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Quigley, Muireann

DOI:
10.1093/medlaw/fwp021

Document Version
Peer reviewed version

Citation for published version (Harvard):
Quigley, M 2009, 'Property: The Future of Human Tissue?', *Medical Law Review*, vol. 17, no. 3, pp. 457-66. https://doi.org/10.1093/medlaw/fwp021

Quigley, M. 'Property: The Future of Human Tissue?', Medical Law Review (2009) 17(3):457-466

Property: The Future of Human Tissue?*

Jonathan Yearworth and Others v. North Bristol NHS Trust [2009] EWCA Civ 37

Introduction

There has been a distinct reluctance on the part of the courts to contend with the problem of property in the body and bodily materials. English law in general adheres to the 'no property' rule, although it does allow that human tissues can be property for certain well circumscribed purposes. As Mason and Laurie maintain this is often done "as a means to other legal ends".[1] The Court of Appeal ruling in the case of *Yearworth*[2] both confirms and challenges this position. The case represents a landmark judgement on the question of whether individuals can be legally said to have property in their bodies. More specifically the case addresses the question of ownership in sperm. The significance of the judgement lies not in the decision itself but in how it was reached.

The facts of the case are straightforward enough. Mr Yearworth and the five other claimants had all been diagnosed with cancer and had undergone chemotherapy treatment at Bristol Southmead Hospital. Since the hospital has a fertility unit licensed under the Human Fertilisation and Embryology Act 1990[3], the men were offered the option to have samples of their semen frozen and stored for use at a later date due to the potential damaging effect of the chemotherapy on their fertility. Acting on the advice received the six men produced samples for storage. Each of the claimants had consented to the storage of their semen for ten years which is the maximum allowable time under the 1990 Act. On 28/29 June 2003 the storage system at the hospital failed. As a result the men's semen thawed and the sperm contained therein was irreversibly damaged.

In the County Court the case was pleaded in negligence, and, as such, while the North Bristol NHS Trust admitted a duty to take reasonable care of the samples and that it was in breach of this duty, it denied liability. The Trust claimed that the loss of the sperm did not represent the kind of damage required for an action in negligence. Judge Griggs deliberated on two key issues: firstly, whether the damage to the sperm in itself constituted a personal injury to the claimants; and, secondly, whether the sperm was their property. He also considered the issue of damages. In respect of these issues the judge held that the damage to the sperm did not constitute a personal injury nor was the sperm to be considered to be the claimants' property. For this reason while he commented on the matter of damages his

* DOI: https://doi.org/10.1093/medlaw/fwp021

[1] J.K. Mason and G.T. Laurie, *Mason and McCall Smith's Law and Medical Ethics*, 7th Edition (Oxford University Press 2006), p.514.

[2] Jonathan Yearworth and Others v. North Bristol NHS Trust [2009] EWCA Civ 37.

[3] At the time of the ruling the amendments of the Human Fertilisation and Embryology Act 2008 were not in force, but they would not have had any substantive effect on the judgement if they had been.

decisions here were of no practical effect given his findings against the claimants regarding both personal injury and property.

While Judge Griggs only heard arguments relating to personal injury and property, the Court of Appeal also considered whether there was any liability in bailment or contract. The Court upheld the judge's ruling in respect of personal injury but reversed the decision that the claimants did not have property in their sperm samples. Notwithstanding the fact that it recognised the men's property in their stored sperm samples the Court concluded that for the purpose of assessing damages an action in bailment might be more fruitful than one in tort. Consequently, it ruled that there had been a bailment of the sperm to the Trust and that the Trust was in fact liable here as well.

The interest for legal scholars in *Yearworth* stems from two aspects: firstly, it represents the first major departure from previous judicial reasoning on the issue of property in the body and separated body parts; and, secondly, it is unique in its assessment of the facts through the law of bailment. As such this note will focus on these aspects of the judgement, leaving aside the issue of personal injury.

Body of Law

Yearworth is not unique in its determination that separated body parts are capable of being property at law and thus the ruling of the Court of Appeal is, perhaps, not without precedent in this respect. It does, however, part ways with previous judicial reasoning in the manner in which their Lordships reached their decision. In order to appreciate the significance of this departure we must give some texture to it by briefly setting out the background from which the Court was working.

It has long been accepted in English law that there is 'no property in a corpse'. The exact origins of this are unclear. It is often attributed to Coke, who in 1644 wrote:

> The burial of the *Cadaver* (that is, *caro data vermibus*) is *nullis in bonis,* and belongs to Ecclesiastical cognizance.[4]

Indeed in this case this is the authority cited, however, it may be attributable to the *Haynes' Case* in 1614.[5] The meaning in both instances is contested[6] with Mason and Laurie maintaining that that the ruling in the later was not that the corpse was not property, but that it could not own property.[7] Regardless of its rather questionable origins the dictum was entrenched in English law by the nineteenth century being cited in *R v Lynn* (1788)[8], *R v Sharpe* (1857)[9], *Foster v Dodd* (1866)[10], *R v Price* (1884)[11], and

[4] 3 Co. Inst. 203.
[5] 77 ER 1389.
[6] See P.D.G. Skegg, 'Human Corpses, Medical Specimens and the Law of Property' (1976) 4 *Anglo-American law Review* 412-25 and A. Grubb, '"I, me, mine": Bodies, Parts and Property' (1998) 3 *Medical Law International* 299 – 317.
[7] J.K. Mason and G.T. Laurie, 'Consent or Property? Dealing with the Body and its Parts in the Shadow of Bristol and Alder Hey' (2001) 64(5) *Modern Law Review* 710-29, p.714.
[8] 2 T R 394.

Williams v Williams (1881-85)[12] during that period. The 'no property' rule whilst serving religious sentiment and ecclesiastical law[13] was problematic when the cases appeared before the courts. This was especially so for cases that ought to have been prosecuted in theft. This was because, as Mason and Laurie point out, "if there is no property, there can be no theft"[14]. Consequently, cases, such as those cited above, were decided without recourse to the sanctions to which property can give rise. Instead the judgements were decided on issues of religion, public health and public decency.

The application of skill

In recent times the case of *R v Kelly and Lindsay*[15] challenged the position that there were no circumstances under which property could exist in human body parts. The case was that of a Royal College of Surgeons technician who removed body parts for use by an artist for moulds of a sculpture. The accused argued that theft could not have taken place as there were no property rights attached to the objects that had been taken. Although the courts did not recognise full ownership in this case they did identify a sufficient proprietary interest. In *Kelly* the Court of Appeal held that:

> . . . parts of a corpse are capable of being property within s.4 of the Theft Act, if they have acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques, for exhibition or teaching purposes.[16]

Here Rose LJ was reliant on the 1908 Australian case of *Doodewood v Spence*[17] which held that:

> [W]hen a person has by the lawful exercise of work or skills so dealt with a human body or part of a human body that it has acquired some attributes differentiating it from a mere corpse awaiting burial he acquires a right to retain possession of it, at least as against any person not entitled to have delivered to him for the purpose of burial.[18]

While the Court in *Kelly* did question the dubious origins of the work and skill principle Rose LJ felt it was for Parliament and not the Court to change it if required.[19]

The ruling in *Kelly*, however, was out of keeping with that made in *Dobson v North Tyneside Health Authority*[20] two years earlier. Here the

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[9] 169 ER 959.
[10] LQ 1 QB 475, (1867) LR 3 QB 67.
[11] 12 QBD 247.
[12] All ER 840.
[13] See P. Matthews, 'The Man of Property' (1995) 3 *Medical Law Review* 251-74, p.254.
[14] Mason and Laurie, *supra* n. 6.
[15] [1998] 3 All ER 741.
[16] *Ibid.* at 749-750.
[17] 6 CLR 406.
[18] *Ibid.* at 413-44.
[19] *Supra*, n. 14 at 630(g)

family of a woman who had died of a brain tumour needed samples of her brain tissue in order to establish that the hospital had failed in giving the appropriate diagnosis in an acceptable time. The hospital had disposed of the brain after a time and the family claimed that this was unlawful. Gibson LJ held that the hospital fixation of the brain for use within the coroner's jurisdiction was not equivalent to preserving it with the intention of using it as a specimen and, therefore, did not transform it into property. The matter was again addressed in 2004 in the case of *AB and Others v Leeds Teaching Hospital NHS Trust*[21] where the assumption in *Doodewood* was upheld[22].

Clarke LCJ, giving the judgement of the Court in *Yearworth*, does not deny that the storage of sperm in liquid nitrogen represented "an application to the sperm of work and skill which conferred on it a substantially different attribute".[23] In this respect his analysis is in keeping with the decision in *Kelly* rather than *Dobson*. Despite this the decision in *Yearworth* parts company with the 'work and skill' principle as the proper basis for conferring property rights. To this end the Lord Chief Justice says:

> [W]e are not content to see the common law in this area founded upon the principle in *Doodewood*, which was devised as an exception to a principle, itself of exceptional character, relating to the ownership of a human corpse.[24]

The Court followed on from this by explicitly rejecting the application of skill as a valid dividing line between those tissues which can be said to be owned and those which cannot, with his Lordship saying that such a distinction was "not entirely logical."[25]

The judgement here is interesting not only in going against the previous common law doctrine regarding the application of skill but also because it is could be considered to be out of step with the requirements of the Human Tissue Act 2004 on the matter. The 2004 Act is not directly relevant to the task at hand in *Yearworth* because sperm fall outwith its remit,[26] instead being subject to the statutory provisions of the Human Fertilisation and Embryology Act 1990 (as amended by the Act of 2008). Nonetheless the 2004 Act is noteworthy for the fact that it has enshrined the application of skill exception into statute.[27] It could be argued that, despite the flawed origins of the exception, that its presence in recent legislation gives an indication of the will of Parliament on the issue of human tissue. The Lord Chief Justice, however, notes that its wording does not necessarily preclude property being recognised on a different basis, and, as a consequence, the judgement here is not precluded by its provisions.[28]

It is clear that the 'application of skill' is not considered to be an adequate basis for property in human tissue. The Court is explicit that there

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[20] [1996] 4 All ER 479.
[21] EWHC 644.
[22] *Ibid.* at 156.
[23] *Supra*, n. 2 at 45(d).
[24] Ibid.
[25] Ibid.
[26] Human Tissue Act 2004, S. 53(1).
[27] S. 32(9)(c).
[28] *Supra*, n. 2 at 38.

can be property in human tissue quite regardless of whether anything has been done to it to alter its attributes. As we will see below the Court is concerned with the control that individuals have over their tissues, but despite this it is not altogether clear where it sees the claimants' property control as stemming from. In the judgement Clarke LCJ states that the men "[b]y their bodies, they alone generated and ejaculated the sperm."[29] Since he does not elaborate on this it is difficult to interpret but appears to be somewhat neo-Lockean in tone, perhaps alluding to a natural rights view of property. Whether this is correct or not it seems, at least, that the same reasoning could apply to other bodily tissues. It would not be prudent, however, to extend the implications of the words of the Court too far beyond their scope. For example, there is no evidence that it sees its judgement as applying to the whole body. Indeed there is something to be said to the contrary. Firstly, while the Court adopts a classical bundle of rights view of ownership[30], it sees this as "different collections of rights held by persons over physical and other things."[31] This wording, perhaps, suggests a view of property which draws a bright line between owner and what is owned.[32] It is not altogether apparent that this is the opinion in this case. A perfunctory acceptance is given to the ruling in *R v Bentham,*[33] which gives legal support for the notion of separation as pivotal in deciding whether something could be deemed to be the appropriate subject of property rights, yet great emphasis is placed on the legal rules that protect the "body and bodily autonomy".[34] It might be that their Lordships see the control rights entailed in these protections as amounting to property, but this might be to infer too much.

Control and property

Counsel for the Trust argued that the provisions of the HFE Act 1990 effectively obviated any claim that the men might have based in property.[35] It was counsel's contention that "the men could not have *directed* the unit to use their sperm in any particular way . . . [they] could only have *requested* the unit to use their sperm in a particular way".[36] This argument was rejected by the Court of Appeal which, while accepting that the claimants could not have directed the use of their sperm, denied that the presence of limitations on usage amounted to a negation of their ownership in their sperm.[37] Those units holding a licence pursuant of the 1990 Act are required to use stored gametes and embryos only for those purposes set out

[29] *Ibid.*, at 45(f)(i).
[30] For more on this see A.M. Honoré, 'Ownership' in A.G. Guest (Ed.) Oxford Essays in Jurisprudence (Oxford University Press 1961) pp.107-47.
[31] *Supra*, n. 2 at 28.
[32] For more on this type of view of property see J.E. Penner, *The Idea of Property in Law* (Oxford University Press 1997).
[33] [2005] UKHL 18; [2005] 1 WLR 1057. At section 8 Lord Bingham stated that "[o]ne cannot possess something which is not separate and distinct from oneself."
[34] *Supra*, n. 2 at 30.
[35] The amendments of 2008 were not in force at the time of this judgement, but would not have altered the outcome if they had been.
[36] *Supra*, at 43.
[37] *Ibid.*, at 45(f)(ii).

in Schedule 3 of that Act and for which consent has been obtained. As affirmed in the recent case of *Evans v Amicus Healthcare Ltd*[38] individuals may withdraw their consent at any time.[39] Rather than seeing the Act as reducing the proprietary control of the claimants over their sperm, the Court in this case have taken the stringent consent provisions of the Act as a powerful confirmation of their ownership. The fact that the control granted under the Act is a negative rather than positive control does not dissuade their Lordships in this matter.[40] In addition the Lord Chief Justice pointed to examples of so-called 'real' property where ownership is not denied in virtue of the limitations that are placed on the use of the object.[41]

In addition to domestic law considerations regarding recognition of ownership in body parts the Court also considered two Californian cases: *Moore v Regents of the University of California*[42] and *Hecht v Superior Court of Los Angeles County*[43]. Of the two it seems to be the second of these cases which is of interest for the judgement in *Yearworth*. This was the case of a woman whose deceased partner had deposited sperm for use at a later date. The Court in this case ruled that the sperm was capable of being property and thus capable of being subject to the provisions of the deceased's Will. In the case under consideration here it was the opinion of the Court that:

> [I]t is hard to regard ownership of stored sperm for the purposes of directing its use following death as other than a step further than that which the men invite us to take in the present case.[44]

As alluded to by the Lord Chief Justice it is logically difficult to see how the self-same sample of sperm (or indeed any tissue sample) could be considered to be property once the source of that sample has died if it was not already capable of being property before their death. Furthermore the ruling in *Hecht* cannot simply be taken to be the recognition of a proprietary interest that begins after death. This is because the judgement was concerned with the disposition of the sperm at Will and as such it is concerned with the legitimacy of a decision which took place pre-mortem. Effectively the sperm must have been capable of being property at the time the Will was drawn up.

Gratuitous bailment

It is clear that the Court in *Yearworth* considers the rights of control that the claimants had over their samples to be key. As such once their Lordships were satisfied that since the sperm was to be regarded as the men's property for the purpose of an action in tort that this necessarily implied that the claimants were capable of holding "such lesser rights in relation to it as

[38] [2005] Fam 1.
[39] In the case of embryos this means up until the point of implantation.
[40] *Supra*, n. 2 at 45(f)(ii - iii).
[41] Ibid.
[42] 793 P.2d (Cal. 1990).
[43] (1993) 20 Cal. Rptr. 2d 275.
[44] *Supra*, n. 2 at 40.

would render them capable of having been bailors of it."[45] The interest of the Court in assessing the matter through the law of bailment rests on the supposition that the facts of the case more closely resemble contract than tort.[46] Bailment is notable in its distinction from contract since only possession rather than ownership is transferred between the bailor and the bailee. Given the earlier finding in favour of ownership there could have been no disputing, in this case, the fact that the Trust had taken possession rather than ownership of the sperm samples. It was, however, to be determined what duties and responsibilities this entailed and the scope of these. The Court, in its assessment, relied on the judgements in *Coggs v. Bernard*[47], *Wilson v. Brett*[48], *Midland Silicones Ltd v. Scruttons Ltd*[49], *Gilchrist Watt and Sanderson Pty. Ltd v. York Products Pty. Ltd*[50], and *Port Swettenham Authority v. T.W.Wu and Co. (M) Sdn. Bhd.*[51]. Utilising the principles in these cases the conclusion reached by their Lordships was that a gratuitous bailment existed and that by taking exclusive possession of the sperm samples the fertility unit at the hospital "held itself out to the men as able to deploy special skill in preserving the sperm."[52] In accepting possession of the sample the unit took on a duty to take reasonable care of the sperm and the subsequent events constituted a breach of that duty.[53] In addition, given its resemblance on the facts to contract, the Court denied that liability in this case lay in tort.[54]

The judgement here is particularly noteworthy because it is the first time that a case involving human tissue has been considered under the law of bailment. The Court in this case was satisfied that any assessment for damages could include damages for psychiatric injury and/or mental distress. This is to the advantage of any claimants bringing an action since these are notoriously difficult to recover in tort. Thus the ruling creates another option for those seeking remedial action. While it seems likely that similar reasoning would obtain in other cases involving gametes (and probably embryos), it is not clear that it would hold in cases involving other tissues. This is because great emphasis was placed on the mental distress/psychiatric injury suffered by the men due to the implication of the loss of the sperm for their future chances of fatherhood.[55] While cases involving other tissues may well be actionable in bailment they are unlikely to attract the same level of damages as those involving gametes or embryos.

Also of significance amongst their Lordships comments on bailment is their discussion of *Washington University v. Catalona*[56] which they used to reinforce their position regarding property. Primarily this case was about

[45] *Supra*, n. 2 at 47.
[46] *Supra*, n. 2 at t 50.
[47] (1703) 92 E.R. 107.
[48] (1843) 152 ER 737.
[49] [1959] 2 QB 171, [1961] 1 QB 106.
[50] [1970] 1 WLR 1262.
[51] [1979] AC 580.
[52] *Supra*, n. 2 at 49 (a) – (f).
[53] Ibid.
[54] *Ibid.*, at 50.
[55] *Ibid.*, at 9 – 12.
[56] (2006) 437 F Supp 2d 985, U.S. District Court, Eastern District of Missouri.

whether individuals who had donated tissue to the University had any "continuing rights in relation to it as bailors".[57] The Court held that they did not because they had donated the tissue.[58] For Clarke LCJ the fact that that the tissue had been donated implies that it "was property capable of passing from the donors to the donee."[59] This seems to be a direct challenge to those who would deny property in body parts but yet want to allow for individuals to control the fate of their organs and tissues. This is a significant indication that the Court does not consider proprietary considerations to be fundamentally linked to commercial ones and that in cases of gift or donation the reason that individuals can legitimately donate is because they are considered to own the organ or tissue in question in the first place.

Conclusion

This case is not the first time where it has been held that there is property in human tissue, but hitherto the approach of the law to this has been somewhat muddled. Mason and Laurie commenting on the approach of the law to the issue of to the governance of human tissue have previously said that:

> [T]he law tempers the consequent confusion in delivering one clear message: the one person who is least likely to have property rights in body parts is the person from whom these parts were taken.[60]

The judgement in *Yearworth* is striking and represents a step away from both confusion and injustice. The Court's rejection of the work or skill principle will most likely be welcomed by those who have for a long time pointed to its dubious origins and questioned its application in governing human tissue. The effect of this move away from this principle as the sole basis of property in human tissue is to shift the property focus, and the consequent protections of this towards the individuals who are the sources of body parts and tissue samples. The application of skill does give a way to recognise property in human tissue. However, without additional bases for recognising property, its effect is to exclude the very source of these tissues from legal ownership. The ruling in *Yearworth* tries to redress the balance and explicitly vests individuals with property rights in their own body parts and tissues (or at least in their gametes). In addition, it sets a precedent for individuals to seek a remedy in bailment. This gives claimants more scope to recover damages than a similar claim in tort.

The good of this development notwithstanding it is not altogether clear what the implications of the judgement are for wider considerations involving the use of human tissue. The reasoning employed by the Court could logically be extended to apply to bodily tissues other than gametes and indeed whole organs and body parts, but it remains to be seen whether

[57] *Supra*, n. 2 at 48(e).
[58] *Supra*, n. 56 at 1001.
[59] *Supra*, n. 2 at 48(e).
[60] Mason and Laurie, *supra*, n. 7, p. 719

members of the judiciary will follow suit if relevant cases come before them. It could be that gametes are seen as a special type of tissue which compelled their Lordships to try and seek adequate remedy for the men.

Those who oppose the notion of property in the body might argue that consent does the work needed in offering protections over the body and its parts and products. Yet this case demonstrates that there are situations in which it is necessary to appeal to proprietary notions in order to offer remedies for wrongs committed. While the scope of the argument put forward in this judgement remains to be tested, the one thing that is surely certain is that it will be tested. Now that the door has been opened we are likely to see the issue of property in the body and its parts being argued before the Courts again in the future.