Who owns human tissue: patients, hospitals, researchers or others?

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Who owns the body parts, tissues and fluids that are separated from us from time to time? Professor Skene reports and comments on a recent Supreme Court of Western Australian ruling that human tissue is, legally, property. Dr Nisselle cites further related cases and says ownership is a matter for public policy.

Who owns the human tissue stored in a laboratory after surgery or research? Is it 'property' like a watch or a book? Is it capable of being 'owned' in a legal sense? If it is not property, how else could human tissue be categorised? Is it necessary to legally categorise it at all?

The Supreme Court of Western Australia has recently taken the first step in answering these questions: it ruled that tissue removed from the body *is* legally property so that it *can* be 'owned'. However, the court did not have to decide the more difficult question of *who* owns it.[1]

A notable ruling

The court described the case in point, *Roche v. Douglas* [2000] WASC 146, as 'the first time an application has been made allowing for testing of tissue held by a laboratory'; and 'the first case in the 21st century on the status of human tissue'.

The case concerned a woman's claim to share in the estate of a deceased man she said was her father. In order to succeed, she had to prove paternity. The man had had tissue removed during surgery that had been preserved in paraffin wax in a pathology laboratory. The woman applied for a court order requiring the tissue to be DNA-tested.

Under the Court Rules, the court had power 'to make orders…for the taking of samples of any property'. The issue was therefore whether this tissue fell within the legal concept of 'property'. The defendant executor argued it did not; the court said it did:

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

The Master of the Court, Master Sanderson, then made an order that the tissue should be DNA-tested because the order was within the court's powers. He said, however, that 'it [was] not necessary for [him] to determine *who holds the proprietary interest in the tissue*', namely the defendant executor, the hospital or the laboratory.

Even if the plaintiff proves she is the deceased man's daughter, she will not necessarily succeed in her claim. Important issues concerning the effect of adoption orders are raised but not fully discussed in the judgment; they were deferred until after the DNA test.

Other decisions: a comparison

The importance of this case in Australian law has yet to be determined. It certainly states quite clearly a general principle that Australian law has not generally recognised previously – that human tissue removed from the body is property, at least for some purposes.

The court specifically distinguished the case before it from the earlier common law that had rejected this principle. For example, in English cases (mostly from last century) courts held that there is no property in a corpse; that one cannot 'will' one's body; and that an executor's right in respect of a corpse is limited to a right to possession for the purpose of burial. In Australia, a similar decision was made in a case where the parents of a deceased Aboriginal boy were arguing about where he should be buried. The court said that they had equal rights to possession of the body for burial, but did not 'own' the body.[2]

However, courts have not always decided that there can be no property in body parts. In 1908, the High Court of Australia held that the preserved body of what was called in the case 'a two-headed baby' could become property and be given pecuniary value by the work and skill undertaken in preserving it. The

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court said, 'it does not follow from the mere fact that a human body at death is not the subject of ownership that it is forever incapable of having an owner'.[3] This case was considered 'of interest' in *Roche v. Douglas* but 'not directly relevant'; and, in any event, 'it was decided in 1908 some 50 years before Watson and Crick described the DNA double helix'. These comments indicate that the court's view in *Roche v. Douglas* was that it is not the work done on a corpse (or tissue) that makes it property but its very nature.

The Supreme Court of Western Australia cited with approval a textbook suggestion that tissue removed during surgery 'should best be regarded as *gifted* to the relevant hospital'. This means that the tissue must be property notwithstanding that no 'work' has been done on it.

In short, the court in *Roche v. Douglas* justified its decision in the light of new issues raised in a new century – issues to be decided 'in accordance with general principles of law…reason and common sense'.

Does this ruling matter?

How important is *Roche v. Douglas* as a precedent establishing that tissue removed from the human body is property?

I believe its significance is limited. First, one must remember the nature of the hearing. A Master of the Court was asked to make a preliminary ruling that tissue should be tested in order to enable the plaintiff to prove one element of her case. The principal legal argument could then be deferred until after the test had been conducted. If the test could be done, '[t]here will be a considerable saving in time and costs, so on the particular facts of this case there is a compelling reason for holding the tissue samples to be property'. In other words, reason and common sense support such a decision *in this case*.

In addition to being a preliminary ruling, which had no immediate legal implications for the parties, the decision avoided the issue that has been most problematic in earlier cases. If the tissue is property and so capable of ownership, who owns it? The court in this case was able to make the order for testing without deciding this question. But the difficulties it raises perhaps explain why an English court recently reached a different conclusion about the legal status of tissue stored in paraffin wax (the very issue in *Roche v. Douglas*).[4]

In the English case, the argument was more directed to ownership – did the brain tissue *belong* to the executor? The court said that the executor's right to possession of the corpse for burial did not entitle the executor to obtain possession of the stored brain tissue as that tissue was not needed for burial. (The tissue was being sought for testing in a negligence action claiming damages from the hospital for negligently failing to detect brain tumours in a deceased patient.) Another argument based on ownership of tissue was made against the hospital where the tissue was removed during surgery. It was alleged that the hospital was a *bailee* of this tissue – an argument implying that the tissue belonged to the person from whom it was taken (or, presumably, his or her heirs).

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This argument was also rejected by the court.

Comparing this English case with *Roche v. Douglas* brings us to the crunch: if the court in the latter case had been required to rule on ownership as well as property, what would its decision have been? Ownership has implications in buying, selling, bequeathing, theft, quality assurance, claims for faulty products and more. *The Sunday Age* suggested that, 'the ruling sparked concerns that it could lead to legal trade in body parts and even blood donations'.[5] I think this is unlikely for the reasons given above but the questions remain: as the court said in *Roche v. Douglas*, this 'may be the first time that an application has been made for testing of tissue held by a laboratory, but it is unlikely to be the last'.

Series Editor's comment

Ferrets down burrows

As Professor Skene points out, the finding in this WA case has limited precedential effect – but it may lead to even more inquisitive ferrets being sent down medicolegal burrows.

When a patient has a pathology test, the referring doctor often rings after receiving the test result to request further tests on the same specimen either for further elucidation or simply because he or she forgot to order some tests. Most pathologists keep specimens after testing for a period against just this possibility – sometimes for a prolonged period. Will some litigant now 'try on' a subpoena to produce the specimen for testing for forensic purposes unrelated to the original referral, without the consent of the tested party?

The lost thread?

Rumpole's 'golden thread of British justice' – the presumption of innocence – is somewhat tarnished. Rumpole would say that other than, 'Not guilty, m'Lud', the accused does not have to say or do anything to defend him or herself.

A suspect is not required 'to assist the police in their inquiries': the burden in criminal cases is on the prosecution to prove its case; the defendant does not have to prove his or her innocence. No adverse inference (generally) can be taken if the defendant in a criminal case refuses to testify.

However, it is an offence to refuse to be breath-alcohol tested and some states mandate routine blood alcohol testing of the drivers involved in motor car accidents. If you refuse the test, you will not be sat on by 10 policemen whilst a press-ganged doctor inserts a needle and takes blood; however, rather than respect your right, haematologically as well as verbally, to 'remain silent', the law allows adverse inference to be taken to your refusal. Not only will you be penalised for refusing the test, it will be presumed that, if tested, you would have registered over the legal limit.

So, will a sample of blood stored after testing today for, say, lipids, be subject to subpoena tomorrow – for example, to be used for DNA testing after the person involved has refused to provide blood for testing?

Related cases

Many other cases similar to *Roche v. Douglas* have occurred – for example:

- A Sydney woman went to court to demand the return of her uterus that was still in the hospital pathology laboratory a few weeks after the hysterectomy which separated it from her.
- People have sought access to stored Guthrie tests (heel-prick blood tests conducted shortly after birth for phenylketonuria and other genetic conditions) for DNA-testing.[6]
- In the USA, a man sued for a share of the proceeds of sale when he discovered that his splenectomy specimen had been used, without his permission, to start a cell line that was then commercially exploited.[7]

Abortion law reform was catalysed by an incident in which a child talked about an aborted fetus at school during 'Show And Tell', saying something along the lines of 'my mum's got a baby in the fridge'. The fetus had been returned to the mother, at her request, for ritual burial. It was in a specimen pot in the refrigerator at home pending arrangements for the burial. When the news broke in the media, the doctors involved were charged with procuring an illegal termination of pregnancy. In the ultimate, the Western Australian Parliament passed legislation, the *Acts Amendment (Abortion) Act 1998* (WA), which liberalised the law on abortion in that state.

The legal issues associated with ownership of body parts, fluids and tissues will all be tested again in court (and in parliament) in the future. Doctors can, and should, have a view, but in the end, these are issues of public policy. Do our legal rights as citizens extend to the fluids and tissues from which we are separated from time to time? Perhaps future patients will demand that all specimens taken from them be destroyed, say, seven days after the test is concluded. Such a demand might interfere with good medical care – all of us have stories of mole, breast or prostate biopsy material requiring review months or years after they were taken – but society will dictate which of the competing imperatives, medical and legal, is to prevail. MT

References

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

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