

encourage the process of self-assessment – except, of course, in relation to taxation returns’.

An extremely useful feature of the work is Professor Lindell’s editorial notes which follow each chapter. Many of these notes draw attention to subsequent decisions both of the High Court and House of Lords or other developments which touch on or affect observations made by Sir Anthony in his addresses. They also include cross-

references to other writings. There is also a comprehensive Table of Cases and Statutes, a detailed and useful index and a detailed biographical entry in respect of Sir Anthony’s career. In that context, he has been since 1997, and remains, an active member of the Hong Kong Court of Final Appeal on which he sits for two to three months a year. (Sir Gerard Brennan and Justice McHugh are also non-permanent members of that court.)

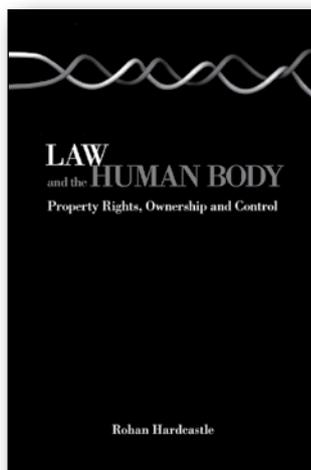
This publication, for which Federation

Press and Professor Lindell are to be congratulated, is a more than worthy sequel to *Jesting Pilate*. It should find a place on the bookshelves of not only every barrister but also of those with any interest in the role and rule of law in this country and some of the great philosophical debates as to this nation’s constitutional make-up at the close of the 20th century.

Reviewed by Andrew Bell SC

Law and the Human Body

By Rohan Hardcastle | Hart Publishing, 2007



The author opens with the question: ‘Do you own your body?’ Although the question sounds simple enough, a clear answer is surprisingly elusive. It has been settled in Australia since 1908 that, in some circumstances (the application of work or skill), ‘a human body, or a portion of a human body, is capable in law of becoming the subject of property’ (*Doodeward v Spence* (1908) 6 CLR 406 at 414). However the status of living bodies — and in particular the status of biological material removed from a living body, such as tissue, cells, fluids or genetic material — is by no means as clear.

In this work adapted from his doctoral dissertation, Dr Hardcastle navigates a broad variety of material from around the common

law world and formulates a principled structure for dealing with this area. He identifies a mix of difficult legal issues that are affected by inconsistent common law principles, a myriad of different statutes, competing commercial interests and significant moral and policy concerns.

The book is divided into two halves. The first half analyses how English, Australian and American jurisdictions currently deal with legal questions concerning biological materials separated from dead bodies and from living persons. The second half deals with future development of the law, and attempts to lay down a coherent framework to assist in resolution of the issues likely to arise.

Chapter 2 is concerned with the legal protection of dead bodies. It starts with the general English principle (of dubious ancestry) that there is no property in a dead body and then traces the exceptions to that principle that have developed. It examines the issue of who might have any property rights that are found to exist in bodies or body parts and how such rights are to be protected (usually in an action for conversion), and draws upon competing strands of American authorities that are in a better developed state than English or Australian ones. The author also examines the various other rights relating to dead bodies, including those that stray close to being proprietary, such as the right to possession for burial.

Chapter 3 deals with the legal rights of a living person in respect of biological material removed from their body, an issue that is likely to be of importance in future but that has so far been dealt with only in American authorities, notably *Moore v Regents of the University of California*, 793 P 2d 479 (Cal SC 1990) and *Washington University v Catalona* 490 F 3d 667 (8th Cir 2007). The author analyses these authorities and argues that the courts have focussed mainly on the posterior question of the competing policy considerations of individuals being permitted to sell separated biological materials without properly dealing with the anterior legal question of how the law of property actually applies to those materials. The author then considers the various authorities in which the possible status of biological materials as property has incidentally arisen as an issue in the course of actions other than proprietary claims made by their source, such as actions under consumer protection or sale of goods legislation, actions for larceny and disputes relating to embryos or gametes in the context of IVF procedures. Finally, he considers non-proprietary interests relating to the information comprised in biological material, such as DNA, retinal prints or fingerprints.

Chapter 4 deals with the *Human Tissue Act 2004* (UK). Although not of direct day-to-day relevance to an Australian audience, the Act is still significant as the most recent and most comprehensive attempt by a common law

jurisdiction to address the legal regulation of biological materials. The Act contains the first statutory codification of the ‘work or skill exception’ first recognised in *Doodeward* and the author provides a detailed analysis of it. The analysis is useful because the UK Act will likely influence future statutory developments and perhaps also assist in the development of the common law.

Chapter 5 commences the analysis of legal theory underlying the area and the potential future development of the law. The author conducts a comprehensive analysis of the ‘work or skill exception’ and rejects the exception as a principle capable of general application for the recognition of property rights. This conclusion is significant because commentators have often simply accepted the legal basis for and general application of the exception. Instead, the author argues that another basis is needed to govern the creation of property rights in detached biological material. The two main candidates—that detachment of material from a person’s body is alone sufficient to create property rights in the detached material; or that such detachment must be

accompanied by an intention to use the detached material as property before any property rights are created—are developed and analysed in further detail in Chapter 6.

The author also places the legal framework in a practical context and considers the application of property rights to the operation of biobanks and to questions of ownership of cell lines cultured from an original human source. The latter area is of increasing significance in practice, particularly in regard to stem cells, and is consequently likely to be a source of future litigation. Usefully, the commentary is accompanied by an understanding of the underlying scientific aspects of the process involved. For example, the author points out the often-overlooked fact that, after amplification of a DNA sample, only a tiny fraction of the resulting sample consists of molecules present in the original source (typically 1/10,000th to 1/50,000th), with the vast majority consisting of material added during the amplification process. Questions of ownership based upon the original source of the material are thus complicated by the rules relating to admixture of materials and

particularly specification and accession. Such insights are important, as when applying the law to science, any failure to have regard to the true underlying scientific reality is likely to lead legal analysis astray.

Chapter 7 considers various non-proprietary rights that an individual has or may have in respect of detached biological material, including duties of confidence applying to information encoded in such material, rights in tort (battery, negligence, intentional infliction of emotional distress) and possibly rights based upon an individual’s privacy. The book concludes, however, that a property-based approach provides the more satisfying legal framework.

Law and the Human Body is a welcome addition to the literature of law and medicine. It summarises the existing state of the law comprehensively and provides informed insights into the way the law can legitimately employ property rights to govern an increasingly complicated area. The author is to be commended for a well-written, accessible book that is useful to both the legal and medical communities.

Reviewed by Ben Kremer

Professional Liability in Australia (2nd ed)

Walmsley, Abadee & Zipser | Law Book Company, 2007

A second edition of a text as useful as the first edition of *Professional Liability in Australia* has proved to be, is, in itself, something to be welcomed. This edition is even more welcome given the extensive impact on the law of professional liability of a host of statutory developments affecting such liability in the period since the first edition went to press in 2002. The authors draw attention to and make extensive reference to these statutory reforms which include the enactment of proportionate liability regimes, the operation of professional standards legislation and the statutory enactment of the *Bolam* test for professional liability. The authors observe in the Preface to this edition that practitioners in this area ‘will increasingly need to develop an appreciation of general principles of

statutory interpretation on advising clients and prosecuting or defending claims’. They are quite right.

The authors also, as would be expected, take on board recent common law developments including the High Court’s decisions in *Woolcock Street Investments Pty Limited v CDG Pty Limited* (2004) 216 CLR 515; *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 and *Harriton v Stephens* (2006) 226 CLR 52.

The book follows the same broad structure as the first edition but with a significantly expanded first section on general principles (running to some 228 pages) and then separate sections dealing with doctors, solicitors, barristers, accountants and auditors, building professionals, valuers

and financial services professionals. This last chapter picks up the language of the *Financial Services Reform Act 2001* (Cth) and treats securities advisers and dealers, finance brokers and insurance agents and brokers, including the not uncomplicated licensing and regulatory provisions relating thereto.

This text is a ‘must have’ for any practitioner dealing with professional liability questions. Such practitioners owe a debt of gratitude to Judge Walmsley SC and Messrs Abadee and Zipser for this new edition which is of high quality and great practical utility. That it has been written by practitioners adds significantly to its appeal.

Reviewed by Andrew Bell SC