Your Body Parts and the Law
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17th January 2022

Introduction

Why is the question of whether we own our body parts one that anyone would even ask?

And if they did ask it, why is it a question to which we should then turn our minds at all?

Who cares if we 'own' our body parts or not – does it really matter?

Hopefully over the course of the next hour, I'll convince that it might matter very much indeed whether the law takes the view that you (or someone else) owns your body parts.

To achieve this, I'm going to talk to you about why people care about the fate of their body parts and why they should care. I'm going to give a sense of the *value* of those parts, the interests people have in them and introduce you to numerous situations in which these various interests have come into conflict. I'm also going to demonstrate why it is in fact deeply problematic if the law *does not* permit the ownership of body parts.

So where to start? Well, it might help to first explain what I mean by 'body parts'.

And as I do that, I'm going to tease out some of the *uses* we put those parts to, and some of the reasons they are important to various people – what I tend to refer to as 'why people have an interest in them'.

What Are 'Body Parts'? And Why Are They Important to People?

By 'body parts', I mean just that – parts of your human body. Sometimes, I might also use terms like 'human biomaterials' and 'human tissue', as well as 'organs'. But as a general approach, what I mean is parts of your living body (or of the body of someone who has died).

These range from whole limbs – like an amputated leg – to whole organs, to blood, hair, skin, bone, down to cells, including ova and sperm.

Now, before the advancements of modern medicine, body parts did not have that many uses. Teeth have been used to make false teeth for centuries, and we've used hair for wigs, but for many centuries parts of bodies did not have a great deal of value. They, and the whole deceased body, however, were the remaining symbol of the person who had died—and hence was treated with care and respect as part of the rituals surrounding death. The other main value of bodies and their parts was for dissection as part of the study and teaching of anatomy.

Deceased bodies and their parts became and have remained a tool for teaching.

Parts of bodies were removed from cadavers and expertly dissected, and then preserved to enable medical students to study their structures and come to understand the workings of the body. So, this is a Preserved Specimen: a sagittal section of a uterus, ovary, vagina and bladder sometime after birth. The specimen is from the Hunterian Museum at the Royal College of Surgeons of England.

However, the value of body parts, and the uses to which they could be put, exploded with the medical developments that came over the course of the twentieth century. Discoveries in the field of transplantation, and the overcoming of the problems of rejection, meant that parts of deceased bodies could be transplanted into the living to save lives. Living donations of kidneys, liver and lung are also possible, in fact, more than

just organs can be donated. We donate blood, plasma and bone marrow. Post-death, bone, skin, eyes and many other bodily structures and tissues can be removed and given to others to improve their health or even save their lives. I imagine we're all familiar with the process of organ donation.

So, we transplant body parts as medical treatment. We also use these biomaterials to make therapeutics that treat disease and other conditions.

Biomaterials also extend to all sorts of tissue and material that we *remove* or *lose* from our bodies --- dandruff, skin cells, hair that we shed, fingernails, semen, menstrual blood and ova… we all lose these bits of tissue (and many more) all the time.

We often remove tissue for testing when a disease is suspected. This is precisely why we give blood and tissue samples when we requested by our doctor or a hospital.

It's also why at birth, a blood sample is taken from almost every child and tested for a range of genetic conditions such as Phenylketonuria (PKU), as a means of screening for diseases that can treated if caught early. For example, PKU can be managed via a special diet, but if it is not, leads to numerous health problems.

But why would I particularly think about the *loss* of biomaterials? One key reason is that most body parts and biomaterials contain DNA, and our DNA has the potential to reveal a great deal of information about us – our predisposition to diseases, whether we are carriers of a genetic mutation that causes disease, our familial relationships and so on. Our DNA can also be used to match a person to a sample, and so determine whether they were in a certain place at a particular time.

Some tissue can also reveal other things about us --- such as whether we've ingested drugs or alcohol --- this is of course exactly why a hospital might take our blood, and so too might a police officer in particular contexts, to determine whether we were driving under the influence of alcohol, or as part of a forensic investigation.

Our biomaterials are a source of *information,* and this raises all sorts of questions about privacy, because access to our tissue can also mean access to our personal information.

Indeed, if you've ever seen a film called *Gattaca*, you might remember many of the characters being very careful to dispose of any material they shed for fear that others might test it and learn things about them they're rather keep private. The film is called *Gattaca* as a reference to the four bases that make up DNA – A, C, T and G, as you can see here.

So, we can already see quite a few reasons people might have an interest in their own or other's body parts. To learn things about them. For criminal investigations. For determining parentage. For treatments.

And we can see some interests emerging --- protecting the community by helping to identify criminals; improving health and saving lives; working out who we're related to; privacy.

We can also see how these might come into conflict --- my privacy interests and someone else's interests is determining parentage.

We as a community have another kind of interest in people's biomaterials and body parts --- these tissues are used in a vast array of research endeavours.

The Medical Research Council notes that 'the use of human tissue is crucial to increase understanding of human disease and to help develop new and improved treatments'.[1] The Human Tissue Authority has made a similar comment, pointing out that[2]: 'Examples of types of research involving human tissue include: developing screening tests for different types of cancer, testing new treatments for conditions like heart disease and researching how stem cells could be used to treat conditions such as multiple sclerosis'.[3]

Much of this research now entails using large *collections* of biomaterials, which when collected are referred to as biobanks or biorepositories. Such collections, like UK Biobank, are exceptionally valuable and enable unique forms of research, particularly when combined with medical information and history about the sources

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[1] Medical Research Council, 'Ethics and Research Policy: Use of Human Tissue', available at www.mrc.ac.uk/Ourresearch/Ethicsresearchguidance/Useofhumantissue/index.htm.
[2] Human Tissue Authority, 'Research', available at: www.hta.gov.uk/licensingandinspections/sectorspecificinformation/research.cfm.
[3] ibid.

of that tissue.

Later on, we will see just how valuable.

Beyond research, body parts and materials are now used for tissue engineering, and for the development of biohybrid (part artificial/synthetic, part biological) cells, tissues and organs.

A great of this research and tissue use happens in publicly funded organisations, such as universities and hospitals. But as you might be beginning to suspect, there is commercial dimension to such research too.

Biomaterials are bought and sold, with commercial firms supplying tissue for research on a for-profit basis.

In 2020, one report valued the global cell line development services market at $789 million but predicted its value to reach $2.44 billion by 2030. The entire global cell therapy industry was estimated to have passed the $1 billion mark in annual turnover years ago.[4]

Cell lines, which are created through discovering a cell that is capable of being manipulated to self-replicate indefinitely, are a vital resource for research, but are also hugely important in the manufacture of biologic drugs. They have many research uses, from such as the study of gene function, and they are also used for the bioproduction of vaccines and antibody and cell therapies.[5]

Some cell lines have been so valuable, they have become famous (and sometimes infamous), such as the HeLa cell line, that was crucial to the development of the Salk vaccine for polio but created using cells taken without consent. Or the Mo cell line, again created without consent using cells taken without the proper disclosures, and which was eventually the subject of litigation in the John Moore case in the 1990s.

So human parts can be valuable. And when something is valuable and also scarce, demand emerges. Like the body snatchers of old, researchers and medics have, on occasion, taken bodily material without consent --- precisely because they want to access both its potential, and also sometimes its commercial value.

While there is much said about the research and treatment uses of biomaterial and body parts, less attention has been paid to other uses, interests and values of tissue outside these contexts. But when we are thinking of how to regulate, we need to produce an approach that can manage *all* uses, or at least produce principles that can be extrapolated to them.

One such entirely different use is the sale of hair for extensions and wigs. You can buy some easily online.

More problematic is the underground market in human remains, where enthusiasts build ‘collections’ of what they consider interesting specimens.

Another entirely different commercial context is the creation of artistic works from body parts and biomaterials. Marc Quinn, for example, produces sculptures using his own (and his family’s) blood. *Self*, a sculpture of his own head created from 9 litres of his own blood was sold to the National Portrait Gallery for £300,000 in 2012.[6]

The performance artist, Orlan, produced works from tissue removed from her body during plastic surgery. Jenny Holzer creates pieces using human bones.

These become items, objects, that are bought, sold, given and displayed, used, possessed and can be damaged or destroyed. They are things in the world.

Perhaps the most well-known of these creations outside the medical and research world are Gunter von Hagen’s *BodyWorld’s* pieces.

Part showman, part educator, von Hagens developed a way to ‘plastinate’ human bodies and parts and created a travelling show. His goal was, he says, to educate the world, but there is more than a little of the

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[4] See C Mason, DA Brindley, EJ Culme-Seymour and NL Davie, ‘Cell Therapy Industry: Billion Dollar Global Business with Unlimited Potential’ (2011) 6 *Regenerative Medicine* 265, 266.

[5] https://www.europeanpharmaceuticalreview.com/news/159967/cell-line-development-services-market-to-value-2-4-billion-by-2030/#:~:text=The%20market%20was%20valued%20at,but%20also%20biologic%20drug%20manufacturing.

[6] A Akbar, ‘National Portrait Gallery Acquires Marc Quinn’s Bloody Head’ (London, *Independent*, 10 September 2009), available at: www.independent.co.uk/arts-entertainment/art/news/national-portrait-gallery-acquires-marc-quinns-bloody-head-1785133.html. See further I Goold, ‘Why Does it Matter How We Regulate the Use of Human Body Parts?’ (2014) 40 *Journal of Medical Ethics* 3.

PT Barnum about him.

Body parts have been displayed in many ways over the years, some in troubling contexts and collections. Remains taken from indigenous communities have been held and displayed in museums for centuries, and while some efforts towards repatriation have succeeded, there is much still to be done.

Such collections are deeply distressing those communities, in part because of the spiritual harms they consider them to perpetuate, and in part because of the legacy of theft and murder they represent.

So, when we think about how body parts are used, there are numerous dimensions to this, and consequently a vast array of interests --- and potential conflicts and complexities with which the law must deal.

This myriad of uses throws up numerous questions for the law. A system that could navigate these uses and potential conflicts should be able to answer question such as

- Who is entitled to possession of tissue?
- Can tissue be sold, bought or bequeathed?
- Can other people access tissue to gain information from it?
- What sorts of rights do family members have where they need access for their own health?
- Whose consent, if any, is needed to use retained tissue in research? Forensics? Medical diagnosis?
- Who should share in the proceeds of profitable research using tissue?
- Should different tissue be regulated differently and if so, how do distinguish between tissues?

More fundamentally, we should ask:
What control ought we to have over our bodies and biomaterials, and how much control should be available to persons other than those from whom the material was obtained?

So let us see how the current law does answer these questions, and how it often fails to do so.

Origins of the Current Law

Now, I'm an historian as well as a lawyer, so I always think it's important to know where the law we have now came from, but that's even more true when it comes to the law on bodies and their parts.

As I said, for a long time, bodies and their parts didn't have any obvious value, aside from their importance as a symbol of a person who once lived, and as a means to learn about the workings of the body. These two values, however, produced a series of cases over some centuries that eventually hardened into a rule that shaped the law for over a century, and continues to do so today.

These values led people, as we shall see, to take bodies, sometimes to unearth them, and then to dissect them (or supply them for dissection). They also led others to dispute how a body might be dealt with, and so led them to disinter bodies, rebury them, cremate them and in doing so, the law often became involved.

We need to understand both the courts response to these two approaches to bodies, and the legislatures. Let's take the problem of a supply for dissection first.

Dissection was for a long time regarded as a desecration of the body in Christian England. It was believed that the body had to be buried whole to ensure salvation, for, as Caroline Walker Bynum has written, 'salvation [was] wholeness, hell [was] decay and partition'.[7] This perception was based on the then-prevalent Christian belief that the body should remain whole after death to enable resurrection on the Day of Judgement.[8] Consequently, dissection was not a fate to which many would willingly submit their corpses.

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[7] C W Bynum, *The Resurrection of the Body in Western Christianity,* Columbia University Press, New York, 1995, 114 as quoted in D Nelkin and L Andrews, 'Do the Dead have Interests? Policy Issues for Research after Life' (1998) 24 *American Journal of Law and Medicine* 261, 262.

[8] R Scott, *The Body as Property* (London, Allen Lane 1980), 13. Though there are many strands of belief within what can be called the Judaeo–Christian tradition, William May has in most strands it is believed that there is 'a profound link and identity of the spirit with its somatic existence'. This belief leads to reluctance to allow the body to be tampered with after death. See JF Childress, 'Attitudes of Major Western Religious Traditions toward Uses of the Human Body and Its Parts ' in DA Knight and P J Paris (eds), *Justice and the Holy* (Atlanta, Scholars Press 1989), 216–217. Ruth Richardson also provides an excellent discussion of aversion to dissection in the English context in R

Despite this, from the 14th and 15th centuries onwards, the study of medicine increasingly created a desire for bodies to examine and study, and so one of the first conflicts that the law had to face in relation to what is done with bodies emerged --- the clash between demand and supply of bodies for dissection.

In England (as well as elsewhere), by the 18th century, the practice of dissection was widespread, but no easy supply was available to meet it. This led to numerous instances of the theft of bodies, of grave robbing and eventually (when Burke and Hare entered the fray), to the murder of the living to meet this ever-growing demand.

There was, however, no regulated supply of human bodies for anatomical study in the United Kingdom until well into the eighteenth century and the passage of the *Murder Act 1752* (UK) (Murder Act), which permitted the judge to sentence a convicted murderer to order that the murderer's body be donated to the Royal Colleges for anatomical study.[9]

This did not meet demand, however, and by the early nineteenth century thousands of corpses were stolen annually, the numbers growing as the body-snatchers became more organised and formed liaisons with anatomists and medical schools.[10]

A Parliamentary Select Committee was established in 1828 to consider the problem, taking evidence from a number of retired resurrectionists. One admitted to stealing more than a thousand adult corpses and almost two hundred of children between 1809 and 1813, while the prominent surgeon Sir Astley Cooper (1768–1841) reportedly boasted that he could acquire the corpse of any person 'let his situation in life be what it may'.[11] Burke, the famous body-snatcher was caught and eventually executed in 1829.

This execution, perhaps in part because it was held in Scotland, did not spur the English Parliament to further action. It would take the violent death of a fourteen-year-old boy in 1831 to do so. In November of that year, John Bishop and Thomas Williams murdered Carlo Ferrari and, with their accomplice John May, removed his teeth and sold them to a dentist, and his body to an anatomist. But both the dentist and the anatomist were suspicious of the body's source as it was clear that the youth had died violently and that the teeth had been ripped from his jaw. The anatomist called the police and the three were apprehended only hours after the murder.[12] Public outcry forced the hand of government, and a choice had to be made between accepting the practice of dissection or turning a blind eye to the forces that were meeting the increasing demand. Within ten days of their conviction and execution the *Anatomy Act 1832* was passed. Those in lawful possession of unclaimed bodies were permitted to hand them over for study, that no relative objected. These were generally the bodies of the poor, who could not afford to bury their deceased loved ones and so did not collect their bodies.

The Act also provided that a family member could donate the corpse of a relative, in return for burial at the expense of the anatomy school.

As a result, the bodies of those too poor to pay for their own funerals would be supplied for dissection by medical students and anatomists.

One bad solution was swapped for another, and the fact that there was considerable protest against the Act, even extending to the vandalization of dissection theatres in an effort to stop the practice of dissecting the poor, evidences how strongly people feel about the treatment of bodies.

The Anatomy Act eventually put an end to the black-market trade in cadavers and body-snatching by providing a regular and adequate source of supply. But it also set the foundations of the approach to the

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Richardson, *Death, Dissection and the Destitute* (London, Routledge and Kegan Paul 1987), ch 1, 2.

[9] Much has been written about associations this and similar legislation in the United States created between punishment and dissection. For example, Helen MacDonald has stated that as a result, in performing dissections 'surgeons were acting as secondary executioners of the law': H MacDonald, *Human Remains: Episodes in Human Dissection* (Melbourne, Melbourne University Press 2005), 2. See also M Sappol, *A Traffic of Dead Bodies: Anatomy and Embodied Social Identity in Nineteenth-Century America* (Princeton and Oxford, Princeton University Press 2002), ch 4.

[10] DG Jones, *Speaking for the Dead: Cadavers in Biology and Medicine* (Aldershot, Ashgate Publishing 2000), 45.

[11] Ibid.. Indeed, one contemporary source notes that the only patients to die in charitable hospitals and *not* be dissected were those whose friends sat with their corpse until it was taken away for burial: student notebook (1822) as cited in H MacDonald, *Human Remains: Episodes in Human Dissection* (Melbourne, Melbourne University Press 2005), 29.

[12] See generally R Scott, *The Body as Property* (London, Allen Lane 1980), 11.

supply of tissue - bodies, and their parts could be used, as long as there was no objection… but those who might object lacked power, and the need to meet demand trumped the interests of those from whose bodies were used and their left behind loved ones.

The Anatomy Act remained in force until 1984.

But the legislative story is only one part. The common law, from the 17th century to the 20th century, lays the other vital part of the current law's foundations.

Our journey through the case law begins in the 17th century, because it is here that we can find the origins of one of the fundamental elements of the common law position on the status of human tissue --- the rule that a corpse cannot be the subject of property rights—what is often called the 'no property in a corpse' rule.

The rule's origins are murky, its foundations dubious, and arguably, as we shall see later, it has been undermined by recent decisions, but it remains good law for now.

These origins lie in the 1614 decision in *Haynes' case*.[13] William Haynes, having disinterred four bodies, removed the winding sheets in which they were wrapped and subsequently reburied the bodies. The issue was to whom the sheets belonged before they were taken.

The court decided that the property vested in whoever had owned the sheets before the bodies were wrapped in them and Haynes was found guilty of petty larceny.[14] As the bodies were replaced, clearly *Haynes* did not concern the taking of a body, nor who might own that body.

Yet despite this, the case was taken by both legal commentators and judges to mean that *the corpse itself* could not be property.[15] The basis for this misinterpretation most likely stems from comments made *obiter* that

> *"the property of the sheets remain in the owners, that is, in him who had property therein, when the dead body was wrapped therewith; for the dead body is not capable of it … a dead body, being but a lump of earth, hath no capacity."*[16]

The case was cited as a founding just such a rule by classical legal scholars such as Sir James Stephen[17] and Sir Edward East.[18] Others, such as Sir Edward Coke[19] and Sir William Blackstone,[20] merely asserted that there could be no property rights in a corpse without citing any convincing authority at all, suggesting an existing belief that there was such a rule

In the 18th and 19th centuries, numerous cases came to the courts concerning dealings with buried and unburied bodies (the use of body *parts* was not yet such an issue). We do not have time to consider them all and their complex dimensions, but what was clearly recognised in almost every case was that body could not be owned by anyone.

For example, *Exelby v Handyside* (1749) concerned an action for the return of the body of stillborn conjoined twins. Dr Handyside, a male midwife, delivered the twins and took them with him after the birth. The twins' father brought an action in trover for their return. As reported in East's *Pleas of the Crown* in 1803, the court found that Dr Handyside should return the children to their father for burial 'as no person had any property in corpses'.[21]

Some years late, *R v Lynn* (1788), the first case concerned with the theft of a corpse from a graveyard for

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[13] (1614) 77 ER 1389.
[14] *Haynes' case* (1614) 77 ER 1389 , 1389.
[15] See further P Matthews, 'Whose Body: People as Property' (1983) 36 *Current Legal Problems* 193, 197.
[16] *Haynes' case* (1614) 77 ER 1389 , 1389.
[17] J Stephen, *A Digest of the Criminal Law (Crimes and Punishments)* (London, Macmillan 1977), 252, Art 318.
[18] E East, *Pleas of the Crown, 1803* (London, Professional Books 1972), 652.
[19] Coke merely reported the case accurately as holding that 'the dead body is not capable of any property': E Coke, The Third Part of the Institutes of the Laws of England: Concerning High Treason, and other Pleas of the Crown, and Criminal Causes, Thomas Bassett, London, 1680, 110. What should be noted at this point is that only Coke was writing at the time Haynes' case was heard. Indeed, he gave advice on the case to the judges of Serjeant's Inn. Both East and Stephen made their commentary on Haynes after the later case of R v Lynn [1788] 100 All ER 395 was decided.
[20] W Blackstone, *Commentaries on the Law of England* (London, 19th edn, Sweet, Maxwell and Stevens 1836), 236.
[21] East, *Pleas of the Crown*, vol 2, 652.

dissection in which the issue was the actual theft of a body,[22] reference made to Edward Coke's view that the corpse was *nullius in bonis* (not the property of anyone).

This position was repeated with approval throughout the 19th century, in cases dealing with bodies destroyed to avoid an inquest; moved to enable reburial elsewhere and a number of decisions dealing with who had the right to control a body post-death.

What came out of these cases by the end of the 20th century were two things.

1. That a body (not yet its parts, as these had not been considered) could not be *owned*. It was no-one's property.

2. BUT three cases established that a person can have a right to *possession* of a body for the purpose of disposing of it.[23]

This second rule is still how the law thinks about control of bodies post-death --- someone, such as the executor is allowed to *possess* it to ensure burial.

You might wonder why I am labouring this distinction between *owning* a body (not possible) and having a legal right to *possess* a body.

This distinction is really important in the law of property.

To fully explore what the law means by 'ownership' and 'possession' is well beyond our time limit. But a simple analogy can help.

Think of an article of clothing you own. Let's say it's a suit. You would say (and the law would agree in a sense) that you 'own' that suit. You bought it, you are in control of it, you can wear it, you can sell it, you can throw it in the bin as you wish. I, however, can't do any of those things with it and if I tried, the police might charge me with theft, and you might make some civil claims against me for interfering with your property.

But what about when you take it to the dry cleaners? You hand it over, the dry cleaner keeps in in their shop for a day or two, cleans it but then when you pay, they give it back (and if they didn't, you'd probably be calling the police again).

Are they the owner? No. But are they a thief? Of course not. What they have there is a temporary right to possess your suit and do certain things with it, but only in line with terms on which you've handed it over to them. So, they can clean it, but they can't wear it to a dinner party. And they have to give it back. In law, we call this a 'bailment', and it illustrates the difference between owning something and merely having a legal right to possession for a purpose. In these corpse cases, it's the latter that the 19th century cases established vested in certain people in relation to a corpse.

So, this is where the courts left things as the 19th century waned. No ownership of a corpse, but it could be possessed to ensure decent burial. Nothing about parts of bodies.

Twentieth Century Turn

So, what happened next? We've entered the 20th century, it appears there's a rule against ownership of a corpse, but it's support is ropey at best. The law gives us no clear indication of how we can treat *parts* at all – whether from people who are still living or for those who are deceased.

But this fundamental opposition to property in a corpse began to create legal complexities in the 20th century, and the cases in which these were navigated are illuminating about what we need in a legal response to the challenges using human tissue and parts present.

To find out what happens next, we need to leave the English law and examine a curious case that came eventually after several appeals to the High Court of Australia (the highest court) – *Doodeward v Spence* (1908).[24] While *Doodeward* is an Australian decision, it was the foundation for three English decisions in

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[22] (1788) 100 ER 395.

[23] *R v Fox* [1841] 2 QB 346; *R v Scott* [1842] 2 QB 248 (cited in *Williams v Williams*). In both cases, a gaoler refused to deliver up a body and it was held that though the body was not property, the executors had a right to possession of it.

[24] (1908) 6 CLR 406.

which it was followed in the late 20th and early 21st century, and so it is important in the English context.

Its influence has been profound because it was the first case to deal with a more modern problem of tissue and body use, that is, a use that did not fit into the old categories of buried and unburied corpses. As such, it ushered in a new era of cases that began to take new approaches to the emerging uses of bodies and human tissue.

The facts of the case in fact bear some similarity to those of *Dr Handyside's* case. The plaintiff, a showman, had for some time been exhibiting a jar of spirits containing the corpse of an infant with two heads. After charging the plaintiff with indecent exhibition of a corpse, the defendant, a policeman, took the body, still in its jar, and retained it. When the plaintiff requested the return of the jar and the body, the police returned only the jar and the spirits that had preserved the corpse. The plaintiff then brought an action against the policeman in detinue for the return of the body.

Detinue is an old action for the return of property. For such an action to succeed, the object in question must be legally recognised as property, so for the first time the question of whether a body could be property was squarely before a court.

The High Court found that the body *could* be property, although the judgments of Chief Justice Griffiths, Justice Barton and Justice Higgins, were hardly a model of unified thought.

Justice Higgins, dissenting, took the view that 'there can be no right to recover in trover or in detinue in respect of a thing which is incapable of being property',[25] and that '[n]o one can have, under British law, property in another human being—alive or dead'.[26]

Justice Barton made clear that he accepted that there was no property in corpses awaiting burial, but he upheld the appeal on the basis that the foetus in question did not come within any definition of a body to be buried. He reasoned that a stillborn child could not be seen as such because it had

> *"never existed independently of the physical attachment to the mother. It was never alive in the ordinary sense of human life … it ha[d] been preserved in a jar or bottle with spirits since the day of its birth, now forty years ago. Add[ed] to these facts that it [was] an aberration of nature, having two heads. Can such a thing be, without shock to the mind, associated with the notion of the process that we know as a Christian burial?"*[27]

Not having ever been a person, it did not come within the ambit of the rule against property rights in bodies. Given that such an opinion is an anathema to modern thinking, Barton J's argument probably should not be accorded much weight, but regardless he supported the majority view that this body could be property, and agreed, he said, with Griffith CJ's reasons, which I will now come to.

It is Chief Justice Griffith's judgment that has had the greatest impact, and which shaped the approach of the courts in both Australia and England.

He held that 'it [did] not follow from the mere fact that a human body at death is not the subject of ownership that it [was] for ever incapable of having an owner'.[28] His Honour made clear that he did not accept the writings of the classical legal commentators who may be seen as the original source of the rule --- they were outdated. Therefore, Griffith CJ considered that the matter before him could therefore be decided as one of first instance 'in accordance with general principles of law, which are usually in accord with reason and common sense'.[29]

The Chief Justice considered that where there were no public health or public decency reasons for prohibiting continued possession, that possession could be lawful, having already pointed to the fact that it was 'idle to contend in these days that the possession of a mummy, or of a prepared skeleton, or of a skull, or other parts of a human body is necessarily unlawful'.[30]

So, although he accepted the existence of the rule against property in corpses but held that it had never

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[25] Ibid, 417 per Higgins J.
[26] Ibid, 419 per Higgins J.
[27] Ibid, 416–7 per Barton J.
[28] *Doodeward v Spence*, 412 per Griffith CJ.
[29] Ibid, 412 per Griffith CJ.
[30] Ibid, 413 per Griffith CJ.

been intended to be of general application. He was also recognising that a certain pragmatism ought to be employed when considering the issue of property in the body. Given that the law had accepted the need to possess a body for burial, and later sanctioned possession of bodies for anatomical study, there was no common law barrier to similar arguments being made for a possessory right in other, related circumstances.

Having held that a proprietary right to possession could exist and be protected by property remedies, Griffith CJ then considered in more detail the circumstances in which a body or its parts could become subject to this right.

He held that bodies and parts could become the subject of property rights 'when a person has by lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession 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 against any person not entitled to have it delivered to him for the purpose of burial'.[31] He did not, however, limit the possible situations in which a body might become property to those merely where work or skill had been employed. He held that it was 'not necessary to give an exhaustive enumeration of the circumstances under which such a right [to permanent possession] may be acquired'.[32]

This was a huge departure.

It created the basis for what we now often refer to as the 'work and skill exception' to the no-property rule.

It recognised that bodies were used and dealt with in ways beyond burial, and that these required a legal solution, and it turned to property principles to achieve it.

And it offered such a solution, which when future challenges came to the English courts, was accepted as the right approach. Whether this was the best decision, well, that we shall come to.

For another ninety years or so, not much happened in the common law relating to the no property rule. A few small cases troubled the English courts, but there was little if any direct consideration of what to do about the status of tissue and body parts.

Legislatively, a change did come. The Human Tissue Act 1961 was passed, creating a basic consent model for the use of human tissue and body parts, largely in anticipation of the new successes in organ and tissue transplantation. The *Anatomy Act* (1832) continued to apply, as did legislation allowing access to bodies and the removal of tissue for post-mortem examinations.

I say 'basic' because the Act (now repealed) lacked detail. Its ambit was limited to the use of bodily tissue for therapeutic purposes, medical education or research, but these purposes were not defined. It allowed a person to consent to the use of their tissue for therapeutic purposes, medical education or research, or for the person lawfully in possession of their body after death to authorise such use if they had no reason to believe the deceased (or their family) had any objections. However, it gave no indication of what was required for a consent to be valid. Consequently, it was later criticised by Shaun Pattinson as being

> *"was outdated and littered with holes and ambiguities. The dearth of case law meant that the law was unclear on many issues that were left the common law."*

Similarly, Margaret Brazier referred to the old Act as 'a toothless tiger imposing fuzzy rules with no provision for sanctions or redress'.

Despite these problems, the Act remained in force for over 40 years, and was, with the Anatomy Act, the key piece of legislation that determined how bodily tissue might be removed and used from bodies.

This was the law as 20th century was coming to a close. And it was in the late 1990s, that this patchy legal framework came under serious challenge.

But at this point, I want to pause this narrative of legal developments, and think about why this framework might be so unprepared to deal with the challenges that were about to arise and begin to suggest to you why this resistance to treating bodies and parts as property would prove to be so problematic.

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[31] Ibid.
[32] Ibid.

A Legal Framework Not Ready for the Challenges to Come

Up until the 20th century, whether or not biomaterials could be considered property was a largely inconsequential question for the law because the question of control and use rarely arose, and where they did in the 19th century, a solution was found in the acceptance of a possessory right for burial. The supply of bodies (and later tissue) was met via a simple consent approach.

But the medical and scientific developments of the later 20th century, the discovery of the importance of genetics, and all the other modern uses I outlined earlier, began to create challenges that some of the cases we're about to look at show that the law was not in a state to deal with the questions they raised.

The law as it stood in the early 1990s could not tell us who could use human tissue, beyond some consented research uses. It could not tell us what happened if tissue was sold or damaged or stolen. And it gave virtually no guidance on who, when a dispute arose, had the right to control or make decisions about that tissue.

As a consequence, the courts found themselves facing considerable difficulty when two particular cases arose that brought many of the issues to the fore.

The first of these was *Dobson v North Tyneside Health Authority* (1996) (*Dobson*). When Deborah Dobson died of a brain tumour at a hospital run by the Newcastle Health Authority and her body was autopsied, and small sections of her brain were removed and preserved on slides. Two years later, her family accused the hospital of negligence and wanted to get hold of this preserved brain tissue as evidence. The slides and tissue had been destroyed.

The family then brought an action against the hospital for this destruction, and argued that the Newcastle Health Authority, in holding the brain, were gratuitous bailees and were therefore not permitted to destroy, lose or convert or otherwise wrongfully interfere with it.[33] To support this claim, they had to prove that the brain was property—that is, an object that could be subject to a bailment agreement.

'Bailment' as we've seen, refers to a relationship where one party holds property that is owned by someone else. They have a right to possess it for certain purposes. 'Conversion' is an intentional tort that is committed by "taking with the intent of exercising over the chattel an ownership inconsistent with the real owner's right of possession".

So to succeed, the brain tissue (a body part) *had* to be property. They argued that *Doodeward v Spence* meant that a body part could be property if it had undergone some process or application of human skill. They alleged that the preservation of the brain in wax satisfied this requirement.

Lord Justice Peter Gibson rejected *Doodeward* as an authority for this proposition, but still agreed the exception to the no property rule existed. However, he disagreed that the fixing of the brain in paraffin was sufficient processing to make the brain an object of property --- for two reasons. He felt that this sort of preservation was not what was meant in the rule (but did not really explain), and that the brain was not a body or part of a body awaiting burial. He therefore held that the brain samples were not property, and therefore that the claims in conversion and wrongful interference failed as the plaintiffs could not show a right to possession or a property interest in the brain.

Two years later, the court found itself considering the status of body parts once again in *R v Kelly* (1998), but this time the context and facts were very different.

Anthony Noel Kelly was an artist, and between 1992 and 1994 the Royal College of Surgeons granted him access to their premises to draw some of the collection of anatomical specimens held there. A technician who worked at the College, Neil Lindsay, removed specimens for Kelly, including part of a brain, six arms or parts of arms, parts from three human torsos and ten legs or feet. All the specimens had been preserved, and some had also been expertly dissected. Kelly kept some of the body parts at his own apartment, others he and Lindsay buried.

Both men were charged with theft under s 4 of the *Theft Act 1968* (UK) (*Theft Act*) when their actions were discovered.

The defendants argued that the rule against property in a corpse precluded a charge of theft as it was impossible to steal something that was not property, as s 4(1) of the *Theft Act* refers to the taking of 'property'.

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[33] *Dobson v North Tyneside Health Authority*, 477 per Peter Gibson LJ.

I like to think of this as their 'gotcha!' argument.

It required the court to decide whether the body parts were property.

Lord Justice Rose accepted the no property in a corpse rule existed. He also accepted the exception from *Doodeward.* But he also considered the work and skill exception to include both dissection and preservation techniques for the purposes of exhibition and teaching.[34]

He therefore found that the Royal College had a right to possession sufficient to bring the specimens within the ambit of s 4 definition. On this basis, it was concluded that the parts were capable of being stolen. Kelly was convicted and sentenced to nine months in prison. Lindsay received a six-month suspended sentence.

So, their 'gotcha!' argument didn't work.

What should we make of these cases?

Well, a big part of their importance is that the showed the problems that arise if we *don't* regard biomaterials as property. Someone could simply take a research sample, or a dissected body part, or Marc Quinn's work, or one of von Hagen's plastinate bodies --- all clearly things that people are possessing, using, and have worked to produce --- and say, 'ha ha, I'll have that, and there's nothing you can do because it's not theft if it's not property!' But that's clearly absurd.

Just as it was clearly absurd to suggest that in not preserving the brain tissue, the hospital hadn't done something wrong.

So, this is the first strand of why I think we need to regard bodies and their parts as property --- because very often the law *needs* them to be so regarded so that the rules we use to regulate the use of things can be used to address problems in the use or possession of body parts and biomaterials.

Had the courts stuck rigidly to the 'no property rule' in *Kelly*, someone who had clearly taken something that was not theirs, that was valuable would have gone unpunished.

This, I would argue, is one of the ways in which trying to a property understanding of human body parts causes legal difficulties.

What treating body parts as property achieves is that it brings these parts, these valuable corporeal things within the range of laws that have already been developed to deal with things and our interests in them.

There have, in fact, been numerous cases both here and elsewhere where had the courts refused to see body parts and biomaterials as property, they would have fallen outside legislative schemes under which they ought clearly to fall.

For example, there are other cases of samples being stolen, and the Theft Act needing to be applied. In *R v Welsh* (1974), the defendant had provided police with a urine sample to be tested for blood alcohol levels, and the tipped it down the sink. In *R v Rothery* (1976), the defendant had supplied a blood sample, then later removed it from the police station. Both were charged with theft and convicted, and it was assumed the samples were property for the purposes of the Act (even though at that point, they arguably weren't under the law). Had the courts not taken this approach, the outcome would have been ridiculous.

Similarly, in the Australian case of *Roche v Douglas as Administrator of the Estate of Edward Rowan (dec'd) (2000).* Susan Roche sought an order for access to stored tissue from a deceased man for the purposes of determining her paternity. Under Order 52 rule 3(1) of the Rules of the Supreme Court 1971 (WA) the court is permitted to take, observe and experiment with any property to determine a matter before it. The defendant argued that the tissue was not property and therefore could not be subject to such an order. It was only by deeming it 'good sense' to regard the tissue as property that the court avoided another absurd result.

What I think should become clear from these cases is that there is considerable *expediency* in resisting the exclusion of body parts from the realm of property.

Such expediency was particularly vital when, in 2009, the courts were challenged by an altogether different case –*Yearworth v North Bristol NHS Trust*'.

The case was the first time the courts had to deal with a claim for *damage* to biomaterials held by a third party on behalf of their source.

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[34] Ibid, 741 per Rose LJ.

The claimants were all men who, prior to having treatment for cancer, had provided sperm samples to be used later if they lost their fertility as a result of the treatment.

These were held by Bristol Southmead NHS Trust, but were irrevocably damaged when the storage unit, in which they were held, failed due to negligence on the part of the Trust. This caused considerable distress to the men, who each suffered various psychiatric injuries such as depression.

The law on when someone can claim psychiatric injuries is somewhat Byzantine, but to shortly explain, the law will only allow claims for 'pure' psychiatric injury (that is, where there is no physical injury from which it stems) in very strictly controlled situations, which did not arise on these facts.

So, the men needed to show that the damage to their sperm was *personal* injury, some sort of physical harm to them. The court at both instances rejected this idea --- it would consider beyond the concept of physical injury for it to include damage to body parts once severed or removed from the body.

So, they were stuck. Excluded by the strict pure psychiatric injury rules, and damage to their body parts not accepted as personal injury. And they didn't have a contract either, so they couldn't claim through that route.

Given the real impact on the men when their semen was destroyed, and the admitted negligence, to deny them a remedy on such a basis would have been an arguably unjust outcome.

The answer was an argument that the sperm was property. It went like this. If it were property, then the Trust had been the bailee (the one in possession) and was under a duty then to keep it safe. When it failed in this duty, negligently, then a claim could be brought.

But to do so, the court had to accept that the sperm was property.

And the Court of Appeal did. But NOT, crucially, by applying the work and skill exception (though it accepted that this existed).

Instead, the court reasoned differently – that the men held many of the rights and powers over their sperm that an owner holds over property --- they could use it, destroy it, transfer it via donation and so on. As such, it was on principle reasonable to say they were in some sense its owner and were dealing with it like property.

Once this leap was made, the Court could regard the Trust as a bailee, and from there (somewhat problematically) made an analogy with damages for contracts to avoid mental distress to award the men compensation for their psychiatric harm.

The case was marked by a considerable amount of legal manoeuvring in the Court of Appeal's reasoning on this point, although such manoeuvring was at least based on a degree of principle.

But what we should see from this decision is that without recourse to property, sometimes people will be left without a solution to their legitimate problem. Here, property offered the most effective and applicable solution because it availed the court of remedies already created to deal with conflicts over or possession of objects. And so, it took it, and rightly so.

Now you might, given all this value in taking a property approach, be wondering quite *why* there is resistance to this. Who am I arguing against? Well, in fact in both the case law as we've seen, and the academic literature for a long time there was (and continues to be) quite strong resistance to the idea that human body parts should be property.

Why?

A number of reasons.

For some people, body parts are special. They were part of someone who lived, who loved, who was a unique and important individual. To treat their bodies or their parts as somehow legally the same as a table or a car or a suitcase seems wrong. It seems like making them somehow less special, less sacred.

For others, to allow parts to be property might also mean they are *commercialised,* and this is wrong. It might be wrong because they are concerned about the sale of organs (and there are good reasons to feel that way). Alternatively, their concern may be that this might lead to a coarsening of feeling in relation to the *source* of that material. Margaret Radin, for example, explores the idea that when make a human trait of capacity *fungible* --- when we give it a market value --- we begin to see human traits and attributes as mere commodities, capable of being reduced to money, and this threatens personhood. Radin's theory has by some been used to explain why commodification of tissue is wrong.

Are either of these concerns convincing? Let's take the second one first. It may be true that the sale of biomaterials is problematic, but this is not an argument against a property approach. Property status does not entail saleability, and if these concerns are sufficiently worrying, we could prevent the sale of biomaterials while still deeming them property. There are many examples of objects that are property, but which cannot be sold, or where the power to sell is restricted—prescription drugs and handguns are two obvious examples.

On the first, indeed some body parts are very much sacred and special and important. But this, as I'm about to explain, might be exactly why we *should* do away with the no-property approach.

To understand this, we need to understand a bit about the concept of 'property' and what, as a legal device, it does.

What it does is tells us who has the right to use, or possess, or destroy, or transfer away an object. It defines our relationships with one another in relation to a thing.

So, if something is 'mine', if I am the owner, I can exclude you from using that thing. Let's say it's my car. I can drive it, but you cannot unless I let you. Only I can sell it, or have it scrapped. My interest in it is protected.

And this, in fact, is exactly what people mean when they use what is sometimes called 'body ownership rhetoric' in relation to their bodies or their parts. When someone says, 'it's my body', what they mean is 'I control my body, I decide what is done with it, including its part (attached or removed) both while I live and once I die'.

And they're reflecting the controls we have over our living bodies, which the laws against assault and rape and so forth protect --- our choices about our living bodies are protected through these consent-based rules, and once something is taken from our body, the concept of property I think mirrors this in giving powers to make decisions of body parts as things.

Fundamentally, property is about use and control; about who has the right to possess these things and to determine (within constraints) what is done with them.

In doing so, the law also operates as the law's mechanism for managing scarce resources that are in demand by more than one party --- it resolves conflicts over who can control a thing. If it did not, then someone in possession of an item would have insecure possession. As Simon Douglas explains:

> *"In the absence of legal regulation, those in possession of such things are always vulnerable to being dispossessed by a more powerful party. This is something that the law tries to avoid, and it does this by allocating property rights in such things to individuals, thus imposing a legal duty on others to refrain from interfering with goods that are in a person's possession."*[35]

This is, in fact, a *good thing* to have in relation to something important and special. It is exactly what you would want if you did regard something like your body parts as special, just like you want that to be the case with regard to your wedding ring, or a valuable painting you've bought.

If we think back then to our researchers, giving them stable possession is exactly what is needed to ensure they can complete their research with confidence. It's what Marc Quinn needs, and it's what the police need and many others who legitimately possess and use human body parts.

It seems clear, then, that treating body parts as property might be right. But let's not be so confident just yet.

One of the best objections made to treating body parts as property is that these strong protections can be counterproductive. Someone might gain too much control. Or someone might unwittingly, not realising the implications, give away control of their parts of biomaterials to someone else.

What might this look like, too much control?

I'll give you two examples.

One is the American case of *Colavito*. When Peter Lucia died in 2002, his widow Debra tried to donate both of his kidneys on his behalf to his friend, Robert Colavito, who was suffering from end stage renal disease. One kidney was airlifted to Colavito, but then found to be damaged. His doctor immediately asked for the other --- but discovered it had been allocated to someone else. Colavito died, and his widow brought an action in conversion --- the kidney, it was argued, was Lucia's to give, as it was his property, and he had

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[35] Douglas, ch 7 in I Goold, J Herring, L Skene and K Greasley (eds), *Persons, Parts and Property: How Should We Regulate Human Tissue in the 21st Century?* (Hart Publishing 2014)

given that property as a gift to Colavito. In allocating it away, the organ donation network managing the situation had interfered with his property rights.

The court disagreed and rejected this argument, and part of the reason was this concern about too much control. That to allow the kind of control that property rights would give here would undermine the organ donation system, that ensured that the terribly scarce resource of donor organs were given to those most in need, and most able to use them (those who are a 'good match').

We can look to another American case for a somewhat different example.

In *University of Washington v Catalona,*[36] was presented with competing claims over the use and possession of biomaterials for the purposes of research. William Catalona was a researcher and surgeon who had been instrumental in establishing a biorepository of tissue samples donated for research purposes, particularly prostate cancer research. The biorepository was held at Washington University and contained consensually donated samples from thousands of men.[37] Donors had signed a consent form, which usually referred to the contribution as a 'donation' and or a 'free and generous gift' to the research.[38] They were told they had the right to withdraw their samples from the research, at which point they would be destroyed.

When, in 2003, Catalona moved to a new institution, he wanted to take the biorepository with him --- but Washington University refused to allow it, having realised the considerable value of the collection. They asserted that they *owned* the collection.

Catalona wrote to the donors, asking them to authorise the release of their samples to him. Many agreed.

But their wishes were not enough. Even though the samples came from their bodies, the court held that Washington was the owner of the biorepository and the samples.

How? The reasoning is a little confusing (and confused), but fundamentally the court reasoned that they men had made *a gift* of their tissue, and in doing so, had passed all control, full ownership, to the University (as that was the organisation to whom the donation was made). They no longer had a say.

If we think tissue is special to people, that they have an important link, or privacy interests in their DNA and other information being protected, or in being able always to decide what happens to part of their bodies, then this should trouble us. Here, the conceptualisation of their tissue as property gave them control, but didn't and couldn't protect them when they gave that control entirely away.

Where does that leave us?

Does this scupper my case for owning our body parts? I don't think so.

I think that there are many, many situations in which we might have the wrong amount of control over items. Some people have too much, some have too little. I might pawn my engagement ring in a fit of pique and regret it, but it's too late.

Property does give strong controls, and it might be that if that control is misused, there will indeed be problems.

But to my mind, most of the problems with property can be remedied. By contrast, the lack of property status creates intractable problems.

- It leaves people who have legitimate reasons for controlling the use of, or access to, tissue that they hold vulnerable.
- It leaves the law in the position of having to use fictions to ensure sensible outcomes in the applications of many laws.
- It leaves us in the dark, legally, about what is happening when an body part or biomaterials are transferred, whether by gift or sale.
- And it leaves us uncertain of what we can and cannot do with body parts and biomaterials, unless we have very detailed, specific legislation that tells us the answer.

By contrast, a property approach will answer these questions.

We can determine who ought to have initial ownership --- it might be the person from whom it was taken, or

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[36] *Washington University v Catalona* F Supp 2d (2006).
[37] ibid at 988.
[38] ibid.

we could decide in the interest of the community it is someone else. There may be a range of legitimate answers to the question of who has (or ought to have) this control. We might say 'the state', or 'the individual from whom they came', or 'the researcher who is using them in a research project', or even 'anyone and everyone, no one is excluded from control or access'.

We can make rules that constraint use or sale, as we do for many other items.

But crucially, property, unlike legislative and consent models, can always give us the answer to the question of *who* can control tissue, *who* holds an interest in it that can be defended. Recognising property rights in biomaterials is a means of explicitly allocating rights of use and control to those materials.

Because this precisely how property works – it determines *relative* title – it tells us who has certain rights (the owner) but also then tells us who *else* has rights if the owner cannot be found, such as those how later deal with the material because they find it.

This is what a consent-based model, which was the approach in the Human Tissue Act 1961, and in the Human Tissue Act 2004 which replaced it, cannot achieve.

This is not to say the HTA 2004 was not an excellent step forward. It was. It replaced the 'fuzzy' 1961 Act with a much more well-defined consent model, with clear requirements for when tissue can and cannot be used without consent. This was a welcome step forward. But it did not resolve all the problems that we still see with the use of biomaterials.

Because when we just use the idea of consent, we come into the sort of problem we saw in *Catalona* – we only know what can be done with body parts in the first instance. We don't have clarity about what subsequent people who come into possession may be able to do with tissue, because they might not be party to the original consent process. So, they might have *no right* to do anything --- if nothing can be done without consent --- and this might be problematic.

Property can do this more readily than a free-floating consent-based framework. This is so because it does not focus on consensual relationships (including contractual ones), but rather it is arranged around the idea of title, providing answers to the possession and control questions by determining who has the best title (or claim) to the item in question.

The law of property delineates how our rights regarding possession and control can be asserted against others who might interfere with them, by non-consensual taking, using, or damaging, and so on. These rights may be subject to various constraints or come with particular duties attached (either on their part or mine). If I loan my property, I retain ownership. The person to whom I loan it gains a right to possession, but this may be subject to various duties. If I donate an item of property, my ownership passes from me to the one who then becomes the new owner and vested with all the rights that attend such status. If I sell an item over which I have the requisite property rights, all of my rights regarding that object pass to the buyer.[39] This comes within the provisions of legislation, such as the Sale of Goods Act 1979. We can, thus, know who holds which rights before and after transfers, as well as how these rights relate to one another.

In contrast to consent-based approaches, the law of property provides guidance on what occurs—legally—when a thing moves from the control or possession of one person to another.[40] Crucially, that guidance is founded on hierarchy of title, and so property will always be able to tell us who has the best right in relation an object, even if that person is a finder or a thief. This is a core advantage of property over consent-based and legislative models—its structure avoids the lacunae these regimes are prone to where they have not provided for particular situations.

Conclusion

So, should you own your body parts?

I think you should, because is the best mechanism for regulating tissue use.

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[39] This is best conceptualised as the conjoining of property and contract. The right to sell is not analytically necessitated by property. See, eg Penner, who describes the right to sell as a hybrid right.

[40] We do not mean to suggest here that consent is not relevant to property. It is entirely relevant to determining, for example, whether transfers of biomaterials would be legitimate. Instead, by 'consent-based' approaches we mean those that utilise consent, but exclude property considerations.

Should it be me, and others who owns my body parts?

Again, I think yes, you of all people have the first and best right to be the owner. The parts came from your body that we protected via other laws. They have your DNA, they may have emotional and psychological importance to you – these, to me, are reasons why your interests trump those of others.

But you might disagree. You might think body parts, like organs are such an important and scarce resource, that they should be owned by the community in some way, or not owned by anyone but distributed by some other model. Fair enough, but you'd still need a system to identify who could possess, transfer and use them – so it would look like property, but you might need to put controls in place to avoid problems.

You might, as some do, think biorepositories should be owned communally, too.

You might be concerned about commercialisation of human biomaterials, and rightly so --- there are clear problems with this, but also strengths. But then I'd remind you that property doesn't necessitate sale.

What about others owning my parts? Well, I've identified a number of clear instances when others might reasonably be deemed an owner, or at least have a right to possession for some purpose.

- Tissue in research once donated – it makes sense for the researcher to perhaps own, or least legally possess
- I might be happy to donate and give away my blood or tissue entirely --- property would allow that
- And in many situations, the law ought to protect possession such as that of the police.

And such an approach is not incompatible with the provisions of the Human Tissue Act 2004, and utilising property rules to govern the uses of biomaterials would provide a useful adjunct to the legislation.

So this is the change I would make to the law as it is. This doesn't mean that human tissue isn't unique and sometimes highly valuable or sacred. But it does mean that we would have a broadly-based legal approach that can encompass the myriad uses of tissue and conflicts to which these give rise, protecting those with legitimate interests from dispossession and interference, and removing the need for the courts to tie themselves in knots to find solutions to the problems that tissue use has and will continue to present.