

The human body as property? Possession, control and commodification

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In the wake of three high-profile judicial decisions concerning the use of human biological materials, the editors of this collection felt in 2011 that there was a need for detailed scholarly exploration of the ethical and legal implications of these decisions. For centuries, it seemed that in Australia and England and Wales, individuals did not have any proprietary interests in their excised tissue. Others might acquire such interests, but there had been no clear decision on the rights or otherwise of the persons from whom the tissue was obtained. In 2009, however, the Court of Appeal of England and Wales recognised a limited exception to this position in *Jonathan Yearworth and others v North Bristol NHS Trust* (2009). In that case, the Court held that the appellants, who had deposited semen samples for freezing before they undertook treatment for cancer, had “for the purposes of a claim in negligence ... ownership of the sperm which they had ejaculated”. One year later, the Supreme Court of Queensland, Australia, took a similarly property-based approach to determining how a semen sample stored shortly before death should be dealt in *Bazley v Wesley Monash IVF* (2010). According to that court, the co-executors of the estate had sufficient proprietary interests in the semen to legally demand its return from the laboratory where it was held. In 2011, the New South Wales Supreme Court similarly found that the widow of a recently deceased man had a right to possession of his semen in *Joceyln Edwards; Re the estate of the late Mark Edwards* (2011).

In the editors' view, these decisions signalled a turning point in the Anglo-Australian jurisprudence in this area, taking the law a step beyond the decisions of the late 20th century such as *R v Kelly* (1998), in which possessory rights were found to rest with *subsequent holders* of *preserved* tissue in accordance with the exception to the prohibition on the ownership of corpses that had been carved out in the

High Court of Australia decision in *Doodeward v Spence* back in 1908. With the generous support of an Oxford-Melbourne Partnership grant (sponsored by Victorian barrister, Mr Allan Myers AO, QC), Professor Loane Skene, Professor Jonathan Herring, Dr Imogen Goold and Ms Kate Greasley convened a series of workshops in the UK and Australia to bring together legal academics and philosophers to examine the impact of these decisions. The papers in this Special Issue are the result of the lively and productive discussions that took place in the course of these workshops in 2011 and 2012.

In the first paper in this issue, Imogen Goold (*see page 3*) introduces the challenges that face the development of an effective, coherent regulatory framework for human biological materials. She contextualises the debate by outlining the myriad uses to which human material is put, and then details the various interests people and institutions have in these materials. Researchers, medical practitioners, patients, families, the community and the police, among many others, all have interests in human biological materials, each at times wanting control of, or access to, that material. In outlining these interests, she teases out the areas of complexity and conflict, the very areas in which the debate over how to regulate tissue is most heated. She argues that any regulatory framework must take account of these interests and the tensions between them, providing sufficient control and protection for legitimate users of tissue, while taking account of the fact that our bodies hold psychological importance for us while we live and, after we die, for those we leave behind.

Loane Skene (*see page 10*), Luke Rostill (*see page 14*, Editor's choice), Jesse Wall (*see page 19*) and Simon Douglas (*see page 23*) then offer explorations of the ambit of the current law, as well as critically appraising the basis for the decisions. Skene points out that “the approach of the courts when considering proprietary ... interests in human bodily material has been pragmatic and piecemeal”, and explains that due to the legal impact of the early case law, “later judges have been constrained by these decisions” and

so “cannot state new principles to be applied more widely to promote consistency. This requires the will of Parliament and legislation to introduce new principles”. Skene's point is an important one in the context of these new decisions, as it aptly captures why those decisions represent such a turning point, and yet at the same time are arguably only very limited in application. Luke Rostill presents a detailed examination of the Yearworth decision, arguing provocatively that the decision does not, as some might suggest, hold that the men had property rights (in the narrow sense of that term) in the sperm they had produced. He presents a compelling case for a much more limited interpretation of the case than has been widely accepted, in which he argues that the court recognised only limited rights of control vesting in the men, rather than any right ‘in rem’, enforceable against all the world.

Jesse Wall and Simon Douglas present two views on the most appropriate approach the law could take to the regulation of human bodily materials. Wall argues that “property rights are rights that can exist independently of any rights holder. Where the exercise of an entitlement gives rise to preferences and choices that can be exercised by any other potential rights holder, then such rights are conceptually *contingent* to the rights holder”. Therefore, property rights are ‘contingent rights’. By contrast, ‘personal rights’ are rights that cannot exist independently of the rights holder. Wall makes the case for limiting the application of property law to human tissue by protecting only such ‘contingent rights’. In his view, the recent cases such as Yearworth go beyond this limit, and he presents a view of how the law ought to develop in order to avoid the over-extensive use of property law. Douglas, on the other hand, argues in favour of recognising property rights in human tissue, resting his argument in part on the implications in this context of scarcity of resources. In presenting his argument, he provides a valuable contribution to the general debate by considering the basic question of whether human tissue can, as a matter of legal theory, be the subject of property rights. He concludes

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that it can be, before going on to argue that it also should be.

Justine Pila (*see page 27*) considers an under-explored area—whether the intellectual property regime suggests an appropriate model for protecting interests in excised human tissue. She outlines two species of intellectual property rights, and argues that both may suggest more appropriate models of *sui generis* protection for excised human tissue than patent rights because of their capacity to better accommodate the relevant public and private interests in respect of that tissue. Remigius Nwabueze then rounds out this section of the issue with a paper examining the question of remedies for interferences with human tissue (*see page 33*). He argues that one reason for the topicality of property in relation to body parts is the capacity of property law to offer the right sort of remedies. In particular, he points out that a proprietary framework would be the most effective means of providing individuals with continuing control, and protections when others interfere with this control.

Jonathan Herring and P-L Chau (*see page 39*) and Charles Foster (*see page 44*) offer alternative accounts of how we ought to think about questions about the regulation of human tissue. Herring and Chau reject property-based approaches to regulation on the grounds that such approaches “assume an individualistic conception of the body” which fails to account for the unbounded, interconnected, constantly changing nature of our bodies and their parts. Foster’s paper takes a different tack, but similarly attacks the atomistic individualism of the property (and usually autonomy)-based approach. Dignity, he argues, rather than autonomy (and its protection via the possessory rules inherent to property) is the principle that best captures what is important about human tissue and should be our guide when it comes to regulation. Property, he argues, cannot reflect the normative directives of dignity.

Sarah Devaney (*see page 48*) and Kate Greasley (*see page 51*) consider the commercialisation aspects of use of human biological materials. Devaney examines the altruism-based system for tissue provision offered by the Nuffield Council on Bioethics in its 2011 report, *Human Bodies: Donation for Medicine and Research*. She argues that such a system has the potential to become inconsistent and unnecessarily complex, and suggests that “the outcomes-focussed and motivations-focussed justifications the Council provides do not sit easily within the fast-paced and unpredictable area of biotechnology research”. In her view, “a fair system for incentivising and rewarding the provision of human tissue in research should be developed, which focuses on elements of this role that are common to all tissue providers”. Greasley explores a different aspect of the commercialisation debate—exploitation. It is often said that markets in human organs and tissue are by their nature unacceptably exploitative, and that we should protect those who would sell parts of their bodies from harming themselves in this way. Market proponents often respond that to prohibit such a market is to deny the poor the best option that their bad situation has to offer. Greasley directly challenges this response, arguing that even in a regulated donor market, both logic and the available evidence suggest that organ selling does not meaningfully improve the material situation of the organ vendor.

Our collection of papers is also joined by contributions from scholars who were not present at our series of workshops, but which we consider useful contributions to the debates around the control and commercialisation of human biological materials. Teck Chuan Voo and Soren Holm (*see page 57*) pose the question whether if organs are treated like property, they should also be inheritable. They defend the idea that the family of a dead person should be, by default, the inheritors of transplantable organs. James

Stacey Taylor (*see page 62*) provides a commentary on their paper. The issue concludes with a paper from Isra Black and Lisa Forsberg (*see page 63*), in which they consider whether it would be ethical to use motivational interviewing to increase family consent to deceased solid organ donation.

DEDICATION

by Dr Muireann Quigley

This special issue is dedicated to the memory of Professor David Price. David was a Professor of Medical Law at De Montfort University where he had worked since 1977. He passed away in January 2012 after a brief illness. David was the leading expert in the UK on the legal and ethical aspects of organ donation and on the use of human tissue for treatment and research. His work has had a significant influence not only on the contributors to this volume, but on research in medical law and ethics more generally. David was also actively engaged in the development of policy. Among other public appointments he was a member of the Organ Donation Taskforce which examined the potential impact of an opt-out system for organ donation in the UK in 2008 and of the Nuffield Council on Bioethics working party which published the report *Human Bodies: Donation for Medicine and Research* in 2011. David was part of a group that first met in Oxford in 2011 to explore the legal regulation of human tissue. This volume grew out of that meeting, and a subsequent meeting in 2012 at which David was sorely missed. As was always the case, David’s contribution to the group and the meeting was invaluable. His knowledge in this area was unsurpassed, yet he was an unerringly generous person with both his time and intellect. David’s enthusiasm affected all those who came into contact with him. He is greatly missed.