

## **Property rights to our bodies and to their products**

Plenary presentation at the Australian Association of Bioethics and Health Law Conference, 3 October 2014

James Edelman\*

This paper examines issues concerning property rights to our bodies and their products. The questions of principle involved in this area have attracted vast debate and discussion amongst lawyers for two millenia. The underlying questions of legal principle should not be complex. The principles established by the Romans give clear guidance for how these questions should be answered. But the difficulty is that the context in which the questions are asked can involve policy choices that are unsuited for common law development. Legislative intervention has offered real benefits.

### **The history of the question 'who owns our bodies or their products?'**

Two thousand years ago, on the other side of the world, some of the finest lawyers that have ever lived were debating the legal answers to some very basic questions.

1. Suppose I mistakenly use your wool to knit a gap in my woollen jumper. You might have a personal action against me but your wool becomes part of my jumper and becomes owned by me. The Romans called this principle *accessio*.<sup>1</sup>

Some questions of *accessio* were more difficult and the Roman solutions were more difficult to justify. Suppose you leave your tablet at a painting workshop. Apelles of Kos mistakes the tablet for his own. He paints a masterpiece on your tablet. Who owns the painting? In general terms, the dominant position in classical Roman law was that Apelles owned the tablet and painting. But the position was different if someone wrote by mistake on another's parchment. Justinian sought to justify the distinction by saying that it could hardly be supposed that the owner of a tablet would obtain the massive

---

\* Justice of the Supreme Court of Western Australia; Adjunct Professor of Law, University of Western Australia and University of Queensland; Conjoint Professor, University of New South Wales. My thanks to Claudia Henry for some of the research into cases discussed in this article.

<sup>1</sup> Inst II.1.26.

value of a work of Apelles.<sup>2</sup> But other classical writers pointed out that this was the result if, say, Virgil, had written on the parchment of another.<sup>3</sup>

The Roman solution was that the painting acceded to the tablet. English and Australian law today still uses the same concept of accession, with many of the same debates. The very important concept of accession of buildings to land is Roman: *inaedificatio*.<sup>4</sup>

2. Suppose that mistaking the boundaries between our land, you use my grapes to make your wine. Who owns the wine? Again, this was the subject of much debate. Broadly, one school of thought (the Sabinian) was that the owner of the materials - the grapes - was the owner of the wine.<sup>5</sup> Another school thought (the Proculian) considered that it was the *maker* of the wine. Justinian settled on a middle way - a *media sententia* - which depended on whether the new thing could be reduced back to its former materials (it would be owned by the owner of the materials) or not (it would then be owned by the maker).<sup>6</sup> The Romans described this concept as *specificatio* - the creation of a new thing. Today we still use these ideas of *specificatio*. In an illuminating discussion of the development of principles of copyright law, Justice Emmett explained how the development and understanding of copyright law, more than a millennia after the Romans, borrowed from ideas of *specificatio*.<sup>7</sup>

3. A third property law principle developed by the Romans was that of first ownership or *occupatio*. Not all things are owned. One category of things that were not owned was *res nullius*. This included (i) things that had never been the subject of Roman ownership, as well as (on one view, that of the Sabinian school) (ii) things which had been abandoned. Pearls and shells

---

<sup>2</sup> Inst II.1.33-34.

<sup>3</sup> G II.77-78.D 6.1.23.3 (Paul).

<sup>4</sup> G II.73; Inst II.1.29-30; D 6.1.23.6-7; D 9.2.50; D 41.1.7.10-12.

<sup>5</sup> G II.79.

<sup>6</sup> Inst II.1.25.

<sup>7</sup> *EMI Songs Australia Pty Limited v Larrikin Music Publishing Pty Limited* [2011] FCAFC 47 [31] - [33].

thrown up from the sea,<sup>8</sup> or wild animals<sup>9</sup> were examples of things that had no owner. They could become owned by *occupatio*, possession by the first possessor of them, who controls them. In the rare examples of things that are not the subject of any property right, English and Australian law recognises the same idea. Subject to legislative regimes that govern fishing, a fisherman's catch of wild fish is a good example of this. Occasionally, however, there were things that could not be owned. Examples were *res sacrae* or sacred things such as temples or altars, and *res religiosae* or things dedicated to the gods.<sup>10</sup> Another example was *res communes* or things in communal ownership: the air, the sea and the shore. Today we speak of the high seas, or the atmosphere, or Antarctica, as communally owned, which really means that they are for everyone and owned by no person.

Roman law on these points was far more sophisticated than these examples suggest. In fact, the detail of Roman law is probably more sophisticated on these issues than the current state of English or Australian law. As Holdsworth observed,<sup>11</sup> these Roman principles were received into English law through Bracton, although the principles became distorted. The distortion occurred because English lawyers came to see the problems as part of the law of torts.<sup>12</sup> This was an error because the question of the person who holds the property right is a separate question from the question of whether a person should pay damages for a wrong.

Nevertheless, whether or not Holdsworth is correct (and his arguments are mostly assertion) that the legal principles concerning original modes of acquisition of property rights developed in a native way within English law, the concepts of *accessio*, *specificatio*, or *occupatio* remain at the core of original modes of acquisition of property, whatever development of the principles has

---

<sup>8</sup> D 1.8.3; 41.2.1.1, Inst II.1.18.

<sup>9</sup> D 41.2.1.1.

<sup>10</sup> G II.1-5.

<sup>11</sup> W Holdsworth, *History of English Law*, Vol. VII, at pp. 501-3.

<sup>12</sup> *Rendell v Associated Finance Pty Ltd* [1957] VR 604.

occurred.<sup>13</sup> It was these principles directly from Roman law that Blackstone expounded. It was these principles, directly from Roman law (and the writings of Iavolenus and Ulpian) that Lord Hoffmann and Lord Hope of Craighead turned in 2002<sup>14</sup> to try to solve a problem involving the question of tracing of mixed funds in bank accounts. The short point is that it is remarkable that, two millennia later, these issues are still being debated in classrooms and courtrooms across the world. It is these three principles, *accessio* (accession), *occupatio* (first ownership) and *specificatio* (the creation of a new thing) that I will use to illustrate the ideas about which I speak this morning, although I acknowledge (as the Romans did) that the rules within each category are contestable.

One of the most controversial contexts in which these principles of property law are debated is in relation to property rights to our bodies and their products. The issue has arisen in various ways including the following.

- (i) Whether body parts,<sup>15</sup> or a blood sample,<sup>16</sup> constitute property that can be stolen.
- (ii) Whether a group of men have property rights over sperm samples they produced which were negligently stored for them.<sup>17</sup>
- (iii) Whether a man's sperm sample could be inherited by his widow upon his death.<sup>18</sup>

The ultimate point that I want to make this morning is that, as lawyers, these problems should be approached with the same basic tools - the same principles of law - that have been recognised for two millennia. There will be difficulty in the application of these principles but that is no different from any other area of law. The greatest controversy concerns the policy issues involved

---

<sup>13</sup> W Holdsworth, *History of English Law*, Vol. VII, at 497.

<sup>14</sup> *Foskett v McKeown* [2001] 1 AC 102.

<sup>15</sup> *R v Kelly* [1999] QB 621.

<sup>16</sup> *R v Rothery* [1976] RTR 550.

<sup>17</sup> *Yearworth and others v North Bristol NHS Trust* [2009] EWCA Civ 37; [2010] QB 1.

<sup>18</sup> *Bazley v Wesley Monash IVF Pty Ltd* [2010] QSC 118; (2010) 2 Qd R 207.

in the answers that are given. But those policy questions - unlike questions of principle - are properly the province of Parliament.

The particular question that I will focus upon in the most detail this morning is just one instance of this human tissue debate, although it is an issue which arises with surprising regularity. The issue is the property rights to gametes of a recently deceased person. I will use this as an example to show that there is a principled manner to understand these issues at common law. But the common law in this area is not as nuanced as any legislative solution, and the litigation delay is potentially self-defeating. These policy issues are properly a matter for Parliament and they have been addressed by Parliament. But it remains important to understand the issues of principle for the broader context of human tissue claims generally.

### **Property rights to gametes**

The particular instance of the broader question that I am examining arises most commonly in circumstances in which the spouse or partner of a very recently deceased man wishes to have spermatozoa extracted from his body for future implantation. In the last 3 years I have been aware of 6 occasions when the issue has arisen in Western Australia alone. I am sure there have been more in this State and many more in other States. Because of the short window of time for extraction, the question arises with such urgency that a decision must be made almost immediately. There is also rarely any need for reasons to be given subsequently.

The first two published decisions in Western Australia to deal with this issue were decisions of the Supreme Court of Western Australia, of Simmonds J and of Martin CJ.<sup>19</sup> In each case the application was brought in the urgent circumstances I have described. In each case, the judges relied, in part, upon

---

<sup>19</sup> *S v Minister for Health (WA)* [2008] WASC 262; *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA)*; *Ex parte M* [2008] WASC 276.

provisions of the Rules of Court permitting orders to be made to preserve material which might be used after subsequent proceedings have been taken.

Order 52 r 3(1) of the *Rules of the Supreme Court 1971* (WA) gives the Court the power to take samples of any property, make any observation of any property, experiment on or with any property, or observe any process, for the purpose of enabling the proper determination of any cause or matter or of any question arising therein.

The section is as follows:

- (1) The Court may for the purpose of enabling the proper determination of any cause or matter or of any question arising therein, make orders on terms for –
  - (a) the taking of samples of any property; or
  - (b) the making of any observation of any property; or
  - (c) the trying of any experiment on or with any property; or
  - (d) the observation of any process.

Similar provisions are found in the rules of the Supreme Courts of South Australia,<sup>20</sup> Victoria<sup>21</sup> and Queensland.<sup>22</sup> In the rules of South Australia,<sup>23</sup> Victoria,<sup>24</sup> and Queensland,<sup>25</sup> there is also provision for the court to make orders for the inspection or preservation of property that is the subject of proceedings.

In this context, the most basic question is this: are gametes property?

### **A starting point: the meaning of 'property'**

The first problem in any analysis of property rights is the lack of any coherent definition of 'property'. The way that the concept is used by lawyers makes it simply impossible to define. This is because the concept is used to

---

<sup>20</sup> The similar provision in South Australia, s 147 of the *Supreme Court Civil Rules 2006* (SA), does not refer to 'property'.

<sup>21</sup> *Supreme Court (General Civil Procedure) Rules 2005* (Vic) Reg 37.01(2).

<sup>22</sup> *Uniform Civil Procedure Rules 1999* (Qld) s 250(3).

<sup>23</sup> *Supreme Court Civil Rules 2006* (SA) s 248.

<sup>24</sup> *Supreme Court (General Civil Procedure) Rules 2005* (Vic) Reg 37.01(1).

<sup>25</sup> *Uniform Civil Procedure Rules 1999* (Qld) s 250(1).

describe phenomena that are fundamentally different. Consider some different ways in which lawyers use the label 'property'.

First, one of the core usages of property is to describe the relationship between a person and a physical thing. "I have property in the cow, Buttercup" is an assertion by a person of a right to a thing.

Secondly, the position is different in relation to land. When lawyers are speaking accurately they do not refer to a person's property right to land or relationship with land. They speak of a property right in relation to land as a right or a relationship with an *estate* in land which is now generally freehold or leasehold. As Mark Wonnacott has explained, an accurate description of the enjoyment of a property right in relation to land is to describe<sup>26</sup> '[t]he relationship of fact (having or being in possession) ... when a person is, as a matter of observable fact, enjoying the rights and incidents of an estate or interest in land'.

Thirdly, lawyers sometimes speak of contractual rights as 'property'. The most common example of this is the description of a bank account as a person's property. Here a massive leap has been taken. A bank account is a personal claim against a bank. It is a contractual right. Despite valiant attempts at theoretical justification,<sup>27</sup> the inclusion of bank accounts within the idea of property destroys the fundamental divide between property rights (in the first and second sense above) and obligations. The consequences of this type of thinking are potentially far reaching and revolutionary.<sup>28</sup> But there is no doubt that many statutes as well as common law decisions speak of 'property' in this way.

---

<sup>26</sup> M Wonnacott, 'Flawed judgment' (1999) *Estates Gazette* 165. See also W Swadling, 'Property' in A Burrows (ed), *English Private Law* (2nd ed, 2007) 228 fn 32; *Georgeski v Owners Corporation SP49833* [2004] NSWSC 1096 [102] (Barrett J).

<sup>27</sup> J Penner, *The Idea of Property in Law* (1997).

<sup>28</sup> See the minority judgments of Lord Nicholls and Baroness Hale in *OBG Ltd v Allan* [2007] UKHL 21; [2008] 1 AC 1.

As property is used in many different contexts, it has been given different meanings. Therefore searching for a single unitary meaning of 'property' is a hopeless ideal. But there are some, few, instances where property is never an appropriate description. As the High Court explained in *Yanner v Eaton*:<sup>29</sup>

Because "property" is a comprehensive term it can be used to describe all or any of very many different kinds of relationship between a person and a subject matter. To say that person A has property in item B invites the question what is the interest that A has in B? The statement that A has property in B will usually provoke further questions of classification. Is the interest real or personal? Is the item tangible or intangible? Is the interest legal or equitable?

In other words, whatever is meant by a person's use of the term 'property' it requires a subject matter independent of the person. Lawyers since the Romans have all known this. Whatever meaning is given to 'property', it is independent of personhood. The antithesis of any meaning of 'property' is personhood. In other words, a living person can be the holder of a property right but he or she cannot be the object of it. Lord Rodger,<sup>30</sup> who was one of the world's finest Roman scholars, ascribed the origin of this principle to the statement by Ulpian that *Dominus membrorum suorum nemo videtur*.<sup>31</sup> On Professor Honoré's account, Ulpian also saw the natural injustice of slavery.<sup>32</sup>

In the decision where Lord Rodger made this remark, *R v Bentham*,<sup>33</sup> the House of Lords considered whether a man holding his hand within his jacket, to appear as if he were holding a gun, could be charged with being in possession of a firearm. The House of Lords concluded that an 'unsevered hand' was not capable of being possessed. In the leading judgment of Lord Bingham, his Lordship said 'one cannot possess something which is not separate and distinct from oneself...[w]hat is possessed must under definition be a thing. A

---

<sup>29</sup> *Yanner v Eaton* [1999] HCA 53; (1999) 201 CLR 351, 367 [20] (Gleeson CJ, Gaudron, Kirby & Hayne JJ).

<sup>30</sup> *R v Bentham* [2005] UKHL 18; [2005] 1 WLR 1057 [14].

<sup>31</sup> D 9 2 13 pr.

<sup>32</sup> T Honoré, *Ulpian: Pioneer of Human Rights* (2002).

<sup>33</sup> *R v Bentham* [2005] UKHL 18; [2005] 1 WLR 1057 [8].

person's hand or fingers are not a thing.<sup>34</sup> A hand or fingers are not a thing because they have no independent existence.

## **Two problems**

I come then to the problems raised by the scenario with which I began. A living person's gametes are part of a person's body. There is no object separate from the person. There can be no property. Without a very clearly expressed legislative intent, it would be a revolutionary conclusion if a description of 'property' in legislation or rules of court were extended to unseparated parts of a living person's body. Two questions thus arise. First, can gametes taken from a living body be the subject of property rights? Secondly, is the position any different after a person has died?

### **Problem 1: Can gametes from a living body be the subject of property rights?**

#### **No obstacle in principle**

The essence of the first question is not a novel principle. A new thing has been created. But there is a preliminary question that must be asked before these principles can be applied. The preliminary question is whether a product of the human body is *capable* of being the subject of property rights. Is an arm, or a leg, a kidney, or gametes to be treated like something that the Romans called *res sacrae*, or *res communes* and incapable of private ownership. Or is it to be treated like a fisherman's catch: something that was not previously owned but is now the subject of ownership.

As a matter of principle, a part of a person's body, when removed from that body, must be capable of ownership simply because it is a thing and all things are capable of being owned. The reason why *res communes*, or the commons, cannot be owned by an individual is because they are owned by everyone. The reason why things like *res sacrae* were not capable of ownership

---

<sup>34</sup> *R v Bentham* [2005] UKHL 18; [2005] 1 WLR 1057 [8].

was usually a choice by the State. So, in pagan times, a *lex* or *senatusconsultum* was required before a thing could become *res sacrae*.<sup>35</sup> Or *res sanctae* (such as the walls of the city) could not be owned because of the *sanctae* - the sanction - of death for those who interfered with them.<sup>36</sup> These questions of policy are for the State. There may be very good policy reasons to impose restrictions on holders of property rights in those things such as prohibitions on sale. But these are questions of policy, not principle. As a matter of principle, the law generally protects relative rights to physical things. As David Hume observed, without a policy of protecting peaceful possession there are threats to the rule of law:<sup>37</sup>

[Separate physical things are] expos'd to the violence of others, and may be transferr'd without suffering any loss or alteration while at the same time, there is not a sufficient quantity of them to supply every one's desires and necessities. As the improvement, therefore, of these goods is the chief advantage of society, so the instability of their possession, along with their scarcity, is the chief impediment

In relation to body parts specifically, as counsel observed in the famous Australian case of *Doodeward v Spence*,<sup>38</sup> the lack of property protection would 'render many of the most valuable collections in hospitals and museums liable to be carried away with impunity'.

Nor is it correct to say that things cannot be the subject of a property right unless they have 'use or significance beyond their mere existence'.<sup>39</sup> This was the rationale of the English Court of Appeal in *R v Kelly*.<sup>40</sup> That case involved an appeal from convictions for theft of body parts stored in jars at the Royal College of Surgeons. The Vice Chancellor, delivering the opinion of the Court of Appeal, acknowledged the possibility of future development of principles in this area. But, subject to that possibility, the Court focused on the

---

<sup>35</sup> G 11.5; D 1.8.9.1.

<sup>36</sup> Inst II.1.10.

<sup>37</sup> D Hume, *A Treatise of Human Nature, Book III*, 2nd edn (Oxford, Clarendon Press, 1978) Part 1, Section 2. See S Douglas, 'Property rights in human biological material' in I Goold et al, *Persons, Parts and Property* (2014) 108.

<sup>38</sup> *Doodeward v Spence* [1908] HCA 45; (1908) 6 CLR 406.

<sup>39</sup> *R v Kelly* [1998] EWCA Crim 1578, [1999] QB 621.

<sup>40</sup> *R v Kelly* [1998] EWCA Crim 1578, [1999] QB 621.

need for something to be *used* as the limit to which the Court of Appeal was prepared to recognise property rights in severed body parts in the context of.

Such a limit is based on the 'bundle of rights' theory of property law. The bundle of rights thesis tends to point towards severed human body parts not being property because, for instance in the case of gametes, legislation might preclude the owner from what is often thought to be one of the most important rights in the bundle, namely *using* the gametes.

The bundle of rights theory, often attributed to Hohfeld, is flawed. The High Court in *Telstra Corporation Ltd v The Commonwealth*,<sup>41</sup> said that 'in many cases, including at least some cases concerning s 51(xxxi), it may be helpful to speak of property as a "bundle of rights"'. But to go beyond this and to use the 'bundle of rights' as a description or a determinant of a property right is a mistake. It is a mistake for several reasons.

The first two problems are fairly fundamental obstacles for the theory. The bundle of rights is not a bundle. And it does not involve rights.

It is not a bundle because, as Pritchard J has recently recognised, the 'rights' can vary from circumstance to circumstance.<sup>42</sup> Some cases might have one 'right'. Others might even have none.

It does not necessarily involve 'rights' properly so called because, in Hohfeld's language, many of the 'rights' are not rights at all but are liberties. The so-called rights as listed by Professor Honoré include<sup>43</sup>

- (i) the right to possess or to have exclusive physical control of a thing,
- (ii) the right to use a thing,
- (iii) the right to the income from a thing,
- (iv) the right to manage and deal with the thing,
- (v) the right to control the use of the thing by others and to permit others to make use of it,

---

<sup>41</sup>*Telstra Corporation Ltd v The Commonwealth* [2008] HCA 7; (2008) 234 CLR 210, 230 [44].

<sup>42</sup>*Strange Investments (WA) Pty Ltd v Coretrack Ltd* [2014] WASC 281 [75].

<sup>43</sup> A M Honoré 'Ownership' in in A.G. Guest (ed.) *Oxford Essays in Jurisprudence* (1961) 108.

- (vi) the right to the capital in the thing,
- (vii) the right to security of possession (that is, to prevent others from making use of it),
- (viii) the right of transmission (to sell or give it away), and
- (ix) the absence of any time limitation on the enjoyment of these rights.

For instance, native title is almost universally recognised as a property right but the core of that title is the 'right' to use in the sense of a liberty. That liberty can be extinguished if inconsistent with a right of exclusive possession.<sup>44</sup>

It is important to see why the 'right' to use, which Honoré described as a 'cardinal feature of ownership'<sup>45</sup> is not a right but, as Honoré realised, it is a liberty. As Douglas and McFarlane have cogently pointed out,<sup>46</sup> to say that A has a 'right' against B to use the motorcar that A owns is really just saying that A has a liberty to use the motorcar or, looked at from B's perspective, B has no right to prevent A from using A's car.

The second flaw in the bundle of rights theory is that many of these liberties are not unique to the holders of rights in relation to things. As Douglas and McFarlane also point out,<sup>47</sup> everyone in the world has the same liberty to use A's car against everyone else, with one exception. The exception is that no-one has that liberty against A. An example they give is both telling and, for me, both compelling and personally resonant:

[I]f A and X are each present at an academic conference where a buffet lunch is served each has a prima facie liberty against the other to take and eat a chocolate mousse; this liberty remains even if there is only one such mousse remaining, and X (or A's) exercise of their liberty will leave A (or X) with only fruit for dessert.

It follows from this reasoning that I reject the reasoning (but not necessarily the result) of the majority of Supreme Court of California in *Moore*

---

<sup>44</sup> *State of Western Australia v Brown* [2014] HCA 8.

<sup>45</sup> A M Honoré 'Ownership' in in A.G. Guest (ed.) *Oxford Essays in Jurisprudence* (1961) 116.

<sup>46</sup> S Douglas and B McFarlane, 'Defining Property Rights' in J Penner and H Smith, *Philosophical Foundations of Property Law* (2013) 220.

<sup>47</sup> S Douglas and B McFarlane, 'Defining Property Rights' in J Penner and H Smith, *Philosophical Foundations of Property Law* (2013) 221.

*v Regents of the University of California*.<sup>48</sup> In that case, the Supreme Court rejected John Moore's action against his treating physician. Moore's action was for the surgeon's conversion of Moore's spleen cells (containing hairy cell leukaemia) to the surgeon's own use for profit (\$15 million sale of the cell line and ultimately said to be \$3 billion profit). The reason given by Panelli J in the majority decision rejecting the claim for conversion was essentially that these things are the subject of legislative policy not property law:<sup>49</sup>

[T]he laws governing such things as human tissues, transplantable organs, blood, fetuses, pituitary glands, corneal tissue, and dead bodies deal with human biological materials as objects *sui generis*, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property. It is these specialized statutes, not the law of conversion, to which courts ordinarily should and do look for guidance on the disposition of human biological materials.

The reasoning in *Moore* is difficult to reconcile with a decision of a differently constituted Supreme Court of California several years later in *Hecht v Superior Court of Los Angeles*.<sup>50</sup> In that case the court recognised a property right of a man's girlfriend to his cryogenically preserved sperm in a sperm bank after his death. The decision of the Court was given by Lillie PJ. Her Honour described the interest of the man's girlfriend as 'in the nature of ownership'.<sup>51</sup> Also in contrast with the Supreme Court of California's reasoning in *Moore*, there has been a host of Australian and English decisions that have recognised the application of property principles to mere body parts or body products, particularly gametes.

A path-breaking decision in this regard was the decision in this jurisdiction of Master Sanderson in *Roche v Douglas as Administrator of the Estate of Edward John Hamilton Rowan (Dec)*.<sup>52</sup> In that case, Ms Susan Roche applied for an order under O 52 r 3(1) of the *Rules of the Supreme Court*

---

<sup>48</sup> *Moore v Regents of the University of California* (1990) 51 Cal 3d 120

<sup>49</sup> *Moore v Regents of the University of California* (1990) 51 Cal 3d 120, 137.

<sup>50</sup> *Hecht v Superior Court of Los Angeles* (1993) 16 Cal App 4th 836.

<sup>51</sup> *Hecht v Superior Court of Los Angeles* (1993) 16 Cal App 4th 836, 846.

<sup>52</sup> *Roche v Douglas as Administrator of the Estate of Edward John Hamilton Rowan (Dec)* [2000] WASC 146; (2000) 22 WAR 331.

for tests to be conducted on tissue specimens of the deceased. The tissue specimens were held in a laboratory. Ms Roche wanted to prove paternity by the deceased for the purposes of a family provision application. Order 52 r 3(1) permits the taking of a sample of any *property*. In order to make this order, it was necessary to determine whether the specimens were property. In a comprehensive and cogent discussion, Master Sanderson concluded that 'it is proper to hold that the human tissue is property'.<sup>53</sup>

In *Bazley v Wesley Monash IVF Pty Ltd*,<sup>54</sup> the husband of the applicant in this case had arranged for samples of his sperm to be stored by an IVF clinic prior to undergoing chemotherapy. Upon his death, the clinic informed the applicant, the deceased's wife, that in accordance with their guidelines the semen could no longer be stored and could not be used to facilitate a pregnancy. The applicant sought to restrain the clinic from destroying the samples. Justice White held that the sperm can be described as 'property', for the purposes of the *Succession Act 1981* (Qld), thus ownership rights vested with the applicant as the deceased's personal representative. Justice White held that '[t]he conclusion, both in law and in common sense, must be that the straws of semen currently stored with the respondent are property'.<sup>55</sup>

The same conclusion was reached in the famous decision of the English Court of Appeal in *Yearworth and others v North Bristol NHS Trust*.<sup>56</sup> But that case qualified the principle in ways that seem to be dependent upon a bundle of rights theory of property. In that case, men had produced sperm to be frozen prior to undergoing chemotherapy. On a form they signed, the hospital that stored their sperm said that the sperm would be stored in liquid nitrogen at a specified temperature, but that it could not guarantee that accidental thawing would not occur. Unfortunately, the liquid nitrogen fell below the requisite

---

<sup>53</sup> *Roche v Douglas as Administrator of the Estate of Edward John Hamilton Rowan (Dec)* [2000] WASC 146; (2000) 22 WAR 331, 338 [23].

<sup>54</sup> *Bazley v Wesley Monash IVF Pty Ltd* [2010] QSC 118; (2010) 2 Qd R 207.

<sup>55</sup> *Bazley v Wesley Monash IVF Pty Ltd* [2010] QSC 118; (2010) 2 Qd R 207, 215.

<sup>56</sup> *Yearworth and others v North Bristol NHS Trust* [2009] EWCA Civ 37; [2010] QB 1.

level and the sperm thawed, losing its viability. The men sued for negligence by the hospital as bailee of the samples, and sought compensation for their mental distress or psychiatric injury.

The Court of Appeal held that in order for the claimants to claim for negligence, they must have *ownership* of the sperm.<sup>57</sup> That conclusion might be doubted, both as a matter of English<sup>58</sup> and, particularly, Australian law.<sup>59</sup> But, proceeding on this assumption, the English Court of Appeal held that property in the sperm could be easily recognised by application of the work and skill exception, as the storage of the sperm in liquid nitrogen constituted 'an application to the sperm of work and skill which conferred on it a substantially different attribute'.<sup>60</sup> However, delivering the judgment of the Court of Appeal, the Lord Chief Justice explained that the Court preferred to 'rest [their] conclusions on a broader basis'<sup>61</sup> that the men had ownership of their sperm for the purposes of a claim for negligence based on a number of factors.<sup>62</sup>

Two factors were that the sperm had been generated from the bodies of the men and that the licence holder (who took possession of the sperm) had only duties to deal with the sperm but no rights in relation to it. As I will explain in a moment, these factors might strongly support the men's ownership by either a *specificatio* or an *occupatio* principle. Other factors on which the Court of Appeal focused essentially involved the coherence of the conclusion with the legislative framework, the *Human Fertilisation and Embryology Act 1990*.

Unfortunately, the decision in *Yearworth* was placed on a much narrower footing in a decision late last year in Scotland, in *Holdich v Lothian Health Board*.<sup>63</sup> That case was brought as the equivalent of a strike out

---

<sup>57</sup> *Yearworth and others v North Bristol NHS Trust* [2009] EWCA Civ 37; [2010] QB 1, 12.

<sup>58</sup> Along the lines of an assumption of responsibility based on *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

<sup>59</sup> *Perre v Apand Pty Ltd* [1999] HCA 36; 198 CLR 180.

<sup>60</sup> *Yearworth and others v North Bristol NHS Trust* [2009] EWCA Civ 37; [2010] QB 1, 20.

<sup>61</sup> *Yearworth and others v North Bristol NHS Trust* [2009] EWCA Civ 37; [2010] QB 1, 20.

<sup>62</sup> *Yearworth and others v North Bristol NHS Trust* [2009] EWCA Civ 37; [2010] QB 1, 20 - 21.

<sup>63</sup> *Holdich v Lothian Health Board* [2013] CSOH 197.

application. In a similar factual scenario to *Yearworth*, the pursuer deposited sperm samples in the defendant's facility. He wanted the opportunity to conceive a child if the treatment for his cancer caused him infertility. Almost a decade later, the pursuer requested his stored sperm so that he and his wife could try to have children by in vitro fertilisation. It was then that he found out there had been a malfunction in the equipment storing his sperm, which had caused the temperature to rise. He was told that the sperm could have been damaged and should not be used, due to a reduced chance of conception and increased risk of chromosomal abnormalities, miscarriage and birth defects. After deciding not to proceed with IVF, the pursuer claimed compensation for negligence causing him distress, depression, and loss of a chance of fatherhood.

Lord Stewart considered that the wrong in *Yearworth* was the preclusion of the defendants' 'right to use', and that it was unclear whether this was a property right or a personal right.<sup>64</sup> His Lordship drew a distinction between *Yearworth*, where the defendant's negligence had precluded any use of the sperm, and the case before him where the damaged sperm could be used but had reduced procreative effect.<sup>65</sup> His Lordship further considered that '[p]ossessory remedies...are available for corpses and bio-matter separated from the body: but that fact of itself does not make the objects of the remedies property'.<sup>66</sup> He concluded:<sup>67</sup>

I am not confident that it is bound to fail, although, as it has been presented at this stage, it faces difficulties. I suspect that it could have been put on simple footing, namely that any "thing", not being a living person, in relation to which the possessory remedies of delivery and interdict are available, is capable of being the subject matter of a contract for safekeeping. Sperm in a container is such a "thing". This puts the emphasis on the res as an object rather than as property. Even *Yearworth*, I suspect, without professing knowledge of the law in England & Wales, goes too far in the pursuit of the property theory.

---

<sup>64</sup> *Holdich v Lothian Health Board* [2013] CSOH 197 [47].

<sup>65</sup> *Holdich v Lothian Health Board* [2013] CSOH 197 [46] - [47].

<sup>66</sup> *Holdich v Lothian Health Board* [2013] CSOH 197 [49].

<sup>67</sup> *Holdich v Lothian Health Board* [2013] CSOH 197 [75].

This latest contribution unfortunately tilts the development of the law back towards a need to find a reason *why* the removed body part or gamete can be the subject of property rights. This is the wrong starting point as a matter of principle, and as a matter of the theory of property rights.

### **How to approach the question of who owns the removed body part**

Once we have ruled out the possibility of an absence of any property principle, there are two possibilities for the rules that determine the owner. Either the rules of *specificatio* (ownership based on creation of a new thing) apply or the rules of *occupatio* apply (ownership based on an ownerless thing).

To put the matter in simple terms, should the severance of part of the human body be treated as the creation, by work and skill, of a new thing such as in the example of using work and skill to turn grapes into new wine (*specificatio*)? Or should it be treated like the case of an island arising in the ocean: a new thing capable of being owned by the first possessor (*occupatio*)?

The answer is that either might apply. Some severance can occur without any real work and skill at all. In those cases rules of *occupatio* should apply. In other cases, real skill and effort is required. Then the rules of *specificatio* should apply.

Some easy examples can be given: when a hair falls from a person's head, or a person cuts herself by accident and drips blood on the floor, there is no room for the operation of a principle of a principle of *specificatio*. So, if forensics collect the hair or the blood for a DNA sample, then they become the owner of the hair or the blood as first possessor.

In contrast, it is strongly arguable that where a complex medical procedure is performed then, absent a contract between the hospital and patient, the question of ownership would fall to be determined by principles of *specificatio*. I have not dealt with the detail of *specificatio* in this paper. For instance, one issue of controversy in Roman law was whether *bona fides* - good

faith - was necessary for the maker to acquire title to the new thing rather than the owner of the materials.<sup>68</sup> Another area in which the principles of *specificatio* could be developed is in the competition between the owner of the materials and the person performing the work. The 'owner of the materials' might be better expressed as the 'person from whom the materials came' since we do not own our own bodies. There are other aspects in which the rules could be developed. But the short point is that there is a set of principles which could easily be developed and applied to this situation.

### **The second problem: Is the position different after death?**

Is the position the same when a human dies? The short answer is 'no'.

The history of the common law 'no property' principle, and a comprehensive discussion of the literature, can be found in Dr Hardcastle's excellent work *Law and the Human Body*.<sup>69</sup> As Hardcastle correctly explains, the common law reached this position as a result of misinterpretation and mistranslation. The misinterpretation was Blackstone's. He took the 17th century decision in *Haynes' Case*<sup>70</sup> as authority for the proposition that stealing a corpse is not a felony unless the gravecloths are also stolen with it. But the point of the decision concerned the person in whose name the charges were laid: the remark that a corpse does not have title to the gravecloths does not mean that there is no title to the corpse. The mistranslation was Sir Edward Coke's when he said in *The Institutes of the Laws of England*<sup>71</sup> that 'cadaver' is short for the Latin *caro data vermibus* or 'flesh given to worms' (and hence ownerless). But more probable is the conclusion of the *Oxford English Dictionary* that the etymology of cadaver is the infinitive *cadere*, 'to fall'.

But with these weak foundations, the general rule became established that there can be no property rights to a corpse. Apart from statute, there were

---

<sup>68</sup> JAC Thomas, *Roman Law* (1976) 187. Cf Inst II.1.25.

<sup>69</sup> R Hardcastle, *Law and the Human Body* (2007) 25 - 28.

<sup>70</sup> *Haynes' Case* (1614) 12 Co Rep 113; 77 ER 1389.

<sup>71</sup> E Coke, *The Institutes of the Laws of England* (Pt III, 4th edn, 1669) 203.

limited ways that the law could deal with interferences with corpses. One was through the ecclesiastical courts, but that depended upon the burial of the corpse in consecrated ground. Another way was the common law offence - from which many modern minds recoil - of *contra bonos mores*, an offence against social morals or, more accurately, the social morals recognised by judges. The offences of this nature were described as long ago as 1936 as being 'so vague and extensive ... subject to important limitations, with the result that offences *contra bonos mores* hold a peculiar position in the law'.<sup>72</sup>

The common law rule is *almost* inexplicable. Even if it might have been re-rationalised as based upon some policy about the sanctity of the human body, the policy would be self-defeating for the very reasons that David Hume gave in *A Treatise on Human Nature*: it allows the very acts that the policy is designed to prevent. There have been numerous scandals in recent decades involving funeral parlours alleged to have been involved in the trafficking of body parts. As technology develops, such interferences with a corpse might become more and more minor. Could it really be said that the common law does not recognise any response to the removal of just a few key cells by a funeral parlour from each cancer victim, at the instance of a well-resourced laboratory, which then develops and profits from a major discovery?

There is one possible justification for the 'no property' principle at common law in relation to corpses. That justification may be that a corpse, like a living person, retains legal personality until executorship or administration is complete. This might seem to be a strange idea but it is one of the building blocks of the law of succession. The interesting puzzle is this: prior to the appointment of an administrator or an executor of an estate, who owns the rights of the deceased? A person who takes the belongings of the deceased after death commits the offence of stealing even though there appears to be no owner of the goods that are part of the unadministered estate. Indeed, even after the

---

<sup>72</sup> 'Offences Contra Bonos Mores' (1938) 2 J Crim Law 609.

appointment of an administrator or executor, that administrator or executor does not hold title outright. The title is held on something akin to a trust but it is not a trust for the legatees. In each case, it seems that a coherent answer might be given by recognising that a corpse retains legal personality at least until appointment of an executor or administrator.

The limited personhood of a corpse would also explain why the only person with a right to deal with the corpse is the executor or administrator to whom title to the corpse passes, but who is subject to a duty in relation to that right to deal with the body for purposes including burial or cremation.

A common law property principle along these lines would align perfectly the treatment of living bodies with the treatment of deceased bodies. It would provide for property rights where parts of a corpse or products of a corpse are severed based on the usual principles of property law such as *specificatio* or *occupatio*. As we have seen, these principles are blunt. But this is not an argument for having no principle at all, a common law vacuum. It is an argument in favour of a legislative solution. And, in different areas relating to human body parts, there have been numerous legislative regimes that have arisen.

In relation to the acts involving interferences with corpses from which we all recoil, statutory intervention in 1832 provided some important relief.<sup>73</sup> And legislation in almost all jurisdictions now provides for the treatment of corpses. In Western Australia, s 214 of the *Criminal Code* provides for a criminal offence, punishable by imprisonment for any person who, without lawful justification or excuse, the proof of which lies on him, 'improperly or indecently interferes with, or offers any indignity to, any dead human body or human remains, whether buried or not'.

Despite particular legislative interventions the common law 'no property' principle continues to have significant influence both in relation to issues at

---

<sup>73</sup> *Anatomy Act 1832* 2 & 3 Will 4, c 75.

common law as well as a factor in the interpretation of various statutory provisions.

### **The problem with the 'no property' principle**

The greatest difficulty that the 'no property' principle causes (without rationalisation on the basis of legal personality of a corpse) is that the implication of the no property principle might appear to be that any severed part, or product from a corpse is also incapable of ownership. Indeed, this was a principle of the common law for a long time. Grave robbers were therefore charged with stealing the gravecloth or the clothes of the corpse rather than the corpse itself, even though a trade had developed in body parts amongst artists, physicians and surgeons.<sup>74</sup>

The common law evolves slowly. An error in the common law due to the writings of jurists as brilliant as Blackstone and Coke takes a long time to eradicate. But the 'no property' principle in relation to deceased bodies and body parts has slowly been unwound.

The exception that has unwound it involves the circumstance where there is an application of work and skill to transform the body part into something *different*. This is a more restrictive principle than *specificatio* generally. *Specificatio* involves the creation of something *new*. This narrower subset of *specificatio* requires that the work and skill must create something *different* from a mere body part.

This exception was first recognised by the High Court of Australia in 1908 in *Doodeward v Spence*.<sup>75</sup> *Doodeward* concerned a doctor who had preserved the corpse of a two-headed stillborn baby in a jar. Following the doctor's death, the preserved corpse was sold at auction to the plaintiff, who used it for public exhibitions. Griffith CJ, with whom Barton J agreed, held that

---

<sup>74</sup> R Richardson, *Death, Dissection and the Destitute* (2001) 71 - 72; R Hardcastle, *Law and the Human Body* (2007) 27.

<sup>75</sup> *Doodeward v Spence* (1908) 6 CLR 406, 411 (Griffith CJ).

in circumstances where the body came into the doctor's possession lawfully, and some work and skills has been bestowed upon it causing the body to acquire a pecuniary value, and in the absence of any positive law to the contrary, the body did become the subject of a property right, and the plaintiff had a right of possession over it.<sup>76</sup>

This principle was affirmed in England in *Dobson v North Tyneside Health Authority*.<sup>77</sup> That case involved an autopsy on a woman, following her death caused by the existence of brain tumours. During the autopsy the deceased's brain was removed, and it was fixed in paraffin, while the body was buried without it. As part of the next of kin's action against the Health Authority for medical negligence, it was submitted that the Health Authority, who were still in possession of the brain, was not entitled to destroy, lose, or interfere with the brain of the deceased. The Court of Appeal applied *Doodeward v Spence* and held that a corpse, *or parts of a corpse*, can become property following the application of human skill.<sup>78</sup>

The principle has been applied in Australia on a number of occasions in relation to the extraction of gametes.

In *Jocelyn Edwards; Re the estate of the late Mark Edwards*, Ms Edwards and her husband had been trying to conceive a child. When Mr Edwards died, Ms Edwards sought an order from the Court to have her husband's sperm extracted, which was granted and carried out. This case concerned Ms Edwards' application to have that sperm released and to be permitted to use the sperm for assisted reproductive treatment. R A Hulme J held that sperm extracted from a deceased man was capable of ownership by applying the 'work and skill' exception and finding that doctors and technicians

---

<sup>76</sup> *Doodeward v Spence* (1908) 6 CLR 406, 414 - 415.

<sup>77</sup> *Dobson v North Tyneside Health Authority* [1997] 1 WLR 596.

<sup>78</sup> *Dobson v North Tyneside Health Authority* [1997] 1 WLR 596, 600.

had preserved the sperm.<sup>79</sup> The same approach was applied in by Gray J in the Supreme Court of South Australia, in *Re H; AE (No 2)*.<sup>80</sup>

The recognition and expansion of this principle has the potential to undermine entirely the application of 'no property' to any severed body part or product of the human body for several reasons. First, it is very difficult to see how the mere preservation of gametes in cases like *Edwards* or *Re H*, creates a *new thing*. The new thing is created when the gametes are separated from the human body. Secondly, unlike in *Doodeward*, the work or skill exception is not being used to determine who *owns* the new thing. In other words, no-one in the cases involving gametes is suggesting that the doctor performing the removal is the owner of the gametes.

It is only a small step to recognise that the relevant property principle is concerned with *how* the separation occurs rather than what is done to alter the separated body part or product. If the separation occurs as a result of work and skill then *specificatio* rules should apply. If the separation occurs without any work or skill then *occupatio* rules should apply. This approach requires the rejection of the bundle of rights thesis of property to the extent that such a thesis (as deployed in relation to living bodies in Scotland in *Holdich* or dead bodies in England in *Kelly*) suggests that there needs to be some particular 'right' such as a 'right to use' the tissue before it can be the subject of property rights.

### **Difficult questions once the property issue has been answered**

As I have explained, a principled understanding of property law can provide a way to understand and to subject the separation of human tissue to the same, coherent property law principles in cases involving living and deceased persons. Those principles will be *specificatio* and *occupatio*. The operation of those principles can involve difficult questions as I explained at the start of this

---

<sup>79</sup> *Jocelyn Edwards; Re the estate of the late Mark Edwards* [2011] NSWSC 478 [80].

<sup>80</sup> *Re H; AE (No 2)* [2012] SASC 177 [58].

paper. But they offer a clear and acontextual and principled solution in this controversial area of law.

However, it is also clear that in the particular context of gametes that are separated from the human body that there are very important policy issues that cannot be solved by legal principle.

(i) Should a living owner of gametes be able to sell or trade in human gametes?

(ii) If so, and there may be strong arguments why it should not be so,<sup>81</sup> under what conditions?

(iii) When a person is recently deceased how could the courts react in time to call in the party (or parties), hear the case, deliver a decision, and pronounce orders in the very short window of time sometimes required to deal with the issue?

(iv) If gametes are removed, who should store them?

(v) Should there be limits to the extent of liability that could arise as a result of the negligent storage?

These are all difficult questions of policy. They are the classic province of Parliament. In Western Australia, since 1982, a number of these issues have been answered by the *Human Tissue and Transplant Act 1982* (WA) and *Human Reproductive Technology Act 1991* (WA).

The *Human Tissue and Transplant Act* sets up a regime, where a designated officer in a hospital may authorise the removal of tissue from the body of a person who has died in hospital or whose dead body has been brought into the hospital.<sup>82</sup> The word 'tissue', as defined in s 3 includes an organ or part of the human body or a substance extracted from, or from a part of, the human body. The removal can be for the purpose of the transplantation of the tissue to

---

<sup>81</sup> See the discussion of aspects of the Queensland regime in *Clark v Macourt* [2013] HCA 56.

<sup>82</sup> *Human Tissue and Transplant Act 1982* (WA) s 22.

the body of a living person. But there are several conditions before the designated officer can act. One of the most significant conditions is as follows:

(1) he or she must be satisfied after making inquiries that the deceased person during his lifetime expressed the wish for, or consented to, the removal after his death of tissue from his body for the purpose or a use of transplantation and had not withdrawn the wish or revoked the consent; or

(2) the designated officer has no reason to believe that the deceased person had expressed an objection to the removal after his death of tissue from his body for that purpose and the designated officer is satisfied that the senior available next of kin consents to the removal of tissue from the body of the deceased person for that purpose.

This regime has a very significant advantage over the common law. It may even be arguable that the statutory regime has supplanted any *general* common law principle concerning preservation of property under Court Rules (even with the problem that unseparated gametes are not yet independent from a person's body and cannot be currently existing property prior to extraction). The advantage is that where time is very short, the delay from a court hearing could defeat the entire purpose of the removal, particularly when a person has just died. The parties need to attend chambers or court, have a hearing of the matter, await delivery of a decision and orders, provide the orders to the hospital, and direct the orders to the attention of the relevant person. In contrast, the designated officer could make immediate enquiries and give an immediate direction for removal, if satisfied of the matters under the Act.

As I explained at the start of this paper, there have been three published decisions on the *Human Tissue and Transplant Act* in the urgent circumstances I have described. All of these cases have involved applicants coming to court for declarations and orders for removal of sperm rather than relying on the direction of an authorised officer of the hospital. In all cases the same orders were made. The orders permitted extraction and storage of sperm but allowed for the matter

to come back to Court to deal with any ongoing issues of storage, and particularly any issue of use or implantation of the sperm. Those issues may require consideration of the provisions of the *Human Reproductive Technology Act*.

## **Conclusion**

The impetus for this paper arose from a hearing I conducted late in the evening on Saturday 29 December 2012. Urgent orders were sought for extraction of sperm from a recently deceased man. I considered that it was appropriate that orders be made. The next morning I recorded the immediate thoughts that had formed the reasons for my decision the previous night. It was immediately apparent that (1) there were many very difficult issues of legal principle involved in the question concerning property rights to human tissue and that (2) the details of the legislation dealing with some of the policy issues might not be fully understood. My brief reasons considered some of these points.<sup>83</sup>

The invitation to give this plenary paper to your conference this morning was propitious in a number of ways. First, it provided me the impetus to explore in much more detail these questions of legal principle which have remained tangled for so long. Secondly, this conference is scheduled during part of my annual leave this week, which meant that I was able to spend the day yesterday reading an absolutely exceptional book by some of the world's leading scholars in this area which was published this week: Goold et al, *Persons, Parts and Property* (2014) as well as an extremely comprehensive article by Dr Lee on the landmark case of *Yearworth*.<sup>84</sup> The version of this paper that is ultimately published will need to take into account many of the

---

<sup>83</sup> *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte C* [2013] WASC 3.

<sup>84</sup> J Lee *Yearworth v North Bristol NHS Trust: Instrumentalism and Fictions in Property Law*, in E Waring, S Douglas and R Hickey (eds), *Landmark Cases in Property Law* (Oxford, Hart Publishing, forthcoming 2014).

powerful chapters in Dr Goold's book and Mr Lee's chapter which impact upon many of the arguments made in this paper.

Ultimately there are two large points that I make in this paper. The first point is a matter of broad principle. It is that the same principles of property law that we have known, developed, and adapted for two millennia should govern rights to tissue which is separated from human bodies, whether living bodies or deceased bodies. It is an argument, like that of Mr Lee and to use his description, for principle over instrumentalism.

The second point focused particularly on the circumstance where gametes are separated from the human body. The controversial issues that arise in the context of gametes are quintessentially issues of policy. Parliament has passed laws which address many of these policy issues. There may be a need for judicial decisions to clarify some issues arising from the legislation but Parliament has solved a number of problems that the common law cannot. However, in areas concerning human tissue where there is no legislation, as well as these areas of legislation which have addressed the policy issues involved, the coherent and principled development of the common law provides a framework by which legal principle can resolve the disputes that arise.