Commentary

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The Question of Property

'Are persons property?' ask Margaret Davies and Ngaire Naffine in their probing, thoughtful and timely monograph. This question is explored through 200 pages and encompasses a range of critical perspectives. I think the answer is to be found in some respects in the final chapter: that the authors were unable to supply a definitive answer to the question; and, moreover that they doubted that there was one.[1] Having dwelt upon this seemingly imponderable question myself over some years, and followed Davies' and Naffine's journey in this work, I came to the conclusion that perhaps the question is the wrong one to ask. By asking 'are persons property', we are putting a construct – legal, theoretical, solid – in the way of the real questions or the real issues. The real questions are ones of control – the zones of influence over people, things, whatever, that form the universe of the person, the individual, the community. In a sense this may be seen to be asking the same question backwards. For example, Davies and Naffine state that:

> Property, as we know it, denotes the ability to exclude others from an 'object': it is a form of control over access.[2]

The ability to exclude is the indicator of the existence of property: if it is property, exclusion goes with it. I would rather think, in this context, of abilities to exclude as an idea or concept in itself – some aspects of which may involve a notion of 'property'; others may not. If the idea of persons *as* property sticks in our throats, shocks us, or raises our defensive hackles, then why think of persons in this way at all? Ask a different question; or reverse the intellectual construct. Rather than focusing on the 'possessive individual' of Western liberal law (a 'particular and peculiar being' our authors note),[3] let us look at the individual and the control spheres/zones around her or him: the arenas for possessive or custodial expression, set

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1 Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates About Property and Personality* (2001) 184.

2 Ibid 185.

3 Ibid 185.

within a context of things and relationships – including the relationship of an individual with the State.

What do we mean by property? It is essentially a 'relational' way of thinking – of bundles of rights in/of people in relation to things.[4] And it is in itself a fluid concept. Within property thinking there are sophisticated ways of relating people and things – layered ways where the subject and object (person and thing) develop and change over time. So the idea of using property thinking should not be as frightening as perhaps it does on first acquaintance.

Our authors take us through an historical journey in which the possessive individual only 'hardened' in the eighteenth and nineteenth centuries and it was in some of these examples that there were examples of a broader way of thinking – not the 'persons versus property' dyad (or the concept of 'thing-ness' versus 'person-ness' as I have expressed it elsewhere).[5] Certainly some examples of early property thinking show its layered nature and complexity. A particularly striking one is feudal, which our authors consider in chapter 2, where the feudal relationship to land is described as 'not one of ownership, but was more akin to guardianship or custody'.[6] The post-enlightenment movements led to the rise of the possessive individual described further on in the chapter: the analysis goes that the individual free from the obligations of tenure was a necessary stepping stone in the development of the 'autonomous individual possessed of the capacity to make free political, social, and economic choices'.[7] Nineteenth century liberalism hardened ideas about the individual perhaps, but the law of 'real' property has multiple examples of the sophistication of property thought – that reflect both the fertility and creativity in considerations of what can be the subject of property, but also *what* that means.

Ultimately all proprietary thinking is simply about who can enforce what against whom. It is necessarily relational. The whole basis of the development of the fabulously inventive scheme and hierarchy of equitable rights and interests is one of the clearest examples of this expression – revealed stunningly in the debate on whether equitable interests are *in personam* or *in rem* rights.[8] The characterisation is interesting, but what it

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4 See the discussion for example by C B Macpherson, 'The Meaning of Property' in C B Macpherson (ed), *Property: Mainstream and Critical Positions* (1978) 1, 3-4.

5 Rosalind Atherton, 'Claims on the Deceased: The Corpse as Property' (2000) 7 (4) *Journal of Law and Medicine* 361.

6 Davies and Naffine, above n 1, 31.

7 Ibid 33.

8 John Brunyate (ed), *Maitland's Equity* (2nd ed, 1936), Lecture XIX, 'The

really means is simply how far obligations can extend to affect people other than the original contractors. Who can enforce what, against whom: how far does the zone of influence or control extend?

The 'what' involves the extent to which 'things' are 'property' (the 'what'); the 'who/whom' the people that have legal personality. Both lie in law, at least in the context of defining ideas of enforceability. And both have shown enormous development and change, displaying considerable fluidity over time. On the 'what' side, the complex and layered way of thinking about things expressed for example in ideas of estates, those abstract things that are a smorgasbord of interests in or in relation to land, has been echoed in the abstractness of thinking that underpins copyright and patent law. On the 'who' side, the development has principally been expanding the categories of persons admitted to legal personality – perhaps the clearest example is that of married women, admitted into the arena of legal personality only properly with the Married Women's Property and Contract legislation of the late nineteenth century.

The right of exclusion became a defining characteristic of property by the time of Blackstone: the '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'.[9] But exclusivity is central in a host of relationships, of which property is one. Exclusion defines limits; rights to sue or enforce are the legal, social or moral sanctions that give force to that exclusiveness. Exclusion is simply an idea of control. We do not need property to reach it. Autonomy is another idea of control. We do not need property to reach it either. But they are related ideas. Autonomy and property are perhaps the expression of the same idea: autonomy expresses in the person what property contains as an idea through its idea of exclusivity.

In approaching the problem of 'persons or property' I suggest that if we reflect upon how certain activities/events/things should sit within a legal environment then the idea is not necessarily person *or* property – or even person *and* property – but rather what is the appropriate zone of influence, control, exclusivity that should accompany it. Perhaps we should approach the problem without the legacy, or perhaps the burden, of Blackstonian property thinking, and try to think more like the Renaissance chancellors trying to work out how far the enforceability of the interest of the *feoffee to uses* (*cestui que use*)[10] should extend. Even now this issue presents itself for

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Nature of Equitable Estates and Interests (I).

9 William Blackstone, *Commentaries on the Laws of England, Vol 2, 'Of the rights of things'* (1979, reprint of 1765 ed) 2, cited by Davies and Naffine , above n 1, 34.

10 From '*cestui a que use le feoffment fuit fait*'.

property and equity scholars in analysing the nature of the interest of a beneficiary under a discretionary trust;[11] and the precise framework of 'rules' (zones of enforceability) for restrictive covenants.[12] To say that something is 'proprietary' is really to say that it can be enforceable beyond the zone of contract.

The Question of Property in Corpses

I would like to draw upon one area of particular interest of my own, corpses, and focus upon chapter 5 of Davies and Naffine's work, 'Personality and Property at the End of Life: The Will and the Corpse'.[13]

The law itself expresses a variety of postures in relation to the corpse. 'It is trite law that there is no property in a corpse', said Gillard J of the Supreme Court of Victoria in July 1998. A case concerning questions of rights to human tissue.[14] It is a recurring theme, the idea of 'no property in a corpse', and it is explored well by our authors in chapter 5. But the fact that there is no property in a corpse does not mean that there is no law about it. As I have stated it elsewhere, 'the common law did not ignore the bodysnatchers'.[15] The strictest proscription of dealing with the body as expressed in law is found in the criminal law, which deals with misconduct with regard to corpses as a criminal offence.[16] At the other end of the

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11 See, eg, Ian J Hardingham and Robert Baxt, *Discretionary Trusts* (1975), ch 6.

12 The subject is considered for example in Peter Butt, *Land Law* (4th ed, 2001) ch 17.

13 I have also been fascinated by the 'beginning' part as well, namely in the status of frozen embyros – the 'what' and the 'who' are they? See for example '*En ventre sa frigidaire*: posthumous children in the succession context' (1999) 19 *Legal Studies* 139-64. But in space allowed for this commentary I will concentrate on the dead.

14 *AB v Attorney General (Vic)*, 23 July 1998. The particular context for this statement of principle was a claim to the post mortem extraction of semen from the deceased husband of the applicant: one of the more gruesome in the range of contexts for an exploration of what is essentially a profoundly provocative and deeply disturbing question, namely rights to bodies, body parts and body products.

15 Atherton, above n 5, 367.

16 Eg, it is provided in the *Crimes Act 1900* (NSW) that: (1) any person who indecently interferes with any dead human body; or (2) improperly interferes with, or offers any indignity to, any dead human body or human remains (whether buried or not), shali be liable to imprisonment for two years. There are common provisions in the Criminal codes of the other Australian jurisdictions. Typically such provisions are located in the acts near sections which prohibit 'indecency', 'obscene publications' and 'bawdy houses'.

spectrum are those acts that are permitted by law: possession of the executor for the purposes of disposing of the body; possession by the Coroner for medical examination in cases where the cause of death warrants enquiry; and possession by medical schools of donated bodies.[17] Between these two extremes are those acts that are permitted but contravene the sensibilities or codes (eg moral or religious) of particular groups within the community; and within the range of permitted acts there are the contests that might arise where different groups raise competing claims to the body. Sitting outside, around, or above all these points on the spectrum of dealing with the body is some notion of public interest: what is the public interest in relation to 'the body' either generally or in a particular case; and 'who' is 'the public' that is represented in rules of law?

Is a corpse property or person? In a sense it is both. It is 'thing' in that it is inanimate – you can trip over it. When it decomposes it becomes part of the soil – 'ashes to ashes; dust to dust'. But 'it' is also person – the intent, control of the person extends through the 'dead hand' in the form of testamentary wishes. The person continues in another sense. Our authors put it in this way:

> As the person ceases to be, she tends to transform into property, except to the extent that she can assert her abstract, rational proprietary interests.[18]

Perhaps this is more about the corpse *was* person – the extension of legal personality through the extent of post-mortem control permissible in the law – largely through the law of property. The enforceability of wishes through the will is an aspect of the extent of legal personality allowed through the deadhand.

The corpse in itself challenges our thinking. The questions are fairly easy to set out: who should be able to say what is to happen to the body after death; who should be able to authorise organ donation or other uses; who should be able to object to post-mortem intervention? The difficulty in using property language and property thinking, as our authors note, is the legacy of slavery and a concern that formal property rights in the body would sanction the commodification of human beings.[19] They consider that

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They are all in the group of morally proscribed things: things which disgust and revolt human sensibilities. This is 'body-snatching' in its most dire form.

17 These are rights are considered in Atherton, above n 5. See also Prue Vines, 'Objections to Post-mortem Examination: Multiculturalism, Psychology and Legal Decision-making' (2000) 7(4) *Journal of Law and Medicine* 422 and John Brennan, 'Accommodating Law to Culture' in H Selby (ed), *The Aftermath of Death* (1992) 210-14.

18 Davies and Naffine, above n 1, 115.

19 Ibid 114.

there is a lack in modern debate about the status of the corpse of 'any sense of "its" personhood', and conclude that 'the law has encountered persistent difficulties in making sense of its subject'.[20]

Difficulties, indeed; but the law has not been without solutions: it is not without law on the subject. While resisting the idea of there being property in a corpse, the law has developed a framework of authority for 'managing' the corpse – a hierarchy of authority as to who can do what to the body. The law has 'solved' (or at least come up with solutions) to the control problem while resisting utterly – at least as a general proposition - the notion that there might be property in that which is the subject of management – notwithstanding its 'thing-ness'. It is unnecessary to call the corpse 'thing' where the problems that it poses can be managed by law. That management is an order of entitlement to deal with the body for the purposes of burial or cremation. It is also an order of entitlement for authorising use of the body for transplant and related purposes. It is also an order which sits within the relationship of the individual with the State in that the rules are on the one hand an aspect of public health management but also an aspect of social order and the criminal law in the necessity at times to investigate the cause of death through coronial intervention.

While resisting the general idea that there is 'property' in a corpse, there are cases which have used property thinking to resolve certain claims: the claim to the preserved still-born baby in a bottle in the landmark High Court case of *Doodeward v Spence*;[21] the criminal prosecution for theft of 35 human body parts[22] from the Royal College of Surgeons over a period of three and a half years in the UK Court of Appeal decision in *Regina v Kelly, Regina v Lindsay*.[23] Property thinking worked in these cases because there was a difference in the object in both cases – preservation. Both used a notion of 'work and skill' as making a difference in determining whether a body part could be regarded as property – or at least access to the solutions/remedies of property and criminal law through that characterisation. This confirms what was suggested by James Fitzjames

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20 Ibid 115.

21 (1908) 6 CLR 406. Consideration of the case and the general questions involved can be found in: Page Skegg, 'Human Corpses, Medical Specimens and the Law of Property' (1976) 4 *Anglo-American Law Review* 412; Roger Magnusson, 'The Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions' (1992) 18 *Melbourne University Law Review* 601; Paul Matthews, 'Whose Property? People as Property' (1983) *Current Legal Problems* 193. Matthews, ibid 235 fn 39, notes that it appears that the Privy Council refused leave to appeal on 16 December 1908.

22 The note of the case states the number as 'approximately' 35.

23 [1999] 2 WLR 384 Court of Appeal, Criminal Division, 14 Mary 1998. The case is noted in [1998] *Medical Law Review* 247.

Stephens in his *History of Criminal Law*: 'I suppose, however, that anatomical specimens and the like are personal property.'[24]

The 'work and skill' exception is an example of forcing the law.[25] To gain the remedies of the law in particular contexts (property law claims – detinue/conversion/theft) the corpse had to be stuffed through a property law matrix. And it did so in a way that was fundamentally 'Lockean' in its philosophical roots – a point well taken by our authors.[26] It is also pragmatic in that where work and skill has generated a preserved, enduring 'thing' – the 'property-like' quality of the object naturally attracts a property characterisation. Possession and possessory remedies have always been useful tools – the thoroughly pragmatic expression of the preservation of order. Possession may also not be grounded in title – it is an independent concept though often coincident with title (property).[27] But the work and skill idea is not without its difficulties. If the reason behind introducing the idea is a recognition that in some situations the body *ought* to be treated differently, then inventing the 'work and skill' idea is to put a narrow example in the place of the real issue. I have argued that property thinking can provide assistance – that the answer is essentially the right one – that there is a point where property law is the right law to use – it recognises that there is a point where 'thing-ness' overtakes 'person-ness'.[28]

Applying the notion of 'thing-ness' to corpses and to body parts has a certain awkwardness, but an immediate practical appeal. That excised tissue, and other body products have a physical existence separate from the body; or that a corpse is a physical, now inanimate, thing is a fact. But the question is more complicated than this. Accepting 'thing-ness' is but a prelude to getting at the real question: the extent of rights that arise out of that 'thing-ness'. This is captured by Paul Matthews when he wrote in 1983 that:

> if one looks at human tissue simply as physical matter, its characteristics are those of other animal tissue about which there is no argument, but which is clearly property in the physical sense. If on the other hand we are concerned in defining 'property' to analyse

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24 Vol 3 p 127.

25 Stephen White, 'The Law Relating to Dealing with Dead Bodies' (2000) 4 *Medical Law International* 145 at 167 examines the lack of satisfactory explanation for the 'exception'. An alternative approach is to suggest that the work and skill aspect is actually irrelevant and that what is really in issue is possession and questions of competing claims for possession, quite independent of a notion of property.

26 Davies and Naffine, above n 1, 113.

27 See, eg, Marcia A Neave, Christopher J Rossiter and Margaret A Stone, *Sackville and Neave Property Law Cases and Materials* (6th ed, 1999) ch 2.

28 Atherton, above n 5.

> the nature of the rights persons have in relation to particular specimens of human tissue, then all we can mean by 'property' is a bundle of concepts, rights, duties, powers, liabilities and so on ... If we understand 'property' in [this] sense, then we must go on to investigate what, if any, legal rights persons can have in human tissue.[29]

The problem, at its most fundamental level, is not so much a question of property models or any other models, but rather one of control. The real questions are now not so much whether the answers should be found through the law of property, tort or contract, but rather who is given the control and how far that control goes. These questions need to be considered as between the individual, the family, institutions and organisations that have custody of bodies or body products, medical practitioners, and the State. Law expresses the balance of control among these often competing groups. The balance contains moral, ethical and sometimes religious elements in response to such fundamental matters as the meaning of life and the meaning of death; and the rights of other human beings to make decisions in respect of such things.

Loane Skene has added a significant dimension to the work of writers such as Derek Morgan and Roger Magnusson,[30] by distinguishing those situations in which personal rights should govern (and principally as an expression of autonomy) and those in which proprietary rights should be permitted.[31] Hospitals, researchers and museums should be accorded property rights in bodies, tissues and body parts in certain situations she argues.[32] The personal right affects questions of initial donation, removal and so on. The proprietary rights come in after that. The range of rights are defined through a distinction in the categorisation at different points in time. What Skene does is to draw the line between the idea of autonomy and the idea of property and provide a sensible division between them. She also proposes a legal regime to give effect to her analysis. It bears further thought. What she does is to respond in a way similar to my own thinking – to suggest another way of approaching the question – to ask other questions – to look for the broad answers (the 'shoulds' in any given case) and then to work backwards to find the legal expression for these or to provide a new

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29 Matthews, above n 21, 195.

30 Derek Morgan, *Issues in Medical Law and Ethics* (2001); Roger Magnusson, 'Proprietary rights in human tissue' in Norman Palmer and Ewan McKendrick (eds), *Interests in Good* (2nd ed, 1998).

31 Loane Skene, 'Proprietary rights in human bodies, body parts and tissue: Regulatory contexts and proposals for new laws' (2002) 22 *Legal Studies* 102; 'Arguments against people legally 'owning' their own bodies, body parts and tissue' (2002) 2 *Macquarie Law Journal* 165.

32 Ibid.

expression for them. It is not an either/or answer. The 'definitive' answer, to the extent that there is one, or should be one, is that persons are not property; but persons may cease to be 'persons' and become property in particular ways. This is only defensible when the principle of autonomy is fully respected but also fully defined. Our authors take us a considerable way in answering the question posed in the title. Skene, I would suggest, takes us another important step along that road.