

ARGUMENTS AGAINST PEOPLE LEGALLY 'OWNING' THEIR OWN BODIES, BODY PARTS AND TISSUE

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There are a number of reasons, in my view, why people should not, as a general principle, be recognised as having proprietary rights in their own body, body parts and tissue.¹ This paper commences with some of the arguments against recognising such rights then examines in more detail the arguments that have been put forward in favour of recognising them. In relation to the latter, counter-arguments are put to each argument. In my view, the counter-arguments outweigh the arguments. This leads to my conclusion that the law should not recognise proprietary rights in bodies, body parts or tissue in favour of the people from whom they came, though proprietary rights may arise in favour of a third person, by principles that I suggest in the paper.

ARGUMENTS AGAINST RECOGNISING PROPERTY INTERESTS IN ONE'S OWN BODY AND ITS PARTS

Various arguments may be advanced against legal recognition of property interests in one's own body. The reasons may be emotional (a repugnance at people selling²

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² Harris, above n 1, 352: organs should not be commodified because that involves 'an affront to our fundamental notions of human dignity'. Sale and property need not go together. One can have property interests that fall short of a 'commercial' interest; see for example, the 'mere-property use-privileges and control-powers': Harris, above n 1, 356. Nevertheless, in the public mind, property and sale are associated and that influences the popular response.

their bodies and body parts³); familial (stored genetic material should be available to blood relatives for their own testing, not subject to veto by one person⁴); pragmatic (the possible consequences of such a principle for hospitals and laboratories, see below); economic (undue fettering of teaching,⁵ research,⁶ commercialisation of biological inventions⁷); and social (maintenance of museum collections).⁸

³ For consequential reasons, I have no objection to other people subsequently acquiring property interests, such as anatomy schools, museums and blood banks. Recognition of this type of ownership promotes understanding of disease, medical and community education and health care; though, as I concede below, it is not essential for these purposes: see text and note 8 below.

⁴ Loane Skene, 'Patients' rights or family responsibilities? Two approaches to genetic testing' (1998) 6 *Medical Law Review* 1; Loane Skene, 'Genetic Secrets and the Family: A Response to Bell and Bennett' (2001) 9 *Medical Law Review* 162.

⁵ The importance of post-mortem examination and the maintenance of pathology collections cannot be underestimated in teaching; understanding the progression of illness; identifying the effects of genetic predisposition, occupational factors and environmental hazards on health; and medical audit - checking the accuracy of pre-death diagnoses, equipment, staff performance, cost effectiveness of various interventions etc. Large collections of retained body parts and tissue enable comparisons over a range of pathology, and over time. Re-testing is possible as new knowledge becomes available. See Nuffield Council on Bioethics, *Human Tissue: Ethical and Legal Issues*, 1995, para 5.23. Samples must be retained so that independent experts can review them. The study of these samples may lead to changes in treatment: *ibid*, para 5.22.

⁶ Some may question whether medical research is an undisputed good to be promoted at all costs (i.e. by reducing the 'control' that people have over their excised body parts and tissue in order to advance science). While it is true that research often creates problems of its own, I believe that the benefits of medical research far exceed any adverse consequences. Genetic research offers the opportunity to develop new diagnostic techniques; prophylactic interventions to avoid death, illness or surgery; and drugs that are designed for individual patients, greatly reducing deaths and injuries from drug overdoses and adverse drug reactions. Research sometimes needs to be done on living tissue: *ibid* para 5.11.

⁷ Some people object to the patenting, ownership and commercialisation of biological inventions. There are religious objections to genetic manipulation (usurping God's province); a notion that genetic information is, or should be, commonly owned, not privately controlled; arguments for collective and individual privacy; possible cost increases for other researchers and the community if genes, genetic sequences and genetic tools needed for further research are patented, so that payment is required for their use; and the concern that patents may delay research, product development and the availability of new treatments. See Loane Skene and Donald Chalmers, 'First International Conference on DNA Sampling in Montreal' (1997) 4 *Journal of Law and Medicine* 229-234. Some of these arguments are valid but it should be remembered that patents are not ownership; they create a monopoly right to exploit an invention for a limited period. The patented invention can be used by others, though at a cost. Research and development of new pharmaceutical products for human health care is very expensive and without the commercial protection of the limited patent period to exploit the invention and make a profit, investors will be reluctant to undertake new projects.

⁸ It is not necessary to deprive people of property rights - either as ownership or control - in order to enable these activities to be undertaken. People could be encouraged to co-operate and to donate or sell their biological material. However, for reasons suggested below, acknowledging and 'paying out' private interests, plus accepting a reduced sample in a research project if people refuse to participate, make this option less attractive.

COUNTER-ARGUMENTS AND RESPONSES

On the other hand, many writers have argued that the law *should* recognise that a person may have a property interest in his or her own body.⁹ Some of these arguments are set out below, together with counter-arguments that may be made in reply.

Self-dominion

One argument in favour of recognising proprietary rights is 'self-dominion'. If one does not 'own' one's body,¹⁰ what does one own? This reflects a popular expectation. Many people would be surprised if they found that they did not own their body and things removed from it. Alternatively, they may be concerned not so much about 'owning' their bodies, as controlling what happens to their body or body parts.¹¹ Recent studies show people are more concerned about the potential *uses* of tissue and genetic information than the initial acquisition or retention,¹² and the majority do not object to altruistic donation of material from their bodies.¹³

However, the law is already adequate to protect people's rights to control not only access to their bodies by someone else but also what happens to their body and their personal information. If this protection is inadequate, then those areas of the law should be strengthened. One need not resort to property law. Moreover, there may be absurd consequences if property law is adopted in this area.

Tort law protects autonomy

People are protected from having their body 'invaded' by the law of tort. They do not have to 'own' their body to get this protection. It is battery (and also a criminal offence) to 'invade' a person's body, or to remove something from it, without the person's consent or other lawful justification. The law of negligence requires health

⁹ Mason and Laurie, above n 1, and the literature they cite, especially in notes 65-68; Harris, above n 1, 351-359.

¹⁰ Derek Morgan, above n 1, 84-90 on the link between autonomy, the role of the state and body ownership, discussing J Locke, J S Mill, I Kant, *et al*; Harris, above n 1, 357, on the arguments concerning self-ownership and slavery.

¹¹ *European Convention on Human Rights*, Article 8, 'Right to respect for private and family life'; incorporated into English law by the *Human Rights Act 1998* (UK).

¹² Human Genetics Commission, *Public attitudes to human genetic information*, Oct-Dec 2000, 34- 35 (access by insurance companies) 41 (use of genetic databases).

¹³ Medical Research Council, *Public Perceptions of the Collection of Human Biological Samples*, October 2000: the majority of people surveyed assumed biological material would be donated altruistically for research. Some people, especially young people, were in favour, or not against, payment for human biological samples, but they were not the majority. The Report states that 'Recompense for ... members of the public [for donation] needs to be considered carefully. There might be a case for recognition of donors' altruism in participating in the study' (Recm 12, 17). It recommends 'careful explanation of the financial implications' when freely donated samples are used in commercial projects. It does not recommend payment for samples (Recm 13, 17). This is short of payment for acquiring a property interest in the sample.

professionals to provide information before they obtain a patient's consent to a medical procedure. Thus the law already covers the wrongful acquisition of body parts and tissue. If it is decided that people should be 'rewarded' for donating bodily material for research, it would be possible to supplement this principle by allowing for once-off payment in gratitude for a person's involvement in a project, without this amounting to a 'sale' of bodily material.¹⁴

One might question whether the law of battery provides sufficient protection where something is obtained from a person's body without a battery in order to obtain it. Consider the allegation by tennis player Boris Becker that a woman '[stole] his sperm [by holding it in her mouth after oral sex] and inseminat[ed] herself to have his baby' so she could blackmail him.¹⁵ In such a case, there would be no battery because the man consented to the sexual act that led to the acquisition of the sperm. A similar scenario might arise where bodily material that has been naturally shed (such as hair) is collected by another person without consent from the 'donor'. Recognition of a proprietary right in the sperm or hair would enable an action in conversion or detinue and so provide a remedy for the 'theft'. But the crux of the 'offence' is not the initial taking of the sperm or hair. It is the wrongful use of it later to secure a benefit for the offender. And the remedy that the 'donor' seeks is not the return of the sperm or hair. It is compensation for the wrongful use of it; or prevention of any, or further, such use. For this reason, the law should focus on protecting people from the wrongful use of their bodily material, however obtained, rather than establishing a proprietary right in it. This falls more readily into the domain of privacy law than property law.

Privacy and non-discrimination law protect against wrongful use of genetic information

If people are concerned about the wrongful *use* of body parts or tissue after their removal, or of information derived from them, that would be better dealt with by laws on privacy or non-discrimination,¹⁶ strengthened if necessary, rather than by property law. Privacy and non-discrimination laws would focus directly on the perceived harm - wrongful use - and not lead to the undesired or absurd consequences that would ensue if property interests are recognised in people's own bodies, body parts and tissue (see below).¹⁷ The Australian Law Reform

¹⁴ Ibid.

¹⁵ *The Guardian* (UK), 23 January 2001, <<http://www.guardian.co.uk/health/story/0,3605,426590,00.html>>. Later Becker withdrew the allegation, and admitted paternity. Consider the scenario where a male superstar is assaulted and sperm is retrieved during the assault. The sperm is later put on the internet for sale. A property right would allow the male to argue for conversion or detinue. What would battery or privacy allow? Presumably one cannot ask for an order for return of such substances unless one assumes they are property.

¹⁶ Skene, above n 4.

¹⁷ Loane Skene, 'Ownership of Human Tissue and the Law' (2002) 3 *Nature Reviews Genetics* (UK) 145-8; Loane Skene, 'Who Owns Your Body? Legal Issues in the Ownership of Bodily

Commission and the Australian Health Ethics Committee currently have a joint reference on *The Protection of Human Genetic Information* and their recommendations, when published, may provide a guide for legislation of this kind.¹⁸

There may be absurd consequences if 'ownership' is possible

Consider the possible legal consequences of recognising that people 'own' their own body parts and tissue. Under a will or on intestacy, beneficiaries would inherit not only the possessions of the deceased but also the deceased's body and stored body parts and tissue. A bequest of 'all my property to my son' would entitle the son to stored tissue on slides, severed limbs and other 'surgical waste'.¹⁹ He could, of course, waive this right but the hospital would be legally obliged to consult him about the matter before disposition. Relatives (other than a beneficiary of a deceased person) could not gain access for their own genetic tests without consent from the 'owner', who could refuse.²⁰ A 'donor' could be held liable for the supply of a 'faulty product' if his or her tissue is used for transplant or given to others in health care products.²¹ Hospitals could not dispose of bodies and body parts without permission, even if the hospital was being closed. The hospital's insurance policy might not cover stored human material, on the basis that it has no insurable interest in it (though it might also be argued that one can insure things in one's possession without being an owner in certain circumstances²²). The hospital would have no legal right to retain tissue that might be vital in defending claims against it; the 'owner' would be entitled to remove and destroy the stored tissue unless restrained by injunction.²³ Finally, denying the hospital ownership of tissue that has been

Material' (2002) 8 (1) *Trends in Molecular Medicine* 48-49 also in HMS Beagle: <<http://news.bmn.com/hmsbeagle/>>.

¹⁸ To date, only the Issues paper has been published: ALRC, AHEC, Issues Paper 26, *Protection of Human Genetic Information*, Oct 2001.

¹⁹ It might be said, with surgically removed material, that there is implied consent not only to remove it but to use and retain it for the purpose for which it was removed, or even to destroy it after use. This is usual hospital practice. However, could consent be implied if the general principle was that excised bodily material is the property of the person from whom it came? Presumably it could not be implied if the person demanded the return of material he or she 'owns'. Public health legislation could be enacted, requiring the hospital to destroy excised material after removal, so defeating any property interest of the person concerned. However, that legislation would impair pathological collections, research projects etc.

²⁰ I believe blood relatives should be entitled to gain access to stored tissue for their own health care. Such access could be given in a way that does not disclose the genetic status of the person whose tissue is stored: Skene, above n 4.

²¹ Under the strict liability provisions of the *Consumer Protection Act 1987* (UK); or trade practices or fair trading legislation in Australia.

²² For example, the common contractual obligation to insure a motor vehicle on hire-purchase; or premises occupied as a tenant.

²³ Note the request by a Victorian woman, Mrs Thompson, to have her daughters' Guthrie cards returned to her; see Loane Skene, 'Access to and ownership of blood samples for genetic tests: Guthrie spots' (1997) 5 *Journal of Law and Medicine* 137; Charles Lawson and Rebecca Smith 'Protecting genetic materials and genetic information: A case study of Guthrie cards in Victoria' (2001) 9 *Journal of Law and Medicine* 215.

lawfully removed (which seems part of, or analagous to, the clinical records) seems inconsistent with the hospital's ownership of clinical records.²⁴

It may be said, of course, that the consequences suggested in the previous paragraph will follow only if the term 'property' means full ownership. If the interest of the person from whom body parts or tissue are taken is a proprietary interest less than full ownership, such as a right of control²⁵, then those consequences might be avoided, at least in part. But those who advocate proprietary interests for people in their own bodies and body parts generally want more than control over them; they want full ownership. Moreover, rights of control can be provided by the laws of battery, negligence (through the initial need for consent and information) and privacy.

PROTECTION AGAINST TAMPERING

A second argument in favour of recognising that bodies and body parts are the property of the person from whom they come, or of next of kin, concerns the protection of those things from unlawful tampering. How can the law protect bodies and body parts from being stolen or interfered with if they are not property? One answer is that there are already specific offences that protect bodies and body parts, such as the offence of desecration of a corpse. If the penalties for these offences are considered too slight to meet the potential consequences of misuse of bodily material, then the penalties should be increased. The existing law also prevents things being removed from corpses, even though the corpse is not property. In Queensland, a judge recently ruled that a woman was not entitled to remove sperm from her deceased husband for use in assisted reproductive technology. He said 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': *In the matter of Gray*.²⁶

Laws concerning desecration of corpses do not, of course, cover the theft of bodily material from a living person but I have already suggested that other areas of law are better suited to deal with the wrongful taking and use of tissue.

'Gifts' of bodies and bodily material

These are not possible unless they are property, as organ and tissue donation is commonly regarded as a 'gift'. This, it is argued, necessarily implies that people do have a property interest in their body since the subject of a gift must be property. However, this is not the case. The basis of human transplant legislation is not

²⁴ *Breen v Williams* (1996) 186 CLR 71.

²⁵ What Rosalind Atherton calls 'control of the range of rights that flows from this [thing-ness of a corpse]'; Rosalind Atherton, 'Claims on the deceased: The corpse as property' (2000) 7 *Journal of Law and Medicine* 361, 375.

²⁶ [2000] QSC 390 (Unreported, Chesterman J, 12 October 2000). Atherton lists articles on similar cases: above n 2, 361.

strictly a gift but consent to use a body or tissue in certain ways.²⁷ It is thus an exercise of a person's personal right to authorise an 'invasion' of his or her person. Also, gifts are not always property. I can give my time or my talents²⁸ (which are not property) as readily as my possessions, both in fact and in law. Similar responses can be made to the argument that 'abandonment' implies that people have a property interest in their bodies and its parts.²⁹ One could make a gift or abandon one's right not to have tissue removed by exercising one's *personal* right to consent to the removal and use of body parts; it need not be a property right.

Property rights would encourage research

A fourth argument put by those who think that people should have property rights in their excised bodily material is that this would encourage, not fetter, the availability of these things for research, teaching and commercial use.³⁰ Recognition of a property interest would not prevent people making gifts of their bodies, body parts and tissue and the opportunity of sale, or other commercial reward such as a share of profits, may be an added inducement. Moreover, researchers could be assured of obtaining and passing on a 'good title' to biological material and its products, so encouraging the biotechnology industry.

There is some merit in the suggestion that payment might augment the supply of human material for research and teaching. However, it might also distort the profile of samples. The best pathological collections are the most extensive. All types of tissue, and all types of illness or disease, should be represented, for purpose of comparison of symptoms, progression, effectiveness of intervention etc. The best way to obtain such a collection is to dispense entirely with the need to obtain consent for the initial taking of the tissue, or for later retention and use. In the light of the experience of Bristol and Alder Hey³¹ and the subsequent publicity and

²⁷ Mason and Laurie, above n 1, argue that only the consent (or refusal) of the deceased should be considered, not that of relatives, as the 'autonomy' in question is that of the deceased. Consistently with their proposal that people should have property in their body and tissue after death, they state that disposition should be up to the deceased alone, with the relatives not permitted to override the deceased's wishes. However, an important reason for consulting relatives and taking account of their views is that this maintains public confidence in the post-mortem and transplant system. People have deeply held feelings about bodies being cut up and used after death. Not consulting relatives led to the public outcry in Bristol and Alder Hey. Recently, UK Health Secretary, Alan Milburn, reportedly said 'Even if you had an opt-out law, you would never operate it but would always want to discuss donation with relatives': Nigel Hawkes, 'Milburn to double organ card holders', *The Times* (UK), 28 Feb 2001, 12.

²⁸ Harris, above n 1, 352, comments that services, eg. surrogacy services, might be commodities without being property.

²⁹ Mason and Laurie, above n 1, make this point regarding gifts and abandonment, suggesting that, by using these terms 'the Nuffield Council was not able to divorce itself completely from the property model'.

³⁰ Derek Morgan, above n 1, 99 references cited in his notes 67-70.

³¹ Inquiries into practices at two English hospitals, the Bristol Royal Infirmary and the Alder Hey Hospital in Liverpool, revealed that large quantities of human organs and tissue were retained by the hospital after patients had died. No consent was obtained and the families did not know that the material had been retained. There was a public outcry resulting in months of media

community concern, however, that course seems unwise. The second best method to maximise pathology collections and to make them most useful is to secure their retention after the initial taking, so that people cannot demand their tissue back by asserting their own property interest in it. Thus people can be encouraged to cooperate by careful information and consent procedures when the material is first acquired. If property then passes to the hospital or researcher, the 'donor' will have no right to get it back.³² The 'title' of the hospital or researcher will be secure, in using, exploiting, selling and disposing of the material.

That said, however, the arguments concerning the acquisition of title by people later acquiring excised or stored human material - and the concern that uncertainty about ownership will fetter research, teaching and the pharmaceutical industry³³ - seem overrated, whether they are regarded as the property of the hospital/researcher or the 'donor'. If such issues arise, they will do so only in the 'first generation' - that is, in the hands of the initial holders of the material or its products. If the researcher who first acquires tissue tries to sell or develop it, his or her 'title' may be at risk if there was fraud or deception in the acquisition so that, if challenged, the researcher would not be entitled to any benefits.³⁴ That is as it should be. Thereafter, however, bona fide purchasers will be protected by the principle of market overt³⁵ and will obtain and pass a good title, regardless of bad faith earlier in the transaction. Thus,

criticism of the hospitals' practices. The government Inquiries recommended new procedures for informing and counselling next of kin. The Interim Report of the highly publicised Bristol Inquiry, chaired by Professor Ian Kennedy (May 2000), is at <http://www.bristol-inquiry.org.uk/index.htm>. The report of the Alder Hey Inquiry, chaired by Michael Redfern QC (30 Jan 2001), is at <http://www.rlcinquiry.org.uk/>. See also the Independent Review Group on the Retention of Organs at Post-Mortem in Scotland, chaired by Professor Sheila McLean (Jan 2001): <http://www.show.scot.nhs.uk/scotorgrev/Documents/Review%20Group%20on%20ROPM%20Report.pdf>.

³² Subject to the duty to return bodies and body parts of deceased people to their next of kin for burial or cremation. Note that this duty does not apply to *tissue*, which is not needed for burial or cremation. For this reason, I have argued elsewhere that tissue should be treated differently from bodies and body parts. I object to the term 'human material' used in the Interim Report of *The Inquiry into the management of care of children receiving complex heart surgery at the Bristol Royal Infirmary*, chaired by Professor Ian Kennedy, May 2000. 'Human material' was defined to include tissue, organs and parts of organs and amputated limbs. In my view, this erroneously elides tissue preserved in a laboratory, for example on glass slides, with larger parts of human bodies; Skene, above n 17.

³³ Harris, above n 1, 355, summarising the view of the majority of the Supreme Court in *Moore v Regents of the University of California* 793 P 2d 479 Cal SC (1990). They were, he said, 'impressed by the argument that if patient-sources were conceded ownership, researchers would be inhibited by the danger of being subjected to civil liability'.

³⁴ *Dobson v North Tyneside Health Authority* [1997] 1 WLR 596 (CA): the action failed not only because the plaintiff could not prove a right to possession, but also because there was no proof that the defendants had done anything unlawful.

³⁵ Under the principle of market overt in English law, a purchaser gains a good title even if there is a defect in the seller's title when goods are sold in an open market, provided that the purchaser buys in good faith without knowledge of any defect or want of title. The principle has statutory force in South Australia and Western Australia (*Sale of Goods Act 1895* (SA) s 22; *Sale of Goods Act 1895* (WA) s 22); but not in NSW where markets overt are deemed not to exist: *Sale of Goods Act 1923* (NSW) s 4(2). There is no law recognising the effect of a sale in market overt in the United States.

in the well known American case, *Moore v Regents of the University of California*,³⁶ even if Moore's doctor, Dr Golde, had not been recognised as having lawfully acquired Moore's spleen cells because of his deception, purchasers of the Mo cell line³⁷ would be entitled to use it freely when they bought it later in good faith.

Inconsistent for third parties to own tissue but not the 'donor'

Finally, one could say that it is inconsistent not to recognise a proprietary right in a human body or body parts in favour of the person from whom they came, or the next of kin, but to recognise such a right in favour of other people.³⁸ How can a proprietary interest suddenly arise in favour of a third party?

It is certainly true that the law has recognised that stored tissue (such as blood and blood products) is property for some purposes. In *R v Rothery*,³⁹ a defendant who removed a blood sample after a blood alcohol test was found guilty of theft. In *PQ v Australian Red Cross Society*⁴⁰ the Supreme Court of Victoria accepted that blood products were goods under the *Trade Practices Act 1974*.⁴¹ In *R v Kelly*,⁴² the Court of Appeal upheld the conviction for theft of an artist who removed body parts from the Royal College of Surgeons to draw them.⁴³ In *Roche v Douglas*,⁴⁴ the Supreme Court of Western Australia held that tissue preserved in paraffin was property for the purpose of Court rules enabling the court to order tests on property. The Court then ordered that the tissue should be tested to see if the deceased man from whom it came was the father of a woman seeking a share of his estate.

However, it is possible to reconcile the recognition of a proprietary right in favour of third parties but not in favour of the person from whom a body or body parts came, or next of kin, if such a principle is found to be necessary. (It might be desirable; for example, to protect human bodily material from tampering; or to ensure that human material or its products are of good quality when used for therapeutic purposes.) There are at least three ways in which this might be achieved.

³⁶ 793 P 2d 479 Cal SC (1990).

³⁷ The Mo cell line, named after Mr Moore, consists of cells that can be reproduced indefinitely. These cells are used in scientific research. Scientists wanting to use the cell line in their research can obtain some of the cells for use in laboratories throughout the world.

³⁸ Harris, above n 1, 359: 'The fact of excision [of tissue in surgery] cannot, *ipso facto*, [create exploitative rights]'.
³⁹ [1976] Crim L R 691 (CA); see also *R v Welsh* [1974] RTR 478 (CA): urine held to be 'property' and capable of being stolen.

⁴⁰ [1992] 1 VR 19.

⁴¹ Similarly in the UK, a commercial agreement for the sale of tissue that falls outside the *Organ Transplants Act 1989* would be governed by the *Supply of Goods and Services Act 1982*, if the supplier 'acts in the course of a business': Ian Kennedy and Andrew Grubb, *Medical Law*, (3rd ed., 2000) 1780.

⁴² [1998] 3 All ER 741, 749-750.

⁴³ An employee of the College who removed the parts from the College was also convicted.

⁴⁴ [2000] WASC 146.

(a) 'Work and skill' argument.

First, a principle might be developed from the case law, recognising that a person may acquire a property interest in human material by undertaking 'work and skill' on it, such as in *Doodeward v Spence*.⁴⁵ If such a principle is adopted, it will need to be refined. The meaning of 'care and skill' - or the '[acquisition of] different attributes by virtue of the application of skill, such as dissection or preservation techniques' (*R v Kelly*)⁴⁶ is unclear. Where is the 'skill' in allowing a drop of blood to fall upon a piece of filter paper, such as a Guthrie card⁴⁷ - or placing an excised appendix in a jar of formalin?⁴⁸ And if there is no skill expended there, is a different principle to be applied to these types of tissue from tissue that has been preserved with laboratory techniques beyond the competence of an untrained person?⁴⁹

(b) 'Different attributes' argument

Alternatively, a variation of the 'work and skill' argument, at least in relation to tissue, is that, once it is absorbed on filter paper, or stained onto a glass slide, it not only has 'different attributes' or 'a use or significance beyond [its] mere existence'.⁵⁰ It is a different thing.⁵¹ It is blood-stained paper or glass, for example; the blood cannot be recovered, so the initial interest of the 'donor', if any, is then overtaken. This argument has more appeal since it applies equally to all tissue on slides etc, regardless of the skill applied in obtaining them. But it seems less appropriate to other types of bodily material. Are organs surgically removed from the body different things from when they were in the body - or even a limb preserved in formalin?

Moreover, once the arguments in the two preceding paragraphs are extended from tissue to bodies and body parts, they run foul of the legal principle that next of kin

⁴⁵ (1908) 6 CLR 406. Griffiths CJ held that what was described in the case as a 'two-headed baby' could become property because of the 'work and skill' expended in preserving it.

⁴⁶ [1998] 3 All ER 741, 749-750.

⁴⁷ Guthrie cards are a piece of paper on which blood samples taken from newborn infants for post-natal genetic testing are placed and stored.

⁴⁸ It might be said that the 'work and skill' in the latter case is in the surgical removal of the appendix, not in preserving it. However, that interpretation does not accord with the comments of Griffiths CJ, (1908) 6 CLR 406, above n 42. Also, it does not apply to Guthrie tests - anyone can prick a baby's heel and catch the blood on the filter paper.

⁴⁹ Even with tissue preserved with laboratory techniques that seem to amount to 'work and skill', the case law is not clear. In *Dobson* [1997] 1 WLR 596 (CA), above n 33, brain tissue preserved in paraffin wax was held not to be 'an item to which the [next of kin of the person from whom it came] ever became entitled to possession' (per Peter Gibson LJ, 601-2). The court did not have to decide whether it was property or not, as the case was decided on other grounds. In the Australian case, *Roche v Douglas* [2000] WASC 146, brain tissue stored in paraffin wax was held to be property by its very nature, i.e. not by virtue of any 'work and skill' in preserving it; but the court did not have to decide whose property it was. Skene, above n 1.

⁵⁰ *R v Kelly* [1998] 3 All ER 741, 750.

⁵¹ The argument is even more plausible that cell lines are a different thing from a person's cells: Harris, above n 1, 358.

are entitled to possession for burial or cremation. Preserved bodies and body parts have certainly had care and skill applied; arguably they have different attributes; they may even be different things. But the executors are still entitled to possession of them - and this right to possession (and disposition by burial or cremation) is inconsistent with a property interest in favour of anyone else.

The same is true where people other than executors have property rights recognised by existing law. The patent system permits the registration of property interests in tissue, including living tissue, its constituents such as genes and chromosomes, and information connoted by genetic material such as DNA sequences and genetic probes. If the person from whom the tissue came 'owns' it, it is inconsistent to recognise property rights of other people, namely the patent holder and people authorised by that person to use the patented 'invention'. It is true that the patent system could be changed so that patents on human tissue could be prohibited - or applicants for such patents could be required to produce proof of consent from the 'donor', or of financial reimbursement to that person, but that is not currently the law. If such changes were considered, they would be novel and it would be necessary to consider also their potential impact on the biotechnology industry, especially from a global perspective.⁵²

(c) *'Authority from donor' argument*

In my view, proprietary interests in favour of a third party should be regarded as arising directly from the authority by which they were acquired. This may be the informed consent of a competent adult 'donor'; a statute requiring the taking of tissue for a particular purpose, such as legislation on coronial post-mortem examinations, or legislation requiring blood alcohol testing for road safety; or a court order requiring the removal of tissue for forensic tests. These forms of legal authority could be regarded as converting something that was not previously property (namely body parts and tissue that are still part of the body) into something that is property, and over which the person who lawfully acquires it has property rights.

CONCLUSION

In conclusion, therefore, it seems to me that the arguments in favour of recognising proprietary rights of people in their own bodies, body parts and tissue are outweighed by the arguments against recognising such rights. On the other hand, it is clearly desirable that proprietary rights should be recognised in favour of hospitals and researchers who are lawfully in possession of those things. There seems no reason why such an interest should not arise directly from lawfully obtaining possession, however that occurs. The extent of the proprietary interest will depend on the circumstances, in particular the nature of the tissue. It will not be

⁵² For example, tissue could be acquired and initial research undertaken in countries where these restrictions do not apply.

possible for a hospital or researcher to obtain full ownership of a body or body parts since the executor is ultimately entitled to possession for burial or cremation.⁵³ However, that principle does not extend to tissue not needed for burial, nor to tissue taken from people who have not died. That tissue might be fully owned by the person who lawfully acquired it, subject to the provision that tissue obtained without consent (that is, under statute or court order), should be used only for the purpose for which it was obtained. The interests of people from whom tissue is acquired will be protected by the laws of battery, negligence and privacy. These require that tissue must not be removed without informed consent (or other lawful authority). The principles that I propose are not essential in promoting the availability and use of human bodies, body parts and tissue for teaching, research, commercialisation of biological inventions and health care. But in my view they will be the most effective.

⁵³

The executor could waive this right. The person lawfully in possession would then be entitled to dispose of, retain or otherwise deal with the body or body parts, subject to public health provisions.