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Property Rights in the (Fragmented) Human Body

"Property, Control and Separated Human Biomaterials" *European Journal of Health Law*, *23*(5), (2016): pp.1-22
http://booksandjournals.brillonline.com/content/journals/10.1163/15718093-12341411

"'Abandonment' and the Acquisition of Property Rights in Separated Human Biomaterials." *Medical Law International* 16, no. 3-4 (2016): 229-251.

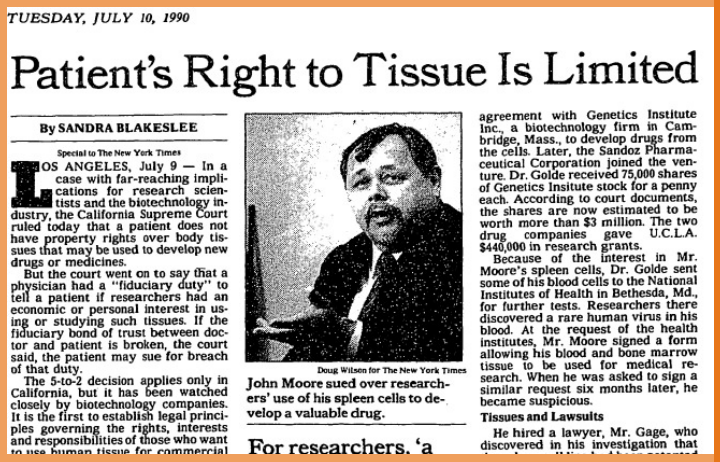
Dr. Neil Maddox

Traditionally, the human body was not regarded as property by the common law. This corresponds to our intuition regarding our bodies being unique objects. A person may refer to "My Body", but it is doubtful they mean this in the same way as when they say "My Car" or "My Phone". The distinction was of little importance until recently given that bodies had little value. A corpse, for instance, was regarded as no different to a lump of clay and was not thought capable of constituting property. The next-of-kin of the deceased had limited rights to take possession of a dead body to ensure its prompt burial, but that was it.

Recent and rapid technological development in biotechnology has radically altered the utility and potential value of parts of the body formerly considered waste products only fit for disposal. The rights to cell cultures developed to treat disease can have billion dollar values. Inevitably, legal disputes follow as to who should have ownership of these products.

The common law rule that there is no property in the body has been used by some to justify denying the source of these materials any rights in them. However, this has not prevented third-party researchers from acquiring such rights. This creates the incongruous situation where anybody can potentially enjoy ownership (including the right to the commercial rights) of a human biological product, except the person who was its source.

An example of such a dispute is the famous case of *Moore v. Regents of the University of California* 793 P 2d 479 (Cal. 1990), where the plaintiff had his spleen removed in the course of cancer treatment. While he consented to the operation, he didn't consent to the use of his cells in subsequent research. Nonetheless, his cell line was developed into a treatment with great commercial value. Moore claimed conversion of property seeking to join in the lucrative profits of the research. He succeeded at first instance, but the California Supreme Court rejected his claim stating that he could not enjoy property in his own cells. The court saw no difficulty with



TUESDAY, JULY 10, 1990

Patient's Right to Tissue Is Limited

By SANDRA BLAKESLEE

Special to The New York Times

LOS ANGELES, July 9 — In a case with far-reaching implications for research scientists and the biotechnology industry, the California Supreme Court ruled today that a patient does not have property rights over body tissues that may be used to develop new drugs or medicines.

But the court went on to say that a physician had a "fiduciary duty" to tell a patient if researchers had an economic or personal interest in using or studying such tissues. If the fiduciary bond of trust between doctor and patient is broken, the court said, the patient may sue for breach of that duty.

The 5-to-2 decision applies only in California, but it has been watched closely by biotechnology companies. It is the first to establish legal principles governing the rights, interests and responsibilities of those who want to use human tissue for commercial

Doug Wilson for The New York Times

John Moore sued over researchers' use of his spleen cells to develop a valuable drug.

For researchers, 'a

agreement with Genetics Institute Inc., a biotechnology firm in Cambridge, Mass., to develop drugs from the cells. Later, the Sandoz Pharmaceutical Corporation joined the venture. Dr. Golde received 75,000 shares of Genetics Insitute stock for a penny each. According to court documents, the shares are now estimated to be worth more than $3 million. The two drug companies gave U.C.L.A. $440,000 in research grants.

Because of the interest in Mr. Moore's spleen cells, Dr. Golde sent some of his blood cells to the National Institutes of Health in Bethesda, Md., for further tests. Researchers there discovered a rare human virus in his blood. At the request of the health institutes, Mr. Moore signed a form allowing his blood and bone marrow tissue to be used for medical research. When he was asked to sign a similar request six months later, he became suspicious.

Tissues and Lawsuits

He hired a lawyer, Mr. Gage, who discovered in his investigation that

New York Times, July 10 1990

recognising that third party researchers had such rights, however. The case settled before it could be appealed further but the question of property rights in the body is far from settled as is evident from the voluminous judicial and academic writing on the topic since the *Moore* case.

These two articles attack the conceptual basis for arriving at such a skewed result. They contend that judicial and academic reasoning justifying vesting property in such owners is applied inconsistently and is consequentialist, i.e. results focussed. Furthermore, there is a critique of the reasoning that the source of such materials has abandoned all interest in them once they become separated from the body. The author argues for recognition of limited property rights vesting in the source of human biological materials, and dismisses many of the objections to so doing.

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The Law of Abandonment

When one describes a person 'abandoning' their property (or their tissue, blood or sperm sample for that matter), it is not always clear what is meant. It can mean the abandonment of all claims in respect of a thing, or be employed as a legal term of art to refer to 'divesting abandonment' a concept derived from property law, whereby an owner loses all ownership of his property if divesting abandonment is found to have occurred. The value of an object can help determine if one has intended to divest oneself of ownership of an object: a newspaper left behind is likely abandoned, whereas a wallet is likely lost. Every cell in the human body contains a person's complete genetic code which can reveal a wealth of information about them. In such circumstances, they can hardly be presumed to have abandoned all rights over their lost strands of hair or flakes of skin when one really thinks about what that entails.

The classic case is *Venner v. State of Maryland* [1976] 30 Md. App. 599, a case concerning a 'drug mule' who had passed his drugs in the bathroom which were subsequently seized and used in evidence against him. The admissibility of this evidence was challenged and the net question for the court to determine was whether he had "abandoned or otherwise relinquished" the drug packets, ultimately finding that he had. Given his semi-conscious state at the relevant time, this conclusion can be questioned.

Cases Analysed

Moore v. Regents of the University of California 793 P 2d 479 (Cal. 1990).

Venner v. State of Maryland [1976] 30 Md. App. 599

Greenberg v. Miami Children's Hospital 244 F. Supp.2d 1064 (S.D. Fla.2003)

Washington University v. Catalona 437 F.Supp.2d 985 (F.D. Missouri, 2006)

Yearworth v. North Bristol NHS Trust [2009] 3 W.L.R. 118.

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A graduate of UCD and the Kings Inns, Neil practiced as a barrister for 8 years until 2013. He holds a Ph.D. from UCD and has authored a number of books and articles in property law, his main area of specialty. His current research focuses on the novel questions that new human reproductive technologies pose to the law of property and succession.