages’ presume that there are losses that go beyond the misallocation of entitlements and seek to compensate for the loss. As Witzleb identifies, torts that concern an individual’s personality, such as false imprisonment, assault, malicious prosecution and even trespass to land, award (‘general’) damages for emotional distress. “As far as these interests are concerned”, Witzleb notes:

the law presumes that the defendant’s wrongful conduct will cause some mental distress and claimants may be awarded substantial damages without being required to prove actual emotional harm.<sup>487</sup>

The approach taken under ‘general’ damages is to presume that there has been a personal loss or suffering following from the interference with the entitlements of the rights-holder. General damages are therefore concerned with compensating the normative consequences of interference that go beyond the misallocation of entitlements. For example, consider the ‘wrongful conception’ in *Rees v*

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<sup>486</sup> R Hardcastle, *Law and the Human Body* (n47) 190.

<sup>487</sup> N Witzleb, ‘Monetary Remedies for Breach of Confidence in Privacy Cases’ (2007) 27.3 *Legal Studies* 430, 446.

*Darlington Memorial Hospital NHS Trust*.<sup>488</sup> The Majority held that general damages in the form of a “conventional sum” may be available to the parents to ‘compensate’ the parents for their loss of “opportunity to live their lives in the way they wished” and “limit the size of their family”.<sup>489</sup> According to Nolan, the award “represents a significant departure from established principles” since the loss of reproductive autonomy “would no longer be merely a compensatable aspect of a more orthodox form of damage (as with loss of amenity and personal injury)”.<sup>490</sup> Rather, non-pecuniary losses from an unwanted pregnancy (such as the loss of reproductive autonomy) are now directly recoverable. The availability of these damages is best understood as being apart of the redistributive justice enterprise of allocating of benefits and burdens in light of the merits of the parties and cannot be understood as the application of corrective justice.

Consider, as a further example, Nwabueze’s ‘remedial quagmire’ that arises where an “organ donated by A for transplantation to B might be intentionally or negligently redirected to C, or maliciously damaged by D.” We are told that organs for transplantation concern an “element of [physical] deprivation” that “distinguishes organ transplantation cases from those of pure emotional harm”.<sup>491</sup> Nwabueze then uses *Arora* as an example of how a proprietary approach should guide the approach to misdirected organs.<sup>492</sup>

Yet, *Arora* is illustrative of the corrective approach to damages that is inapplicable to remedying interference with personal interests. Under *Arora*, the market value of the cell-line or the cost of re-creating the cell-line was recoverable. Recall the above plight of Lucy (miscarried fetus), Joanna (inadequately stored ovum), Matthew and Mark (inter vivos bone marrow transplant). Unlike in *Arora*,

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<sup>488</sup> *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52.

<sup>489</sup> *Rees v Darlington Memorial Hospital NHS Trust* (n488) (Lord Millet) [123], see also D Nolan ‘New Forms of Damage in Negligence’ (n393) 79, note also the alternative understanding of the award based on Lord Bingham judgment; that the award “afforded ‘some measure of recognition’ of the wrong done” (*Rees v Darlington Memorial Hospital NHS Trust* (n488) (Lord Bingham) [8]).

<sup>490</sup> D Nolan ‘New Forms of Damage in Negligence’ (n393) 79.

<sup>491</sup> RN Nwabueze, ‘Remedial Quagmire’ (n416) 206.

<sup>492</sup> RN Nwabueze, ‘Remedial Quagmire’ (n416) 208.

it is not possible to put Matthew, Mark, Lucy or Joanna in the “same place as if the loss had not been inflicted” on them.<sup>493</sup> This is because none of the fetus, the ovum nor bone marrow has an extrinsic market value. Nor is it possible to re-create the opportunity that items enabled. Even if, in Matthew and Mark’s case, the costs of re-extraction are recoverable (for Matthew), under a proprietary approach, Matthew and Mark would then carry the burden to prove that they suffered a non-pecuniary loss from the mis-use of the bone marrow and the need for re-extraction.

The problem with the corrective justice approach is that the law takes aim at restoring the entitlements, and presumes that the restoration of the preferences and choices that the entitlements enable will follow. This approach is applicable where the entitlements in the bodily material enable preferences and choices that are contingently associated with the entitlement-holder so that the loss suffered is commensurable with monetary damages. Yet, where the entitlements in bodily material (foetus, ovum, bone marrow) enable preferences and choices that are particular to the entitlement-holder, the award of ‘general damages’ is the appropriate remedial response.

The law of confidentiality provides a useful example of how a branch of law has developed to award general damages as an ordinary remedial response to interference with personal interests. It is difficult for monetary damages to correct or restore the type of loss suffered from the unauthorized disclosure of personal information. If only pecuniary losses were recoverable from a breach of confidence, the protection of the right to control the material itself (as opposed to the right not to suffer loss from the unauthorized disclosure) would not be adequately protected.

As Justice Morland observed, the protection of the right of respect for private and family life would be “hollow” if only nominal damages were awarded in lieu of the claimant being able to prove a pecuniary loss.<sup>494</sup> Hence, Justice Morland in *Cornelius v de Taranto* allowed general damages for

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<sup>493</sup> NE Palmer, *Interests in Goods* (n475) 548.

<sup>494</sup> *Cornelius v de Taranto* [2001] EMLR 12 [66].

emotional distress.<sup>495</sup> The award of general damages for injury to feelings in *Campbell v MGN* was affirmed by the House of Lords,<sup>496</sup> suggesting the availability for general damages under the emerging tort of privacy. Following *Cornelius*, it has been held in the High Court that that “where a breach causes injury to feelings, this court has power to award general damages”.<sup>497</sup>

The award of general damages for emotional distress under actions for breaches of confidentiality will depend on the “juridical basis of the cause of action”.<sup>498</sup> Confidentiality, insofar as it governs the disclosure of information, governs a wide variety of contexts where someone confides information. Where the context is commercial, equity learns from the remedial response taken in contract and property law, and where the context concerns privacy, equity draws upon the damages awarded for defamation.<sup>499</sup>

The contrast here is between the damages available under property law, which presume that there are no normative consequences to interference with entitlements beyond the misallocation of entitlements, and general damages, which seeks to compensate the loss suffered by the wronged party in terms of the preferences and choices that were harmed. This distinction follows from how the entitlements are characterised as giving rise to contingent or personal interests.

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<sup>495</sup> *Cornelius v de Taranto* (n494).

<sup>496</sup> *Campbell v MGN* (n390).

<sup>497</sup> *Archer v Williams* [2003] EWHC 1670 (Justice Jackson) [76]: “where a breach causes injury to feelings, this court has power to award general damages”.

<sup>498</sup> N Witzleb, ‘Monetary Remedies for Breach of Confidence’ (n487) 549: “the juridical basis of the cause of action can also assume relevance for the availability of the remedy”

<sup>499</sup> N Witzleb, ‘Monetary Remedies for Breach of Confidence’ (n487) 448.

## b. The Transferability of the Right

The “right to transfer property” has been described as “an inherent feature of property rights”.<sup>502</sup> Recall that for Munzer, transferability represents the dividing line between personal rights (such as free speech, privacy, reputation and bodily integrity) and property rights.<sup>503</sup>

It is true that the right to transfer property is an inherent feature of property. This is because property interests are anonymous interests that represent preferences and choices that are not associated with any particular rights-holder; Lucy can exercise the same bundle of preferences and choices in a painting or wine collection than that were exercised by Joanna. It follows that the transfer of anonymous interests is therefore presumptively permissible since there are no normative consequences from the change in rights-holder. In contrast, personal interests are inalienable. Personal interests represent a set of preferences and choices that can only be fully exercised by the rights-holder; Lucy cannot exercise the same bundle of preferences and choices in Joanna’s privacy that can be exercised by Joanna.

Despite this ‘bright-line’ distinction between alienability and inalienability there is exists a middle ground. Calabresi and Melamed, in their seminal essay ‘Property Rules, Liability Rules and Inalienability: One View of the Cathedral’,<sup>502</sup> formulated a distinction between three different ways of protecting an entitlement (property rules, liability rules and inalienability rules). Their framework is based on an economic perspective, which differentiates these different sets of rules in terms of the cost of acquiring an entitlement. The *economic consequences* of acquiring an entitlement identified by Calabresi and Melamed reflect the *normative consequences* of the change of rights-holder as identified Penner.

As we shall see, where there are only normative consequences in terms of the change in entitlement-holder, the parties themselves ought to be able to determine the content of the transaction

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<sup>501</sup> SR Munzer, *A Theory of Property* (n287) 47-8.

<sup>502</sup> G Calabresi and AD Melamed, ‘Property Rules, Liability Rules and Inalienability’ (n15) 1089.

(property rules).<sup>503</sup> Where the entitlements enable preferences and choices that can only be exercised by the entitlement-holder, the interests and rights cannot be transferred to another person (inalienability rules).<sup>504</sup> A middle ground emerges where interests and rights are transferable but there may be wider normative consequences to the transaction or interaction that require “an organ of the state” to govern the transaction (‘liability’ or ‘governance rules’).<sup>505</sup>

### i. ‘Property’ or ‘Transferability’ Rules

According to Calabresi and Melamed, if an individual wishes to acquire an entitlement in a thing from the entitlement-holder, and if the entitlement is protected by a *property rule*, then the individual “must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller”.<sup>506</sup> Transfer under property rules involves a value determined by private actors and, as we have seen, interference is remedied by that market value that was lost by virtue of the interference. Property law permits the transfer of interests since, as anonymous interest, there are no normative consequences beyond the change in rights-holder that follows from the transaction. There is no basis, therefore, to limit or prohibit the free transfer of entitlements in things that represent contingent interests.

Once entitlements in bodily material are viewed as property rights, there are few (if any) limits on the transferability of the property right. It is this feature of property law that explains the motivation towards treating stored semen as items of property in the circumstances that arose in *Hecht* and *Bazely*.<sup>507</sup> As items of property, the right to manage and use the material are transferable rights provided that transfer satisfies the few procedural requirements under the law of intestacy and inheritance.

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<sup>503</sup> G Calabresi and AD Melamed, ‘Property Rules, Liability Rules and Inalienability’ (n15) 1092 - 1111.

<sup>504</sup> G Calabresi and AD Melamed, ‘Property Rules, Liability Rules and Inalienability’ (n15) 1111 - 1115.

<sup>505</sup> G Calabresi and AD Melamed, ‘Property Rules, Liability Rules and Inalienability’ (n15) 1092 - 1111.

<sup>506</sup> G Calabresi and AD Melamed, ‘Property Rules, Liability Rules and Inalienability’ (n15) 1092.

<sup>507</sup> *Bazely v Wesley Monash IVF* (n87); *Hecht v Superior Court of Los Angeles County* (n85).

More significantly, property law has been used to enable the transfer of possession of bodily material in order to *circumvent* governance rules. In *Re: Edwards*, the Court was able to sidestep the requirement of progenitor consent (as required under Section 21 of the Assisted Reproductive Therapy Act).<sup>508</sup> By finding that the widow of the deceased has a property right in the semen, the widow was able to assert her property right to the bodily material rather than the healthcare institution “supplying” the bodily material to the widow (which was prohibited in the absence of progenitors consent).

The approach taken to in England and Wales has been to treat the governance rules in the HFEA as exhaustive. So that, although the same circumstances arose in *Blood*, the question of the common law status of the reproductive material was seen as having been superseded by the statutory code.<sup>509</sup> This prevented the stored semen from obtaining a property law status. The reasoning of *Re: Edwards* may not be directly applicable to the English law, but the reasoning nonetheless demonstrates, that claims to use the bodily material without the consent of the progenitor may succeed once the material is fitted into a property framework since a such a framework is a permissible framework.

## ii. ‘Liability’ or ‘Governance’ Rules

In contrast to the permissible framework of property, ‘governance rules’ (or ‘liability rules’) represent a restrictive framework for the transfer of entitlements. Yet, Calabresi and Melamed’s description of liability rules and property rules suggest that they are both permissible frameworks. What their analysis conflates is the difference between legal permission to obtain an entitlement and the economic costs of obtaining an entitlement. To be ‘entitled’ to pollute a river, for instance, is governed by a liability rule. These ‘liability rules’, according to the Calabresi and Melamed, involve:

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<sup>508</sup> *Re: Edwards* (n90); Assisted Reproductive Technology Act 1997 (Qld Aus.), Section 21: “An ART provider must not supply a gamete or an embryo to another person (including another ART provider) except with the consent of the gamete provider and in a manner that is consistent with the gamete provider’s consent.”

<sup>509</sup> See *ex parte Blood* [1999] (n95) [150].

an additional stage of state intervention: not only are entitlements protected, but their transfer or destruction is allowed on the basis of the value determined by some organ of the state rather than the parties themselves.<sup>510</sup>

Their economic perspective obscures the fact that polluter does not legally obtain the entitlement to pollute. Nonetheless, the same structure of state intervention for the transfer of entitlements is prevalent in the way that entitlements in bodily material are legally obtained by healthcare institutions. The cost of acquiring an entitlement in bodily material, what entitlements can be acquired, and the how the transfer is facilitated is determined by the ‘governance rule’ itself.

For instance, the HTA provides for the transfer for entitlements in human tissue through prescribing particular consent procedures<sup>511</sup> and limits the use of the transferred material to particular purposes.<sup>512</sup> The transfer cannot be a commercial basis but the progenitor may be compensated for expenses incurred and loss of earnings.<sup>513</sup> Similarly, Section 12(1) of the HFEA 1990 prohibits the payment of any money “given or received in respect of any supply of gametes or embryos”,<sup>514</sup> yet the HFEA Guidelines provide that “Donors may be reimbursed all reasonable expenses incurred in the UK in connection with donating gametes or embryos” and that “Donors may be compensated for loss of earnings (wherever they live) up to a daily maximum of £61.28 but with an overall limit of £750 for each course or cycle of donation.”<sup>515</sup>

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<sup>510</sup> G Calabresi and AD Melamed, ‘Property Rules, Liability Rules and Inalienability’ (n15) 1092.

<sup>511</sup> Under Section 5(1) of the Human Tissue Act 2004 it is an offence to do any activity listed in Section 1(1), (2) or (3) without the “appropriate consent” from the “person concerned”. Schedule 3 of the Human Fertilisation and Embryology Act 1990 outlines the necessity for “consent” and “effective consent” for the storage or use of embryos or gametes by a licensed authority.

<sup>512</sup> Under Section 8(1) of the Human Tissue Act 2004 it is an offence to use or store tissue for a purpose other than a “qualifying purpose” (as outlined in Schedules 1 and 2 of the Act). Under the Section 41 of Human Fertilisation and Embryology Act 1990, it is an offence to perform activities that are not in accordance with a License (under Schedule 2) or that are prohibited by Sections 3, 3A and 4 of the Act.

<sup>513</sup> Human Tissue Act 2004, s32(7)

<sup>514</sup> Human Fertilisation and Embryology Act 1990, Section 12(1).

<sup>515</sup> Human Fertilisation and Embryology Authority, *Code of Practice* (n68) [13].

Donors of tissue and reproductive material may therefore receive compensation for extracting and transferring their bodily material. Here, the governance rules determine who may have entitlements in the material,<sup>516</sup> determines or limits the price that can be paid for the entitlements,<sup>517</sup> prescribes preconditions for a valid transfer.<sup>518</sup>

It is still possible to transfer these entitlements because the entitlements in bodily material for donation nonetheless represent preferences and choices that are not associated with the entitlement-holder. Yet, there may be other, wider policy concerns that necessitate that the process of transfer, and the content of the transfer, to be governed by a set of rules.

Calabresi and Melamed attempt to explain the employment of liability rules in terms of economic efficiency and distributional outcomes. The most common reason, we are told, for employing a liability rule is that market evaluation of entitlements is too inefficient.<sup>519</sup> This may be true in some contexts. Yet, the governance of the transfer is justified with reference to concerns about the transfer, such as the authenticity of consent or the welfare of the transferor: what Calabresi and Melamed term as “paternalism”.<sup>520</sup>

Note that by limiting how entitlements in bodily material are transferred, and upon what terms, the exercise of the right to transfer and the right to income is reduced from enabling an open set of activities to a closed set of activities. In other words, the effect of governance rules is to permit a particular interaction and transaction, and prohibit a set of alternative transactions that would otherwise be exercisable under property rights, so that the governance strategy employed by the HTA and HFEA represents anonymous, but not exclusionary, interests.

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<sup>516</sup> Human Tissue Act 2004, Schedule 1; Human Fertilisation and Embryology Act 1990, Schedule 2.

<sup>517</sup> Human Fertilisation and Embryology Act 1990, Section 12; Human Tissue Act 2004, Section 32.

<sup>518</sup> Human Tissue Act 2004, Section 1(1) -(3); Human Fertilisation and Embryology Act 1990, Schedule 3.

<sup>519</sup> G Calabresi and AD Melamed, ‘Property Rules, Liability Rules and Inalienability’ (n15) 1110.

<sup>520</sup> G Calabresi and AD Melamed, ‘Property Rules, Liability Rules and Inalienability’ (n15) 1113.

### iii. 'Inalienability' or 'Non-transferability' Rules

If the law prohibits someone from acquiring an entitlement, then the entitlement is protected by an “inalienability rule”. Entitlements that are governed by inalienability rules are non-transferable and, as we have seen, the remedies for loss of the entitlement may reflect a retributive aim. According to Calabresi and Melamed, their use of inalienability rules can be also be analysed in terms of economic efficiency, and distributional outcomes. Included within the analysis of economic efficiency of inalienability rules is the concern that there may be “external costs” that “do not lend themselves to collective measurement in an acceptably objective and nonarbitrary way”.<sup>521</sup> In other words, there may be normative consequences to the transaction “beyond the fact that the ownership has changed”<sup>522</sup> that cannot be measured in monetary terms.

I suggest that inalienability rules govern personal interests. Since such interests are necessarily associated with the interest-holder, it is not possible for another person to acquire the interest. As explained above, it also follows that where a personal interest is interfered with, a loss is suffered by the interest-holder which asymmetrical with gain or advantage obtained by the interferer, nor can the difference be *corrected* through payment for the transfer or monetary damages.

For example, Matthew’s right to free speech and right to privacy, and Marks’s reputation and right to bodily integrity, each protect preferences and choices that that only Matthew and Mark can exercise respectively. These interests are non-transferable: not because of wider policy concerns about the transfer, but because another cannot exercise the preferences and choices. When Matthew is deprived of his free speech or Mark his bodily integrity, there are normative consequences beyond the misallocation of entitlements; there is a loss that cannot be measured ‘in an acceptably objective and nonarbitrary way’. Consider also the interests of chemotherapy patients in their stored reproductive material or the interests of parents in the bodies of their newly deceased infants. These interests are

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<sup>521</sup> G Calabresi and AD Melamed, ‘Property Rules, Liability Rules and Inalienability’ (n15) 1111.

<sup>522</sup> JE Penner, *The Idea of Property in Law* (n333) 111.

also inalienable interests since another person cannot stand in the same position as them with regards to the reproductive material or infants.

We need to be careful here with the difference between an *entitlement* and an *interest* when identifying which interests are inalienable. At the most basic level, when Joanna gives Lucy a painting, Joanna is transferring a possession entitlement in the painting to Lucy. When Joanna also confidentially discloses personal information to Lucy, she is also transferring an entitlement in the information to Lucy. Lucy is in possession of both a painting and personal information. The difference is that if Matthew were to unlawfully acquire the painting and the personal information, Lucy has an enforceable right against Matthew with regards to the painting, but not with regards to the information. This is because Joanna transferred her interest in the painting to Lucy, but *cannot* transfer her interest in her own privacy. Accordingly, if Joanna were to authorise a health authority to possess her bodily material, she may retain a personal, non-transferable, interest in the material.

In sum, this Section has outlined two structure features that follow from the conceptual distinction between anonymous and personal interests. The first structural feature concerns the content of the remedial duty. I have suggested that interference with anonymous interests is remedied through a corrective approach. This results in the availability of damages for pecuniary loss as the ordinary remedial measure and the ability to recover non-pecuniary loss as an extra-ordinary remedy. In contrast, interference with personal interests is remedied through a redistributive approach that results in the availability of general damages. The second structural feature concerns the transferability of a right. I have suggested here that anonymous interests are transferable and the transfer may be facilitated by property rules, where content of the exchange is determined by private agreement, or by governance rules, where the governance rules themselves delimit the content and circumstances of transfer, whereas, personal interests are inalienable interests.

## Chapter Summary

To summarise this Chapter, let us consider how the conceptual and structure distinctions introduced here in terms of personality and anonymity enable us to better understand the law on the use and storage of bodily material.

I have suggested here that a structural feature of property law is the corrective aims of the remedial duty. Under such an approach, ‘special’ damages seek to correct the misallocation of entitlements and presume that the restoration of the preferences and choices that the entitlements enable will follow. This was the approach taken in *Arora*. Non-pecuniary damages are recoverable where the loss is a foreseeable consequence of the breach of duty. Such losses were proved in *Yearworth*, but not by Mrs Shorter in *Re: Organ Retention*. In contrast, areas of law that concern personal interests remedy interference on a distributive basis, which takes the form of general damages. As a result, the non-pecuniary losses flowing from battery, defamation or breach of confidence are recoverable. In contrast, the non-pecuniary losses flowing from negligence or damage to property are only recoverable subject to requirements of proof of a particular injury and requirements of foreseeability.

The final structural feature introduced here concerns the transferability or alienability of the interest. Under property law, rights are transferable under a voluntary transaction. Hence, by deeming the stored semen to be items of property, the Court in *Bazely* was able to identify a legal avenue through which the rights in the semen can be transferred (Section 8 of the Queensland Succession Act 1981) so that such right vested in the administrator of the estate. Furthermore, by establishing that the widow had a property right in the semen enabled the Court in *Re: Edwards* to bypass legislative ‘governance rules’ (under Section 21 of Assisted Reproductive Technology Act 1997) on the “supply” of gametes. The tactic was not attempted in the similar circumstances that arose in *ex parte Blood* since it was held that governance rules under the HFEA exhaustively addressed the domestic legal issues.

As we saw with the exclusivity of property, departures from the no property rule have been motivated by a structure advantage of treating an item of bodily material as an item of property. We now also have an understanding as how entitlements in things may be characterised as exclusive or interactive, contingent or personal, interests. We also have a structure of legal protection that follows from the way we characterise entitlement. Given the bundle of entitlements that ought to attract legal protection identified in Chapter Two, we are now able to identify the appropriate legal structure(s) to govern the use and storage of separated bodily material.

## Part D: Rules and Procedures

### Chapter Six: Property and Confidentiality

We have so far identified the *entitlements* in separated bodily material that ought to be afforded legal protection. We have also identified the types of *interests* that may arise out of the exercise of entitlements, and the particular *rights* (and duties) that provide legal protection to these interests. It is now possible to determine the appropriate legal status of separated bodily material by taking the entitlements in bodily material identified in Part B and assess which type of interests, and which set of rights, ought to arise in separated bodily material.

In Section One, I will consider how the law ought to characterise the entitlements identified in Part B so as to identify the types of interests that arise in bodily material. I will suggest that entitlements in bodily material ought to represent ‘exclusionary interests’ and thereby ought to obtain legal protection through the ‘boundary approach’. I will also suggest that entitlements in bodily material that is *for-itself* or *for-others* represent personal interests; by contrast, the entitlements obtained by healthcare institutions are appropriately characterised as anonymous interests. This difference between personal and anonymous interests in bodily material invites different legal structures to be applied to the protection of the different entitlements in bodily material.

In Section Two I will suggest which legal structures ought to be applied to the use and storage of separated bodily material. I argue that the formation of duties akin to duties of confidentiality formulated under the emerging tort of privacy is the most appropriate method of protecting entitlements in bodily material that is *for-itself* or *for-others*. However, this does not preclude the operation of property law. Rather, when healthcare institutions obtain bodily material for their own purposes or possess the material subject to the interests of patients or closely concern persons, the entitlements in the bodily material exercised by healthcare institutions ought to give rise to property rights. In Section Three, this recommendation will then be compared with how the law currently addresses the use and

storage of bodily material, demonstrating where the recommendation in this Thesis diverges from the direction that the law is currently develop in.

## Section One: Interests in Bodily Material

In Chapter Two, I argued that where the body or bodily material continues to function as a medium of social experience (the *body-for-others*), closely concerned persons may obtain a right to possession and a right of authorisation. I also argued that where the bodily material retains a functional connection with the attached body in engaging with the world (the *body-for-itself*), the progenitor, and potentially a co-participant in therapy, may retain a right to manage and a right to use the material. Where the bodily material is neither for-itself or for-others, I argued that healthcare institutions ought to have a large bundle of entitlements in the bodily material in which they obtain possession of. Moreover, the analysis in Chapter Three suggested that payments to an individual in exchange for the transfer of material from to an institution ought to be limited to compensatory payments.

The purpose of this Section is to take these entitlements identified in Part B and determine the type of interests to which these entitlements ought to give rise to. I identified in Part C that the exercise of entitlements may give rise to *exclusionary interests*, that represent open-ended entitlements that are protected by an exclusionary boundary, or *interactive interests*, where entitlements and responsibilities are allocated between parties in an interaction. In addition, the exercise of entitlements may also give rise to *personal* or *anonymous* interests, depending on whether the exercise of the entitlements enable activities, preferences and choices can or cannot exist independently of the entitlement-holder. By identifying the interests that arise in bodily material we are able to connect the entitlements in bodily material that ought to have legal protection with the appropriate means of protecting the entitlements.

### **a. Exclusionary Interests in Bodily Material**

I suggest that the entitlements that may be exercised in bodily material ought to be treated as exclusionary interests. Just as the focal point of property rights and rights of bodily integrity is the relationship between the rights-holder and the thing, we ought to also view entitlements in bodily material as concerning the relationship between the entitlement-holder and the thing. This is in contrast to interactive interests, where the focal point is a particular activity, interaction or transaction in which

the entitlement-holder may engage in. As I explain here, entitlements in bodily material ought to be conceived of as exclusionary interests since the same three assumptions that underlie the boundary approach to property rights and rights of bodily integrity are also applicable to the entitlements in bodily material.

### i. Purposely Dealing with Things

Recall the assumptions that lay behind the boundary approach under property law. The first assumption was that the relationship with the thing reflect an interest in “purposely dealing with things”.<sup>523</sup> Entitlements in bodily material are principally concerned with is the *relationship with a thing* (that enables a set of activities) rather than the particular activity or interaction that the use of things may enable. The focal point of the law is the *thing* rather than any particular activity or interaction.

As I explained in Chapter Four, property law is concerned with the use of things (land and toothbrushes), rather than activities (the growing of wheat or dental hygiene), and trespass to the person is concerned with the body, rather than activities (such as mole removal, rugby tackles or sexual intercourse). I suggest here that the focal point the law on the use and storage of bodily material ought to be the bodily material itself rather than any particular activity of extraction, preservation or interment.

When closely concerned persons exercise their right to authorise the use of the body or bodily material of a deceased person, or exercise their right to possession of the body, these entitlements are being exercised because we recognise that the *relationship with the bodily material* is important. This is because the body of the deceased remains as medium of social experience. This social experience cannot be reduced into a particular activity or interaction. It is similarly the case with the right of the progenitor to use and manage their bodily material; their relationship with their bodily material is - itself - important, since it shares a functional unity with the attached body in tasks of ‘coping’ with, and ‘engaging’ in, the world. Moreover, healthcare institutions, in their therapeutic, scientific and

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<sup>523</sup> JE Penner, *The Idea of Property in Law* (n333) 71.

educational use of bodily material, are also engaged in purposely dealing *with the thing*, rather than any particular activity or interaction.

## ii. Open-Ended Set of Activities

The second, and related, assumption is that the set of activities that the bodily material enables is an undefinable set of activities. Since the relationship with the body of the deceased cannot be reduced to a particular set of activities or interactions, it is appropriately viewed as enabling an open-ended set of activities. Even the single act of authorising, or not authorising, the use of a deceased body may represent a number of different decisions and motivations on the part of the friends and family of the deceased. Similarly, how the body is interred may also take on a variety of forms which also may represent a diverging set of values and beliefs. The exercise of entitlements in the *body-for-others* is concerned with a relationship with a thing that cannot be reduced to the predictable set of activities.

Just as the ‘self-ownership’ of attached body may enable an open set of activities, bodily material that shares a functional equivalency with the attached body also enables a range of open-ended choices as to how the material may be used. Although stored material for therapeutic application, may be limited to particular therapeutic applications, the material nonetheless embody a set of choices and preferences that cannot be equated with the particular activity of the therapeutic treatment. In other words, the limits on how the material can be used only constrain, but do not deflate, the sphere of undefined activity. As S Green explains, it was the ability to identify this sphere of undefined activity, or “negative control,” that enabled the Court of Appeal to treat the bodily material in *Yearworth* as items of property:

In essence, the Court of Appeal took the view that the limits imposed by the HFEA upon the claimants' right to use their stored sperm were not sufficiently extensive to prevent their having property rights in that sperm. Although the Act restricts the ability to use sperm removed and stored for reproductive treatment to those licensed by the Act to do so, thereby preventing the claimants themselves from so using it, the

court gave much weight to the *negative* control of the claimants; that is, the fact that their sperm could neither continue to be stored, nor used for any purpose, without their consent.<sup>524</sup>

Hence, I would suggest that entitlements in the *body-for-itself* and the *body-for-others* are appropriately viewed as enabling an open-ended set of activities despite factual and legal limitations on the set of activities that may be pursued.

In terms of the entitlements exercised by healthcare institutions, recall Smith's cost-based analysis of the exclusivity of property rights. The 'exclusion strategy' operates by having clear boundaries around items of property.<sup>525</sup> Within the boundary "owners have open-ended choices of how to invest in or consume the asset".<sup>526</sup> This strategy is said to be more economically efficient than the 'governance strategy' under 'liability rules' because of the greater costs involved in identifying the activities that fall into the scope of permitted use and identifying the loss of value recoverable from interference with particular activities.<sup>527</sup> More generally, we recognise that healthcare institutions exercise entitlements in bodily material to produce socially valuable outcomes. The more open-ended their exercise of their entitlements in bodily material the greater scope for the research, clinical and therapeutic benefits that follow the institutional use of bodily material. The entitlements that a healthcare institution may exercise ought to also represent a sphere of undefined activity.

### iii. The Exclusion of Others

If entitlements in bodily material represent a sphere of undefined activity, it follows that in order to protect the entitlements in the material the attention of the law is directed to sources of interference

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<sup>524</sup> S Green, 'The Subject Matter of Conversion' (n84) 239.

<sup>525</sup> HE Smith, 'Property and Property Rules' (n338)1753: "For reasons of information cost it is often advantageous and almost inevitable that rights will be delineated by means of what I have called an 'exclusion strategy.' Such a strategy relies on rough and low-cost signals that are not tied to use in order to protect indirectly a large and unspecified set of uses."

<sup>526</sup> HE Smith, 'Property and Property Rules' (n338) 1728.

<sup>527</sup> L Katz, 'Exclusion and Exclusivity in Property Law' (n332) 280.

with the relationship with the bodily material, rather than any particular interaction or activity. This, as we have seen, produces a type of “non-ownership”<sup>528</sup> or “negative ownership”<sup>529</sup> insofar as the legal contours of the entitlements are shaped by the exclusion of others. The law, in other words, constructs an exclusionary boundary of “negative liberty”.<sup>530</sup> Inside the boundary, the actions of the entitlement-holder are presumptively valid, and outside the boundary, any interference with the thing by another is *prima facie* prohibited.

However, as Katz<sup>531</sup> and Penner<sup>532</sup> have identified, the ‘exclusivity’ is not the absolute exclusion of all others but rather an exercise of authority over who may and may not interact with the thing. So it is conceptually consistent to say that the progenitor in *Bazely* had an exclusive interest in his stored semen but his partner may nonetheless have a reversionary interest in the semen. Entitlements in bodily material can therefore be appropriately characterised as representing exclusionary interests and ought to benefit from the structural protection afforded by the ‘boundary approach’.

## **b. Personal and Anonymous Interests in Bodily Material**

### **i. Applying the Distinction**

In Chapter Five, I suggest that we can understand the distinction between property rights and ‘personal rights’ in terms of the type of preferences and choices that the exercise of entitlements enables. Where the exercise of entitlements give rise to preferences and choices that are “contingently associated with a particular owner”,<sup>533</sup> or where the preferences and choices can exist “independent of a particular person”,<sup>534</sup> then such entitlements represent ‘anonymous interests’. Whereas, if the exercise of entitlements give rise to preferences and choices that are necessarily associated with a particular

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<sup>528</sup> L Katz, ‘Exclusion and Exclusivity in Property Law’ (n332) 277.

<sup>529</sup> S Green, ‘The Subject Matter of Conversion’ (n84) 239.

<sup>530</sup> JE Penner, *The Idea of Property in Law* (n333) 73.

<sup>531</sup> L Katz, ‘Exclusion and Exclusivity in Property Law’ (n332) 289.

<sup>532</sup> JE Penner, *The Idea of Property in Law* (n333) 74.

<sup>533</sup> JE Penner, *The Idea of Property in Law* (n333) 111.

<sup>534</sup> *OBG v Allan* (n447) [309].

person or cannot exist independently of the particular person, then such entitlements represent ‘personal interests’. We can now apply this distinction to the entitlements that ought to be recognised in separated bodily material.

### *Personal Interests*

According to this view of the body developed in Chapter Two, the body-for-itself is *self-ascribed*, so that physical separation does not necessarily change the relationship between the person and their body provided the body part is still functionally unified with the body in its responsiveness to the task of engaging or coping with the world. This provides a normative basis for why the progenitor of bodily material ought to be able to retain management and use entitlements in their material. The body was also described as *for-others*. Our bodies are the medium of social experience and deceased bodies can continue to figure as Persons for other people. This provided a normative basis for why family and friends (closely concerned persons) ought to be able to exercise a degree of control over how the body of their deceased loved-one is treated. As the law currently affords, closely concerned persons ought to have the right to authorise the use of the body or bodily material of the deceased and may exercise the right to possession as the corollary of the duty to inter.

These entitlements in the *body-for-itself* and the *body-for-others* were described in Chapter Two as ‘constitutive’ entitlements. The attached body enables experience of, and existence in, the world, thereby enabling preferences and choices that are necessarily associated with the person. In a similar way, separated bodily material that retains a functional similarity with the body enables preferences and choices that are necessarily associated with the person. The entitlements in the *body-for-itself* are therefore appropriately characterised as personal interests.

Entitlements in the *body-for-others* also represent personal interests. This is because the body of the deceased retains a normative function of being the medium of social experience. This normative function is necessarily connected to the family and friends of the deceased since it is their relationship with the deceased that helps constitute their experience and existence (as mothers, as daughters, as

husbands or as wives). Their entitlements in the body of the deceased therefore enable preferences and choices that *cannot exist independent of their* relationship with the deceased.

I contend that entitlements in the *body-for-itself* and the *body-for-others* are appropriately characterised as personal interests. Yet, a hallmark of property is that property rights concern anonymous interest. It follows that entitlements in the *body-for-itself* and the *body-for-others* are appropriately characterised as having a normative feature that is inconsistent or incompatible with a defining feature of property law.

### *Anonymous Interests*

Following on from the analysis in Chapter Two, healthcare institutions may obtain entitlements in bodily material on a ‘social basis’, so that their entitlements are justified by the consequences of allocating entitlements to healthcare institutions. The bundle of entitlements that are justified with reference to societal goals may be exercised by different healthcare institutions that pursue the therapeutic, scientific and educational use and application of the body material. It follows that these entitlements represent preferences and choices that *can exist independent of* any particular healthcare institution since the use of bodily material for these purposes is not connected to, or dependent upon, any attribute or characteristic of the institution. The entitlements exercised by healthcare institutions therefore represent anonymous interests, and (as above) exclusionary interests. Such entitlements share the same conceptual features as property rights.

### ii. Maintaining the Distinction

Our conceptual divide between property and personality developed in Chapter Five maps onto the distinction between ‘constitutive’ entitlements and ‘contingent’ entitlements developed in Chapter Two. Yet recent decisions, such as *Yearworth*, *Bazely* and *Re: Edwards*, have conflated this distinction. For instance, the entitlements that were recognised in *Yearworth* were recognised because of the particular relationship between the progenitors and their semen; the semen was extracted by them, for their own purposes. The right to manage and use the stored semen enabled preferences and choices, such as

the choice of assisted reproductive therapy and the preference for biological paternity, that are particular to the progenitors. Yet, the right to manage and use the semen were treated as property rights. As discussed, the impetus for recognising property rights in the bodily material was to avail the claim of particular structural features of the ‘boundary approach’ available under property law.

Given that treating the bodily material as items of property enabled the claimants in *Yearworth* to succeed in their meritorious claim and obtain an appropriate level of damages, the harm in conflating this distinction between personal and anonymous interest is not immediately apparent. Yet, I suggest here that conflating the distinction gives inadequate legal protection to the preferences and choices that are necessarily associated with the entitlement-holder. This poses both structural and conceptual problems.

### *Structural Problems*

I argued in the previous Chapter that the legal structure of property rights includes a corrective remedial duty and the transferability of rights. I explained that this legal structure follows from the characterisation of entitlements as representing preferences and choices which are contingent to, or can exist independent of, the entitlement-holder. There are two assumptions here. The first is that, for entitlements in items of property, there are no normative consequences from the transfer of entitlements to another (so that property rights are transferable rights). The second is that there are no normative consequences from interference with the entitlements beyond the misallocation of entitlements (so that interference can be corrected by damages). If this legal structure were to be employed to protect personal interests, the law would provide inadequate protection of the preferences and choices that are particular to the entitlement-holder.

As we have seen, under the corrective justice approach, special damages are to be available as the remedial response to interference with entitlements in bodily material. Under this approach, claimants will be required to prove that any non-pecuniary loss was foreseeable upon the breach of the primary duty by the duty-bearer. This remedial approach presumes that correcting the misallocation of

entitlements will restore the preferences and choices that the entitlements enabled, unless a further loss can be proven by the claimant.

Given that entitlements in the *body-for-itself* and the *body-for-others* arise because the bodily material is either retained for therapeutic benefit or remains the medium of social experience, the loss suffered from interference with these entitlements will be almost invariably non-pecuniary. Under a corrective justice approach, claimants will therefore carry the burden to prove existence and foreseeability of a non-pecuniary loss.<sup>535</sup> This burden was discharged by the claimants in *Yearworth*<sup>536</sup> but provided an additional remedial hurdle for the claims in *Re: Organ Retention* that some claimants were unable to clear.<sup>537</sup>

By contrast, if general damages are available as the remedial response, it will be presumed that the interference with personal interests in the bodily material will cause some form of mental distress or anguish. The circumstances of the case will shape the measure of damages insofar as this redistributive justice approach allocates benefits and burdens in light of the merits of the parties. For instance, the loss suffered by the patients or the blameworthiness of the conduct of the healthcare institution, may shape the remedial response to the destruction of stored gametes. The concern is that the appropriate remedial response to interference with personal interests is a redistributive approach to loss, so that treating personal interests as anonymous interests therefore invites an inappropriate remedial response.

In terms of the transferability of rights in bodily material, once bodily material is conceived of as an item of property there are few procedural or substantive limits on the right to transfer. As the reasoning of *Re: Edwards* demonstrates, claims to use the bodily material of another may succeed under property law even when the consent of the progenitor is required under statute for the use of the

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<sup>535</sup> *Yearworth v North Bristol* (n20) [54].

<sup>536</sup> *Yearworth v North Bristol* (n20) [10] - [12].

<sup>537</sup> *Re: Organ Retention* (n52) [259]

bodily material.<sup>538</sup> Ordinarily, legislative provisions restrict the transferability of bodily material. For instance, in *ex parte Blood*, the HFEA was held to govern the use and storage of bodily material (to the exclusion of the common law) and lawful authority to use the bodily material of the progenitor required the progenitor's consent.<sup>539</sup>

I have suggested here that entitlements in bodily material, that are justified either because it forms part of the *self-ascribed body* or part of the *body-for-others*, ought to give rise to non-transferable rights. This is because these entitlements enable preferences and choices that can only be exercised by the entitlement-holder, and it is the exercise of these preferences and choices that *justifies* the recognition of the entitlement. The change in entitlement-holder removes the justificatory basis for the exercise of the entitlement. Simply put, a further problem with conflating the distinction between anonymous interests and personal interests is that it enables the transferability of rights that ought not to be transferable as there will be no justification for why the recipient of the right ought to be able to exercise the right.

### *Conceptual Problem*

These structural problems reflect a deeper conceptual unease. Since property law is concerned with anonymous interests, it is 'blind' or unresponsive to the preferences and choices that are particular to the entitlement-holder. In other words, property law misses, by-passes or ignores the preferences and choices that are particular to, or necessarily associated with, the entitlement-holder.

Herein lies the underlying problem: property is good with *things*, but sometimes our control of things is more about *us* (our personality, personhood or our relationships). Privacy is a useful example. We control our personal information in order to protect a feature of our personality, and when our control of our personal information is interfered with, a feature of our personality is invaded. Equally when a parent is deprived control of a miscarried foetus or the body of a deceased infant, or when a

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<sup>538</sup> Assisted Reproductive Technology Act 2007 (NSW), Section 21.

<sup>539</sup> See *ex parte Blood* [1999] (n96) [150].

patient stored semen thaws or a widow is unable to continue with assisted reproductive therapy, they are unable to exercise their rights as a parent, as a wife or as an embodied person; their interest in the *body-for-itself* and the *body-for-others* represents a very personal interest.

In contrast, a defining conceptual feature of property is that it governs anonymous interests; the type of interests that arise in mere things (land, toothbrushes, lamps). Yet, the storage and use of bodily material can give rise to personal interests; the type of interests that relate to our subjectivity or our *being-in-the-world*. By applying the legal structure that has been developed to govern anonymous interests to personal interests, the law is by passing, ignoring or denying the subjectivity that is in the thing.

The application of property law to *all* items of bodily material gives rise to a concern analogous to the concerns we addressed with reference to objectification (in Chapter Three). There are no concerns with treating items of bodily material that are subject to anonymous interests as items of property. The permissibility of treating anonymous interests as giving rise to property rights is analogous to the permissibility of treating objects as having solely objective properties. However, concerns arise with the application of property law to items of bodily material that are subject to personal interests. The impermissibility of treating these personal interests as giving rise to property rights is analogous to the impermissibility of ignoring, by-passing or disregarding the subjectivity that may be in an object. After all, *we are all things*. Some things attract moral considerations whilst other things are mere objects in the world.

As we have seen, this underlying conceptual unease is connected to particular structural problems with the application of property law to all items of bodily material. Conceptually, property law is concerned with preferences and choices that exist independent of the entitlement-holder. Connected to this conceptual feature are structural features that treat interference with entitlements as corrected by damages and treats entitlements in a thing as transferable entitlements. In essence, property law represents a structure of rights and duties that treat the preferences and choices that the entitlements

enable as preferences and choices that are independent of the entitlement-holder. Yet, some entitlements in some items of bodily material are necessarily associated with the entitlement-holder. The application of property law to these items of bodily material provides inadequate legal attention to the preferences and choices that are necessarily associated with the entitlement-holder.

### iii. The Emerging Structure

In this Section I have attempted to identify how entitlements in bodily material ought to be characterised. By identifying the interests that entitlements in bodily material represent, we are able to connect in the next Section the entitlements in bodily material with the appropriate legal method of protecting entitlements in bodily material.

I have argued here that entitlements in bodily material can be appropriately characterised as exclusionary interests in bodily material since the three assumptions that underlie the ‘exclusionary use of things’ are applicable to the entitlements that may arise in bodily material. Moreover, by assessing whether entitlements in bodily material represent anonymous or personal interests, we have identified in this Section a reason for why property law ought not to govern the use and storage of all items of bodily material. The concern is that the legal treatment of entitlements in the *body-for-itself* or the *body-for-others* as property rights ignores the particular connection between the entitlement-holder and the bodily material; whereas, the entitlements in bodily material that healthcare institutions may obtain represent contingent and exclusive interests. Accordingly, these entitlements give rise to property rights.

We therefore have an idea of the appropriate legal structure for the law governing the use and storage of bodily material. The entitlements of progenitors (in the *body-for-itself*) and closely concerned persons (in the *body-for-others*) represent exclusionary and personal interests. The legal structure that protects these entitlements ought to compose of the rights and duties under ‘the boundary approach’, whilst also adopting the rights and duties that reflect the necessary connection between the entitlements and the entitlement-holder. As for the entitlements in bodily material that healthcare institutions obtain, these entitlements may be treated as property rights and adopt a structure of rights

and duties provided by established property law doctrine. However, as we shall see, the exercise of these property rights may be subject to the duties that the healthcare institutions owe to progenitors and closely concerned persons.

## Section Two: Rights in Bodily Material

We have identified the interests that may arise in bodily material: where an individual retains entitlements in the *body-for-itself* or the *body-for-others*, these entitlements represent exclusionary and personal interests, and where a healthcare institution obtains entitlements in bodily material, they obtain exclusionary and anonymous interests. In this Section, I will prescribe a structure of rights and duties that can give legal effect to these interests. Following from the analysis in Part C, this structure of rights and duties concern:

the basis of the right: whether the right arises because of the relationship with the thing or because of the relationship with the duty-bearer;

the content of the right: whether the right concerns the relationship with the thing or the value that can be derived from the thing;

the content of the primary duty: whether the duty on the duty-bearer concerns conduct that causes interference with thing or concerns the standard of conduct undertaken by the duty-bearer;

the content of the remedial duty: whether remedies aim to correct the misallocation of entitlements or to distributive benefits and burdens on a criterion of merit; and

the transferability of the right: whether the right can freely transferred to another, transferred under certain conditions, or is non-transferable.

In identifying particular structures of rights and duties, I will also be recommending which rules and procedures ought to govern particular legal relationships. This provides a solution as to the appropriate legal status of separated bodily material.

There are three parts to this recommended structure of rights and duties outlined in this Section. First, I identify a number of key features of how existing statutory provisions govern the use and storage of bodily material. I will also isolate how these features of the existing statutory provisions help

shape the structure of rights and duties that ought to be employed to protect entitlements in bodily material.

Second, I will argue here that when bodily material is extracted, removed or detached from an individual, or when an individual dies, the healthcare institutions that obtain possession of the body or bodily material ought to be subject to a set of duties that are structurally similar to the duties imposed under the emerging tort of privacy. The combination of existing statutory duties and this new set of duties of confidentiality supplant the need for property law to govern the relationship between individuals and institutions with regards to the use and storage of bodily material.

However, these novel duties of confidentiality do not supplant the need for property law entirely. The third aspect of my recommendation is that healthcare institutions may exercise property rights in bodily material that they obtain possession of, provided that the exercise of these property rights is consistent with the performance of the duties imposed upon the healthcare institutions as possessors of bodily material.

### **a. Existing Statutory Governance**

There are three ways in which the HTA and HFEA currently govern the use and storage of bodily material that influences the structure of the non-statutory rights and duties that ought to be applied to entitlements in bodily material. The first is that statutory provisions limit the right to transfer bodily material so that the right is reduced to the right to participate in a particular transaction under particular circumstances. The second is that, with the exception of the rule under *Dobson*,<sup>540</sup> healthcare institutions exercise the right of actual possession of bodily material whilst individuals may have a superior right to possession, a reversionary right to possession or a non-possessory right. The third feature of the existing statutory governance is that it provides a mere ‘skeleton of rights and duties’

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<sup>540</sup> *Dobson and another v North Tyneside Health* (n39) 478, quoting *Clerk and Lindsell on Torts* (17th edn, 1995) 653 [13-50]: “the executors or administrators or other persons charged by the law with the duty of interring the body have a right to the custody and possession of it until it is properly buried”.

which needs to be ‘fleshed out’ by a boundary approach to the protection of entitlements in bodily material.

### i. Governance Rules and the Right to Transfer

There is an important exception to the suggestion in Section One that entitlements in bodily material represent exclusionary interests. That is, the right to transfer bodily material to a healthcare institution may be circumscribed by ‘governance rules’ or ‘liability rules’<sup>541</sup> so as to reduce the entitlement to a right to engage in a particular transaction.

As we have seen, the HTA and HFEA represent a set of governance rules that prescribe the conditions of a valid transfer as well as limits as to the content of the transfer. A condition for a valid transfer is that the healthcare institution may obtain human tissue, without the need for consent, provided that it is no longer needed for the care of the patient and it is used for a particular set of purposes identified in Part 2 of Schedule 1 of the HTA. Where human tissue is not needed for the patient’s own care or therapeutic benefit, the material may be stored for the purposes of clinical audit, education or training related to human health, monitoring or quality assurance.<sup>542</sup>

Otherwise, healthcare institutions must obtain the “appropriate” or “relevant” consent in order for the institutions to obtain lawful possession of human tissue, organs, gametes or embryos.<sup>543</sup> This involves measures that ensure that the transferor has the “legal capacity to make the decision”, is fully informed as to the transfer, and is acting voluntarily.<sup>544</sup> The purpose of these governance rules is to ensure that a voluntary and autonomous decision is being exercised by the transferor.

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<sup>541</sup> G Calabresi and AD Melamed, ‘Property Rules, Liability Rules and Inalienability’ (n15) 1092: “liability rules involve an additional stage of state intervention: not only are entitlements protected, but their transfer or destruction is allowed on the basis of the value determined by some organ of the state rather than the parties themselves”.

<sup>542</sup> Human Tissue Act 2004, Part 2, Schedule 1.

<sup>543</sup> Human Tissue Act 2004, Section 1(1) -(3), Section 5(1); Human Fertilisation and Embryology Act 1990, Schedule 3.

<sup>544</sup> Department of Health, *Reference Guide to Consent for Examination or Treatment* (n ) 7; Nuffield Council on Bioethics, *Human Bodies: Donation for Medicine and Research* (n65) 56, 61; Human Fertilisation and Embryology Authority, *Code of Practice* (n286) §5.

In addition to concerns as to the authenticity of consent, the transfer of bodily material also raises concerns as to the welfare of the transferor and the recipient of the material. Statutory provisions and guidelines: limit which items of bodily material can be extracted and transplanted, limit how often a transfer can occur, requires that transferors are assessed as to their “medical suitability”, and that the bodily material meets a qualitative standard for purpose of the transfer.<sup>545</sup> Concerns, beyond concern for the participants in any one transaction, also limit the content of the transaction. For instance, payment in exchange for human tissue, gametes or embryos is limited to monetary payments that reimburse the cost and opportunity loss that are directly associated with the extraction and transfer of the bodily material.<sup>546</sup>

Statute law prescribes a set of governance rules for how the right to transfer can be exercised because of legitimate concerns for the administrative and educational function of hospitals, authenticity of consent to transfer, the welfare of the transferor and the recipient of bodily material, and wider concerns with commercial transactions for bodily material. The result is that the right to transfer bodily material is significantly constrained to the extent that it is reduced from the open-ended right to transfer, to the right to participate in a particular transaction that is valid under particular circumstances.

## ii. Right of Actual Possession

In addition, the HTA and HFEA also require that healthcare institutions must be licensed in order to store and use bodily material that is either pursuant to purposes identified in Schedule 1 of the HTA or pursuant to a licensed activity under Schedule 2 of the HFEA. The result is, if tissue, organs, gametes or embryos are to be procured, stored, or used for therapeutic, scientific or educational purposes, such activities can only be lawfully performed by licensed healthcare institutions.<sup>547</sup> The

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<sup>545</sup> Human Tissue Authority, *Code of Practice 2* (n286) [59]; Human Tissue Authority, *Code of Practice 6* (n286) [49].

<sup>546</sup> Human Fertilisation and Embryology Authority, *Code of Practice* (n286) [13]; Human Tissue Act 2004, Section 32(7).

<sup>547</sup> Human Fertilisation and Embryology Act 1990, Schedule 2; Human Tissue Act 2004, Section 8(1), Section 16.

effect of this statutory structure is to limit the lawful exercise of the right to actual possession to healthcare institutions. The only relevant exception is the right to actual possession as the corollary of the duty to inter under the rule in *Dobson*.

Where bodily material is transferred to a healthcare institution, not only will the transfer be facilitated by a particular statutory procedure, but the result of this procedure is that the healthcare institution will obtain the right to actual possession under statute. This structural feature is important as it requires that the legal approach to the use and storage of bodily material provides a set of rights and duties that enable individuals to assert their non-possessory entitlements or their immediate, superior or reversionary rights of possession, against the healthcare institution who exercises the actual right of possession.

Therefore, with the exception of the right of possession under *Dobson*, entitlements in bodily material are allocated between a healthcare institution exercising the right of actual possession and individuals asserting their rights of authorisation, management, use or the superior or reversionary right of possession. The legal approach to the use and storage of bodily material must be able to facilitate the exercise of these entitlements within this particular structural arrangement.

### iii. 'The Statutory Skeleton'

In addition to facilitating the transfer of bodily material, and providing the legal conditions for the lawful use and storage of bodily material by healthcare institutions, the HTA and HFEA also provide statutory recognition of the right to authorise, manage and use bodily material. The third feature of the current statutory governance of the use and storage of bodily material is the way in which the statutory schemes protect these entitlements.

The statutory provisions prescribe rights and duties that arise in the context of particular activities or interactions. The focus of the legislative provisions is to require that consent is obtained in order for an activity in respect of bodily material to be a lawful activity. For instance, the management

and use entitlements of the progenitors in the fertilised embryo in *Evans* where facilitated by the requirement of bilateral consent for each act of creation, storage and use.<sup>548</sup> Without the consent of the progenitors, an act of creation, storage or use would be unlawful. Hence, the strategy of protection under the HTA and HFEA is limited to prohibiting wrongful acts. This reflects a ‘bilateral approach’ that apportions rights and responsibilities between participants in an action or activity.

Yet, the bilateral approach is an inadequate approach. Consider, for example, *Yearworth*. The chemotherapy patients in *Yearworth* had statutory rights to use and manage their stored semen. These rights were facilitated by the duties imposed on the fertility unit as a licensed authority. The statutory duties on the fertility unit required that the unit was “unable to store the men’s semen without their consent”,<sup>549</sup> “unable to use it for the purposes of any treatment of persons other than the men themselves (with their wives or partners) without their consent of such use”,<sup>550</sup> and unable to store or use the semen if the men withdrew their consent.<sup>551</sup> This is again illustrative of the bilateral approach under the HFEA; the legislation allocates particular rights and duties between the parties in a bilateral interaction.

The inadequacy of the bilateral approach in *Yearworth* was that the inadequate storage of the semen was not a breach of a statutory duty and thus the progenitors’ rights were unable to be vindicated through the statutory governance of their rights. In order to vindicate the rights in the semen, the Court of Appeal in *Yearworth* used the ‘boundary approach’ under property law to provide the appropriate structure of protection.

Mason and Laurie have identified further inadequacies of this ‘bilateral approach’ or “consent paradigm”.<sup>552</sup> According to Mason and Laurie, reliance upon consent as the focal point of the legal

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<sup>548</sup> *Evans v Amicus Healthcare* (n73) [36].

<sup>549</sup> *Yearworth v North Bristol* (n20) [44]; Human Tissue Act 2004, Schedule 3, Paragraph 8(1).

<sup>550</sup> *Yearworth v North Bristol* (n20) [44]; Human Tissue Act 2004, Schedule 3, Paragraph 5.

<sup>551</sup> *Yearworth v North Bristol* (n20) [44]; Human Tissue Act 2004, Schedule 3, Paragraph 4.

<sup>552</sup> JK Mason and GT Laurie, ‘Consent or Property’ (n56) 727.

relationship constrains the scope of the law in terms of the limited civil remedies available as sanctions for non-adherence with the statutory provisions,<sup>553</sup> the limited circumstances under the common law where consent or authorisation is required with regards to interaction with bodily material,<sup>554</sup> and the unclear form of legal protection provided to the right to possess as the corollary to the duty to inter.<sup>555</sup>

I suggest that entitlements in bodily material ought to represent exclusionary interests and the structure of rights and duties that protect entitlements in bodily material ought to adopt a boundary approach to the protection of the entitlements. Although the statutory procedures under the HTA and HFEA provide a valuable ‘skeleton’ of rights and duties, insofar as they give legal recognition to principal entitlements of authorisation and management, we must look to common law and equitable doctrines that employ a boundary approach to the protection of entitlements in things in order to afford legal protection to exclusionary interests in bodily material.

## **b. A New Confidentiality**

As we saw in Chapter Four, the duties of confidentiality under the emerging tort of privacy employ a boundary approach to the protection of personal information. I will argue here that the *structure of rights and duties* under the emerging tort of privacy is the structure of rights and duties that ought to be employed to protect the entitlements in bodily material that are exercised by individuals; this is so that an approach, akin to the common law approach to the right to privacy, is able to provide exclusionary protection of entitlements in bodily material whilst still employing a structure of protection that is consistent with the personal interests that arise in bodily material.

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<sup>553</sup> JK Mason and GT Laurie, ‘Consent or Property’ (n56) 727.

<sup>554</sup> JK Mason and GT Laurie, ‘Consent or Property’ (n56) 727.

<sup>555</sup> JK Mason and GT Laurie, ‘Consent or Property’ (n56) 727.

## i. The Analogy with Confidential Information

Confidentiality imposes duties on possessors of particular types of information. I am suggesting here that this set of duties ought to be transplanted so as to apply to possessors of particular types of bodily material - namely - to possessors of bodily material that is *for-itself* and *for-others*.

This represents a novel doctrinal development. The extent of doctrinal change is arguably in equal proportion to the recognition of property rights in material that has been subject to a ‘no property rule’ for over three centuries of legal history. Whether it is the extension of property law or other branches of private law, doctrinal extensions are inevitable given the lack of any clear legal status of bodily material and the constrained scope of existing statutory provisions. Although duties of confidentiality are classified as equitable duties imposed on recipients of confidential information, “classification should be the law’s servant, not its master”,<sup>556</sup> and we ought to be willing to view legal rules as shaped by the particular structure of rights and duties rather than wholly determined by classification.

I suggest that this analogy between confidentiality and the entitlements in bodily material held by individuals is apt for three reasons. First, as demonstrated in Section One, interests in personal information and interests in the *body-for-itself* and the *body-for-others* share two important conceptual features. They both represent entitlements in a thing that ought to be exercised to the exclusion of others (exclusionary interests) as well as protecting preferences and choices that cannot exist independently of the entitlement-holder (personal interests).

The second similarity is that the rights in bodily material exercised by individuals and the right to control personal information are rights that are asserted against those who possess or acquire the bodily material or personal information. Duties of confidentiality are - in property law terms - exercisable against the duty-bearer who has the right of actual possession. It is this structure of entitlements - of

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<sup>556</sup> S Green, ‘Rights and Wrongs’ (n392) 553.

rights that constrain the possessor of *the thing* - that most closely aligns with the structure of entitlements that arises where individuals have entitlements in bodily material.

The third similarity between privacy and personal interests in bodily material is that both interests share a value of trust and confidence. When an individual, whether they be the progenitor of the material or friends or family of the deceased, transfers the possession of the body or bodily material to a healthcare institution, they are entrusting healthcare professionals and healthcare institutions with the body or bodily material. Trust and confidence is being exercised because the transfer of possession is the transfer of a power to deal with the body in a way that is consistent or inconsistent with the individual's personal interests. After the transfer, the individual has no other way of controlling how the body or bodily material is being treated except through the relationship with the healthcare professionals and healthcare institution. This relationship will not always constitute a fiduciary relationship, since the healthcare professionals and institutions are not required to "exclusively" exercise the power "for the [individual's] benefit".<sup>557</sup> Nor can the relationship always be conceptualized as a commercial or contractual relationship as the service may be provided by the healthcare institution in exchange for valuable consideration.

The relationship is therefore best understood as a relationship of trust and confidence that arises out of the transfer of bodily material to a healthcare institution. The healthcare institution then owes duties to protect the personal interests of the progenitors, co-participants in therapy, or closely concerned persons. This relationship is akin to the relationship of trust and confidence that arises when personal information is disclosed and the recipient of the personal information is under a duty to protect the privacy interests of the interest-holder. It follows that interests in bodily material ought to obtain a legal structure that is akin to the legal structure afforded to interests in personal information.

This approach preserves the 'no property rule' insofar as the legal relationship between the entitlement-holder and possessors of bodily material is not governed by property law. As we shall turn

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<sup>557</sup> A Grubb, 'The Doctor as Fiduciary' (1994) 47 *Current Legal Problems* 311.

to now, such an approach provides a boundary of exclusionary protection for entitlements in bodily material whilst still providing adequate legal protection to the preferences and choices that are particular to, or necessarily associated with, the entitlement-holder.

## ii. The Structure of Rights and Duties

### *The Basis of the Right*

With the exception of the rule under *Dobson*, individuals do not obtain the right of actual possession. Rather, the entitlements in the *body-for-itself* or the *body-for-others* are either non-possessory entitlements (such as rights of authorisation or management) or, superior or reversionary rights of possession. Since institutions obtain the actual right to possession, we need to make a subtle adjustment to the application of the boundary approach to entitlements in bodily material held by individuals.

As discussed in Chapter Four, where the entitlements include the actual right to possession, the boundary approach imposes duties on an open set of persons not to interfere with the right to possession. We can justify the full use of an exclusionary boundary because of the ease with which third parties can identify that they are under a duty not to interfere with the right to possession. Difficulty arises where third parties lawfully obtain possession of the thing, but, unbeknown to them, other rights-holders have entitlements in the thing. I have argued that this creates an inequality between the rights-holder and the duty-bearer since the duty-bearer may be under a duty to adhere to entitlements of which they cannot be reasonably expected to have knowledge of.

Where the entitlements in the thing are beyond the right of actual possession, one structural technique that can be used to re-adjust the balance between the rights-holder and duty-bearers is to limit the correlative duty to circumstances where the duty-bearer knew, or ought to have known, of the entitlements of the rights-holder. These 'latent rights' represent an intermediate position between pre-existing rights (that arise because of the relationship with the thing and are exercisable against an open set of persons) and direct rights (that arise out of a particular activity or interaction involving the duty-bearer). Latent rights are nonetheless 'interests in things' but give rise to rights actionable against those

who knew, or ought to have known, of the entitlements of the rights-holder. Under this approach, the right of closely concerned persons to authorise the use and storage of the body of a deceased person, and the progenitor's right to manage and use their bodily material, are rights actionable against those who knew, or ought to have known, of the rights of the progenitor or closely concerned persons.

Under the emerging tort of privacy, duties of confidence arise where the recipient of personal information knew or ought to have known that the information is "fairly and reasonably to be regarded as confidential".<sup>558</sup> Under the traditional formulation in *Coco v Clarke*, there were two limbs to the test: (a) the circumstances in which the information was imparted needed to be circumstances that import confidence and (b) the information itself needed to have a "necessary quality about it".<sup>559</sup> More recent judicial developments have removed the necessity of establishing both limbs of the tests, so that the "nature" or "quality" of the information may be sufficient to find the defendant knew or ought to have known that the information is reasonably regarded as confidential information.<sup>560</sup> But that is not to sideline the first limb of the traditional formulation; the circumstances in which the information is imparted may nonetheless be relevant to determine whether the recipient had actual or constructive knowledge of the interest.

Here a similar basis may facilitate the recognition of the right to authorise the use and storage of the body of a deceased person, and the right to use and manage bodily material retained for therapeutic benefit. Whether actual or constructive knowledge of these rights arise will depend on (i) the circumstances in which the bodily material is detached from the person (ii) the circumstances in which the bodily material is transferred into the possession of the healthcare institution (iii) the 'nature' or 'quality' of the bodily material. I suggest that the process through which a healthcare institution obtains

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<sup>558</sup> *Campbell v MGN* (n390) [14].

<sup>559</sup> *Coco v AN Clark* (n383) 41.

<sup>560</sup> G Philipson, 'Transforming Breach of Confidence' (n384) 746; *Campbell v MGN* (n390) (Lord Nichols) [14]: "[confidentiality] has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. In doing so it has changed its nature...Now the law imposes a 'duty of confidence' whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential."

possession of bodily material is a process through which actual or constructive knowledge of an entitlement-holder's personal interests in the material can arise or can be imputed.

In terms of the bodies of deceased persons, a healthcare institution is required to either ascertain that the deceased has expressed their willingness for their body to be used for a particular purpose or obtain the "appropriate consent" from an appointed representative or those in a closest qualifying relationship in order for the healthcare institution to be able to store or use the body or bodily material.<sup>561</sup> Where the closely concerned persons do not provide authorisation for the use of the body, or only provide authorisation as to a particular set of uses, the healthcare institution would know, or can be reasonably deemed to have known, that the closely concerned persons are owed duties regarding the use and storage of body of the deceased. In essence, the circumstances of the transfer of the body into the possession of a healthcare institution represents a procedure (required under statute) that will provide sufficient indication to the healthcare institution or licensed authority that they hold the body or bodily material subject to the interests of closely concerned persons. The statutory procedure is required because of the death of the person and further statutory conditions may apply because of the 'nature' of the bodily material that is from the deceased.

As for bodily material from a living progenitor, the circumstances of extraction are key indicators of whether management and use entitlements are being retained by the progenitor (and potentially their partner). Where the material is being extracted for the progenitor's own therapeutic benefit (or where the material is being extracted for shared therapeutic benefit) there is a strong indication that a use entitlement is being retained, by the progenitor (or by the couple) seeking treatment. This is coupled with the circumstances of the transfer, which are likely to involve informed consent for the extraction of bodily material under the common law and the required statutory consent for storage and use of the bodily material. Moreover, the 'quality', 'nature' or 'type' of material may also be relevant in determining whether the recipient of the material knew or ought to have known that the progenitor retains an interest in the material if the material is commonly retained for therapeutic benefit. These

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<sup>561</sup> Human Tissue Act 2004, Section 3, Section 4 and Section 27.

circumstances of extraction and transfer, and the nature of the material itself, are likely to provide sufficient bases on which to ground duties of confidentiality.

For example, when Matthew dies, Mark extracts semen, and Joanna extracts bone marrow for Lucy, the healthcare institution obtains possession of Matthew's body, Mark's semen and Joanna's bone marrow through a statutorily prescribed process. It is because of this process that the healthcare institution either knew, or can be reasonably treated as having known, that Matthew's body, Mark's semen and Joanna's bone marrow are subject to personal interests. These circumstances are therefore able to provide the basis for the duties imposed on the healthcare institution that are owed to Mark, Joanna, Lucy and the friends and family of the Matthew.

The only exception would be where the family and friends of Matthew exercise their right to possess Matthew's body as the corollary of the duty to inter under the rule in *Dobson*. This common law right to possession ought to arise as a pre-existing right so that it is exercisable against an open set of persons. Similar to the recent application of the work or skill rule in *Bazely*, the right to possession can be asserted against "any person" and subject only to "positive law which forbids its retention under the particular circumstances".<sup>562</sup> In terms of the basis of this right to possess the body of the deceased, this particular entitlement affords a structure of protection akin to property law insofar as the right to actual possession is exercisable against an open set of persons.

I have suggested that entitlements in bodily material that are exercised by individuals ought to give rise to latent rights. This follows from characterising these entitlements as representing exclusionary interests, whilst still considering the position of the duty-bearer with regards to entitlements that are beyond the right to actual possession. The only exception is the common law right to possess the body of the deceased. I have suggested that this right ought to operate as a pre-existing right, so that the right to possess is actionable against an open set of persons.

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<sup>562</sup> *Bazely v Wesley Monash IVF* (n87) [18].

## *The Content of the Right*

As exclusionary interests, interests in bodily material concern the relationship of control between the entitlement-holder and the thing, rather than the particular activities that the relationship with the thing enables. The legal structure that protects exclusionary interests therefore protects this relationship through the vindication of ‘original rights’; that is, rights that protect the relationship with the thing independent of the value derived from the use of the thing. It follows that the legal structure that is applied to the use and storage of bodily material ought to include the vindication of original rights.

To succeed in a claim for breach of confidentiality in a medical context, it is sufficient that unauthorized disclosure of personal information occurred.<sup>563</sup> This is because confidentiality protects the relationship between the confider and the information without the confider having to show a loss that was derived from the inference with the relationship of control. Duties of confidentiality therefore represent a legal structure that protects original rights in personal information.

Applying this structural feature to the entitlements in bodily material that are exercised by individuals would mean that interfering with an individual’s rights to: possess the body of the deceased, authorize the use of the body of the deceased, or manage or use bodily material, would each amount to an actionable loss. The interference, itself, will be a legal wrong without the need for the entitlement-holders to show that they suffered a tangible loss that was caused by the interference in order to succeed in a legal claim.

This development addresses the main inadequacy of most non-proprietary solutions to the use and storage of bodily material. As we saw in *Yearworth*, the claimants were unable to show an actionable

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<sup>563</sup> *Bluck v Information Commissioner* (n411) [15].

loss unless the claim was fitted into a property rights-based claim.<sup>564</sup> Moreover, as Nwabueze has identified, claims for misdirected, misapplied or maliciously destroyed organs will confront a “remedial hurdle” in “proving a contemporaneous loss”<sup>565</sup> unless the legal right adopts some of the structural features of property rights. This is because property rights (and rights of bodily integrity and privacy) protect ‘original rights’ as part of the boundary approach. By contrast, a ‘derivative loss’ is required for a successful action under the bilateral approach; thus, the claimants in *Re: Organ Retention* were required to establish that the physicians’ failure to adequately inform them of the storage and use of their children’s organs was not only *wrongful* (breach of duty)<sup>566</sup> but was also *harmful* (caused a derivative loss).<sup>567</sup>

### *The Content of the Duty*

As part of the boundary approach, the content of the duty that is imposed on the duty-bearer is a singular duty. The duties that the law of confidentiality imposes are singular duties of non-disclosure.<sup>568</sup> This reflects the importance of privacy to the rights-holder relative to the position of the duty-bearer who knows, or ought to have known, the personal and confidential nature of the information. Moreover, the duty of non-disclosure covers both deliberate and inadvertent conduct that leads to disclosure. This is a particularly stringent duty even compared to the singular duties under property law. It is the combination of the right-holder’s exclusionary interest in the personal information coupled with the circumstances through which the duty-bearer obtained the information that justifies such a stringent duty on the duty-bearer.

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<sup>564</sup> *Yearworth v North Bristol* (n20) [24]: “The determination under challenge was to the effect that the decision in *Gregg v. Scott* [2005] UKHL 2, [2005] 2 AC 176, compelled a conclusion that, unless the men were to demonstrate a greater than even chance that the lost sperm could have been used in order to achieve conception, then, irrespective of any recovery of their natural fertility, they could not claim in respect of such physical damage to their overall ability to become fathers as was wrought by the so-called personal injury.” *c.f.* *Yearworth v North Bristol NHS* [25]: “In order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred per Lord Brandon in *Leigh and Silavan Ltd v. Aliakmon Shipping Co. Ltd* [1986] AC 785 at 809F.”

<sup>565</sup> RN Nwabueze, ‘Remedial Quagmire’ (n416) 205.

<sup>566</sup> *Re: Organ Retention* (n52) [170 - 206].

<sup>567</sup> *Re: Organ Retention* (n52) [259].

<sup>568</sup> *A-G v Guardian Newspapers (No. 2)* (n410) [34].

I suggest that the relationship between an individual who has entitlements in bodily material and the healthcare institution who possesses the bodily material (and is aware of the entitlements of the entitlement-holder) resembles the relationship between rights-holder and duty-bearer under the law of confidentiality. It follows that the duty owed to closely concerned persons, progenitors or co-participants in therapy, are singular duties of non-interference. This means that healthcare institutions that possess the bodily material are responsible to the entitlement-holder for any misuse of, or damage to, the bodily material. Even where the damage or misuse was caused inadvertently or was caused despite the healthcare institution taking all reasonable precautions to avoid damage to, or misuse of, the bodily material.

The right to possession under the rule in *Dobson* again provides for the only exception. Since the entitlement here is a right of actual possession that is exercisable against an open set of persons, the appropriate analogy in terms of the content of the duty is with property law. The right to possession ought to therefore benefit from the complementary sets of duties of non-interference (where the conduct is deliberate or voluntary) under trespass and conversion as well as duties of care under negligence and bailment.

Therefore, where a healthcare institution obtains possession of bodily material, such as Matthew's body, Mark's semen or Joanna's bone marrow, the institution is under a duty of non-interference that is owed to Matthew's family and friends, Mark, Joanna and Lucy. The stringency of this duty reflects both the exclusionary interest in the body, semen or bone marrow and the healthcare institution's actual or constructive knowledge of the entitlements from the circumstances through which the Healthcare Institution obtained possession of the material. Where the friends and family of Matthew obtain the right to possess Matthew's body, this ought to impose duties of non-interference (akin to duties under trespass and conversion) and duties of care (akin to duties under negligence) on an open set of persons.

## *The Content of the Remedial Duty*

The way in which the law remedies interference with personal interests is to *redistribute* benefits and burdens in light of the merit of the parties. This is because damages are unable to correct interference with preference and choices that are necessarily associated with the entitlement-holder. In the context of private law remedies, this remedial measure surfaces as ‘general damages’. This is opposed to ‘special damages’, which represents an attempt to *correct* the misallocation of entitlements (whilst assuming the preferences and choices that the entitlements enable will be restored).

Under confidentiality, “where a breach causes injury to feelings, [the] court has power to award general damages”.<sup>569</sup> Similarly, I suggest that since entitlements in the *body-for-itself* and the *body-for-others* are personal interests, the availability of general damages is appropriate. As discussed in the previous Chapter, the practical effect of this compensatory approach under general damages removes the requirement of the rights-holder to prove that interference with their rights caused an identifiable psychiatric injury or prove another actionable loss onto which damages for emotional distress can be engrafted onto. Instead, under general damages, the interference with personal interests is presumed to cause a non-pecuniary loss. The quantum of the non-pecuniary loss may vary depending on the circumstances of the particular case, such as the extent of the loss suffered by the rights-holder or the degree of blameworthiness of the interferer. However, the ability to obtain damages will not depend on proving the existence of a non-pecuniary loss.

Although distributive justice may be primarily concerned with the compensatory aims of awarding damages in proportion to the loss suffered by the wronged-party, a large range of considerations may become relevant because the distribution of benefits and burdens is determined by reference to the ‘merit’ of the parties. Since a collection of considerations can shape the relative merits of the parties involved in the dispute, the criteria for allocating benefits and burdens represent an opportunity to advance a particular set of a large range of public policies. For example, Palmer argues that, in the context of biobanks, ‘liability rules’ enable the courts to exercise a degree of social control

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<sup>569</sup> *Archer v Williams* (n497) [76].

by not only forcing research and clinical enterprises to account for their practices but also by limiting the extent individuals can dictate terms to these socially important enterprises.<sup>570</sup> By awarding damages that are not necessarily determined by inter-exchange between the parties Palmer argues that the law can “attempt to optimize the benefits and risks of knowledge distribution” in biobanking<sup>571</sup> since (to borrow Nwabueze’s description):

liability rules are superior to property rules in dealing with issues raised by emergent biobanks because they bring into focus the relevant ethical issues, such as a person’s right to control the actions of professionals and their organisation.<sup>572</sup>

Harrison also advocates for use of ‘liability rules’ for the protection of entitlements in separated bodily material in an approach that avoids the commodification of the person and would “draw from models of publicly mediated compensation in other areas of law”.<sup>573</sup> Under this approach recommended here, the law would employ a distributive justice approach to primarily address the need to compensate the non-pecuniary losses that follow from interference with personal interests. Yet, a range of public policy factors (as Harrison and Palmer suggest) may also guide the allocation of benefits and burdens under the recommended approach.

### *The Transferability of the Right*

Since personal interests represent preferences and choices that are necessarily associated with the entitlement-holder, it follows that the right to privacy and the rights in the *body-for-itself* and the *body-for-others* are non-transferable rights. Although a number of people may possess the personal information that pertains to a particular person, only that particular person to whom the information pertains is the rights-holder. In terms of bodily material, the rights that closely concerned persons have in the body of

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<sup>570</sup> LI Palmer, ‘Should Liability Play a Role in Social Control of Biobanks’ *Journal of Law, Medicine and Ethics* 33 (2005) 70.

<sup>571</sup> LI Palmer, ‘Should Liability Play a Role in Social Control of Biobanks’ (n570) 70.

<sup>572</sup> RN Nwabueze, ‘Remedial Quagmire’ (n416) 202.

<sup>573</sup> CH Harrison, ‘Neither Moore nor the Market: Alternative Models for Compensating Contributors of Human Tissue’ (n454) 94.

a deceased person and the rights of progenitors and co-participants in therapy have in extracted material, are rights that ought to be limited to those particular individuals.

Recall how entitlements in the *body-for-itself* and the *body-for-others* are justified with reference to the attributes and characteristics of the entitlement-holder. For the *body-for-itself*, it is because the bodily material remains functionally unified with the body in its responsiveness to the task of engaging or coping with the world that the progenitor of the material retains the right to manage and use entitlements in their material. For the *body-for-others*, it is because our bodies are the medium of social experience, and deceased bodies can continue to figure as the medium of social experience for other people, that explains why family and friends ought to be able to exercise a degree of control over how the bodies of their deceased loved-one is treated. Crucially, if these entitlements were transferred to another, the reasons justifying the exercise of the entitlement would no longer be applicable. The transfer of entitlements in the *body-for-itself* and the *body-for-others* removes the justification for why the entitlements ought to be legally protected.

As we shall see, this prescription is at odds with recent judicial developments where property law has been employed to facilitate the transfer of entitlements in bodily material to the partner of the progenitor of reproductive material. As I have mentioned earlier, the ability for a partner of a participant in the assisted reproduction therapy to obtain a use entitlement in the extracted material can be understood in terms of the partner exercising a reversionary use entitlement as a co-participant in the therapy. Under the approach recommended here, the reversionary right of the co-participant is premised upon the same basis as the progenitor; duties are imposed on the possessor of the material because of their actual or constructive knowledge of the interest. A consequence of this approach is that the onus is placed on a co-participant to have their intended involvement in the therapy known by the healthcare institution. It is because the interest in stored semen is a personal interests, that they ought to be conceived as use and reversionary use entitlements, rather than employing legal structures developed to facilitate the transfer of property.

In sum, the statutory provisions that govern the use and storage of bodily material provide a skeleton of rights and duties but do not provide adequate protection for exclusionary interests. To further fortify the protection of entitlements in bodily material, we need to identify common law or equitable doctrines that adopt the boundary approach to the protection of entitlements in things. I have argued here that since the emerging tort of privacy represents a legal structure that adequately protects exclusionary and personal interests, the same structure of rights and duties ought to govern the personal interests that arise in bodily material.

Under such an approach, the right to authorise the use of the body of a deceased person and the right to manage and use bodily material ought to arise as latent, original and non-transferable rights that impose singular duties of non-interference and redistributive remedial duties. The only exception is the right to possession that arises under the rule in *Dobson*. This right to possession only deviates from the recommended approach, and aligns with a property law approach, in terms of the basis of the right and content of the primary duty.

### **c. A New Property**

Although the imposition of the duties of confidentiality, supplants the need for property law to govern the legal relationship between individuals and healthcare institutions with regards to the storage and use of bodily material, property rights in bodily material ought to nonetheless arise where a healthcare institution obtains entitlements in bodily material. The exercise of these property rights will nonetheless be limited by statutory duties under the HTA and HFEA by duties of confidentiality formulated above.

#### **i. The Departure from the ‘No Property Rule’**

As discussed in the previous Section, the entitlements that an institution may obtain in bodily material represent exclusionary interests, since entitlement-holders ought to “have open-ended choices of how to invest in or consume” their entitlement.<sup>574</sup> The entitlements that a healthcare institution may

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<sup>574</sup> HE Smith, ‘Property Rules’ (n338) 1728.

obtain are also anonymous interests, since the entitlements enable preferences and choices that “can exist independent of” the entitlement-holder.<sup>575</sup> This suggests that the entitlements in bodily material that an institution exercises share the same conceptual features as property rights.

Although healthcare institutions obtain the lawful right to store and use bodily material under statute, the statutory governance of entitlements is limited insofar as it only provides the skeleton of rights and duties for parties to particular activities or interactions. In order to provide adequate legal protection for - what ought to be treated as - exclusionary interests, the law ought to adopt a boundary approach that protects an open-ended sphere of activity with regards to the bodily material. I therefore suggest that once a healthcare institution obtains the possession of the bodily material, the entitlements that the institution has may be clothed as property rights. Actions for conversion, trespass, reversionary injury, bailment and negligence causing damage to property will protect entitlements in the material. This is a clear departure from the medieval ‘no property rule’ that has so far governed the status of bodily material.

## ii. The Structure of Rights and Duties

Let us briefly consider the structure of rights and duties that property law would afford to the protection of entitlements in separated bodily material. In terms of *the basis of rights* under property law, the right to possession is a pre-existing right under conversion, trespass and reversionary injury. These rights to possession, and the rights of use that unencumbered possession enables, are exercisable against an open set of persons. This is complemented by the action for negligence causing damage to property, which is formulated upon the basis of an interaction giving rise to a duty of care but does not as well as the availability of an action in bailment, where duties of care arise ‘directly’ between the bailor and bailee. As a result, the wrongful interference actions provide protection for both “proprietary and possessory rights”.<sup>576</sup>

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<sup>575</sup> *OBG v Allen* (n447) [309].

<sup>576</sup> S Green, ‘Rights and Wrongs’ (n393) 552.

The *content of the right* under property law is concerned with the ‘original dimension’ of the entitlement. This is because the relief available for wrongful interference with the possession or control of the bodily material will be governed by Section 3(2) of the Tort (Interference with Goods) Act 1977. Although consequential loss is recoverable, under Section 3(2) it is not necessarily to show subsequent loss in order to succeed in an action for conversion, trespass, reversionary injury, or negligence causing damage to property. It is sufficient for the claimant to show the infringement of a right through the breach of the duty owed to the rights-holder. This conceptually follows from the interests in bodily material being exclusionary interests; the transgression past the exclusion boundary is itself an actionable wrong.

Since healthcare institutions obtain possession of bodily material as items of property, the right to possession will impose a combination of *strict and fault-based duties*. The duty not to undertake conduct that deprives the rights-holder’s full benefit of the right of possession under conversion, and the duty not to directly interfere with the right of possession under trespass to goods, are both strict duties.<sup>577</sup> In addition, negligence and bailment imposes duties of care with regards to the property rights of the rights-holder.

Where this primary duty is not performed, the *content of the remedial duty* under property law is to place the entitlement-holder “in the same place as if the loss had not been inflicted on him”.<sup>578</sup> As part of the corrective approach to loss, the full cost of repair or replacement, the loss of profit or the full market value may be recoverable. As damages awarded for the destruction of the cell-line in *Arora* illustrate, the award of special damages is likely to adequately remedy the interference with bodily material where it is held and used for research or commercial purposes, even where the bodily material has no extrinsic market value.<sup>579</sup>

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<sup>577</sup> S Green, ‘Understanding The Wrongful Interference Actions’ (n124) 25.

<sup>578</sup> NE Palmer, *Interests in Goods* (n475) 548.

<sup>579</sup> *US v Arora* (n427) 1110.

Finally, in terms of the *transferability* of the property rights, when a healthcare institution obtains possession of the material, the institution obtains an anonymous interest in the material. There is therefore no *conceptual* reason why the material cannot be treated as a transferable, tradable and fungible commodity, so that the entitlements obtained by Healthcare Institutions may be governed by Calabresi and Melamed's 'property rules'.<sup>580</sup> However, the transfer of property will only be lawful where the transfer is consistent with both the 'governance rules' (or 'liability rules')<sup>581</sup> under the HTA and HFEA and the duties of confidence imposed on possessors of bodily material as formulated above. Such duties may prevent or limit the exercise of the right to transfer.

### iii. Obligations on Property Rights-holders

Although a healthcare institution may obtain entitlements in bodily material, and obtain the above structure of legal protection, existing statutory duties and duties of confidence developed here may impose obligations on the possessor of the material and prevent or limit the exercise of an entitlement in bodily material. The duties of confidentiality provide three main sets of obligations on the possessors of bodily material concerning the functional state of the bodily material, the use of the material and the relationship between the material and third parties. Recall that the duties under confidentiality are strict, so that the possessor of bodily material is under a duty not to deliberately or inadvertently undertake conduct that is inconsistent with the entitlements in the bodily material held by closely concerned persons, progenitors or co-participants.

The first main set of obligations concern the functional state of the bodily material. Where closely concerned persons obtain the right to possess the body of the deceased, or where progenitors or co-participants in therapy retain the right to use bodily material, the duty imposed on the possessor of the body or bodily material is to preserve the function of the body or bodily material. As discussed earlier, where the bodily material is *for-itself*, the function of the bodily material is determined by the therapeutic application of the bodily material, and where the bodily material is *for-others*, the function of

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<sup>580</sup> G Calabresi and AD Melamed, 'Property Rules, Liability Rules and Inalienability' (n15) 1092.

<sup>581</sup> G Calabresi and AD Melamed, 'Property Rules, Liability Rules and Inalienability' (n15) 1092.

the bodily material is the medium of social experience. The first set of obligations is therefore to preserve the material so that the material may continue to perform these functions.

The second set of obligations, that follow from the imposition of duties of confidentiality on possessors of bodily material, concern the limits of permissible activity with regards to the bodily material. Where closely concerned persons authorise a particular category of use of the body of a deceased person, the Healthcare Institution is under a duty to limit the scope of use of the material to that category. Similarly, where a progenitor or co-participant retains the right to manage bodily material, the possession or any use of the bodily material requires the authorisation or consent of the progenitor. The possessors of bodily material are therefore also constrained in the way in which they use or store the bodily material, since their right to possess and use bodily material are determined by the authorisation or consent obtained from closely concerned persons or progenitors.

The duties of confidentiality formulated here also impose constraints and obligations on the possessors of bodily material with regards to third parties. As discussed, healthcare institutions ought to obtain the right to possession as a pre-existing right, so that their right to possession is exercisable against an open set of persons. Where their right to possession is encumbered by duties of confidentiality to other entitlement-holders, healthcare institutions ought to also be under a duty to exercise their right of possession against third parties in order to protect the entitlements of other entitlement-holders. Thus, if a third party (who is not subject to duties of confidentiality) directly or negligently interferes with the bodily material, the healthcare institution ought to be under an obligation to claim under trespass to goods or under negligence against the third party. This way, the full arsenal of property law may be used against third party interferers even when the possessor of the material only exercises the right to possession.

In addition, the healthcare institution may seek to transfer the possession of the bodily material to another licensed institution, such as an independent research group, a biobank network or storage facility. In exercising this right to transfer, the initial possessor of the bodily material would be under a

duty to make the recipient of the bodily material aware of the authorisation, management, use or possession entitlements of closely concerned persons, progenitors or co-participants. The act of making the recipients aware of these entitlements in the bodily material functions is to bring the recipients of the bodily material under the duties of confidentiality that are owed to the entitlement-holders. Whereas, if the first institution transfers the bodily material without making the recipient institution aware of the entitlements of others, the transfer of possession would have the legal effect of extinguishing the method of protecting the entitlements of others. The exercise of the right to transfer, without provision of notice to the recipients, would be the exercise a property right that is inconsistent with the duties owed to other entitlement-holders, and therefore a breach of the duties owed to the entitlement-holders.

Healthcare Institutions, as the possessors of bodily material, are best able to: account for state of the material, control the use of the bodily material and govern the relationship between third parties and the bodily material. The effect of this structure of property rights and duties of confidentiality is to enable healthcare institution to exercise their entitlements through open-ended choices, and as against an open-set of persons, whilst also constraining healthcare institutions from exercising their property rights in a way that is inconsistent with the entitlements of closely concerned persons or progenitors.

I have argued that this represents the appropriate set of rules and procedures to govern the use and storage of bodily material. Notice that under this recommendation, bodily material does not have a 'legal status'. Rather, the legal relationships with regards to bodily material are governed by different legal rules: the relationship between individuals and institutions with regards to bodily material is a relationship of confidence, whereas the relationship between institutions and third parties with regards to bodily material is a proprietary relationship.

## Section Three: The Ownership of Bodily Material Revisited

My recommendation, briefly stated, is that individuals may obtain a narrow bundle of entitlements in bodily material that is *for-itself* or *for-others*, whilst healthcare institutions ought to obtain a large set of entitlements in bodily material. The entitlements held by individuals ought to be afforded legal protection through the imposition of duties of confidentiality, whilst the entitlements obtained by healthcare institutions ought to give rise to property rights.

Let us conclude the substantive discussion by comparing the legal approach that I have recommended in this Thesis with the way the law has so far developed. We can understand the current law on the use and storage of bodily material with reference to the five strands of legal authority: the work or skill exception, statutory rights and duties, the affirmation of the no property rule, the new basis under *Yearworth*, and the posthumous use cases. The divergence between the way the law is and the way the law ought to be is concerned with both *what* entitlements ought to be protected and *how* the entitlements ought to be protected.

### i. The Work or Skill Exception

Under the approach recommended here, there is no longer a need for the work or skill exception. This is because entitlements can be justified in more convincing and encompassing ways, and because entitlements can be protected under a boundary approach without a threshold requirement of work or skill.

### *Entitlements and Justifications*

Under the common law, an established exception to the ‘no property rule’ is that the applier of work or skill may obtain the right to possess bodily material as a property right. Under the HTA and HFEA, healthcare institutions may obtain a statutory right to possess bodily material (conditional upon obtaining consent and meeting license requirements). I have suggested that this is justified given the social value of healthcare institutions exercising entitlements in bodily material for therapeutic,

scientific and educational purposes. This suspends the need for the work or skill rule as threshold requirement to establish the right of a Healthcare Institution to possess bodily material.

As for an individual obtaining entitlements upon the basis of the application of work or skill, I have argued that the application of work or skill is an insufficient basis to justify the recognition of entitlements in a pre-social analysis. Instead, an individual may obtain entitlements in bodily material on a Hegelian or Phenomenological basis, akin to the reasoning in *Yearworth*.

The work or skill rule contained in Section 32(9)(c) of the HTA differs from the common law rule in terms of the entitlement in bodily material that is being established. The statutory rule provides a basis for the exercise of income, rather than possession entitlements, in “controlled material”.<sup>582</sup> Based on what we can infer from the drafting of this provision,<sup>583</sup> Section 32 is attempting to distinguish between the non-commercial dealings in human tissue that is intended for transplantation from commercial dealings in other items of human tissue including any tissue that has been the subject of work or skill. This distinction roughly aligns with the recommendation here that the transfer of bodily material from individuals to institutions, and the transfer of bodily material for therapeutic application between institutions, ought to be a non-commercial transfer. The work or skill rule nonetheless appears to be redundant in formulating this distinction.

### *Interests, Rights and Rules*

The result of the successful application of the work or skill rule has been to establish that the applier of work or skill has the right possession that arises as a pre-existing right. The effect is to enable the applier of work or skill to assert their right to possession against an open set of persons. I have suggested that the right to possession, whether it is obtained by healthcare institutions or under the rule

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<sup>582</sup> Human Tissue Act 2004, Section 32(8): For the purposes of this section, controlled material is any material which— (a) consists of or includes human cells, (b) is, or is intended to be removed, from a human body, (c) is intended to be used for the purpose of transplantation, and (d) is not of a kind excepted under subsection; Section 32(9)(c): The following kinds of material are excepted... material which is the subject of property because of an application of human skill.

<sup>583</sup> R Hardcastle, *Law and the Human Body* (n47) 113-116.

in *Dobson*,<sup>584</sup> represents an exclusionary interest. It follows that under the recommended approach, the right to actual possession arises as a pre-existing right, either as a property right or under the rule in *Dobson*, without the need for the threshold requirement of work or skill.

## ii. Statutory Rights and Duties

The provisions under the HTA and HFEA divide up the bundle of entitlements between healthcare institutions, progenitors and closely concerned persons. I have suggested here that we ought to allocate the entitlements slightly differently. I have also argued that the statutory schemes provide a skeleton of rights and duties through a bilateral approach, and that we ought to afford entitlements in bodily material protection through a boundary approach.

### *Entitlements and Justifications*

Under the HTA and HFEA, there are a number of entitlements that individuals may exercise in their bodily material or the bodily material of deceased persons. Progenitors have statutorily recognised entitlements to authorise the use and storage of their bodily material, whilst living or posthumously. In the absence of the wishes of the deceased being known, closely concerned persons may authorise the use and storage of the body or bodily material of a deceased relative or friend.<sup>585</sup> Through statutory consent requirements, transfer their bodily material to others, transfer their bodily material to a healthcare institution and to use their own bodily material for therapeutic purposes.<sup>586</sup> A healthcare institution may then exercise possession and use entitlements provided that their possession and use of the material satisfies the statutory consent and licensing requirements.

In terms of the allocation of entitlements under the legislative schemes, I have argued that the entitlements provided to progenitors are over-extensive. Under the philosophical approach developed

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<sup>584</sup> *Dobson and another v North Tyneside Health* (n39) 478, quoting *Clerk and Lindsell on Torts* (17th edn, 1995) 653 [13-50]: 'the executors or administrators or other persons charged by the law with the duty of interring the body have a right to the custody and possession of it until it is properly buried'.

<sup>585</sup> Human Tissue Act 2004, Section 24.

<sup>586</sup> Human Tissue Act 2004, Section 1(1)-(3), Section 5.

here, the body is *for-itself* and *for-others*. Yet, when bodily material is separated from the person and does not continue to be functionally *for-itself*, I can find no reason for treating the bodily material as distinct from any other common resource. As a common resource, it is put to best use through therapeutic, scientific or educational application by healthcare institutions. In contrast, bodies of deceased persons are not a common resource where the body or bodily material continues to be the medium of social experience (the *body-for-others*). The right of closely concerned persons to authorise the use of the body or to possess the body has a sound philosophical basis. Yet - again contrary to the current legal approach - I suggest that there is no justificatory basis for the rights of the deceased in relation to their body.

### *Interests, Rights and Rules*

Although the entitlements recognised under statute may not always strike the right balance between individuals and institutions, the statutory frameworks represent a governance strategy that limits the exercise of entitlements to particular activities and transactions. The existing statutory provisions recognise the right of healthcare institutions to possess and use bodily material, whilst circumscribing the possible purposes for which material is stored and used,<sup>587</sup> and requiring, in most instances, that healthcare institutions obtain the “appropriate” or “effective” consent for retention or use of the material.<sup>588</sup> The statutory provisions also prescribe the terms of the transfer of bodily material from individuals to healthcare institutions.

I have argued here that the statutory schemes provide a valuable ‘skeleton of rights and duties’ with regards to particular acts of procurement, creation, storage or use. Yet, these legislative provisions are concerned with particular activities with regards to items of bodily material. In contrast, I have also

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<sup>587</sup> Human Fertilisation and Embryology Act 1990, Sections 5 to 8 of Schedule 3; Human Tissue Act 2004, Section 8, Schedule 1.

<sup>588</sup> Human Fertilisation and Embryology Act 1990, Sections 1 to 4 of Schedule 3; Human Tissue Act 2004, Section 1(1)-(3).

argued that entitlements in bodily material ought to enable a sphere of “undefined activity”<sup>589</sup> or “negative ownership”.<sup>590</sup>

The skeletal rights and duties therefore need to be ‘fleshed out’ by a boundary approach to entitlements in bodily material. A boundary approach is able to impose duties on an open or wide set of persons, treat interference with the relationship entitlement as a wrongful intrusion to the protected sphere of activity, impose singular duties of non-interference, and impose remedial duties where the primary duty of not performed. This structure of protection can be provided by recognising property rights in bodily material or by employing a structure of rights and duties akin to the structure under the emerging tort of privacy.

### iii. The ‘No Property Rule’

There are useful examples of where the ‘no property rule’ has enabled the courts to refuse the recognition of entitlements that ought not arise as pre-existing rights. Yet, the affirmation of the no property rule has also prevented the law from affording entitlements the structure of protection would be available under a boundary approach.

#### *Entitlements and Justifications*

The reasoning in *Moore*,<sup>591</sup> *Greenberg*<sup>592</sup> and *Washington University*<sup>593</sup> aligns with the analysis of control and income entitlements in Part B of this Thesis. I argued that where bodily material does not retain a functional connection to the attached body so that it is no longer needed for the patient’s care or treatment, there is no reason why the progenitor of the material ought to retain entitlements in the material. The mere fact that the progenitor was first in possession of the material does not provide a

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<sup>589</sup> JE Penner, *The Idea of Property in Law* (n333) 72.

<sup>590</sup> S Green, *The Subject Matter of Conversion*, (n84) 239.

<sup>591</sup> *Moore v Regents of the University of California* (n25).

<sup>592</sup> *Greenberg v Miami Childrens’* (n33).

<sup>593</sup> *Washington University v Catalona* (n36).

sufficient basis for why the progenitor ought to be able to control how,<sup>594</sup> or by whom,<sup>595</sup> the material is used. Moreover, the right to obtain a monetary benefit from the use of the material cannot be justified with reference to prior possession, or any other pre-social or ‘natural rights’ method of justifying entitlements.<sup>596</sup>

However, this does not preclude the progenitor of the bodily material from obtaining control entitlements in the material upon the basis of an interaction or transaction. For instance, the claim for breach of fiduciary duties succeeded in *Moore* because duties arose out of the relationship between patient and healthcare professional.<sup>597</sup> Similarly, had the progenitors in *Greenberg* been able to prove that they had formed an agreement with the Miami Children’s Hospital Research Institute, then their intentions that treatment be made publicly available could have been vindicated contractually.<sup>598</sup> Although control entitlements may arise out of an interaction or transaction, they ought not to arise because of the relationship (of mere prior possession) with the bodily material.

The ‘no property rule’ has been a principle within which various policies have been housed. One positive feature about the way in which the law has developed by affirming the ‘no property rule’ is to displace the presumption that progenitors of bodily material ought to retain control of bodily material merely because it was once within their bodily sphere.

### *Interests, Rights and Rules*

The ‘no property rule’ not only limits the recognition of entitlements in bodily material, but also limits the way in which our legal relationship with bodies and bodily material may be viewed. Another positive feature of the affirmation of no property rule is that it has kept human tissue, organs, gametes

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<sup>594</sup> *Greenberg v Miami Childrens’* (n33).

<sup>595</sup> *Washington University v Catalona* (n36).

<sup>596</sup> *Moore v Regents of the University of California* (n25).

<sup>597</sup> *Moore v Regents of the University of California* (n25) 128-135.

<sup>598</sup> *Greenberg v Miami Childrens’* (n33) 1075.

and embryos as legally distinct from other objects and commodities. I have argued here that, in circumstances where the bodily material continues to be part of the *body-for-itself* or the *body-for-others*, we ought to preserve this distinction. This is because entitlements in these types of bodily material enable preferences and choices that are necessarily associated with the entitlement-holder, so that such entitlements are conceptually distinct from entitlements that give rise to property rights. Yet, in other circumstances, we ought to depart from the ‘no property rule’ and treat entitlements in bodily material as items of property.

The difficulty in affirming the ‘no property rule’, even in a limited set of circumstances, is that it forgoes an exclusionary structure of protection that would be otherwise appropriate for the legal protection of entitlements in bodily material. The litigation in *Re: Organ Retention* is illustrative of the remedial hurdles that arise when the bodily material is not protected by the ‘boundary approach’. In *Re: Organ Retention*, the parents of the deceased children had to either identify a breach of statutory duty or establish that: the physicians owed a duty of care to the parents of the deceased children on the bases of the factual circumstances of the interaction,<sup>599</sup> show that they suffered a loss,<sup>600</sup> and that the loss was a foreseeable loss flowing from physician’s breach of the duty of care.<sup>601</sup> The ‘no property rule’ has so far allowed entitlements in bodily material to be inadequately protected by the ‘bilateral approaches’ of statute law and remaining branches of common law. I have suggested that a ‘boundary approach’ to the protection of entitlements in bodily material may be afforded through a structure of duties akin to the emerging tort of privacy.

The metaphor of the body-as-property is mixed metaphor. It has the attraction of assimilating the protection of the body with the ‘exclusionary boundary’ of property law. However, the difficulty with the metaphor is that suggests the personal and particular relationship we have with our body (and the bodies of others) is similar to the anonymous and contingent relationship we have with items of

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<sup>599</sup> *Re: Organ Retention* (n52) [170 - 206].

<sup>600</sup> *Re: Organ Retention* (n52) [568].

<sup>601</sup> *Re: Organ Retention* (n52) [259].

property. Whilst we may want to protect the relationship between parents and the bodies of their newly deceased infants as an exclusionary relationship, yet it cannot be said that the physicians or researchers who obtained the body parts of the children can stand in essentially the same position as the parents of the children.

Hence, for entitlements in bodily material that is *for-itself* and *for-others*, I suggest we ought to continue to affirm the no property rule, whilst borrowing from property law the structural features of ‘boundary approach’ to entitlements in things. For the entitlements in bodily material exercised by healthcare institutions, we may depart from the no property rule.

## v. The New Basis under *Yearworth*

The reasoning in *Yearworth* provides a sound basis for recognising entitlements in bodily material whilst also illustrating the need for a boundary approach to the protection of such entitlements. The use of property law to provide this protection unfortunately conflates an important distinction between personal and anonymous interests.

### *Entitlements and Justifications*

The Court of Appeal in *Yearworth* recognised that the progenitors of stored semen have the right to manage and use the semen since “by their bodies, they alone generated and ejaculated the sperm, and the sole object of their ejaculation was that it might later be used for their benefit”.<sup>602</sup> This accords with an Hegelian account of ownership; through the “conjunction of two wills”,<sup>603</sup> the intention of the progenitors to attempt assisted reproductive therapy is “manifest” in the external objects.<sup>604</sup> The reasoning also aligns with the phenomenological account of the body in Chapter Two; since the bodily material retains a functional unity with tasks of the attached body, including in this instance the project

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<sup>602</sup> *Yearworth v North Bristol* (n20) [45].

<sup>603</sup> J Waldron, *The Right to Private Property* (n13) 369.

<sup>604</sup> GWF Hegel, *Philosophy of Right* (n13) [34]; MJ Davis and N Naffine, *Are Persons Property?* (n139) 4-5.

of attempting biological parenthood, the items of bodily material are therefore to be included in the *self-ascribed* body.

### *Interests, Rights and Rules*

There are two important features of the process through which the Court identified that the progenitors has entitlements in the semen. The first feature is the way in which the management and use entitlements in the bodily material were treated as exclusionary interests. The HFEA provided a set of rights and duties, so that the Healthcare Institution was able to store the semen provided that they obtain consent from the progenitors and did not use the material without obtaining the progenitors' consent. These particular rights and duties were not breached, but rather the Court found that the progenitors were 'owners' of the material and therefore had common law rights beyond their statutory rights. Their 'ownership' extended beyond particular activities or interactions identified in statute. Rather, the entitlements of the progenitors were treated as falling within a sphere of 'undefined activity' or forming a type of negative ownership or negative liberty. This amounts to recognising that the entitlements in the bodily material represented exclusionary interests in the material.

The second feature of the process is that, under any interpretation of the reasoning offered by the Court of Appeal, the six progenitors are the only possible entitlement-holders. The right to use the semen followed from the progenitor's use of their body to attempt to obtain a particular benefit, namely, to become biological parents.<sup>605</sup> It follows from this reasoning that it would not be possible for another patient to stand in essentially the same position as the progenitors with regards to the progenitors' semen. The entitlements recognised in *Yearworth* therefore represent personal interests; preferences and choices that are necessarily associated with the entitlement-holders.

Given the necessary connection between the entitlements and the entitlement-holders, the legal status of 'property' that was afforded to the semen raises a conceptual problem. Property interests are

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<sup>605</sup> *Yearworth v North Bristol* (n20) [45(f)] "by their bodies, they alone generated and ejaculated the sperm... that it might later be used for their benefit."

interests that can exist independently of the rights-holder, whereas the interests in that arose in *Yearworth* are interests that cannot exist independently of the rights-holder.

This underlying conceptual problem surfaces as a structural concern at the remedial stage of the claim. The progenitors were required to prove that their psychological injury was for a foreseeable loss consequent upon the breach of duty by the NHS Trust.<sup>606</sup> Their ability to meet this requirement, in this particular case, masks the structural problem. The problem, as expressed above, is that treating personal interests as anonymous interests invites an inappropriate remedial response. Given how personal interests in bodily material arise because the bodily material is either retained for therapeutic benefit or remains the medium of social experience, the loss suffered from interference with personal interests is likely to be non-pecuniary. The appropriate remedial response is for the law to accept that the interference with personal interests in the bodily material will cause some form of mental distress or anguish, rather than requiring the proof of the existence and foreseeability of a non-pecuniary loss.

The motivation to bring the bodily material into the paradigm of property rights was to benefit from the boundary approach - in particular, to obtain legal recognition of their 'original rights' in the semen so as to identify an actionable loss caused by the inadequate storage of the semen. Again, the tension arises between the need for the boundary approach and the unease with treating personal interests as anonymous interests.

### *Under the Recommended Approach*

I have suggested here that novel duties of confidentiality are able to avoid this tension by providing an exclusionary structure of protection whilst still treating entitlements in bodily material as personal interests. In terms of the particular scenario that arose in *Yearworth*, I would suggest that the relationship is best viewed as a relationship of confidentiality rather than a relationship with property. The North Bristol NHS Trust knew, or at least ought to have known of, the personal interests of the cancer patients in their stored semen. The healthcare institution would be therefore under an obligation

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<sup>606</sup> *Yearworth v North Bristol* (n20) [9] - [12].

to exercise their statutory and proprietary right to possession in a way that is consistent with the patients' rights to manage and use the material. By storing the semen improperly, the NHS Trust breached their strict duty owed to the patients, and their failure to perform this primary duty imposes a remedial duty on the NHS Trust to compensate the patients for their personal loss through payment of general damages.

#### iv. Posthumous Use

The reasoning that was employed in *Bazely* and in *Re: Edwards* concerned the application of two rules: that property rights arise from the application of the work or skill rule<sup>607</sup> and the right to possession arises as part of a widow's rights as the administrator of the estate.<sup>608</sup> The problem with the application of the work or skill rule in the two decisions is that the resulting property rights were transferred to the claimants in circumstances in which rights in the bodily material ought to have been either subject to governance rules or inalienability rules. The problem with the application of the rights of the administrator of the estate to these cases is the shift from a limited right to possess the bodily material to the right to use the bodily material of a deceased person.

#### *Entitlements and Justifications*

The right of the administrator of the estate to obtain possession of the body or bodily material of the deceased follows as the corollary of their duty to inter the body of the deceased. This right to possession ought to be circumvented by the reasons for which the right arises.<sup>609</sup> Yet, in *Bazely* and *Re: Edwards* the widows' obtained a general right of possession that were acknowledged to encompass the right to use the bodily material. Hence, the entitlements recognised in *Re: Edwards* and *Bazely* cannot follow from the reasoning in *Re: Gray*, where it was held that:

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<sup>607</sup> *Doodeward v Spence* (n37).

<sup>608</sup> *Re: Gray* [2000] QSC 390; *Dobson and another v North Tyneside Health* (n39)

<sup>609</sup> *Re: Gray* (n608); *Dobson and another v North Tyneside Health* (n39).

[A] deceased's personal representative or, where there is none, the parents or spouse, have a right to possession of the body *only for the purposes of ensuring prompt and decent disposal* [which] has ... the corollary that there is a duty not to interfere with the body or ... to violate it.<sup>610</sup>

We ought to be careful to maintain this distinction between the right to obtain a *limited* right to possession from the general right to possess *and use* the bodily material of the deceased. This is because the rights of friends and family in relation to the body of a deceased person follow the body of the deceased being *for-others*. This principle is encapsulated in the rule in *Dobson* and the rule in *Re: Gray*. In contrast, the right to possess and use bodily material follows the progenitor's consensual extraction of the material for their own therapeutic benefit (where the bodily material remains *for-itself*) under *Yearworth* or may follow from the outdated work or skill exception under *Doodeward*. These are distinct principles, with distinct lines of authority, that ought to remain differentiated. Skene shares this concern:

a principle that one can lawfully remove tissue from a corpse, for one's own purposes, provided the corpse is in one's lawful possession, is surely too wide.<sup>611</sup>

The right for a partner to obtain the right to use the material of the deceased must therefore be a right that "extends beyond"<sup>612</sup> the right of a partner as the administrator of the deceased's estate. The basis for finding that the widows in *Bazely* and *Re: Edwards* had the right to possess and use the stored semen appears to therefore follow from application of the work or skill rule under *Doodeward*.

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<sup>610</sup> *Re: Gray* (n608) 390 [emphasis added].

<sup>611</sup> L Skene, 'Proprietary Interests in Human Bodily Material: *Yearworth*, Recent Australian Cases on Stored Semen and Their Implications' (2012) *Medical Law Review* 227, Skene provides good example of why we should be wary of conflating possession with use: (237) "Consider a man who suspects he is not the biological father of a child who has just died and takes a blood sample for DNA analysis. Surely a court would not say that, even if he is legally entitled to possession of the body for burial, he is also legally entitled to take a sample and test it for his own purposes."

<sup>612</sup> *Re: Edwards* (n90) [90].

Yet, the work or skill rule provides a basis for the *applier* of work or skill to obtain possession and use entitlements in bodily material. Since the widows in *Bazely* and *Re: Edwards* were neither the appliers of the work or skill nor the progenitors of the bodily material, the entitlements must be either be lawfully *transferred* to them or the work or skill be applied *vicariously* ‘for their purposes’<sup>613</sup> in order for them to obtain the entitlements in the bodily material.

### *Interests, Rights and Rules*

The acquisition of the entitlements by transfer provides the more plausible of the two possible explanations. The application of the work or skill rule gives the material that is subject to the work or skill the status of property. As property, the bodily material was then able to be transferred to the widows. Once the semen in *Bazely* had the status of being property, either through the application of *Doodeward* or *Yearworth*, the lawful transfer of the semen from the deceased to the claimant followed from the application of Section 8 of the Queensland Succession Act 1981. By asserting her property rights under the Act, the widow was able to obtain the use entitlements in the semen that her deceased partner held as property rights.

The transfer of entitlements in *Bazely* is ultimately inconsistent with the recommendation here. This is because the deceased’s entitlements in bodily material represent personal interests, and as personal interests, ought to give rise to non-transferable rights. As I will explain below, although the process through which the widow obtained the right to possess and use the semen is contrary to the approach recommended here, the outcome of the widow exercising these rights is nonetheless the right outcome. Moreover, we can arrive at the same outcome without relying upon the transferability of rights under the law of succession.

The reasoning in *Re: Edwards* is more troubling. Once the semen in *Re: Edwards* obtained the status of property, the Court was willing to describe the transfer of the semen to the widow as a ‘release’, ‘relinquishment’ or ‘surrender’ of the semen so as to avoid the statutory prohibition of

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<sup>613</sup> *Re: Edwards* (n90) [91]; L Skene, ‘Proprietary Interests in Human Bodily Material’ (n611) 237.

‘supplying’ semen in the absence of consent of the progenitor.<sup>614</sup> The work or skill rule gave the semen the status of property, and as property it was treated as transferable, independent of the statutory restrictions on the transfer or ‘supply’ of semen without the consent of the progenitor.

In addition to the concern with the transferability of personal interests expressed above, a further problem with *Re: Edwards* is that property law was employed to circumvent the legislative restrictions in the transfer of bodily material, ultimately circumventing the need to the progenitor’s consent for the use of his reproductive material. Yet, I have argued that the right to use bodily material follows the progenitor’s consensual extraction of the material for therapeutic purposes. Despite this requirement of progenitor’s consent being codified in legislation, the Court in *Re: Edwards* by-passed the requirement. In essence, using the transferability of property rights to evade the governance rules.

Alternatively, there is the suggestion that the widow in *Re: Edwards* ought to obtain the right to use the bodily material because it was removed “for her purposes”,<sup>615</sup> so that the application of work or skill was applied ‘for her benefit’. However, the semen was removed following a court order as an interim measure. To say that it was ‘for her purposes’, rather than removed for the purposes of a later judicial determination, is to presume that she had the right to the semen when it was extracted despite the fact that the semen was extracted in order for the court to determine whether the widow had a right to the semen. This interpretation of *Re: Edwards* lends itself to a self-fulfilling prophecy.

The problem with the recent posthumous use cases is two-fold. First, the rights sought by the widows ought to be independent of their rights as the administrator of the estate. Otherwise, the law conflates an important distinction between the right to possession for the purposes of interment, and the general right to possession that may involve the use of the material. Second, the application of the work or skill rule, or even the new basis under *Yearworth*, either relies upon the transferability of the

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<sup>614</sup> Assisted Reproductive Technology Act 2007 (NSW, Aus.), Section 21.

<sup>615</sup> L. Skene, ‘Proprietary Interests in Human Bodily Material’ (n611) 237: “if a court authorises the removal of bodily material from a person for later use by another person, that may provide the basis for the tissue becoming property by work or skill performed for the purposes of a particular person by an agent.”

rights in the material, where such rights ought to be non-transferable, or relies upon self-referential reasoning.

### *Under the Recommended Approach*

We can avoid these two problems through adopting the recommendations provided here. Recall how the reasoning in *Yearworth* provides a sufficient basis for why a progenitor ought to retain the right to manage and use their own reproductive material. As *Hecht* and *Bazely* demonstrate, there may be circumstances where we ought to broaden the reasoning provided in *Yearworth*. Although the progenitors in *Hecht* and *Bazely* alone generated and ejaculated the sperm, it was done for the benefit of themselves *and* their partner. The partners of the progenitors are co-participants in a therapeutic enterprise since the intention is for them to participate in the assisted reproductive therapy. As co-participants, they may obtain reversionary entitlements in the bodily material. Under this explanation, the entitlements in the bodily material arise out of the circumstances of the extraction, so that the reversionary entitlements vest in the co-participants when the material is extracted and transferred to a healthcare institution. It follows that upon the death of the progenitor, the entitlements of the deceased expire and the reversionary entitlements of the co-participant may be exercised.

Under the approach prescribed here, the healthcare institution obtains a right to possession that is subject to duties of confidence to the progenitor, who has use and management entitlements, and the co-participant, who has reversionary use and management entitlements; that is, provided that the institution knew, or ought to have known, of the interests of the progenitor *and* the co-participant. Knowledge of these interests arises out of the nature of the bodily material, the circumstances of the extraction and the circumstances of the transfer. The progenitor and co-participant therefore obtain legal protection of their rights in the bodily material through duties akin to duties of confidentiality

This approach can be applied to the circumstances that arose in *Hecht* and *Bazely*, resulting in the widows' exercising their reversionary use entitlement in the stored semen. However, it cannot be applied to the circumstances that arose in *Re: Edwards* or *ex parte Blood*. This is because in both cases the

semen was extracted from a comatose patient, meaning that the progenitor did not intend for the semen to be extracted or have any other conscious involvement in the extraction. Under the approach recommended here, the basis for which the right to use bodily material arise involve (at minimum) the progenitor's consent to the extraction, and this justificatory principles cannot be applied to the circumstances of the widows in *Re: Edwards* and *ex parte Blood*.

In sum, the Court in *Bazely* correctly identified that the widow ought to be entitled to use the semen. The legal method of arriving at this outcome - the law of succession - is ultimately an inappropriate method. Rather, the right of the widow to use the semen of her deceased partner is best facilitated through duties of confidentiality. The circumstances that arose in *Re: Edwards* were unfortunate circumstances. Yet, property rights were identified in the semen in order to circumvent a statutory requirement of consent for the use of reproductive material. The hope is that such reasoning is constrained to the particular circumstances that arose in *Re: Edwards*.

## Chapter Summary

By pulling together the entitlements in bodily material that ought to attract legal protection identified in Part B, with the way in which entitlements can be protected identified in Part C, I have formulated in this Chapter a recommendation as to how the law ought to govern the use and storage of bodily material. Since entitlements in bodily material represent exclusionary interests, I have argued that the structure of rights and duties employed to protect these entitlements ought to resemble the 'boundary approach'. Moreover, since personal interests or anonymous interests may arise in bodily material, it is necessary to develop diverging legal approaches in order to provide the appropriate structure of protection for the different entitlements in bodily material.

I argued that novel duties of confidentiality ought to provide legal protection for entitlements in bodily material that is *for-itself* or *for-others*. The structure of rights and duties recommended here is akin to the rights and duties under the emerging tort of privacy. In addition, I have also suggested that where a healthcare institution obtains entitlements in bodily material, these entitlements may be treated

as property rights. The exercise of these entitlements may be limited by the novel duties of confidentiality imposed upon the healthcare institution as the possessor of bodily material. As I explained in Section Three, this recommended approach differs in a number of ways from the current legal approach to the use and storage of bodily material. Ultimately, I suggest that we ought to depart from the ‘no property rule’, but without treating all legal relationships that concern separated bodily material as relationships governed by property law.

## Conclusion

Recent legal developments indicate that a full departure from the ‘no property rule’ is likely. The analysis in this Thesis suggests that a full departure from the ‘no property rule’ is not inevitable, in that duties of confidentiality may provide a preferable legal approach to entitlements held by individuals than the approach available under property law. This approach has been informed by an underlying philosophical contention: that the world is made of *things* and that some things, even things that are physically separate from a Person, constitute the existence of a Person. To conclude, I will outline here the main propositions advanced in each chapter of this Thesis so that we may follow the reasoning process that started at the deconstruction of ‘ownership’ and arrived at the recommendation that a combination of property rights and duties of confidentiality ought to govern the use and storage of separated bodily material.

I suggested in Chapter One that the law on the use and storage of bodily material is concerned with the exercise of entitlements in bodily material. These ‘entitlements’ are similar to Honoré’s ‘incidents of ownership’ and represent various different functional relationships that may arise between a person and a thing. However, what is often overlooked is that the law on the use and storage of bodily material is the combination of entitlements in bodily material and sets of rules and procedures that provide legal protection of the entitlements.

The first task in determining the appropriate legal status of bodily material is to determine which entitlements in bodily material ought to attract legal protection. I argued in Chapter Two that if our understanding of the attributes and characteristics of the person are limited to considerations of utility and autonomy, then we may be able to justify the exercise of a bundle of entitlements by an individual in a pre-social analysis. However, from this perspective, separated bodily material comes ‘common stock’. As a result, the value of healthcare institutions being able to retain and use bodily material will often, or always, be greater than the value of an individual exercising entitlements in the bodily material.

Alternatively, if our understanding of the person is shaped by a phenomenological understanding of the body, then individuals may obtain some entitlements in bodily material that are sufficiently important to attract legal protection despite competing institutional interests. The control entitlements in bodily material that progenitors, co-participants in therapy and closely concerned persons therefore arise from viewing the body as *for-itself*, as *self-ascribed* and as *for-others*.

Chapter Three concerned the exercise of income entitlements. I argued that it is not possible to justify the exercise of the right to income with sole reference to the attributes or characteristics of the person. However, assuming that the ability for individuals to obtain a monetary reward from the transfer of bodily material increases the availability of bodily material, there may be a sound *prima facie* basis from which to argue that individuals ought to be able to exercise income entitlements in bodily material. Despite this potential benefit, I have nonetheless argued that the operation of a market in bodily material (or the provision of monetary reward for bodily material) is exploitative since any benefit obtained is the product of unacceptable pressure on those living in financially constraining circumstances. I therefore suggested that payments for gametes and human tissue ought to compensate or reimburse, but not financially reward or benefit, the progenitor.

Once we had identified the entitlements in bodily material that ought to attract legal protection, the next task was to determine which set of rules and procedures are the most appropriate legal method for protecting entitlements in bodily material. I suggested that entitlements in property and entitlements in the (attached) body represent exclusionary interests and that the law employs a 'boundary approach' to the protection of exclusionary interests. In addition, I argued that entitlements may be characterised as either personal or anonymous interests, and that particular structural features follow from whether the exercise of an entitlement enables preferences and choices that can or cannot exist independently of the entitlement-holder.

In applying this conceptual and structural understanding of the different branches of private law to the entitlements identified earlier in the Thesis, I was able to identify the interests and rights that

ought to arise in separated bodily material. I argued that entitlements in bodily material represent exclusionary interests. Moreover, that the entitlements in the *body-for-itself* or the *body-for-others* represent personal interests, whereas the entitlements that healthcare institutions obtain are anonymous interests.

Given the different interests that arise in bodily material, and the existing statutory governance of the transfer, storage and use of bodily material, I made two main recommendations. First, I recommended that the exercise of entitlements by individuals ought to be protected through the imposition of duties of confidentiality akin to the structure of rights and duties formulated under the emerging tort of privacy. The application of these duties does not preclude the recognition of property rights, as demonstrated in my second recommendation. When a healthcare institution obtains entitlements in bodily material, such entitlements may give rise to property rights, although the exercise of these property rights may be subject to duties of confidentiality.

This dissection of the law into property rights and duties of confidentiality reflects the underlying contention that all items of separated bodily material are *things*, yet some items of bodily material are things that attract moral attention because of the intimate relationship the *thing* and a *Person*. Property law, I have argued, is poorly equipped to govern the use of things where the interest in the thing is necessarily connected to a Person.

# Bibliography

## Cases

### Australia

*Bazley v Wesley Monash IVF Pty Ltd* [2010] QSC 118.

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

*Jocelyn Edwards; Re the estate of the late Mark Edwards* [2011] NSWSC 478.

*Re: Gray* [2000] QSC 390.

### The United Kingdom

*A v B plc* [2003] 3 WLR 542.

*AB and others v Leeds Teaching Hospital NHS Trust and another, In re: Organ Retention Group Litigation*  
[2004] EWHC 644.

*A-G v Guardian Newspapers (No 2)* [1988] UKHL 6.

*Archer v Williams* [2003] EWHC 1670.

*BCCI v Akindale* [2001] Ch. 437.

*Bluck v Information Commissioner* (2007) 98 BMLR 1.

*Campbell v MGN* [2004] UKHL 22.

*Coco v AN Clark* [1969] RPC 41.

*Cornelius v de Taranto* [2001] EMLR 12.

*Dobson and another v North Tyneside Health Authority and another* [1996] 4 All ER 474.

*Eagle Trust plc v SBC Securities* [1993] 1 WLR 484.

*Evans v Amicus Healthcare Ltd and others* [2004] EWCA (Civ) 727.

*Evans v United Kingdom* (2008) 46 EHRR 34.

*Farley v Skinner* [2001] UKHL 49.

*Kuwait Airways Corp v Iraqi Airways Co and anor (Nos 4 & 5)* [2002] UKHL 19.

*McLoughlin v O'Brian* [1983] 1 AC 410.

*OBG v Allan* [2007] UKHL 21.

*R v Kelly / R v Lindsay* [1998] 3 All ER 741.

*R v Human Fertilisation and Embryology Authority, ex parte Blood* [1997] 2 All ER 687.

*R v Human Fertilisation and Embryology Authority ex parte Blood* [1999] Fam 151.

*R v Turner (No 2)* [1971] 2 All ER 441.

*RK v Oldham NHS Trust* [2003] Lloyd's Rep Med 1.

*Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52

*Venables and another v News Group Newspapers* [2001] 1 All ER 908.

*Waverley Borough Council v Fletcher* [1996] QB 334.

*Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37, [2010] QB 1.

## The United States

*Greenberg v Miami Children's Hospital*, 1064, 264 F.Supp.2d. 1066.

*Hecht v Superior Court of Los Angeles County* (1993) 20 Cal. Rptr. 2d 275.

*Moore v Regents of the University of California* 793 P.2d 478 (Cal. 1990).

*US v Arora* 860 F.Supp. (1994) 1091.

*Washington University v. Catalona* 437 F.Supp.2d 985.

## Legislation

### The United Kingdom

Human Tissue Act 1961,

s2.

Human Tissue Act 2004,

s1, s4, s5, s8, s16, s27, s32, Schedule 1, Schedule 2, Schedule 3.

Human Fertilisation and Embryology Act 1990,

s3, s3A, s4, s12, s41, Schedule 1, Schedule 2, Schedule 3.

Theft Act 1968,

s1, s4, s5.

Torts (Interference with Goods) Act 1977

s1, s3.

## Australia

Assisted Reproductive Technology Act 2007 (NSW),

s21.

Queensland Succession Act 1981 (Qld.),

s8.

## Books and Book Chapters

Beauchamp, TL and Childress, JF. *Principles of Bioethics* (Oxford University Press, 1989).

Bennett, B. *Health Law's Kaleidoscope: Health Law Rights in a Global Age* (Ashgate, 2008)

Bentham, J. *The Theory of Legislation* [1802] (C.K. Ogden ed., Kegan Paul, Trench, Trubner & Co., 1931).

Carman, T. *Merleau-Ponty* (Routledge: 2008)

Carter, A. *The Philosophical Foundations of Property Rights* (Harvester Wheatsheaf, 1989)

Cohen, G. *Blackwell Dictionary of Western Philosophy* (Blackwell, 2004).

Coleman, JL. 'Theories of Tort Law' in EN Zalta (ed.) *Stanford Encyclopaedia of Philosophy* (Stanford University, 2009)

----- 'The Morality of Strict Tort Liability' in *Markets, Morals, and the Law* (Cambridge University Press, 1988).

Davis, MJ & N Naffine, N. *Are Persons Property? Legal Debates about Property and Personality* (Aldershot: Ashgate, 2001)

Dickenson, DL. *Property in the Body: Feminist Perspectives* (Cambridge University Press, 2007)

Donner, W. 'A Millian Perspective on the Relationship between Persons and Their Bodies' in *Persons and Their Bodies: Rights, Responsibilities, Relationships* (Kluwer Academic Publishers, 1999).

Dworkin, A. 'Against the Male Flood: Censorship, Pornography, and Equality' in D Cornell (ed.), *Oxford Readings in Feminism: Feminism and Pornography* (Oxford University Press, 2000).

- N Eilan, N. "Consciousness, Self-Consciousness and Communication in Merleau-Ponty" in T Baldwin ed. *Reading Merleau-Ponty* (Routledge: 2007).
- Fabre, C. *Whose Body is It Anyway?* (Oxford University Press, 2006).
- Feinberg, J. *The Moral Limits of the Criminal Law: Harm to Others* (Oxford University Press, 1984).
- Ferguson, KE. *The Man Question: Vision of Subjectivity in Feminist Theory* (University of California Press, 1993).
- Foster, C. *Human Dignity in Bioethics and Law* (Hart Publishing, 2011).
- Gardner, J. 'Wrongs and Faults' in AP Simester, *Appraising Strict Liability* (Oxford University Press, 2005).
- 'Obligations and Outcomes in the Law of Torts' in P. Cane & J. Gardner (eds) *Relating to Responsibility: Essays for Tony Honoré* (Hart Publishing, 2001).
- Green, TH. *Lectures on the Principles of Political Obligation* [1895] (Longmans Green & Co. 1941).
- Green, S. 'Rights and Wrongs: An Introduction to the Wrongful Interference Actions' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2012).
- Hardcastle, R. *Law and the Human Body: Property Rights, Ownership and Control* (Hart Publishing, 2009).
- Harris, J. *Wonderwoman and Superman: The Ethics of Human Biotechnology* (Oxford University Press, 1992).
- Harris, JW. *Property and Justice* (Clarendon Press, 1996).
- Haugeland, J. *Having Thought: Essays in the Metaphysics of Mind* (Harvard University Press, 1998).
- Hegel, GWF *Philosophy of Right* [1821] (Oxford University Press, 1967).
- Herring, J *Medical Law and Ethics* (4th ed. Oxford University Press, 2011).
- 'Crimes Against the Dead' in B Brooks-Gordon (ed.) *Death Rites and Rights* (Hart Publishing, 2007).
- Hill, J. 'The Proprietary Character of Possession' in E Cooke (ed.) *Modern Studies in Property Law* (Hart Publishing, 2001).
- Honoré, AM. 'Ownership' in *Making Law Bind: Essays Legal and Philosophical* (Clarendon Press, 1961).

- Husserl, E. *Cartesian Meditations: An Introduction to Phenomenology* (Springer, 1982).  
 ----- *The Crisis of the European Sciences* (Northwestern, 1974).
- Jaspers, K. *General Psychopathology* (7th ed. Manchester University Press, 1963)
- Kant, I. *Metaphysics of Morals* (MJ Gregor ed. Cambridge University Press, 1996).  
 ----- *Lectures on Ethics* (Harper & Row, 1963).
- Locke, J. *Two Treatises of Government* [1689] (Peter Laslett (ed.), Cambridge University Press, 1988).
- MacKinnon, C. *Only Words* (Harvard University Press, 1993).  
 ----- *Feminism Unmodified* (Harvard University Press, 1987).
- Macpherson, CB. 'The Meaning of Property' in *Property: Mainstream and Critical Positions* (Basil Blackwell, 1978).
- McFarlane, B. *The Structure of Property Rights* (Hart Publishing, 2008).
- Metzinger, T. *Being No One* (MIT Press, 2003).
- Merleau-Ponty, M. *The Primacy of Perception* (Evanston, Ill, Northwestern University Press: 1964).  
 ----- *The Phenomenology of Perception* (Routledge, 2003).
- Munzer, SR. *A Theory of Property* (Cambridge University Press, 1990).
- Nedelsky, J. 'Law, Boundaries, and the Bounded Self' in Post (ed.) *Law and the Order of Culture* (1991).
- Nozick, R. *Anarchy, State and Utopia* (Oxford: Basic Books, 1974).
- Palmer, NE. *Bailment* (3rd ed. Sweet & Maxwell, 2009).  
 ----- *Interests in Goods* (2nd ed. LLP, 1998).
- Papadaki, E. 'Feminist Perspectives on Objectification' in EN Zalta (ed.) *Stanford Encyclopaedia of Philosophy* (Stanford University, 2010).
- Penner, JE. *The Idea of Property in Law* (Oxford University Press, 1997).
- Powers, TM. 'The Integrity of Body: Kantian Moral Constraints on the Physical Self' in MJ Cherry (ed.) *Persons and Their Bodies: Rights, Responsibilities, Relationships* (Kluwer Academic Publishers, 1999).
- Price, D 'Property, Harm and the Corpse' in B Brooks-Gordon (ed.) *Death Rites and Rights* (Hart Publishing, 2007).

- Radin, MJ. *Contested Commodities* (Harvard University Press, 1996).
- Rawls, J. *A Theory of Justice* (Harvard University Press, 1971).
- Raz, J. *Practical Reason and Norms* (Oxford University Press, 1999).
- Rose, C. 'Property as Storytelling' in *Property and Persuasion* (1994)
- 'Takings' and the Practices of Property' in *Property and Persuasion* (1994)
- Shildrick, M. 'Beyond the Body of Bioethics: Challenging the Conventions' in *Ethics of the Body: Postconventional Challenges* (MIT Press, 2005).
- *Leaky Bodies and Boundaries: Feminism, Postmodernism and (Bio)ethics* (Routledge, 1997).
- Stevens, R. *Torts and Rights* (Oxford University Press, 2007).
- Swadling, W. 'Unjust Delivery' in A Burrows and A Rodger, *Mapping the Law: Essays in Honour of Peter Birks* (Oxford University Press, 2006).
- Titmuss, RM. *A Gift Relationship: From Human Blood to Social Policy* (Allen & Unwin, 1970).
- Toombs, SK. 'What Does it Mean to be Somebody?: Phenomenological Reflections and Ethical Quandaries' in MJ Cherry (ed.) *Persons and Their Bodies: Rights, Responsibilities, Relationships* (Kluwer Academic Publishers, 1999).
- Underkuffer, LS. *The Idea of Property: Its Meaning and Power* (Oxford University Press, 2003).
- Waldron, J. *The Right to Private Property* (Clarendon Press, 1988).
- Weinrib, E. *The Idea of Private Law* (Harvard University Press, 1995).
- Wertheimer, A. 'Exploitation' in EN Zalta (ed.) *Stanford Encyclopaedia of Philosophy* (Stanford University, 2009).
- Wittgenstein, L. *Philosophical investigations* (Basil Blackwell, 1968).
- Zahavi, D and Gallagher, M. *The Phenomenological Mind* (Routledge, 2008).

## Articles

- Arnold, R. 'The Protection of Confidential Information in the Human Rights Era: Two Aspects' (2007) 2.9 *Journal of Intellectual Property Law & Practice* 599.
- Bortolotti, L and Broome, M. 'A Role for Ownership and Authorship in the Analysis of Thought Insertion' (2009) 8.2 *Phenomenology and the Cognitive Sciences* 205.

- Boulter, W. 'Sperm, Spleen and Other Valuables: The Need to Recognise Property Rights in Human Body Parts' (1994-1995) *Hofstra Law Review* 693.
- Boyle, J. 'The Second Enclosure Movement and the Construction of the Public Domain' (2003) 33 *Law and Contemporary Problems* 302.
- Brazier, M. 'Retained Organs: Ethics and Humanity' (2002) 22 *Legal Studies* 550.
- Brazier, M and McGuinness, S. 'Respecting the Living Means Respecting the Dead Too' (2008) *Oxford Journal of Legal Studies* 297.
- Calabresi, G and Melamed, AD. 'Property Rules, Liability Rules and Inalienability' [1972] *Harvard Law Review* 1089.
- Campbell, CS. 'Body, Self and the Property Paradigm' (1992) 22.5 *Hastings Centre Report* 40.
- Cane, P. 'Causing Conversion' (2002) 118 *Law Quarterly Review* 544.
- Carruthers, P. 'The Illusion of Conscious Will' (2007) *Synthese* 159.
- Chadwick, RF. 'The Market for Body Parts: Kant and Duties to Oneself' (1989) *Journal of Applied Philosophy* 129.
- J Christman, J. 'Can Ownership be Justified by Natural Rights?' (1986) 15.2 *Philosophy and Public Affairs* 156.
- 'Distributive Justice and the Complex Structure of Ownership' (1994) *Philosophy and Public Affairs* 225.
- 'Self-ownership, Equality and the Structure of Property Rights' (1991) *Political Theory* 28.
- Demsetz, H. 'Toward a Theory of Property Rights' [1967] *American Economic Review* 347.
- Dworkin, G. 'Is More Choice Better Than Less?' (1982) 7 *Midwest Stud Philos* 47.
- Fabre, C. 'Reply to Wilkinson' (2008) 14 *Res Publica* 137.
- Ford, M. '*Evans v United Kingdom*: What Implications for the Jurisprudence of Pregnancy?' (2008) 8 *Human Rights Law Review* 171.
- Foster, C. Dignity and the Use of Body Parts (2012) *Journal of Medical Ethics* (forthcoming, published online 14 August 2012) 1.
- Fraser, L. 'Property Rights in Environmental Management: The Nature of Resource Consents in the Resource Management Act 1991' (2008) *New Zealand Journal of Environmental Law* 145.

- Frey, BS, and Jegen, R. 'Motivation Crowding Theory' (2001) 15.5 *Journal of Economic Surveys* 589.
- Frey, BS, and Oberholzer-Gee, F. 'The Cost of Price Incentives: An Empirical Analysis of Motivation Crowding-Out' (1997) 87.4 *The American Economic Review* 746
- Gardner, J 'What is Tort Law For? Part 1. The Place of Corrective Justice' (2011) *Law and Philosophy* 1.
- Gauthier, CC 'Philosophical Foundations of Respect for Autonomy (1993) 3.1 *Kennedy Institute of Ethics Journal* 22.
- George, A. 'The Difficulty in Defining Property' *Oxford Journal of Legal Studies* 25.4 (2005) 793.
- Getzler, J. 'Theories of Property and Economic Development' (1996) 26.4 *Journal of Interdisciplinary History* 639.
- Gillespie, TW and Hillyer, CH. 'Blood Donors and Factors Impacting the Blood Donation Decision (2002) 16.2 *Transfusion Medicine Reviews* 115
- Gillon, R. 'Medical Ethics: Four Principles Plus Attention to Scope (1991) *British Medical Journal* 184.
- Goold, I. 'Sounds Suspiciously like Property Treatment: Does Human Tissue Fit within the Common Law Concept of Property?' [2005] *UTSLRev* 3; (2005) 7 *UTS Law Review* 62.
- Green, L 'Pornographies' (2000) 8(1) *Journal of Political Philosophy* 27.
- Green, S. 'The Subject Matter of Conversion' (2010) *Journal of Business Law* 218.
- 'Understanding The Wrongful Interference Actions' (2010) *Conveyancer and Property Lawyer* 15.
- Grubb, A. 'The Doctor as Fiduciary' (1994) 47 *Current Legal Problems* 311.
- Harmon, SHE, and Laurie, GT. 'Yearworth v North Bristol NHS Trust: Property, Principles, Precedents and Paradigms'(2010) 69.3 *Cambridge Law Journal* 476.
- Harrington, M, Sweeney, MR, and Bailie, K *et al.* 'What Would Encourage Blood Donation in Ireland?'(2007) 92 *Vox Sanguinis* 361.
- Harris, J. 'Law and Regulation of Retained Organs: the Ethical Issues (2002) 22 *Legal Studies* 527.
- Harrison, CH. 'Neither Moore nor the Market: Alternative Models for Compensating Contributors of Human Tissue' (2002) 28 *American Journal of Law & Medicine* 77.

- Hart, HLA. 'Are There Any Natural Rights?' (1955) 64.2 *The Philosophical Review* 175.
- Hawes, C 'Property Interests in Body Parts: *Yearworth v North Bristol NHS Trust*' (2010) 73 *Modern Law Review* 130.
- Herring J and Chau, P-L. 'My Body, Your Body, Our Bodies' (2007) 15 *Medical Law Review* 34.
- Honoré, AM. 'Responsibility and Luck' (1988) *Law Quarterly Review* 104.
- Hughes, PM. 'Exploitation, Autonomy, and the Case for Organ Sales' (1998) 12.1 *International Journal of Applied Philosophy* 89.
- Husserl, E. 'Philosophy as Rigorous Science' (2002) *The New Yearbook for Phenomenology and Phenomenological Philosophy* 249
- Hughes, PM. 'Exploitation, Autonomy, and the Case for Organ Sales' (1998) 12.1 *International Journal of Applied Philosophy* 89.
- Honoré, AM 'Responsibility and Luck' (1988) *Law Quarterly Review* 104.
- Katz, L. Exclusion and Exclusivity in Property Law (2008) 58 *University of Toronto Law Journal* 275.
- Laughton, R. 'Sexual Solipsism' (1995) 23(2) *Philosophical Topics* 181.
- Liddell, K and Hall A., 'Beyond Bristol and Alder Hey: The Future of Regulation of Human Tissue (2005) *Medical Law Review* 170.
- Mason, K and Laurie, G. 'Consent or Property? Dealing with Body Parts in the Shadow of Bristol and Alder Hey' (2001) *Modern Law Review* 710.
- Mellström, C and M Johannesson, M. 'Crowding Out in Blood Donation: Was Titmuss Right?' (2008) 6(4) *Journal of the European Economic Association* 845.
- Merril, TW and Smith, HE. 'The Property / Contract Interface' (2001) 101 *Columbia Law Review* 183.
- Mulheron, R. 'Rewriting the Requirement for a "Recognised Psychiatric Injury" in Negligence Claims' (2012) *Oxford Journal of Legal Studies* 77.
- Munzer, SR. 'Uneasy Case Against Property Rights in Body Parts' (1994) 11 *Social Philosophy and Policy* 259.

- 'Kant and Property Rights in Body Parts' (1993) 6 *Canadian Journal of Law & Jurisprudence* 319.
- Nedelsky, J. 'Law, Boundaries and the Bounded Self' (1990) 30 *Representations* 162.
- Nolan, D. 'New Forms of Damage in Negligence' (2007) 70(1) *Modern Law Review* 59.
- Nwabueze, RN 'Donated Organs Property Rights and the Remedial Quagmire' (2008) 16 *Medical Law Review* 201, 205.
- Palmer, LI. 'Should Liability Play a Role in Social Control of Biobanks' *Journal of Law, Medicine and Ethics* 33 (2005) 70.
- Partridge, E. 'Posthumous Interests and Posthumous Respect 91 *Ethics* 243.
- Pawlowski, M 'Property in Body Parts and Products of the Human Body' [2009] *Liverpool Law Review*, 35.
- Philipson, G. 'Transforming Breach of Confidence: Toward a Common Law Right to Privacy under the Human Rights Act' (2003) *The Modern Law Review* 726.
- Quigley, M 'Property and the Body: Applying Honoré' (2007) 33 *Journal of Medical Ethics* 631.
- 'Property: The Future of Human Tissue?' (2009) 17 *Medical Law Review* 457.
- MJ Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review* 957.
- 'Reconsidering Personhood' (1995) *Oregon Law Review* 423.
- 'Compensation and Commensurability' (1993) *Duke Law Journal* 56.
- Rao, R 'Property, Privacy and the Human Body' (2000) 80 *Boston University Law Review* 359.
- 'Genes and Spleens: Property, Contract, or Privacy Rights in the Human Body?' (2007) 35 *Journal of Law, Medicine and Ethics* 371.
- Rapport, FL and Maggs, CL. 'Titmuss and the Gift Relationship: Altruism Revisited' (2002) 40(5) *Journal of Advanced Nursing* 495.
- Reich, C. 'The New Property' (1964) 73 *Yale Law Journal* 733.
- Rendtorff, JD. 'Basic Ethical Principles in European Bioethics and Biolaw: Autonomy, Dignity, Integrity and Vulnerability - Towards a Foundation of Bioethics and Biolaw' (2002) 5 *Medicine, Healthcare and Philosophy* 235.

- Rippon, S. 'Imposing Options on People in Poverty: The Harm of a Live Donor Organ Market' (2012) *Journal of Medical Ethics* (forthcoming, published online June 28, 2012).
- Robertson, M. 'Reconceiving Private Property' (1997) 24 *Journal of Law and Society* 200.
- Rose, C. 'Canons of Property Talk, or, Blackstone's Anxiety' (1998-1999) 108 *Yale Law Journal* 601.
- Saul, JM. 'On Treating Things as People: Objectification, Pornography, and the History of the Vibrator' (2006) 21.2 *Hypatia* 45.
- Savulescu, J. 'Is the Sale of Body Parts Wrong?' (2003) 29 *Journal of Medical Ethics* 138.
- Schreiber, GB, Scumpf, KS, Glynn, SA *et al.*, 'Convenience, the Bane of Our Existence, and Other Barriers to Donating' (2006) 45 *Transfusion* 545.
- Siminoff, L, Mercer, MB, Graham, G *et al.* 'The Reasons Families Donate Organs for Transplantation: Implications for Policy and Practice' (2007) 62 *J Trauma* 969.
- Simmons, J. 'Original-Acquisition Justifications of Private Property' (1994) 11 *Social Philosophy and Policy* 63.
- Skegg, PDG. 'Human Corpses, Medical Specimens and the Law of Property' (1975) 4 *Anglo-American Law Review*, 412.
- 'The "No Property" Rule and Rights Relating to Dead Bodies' [1997] *Tort Law Review* 222.
- Skene, L 'Proprietary Interests in Human Bodily Material: *Yearworth*, Recent Australian Cases on Stored Semen and Their Implications' (2012) *Medical Law Review* 227.
- Smith, HE. 'Property and Property Rules' (2004) 79 *New York University Law Review* 1719.
- 'Modularity and Morality in the Law of Torts' (2011) 4.2 *Journal of Tort Law* 1.
- Spital, A and Taylor, JS. 'Routine Recovery of Cadaveric Organs for Transplantation: Consistent, Fair, and Life-Saving' (2007) 2 *Clin J Am Soc Nephrol* 300.
- M Sque, M, Long, T, Payne, S *et al.* 'Why Relatives Do Not Donate Organs for Transplants: 'Sacrifice' or 'Gift of Life'? (2008) 61(2) *Journal of Advanced Nursing* 134.
- Taylor, RS. 'A Kantian Defense of Self-Ownership' (2004) 12 *The Journal of Political Philosophy* 65.
- Tormey, JF. 'Exploitation, Oppression and Self-Sacrifice' (1974) 5 *Philosophical Forum* 206.

- Trindale, FA. 'Intentional Torts: Some Thoughts on Assault and Battery' (1982) 2 *Oxford Journal of Legal Studies* 211.
- Vadas, M. 'The Manufacture-for-use of Pornography and Women's Inequality' (2005) 13(2) *The Journal of Political Philosophy* 174.
- Waldron, J. 'Two Worries About Mixing One's Labour' 33 *The Philosophical Quarterly* 39.
- Weinrib, EJ. 'Corrective Justice in a Nutshell' (2002) *The University of Toronto Law Journal* 349.
- Wilkinson, TM 'The Confiscation and Sale of Organs' (2007) 13 *Res Publica* 327.
- Witzleb, N. Monetary Remedies for Breach of Confidence in Privacy Cases (2007) 27.3 *Legal Studies* 430.

## Reports and Regulations

- Bristol Inquiry Interim Report, *Removal and Retention of Human Material* (2000).
- Department of Health, *Reference Guide to Consent for Examination or Treatment* (2009).
- Department of Health, *A Code of Practice for the Diagnosis of Brain Stem Death* (1998).
- Department of Health, *Annual Report of the Chief Medical Officer* (2001).
- Human Fertilisation and Embryology Authority, *Code of Practice* (2009).
- Human Tissue Authority, *Code of Practice 2* (2009).
- Human Tissue Authority, *Code of Practice 6* (2009).
- Nuffield Council on Bioethics, *Human Bodies: Donation for Medicine and Research* (2011).
- United States' National Bioethics Advisory Commission, *Research Involving Human Biological Materials: Ethical Issues and Policy Guidance* (1999).