

PROPERTY RIGHTS IN HUMAN CORPSES AND HUMAN TISSUE: THE POSITION IN WESTERN AUSTRALIA

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INTRODUCTION

The recent revelation of the undisclosed removal of body parts from corpses in both Sydney and the UK has understandably caused considerable public debate. The most prominent view expressed in the media is one of condemnation and revulsion. Integral to this reaction is the apparent disregard and contempt that those in charge of the corpses have shown towards the dignity of the deceased and the right of the deceased's relatives and friends to mourn, honour and respect the dead. The stories of knives being repeatedly stabbed into the backs of corpses, broom sticks replacing backbones, and organs being removed and sold for profit to research organisations, paints a very bleak picture, which might just be funny in a very macabre way if depicted in a Tarantino or Coen brothers movie, with John Travolta and Samuel L Jackson taking the leads as the amoral coroners or forensic pathologists.

While the current stories do not appear to be fictional and are definitely not funny, there is no doubt that the stories have been conveyed through various parts of the media in an overtly sensationalistic manner. This is hardly surprising. In an era where a cannibalistic character called Hannibal is a movie icon, it is increasingly difficult to shock society and catch the fleeting attention of the desensitised public. The fact that coroners and forensic pathologists have a vital role to play in society by determining the causes of death, and that organs retrieved from corpses are vital for transplants and medical research, does not even begin to have the appeal of the macabre and secret world inhabited by these death specialists.

The imbalance in the presentation of the stories and the climate this has created is unfortunate because it interferes with the ability of society to

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engage in a rational debate of some extremely pertinent medico/legal/ethical problems that we currently face. As the scientific and medical worlds continue to advance at breakneck speed, rational debate becomes all the more urgent. There is evidence, which shows that body tissue has already developed a commercial value and a black market trade in 'harvesting' body tissue has been thriving for some time.¹

Traditionally, it has been religious and spiritual beliefs that have set the tone or the implicit limitations on our regulation of dead bodies and body tissue. In Australia, our laws have tended to reflect the Christian moral values that human life is 'both a gift and responsibility'² and that it is 'sacred and inviolable in all its phases and in every situation'.³ Of equal importance have been the Christian concepts of charity and solidarity⁴, which underpin the current regulation of organ donation. However, for whatever reason, the role which spirituality and religion play in our society has been steadily declining, a point noted by the Anglican Archbishop of Canterbury, who recently declared that Britain was now an atheist society.⁵ Unless this decline is abated, this form of traditional regulation and control will cease to be effective, and there will be a dire need for the legal system to lay down limits and principles.

It cannot be said that our legal system has kept up to date thus far. An examination of case law and legislation in Australia demonstrates that the legislature is reactionary and cautious. Parliament's response has been to deal with each specific problem after the problem has arisen, and then limit the extent to which the legal response can be applied in later situations. There appears to be no central principle upon which the legislation is based. Because of these factors, it is inevitable that when a novel dispute over a corpse or specific tissue extracted from a corpse arises, it is the judiciary who are in the unenviable position of determining priority rights between different claimants. The determination is inevitably based on old common law authorities, many of which are outdated when compared with the advances of science and technology.

The purpose of this article is to critically examine the current law in Western Australia with respect to the regulation of dead bodies and the

¹ In 1985 the World Medical Association considered that there was sufficient evidence to show that a trade of considerable financial gain had developed with respect to live kidneys from underdeveloped countries. See: 37th World Medical Assembly, Brussels, Belgium, October 1985.

² Catholic Health Association of Canada. *Health Ethics Guide*. Canada, 2000, 11.

³ Catholic Health Association of Canada. *Health Ethics Guide*. Canada, 2000, 12.

⁴ Catholic Health Association of Canada. *Health Ethics Guide*. Canada, 2000, 12.

⁵ AD 2000, (December - January 2000 - 2001), 4.

⁶ While there are different laws in all of the States, there are enough similarities that this analysis can have wider application.

tissue of those bodies.⁶ In so doing, two issues will be addressed:

1. Whether the law in Western Australia impliedly recognises the existence of property rights in corpses and body tissue despite the traditional judicial and legislative reluctance⁷ to expressly acknowledge such rights.
2. Whether the traditional reluctance to expressly recognise property rights in corpses and human tissue should be overcome so that the removal, disposal and usage of them can be regulated according to clear, consistent and established rules of property law.

DEFINITIONS

There is a common misconception that 'having property' in something amounts to full and complete ownership of that thing. This is a misconception because the law recognises a wide variety of property rights which do not equate with full and unfettered ownership. As was noted by the majority of the High Court in *Yanner v Eaton*⁸ the concept of 'property' is 'elusive' and is frequently used to connote a 'bundle of rights'.⁹ Because of its elusiveness and lack of precision, the word can be and frequently is used and applied to many different types of relationship with a subject matter.¹⁰ The majority emphasised that the nature and extent of the rights are not uniform across all interest types. So, while one category of property right may include the right to alienate and control access, other categories, such as native title rights, do not need to exhibit those same traits to be considered property.¹¹

While not a legal term of art, the word 'ownership' is generally used to describe the strongest of all types of proprietary interests¹² in personal property.¹³ To have 'ownership' of something is to have complete control of the thing; to have the beneficial use of the thing, to be able to alienate it and exclude others from access within the bounds of the law.

Just as 'ownership' is a type of property right, so is 'possession'. It has long been held that having 'possession' of something is evidence of the right to have possession and that this possession gives the possessor a better interest in the thing than all but the true owner (or those claiming

⁷ See, for example, Australian Law Reform Commission, Report, *Human Tissue Transplants* (Report, 1979), para 168 at 81- 82.

⁸ *Yanner v Eaton* (1999) 201 CLR 351.

⁹ *Yanner v Eaton* (1999) 201 CLR 351 at 366-367.

¹⁰ *Yanner v Eaton* (1999) 201 CLR 351 at 366-367.

¹¹ See also Jackson, D. *Principles of Property Law*. Law Book Co., 1967, 11-12.

¹² Jackson, D. *Principles of Property Law*. Law Book Co., 1967.

¹³ Due to the doctrine of tenure, the term "ownership" is technically inappropriate in the context of real property: *Mabo v Queensland* (1992) 175 CLR 1.

¹⁴ See *Parker v British Airways Board* [1982] 1 All ER 834 and *Asher v Whitlock* (1865) 1 LRQB 1.

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through the true owner).¹⁴ The most important aspect of this definition is that possession is recognised as an enforceable property right. Having possession of something does not automatically mean that you own it, but it will generally mean that you have a recognised property right to the thing which is enforceable at law.¹⁵

The recognition of a right as a property right is significant for a number of reasons. Where a property right is infringed, the remedies available are generally more extensive and enforceable than those available for breach of contract or claims based in the tort of negligence. For example, a person who establishes a property right in an object can sue another party in either detinue or conversion in circumstances where there is no contractual relationship between the two parties and no relationship of proximity. Furthermore, the fact that the law recognises property rights ranging from ownership to inchoate possessory rights means that competing claims may be made over the one object. In situations where there is more than one property right being asserted, the law has developed enforceability and priority rules to determine the relative strength of the conflicting property rights. These well-established principles enable disputes to be resolved consistently and ensure a sufficient degree of certainty in the law.

LEGAL CONTROL OVER BODY TISSUE WHILE A PERSON IS ALIVE

Before examining the legal position with respect to corpses, it is worthwhile noting the extent of legal control which a person has over their body tissue during their lifetime. There are a variety of Western Australian statutes which touch on this issue. The *Human Tissue and Transplantation Act 1982 (WA)* ('HTTA') is one example. This statute governs the donation and transplantation of body organs from both live and dead donors. With respect to donations from living donors, the law differentiates between regenerative and non-regenerative human tissue, setting up slightly different consent regimes with respect to both.¹⁶ The influence of Christian moral values is evident in a number of provisions in the Act. The sacredness of the human life is upheld by the requirement that the donor is not permitted to donate non-regenerative tissue unless it is for the purpose of transplantation to another living

¹⁵ It should be noted that custody is an interest which is lesser than possession and is 'the physical holding of, or control over, a thing without a right or claim to exclusiveness which is necessary to constitute possession'. See *Butterworths Australian Property Law Dictionary*. Butterworths, 1997.

¹⁶ *Human Tissue and Transplant Act 1982 (WA)*, ss 8, 9, 13, 18, 19.

¹⁷ *Human Tissue and Transplant Act 1982 (WA)*, s 9.

¹⁸ *Human Tissue and Transplant Act 1982 (WA)* ss 29, 30.

person.¹⁷ The concept of 'charity' is upheld by the distinction between donation and selling, the latter of which is illegal under the Act.¹⁸

Other Western Australian statutes regulating body tissue and organs include the *Artificial Conception Act 1985* (WA) ('ACA') and the *Human Reproductive Technology Act 1991* (WA) ('HRTA'). The ACA identifies who is to be considered to be the mother or father of a child when either the sperm or ovum comes from a third party. The HRTA sets out specific rules with respect to the vesting of all rights, control and disposal of donated sperm, ova and developed embryos.¹⁹

Interestingly, the legislative approach in WA on these particular issues appear to flirt with the notion that bodies and body parts could be deemed to be the 'property' of the individual. The HRTA expressly likens the rights to donated sperm and eggs as equivalent to those governing personal property.²⁰ While not expressed in property terminology, the underlying principle in the ACA appears to be that once implanted, any paternity or maternity rights that the donor may have had because the sperm or ova came from their body and was once 'their property' are extinguished. In a similar way, the fact that the HTTA permits and regulates the donation of tissue and prohibits the sale of the tissue, could be said to be an implied assertion of two things. Firstly, that the donor has rights over their body tissue to such an extent that they are capable of giving it away and secondly, that in the absence of the statutory prohibition, the right of sale would actually exist. This second argument has become increasingly popular in Native Title cases, and the substance of the argument is that when the legislature imposes restrictions or completely forbids certain activities, it must follow that the right or ability to engage in the activity *prima facie* exists, otherwise there would be no need for it to be restrained.²¹ Moreover, as is noted in *Yanner v Eaton*²², legislation which places limitations upon your ability to undertake certain activities with respect to some 'thing', does not prevent you from having a 'property right' in that thing. For example, while I may not be able to build a twelve

¹⁹ *Human Reproductive Technology Act 1991* (WA) ss25, 26.

²⁰ *Human Reproductive Technology Act 1991* (WA), s25.

²¹ See the arguments made by the High Court in *Wik v State of Qld* (1996) 187 CLR 1 with respect to the relevance of a number of statutory restrictions and reservations imposed upon the lessees of the pastoral leases. According to the minority judgment of Brennan CJ (with whom Dawson and McHugh JJ agreed), the imposition of these restrictions and reservations implied that the lessee would otherwise be entitled to absolute and exclusive possession (at 73-74.). In contrast, Gaudron J held that the reservations and restrictions were the strongest indication of a lack of exclusive possession (at 153-154 and 163-164). Gummow J appeared to agree with Gaudron J (at 200-201), while Kirby J downplayed the relevance of the restrictions and reservations (at 247).

²² *Yanner v Eaton* (1999) 201 CLR 351.

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story building on a block of land does not mean that I have no property rights in the land. Similarly, even though it is illegal for me to sell my body organs that, does not by itself, mean that I do not have any property in them.

LEGAL RIGHTS IN BODIES AND ORGANS AFTER DEATH

When a person dies, there are inevitably certain formalities which must be completed. In Western Australia, a death certificate must be completed in accordance with s41 and s44 of the *Registration of Births, Deaths and Marriages Act 1961* (WA) and the cause of death must be noted in the State Register.²³ Where that death occurs in circumstances rendering it a 'reportable death' within the meaning in the *Coroners Act*,²⁴ the corpse is under the control of the coroner until the coroner issues a certificate of disposal of body.²⁵ Throughout the time the corpse is in the possession of the Coroner, the deceased person's next of kin are permitted to view and touch the corpse, unless the Coroner determines it is either dangerous or undesirable to do so.²⁶

Control of the corpse

Regardless of religious belief, there can be little argument that in most cases when a person dies, physical matter is left behind. Out of context, it seems macabre that anyone would dispute the rights to control that dead body. However, these disputes do arise, in scenarios that are not macabre at all. Take for instance, the corpse of a child from divorced parents. While it may seem awfully destructive for the parents to contest the right to take possession of the body and bury the child in the manner they each see fit, it does not mean that the action is morally outrageous or beyond comprehension. Likewise, for any number of reasons it is understandable that a family who wishes to bury one of its members in a certain location or in accordance with certain beliefs may contest the right of a de facto or spouse to bury the person somewhere else or in accordance with other beliefs.

In Western Australia, as with many other States of Australia, there is no

²³ *Registration of Births, Deaths and Marriages Act 1961* (WA) s42.

²⁴ *Coroners Act 1996* (WA).

²⁵ *Coroners Act 1996* (WA) ss28, 29, 30.

²⁶ *Coroners Act 1996* (WA) s30(2).

²⁷ There are a few exceptions to this absence of legislative guidance on rights to corpses. The *Anatomy Act 1930* (WA) is one such example, where an executor or person having lawful possession of a corpse can permit the corpse to be donated to an authorised school of anatomy for the purposes of anatomical examination. Section 9 of the Act sets out the circumstances in which this provision can be granted.

²⁸ See *Smith v Tamworth City Council and Ors* (1997) 41 NSWLR 680 at 685, per Young

legislation governing who has the legal right to take possession and bury the body of the deceased.²⁷ The answer to this question is found in case law and the current position can be traced back to Ecclesiastical Law.²⁸

In *Re Boothman; Ex parte Trigg*²⁹ Owen J of the WA Supreme Court was required to determine whether the decision of the Kalgoorlie Coroner to release the body of the deceased to his de facto wife should be quashed and replaced with an order releasing the body to the deceased's executor, his sister. In determining the dispute, Owen J adopted statements made by Young J in an earlier NSW decision³⁰, and held that the common law position is that:

1. If a person has named an executor in his or her will and that person is ready willing and able to arrange for the burial of the deceased's body the person named as executor has the right to do so.
2. A person with the privilege of choosing how to bury the body is expected to consult with other stakeholders, but is not legally bound to do so.
3. Where no executor is named the person with the highest rank to take out administration will have the same position as the executor in proposition 1.
4. The right of the surviving spouse or de facto will be preferred to the right of children.
5. Where two or more persons have an equally ranking privilege, the practicalities of burial without unreasonable delay will decide the issue.³¹

Owen J states that the right of the executor to take possession of the body and to dispose of it is an 'absolute right'. He justifies this statement by referring to 'ancient tradition' and 'various statutes' which impose on the executor the onerous duty to see to the disposal of the body.³² Given that such a duty exists, he reasoned that the 'right' of the executor to bury the deceased is absolute and should not be subject to any priority or merit based claims. While the first proposition of Young J is stated in such a way as to justify this interpretation, it is interesting to note that Young J held in an earlier part of his judgment that the executor had the 'primary privilege'³³ to bury. Arguably, these words could be construed in such a manner to allow for a merit based argument to be raised.

In a similar way, the manner in which Young J phrased proposition 3

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²⁹ *Re Boothman; Ex parte Trigg* (unreported), WA Supreme Court (Civ 1060 of 1999, 27 January 1999) per Owen J. BC 9900110.

³⁰ *Smith v Tamworth City Council and Ors* (1997) 41 NSWLR 680.

³¹ *Re Boothman; Ex parte Trigg* (unreported), WA Supreme Court (Civ 1060 of 1999, 27 January 1999) per Owen J. BC 9900110 at 7.

³² *Re Boothman; Ex parte Trigg* (unreported), WA Supreme Court (Civ 1060 of 1999, 27 January 1999) per Owen J. BC 9900110 at 8.

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does not entirely reflect his earlier comments on this issue. The statement suggests that when a person dies without appointing an executor, the person most likely to be given the grant of administration will have the 'primary privilege' to take possession and bury the body. However, in his reasoning Young J qualified this proposition by stating that it will 'usually' occur.³⁴ The word 'usually' does not mean 'absolutely' and implies that there may be situations in which this conclusion can be validly contested by a merit based argument.

The conflicting rights of people to take possession and bury a corpse where the deceased died intestate and with no substantial assets was at issue in the South Australian Supreme Court in *Jones v Dodd*.³⁵ In this case, the Full Court of South Australia expressly endorsed the more flexible approach implied by Young J, and held that various 'merits' could be taken into account in determining the outcome of the dispute. Perry J, with whom Millhouse and Nyland JJ agreed, stated that:

'... the proper approach in cases such as this is to have regard to the practical circumstances, which will vary considerably between cases, and the need to have regard to the sensitivity of the feelings of the various relatives and others who might have a claim to bury the deceased, bearing in mind also any religious, cultural or spiritual matters which might touch upon the question'.³⁶

It should be noted that in *Smith v Tamworth City Council*³⁷ Young J made two other statements of principle with regard to the right to dispose of corpses, namely:

1. 'Where the deceased does not leave any estate, then it would seem that the duty is still on the person under whose roof the deceased dies to arrange the burial'³⁸,
2. 'Apart from appointing an executor who will have the right ... (to possession and burial)... and apart from any applicable statute dealing with disposal of parts of a body, a person has no right to dictate what will happen to his or her body'.³⁹

While the case law makes it clear that when a person dies someone will have a right to custody and possession of the body for the purposes of

³³ *Smith v Tamworth City Council and Ors* (1997) 41 NSWLR 680 at 691, per Young J.

³⁴ *Smith v Tamworth City Council and Ors* (1997) 41 NSWLR 680 at 691, per Young J.

³⁵ *Jones v Dodd and Anor* (unreported) [1999] SASC 125 (1 April 1999).

³⁶ *Jones v Dodd and Anor* (unreported) [1999] SASC 125 at [51] (1 April 1999).

³⁷ *Smith v Tamworth City Council* (1997) 41 NSWLR 680.

³⁸ *Smith v Tamworth City Council and Ors* (1997) 41 NSWLR 680 at 691, per Young J

³⁹ *Smith v Tamworth City Council and Ors* (1997) 41 NSWLR 680 at 693 - 694, per Young J.

⁴⁰ *Williams v Williams* (1882) 20 ChD 659.

⁴¹ *Doodeward v Spence* (1908) 6 CLR 406.

⁴² See, for example, *Smith v Tamworth City Council and Ors* (1997) 41 NSWLR 680 at

disposal of that body, there is some confusion as to whether this amounts to a property right. The majority of cases continue to refer to an 1882 English decision⁴⁰ and a 1908 High Court decision⁴¹ as authorities for the proposition that there is no property in the dead body unless the body has been processed through some human skill.⁴² In fairness however, some of the cases do question the significance and relevance of this statement in light of medical and scientific progress. In reference to the early High Court case, Master Sanderson of the Western Australian Supreme Court recently noted:

‘.. it was decided in 1908 some 50 years before Watson and Crick described the DNA double helix. Perhaps, if anything is to be drawn from the case it should be to adopt the sentiments of Griffith CJ and regard this present case as the first case arising in the 21st century on the status of body tissue and to decide the case in accordance with general principles of law which are, hopefully, in accord with reason and common sense.’⁴³

It is submitted that the historic denial of ‘property rights’ in a corpse is based on a failure to distinguish ‘ownership’ from other forms of proprietary rights. It is further submitted that the more recent authorities, while still ostensibly denying ‘property’ rights exist, are actually denying the existence of ownership rights, as opposed to the existence of any form of proprietary right at all. This would seem to be the logical and appropriate approach to this issue. Simply because the possession and custody of the body is for the specific purpose of disposal, it is nonetheless an enforceable right. If someone removes the corpse from the executor’s care, the executor could bring an action to retrieve the body.⁴⁴ Furthermore, the rules which the courts have developed to determine who has the best right to bury the body in cases of conflicting claims are akin to the priority rules developed to deal with competing property claims. On this basis, it is submitted that in practical terms the right to possess and control the corpse is treated as if it were a type of limited property right and that the judicial reluctance to call the right a property right is unnecessarily obfuscating and misleading.

Organ donations after death

While there is no legislation addressing the legal rights to the corpse, legislation has been enacted Australia wide to regulate the donation and usage of tissue taken from the corpse. The legislation was developed and enacted in the 1970s and 1980s as the medical world made huge

690, per Young J; *Jones v Dodd and Anor* (unreported) [1999] SASC 125, and *Roche v Douglas as Administrator of the Estate of Rowan (deceased)* (unreported) [2000] WASC 146 (7 June 2000).

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progress in successful tissue transplantation. By authorising donations and prohibiting sale of human tissue, the legislation clearly embraces a certain moral stance with respect to the issue. However, because there is no express reference to property rights, or any reference to civil remedies in the event that there is non-compliance with the legislation, there are still many issues which are unanswered in the context of human tissue donation.

In Western Australia, organ donations after death are governed by the *Human Tissue and Transplant Act 1982* (WA). Section 22 of the Act allows tissue to be removed from a corpse for the following limited purposes:

- for transplantation into the body of a living person; or
- for therapeutic, medical or scientific purposes.

The tissue can only be removed for these purposes if:

- during his lifetime, the deceased person 'expressed the wish for, or consented to' the removal of tissue and had not revoked that wish or consent; or
- where there is 'no reason to believe' that during his lifetime the deceased person had expressed an objection to the removal of tissue, and the senior available next of kin consents to the removal of the tissue.

In either case, the consent may be limited or restricted with respect to how the tissue is to be used and trading in human tissue removed from a corpse is made illegal under s29 of the HTTA.

In determining whether there is an implied recognition in the Act of some form of property rights in the human tissue extracted from corpses, a few points should be noted. The first is the usage of the word 'consent'. The fact that the tissue can only be removed if consent to removal is established, suggests that the deceased person (prior to their death) or senior next of kin have a right to control access to that tissue. The right to control access does not by itself mean that 'property rights' exist in the tissue, but it is a traditional characteristic of property rights. Likewise, applying the popular native title argument identified above, it could be asserted that the limitation on usage of the tissue is a recognition that in the absence of the legislative provision, the tissue could be allowed to be removed for any purpose whatsoever. However, both of these arguments are undermined by the fact that if tissue is removed in contravention of the terms of the legislation only criminal sanctions apply. The legislation does not contain any specific remedies for the next of kin in the event that the tissue is wrongly removed. An action in negligence will be available if it can be established on the facts, however, there is no statutory recognition of a right of the next of kin

to take action for the return of the tissue for the purposes of burial with the rest of the corpse.

Further, the HTTA does not clearly state whether a donation of tissue to a 'specific person' could be made. The key phrase in the statute is '... into the body of *a* living person'. The clarification of this phrase is necessary because it will impact upon the determination as to the existence of property rights in the extracted tissue. If it is interpreted narrowly so as not to authorise donation to a specific person, it will be another limitation on the right to donate, and arguably, more evidence that property rights in the tissue do not exist. Moreover, unless the phrase is clarified, the status of a donation of human tissue from a deceased person to a specific person will be in doubt. Is the donation valid? If valid, can the donated tissue be used for transplantation into a person other than that person specified? Does the specified person have any enforceable property rights to the tissue?

It should also be noted that the HTTA inadvertently places a restriction on the right of an executor to dispose of the body of a deceased. The authority to consent to removal of tissue in the absence of clear consent by the deceased lies with the senior next of kin. In those cases where an executor is not the senior next of kin, the executor will have the right to dispose of the body, but has no rights with respect to the removal of body tissue. This in itself however, does not negate the possibility of both being considered to be property rights. As noted above, it is a long-standing principle of property law, if not one of the fundamental tenets, that more than one property interest can exist in a piece of property and that any conflict be resolved by reference to priority principles.

Accessing body parts and tissue after death

An interesting and more contemporary issue which has arisen because of the advances of science is the right of access to, the retention and disposal of the body tissue of a corpse. This has become increasingly prevalent given the development and reliability of DNA testing and artificial conception. There is limited legislative regulation with regard to this issue. Pursuant to s34 of the *Coroners Act 1996* (WA), a coroner may direct the pathologist or doctor performing a post-mortem examination of a corpse, to remove 'any tissue which it appears necessary to remove to investigate the death'. Furthermore, under the same section, the pathologist or doctor have powers to remove tissue in cases where the deceased gave written permission prior to death, or the senior next of kin has consented to the removal for therapeutical,

⁴³ *Roche v Douglas as Administrator of the Estate of Rowan (deceased)* (unreported) [2000] WASC 146 at [14], (7 June 2000).

⁴⁴ Arguably that action could be based in conversion.

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medical, teaching or scientific purposes. The coroner, pathologist and/or doctor are clearly prohibited from selling such tissue⁴⁵, but there are no explicit provisions regarding the preservation and disposal of the tissue removed from a corpse. The legislation simply empowers the Coroner to give 'directions or guidelines' as to these issues.⁴⁶

Because the legislation does not address the issue of the right of non-medical persons to access the body tissue, the courts have been required to address these issues without any legislative guidance. A variety of cases have been heard in different jurisdictions over the last decade, all of which have incorporated arguments based on property. Because of the varying judicial responses and approaches to the property based arguments, it is interesting to briefly note the cases and their circumstances.

In *Dobson and Anor v North Tyneside Health Authority and Anor*⁴⁷, the deceased died of a brain tumour. During the post-mortem, the deceased's brain was removed, preserved in paraffin and eventually stored by the hospital where the deceased died. Two years after his death, the deceased's next of kin commenced an action in negligence against the Health Authority for failing to detect the deceased's tumours at an earlier stage. They also commenced an action against the hospital, seeking damages for its failure to preserve the deceased's brain, which thereby deprived them of evidence that may have helped them in their claim against the Health Authority.

The claim for damages against the hospital was struck out. The English Court of Appeal held that the next of kin did not have an action in conversion against the hospital because at the time the deceased died no executors or administrators had been appointed over the deceased's estate, and there was thereby no one who had either actual possession or an immediate right to possession of the body. The grant of administration did not occur until after the deceased had been buried and, in any event, the executors and administrators' right to custody and possession of the corpse was limited to the fulfilment of their duty to inter the body. The court accepted the principle from *Doodeward v Spence*⁴⁸ that where a body has undergone some work and skill it may be converted to property, but, in this case, the court rejected the argument that by fixing the brain in paraffin, it had been converted into an item of property capable of possession.

Public policy and common sense appear to have played a significant role

⁴⁵ The wording of s29 and s30 of the *Human Tissue and Transplantation Act 1991* (WA) makes it clear that the prohibition is extremely wide.

⁴⁶ See *Coroners Act 1996* (WA) ss 34(6) and s58(1).

in this decision. The court stated that they were 'far from persuaded that it would be right to impose a duty on hospitals to retain tissue removed in a post mortem against the possibility that it might be material evidence in civil litigation commenced at some future time.'⁴⁹ It is submitted that this conclusion is sufficient in itself, and that there was no need for the court to consider the issue of 'property' in the tissue at all.

In a slightly different case heard in NSW in the same year, the plaintiff sought a court order entitling him to access the human tissue of the deceased for the purposes of conducting a DNA test.⁵⁰ The plaintiff alleged that he was the son of the deceased, and was entitled to claim in the deceased's intestacy.⁵¹

The tissue samples were held by a pathology business, which had indicated that it would make sections of the tissue available if lawfully authorised and required to do so. In seeking the court to make such an order, the plaintiff relied on pt 25 r 8 of the Supreme Court Rules of NSW. This rule authorised the court to make orders directed to persons who were not parties to the litigation, requiring them to allow inspection, the taking of samples and the making of observations and experiments in relation to 'any property'.

The key question for Bryson J on these facts was whether or not the tissue was 'property' within the meaning of the Order. Just like the English decision in *Dobson*⁵², Bryson J referred to the main principle of *Doodeward v Spence*⁵³ - namely, that while there is generally no property in a corpse, property may exist if there has been some skill or work by the person in lawful possession which distinguishes it from a corpse awaiting burial. Interestingly, and contrary to what was implied in the English decision, Bryson J held that because the human tissue taken from the deceased was fixed in paraffin which was susceptible to ownership, the tissue itself amounted to property within the meaning of the rule.⁵⁴ It is important to note that, consistent with the reasoning of this paper, Bryson J stressed that the word 'property' did not 'require that there be any right of ownership'.⁵⁵

⁴⁷ [1996] 4 All ER 474.

⁴⁸ (1908) 6 CLR 406.

⁴⁹ *Doodeward v Spence* (1908) 6 CLR 406 at 480.

⁵⁰ *Pecar v National Australia Trustees Ltd and Anor* (unreported) NSW Supreme Court (no 2518 of 1996) (27 November 1996).

⁵¹ The plaintiff stated in evidence that his mother and the deceased had both referred to him as the deceased's son, and that the deceased had introduced the plaintiff to his new wife as 'my son'.

⁵² *Dobson and Anor v North Tyneside Health Authority and Anor* [1996] 4 All ER 474.

⁵³ (1908) 6 CLR 406.

⁵⁴ Although Bryson J held that the tissue was 'property', he refrained from making the Order requested because of the uncertainty as to whether or not the trial itself was going to continue.

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Three years later in Western Australia, a very similar case arose for consideration. In *Roche v Douglas as Administrator of the Estate of Rowan (deceased)*⁵⁶, the plaintiff sought to access body samples of the deceased which had been preserved in paraffin wax and stored at a pathologist's laboratory. The plaintiff claimed that she was the daughter of the deceased and should be entitled to claim under the *Inheritance (Family and Dependants Provision) Act 1972 (WA)*. The executor of the will, the defendant, argued that the plaintiff was unable to claim under the Act on a number of grounds.⁵⁷

The plaintiff sought orders on either of two grounds. The first was pursuant to SC O52 r3(1), which, like the NSW provision in the previous case, permitted the court to make orders for the sampling or experimentation on any property. The second ground was based on the plaintiff's assertion that the court had the power to make such an order, because it was an order that was necessary for the estate to be properly administered.

Similarly to Bryson J, Sanderson M identified the key question as being whether or not the body tissue held by the pathologist was 'property'. After examining the earlier authorities on the lack of 'property' rights to a corpse, Sanderson M noted that there were no authorities directly dealing with property rights in a portion of a corpse. Ultimately, Sanderson M held that the human tissue was 'property' and could be the subject of an order. Unlike Bryson J, his finding was not based on the fact that the tissue was preserved in paraffin wax, but rather, he asserted his decision was based on both reason and good sense. Sanderson M expressly noted the important role that DNA testing now played in inheritance cases and he commented that:

'In the wider sense, it defies reason to not regard tissue samples as property. Such samples have a real physical presence. They exist and will continue to exist until some step is taken to effect destruction. There is no purpose to be served in ignoring physical reality. To deny that tissue samples are property, in contrast to the paraffin in which they are kept or the jar in which both the paraffin and the samples are stored, would be in my view to create a legal fiction. There is no rational or logical justification for such a result.'⁵⁸

One final case example that requires consideration in the context of

⁵⁵ *Pecar v National Australia Trustees Ltd and Anor* (unreported) NSW Supreme Court (no 2518 of 1996) (27 November 1996).

⁵⁶ (unreported) [2000] WASC 146 (7 June 2000).

⁵⁷ The arguments were that (a) her birth certificate showed that the deceased's mother was also her mother, (thereby making her the deceased's sister, not daughter), or (b) even if she was the natural daughter of the deceased, she had been adopted by the deceased's mother and at law this made her his sister, not daughter, and (c) when the deceased's mother died, the plaintiff benefited from her estate in the same manner as

rights to human tissue is the case of *In the matter of Gray*⁵⁹. The facts of this Queensland case are substantially different from the previous two cases, but the question of property rights in human tissue was nonetheless the main issue. The human tissue in this case was the semen of the deceased, and the application for its extraction was made the day after he unexpectedly died.

The Applicant had been living with the deceased for approximately 14 years, 6 years as his wife, and they had one child. The Applicant asserted that prior to his death, she and the deceased discussed the possibility of having another child in the near future. On the basis of this plan and the sudden death of her husband, the Applicant told the court that she wanted to go ahead with their plan and become pregnant by artificial insemination.

After reviewing a variety of authorities, Chesterman J refused the application. Although there was no legislation either permitting or prohibiting such an order, he commented that the 'underlying principles of law are that those entitled to possession of a body have no right other than the mere right of possession for the purpose of ensuring prompt and decent disposal'⁶⁰ and that there was a correlating duty not to 'interfere with the body... to violate it.'⁶¹ Further, he acknowledged that if the power to make such an order existed, it would be discretionary⁶² and that he would not exercise his discretion in this case for 3 reasons: (a) there was no evidence the deceased wanted his wife to be impregnated posthumously; (b) given the urgency of the application, there was no evidence to suggest that the applicant had made careful or rational deliberation; and (c) it would be impossible to know whether it would be in the best interests of a child to be conceived in that manner.

It should be noted that in rejecting the application, Chesterman J referred to the 'rapidly changing and expanding medical technology' which he predicted would pose frequent challenges for the law in the future. He was adamant however, that these challenges did not have to be resolved by the adoption or development of 'a specific principle' of law, nor, implicitly, by the adoption of principles of property. In his opinion '[g]ood sense and ordinary concepts of morality should be a sufficient guide for many of the problems that will arise'.⁶³

the deceased.

⁵⁸ *Rocbe v Douglas as Administrator of the Estate of Rowan (dec)* (unreported) [2000] WASC 146 at [24] (7 June 2000).

⁵⁹ *In the matter of Gray* (unreported) [2000] QSC 390, (12 October 2000).

⁶⁰ *In the matter of Gray* (unreported) [2000] QSC 390 at [18] (12 October 2000).

⁶¹ *In the matter of Gray* (unreported) [2000] QSC 390 at [20] (12 October 2000).

⁶² *In the matter of Gray* (unreported) [2000] QSC 390 at [23] (12 October 2000).

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A comparison of these cases shows that while the decisions may all be based on concepts of morality, those concepts of morality are not unified to the extent required to produce consistent judgments in the different courts. On the basis of the case law, it is impossible to state with any degree of certainty whether property rights in human tissue do or do not exist. For example, in *Dobson*⁶⁴ the fixing of the tissue in paraffin was not sufficient for it to be deemed to be 'property', while in *Pecar*⁶⁵ the court came to the opposite conclusion on very similar facts. In contrast to both of these decisions, the court in *Roche*⁶⁶ held that there was property in certain tissue irrespective of what it had been preserved in. The different judgments cannot be explained or justified solely on the basis of the different factual circumstances of each case. As the above analysis of the cases demonstrates, the differences arise because there is no identifiable rationale of law upon which the decisions are all based.

SHOULD PROPERTY RIGHTS IN CORPSES AND HUMAN TISSUE BE RECOGNISED?

It is asserted that the approach of Chesterman J and the reliance on old common law principles as the means for determining the ever increasing range of issues and conflicts arising with respect to corpses and human tissue should be rejected. With all respect to Chesterman J⁶⁷, it is submitted that reliance upon 'good sense and ordinary concepts of morality' is a fundamentally inadequate response to the future legal, ethical and medical issues we face. It is trite to say that if disputes are resolved according to notions of 'good sense and morality', the validity and objectivity of any judicial decision will be subject to question. This indeed raises a variety of other issues, such as whether or not playing 'moral guardian' is within the role of the judiciary - or whether it is more accurately placed with the legislature, as representatives of the people. Furthermore, in the absence of definite principles, legitimate medical research could be hampered given the uncertainty as to the legality or illegality of such activities. Or, even worse, such a lack of specificity could lead to unregulated and morally questionable scientific experimentation.

For the sake of consistency and clarity, it is imperative that a

⁶³ *In the matter of Gray* (unreported) [2000] QSC 390 at [24] (12 October 2000).

⁶⁴ *Dobson and Anor v North Tyneside Health Authority and Anor* [1996] 4 All ER 474.

⁶⁵ *Pecar v National Australia Trustees Ltd and Anor* (unreported) NSW Supreme Court (no 2518 of 1996), 27 November 1996.

⁶⁶ *Roche v Douglas as Administrator of the Estate for Rowan (deceased)* (unreported) [2000] WASC 146 (7 June 2000).

⁶⁷ *In the matter of Gray* (unreported) [2000] QSC 390 at [18] (12 October 2000).

comprehensive legislative regime governing the plethora of issues which arise in the context of corpses and human tissue be developed and enacted. As distasteful as this approach may seem to some, it is further submitted that the best way for the law to address all of the possible conflicts and claims is for the legislature to expressly recognise extracted human tissue and corpses as property and adopt and adapt current property law principles⁶⁸ as the foundation for the regulation.

It is submitted that such an approach is necessary for a variety of reasons. First, the unquestionable factual reality is that the moment human tissue is taken from the body, it becomes an object or thing which is detached from that body. It is a separate entity it becomes an identifiable thing. It is physically capable of being touched, of being moved, of being altered and of being reused. In a similar way, a corpse can be seen to be the physical matter which remains when a human life dies. Objectively, it can be viewed as a shell and disassociated from the human life which inhabited it. Because of their separate physical identities, the extracted human tissue and the human corpse become separate 'objects' which, as has been demonstrated in recent times, have their own commercial value and demand. The consequence of this is that conflicting claims may arise with respect to the human tissue and corpse in much the same way as they presently do over personal and real property, the only difference being that there will be more emotional, spiritual and ethical issues arising over the human tissue conflict. In failing to recognise this physical reality and thereby ignoring the fact that both human tissue and corpses have become commercially objectified, the current law cannot adequately address the range of conflicting situations that do and will continue to arise.

This argument appears to be at odds with many philosophical arguments which have been raised in opposition to the recognition of property rights in corpses and human tissue. The arguments based on upholding the value and sanctity of human life and preserving the dignity of the deceased are extremely compelling. However, it is submitted that the express recognition of property rights will not inexorably lead to the destruction of these values. Conversely, these values could be entrenched by the implementation of comprehensive and thorough legislation. The range and nature of recognisable property interests, their enforceability and their assignability could be comprehensively limited in such a way so as to achieve a balance between legal certainty and moral acceptability.

In the context of this argument, it must be remembered that the recognition of 'property rights' in corpses and human tissue will not automatically mean the recognition of 'ownership' rights nor will it automatically lead to the

⁶⁸ One vital exception to this objectification of human tissue is with respect to

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development of a 'market place' for the buying and selling of corpses and tissue. As noted at the outset, property rights are many and varied and range from ownership through to inchoate possessory rights. Because of this 'elusiveness', the main benefit to be derived from the adoption of property rights and property principles is that a variety of rights and interests in corpses and tissues can be recognised, enforced and protected in a consistent and regulated manner. The property law paradigm will not necessarily lead to an amoral and uncontrollable money driven market, but rather, it can lead to greater certainty in the law, greater protection of rights and values, and greater accountability⁶⁹ by all those who have recognisable rights in corpses and human tissue. As Jackson notes:

'Even though a particular right may be exercisable only over a certain type of object by reason of the nature of that object, its function will have an essential similarity to a right exercisable over another type of object, *in that the purpose of both is to control the use or acquisition of the object.*'⁷⁰

CONCLUSION

As noted in the introduction, the issues relating to corpses and human tissue impinge on our sensibilities and it would be impossible to fully regulate these issues without confronting the myriad of emotional, cultural, spiritual and religious considerations which arise. While this is a daunting task, given the nature of the changing world and the new world of science, they are issues which demand comprehensive legal regulation. At this point in time, as the preceding analysis of the position in Western Australia shows, the law is developing in an ad hoc and inconsistent manner and at a pace which is far out of step with the progress of science. The tardiness of the law in addressing these issues, coupled with a general erosion of the traditional moral bounds of society means that we could be faced with a situation where access to corpses and human tissue is plagued by doubt and inconsistencies, or, even worse, effectively controlled by amoral and non-accountable market forces.

It is submitted that the recognition of property rights in corpses and human tissue will provide a solid foundation upon which legislation can be enacted clarifying all of the rights and remedies which may be asserted by the various interested parties. As offensive as it may sound to some, the recognition of different types of property interests over

developed embryos. Any regulation regarding the protection, control, usage and