THE RECOGNITION OF PROPRIETARY RIGHTS IN HUMAN TISSUE IN COMMON LAW JURISDICTIONS

BY ROGER S. MAGNUSSON*

[*Human tissue is used in an increasing number of medical and scientific contexts. Despite this, the law has traditionally regarded such tissue as having no status in law. This paper provides an overview of the issue of property rights in human corpses, cadaveric specimens, donated living tissue, and human tissue used in biotechnology and human reproductive technology. It discusses Australian common law and legislation, and reviews developments in England and the United States from an Australian perspective. The paper argues that limited proprietary rights, consistent with Australian legislation, ought to be recognized both in living and in dead human tissue, in order to achieve worthwhile objectives.*]

1 *INTRODUCTION*

The legal status of human tissue is a question of increasing practical significance. The uses of human tissue in modern society go far beyond the odd wig, dental display, museum skull, or medical school cadaver. These days, hearts and lungs are transplanted; blood is transfused; skin and other tissue (including foetal tissue) are grafted; blood and urine are used to test for levels of alcohol consumption; human cells are used by biotechnology companies in the production of novel cell lines, and in conjunction with recombinant DNA and gene splicing techniques, to produce synthetic hormones and enzymes; and human sperm and ova are used for *in vitro* fertilization and in other human reproductive technologies.[1]

The pace of scientific and biotechnological progress has once again left lawyers limping in the rear. As recently as 1977, the Australian Law Reform Commission stated that removed human tissue has no status in law and that '[t]here is no reason to endow such tissue with the attributes of property.'[2] The Commission noted that existing legislation regulating the donation of tissue for transplant purposes 'should be sufficient in the Australian community today.'[3] A decade and a half later, there is good reason to question whether the Commission's conclusion is satisfactory. To hold categorically that human tissue cannot be the subject of proprietary rights suggests that, in the absence of

* B.A. (A.N.U.), LL.B. (Hons) (A.N.U.). Barrister and Solicitor of the Supreme Court of Victoria. Ph.D. candidate in the Faculty of Law, University of Melbourne. I would like to thank Professor Harold Luntz for his helpful comments on an earlier draft of this paper. Any errors, of course, are mine. This research is supported by an AIDS post-graduate scholarship from the Commonwealth Department of Health, Housing and Community Services.

1 For an excellent survey of the impact science and biotechnology are having upon the (instrumental) use of the human body, particularly with respect to body parts, see Scott, R., *The Body as Property* (1981).

2 Australian Law Reform Commission, *Human Tissue Transplant*, Report No. 7 (1977) 7.

3 *Ibid.* 8.

specific empowering legislation, such tissue could not be gifted, bought or sold, stolen or converted, bailed or patented. In a rapidly developing biotechnological age, a legal vacuum such as this would be very curious indeed.

This paper aims to provide an overview of the question of proprietary rights in human tissue. It will be argued that limited proprietary rights, consistent with Australian human tissue legislation, ought to be recognised both in living and in dead human tissue, in order to achieve worthwhile objectives in a number of contexts. There is increasing academic support for this view,[4] although modern authorities are relatively scarce.

The question of whether proprietary rights exist in human tissue has lingered at the edges of the law for several centuries. At one time slaves and villains were said to be the subject of property rights.[5] Similarly, a wife was also considered at one time to be the property of her husband,[6] although it is now clear that no one can have proprietary rights in the living body of another person.[7] A considerable body of English law has developed over the legal status of a corpse,[8] although the application of these cases in Australia is not free from doubt.[9] The 'dead body' cases are nevertheless a major obstacle to a more general recognition of proprietary rights in human tissue. The question of whether a living person has property in their own body has usually been of philosophical interest only.[10] While courts of equity acted on the basis that their jurisdiction was available only to protect property rights,[11] they refused to grant injunctions restraining personal defamation[12] and trespass to the person,[13] presumably on the basis that no one has property in their own body.[14] When someone interferes with another's body,

4 *E.g.* Palmer, N., *Bailment* (2nd ed. 1991) 9-13; Matthews, P., 'Whose Body? People as Property' (1983) 36 *Current Legal Problems* 193; Skegg, P., 'Human Corpses, Medical Specimens and the Law of Property' (1975) 4 *Anglo-American Law Review* 412.

5 Dickens, B., 'The Control of Living Body Materials' (1977) 27 *University of Toronto Law Journal* 142, 143-4; Matthews, P., *op. cit.* n. 4, 221-3; Scott, R., *op. cit.* n. 1, 26-8; *Chambers v. Warkhouse* (1692) 3 Lev. 336; 83 E.R. 717, 718; *cf.* 1 Bl. Comm. 423-5. In *Gregson v. Gilbert* (1783) 3 Dougl. 232; 99 E.R. 629, a case which involved slaves being thrown overboard from a boat running short of water, Solicitor-General Lee stated:

> It has been decided, whether wisely or unwisely is not now the question, that a portion of our fellow creatures may become the subject of property. This therefore, was a throwing overboard of goods'.

6 For a discussion, see *Hopkins v. Blanco* 320 A. 2d 139 (1974).

7 *Doodeward v. Spence* (1908) 6 C.L.R. 406, 418-9 *per* Higgins J; *Doodeward v. Spence* (1907) 7 S.R. (N.S.W.) 727, 729 *per* Pring J.

8 See below.

9 *Doodeward v. Spence* (1908) 6 C.L.R. 406.

10 *E.g.* Radin, M., 'Property and Personhood' (1982) 34 *Stanford Law Review* 957, 966; but see 3 Co. Inst. 215 (a condemned criminal retains property in his own body until execution); *cf. Williams v. Williams* (1882) 20 Ch. D. 659, 665 (since there is no property in a dead body a deceased cannot by will dispose of their own body).

11 *Emperor of Austria v. Day* (1861) 3 De G. F. & J. 217, 253-4; 45 E.R. 861, 875; *Attorney-General v. Sheffield Gas Consumers Co.* (1853) 3 De G. M. & G. 304, 320; 43 E.R. 119, 125; *Walter v. Ashton* (1902) 2 Ch. 282, 293.

12 *White v. Mellin* [1895] A.C. 154, 169; *Prudential Assurance Co. v. Knott* (1875) 10 L.R. Ch. App. 142.

13 *Fitzwilliam v. Beckman* [1978] Qd. R. 398; see Meagher, R. P., Gummow, W. M. C. and Lehane, J. R. F., *Equity: Doctrines and Remedies* (2nd ed. 1984) para. 2122. Injunctions restraining trespass to the person have now been granted (*Parry v. Crooks* (1981) 27 S.A.S.R. 1; *Zimitat v. Douglas* [1979] Qd. R. 454; *Egan v. Egan* [1975] Ch. D. 218) although not on the basis that property is now recognized in one's own body, but because the equitable jurisdiction now extends to preventing the commission of torts; see *Parry v. Crooks* (1981) 27 S.A.S.R. 1, 13-9.

14 See *Dowse v. Wynyard Holdings Ltd* [1962] N.S.W.R. 252, 267 per Jacobs J.

the concepts of assault and battery have usually provided adequate remedies.[15]

More recently, the issue of proprietary rights in human tissue has been considered by courts within the specific context of living human tissue. Several developments have contributed to the emergence of this issue within common law countries. They include rising concern about quality control within blood and organ banks, the financial rewards from the commercial exploitation of products of biotechnological engineering synthesized from human tissue, and the rise of blood and urine specimen collection for legal and medical purposes.

2 *PROPRIETARY RIGHTS IN HUMAN CORPSES*

A major stumbling block to the recognition of proprietary rights in human tissue is the line of English cases said to support the view that there is no property in a dead body. This rule was thought to apply both to buried[16] and unburied[17] corpses. If there is no property in a corpse, it might reasonably be argued that there can be no property in cadaveric specimens, or in tissue removed from a living body. An analysis of the case law however, shows that this rule rests upon remarkably frail foundations.

2.1 *Anglo-Australian Authorities*

The earliest decision cited as authority for the 'no property' rule is *Haynes's Case*,[18] decided in 1614. Haynes was convicted of stealing several burial sheets, the property in which was held to be in those who had owned the sheets before they were used to dress the corpse. The Court noted that the corpse itself was not capable of having property in the sheets, although this appears to have been misunderstood by later commentators to mean that a corpse itself was not capable of *being* property.[19] Coke reports the case correctly,[20] but elsewhere states that '[t]he burial of the *Cadaver* (that is *caro data vermibus*) is *nullius in bonis*, and belongs to the Ecclesiastical cognizance'.[21]

The next reported judicial consideration of the issue was during *Handyside's* case,[22] in 1749. This was an action in trover brought against a doctor for the bodies of two children joined by a birth defect. East notes that 'Lord C. J. Willes held the action would not lie, as no person has any property in corpses'.[23] East

[15] Smith, A., 'Stealing the Body and its Parts' [1976] *Criminal Law Review* 622, 625; Harper, T., 'Body Snatchers' (1976) 126 *New Law Journal* 1007.

[16] *Haynes's Case* (1614) 12 Co. Rep. 113; 77 E.R. 1389; *R. v. Sharpe* (1856-57) Dears & Bell 160; 169 E.R. 959.

[17] *Handyside* (1749) 2 East. P.C. 652; *Williams v. Williams* (1882) 20 Ch. 659; see also *Doodeward v. Spence* (1908) 6 C.L.R. 406, 420 *per* Higgins J.

[18] (1614) 12 Co. Rep. 113; 77 E.R. 1389, cited as authority for the 'no property rule' in 2 East P.C. 652; 2 Bl. Comm. 429; Stephen, J. F., *Digest of Criminal Law* (5th ed. 1894) 252.

[19] Matthews, *op. cit.* n. 4, 197-8.

[20] 3 Co. Inst. 110.

[21] *Ibid.* 203: Roughly translated: 'The burial of the corpse (that is, flesh given to worms) belongs to one and belongs to the ecclesiastical jurisdiction'. Coke cites Britton, folio 84b (1865 ed. by Nichols, Book 1) 214 for this proposition, but the reference has nothing to do with dead bodies, see Matthews, *op. cit.* n. 4, 198.

[22] 2 East P.C. 652.

[23] *Ibid.*

cites *Haynes's Case*[24] and Blackstone[25] as authorities. Historical research by Matthews, however, has shown that *Handyside's* case was settled while the jury were out,[26] and this may explain why Sir John Willes said that the action *would not lie* rather than that it *did not lie*. *Handyside*,[27] not being decided, can not therefore be regarded as binding authority for the proposition put by Lord C. J. Willes.

In the late eighteenth and nineteenth centuries several cases reached the courts arising from the disturbance or exhumation of buried corpses. Two cases in particular, *R. v. Lynn*,[28] and *R. v. Sharpe*,[29] clearly showed that, despite Coke, corpses did not belong exclusively to the ecclesiastical jurisdiction, and that civil courts would sanction the exhumation of bodies for dissection, or for re-burial according to different rites. In *Lynn's* case, counsel moved in arrest of a judgment against the defendant for disinterring a body for the purposes of dissection, quoting Coke's dictum that a corpse belonged to no one. The Court did not comment on this proposition, but held that the defendant's conduct was highly indecent and cognizable in a criminal court.[30]

In *Sharpe's* case, the defendant was charged with removing his mother's remains from a graveyard belonging to a group of dissenters from the Anglican church, in order to re-bury them in another cemetery. The defendant was convicted of trespass, a common law misdemeanour. This conviction was confirmed by Erle J., who delivered a judgment from the Court of Criminal Appeal. After stating that it was no defence to the indictment that the motive of the person removing the body was pious and laudable, his Lordship continued:

> Neither does our law recognise the right of any one child to the corpse of its parents as claimed by the defendant. Our law recognises no property in a corpse, and the protection of the grave at common law as contradistinguished from ecclesiastical protection to consecrated ground, depends upon this form of indictment; and there is no authority for saying that relationship will justify the taking a corpse away from the grave where it has been buried. We have been unwilling to affirm the conviction on account of our respect for the motives of the defendant, but we have felt it our duty to do so rather than lay down a rule which might lessen the only protection the law affords in respect of the burials of dissenters.[31]

At first sight, the passage above appears to suggest that since a corpse cannot be the subject of property, the indictment against the defendant was not defeated by any (proprietary) rights asserted by the defendant over his deceased mother. Skegg argues, however, that the passage does no more than explain the form of indictment that was used — trespass upon the burial ground and removal of the corpse.[32] This is the preferred view, although it is not immediately apparent. The rationale underlying his Lordship's reference to the 'no property' rule appears to be the belief that the protection of a corpse by civil courts, as opposed to ecclesiastical courts, could only be achieved through the common law mis-

24 (1614) 12 Co. Rep. 113; 77 E.R. 1389.
25 4 Bl. Comm. 235.
26 See Matthews, *op. cit.* n. 4, 208-10.
27 2 East P.C. 652.
28 (1788) 2 T.R. 733; 100 E.R. 394.
29 (1856-57) Dears & Bell 160; 169 E.R. 959.
30 (1788) 2 T.R. 733, 734; 100 E.R. 394, 395.
31 (1856-57) Dears & Bell 160, 163; 169 E.R. 959, 960.
32 Skegg, *op. cit.* n. 4, 414.

demeanour of trespass upon the burial ground where the deceased was buried, rather than through larceny. His Lordship further concluded that the indictment was not defeated by any asserted (familial) relationship between the defendant and the deceased, nor by any right to the corpse of the deceased parent asserted by the defendant. It is highly unlikely that the right the defendant was asserting to his mother's body was asserted as a *proprietary right* to the whole body *as a chattel*. His Lordship was not therefore adopting the 'no property' rule in order to reject a defence to the charge of trespass made along the lines that the defendant had lawfully entered the burial ground to recover possession of a chattel which he owned. Such as assertion would have been well beyond the bounds of the law at that time. The better view is therefore that, in noting the 'no property' rule, Erle J. was simply defending the form of indictment used, rather than responding to any direct proposition that the defendant has proprietary rights over the deceased. If this is true, however, his Lordship's mention of the 'no property' rule could only have been *obiter dicta*, since the defendant had been charged with trespass to land. A similar observation of Byles J. in *Foster v. Dodd*, that 'a dead body by law belongs to no one',[33] can also be regarded as *obiter dicta*, since the issue in that case was purely one of statutory interpretation.[34]

In *Williams v. Williams*[35] the friend of a deceased man sued his executors to recover the costs of his cremation. In a codicil to his will, the deceased man had directed the plaintiff to burn his body and his executors to repay the plaintiff's costs of so doing. On his death, however, the executors, in accordance with the wishes of the deceased's family, had the body buried. It was only by fraud upon the Home Secretary that the plaintiff obtained a licence to disinter the body, supposedly to have it re-buried on consecrated land. The plaintiff then transported the body to Italy and had it cremated.

Kay J. found against the plaintiff on several grounds. Having quoted at length the opinion of Erle J. in *Sharpe's* case,[36] he stated that since there was no property in a dead body, the deceased could not by will dispose of his own body.[37] It is highly unlikely, however, that the deceased had intended to dispose of his body as a chunk of property, by giving it to the plaintiff as a gift. His Lordship also found that upon death it was the executors of the deceased who had a right to possession of the body.[38] His Lordship evidently regarded such a right of possession as exclusive and added this as an additional reason why the plaintiff, who was not one of the executors, could not enforce the deceased's wishes. His Lordship did not, however, regard the executor's right of possession as a proprietary right, since he had previously stated that there was no property in a dead body. What Kay J. objected to was the deceased's attempt to give

33 (1867) L.R. 3 Q.B. 67, 77.

34 The case concerned the validity of an Order in Council and an Order of the Secretary of State. The issue was whether certain Burial Acts authorized churchwardens to enter upon the plaintiff's land, which had previously been a burial ground, to take actions the ensure public health and safety. The Court held that the plaintiff's land was not within the operation of the Acts.

35 (1882) 20 Ch. D. 659.

36 (1856-57) Dears & Bell 160; 169 E.R. 959.

37 (1882) 20 Ch. D. 659, 665.

38 Kay J. relied upon *R. v. Fox* (1841) 2 Q.B. 246; 114 E.R. 95.

possession of his body to the plaintiff through his will, when by law possession vested in the deceased's personal representative. But if the only issue was the manner of effecting a right of possession, then his Lordship's remarks concerning property in corpses may be regarded as *obiter dicta*.[39]

The last of the English authorities is *R. v. Price*.[40] In this case a father was indicted for attempting to burn the dead body of his five year old child. The case is famous for the remark of Stephen J. that the burning of the corpse was not a crime at common law unless it was done in such a way as to cause a public nuisance. His Lordship also remarked, *obiter*, that 'a dead body is not the subject of property'.[41] There does not appear to be any recent English authority addressing the issue of property rights in corpses, as against interferences with graves and corpses. In one Scottish case, however, Lord Moncrieff stated, '[i]n my view, a body that has been consigned for burial ceases to be subject to theft only when interment is complete.'[42]

In Australia, the High Court considered the issue of property in a corpse in *Doodeward v. Spence*.[43] In this case, the plaintiff was prosecuted for indecent exhibition of a stillborn child with two heads. The defendant police officer had taken the body away as an exhibit and it remained thereafter in a museum at Sydney University. The plaintiff demanded its return and upon refusal, sued in detinue. Griffith C.J., one of the majority, accepted in principle that a human body may be the subject of property. In any event, his Honour held that the foetus in this case had been so changed by the lawful exercise of human skill that it could no longer be regarded as a mere corpse awaiting burial. Accordingly, the plaintiff had a right to possession of the foetus as his own property as against 'any person not entitled to have it delivered to him for the purpose of burial'.[44]

Higgins J., in contrast, expressed in his dissenting opinion the view that there was no property in a human body, living or dead.[45] His Honour relied upon the English authorities discussed above. Barton J. expressed his general agreement with the Chief Justice, but then added, 'I do not wish it to be supposed that I cast the slightest doubt upon the general rule that an unburied corpse is not the subject of property.'[46] His Honour did not however regard a stillborn foetus as a corpse, hence it did not come within the general rule. The result of the case was therefore that the plaintiff was entitled to possession of the foetus. However, the case itself is highly unsatisfactory in resolving the general issue of whether property rights may exist in dead human tissue.

This survey of Anglo-Australian authorities suggests several things. First, judicial support for the 'no property' rule can be confined to *obiter dicta*. Secondly, the 'no property' rule itself arose from inadequate reporting and misreading of early cases. Thirdly, the relevant authorities are old and ought for

39 Matthews, *op. cit.* n. 4, 212.
40 (1884) 12 Q.B.D. 247.
41 *Ibid.* 252.
42 *Dewar v. H.M. Advocate* [1945] S.L.T. 114, 116.
43 (1908) 6 C.L.R. 406.
44 *Ibid.* 414.
45 *Ibid.* 418-9.
46 *Ibid.* 417.

this reason to invite reconsideration. Fourthly, in Australia there is no unequivocal adoption of the 'no property' rule.

2.2 *The American Position*

In the United States, the 'no property' view has been rejected in favour of a right of 'quasi-property' in the deceased's body for the purposes of burial. It is useful to consider the position at the State Supreme Court level in some detail, for the rationale supporting the United States' approach applies equally to the Australian context.

Courts in the United States have frequently paid lip service to the proposition that there is no property in a dead body.[47] It is certainly clear that a deceased's body does not form part of the deceased's estate,[48] nor is it an ordinary commercial chattel.[49] However, many states have acknowledged a right of 'quasi-property' to the possession of the deceased's body for the purposes of determining who has custody of the body for burial.[50] This right of possession vests in the deceased's surviving spouse[51] and thereafter in the next of kin.[52] Such a right includes choosing the place and rites of burial,[53] and if appropriate, later re-interring the remains.[54] Any tortious interference with the right of possession, such as unlawful autopsy,[55] improper burial,[56] or unauthorized re-interment[57] gives right to an action for damages including damages for mental distress.[58] In addition, the surviving spouse or next of kin retains 'a sort of possession in the spot in which the body is buried'.[59] He or she thus retains an ongoing right to have the body remain undisturbed in the grave.[60]

Paramount even to the right of quasi-property vested in the surviving spouse or next of kin is the deceased's own right to determine the manner of disposal by

[47] *E.g. Enos v. Snyder* 63 P. 170 (1900), 171; *Lubin v. Sydenham Hospital* 42 N.Y.S. 2d 654 (1943), 656; *Leno v. St Joseph Hospital* 302 N.E. 2d 58 (1973), 59.

[48] *Smart v. Moyer* 577 P. 2d 108 (1978), 110; *O'Donnell v. Slack* 55 P. 906 (1899), 907; *Enos v. Snyder* 63 P. 170 (1900), 171.

[49] *Finlay v. Atlantic Transport Co.* 115 N.E. 715 (1917); *Larson v. Chase* 50 N.W. 238 (1891), 239.

[50] *E.g. Rivers v. Greenwood Cemetery* 22 S.E. 2d 134 (1942), 135; *Spiegel v. Evergreen Cemetery Co.* 186 A. 585 (1936), 586; *Lubin v. Sydenham Hospital* 42 N.Y.S. 2d 654 (1943), 656; *Sinai Temple v. Kaplan* 127 Cal. Rptr. 80 (1976), 85; *cf. Tillman v. Detroit Receiving Hospital* 360 N.W. 2d 275 (1984).

[51] See *e.g. Larson v. Chase* 50 N.W. 238 (1891), 239; *Pettigrew v. Pettigrew* 56 A. 878 (1904), 880; *Rivers v. Greenwood Cemetery* 22 S.E. 2d 134 (1942), 135; *O'Donnell v. Slack* 55 P. 906 (1899), 907.

[52] See *e.g. Enos v. Snyder* 63 P. 170 (1900), 172; *Leno v. St Joseph Hospital* 302 N.E. 2d 58 (1973), 59-60; *Lubin v. Sydenham Hospital* 42 N.Y.S. 2d 654 (1943), 656.

[53] *O'Donnell v. Slack* 55 P. 906 (1899), 907.

[54] *Rivers v. Greenwood Cemetery* 22 S.E. 2d 134 (1942); *Weld v. Walker* 130 Mass. 422; 39 Am. Rep. 465 (1881).

[55] *Larson v. Chase* 50 N.W. 238 (1891); *Gray v. Southern Pacific Co.* 68 P. 2d 1011 (1937); *Torres v. State of New York* 228 N.Y.S. 2d 1005 (1962).

[56] *Spiegel v. Evergreen Cemetery Co.* 186 A. 585 (1936); *Cohen v. Groman Mortuary Inc.* 41 Cal. Rptr. 481 (1964).

[57] *Gostkowski v. Roman Catholic Church of the Sacred Hearts of Jesus and Mary* 186 N.E. 798 (1933).

[58] *Larson v. Chase* 50 N.W. 238 (1891), 239-40.

[59] *Rivers v. Greenwood Cemetery* 22 S.E. 2d 134 (1942), 135.

[60] *Meek v. State* 185 N.E. 899 (1933).

will,[61] or even contract,[62] of his or her body and bodily organs. Courts in the United States have rejected the English approach in *Williams v. Williams*[63] in favour of upholding the deceased's testamentary instructions, so long as they are not absurd, wasteful of property or indecent.[64]

What then is the nature and source of these quasi-property rights which the deceased enjoys in his or her own body, and which the surviving spouse or next of kin has in the deceased's body? In *Pettigrew v. Pettigrew*, the Supreme Court of Pennsylvania stated:

> When a man [*sic*] dies, public policy and regard for the public health, as well as the universal sense of propriety, require that his [*sic*] body should be decently cared for and disposed of. The duty of disposition therefore devolves upon someone, and must carry with it the right to perform.[65]

The right of custody, control and disposition of the deceased's body springs therefore from the duty imposed upon the surviving spouse or next of kin on behalf of the public. These rights are held subject to a trust,[66] for the benefit 'of all who may from family or friendship have an interest in [the body]'.[67] The United States position, as outlined, was approved in an early Canadian case, where the Court also acknowledged that the 'no property' rule was of doubtful historical origin and was mostly supported by *obiter dicta*.[68]

2.3 *The Nature of an Executor's Rights in Anglo-Australian Law*

Courts in the United States are not, of course, alone in recognizing a duty to dispose of a dead body, together with a corresponding right to its possession for the purposes of burial. In Anglo-Australian law, however, this duty and corresponding right does not vest in the surviving spouse or next of kin, but in the executor of the will of the deceased, where he or she dies possessed of personal property.[69] This rule is arguably preferable to the American one, by resolving in advance disputes which arise when different members of the

61 See *e.g. Smart v. Moyer* 577 P. 2d 108 (1978), 110; for further references see 'Validity and Effect of Testamentary Direction as to Disposition of Testator's Body' 7 A.L.R. 3d 747 (1966).

62 *Standard Accident Insurance Co. v. Rossi* 35 F. 2d 667 (1929) (provision of accident policy giving insurer right to conduct autopsy held valid and enforceable).

63 (1882) 20 Ch. D. 659.

64 *Smart v. Moyer* 577 P. 2d 108 (1978), 110; *Wood v. E. R. Butterworth & Sons* 118 P. 212 (1911), 214.

65 56 A. 878 (1904), 879. Similarly, *Pierce v. Proprietors of Swan Point Cemetery* 10 R.I. 227; 14 Am. Rep. 667 (1872), 676-7: 'There is a duty, imposed by the universal feelings of mankind [*sic*], to be discharged by some one towards the dead, a duty, and we may also say a right, to protect from violation, and a duty on the part of others to abstain from violation'.

66 *Pettigrew v. Pettigrew* 56 A. 878 (1904), 879; *Larson v. Chase* 50 N.W. 238 (1891), 239.

67 *Pierce v. Proprietors of Swan Point Cemetery* 14 Am. Rep. 667 (1872), 677; see also *Larson v. Chase* 50 N.W. 238 (1891), 239.

68 *Miner v. Canadian Pacific Railway Co.* (1910) 15 W.W.R. 161, 166-8.

69 2 Bl. Comm. 508; *Green v. Salmon* (1838) 8 Ad. & E. 348; 112 E.R. 869; *Rees v. Hughes* [1946] 1 K.B. 517, 524, 528; *Williams v. Williams* (1882) 20 Ch. D. 659, 664; *Sharp v. Lush* (1879) 10 Ch. D. 468, 472; *Schara Tzedeck v. Royal Trust Co.* [1952] 4 D.L.R. 529, 535. This right is subject to the coroner's rights to retain the body for lawful inquest: *R. v. Bristol Coroner, ex parte Kerr* [1974] Q.B. 652. In a practical sense the deceased's immediate family will usually arrange the funeral but this does not affect the residual legal duty; see further Hume, S., 'Dead Bodies' (1956) 2 *Sydney Law Review* 109, 110-5.

deceased's family wish to bury the body in their own way.[70] Formerly, a husband was responsible for burying his wife, but this rule was only applicable while the law did not recognize the capacity of a woman to own real property.[71] In Australia, when a person dies intestate, the duty to bury the body vests in the Public Trustee,[72] unless the deceased has insufficient means to pay for the burial. In the latter case, at least in Victoria, the police or the coroner's office arrange the funeral with the government undertaker.[73]

As in the United States, the duty to dispose of the deceased's body is in the nature of a public duty,[74] and carries with it an enforceable right to possession of the body. Thus in *R. v. Fox*,[75] the Court issued peremptory mandamus directing the governor of a prison to deliver possession of the deceased to his executors.[76] There is Canadian[77] and Scottish[78] authority that any unlawful autopsy is a violation of the executor's right to custody and possession of the deceased's body and gives rise to an action for damages.[79] In Anglo-Australian law, however, it appears that the executor can maintain a civil action only prior to burial, and thereafter any interference with the deceased's body is dealt with by criminal law.[80]

2.4 *The 'Proprietary' Quality of an Executor's Rights*

In both Anglo-Australian and United States common law therefore, those charged with the public duty of disposing of the dead enjoy similar rights, at least prior to burial. In United States jurisdictions, however, they are quasi-property rights, whereas in England and Australia they are merely personal rights. The United States view is that the rationale for the 'no property' rule vanished with

70 See *Williams v. Williams* (1882) 20 Ch. D. 659; and more recently, the Hancock saga, where the executor's right to determine to whom Mr Hancock's body should be delivered was apparently overlooked, 'Rose, Gina battle for Hancock's body' *Age* (Melbourne), 2 April 1992.

71 *Rees v. Hughes* [1946] 1 K.B. 517, 524-6.

72 See *e.g.* State Trust Corporation of Victoria Act 1987 (Vic.) Part 3. In the following discussion, the term 'executor' will be used to include an administrator and anyone else exercising equivalent powers over the body of a person who dies intestate.

73 Personal inquiries, State Trustee Corporation of Victoria: 168 Exhibition Street, Melbourne, Victoria 3000.

74 See *Rees v. Hughes* [1946] 1 K.B. 517, 523; *R. v. Stewart* (1840) 12 Ad. & E. 773, 778; 113 E.R. 1007, 1009: '[T]he feelings and the interests of the living require [burial], and create the duty'; *Edmonds v. Armstrong Funeral Home Ltd* [1931] 1 D.L.R. 676, 680.

75 (1841) 2 Q.B. 246; 114 E.R. 95; *cf. R. v. Coleridge* (1819) 2 B. & ALD 806; 106 E.R. 559.

76 See also *R. v. Scott* (1842) 2 Q.B. 248; 114 E.R. 97; *Williams v. Williams* (1882) 20 Ch. D. 659, 664.

77 *Edmonds v. Armstrong Funeral Home Ltd* [1931] 1 D.L.R. 676.

78 *Hughes v. Robertson* [1913] S.C. 394; *Pollock v. Workman* [1900] 2 F. 354.

79 See Clerk, J. F., *Clerk & Lindsell on Torts* (15th ed. 1982) para. 2145. Dealing negligently with an unburied corpse may also give rise to damages on ordinary tort principles, *Owens v. Liverpool Corporation* [1939] 1 K.B. 394.

80 The Anglo-Australian executor does not enjoy the right vested in the United States next of kin to have the body remain undisturbed in the grave. Criminal cases include: *R. v. Sharpe* (1856-57) Dears & Bell 160; 169 E.R. 959 (unauthorised disinterment for religious reasons); *R. v. Cundick* (1822) Dowl & RY.N.P. 13; 171 E.R. 900 (gaoler sold body of executed convict for dissection); *R. v. Jacobson* (1880) 14 Cox's C.C. 522 (removal of bones during building excavations); *R. v. Davis* (1942) 42 S.R. (N.S.W.) 263 and *R. v. Hunter, R. v. MacKinder, R. v. Atkinson* [1974] Q.B. 95 (knowingly concealing a corpse); *R. v. Clark* (1883) 15 Cox's C.C. 171 (exposing body of infant deceased on public highway); *R. v. Farrant* [1975] 61 Crim. L.R. 524 (defacing vault and performing necromantic rites); *Foster v. Dodd* (1866) L.R. 1 Q.B. 475, 485 (any indecent interference with the dead); *cf. R. v. Lennox-Wright* [1973] Crim. L.R. 529.

the loss of exclusive ecclesiastical jurisdiction over the dead.[81] Temporal courts, by contrast, have recognized that the right is clearly proprietary in nature. As the Supreme Court of Pennsylvania stated in *Pettigrew v. Pettigrew*:

> [I]n as much as there is a legally recognised right of custody, control and disposition, the essential attribute of ownership, I apprehend that it would be more accurate to say that the law recognises property in a corpse, but property subject to a trust.[82]

Ultimately, the issue requires an assessment of the nature of property rights. In *Meek v. State*, the Supreme Court of Indiana said:

> There is much conflict in the authorities as to whether there may be a property right in a dead body. Some of the confusion arises upon a failure to distinguish between the thing in which a property right is held and the right itself. It has been urged that there is no property right since the body may not be sold or bartered away. But this is not conclusive, since the same argument may apply to many things in which there may be an unquestioned right of property. Property rights are more limited in some objects than in others, but, if there is any right of control over or interest in an inanimate material thing, it would seem to be a property right.[83]

As recognized by the Court, 'property' in its legal sense is spoken of as a bundle of rights or interests in an object, or as legal relations between persons with respect to a particular object, rather than as the object itself in respect of which rights or interests are enjoyed.[84] Together these rights and interests form the general right of ownership in the object. In contrast to European civil law, the common law does not require that the full range of rights generally enjoyed over tangible personal property be present in every case for the right to enjoy proprietary status. Special rights of property, for instance the option to purchase land,[85] the exclusive right to hunt wild animals,[86] and even the exclusive right of burial in a particular plot in a cemetery,[87] are still proprietary in nature.

Different criteria have been suggested for distinguishing proprietary interests from personal interests in order to identify the essential characteristic of property. Since the ability to enjoy proprietary rights is secured by their enforceability, it makes sense to consider their essential proprietary nature as turning upon some feature distinguishing the enforceability of proprietary as against personal interests. A widely accepted distinction has therefore been made between proprietary interests, the loss of which gives rise to a right to recover the interest itself, and personal interests, the loss of which only gives rise to a right to compensation. This distinction loses meaning in the case of some choses in

81 In *Spiegel v. Evergreen Cemetery*, 186 A. 585 (1936), 586, the New Jersey Supreme Court stated:

> During its formative period, the ecclesiastical courts had jurisdiction of the dead and, in consonance with the doctrines of that jurisdiction, the common law early rejected the concept of property in the corpse and the ashes, and treated them as subjects largely of church superintendency. But the assumption of exclusive jurisdiction by the temporal courts brought radical changes of theory; and it is now the prevailing rule . . . that the right to bury the dead and preserve the remains is a quasi-right in property.

See also *Larson v. Chase* 50 N.W. 238 (1891) (temporal courts are now the 'sole protector of the dead and of the living in their dead').

82 56 A. 878 (1904), 879; similarly, *Larson v. Chase* 50 N.W. 238 (1891), 239.

83 185 N.E. 899 (1933), 901.

84 Jackson, D.C., *Principles of Property Law* (1967) 10. The following discussion draws heavily upon Jackson, 1-45.

85 *Wimpey (George) & Co. Ltd v. Inland Revenue Commissioners* [1975] 1 W.L.R. 995, 1000; *London and South Western Railway Co. v. Gomm* (1882) 20 Ch. D. 562, 581.

86 *Blades v. Higgs* (1865) 11 H.L.C. 621, 631; 11 E.R. 1474, 1478.

87 Lord Hailsham of St Marylebone (ed.), *Halsbury's Laws of England* (4th ed. 1973) Vol. X, paras 1126-31.

action, such as a right to payment under a contract, although it works well enough in the case of tangibles. Jackson argues that the preferred criterion for distinguishing proprietary from personal rights is the ability to enforce the interest against persons other than the grantor.[88] Although this second test does not precisely fit the context of an executor's rights, which arise from the operation of the will and from public policy in the decent disposal of the dead rather than directly from a grantor, the executor's rights do nevertheless extend to prevent *any* interference with the process of disposal of the body.[89] With respect to the first test, the executor also has a right to regain possession and can obtain an injunction against any acts of interference with possession.[90] These rights, as recognized by the Pennsylvania Supreme Court in the passage quoted above, amount to exclusive possession and control of the corpse.

The ownership rights typically enjoyed in personalty extend of course beyond mere possession to include the right to use, use up, abuse, or alter (physical uses), to lend, hire out, or grant as security (income-deriving uses), and to give, sell, grant as security or bequeath (alienability). Such rights are examples of the *content* of ownership; the uses permitted by the right of ownership.[91] The ability to alienate the interest is one right or incident of ownership which is often regarded as a criterion for distinguishing proprietary from personal rights. Jackson has argued, however, that the ability to alienate is a less important characteristic than enforceability.[92] Thus courts have treated assignability as a contingent factor which will *usually* be present,[93] and there are examples of unassignable proprietary interests.[94] In any event, there is little doubt that an executor may alienate his or her rights over the deceased. In *Smart v. Moyer*,[95] the Utah Supreme Court held that an executor had waived his rights over the deceased by permitting the surviving spouse to bury the body rather than cremating it in accordance with the will. An executor's rights may also be alienated by renouncing probate.

Within Anglo-Australian law, therefore, it is argued that an executor's rights over the deceased's body ought to be regarded as proprietary in nature, as is apparently the case in Canada, and in the United States. Whichever criterion is used for defining property, it is suggested that the executor's rights qualify. Legal rhetoric therefore ought to reflect the rights which courts will enforce. At death, the deceased's body ought to be regarded as vesting in the executor prior to disposition for its own protection, thereby attracting at least the same protection as the deceased's personalty, in which the executor enjoys an unquestioned proprietary interest.[96] Delivery of the body to an undertaker would

88 Jackson, *op. cit.* n. 84, 43-5.
89 *Williams v. Williams* (1882) 20 Ch. D. 659, 664; *R. v. Fox* (1841) 2 Q.B. 246; 114 E.R. 95.
90 *Ibid.*
91 Lawson, F.H. and Rudden, B., *The Law of Property* (2nd ed. 1982) 10.
92 Jackson, *op. cit.* n. 84, 41.
93 *E.g. In re Button's Lease* [1964] 1 Ch. D. 263, 272.
94 See *Errington v. Errington and Woods* [1952] 1 K.B. 290.
95 577 P. 2d 108 (1978).
96 See *Commissioner of Stamp Duties (Qld) v. Livingston* [1965] A.C. 694, 712-4; *Dewar v. H.M. Advocate* [1945] S.L.T. 114, 115.

therefore be regarded as a bailment, the executor retaining the rights of a bailor. Similarly, delivery of the body to the coroner for a post-mortem examination might also be regarded as a bailment, the terms of which would be largely determined by the relevant legislation.[97] Quite apart from the rights conferred by legislation, the coroner would also have the rights of a sub-bailee.[98]

3 *PROPRIETARY RIGHTS IN CADAVERIC SPECIMENS*

Whatever the position with regard to corpses destined for burial or cremation, the argument for recognizing property rights in human tissue is even more compelling when it comes to corpses and cadaveric specimens preserved and kept within an artificial environment. Consistent with the United States view on property rights in corpses, the Uniform Anatomical Gift Act 1987 (U.S.), which creates a scheme for the donation at death of the deceased's body or constituent tissue for medical and scientific purposes, has been interpreted as vesting 'ownership' of donated tissue in the donee.[99] The position in England and Australia is less clear.

3.1 *Why the Issue is Relevant*

Museums and medical schools house numerous skeletons, preserved bodies and anatomical specimens. Legislation in most Australian jurisdictions, for example, authorizes the retention of the deceased's body for anatomical examination and medical instruction where this is not contrary to the deceased's own expressed wishes and the wishes of his or her next of kin.[100] Recent research has also brought to public attention the shameful legacy of a trade in Aboriginal body parts, brains and skeletons, acquired not only by systematic grave-robbing but also by premeditated murder.[101] Some of these remains were acquired as recently as during the second decade of this century. Many specimens were sent to British and other European museums where, following publication of Charles Darwin's *The Origin of Species* (1859), they were of great interest in bolstering racial theories of human origins. Despite the return of some items from Edinburgh University, following efforts by Aboriginal representatives and Australian museums, there is still considerable opposition to Aboriginal demands for the return of all ancestral remains. The head of London's Natural History Museum has been quoted as calling for more donations.[102]

97 Coronial services legislation in Australian jurisdictions authorizes a coroner to order an inquest before or during the course of an investigation: see, *e.g.* Coroners Act 1985 (Vic.) s. 27; Coroners Act 1980 (N.S.W.) s. 48.

98 *Cf.* Coroners Act 1985 (Vic.) s. 4 which states that any rule of common law which, immediately before the commencement of that section, conferred a power or imposed a duty on a coroner shall cease to have effect. Arguably, the *subsequent* recognition of proprietary rights in a dead body would not be affected by s. 4.

99 8A ULA, s. 7 comment.

100 Human Tissue Act 1982 (Vic.) s. 32; Anatomy Act 1977 (N.S.W.) ss 8-8A; Transplantation and Anatomy Act 1979-1991 (Qld) ss 31-2; Anatomy Act 1964 (Tas.) ss 9-12; Anatomy Act 1930-1984 (W.A.) s. 10; Transplantation and Anatomy Act 1983 (S.A.) ss 29-30; Transplantation and Anatomy Ordinance 1978 (A.C.T.) ss 37-8.

101 See Monaghan, D., 'The Body-Snatchers', *Bulletin*, 12 November 1991, 30-8; Sandilands, B., 'Black Deaths: the Path to Enlightenment', *Bulletin*, 26 November 1991, 50-1.

102 Monaghan, *op. cit.* n. 101, 32.

Unless some form of proprietary rights are recognized in cadaveric specimens, museum and medical school specimens could be damaged, stolen, or in fact retained with impunity. For example, the mutilation of bodies validly donated to medical faculties, otherwise than for the purposes of instruction, would clearly be intolerable. Likewise, the retention of Aboriginal body parts obtained by systematic grave-robbing and murder is also understandably intolerable for many Australians, black and white. Sadly, the recognition of proprietary rights in the Aboriginal bodies from which tissue specimens were taken would probably have made little practical difference to what a Sydney newspaper once described as the 'new export industry'.[103] However, so long as such tissue is not accorded any status at law, Aboriginal ancestral remains are not something over which the Aboriginal community or direct descendants could ever hope to legally gain exclusive possession and control.[104] Although the criminal law sanctions interference with a corpse after burial, there do not appear to be any authorities prohibiting the mutilation or indecent treatment of a body part, which has not and will not be buried, and which does not also interfere with an executor's rights over a body.

3.2 *The Theoretical Basis for Protection*

There are good reasons for arguing, therefore, that propriety rights ought to be recognized as existing in cadaveric specimens. Sir James Fitzjames Stephen thought that anatomical specimens could constitute personal property,[105] although this was denied in a *dictum* of Pring J. in the leading Australian case, *Doodeward v. Spence*.[106] On appeal to the High Court, Griffith C.J. expressed the view that it is the work of preservation which itself changes the corpse or specimen so that it acquires the characteristics of property, rather like the way in which the capture of a wild animal causes it to become the hunter's property. His Honour's view is reported in the headnote and is often cited as the *ratio* of the case, although this is inappropriate, since Higgins J. disagreed with this principle, and Barton J. agreed with both his brother judges, while distinguishing corpses from the foetus in the case before him.[107]

An alternative view would be to accept the 'no property' rule and to regard the retention by anatomy schools and museums of bodies and specimens as a *mere possessory right* subject only to the claims of a person with a better right to

[103] *Ibid.* 34.

[104] Even assuming that Aboriginal ancestral remains may be treated as chattels, the statute of limitations would probably have long extinguished any claims. Curiously, therefore, it may be to the advantage of Aborigines to argue that ancestral remains are not something in respect of which *overseas museums* would have a right to enforce possession.

[105] Stephen, J., *A History of the Criminal law of England* (1883) Vol. III, 127.

[106] (1907) 7 S.R. (N.S.W) 727, 729:

> There can be no property in a human body, dead or alive. I go further, and say that if a limb or any portion of a body is removed that no person has a right of property in that portion of the body so removed.

[107] (1908) 6 C.L.R. 406. Limited support may perhaps be gleaned from the judgment of Higgins J., who was prepared to assume that there can be property in a mummy, although this support faltered when it came to pronouncing on the question of property in skeletons and anatomical specimens: (1908) 6 C.L.R. 406, 422-3.

possession or a right to insist upon burial or disposal. Where the deceased has given consent to the use of his or her body by science in accordance with a legislative scheme, no one would have a better right to possession than the relevant scientific facility. A dispossessed plaintiff could perhaps sue in conversion on the strength of their actual possession. However, while full ownership of general property is not necessary in order to sue,[108] conversion is nevertheless dependant upon the existence of some proprietary rights.[109] Thus, although the defendant would be estopped from denying the plaintiff's title, they will not be estopped from 'showing that there could never have been any title.'[110] In accordance with this line of reasoning, the offence of theft would also be ruled out, since the thief could simply claim that there was no intention of permanently depriving the possessor of their proprietary rights in the specimen, since the specimen was not something in respect of which proprietary rights could exist.[111] Matthews argues that this sort of reasoning ignores the common law doctrine of relative title, which has always adjudicated *between* the title of two litigants, rather than inquiring into the absolute validity of the title itself.[112] If this view is correct, then the possession of a specimen by a museum or medical school might also, in addition to conversion, be enforced by an action for trespass, since this action is based upon the wrong to possession.[113]

Conceptually, however, the ability to enforce possession necessarily introduces the concept of property. Traditionally, the things denied the status of property (apart from corpses) are things which cannot be *possessed* such as animals in their wild state, electricity and air. The absence of any sort of title means the inability to enforce a right of possession. Thus in *Doodeward v. Spence*,[114] Higgins J., having stated that there was no property in a dead foetus supporting the plaintiff's right to possession of it for exhibition, concluded in the following terms:

> A right to keep possession of a human corpse seems to me to be just the thing which the British law, and, therefore, the New South Wales law, declines to recognize.[115]

Unless a proprietary right underlies the possession of skeletons and cadaveric specimens therefore, there can be no effective remedy for damage or unauthorized removal. This conclusion applies equally to tissue donated for transplantation.

[108] *Armory v. Delamirie* 1 Strange 505; 93 E.R. 664; *Parker v. British Airways Board* [1982] Q.B. 1004.

[109] See *Ward v. Macauley* (1791) 4 T.R. 489, 490; 100 E.R. 1135.

[110] *Doodeward v. Spence* (1908) 6 C.L.R. 406, 418.

[111] *Cf. Hibbert v. McKiernan* [1948] 2 K.B. 142, where the defendant was convicted of the theft of 'lost' golf balls lying on a golf course. The case supports the proposition that the golfer's property in 'lost' golf balls is not abandoned, but that 'special property' is regarded in law as vesting in the secretary and members of the golf course. Presumably, if the golfer's balls were identifiable and the golfer wished to re-possess them later on, the secretary's rights would be extinguished. In the meantime however, the case makes it clear that a person may be liable for theft for interfering, with 'felonious intent', with the secretary's mere possessory right.

[112] Matthews, *op. cit.* n. 4, 215-6.

[113] *Webb v. Fox* (1797) 7 T.R. 391; 101 E.R. 1037; *Ward v. Macauley* (1791) 4 T.R. 489, 490; 100 E.R. 1135.

[114] (1908) 6 C.L.R. 406.

[115] *Ibid.* 424.

4 *PROPRIETARY RIGHTS IN TISSUE SAMPLES FROM LIVING BODIES*

Historically, while severed human tissue was not considered *useful*, the question of proprietary rights in human tissue was only relevant to the treatment of corpses and cadaveric specimens. This situation has now changed dramatically. The rise of tissue banks, biotechnological engineering and human reproductive technology has brought with it problems which require for their resolution a determination of the legal status of tissue removed from live donors. These issues have been investigated most comprehensively within the courts and literature of the United States, although they are of increasing importance in Australia.

4.1 *Australian Human Tissue Legislation*

At common law, since a donor could not bequeath his or her body, it followed that there could be no consent to the removal of tissue at death for transplantation or therapeutic purposes.[116] Legislative schemes in all Australian jurisdictions now provide for consent to the donation of regenerative and non-regenerative tissue by living adult donors,[117] as well as the removal of tissue after death.[118] The legislation provides for consent to donation for specified purposes: for transplantation to the body of another living person, for other therapeutic purposes or for medical or scientific purposes. In practice many kinds of tissue are transplanted, including the heart, skin, blood, bone, bone marrow, kidneys, corneas, parts of the ear, glands (thyroid, adrenal, pituitary, thymus), liver, lungs, cartilage and pancreas.

In Australia, donors are prohibited from trading in their own tissue, including blood, in the absence of ministerial permission.[119] In some jurisdictions, however, reputable suppliers are permitted to sell processed tissue for medical or scientific purposes, so long as the tissue itself was obtained without payment.[120] The prohibition against donors receiving payment for donating their own tissue is plainly a policy decision, although it should be noted that the sale of processed

[116] See *Williams v. Williams* (1882) 20 Ch. D. 659, 665.

[117] Human Tissue Act 1982 (Vic.) ss 7-8, 21; Human Tissue Act 1983 (N.S.W.) ss 7-8, 19; Transplantation and Anatomy Act 1979-1991 (Qld) ss 10-11, 17; Human Tissue Act 1985 (Tas.) ss 7-8, 18; Human Tissue and Transplant Act 1982 (W.A.) ss 8-9, 18; Transplantation and Anatomy Act 1983 (S.A.) ss 9-10, 18; Transplantation and Anatomy Ordinance 1978 (A.C.T.) ss 8-9, 20; Human Tissue Transplant Act 1979 (N.T.) ss 8-9, 14.

[118] Human Tissue Act 1982 (Vic.) ss 26-27; Human Tissue Act 1983 (N.S.W.) ss 23-24; Transplantation and Anatomy Act 1979-1991 (Qld) ss 22-23; Human Tissue Act 1985 (Tas.) ss 23-24; Human Tissue and Transplant Act 1982 (W.A.) s. 22; Transplantation and Anatomy Act 1983 (S.A.) ss 21-22; Transplantation and Anatomy Ordinance 1978 (A.C.T.) ss 27-28; Human Tissue Transplant Act 1979 (N.T.) ss 18-19.

[119] Human Tissue Act 1982 (Vic.) s. 38; Human Tissue Act 1983 (N.S.W.) s. 32; Transplantation and Anatomy Act 1979-1991 (Qld) ss 40-44; Human Tissue Act 1985 (Tas.) s. 27; Human Tissue and Transplant Act 1982 (W.A.) s. 29; Transplantation and Anatomy Act 1983 (S.A.) s. 35; Transplantation and Anatomy Ordinance 1978 (A.C.T.) s. 44; Human Tissue Transplant Act 1979 (N.T.) s. 24. For a critical discussion, see Kevorkian, J., 'Marketing of Human Organs and Tissues is Justified and Necessary' (1989) 7 *Medicine and Law* 557; *cf.* 'Nelson Hair Fetches £5,000', *The Times* (London), 19 February 1988 (recording the sale of a lock of Nelson's hair).

[120] Human Tissue Act 1983 (N.S.W.) s. 32(2); Transplantation and Anatomy Act 1983 (S.A.) s. 35(3); Human Tissue Transplant Act 1979 (N.T.) s. 24(4); Human Tissue Act 1985 (Tas.) s. 27(2) (excludes blood from exception); Transplantation and Anatomy Ordinance 1978 (A.C.T.) s. 44(2) (excludes blood from exception).

tissue by donee institutions, particularly those involved in biotechnological engineering, could bring substantial returns.

While existing legislative schemes do not directly invest donated tissue with proprietary characteristics, the donee's right to exclusive possession of donated tissue prior to transplantation to another person is obviously something central to the whole scheme. It would make sense therefore to regard the delivery of tissue, by a donor to a blood bank or scientific institution, either as an outright gift, or as a bailment, subject always to the conditions set out in the applicable legislation that the tissue be used for transplantation, or for medical or scientific purposes. Similarly, it makes sense to regard a blood donation made for the purposes of a later autologous transfusion as a bailment of tissue subject to the condition that such tissue be later transfused to the patient if necessary in the event of later surgery. Tissue removed during a medical procedure would probably best be regarded as being gifted to the relevant hospital in the absence of specific agreement.[121] Any interference with or taking of tissue destined for destruction could also be treated as theft or conversion.[122]

Proprietary actions such as theft and conversion are clearly appropriate to ensure that the terms of a tissue bailment are respected. In donation contexts, the terms of bailment would limit the purposes to which donated tissue could be put to the purposes specified in human tissue legislation. Proprietary remedies are necessary since no specific legislative offences exist for the maltreatment or destruction of validly donated tissue. Similarly, torts against the person can provide no protection for the maltreatment of removed tissue, or for the use of tissue for unauthorized purposes. The tort of battery, for example, is inappropriate, since nothing which is done to *removed* tissue can constitute interference with the 'person' of the tissue donor. Finally, although economic loss will often be negligible, this will not usually be a motivation for persons wishing to vindicate their rights.

4.2 *Anglo-Australian Authorities*

There are a handful of English decisions in which human tissue has been treated as property. All arise within the context of theft offences. In *R. v. Herbert*,[123] the defendant was convicted of theft, in addition to assault, for cutting a quantity of hair from the head of his reluctant female passenger. Such an offence appears to have become well accepted at magistrates' court level in England.[124] This makes sense, for if severed hair were not regarded as property

121 *Cf.* however a report in the *Sydney Morning Herald*, 20 March 1987, where a woman's womb was returned to her at her request by the N.S.W. Health Department, following a hysterectomy: 'Bio-Technology: The Vatican Speaks' (1987) 46 *Reform* 65, 67-8.

122 Merely because goods are to be destroyed does not mean that the owner's property rights are lost prior to actual destruction: see *Williams v. Phillips* (1957) 41 Cr. App. Rep. 5 (conviction for larceny of refuse by a dustman); *R. v. Edwards and Stacey* (1877) 13 Cox's C.C. 384 (conviction for larceny of diseased pigs, which had been shot and buried); see also *People v. Krivda* 96 Cal. Rptr. 62 (1971); *Haynes's Case* (1614) 12 Co. Rep. 113; 77 E.R. 1389.

123 (1961) 25 *Journal of Criminal Law* 163, refers to commentary of A.L.P., 'Rape of the Lock' [1961] *The Justice of the Peace and Local Government Review* 12.

124 *Ibid.* 164.

(originally the property of the person from whose head it is severed), articles such as wigs could be stolen, unless the act of constructing a wig was itself regarded as creating property from something otherwise having no status in law.[125]

In *R. v. Welsh*,[126] the defendant was convicted of theft of a urine sample collected at a police station for the purposes of an alcohol level test. Having initially provided the sample, the defendant poured it down the sink while the constable was temporarily absent from the room. On appeal to the Court of Appeal on sentence only, the Court noted that theft of urine was 'in its way a technical offence',[127] but otherwise cast no doubt on its correctness. A similar example is the Court of Appeal decision in *R. v. Rothery*.[128] In this case the defendant had provided a blood sample for a blood alcohol test. He was then released and left, taking the sample with him, having removed it while the officer's back was turned. He was convicted both of theft and of failing to provide a specimen under the Road Traffic Act 1972 (U.K.). On appeal, the Court of Appeal quashed the conviction for the statutory offence. The conviction for theft was not in issue, although Scarman L. J., delivering the judgment of the Court, appeared to recognize its correctness and freely spoke of the removal of the blood sample as 'theft'.[129] If either of the above decisions is correct, it follows that statutes which require the provision of human tissue samples for police-related forensic investigations effectively require the donor of the tissue to transfer his or her proprietary interests in the sample to the police.[130] Such interests would presumably come into existence as soon as the sample was removed from the body. In the absence of legislation, samples removed by consent could be regarded as a gift.

The English decisions clearly demonstrate the need for a theoretical foundation for the regulation and control of tissue samples required for specific forensic purposes. Property provides an attractive foundation. Recognition of proprietary interests in tissue samples could be used to protect against the theft and abuse of blood samples taken, for example, for Human Immunodeficiency Virus (HIV) testing. If the donation of blood for an HIV test were regarded as a bailment, conditions of propriety and confidentiality could perhaps be implied into the bailment relation, thus extending a doctor's duty of confidentiality into the pathology laboratory.

4.3 *The Application of 'Sale of Goods' Conditions to Donated Human Tissue*

Reporting in 1977, the Australian Law Reform Commission, in its inquiry into human tissue transplants, noted that it was possible to envisage the application to

[125] This was the view of Griffith C.J. with respect to dead bodies in *Doodeward v. Spence* (1908) 6 C.L.R. 406, 414.

[126] [1974] R.T.R. 478; see also Smith, *op. cit.* n. 15, 622.

[127] *Ibid.* 480.

[128] [1976] R.T.R. 550; [1976] Crim. L.R. 691.

[129] See also a report of a conviction for conspiracy to steal blood from the English National Blood Transfusion Service for resale to Denmark, 'Blood Sale Doctor gets 3 Years', *The Times* (London), 7 July 1984.

[130] For a summary of current legislative provisions authorizing the removal of tissue for police related forensic examinations, see: Victorian Consultative Committee on Police Powers of Investigation, *Report on Body Samples and Examinations* (September 1989).

donated tissue of 'sale of goods' type warranties and conditions.[131] The recognition of such conditions, particularly in blood transfusion litigation, provides another interesting perspective on the question of property in human tissue.

In the United States, there has been a substantial volume of litigation against hospitals and blood banks claiming breach of warranty of fitness in respect of sales of blood and blood products to patients in the course of their treatment. In the landmark case of *Perlmutter v. Beth David Hospital*,[132] the New York Court of Appeals held that receipt by a paying patient of a blood transfusion containing harmful impurities was only incidental and secondary to the provision of medical services, and therefore did not amount to a sale of the blood. By characterizing the transfusion as the provision of a service, the Court held that the blood provided to the plaintiff was not covered by strict liability provisions in New York sale of goods legislation. This decision has been widely followed at the supreme court level in other states.[133] In *Carter v. Inter-Faith Hospital of Queens*,[134] however, the New York Supreme Court refused to summarily dismiss a claim in breach of warranty against a commercial blood bank, thereby effectively recognizing that a transfer of blood for consideration by a profit-making organization may be regarded as a sale of goods. This decision was also followed at the supreme court level in several states.[135] The commercial blood banks' exception, together with decisions in some jurisdictions refusing to follow the *Perlmutter* approach,[136] led to the enactment in most states of 'blood shield' legislation. This legislation states that the provision of blood is the provision of a service, thereby precluding strict product liability under legislation for sales of blood even by commercial vendors. More recently, blood shield legislation has prevented recovery on a strict liability basis for transfusion-acquired HIV/Acquired Immunodeficiency Syndrome (AIDS).[137]

The relevance of United States blood litigation to proprietary rights in human tissue lies in the recognition that at common law, blood may be a 'product' capable of regulation under legislation dealing with personal property. In *Perlmutter* itself, the Court decided that a blood transfusion was the provision of a service rather than a sale of goods not because property in the blood was not transferred to the plaintiff, but because 'not every transfer of personal property constitutes a sale'.[138] In states which have not followed the *Perlmutter* approach, the recognition of property in blood is more explicit. For example, in *Reilly v.*

131 Australian Law Reform Commission, *op. cit.* n. 2, 7-8.

132 123 N.E. 2d 792 (1954).

133 *E.g. Balkowitsch v. Minneapolis War Memorial Blood Bank* 132 N.W. 2d 805 (1965); *Dibblee v. Dr W. H. Groves Latter-Day Saints Hospital* 364 P. 2d 1085 (1961).

134 304 N.Y.S. 2d 97 (1969).

135 For example *Community Blood Bank, Inc. v. Russell* 196 So. 2d 115 (1967); *Jackson v. Muhlenberg Hospital* 249 A. 2d 65 (1969).

136 For example *Cunningham v. MacNeal Memorial Hospital* 266 N.E. 2d 897 (1970); *Hoffman v. Misericordia Hospital of Philadelphia* 267 A. 2d 867 (1970).

137 For example *Coffee v. Cutter Biological* 809 F. 2d 191 (1987); *McKee v. Cutter Laboratories Inc.* 866 F. 2d 219 (1989); *Miles Laboratories Inc. v. Superior Court* 220 Cal. Rptr. 590 (1985).

138 *Perlmutter v. Beth David Hospital* 123 N.E. 2d 792 (1954), 794; see also *Sloneker v. St Joseph's Hospital* 233 F. Supp. 105 (1964), 106 (although title to the blood may be transferred, this does not make the transaction a sale).

King County Central Blood Bank, Inc.,[139] the State of Washington Court of Appeals stated:

> The transaction in this case has all the attributes of a sale. There was a transfer of property through the mutual consent of competent parties for a consideration in money paid.[140]

It is suggested therefore that United States courts have accepted that human blood at least shares the proprietary characteristic of *alienability*.

In Australia, the issue of whether transfused blood may be subject to sale of goods warranties arose for decision in recent AIDS litigation. Prior to the introduction of HIV antibody screening in May 1985, several hundred Australians contracted HIV infection from contaminated blood transfusions. Many of the actions commenced against the Red Cross and relevant hospitals alleged, in addition to negligence, contravention of various consumer protection provisions of the Trade Practices Act 1974 (Cth). In *E. v. Australian Red Cross Society*,[141] which acted as a test case for these claims in the Federal Court, the consumer protection allegations were dismissed. Unfortunately, Wilcox J. left open the question of whether blood may be 'goods' for the purposes of the warranties contained in the Trade Practices Act 1974 (Cth) and equivalent state legislation. With respect to the liability of the defendant hospital, his Honour stated that '[e]ven if it is appropriate to regard the blood plasma as "goods", a proposition which the respondents dispute',[142] the contract between the plaintiff and the hospital was not for the supply of blood (which was supplied free) but for the supply of nursing services. On appeal, Lockhart J. also chose to leave open the question of whether blood could answer the description of 'goods' for the purposes of the Trade Practices Act 1974 (Cth).[143] Interestingly, the Appeal Court followed the *Perlmutter* approach, characterizing the relationship between the plaintiff and the defendant hospital as a contract for the supply of services.

A more definitive answer to the problem emerges from *PQ v. Australian Red Cross Society*,[144] a decision of McGarvie J. in the Supreme Court of Victoria. In this case, an action for breach of ss 74D and 74B of the Trade Practices Act 1974 (Cth) was statute barred by s. 74J. The relevant part of s. 74J provided that the plaintiff's cause of action accrued 'on the day on which the consumer . . . who acquired the goods . . . first became aware . . . that the goods were not reasonably fit for [their] purpose'. His Honour found that the plaintiff had been aware that blood products supplied by the Red Cross were not of merchantable quality in November 1984, and was therefore outside the three year time limit when the action was commenced in August 1989. His Honour's reasoning assumes that blood products were in fact 'goods' for the purposes of consumer protection legislation, or no cause of action would have arisen at all.[145]

139 492 P. 2d 246 (1972).
140 *Ibid.* 248; see also *Russell v. Community Blood Bank, Inc.* 185 So. 2d 749 (1966), 752.
141 (1991) 27 F.C.R. 310. The plaintiff in this case contracted HIV from frozen blood plasma administered to stop massive bleeding following by-pass surgery.
142 *Ibid.* 353.
143 *E. v. Australian Red Cross Society* (1991) 105 A.L.R. 53, 58.
144 [1992] 1 V.R. 19.
145 *Ibid.* 40-2.

While it appears that HIV infected litigants will face considerable difficulties in recovering for breach of consumer warranties in Australia, the *PQ* decision nevertheless lends support to the general recognition of proprietary rights in human tissue. Whether blood can be regarded as a subject of trade and commerce or not, it is clear that the Australian Red Cross Blood Bank routinely collects and exercises control over donated blood. It would be intolerable to suggest that it could not defend its right to possession from interference. Although blood is not purchased from donors, it is a valuable item, and its collection involves significant expenditure. It would be incredible if damages could not be recovered for the destruction of blood, negligently caused (for example, by fire), as they could for the destruction of personal property. Once again, the utility of blood and blood products points to the need for a theoretical foundation for the possession, protection and control of severed human tissue.

5 *PROPRIETARY RIGHTS IN THE PRODUCTS OF BIOTECHNOLOGICAL ENGINEERING*

Recent rapid advances in biotechnology have created a new and challenging context for the resolution of the issue of proprietary rights in human tissue. Although the issues have hitherto been canvassed primarily in the United States, they will inevitably arise also in Australia. In its broadest sense, biotechnology refers to the application of engineering and technological principles to the life sciences; it thus encompasses human tissue transplants, *in vitro* fertilization and genetic engineering.[146] In America, however, it has recently acquired a more specialized meaning, referring to:

> the industrial application of the results of biologic research, particularly in fields such as recombinant DNA or gene splicing, which permits the production of synthetic hormones or enzymes by combining genetic material from different species.[147]

5.1 *Recent United States Developments*

The massive commercial gains to be won from the manufacture and marketing of novel cell lines or bacterial strains have forced upon United States courts the issue of property rights in the constituent tissue.[148] In 1980 in *Diamond v. Chakrabarty*,[149] the United States Supreme Court, by a narrow margin, granted patent protection to a living, genetically engineered micro-organism capable of breaking down the components of crude oil. This decision stimulated a massive investment of capital into commercial biotechnology.[150] Patent protection is now available for products synthesized from human cells or containing cloned human

146 *McGraw-Hill Dictionary of Scientific and Technical Terms* (3rd ed. 1984) 184.

147 *Mosby's Medical, Nursing and Allied Health Dictionary* (3rd. ed. 1990) 148.

148 See *e.g.* Hardiman, R., 'Towards the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue' (1986) 34 *University of California Los Angeles Law Review* 207.

149 447 U.S. 303; 65 L. Ed. 2d 144 (1980).

150 Hardiman, *op. cit.* n. 148, 210-13, 221-3. For a review of developments in United States patent law protecting biotechnological research see Armitage, R., 'The Emerging US Patent Law for the Protection of Biotechnology Research Results' (1989) 2 *European Intellectual Property Review* 47.

DNA. The possibility that human beings may themselves become the subject of patents has been foreseen, and legislation prohibiting this has been proposed in the United States.[151] In Australia, micro-organisms may be patented along normal principles,[152] although the Patents Act 1990 (Cth) s. 18(2) provides that human beings and the biological processes for their generation, are not patentable inventions.

The issue has now arisen of the rights of a donor of tissue used in biotechnological manufacture to share in the profits from its commercial success. In *Moore v. Regents of the University of California*,[153] the key defendant was a physician at the University of California Los Angeles (UCLA) Medical Centre, who in the course of his treatment of a patient diagnosed as having hairy-cell leukaemia, developed a unique cell line using the patient's tissue. The Regents of the University of California patented the cell line together with methods of production for various products derived from it. The 'Mo-cell line', named after the patient, John Moore, was produced from Moore's spleen which was removed as part of the standard procedure for hairy-cell leukaemia. The cell line and derivative products were all produced without Moore's knowledge or consent. At the defendant's request, Moore made many interstate visits to the UCLA Medical Centre over a number of years and supplied numerous samples of body fluids. The defendants led Moore to believe that these samples were necessary to monitor his progress although in fact the samples were used only to assist the defendants in producing a cell line for commercial exploitation. The Court of Appeal noted that the market potential for the derivative products from the Mo-cell line was expected to be three billion dollars by 1990.[154]

The Californian Court of Appeal held that Moore had adequately stated a cause of action for conversion of his spleen:

> Plaintiff's spleen, which contained certain cells, was something over which plaintiff enjoyed the unrestricted right to use, control and disposition. The rights of dominion over one's own body, and the interests one has therein, are recognised in many cases. These rights and interests are so akin to property interests that it would be subterfuge to call them something else.[155]

On appeal, the Supreme Court of California reversed this decision, holding that Moore had failed to make out a case for conversion. The majority noted that there was no judicial precedent recognizing conversion liability for unauthorized use of human cells in biotechnological research. They expressed concern that this would 'impose a tort duty on scientists to investigate the consensual pedigree of each human cell sample used in research.'[156] It was considered that the extension of conversion to cover unauthorized research upon human tissue would have a devastating impact upon biotechnological research.[157] It was noted that Californian

151 Armitage, *op. cit.* n. 150, 49-50.
152 See McKeough, J. and Stewart, A., *Intellectual Property in Australia* (1991) 262-3.
153 249 Cal. Rptr. 494 (1988) (Court of Appeal); 793 P. 2d 479 (1990) (Supreme Court).
154 249 Cal. Rptr. 494 (1988), 498.
155 *Ibid.* 505. The Court continued at 508:

> A patient must have the ultimate power to control what becomes of his or her tissues. To hold otherwise would open the door to a massive invasion of human privacy and dignity in the name of medical progress.

156 793 P. 2d 479 (1990), 487.
157 *Ibid.* 494-6.

legislation dealing with human biologic materials limited many of the rights customarily associated with property. By treating human tissues as objects *sui generis*, the apparent intention of the legislature was not to abandon human tissue to the general law of personal property. In view of this and the policy implications, the Court concluded that any extension of the doctrine of conversion ought to be effected by the legislature. The plaintiff did, however, have a remedy for breach of the physician's fiduciary duty and for lack of informed consent.

Although Moore's conversion claim failed, it is significant that the majority stated:

> While we do not purport to hold that excised cells can never be property for any purpose whatsoever, the novelty of Moore's claim demands express consideration of the policies to be served by extending liability.[158]

This statement is consistent with the recognition of a need for property in human tissue as a basis for protecting severed tissue from theft or damage, while still denying the source of tissue any share of profits from its commercial exploitation. As Broussard J., dissenting on the conversion question, said:

> Although the majority opinion ... appears to suggest that a removed body part ... may never constitute 'property' for purposes of a conversion action, there is no reason to think that the majority actually intends to embrace such a broad or dubious proposition. If, for example, another medical center or drug company had stolen all of the cells in question from the UCLA Medical Center laboratory and had used them for its own benefit, there would be no question but that a cause of action for conversion would properly lie against the thief. ... Thus, the majority's analysis cannot rest on the broad proposition that a removed body part is not property, but ... on the proposition that a patient retains no ownership interest in a body part once the body part has been removed.[159]

If this critique is correct, the majority opinion effectively requires that the removal of tissue be treated as a *gift* by the donor to the removing institution.

5.2 *The Australian Context*

The issues raised in *Moore* by the commercialization of biotechnological research have not yet arisen in Australian courts. Assuming that the products of biotechnological engineering would be regarded as 'processed' tissue under human tissue legislation, these products could only be sold in some states.[160] In states where sale is prohibited, the financial incentive in biotechnology will be absent. Legislation prohibits a donor from selling his or her own tissue without ministerial consent,[161] although this leaves open the question of whether a donor of tissue would have a cause of action for conversion against researchers for research performed without consent.

In Australia, the status of tissue used in biotechnological research must be considered in the light of human tissue legislation. Such legislation provides for consent to use of donated tissue for scientific and medical purposes, and this presumably includes biotechnological research. As argued above, however, the legislation is only effective if property rights are acknowledged in severed tissue.

158 *Ibid.* 493.
159 *Ibid.* 501.
160 *Supra* n. 120.
161 *Supra* n. 119.

Otherwise a researcher would have no better right to possession than the tissue donor, or the dustman. As the Court of Appeal stated in *Moore*:

> Defendants' position that plaintiff cannot own his tissue, but they can, is fraught with irony. . . . We cannot reconcile defendants' assertion of what appears to be their property interest in removed tissue and the resulting cell-line with their contention that the source of the material has no rights therein.[162]

Proprietary rights could, of course, be regarded as being created *through the process* of biotechnological research, rather than at the time tissue was removed from the donor.[163] This would provide a basis for enforcing a researcher's right to possession of tissue, even if the tissue at the time of donation had no legal status. This second alternative would obviate a curious result. Since donors cannot obtain a direct financial advantage by selling their own tissue, it would be very generous indeed to consent to the use of tissue samples for biotechnological research, since this would vitiate the potentially enormous financial gains which a donor could obtain indirectly by way of damages or restitution for the donee's *unauthorized use*, at least in states where processed tissue (the products of biotechnology) can be sold for a profit by the donee.

Australian tissue legislation rests upon the principle that 'the Australian sees his [*sic*] body and its tissues not as an object of commerce but as something to be the subject of voluntary gift'.[164] As the financial returns from biotechnology increase, however, courts and legislatures will feel increasing pressure to allow donors to share the wealth created from their tissue.[165] In the meantime, rising financial stakes and competition between biotechnological organizations seeking to patent and exploit the products of biotechnological research require that severed tissue be treated as property, at least for the purposes of enforcing an exclusive right to possession of tissue by researchers.

6 *PROPRIETARY RIGHTS IN FOETAL AND EMBRYONIC TISSUE*

A final area which raises the issue of property in human tissue is human reproductive technology. It is here that potential limitations upon a proprietary view of human tissue become apparent.

At common law, a *conceptus* possesses 'contingent interests which vest and become enforceable upon "live birth"'.[166] Prior to birth, a foetus has no legal personality or separate existence from its mother;[167] hence it lacks standing to protect its own interests through a next friend or tutor,[168] nor can it enjoy the

[162] *Moore v. The Regents of the University of California* 249 Cal. Rptr. 494 (1988), 507.

[163] This was the view of Griffith C.J. in *Doodeward v. Spence* (1908) 6 C.L.R. 406, 414.

[164] Australian Law Reform Commission, *op. cit.* n. 2, 8.

[165] Eventually, courts may even have to consider, as in the United States, the tax implications of substantial payments received by donors from biotechnology companies for tissue used to manufacture a successful biotechnological product; see, for discussion: *United States v. Garber* 589 F. 2d 843 (1979).

[166] New South Wales Law Reform Commission, *In Vitro Fertilization*, Artificial Conception Discussion Paper No. 2 (1987). See also *Watt v. Rama* [1972] V.R. 353, 374-7.

[167] See for example *Attorney-General for the State of Queensland v. T* (1983) 57 A.L.J.R. 285, 286; *K v. Minister for Youth and Community Services; Re Infant K* (1982) 8 Fam. L.R. 250; *Paton v. British Pregnancy Advisory Service Trustees* [1979] 1 Q.B. 276, 279.

[168] See *K v. Minister for Youth and Community Services; Re Infant K* (1982) 8 Fam. L.R. 250; *C v. S* [1987] 2 W.L.R. 1108, 1113.

protection of the court's wardship jurisdiction.[169] If a foetus has no legal rights at common law, clearly a human embryo will also have none.[170] An embryo produced by *in vitro* fertilization (IVF) procedures will therefore be legally controlled by others and the issue arises whether a proprietary model has been adopted to regulate possession, control and disposition of embryos prior to implantation.

6.1 *Advisory Reports Dealing with the Status of Embryonic Tissue*

Before examining Australian legislation on human reproductive technology, it is useful to consider some of the issues identified in government and law reform commission reports into human reproductive technology prepared by state,[171] federal,[172] and overseas[173] bodies. The issue of the legal status of the human embryo was addressed directly by the Senate Select Committee of the Commonwealth Parliament, set up following the tabling in the Senate of the (now defunct) Human Embryo Experimentation Bill 1985 (Cth). The Committee tabled its report in 1986. The Committee spoke of the human embryo as 'genetically new human life organised as a distinct entity oriented toward further development'.[174] The potential for future development exhibited by the embryo, together with the absence of any definitive stages in its embryonic development justifying treatment according to gradations of moral value, led the Committee to conclude that the embryo should be treated from conception as if it were a human subject.[175] The Committee therefore rejected a proprietary model for the control and disposition of embryos:

> the preferred model is to regard the embryo not as 'property belonging to', but as an entity enjoying the protection of a guardian. Under this model the property rights of gamete donors are exhausted on fertilisation when a genetically new human life organised as a distinct entity oriented towards further development comes into being.[176]

In view of the fact that the Committee regarded the human embryo as an entity entitled to develop according to natural processes, under the protection of a guardian, it is not surprising that it rejected destructive, non-therapeutic experimentation upon embryos.[177]

169 *Re F (in utero)* [1988] 2 All E.R. 193.

170 Although not free from controversy, the term 'embryo' is generally used to refer to the conceptus in the first eight weeks of its development; from eight weeks to birth the term 'foetus' is used.

171 Vic.: Committee to Consider the Social, Legal and Ethical Issues Arising from In Vitro Fertilization, *Report on the Disposition of Embryos Produced by In Vitro Fertilization* (1984) (The 'Waller Committee Report'); N.S.W.: New South Wales Law Reform Commission, *In Vitro Fertilization*, Artificial Conception Discussion Paper No. 2 (1987) (The 'New South Wales Law Reform Commission Report'); S.A.: *Report of the Select Committee of the Legislative Council on Artificial Insemination by Donor, In Vitro Fertilisation and Embryo Transfer Procedures and Related Matters in South Australia*, Report (1987).

172 Senate Select Committee on the Human Embryo Experimentation Bill 1985, *Human Embryo Experimentation in Australia*, Report (1986).

173 Great Britain Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, Report (1984) (The 'Warnock Committee Report').

174 Senate Select Committee Report, *op. cit.* n. 172, para. 2.21.

175 *Ibid.* paras 3.5, 3.18; see also Kasimba D. and Buckle S., 'Embryos and Children' (1988) 2 *Australian Journal of Family Law* 228, 229-32.

176 Senate Select Committee Report, *op. cit.* n. 172, para. 3.41.

177 Kasimba, P. and Buckle, S., Guardianship and the IVF Human Embryo' (1989) 17 M.U.L.R. 139.

Two senators dissented from the Committee report. In contrast to the majority, which had focused on the teleological nature of the embryo, the dissenting report paid little attention to the status of the embryo and concentrated instead on the rights of the gamete donors and of the woman receiving the embryo into her womb. The dissenting report also differed by recognizing implantation and the development of the embryonic disc as significant marker events in the development of the embryo. It has been argued that this emphasis led the minority, unwittingly, to embrace a property model:

> the pre-eminence of the decision-maker is precisely the feature that is central to, and indeed the point of, the modern notion of property. . . . [The minority report's] concerns are just those appropriate to a defence of property rights.[178]

At one extreme, a proprietary view of embryonic tissue may be considered as inappropriate where the embryo is regarded as possessing rights of self-determination which the state will protect. At the other extreme, an individual's right to control and dispose of an embryo is the essence of a proprietary interest in that embryo. The proprietary status of embryonic tissue is therefore contingent upon whether the law will protect and assist embryonic tissue to 'achieve its potential' or whether it will allow such tissue to be treated instrumentally for research purposes, or according to individual donor wishes. Significantly, the National Health and Medical Research Council has advocated a property model:

> Sperm and ova produced for IVF should be considered to belong to the respective donors. The wishes of the donors regarding the use, storage and ultimate disposal of the sperm, ova and resultant embryos should be ascertained and as far as is possible respected by the institution.[179]

The view that donors have proprietary rights with respect to embryonic tissue has generally been rejected by expert committees. The Waller Committee, for example, in its 1984 report stated that property concepts 'have no place in a consideration of issues which focus on an individual and genetically unique human entity'.[180] While this may be applauded, if proprietary rights are not to be recognized in embryonic tissue, then, strictly speaking, in the absence of legislation, IVF clinics could destroy sperm, ova and embryos, or keep and use them as they wished, for research purposes, or for a couple other than the couple for whom they were originally intended.[181] It is the recognition of the *proprietary status* of the human embryo which is an essential pre-condition to the enforcement of the terms of a (human tissue) *bailment*.

6.2 *Australian Legislation Dealing with Human Reproductive Technology*

As one turns to Australian legislation regulating the control of embryonic tissue, it becomes apparent that there is a tension between the 'no property' view

[178] *Ibid.* 151.

[179] National Health and Medical Research Council (Australia), *Consideration by Institutional Ethics Committees of Research Protocols involving Frozen-Thawed Human Ova (Supplementary Note 4: In Vitro Fertilisation and Embryo Transfer)* (1987) para. 6.

[180] Waller Committee Report, *op. cit.* n. 171, para. 2.8; Warnock Committee Report, *op. cit.* n. 173, 56, 58-64; New South Wales Law Reform Commission Report, *op. cit.* n. 171, 31, 84, 91-6.

[181] New South Wales Law Reform Commission Report, *op. cit.* n. 171, 31, 84-5. In *Del Zio v. Manhattan's Columbia Presbyterian Medical Center* (unreported) discussed in Wells, T., 'The Implications of a Property Right in One's Body' (1990) 30 *Jurimetrics Journal* 371, 373-4, the

advocated by the various committees, and the legal effect of legislative provisions. To date only the states of Victoria, South Australia and Western Australia have enacted legislation regulating IVF, gamete intra-fallopian transfer (GIFT) and other reproductive procedures.[182] None of the Acts specifically consider the proprietary status of the human embryo. It is clear, however, that spermatozoa, ova, and embryonic tissue are intended to be treated in a different way from ordinary human tissue.[183]

Under the Victorian legislation, fertilization of ova is prohibited except for the purpose of future implantation into a woman's body.[184] The one exception to this principle consists of experimental procedures approved by the Standing Review and Advisory Committee, which may only occur prior to syngamy, and which must be reasonably likely to lead to improvements in artificial reproduction techniques.[185] Control of gametes and embryos prior to implantation into the womb of the woman in accordance with the Act is shared between both the donor(s) and the benefitting husband and wife. The consent of all parties is required before a fertilization procedure can take place, although gametes will not be used if a donor's consent is withdrawn.[186]

Under the South Australian legislation, artificial fertilization can only be carried out by licensed practitioners in accordance with a code of ethical practice which treats the welfare of the future child as of paramount importance.[187] Experimental procedures that may be detrimental to an embryo cannot be licensed and are therefore illegal.[188] The code of ethical practice includes a provision that the persons on whose behalf an embryo is stored outside the human body have the right to decide how the embryo will be dealt with or disposed of.[189]

Finally, under the West Australian legislation, it is an offence to store tissue intended for use in an artificial fertilization procedure, and to carry out such procedures without a licence from the Commissioner of Health, and without specific approval from the Human Reproductive Technology Council.[190] The licence and approval may contain specific conditions, and may include the Code of Practice developed by the Council. Approval by the Council cannot be granted for research unless it is intended to be therapeutic for the egg or embryo, and is

plaintiffs sued for conversion of personal property after a hospital department chairman destroyed a culture prepared from the plaintiff's sperm and ova. The jury rejected the property claim, but awarded Mrs Del Zio $50,000 for emotional distress.

182 Infertility (Medical Procedures) Act 1984 (Vic.); Reproductive Technology Act 1988 (S.A.); Human Reproductive Technology Act 1991 (W.A.); see also Human Embryo Experimentation Bill 1985 (Cth).

183 Spermatozoa, ova and foetal tissue are specifically excluded from human tissue legislation: Human Tissue Act 1982 (Vic.) s. 5; Human Tissue Act 1983 (N.S.W.) s. 6; but *cf.* Part 3-3A; Transplantation and Anatomy Act 1979-1991 (Qld) s. 8; Human Tissue Act 1985 (Tas.) s. 5; Human Tissue and Transplant Act 1982 (W.A.) s. 6; Transplantation and Anatomy Act 1983 (S.A.) s. 7; Transplantation and Anatomy Act 1978 (A.C.T.) s. 6; Human Tissue Transplant Act 1979 (N.T.) s. 6.

184 Infertility (Medical Procedures) Act 1984 (Vic.) s. 6(5).

185 *Ibid.* ss 6(5)(b), 9A, 29.

186 *Ibid.* ss 9A(3), 11(5), 12(5), 13(5)-(6), 13A(5), 15.

187 Reproductive Technology Act 1988 (S.A.) ss 10(2), 13.

188 *Ibid.* s. 14.

189 *Ibid.* s. 10(3)(b).

190 Human Reproductive Technology Act 1991 (W.A.) ss 6, 20.

likely to have no detrimental effect.[191] A number of procedures are prohibited, including human cloning, embryo flushing, and the genetic manipulation of any embryo.[192] The Act provides that all rights in respect of validly donated gametes vest in the licensee, subject to the Act.[193] From the moment fertilization begins, however, all rights in respect of the embryo, including how it is to be dealt with or disposed of, vest in the couple on whose behalf the embryo is being developed, and the rights of the licensee and donor(s) are extinguished.[194]

In addition to the above legislation, which significantly restricts what may be done with the embryo, and by whom, legislation in Victoria and Western Australia also prevents ova, semen or embryonic tissue from being treated as ordinary articles of commerce by prohibiting their supply for valuable consideration.[195] Commercial surrogacy arrangements are also made illegal and void in three states,[196] although this would not prevent a commercial IVF company from charging benefitting couples for their services.

This short survey of legislative provisions suggests several things. First, legislatures have rejected a proprietary model of embryonic tissue in so far as this would allow the instrumental use of human tissue for research purposes, in prejudice to the future development of the embryo.[197] Secondly, however, legislatures have embraced a proprietary model with respect to the rights of intending beneficiaries of donated gametes and embryos to control how such tissue shall be dealt with or disposed of.[198] If the right of an embryo to future development was respected literally, and the proprietary model was eradicated altogether, the law would need to compel a woman to accept an embryo into her uterus, and this option has, with good reason, been rejected.[199] Subject to legislative provisions safeguarding the interests of the embryo, it makes sense to regard the human embryo as a subject of limited property rights. Donated gametes, subject to legislation,[200] and embryos could both then be regarded as the subject of a bailment; compensation could be claimed for their destruction, and remedies could be made available for interference with possessory rights.

191 *Ibid.* s. 14(2).
192 *Ibid.* s. 7.
193 *Ibid.* s. 25.
194 *Ibid.* ss 26(1)(a), (c).
195 Infertility (Medical Procedures) Act 1984 (Vic.) ss 11(6), 12(6), 13(7), 13A(6); Human Reproductive Technology Act 1991 (W.A.) s. 7(1)(j). Compensation for medical and travelling expenses, however, is permitted.
196 Infertility (Medical Procedures) Act 1984 (Vic.) s. 30; Family Relationships Act 1975 (S.A.) ss 10f-10i (as amended); Surrogate Parenthood Act 1988 (Qld). In Western Australia, although commercial surrogacy agreements are not prohibited, they would be unworkable, due to confidentiality provisions which would prevent the beneficiaries of gametes or an embryo from learning the identity of the donor(s); see Human Reproductive Technology Act 1991 (W.A.) s. 49.
197 Legislatures have, for example, prohibited researchers from allowing an embryo to develop *in vitro* beyond the stage at which implantation would normally occur: Reproductive Technology Act 1988 (S.A.) s. 10(3)(d); Human Reproductive Technology Act 1991 (W.A.) s. 7(1)(c).
198 See, particularly, Reproductive Technology Act 1988 (S.A.) s. 10(3)(b); Human Reproductive Technology Act 1991 (W.A.) ss 26(1)(a), (c).
199 For a discussion, see: Kasimba and Buckle, *op. cit.* n. 177, 149.
200 The Human Reproductive Technology Act 1991 (W.A.) s. 25 and the Infertility (Medical Procedures) Act 1984 (Vic.) ss 9A-15 both include (different) provisions resolving the question of who may legally control donated sperm and ova prior to fertilization. The West Australian legislation is more comprehensive. It confers 'all rights' in donated gametes to the licensee, which presumably

6.3 *Implications for Foetal Tissue Transplantation*

After implantation, any discussion of the proprietary status of embryonic or foetal tissue cannot be divorced from the issue of control of women's bodies. This issue is beyond the scope of this paper.[201] The destruction of foetal tissue also raises complex questions involving criminal law, family law, and again, control of women's bodies.[202] Assuming that an abortion has been legally carried out, however, the status of the aborted foetus as a source of tissue for foetal transplants, and for the production of particular hormones and enzymes, becomes a pressing concern. Arguably, foetal tissue obtained from a dead foetus which was never born, or from a still-born foetus, must be regarded as tissue from an entity which never enjoyed legal status; hence it must be regarded as a former part of the mother.[203] That being the case, such tissue ought to be regarded as being capable of being donated by consent, despite the fact that foetal tissue is generally excluded from human tissue legislation.[204] A separate consideration of the issue is required for a prematurely born infant who dies shortly after birth. Human tissue legislation which authorizes the removal of tissue after death in cases where the deceased during his or her life expressed no objection, and where the deceased's next of kin do not object,[205] clearly has no application to infants who failed to thrive. However, there would appear to be no reason why the same principles ought not to apply, thereby authorizing parents to consent to donation of such tissue. Legislation would, of course, be of assistance in regulating the purposes to which such tissue could be put. Ultimately, questions may arise such as whether such tissue can be sold, or whether parents are entitled to share in the financial rewards of biotechnological products produced from foetal tissue. In the meantime, the recognition of proprietary rights in foetal or immature tissue would at least allow such tissue to be effectively *alienated*, in accordance with appropriate terms of bailment. The recognition of proprietary interests in foetal tissue would also protect the possessory rights of researchers using such tissue for worthwhile purposes.

7 *CONCLUSION*

This paper has attempted to review a variety of contexts within which the issue of proprietary rights in human tissue has become relevant. Primarily, it has been argued that human tissue may usefully be regarded as personal property to enforce possession, to prevent damage and destruction, for the purposes of

would include the right to enforce possession and to claim for negligent or wilful damage to gametes, rather than a right simply to consent to or to veto a procedure as is conferred upon donors under the Victorian legislation. Apart from legislation, it would make sense to regard the donation of sperm or ova in the same way as a donation of other human tissue, either as an outright gift or as a bailment, subject to the later wishes of donors to withdraw their gametes from the programme.

201 See, however, Graycar, R. and Morgan, J., *The Hidden Gender of Law* (1990) 198-232.

202 *Ibid.* See also Kasimba, P. and Dawson, K., 'Can Fetal Tissue Transplantation Be Done Legally?' (1990) 12 *Sydney Law Review* 362.

203 Deutsch, E., 'The Use of Human Tissue, particularly Foetal Tissue, in Neurosurgery' (1990) 9 *Medicine and Law* 671, 673.

204 *Supra* n. 183.

205 *Supra* n. 118.

criminal offences such as theft, and for the purposes of bailment. The view that human tissue has no status in law reflects a bygone era in which the uses to which human tissue could be put were not recognized. The antiquity of the common law authorities supporting the 'no property' rule invites a fresh consideration of the issues.

Human tissue is now used instrumentally in a steadily increasing number of medical and scientific contexts, and the end is nowhere in sight. Scientific progress demands that the law keep pace. The recognition of statutory or common law proprietary rights in the products of biotechnical research has enormous financial implications for the commercialization of biotechnology, directly influencing investment and research in this area. Advances in human reproduction technology, on the other hand, require a consideration of whether there are to be any limits to the instrumental use of human tissue. A proprietary theory of human tissue must not therefore be applied blindly, but must be guided by principles which ensure that human dignity is preserved, while fostering the use of human tissue for worthwhile social objectives.