

Marking Boundaries between the Person and the Thing: The Law's Dilemma over Personhood vs Property

Kate Galloway*

The New York Court of Appeals found in 2006 that 'Coke's classic edict [that a corpse has no value] is of more than historical interest: it has been a staple of the common law'. While this is true, it is also true that the common law has found a myriad of exceptions to the general proposition of no property in a corpse – resulting in a situation that is far from clear in an age where biological materials from the living and from the deceased do have value. The recent US decision of *Colavito v New York Organ Donor Network Inc* (2006) 8 N.Y.3d 43 maps the common law position and ultimately marks the biological matter of a deceased (in this case, a kidney) as 'person' rather than 'property'. As has so often happened in cases dealing with this issue however, the court was able to sidestep a fuller explanation of the boundary, on the basis that the plaintiff had no enforceable right to the kidney in question as it was in any event histo-incompatible with his antibodies. Whether this marking will remain sustainable in Australia in light of biotechnological advances is open to question. The dilemma over legal marking of 'personhood vs property' remains at the interface of social and philosophical norms.

I Introduction

Dispatch: "What's the problem there?"

Caller: "I got a human foot."

Dispatch: "Have a what?"

Caller: "A human left foot."

Dispatch: "What's your name?"

Caller: "My name is Shannon Whisnant, and it's plum nasty. Got me grossed out."¹

911 call logged recently in Maiden, North Carolina, after the discovery of a human leg in a BBQ smoker purchased at auction.

* Lecturer, School of Law, James Cook University

¹ http://www.theregister.co.uk/2007/10/03/amputated_leg_found_in_barbecue_smoker/, 28 October 2007.

According to press reports, Whisnaut subsequently told local media he was willing to go to court to keep the leg and planned to charge admission to see it – US\$3 for adults and \$1 for children. ‘It’s a hell of a conversation piece,’ he told the Greenville News. ‘I bought it. It’s mine.’ This is a clear example of a person seeking to enforce a property right. In this simple statement (‘I bought it. It’s mine.’) Mr Whisnaut indicates that the human foot (with some leg attached) is a chattel personal, to which attaches a bundle of rights.

Unfortunately however for Mr Wishnaut, the person to whose body the leg was originally attached wants his leg back.

John Woods had his leg amputated in 2004 as a result of injuries he suffered in a plane crash. He kept the amputated leg, planning to have it buried with him when he died. Originally he kept the leg in his freezer but his electricity was disconnected. He apparently hung it on his front fence, before storing it in his BBQ smoker in a storage facility. When he defaulted in his payments for the storage, the storage owner auctioned his belongings – including the BBQ smoker with leg.

Mr Woods’ actions in relation to the leg clearly indicate that he continues to view this leg as part of himself. To him, the leg is not a chattel, but is a person. It is him.

Our question today is: what is the leg? Is it *person*? Or is it *property*? Is the leg part of Mr Wood, whose body originally sported two fully attached lower limbs (but now sports only one)? Or does it constitute a chattel, belonging to Mr Wishnaut who paid for it?

This paper concerns the way in which the law marks the boundary between personhood and property. This is a contemporary issue – not just because of Mr Wood’s amputated leg – but because of the burgeoning biotechnology industry and the international movement towards repatriation of human remains taken from colonised societies around the world in centuries past. These present the law with a dilemma of marking the boundary between what is person and what is thing.

Today we’ll consider recent applications of the law in relation to human biological matter – matter taken from a deceased and matter taken from the living. We’ll have a go then at applying these principles to the conundrum of (the very much alive) Mr Woods’ formerly attached leg.

Marking the Legal Character of a Deceased Human

Our starting point in this investigation of the law’s treatment of the human body is the status of a corpse at law. The courts have long held that there is no property in a corpse. While Roger Magnusson’s 1991 article points out that this is founded on flawed reasoning, the proposition was confirmed in 1908 in Australia in *Doodeward v Spence*.² This case however found (by majority) that the preserved two-headed foetus was not a corpse; alternatively that it had been ‘so changed by the lawful exercise of human skill that it could no longer be regarded as a corpse awaiting burial’.³

² (1908) 6 CLR 406, 419.

³ *Ibid*, 414.

In an earlier US case, *Pierce v Proprietors of Swan Point Cemetery*,⁴ Potter J considered the body to be ‘a sort of quasi-property’. This arose out of ‘our common humanity’ and was reflected more in relation to ‘duties to perform toward the body’ than anything approaching ownership as we might usually understand it. Potter J felt this ‘quasi-property’ was in the nature of ‘a sacred trust for the benefit of all who may from family or friendship have an interest in it’.⁵ This statement was cited with approval by the English Court of Appeal in 1996, in *Dobson v North Tyneside Health Authority*,⁶ which also reiterated the old principle that there was no property in a corpse. This approach was also applied in a 1997 NSW decision.⁷ (These issues are currently being considered by the Queensland Law Reform Commission.)

Regardless of the apparently dubious foundation of the principle, this centuries-old law has been recently applied in *Colavito v New York Organ Donor Network Inc*⁸ where the New York Court of Appeal said that ‘Coke’s classic edict [that a corpse has no value] is of more than historical interest; it has been a staple of the common law’.⁹

Colavito is of interest to us today, because it deals with different issues from those simply concerning the demarcation of living (personhood) from dead (person or property). It considers the nature of human biological matter taken from a deceased, rather than the whole of the corpse considered in these earlier cases.

⁴ 14 Am Rep 667 (1872). See citation in *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 691.

⁵ *Ibid*, 677.

⁶ [1996] 4 All ER 474.

⁷ *Smith v Tamworth City Council* (1997) 41 NSWLR 680

⁸ (2006) 8 N.Y.3d 43.

⁹ *Ibid*, 50.

*Colavito*¹⁰ was heard by the US Court of Appeals. The widow of a deceased man promised his kidney to the plaintiff. The hospital instead gave the kidney to another patient. The plaintiff, who missed out on the kidney, sued in conversion. The court started its investigation looking at the idea of property in a corpse. It accepted that the only kind of property in a corpse was the right of the next of kin to possess it for burial. This could be the ‘quasi-property’ referred to earlier: in any event, this maintains the marking of the corpse as person rather than wholly as property.

The next question is far more topical and probably more controversial. This is whether application of this rule could establish a ‘public policy against finding property rights in donated organs’.¹¹ That is, the question becomes not is there property in a complete deceased human, but rather is there property in biological matter forming part only of a deceased human. Is a portion of the deceased *property* or is it still *person*?

The New York Appeals Court in *Colavito* reviewed the cases relating to recovery of body parts after death. It found the common theme upheld by the courts was ‘the concept of decent burial for an undeseccated body’.¹² The court then added that it had ‘been careful about characterising causes of action that impose liability for violating these sensibilities. In all instances, we have disclaimed any reliance on a theory of property rights in a dead body.’¹³ The Court of Appeals of New York found no basis on which to ‘forecast the circumstances in which someone may conceivably have

¹⁰ (2006) 438 F.3d 214.

¹¹ *Ibid.*, 224.

¹² (2006) 8 N.Y.3d 43, 52

¹³ *Ibid.*

actionable rights in the body or organ of a deceased person¹⁴ and confirmed that the plaintiff had ‘no common law right to the organ’.

While a US decision, the case confirms the Anglo-Australian approaches – the law is clear in marking the boundary between person and property in relation to a corpse and parts of a corpse – these comments support the maintenance of a clear delineation between personhood and property, in particular the characterisation of the corpse or parts of it as representing particular human sensibilities.

The marking of the human as sacred was explicit in the 2007 English decision of *Re St Mary Sledmore*.¹⁵ This case involved an application for the exhumation of Sir Mark Sykes and Lady Edith Sykes for the purposes of testing Sir Mark’s tissue samples. Sir Mark died in 1919 of Spanish flu and the petitioner in this case, a world renowned researcher into bird flu, sought to use data from the tissue samples (if there were any remaining) to ‘unravel the genetic structure of the virus’.¹⁶ Lady Edith’s body was buried on top of Sir Mark’s and therefore had to be exhumed to provide access to Sir Mark’s coffin. Importantly, the surviving members of the family of the deceased had all consented to the exhumation. The petitioner however needed to overcome the law’s presumption against exhumation. Two other recent decisions on exhumation were discussed by the court,¹⁷ and these three cases together illustrate the rigorous methodology of the court in relation to the taking of tissue samples from interred remains.

¹⁴ *Ibid*, 53.

¹⁵ [2007] All ER 238.

¹⁶ *Ibid*, [2].

¹⁷ *In re Holy Trinity, Bosham* [2004] Fam 125; *In re St Nicholas Sevenoaks* [2005] 1 WLR 1011.

The court firstly establishes as the norm, the Christian doctrine that burial in consecrated ground is final and permanent.¹⁸ On this basis, the applicant is required to show some special case warranting a deviation from the norm. This must be a ‘cogent and compelling case for the legitimacy of proposed research’ which could rest on national or historic importance or scientific experimentation.¹⁹ The court then had to weigh the public benefit that may ensue from the research. This approach is consistent with the marking of human remains as human, not as property.

In looking at the evidence, the judge was concerned that there was no guarantee that Sir Mark’s coffin would yield any tissue sample at all. The quality of the tissue could only be assessed on opening the coffin, but to allow exhumation the court must first be satisfied of public benefit.²⁰ There was no guarantee of a public benefit though, because of the uncertainty as to the existence of tissue to sample. In addition, the scientist was only testing a theory and the result of course could not be known in advance – there was no possibility of demonstrating incontestably a public benefit on this basis.²¹

The court was prepared though to accept grounds for exhumation of lesser weight as the purpose of exhumation was scientific, and in particular, this may result in treatment of ‘dangerous diseases’.²² In this case, the court found the grounds were exceptional on the basis that they were to carry out ‘legitimate scientific research’ and that ‘proving or negating the theories advanced by [the petitioner], will advance the

¹⁸ *Re St Mary Sledmore* [2007] All ER 238, [13].

¹⁹ *Ibid.*

²⁰ *Ibid* [18].

²¹ *Ibid* [17].

²² *Ibid* [20].

capability of others to combat the H5N1 virus'.²³ Thus there was no need to show that the research would directly lead to a cure for bird flu, as simply closing off a line of inquiry would bring an overall public benefit.

While this case was required to decide on exhumation rather than simply dealing with the legal status of human tissue, it does demonstrate, in general terms, a framework within which courts can deal with such matters – including the means of providing a norm against which to measure a legal response to dealing with human remains. Without going into human rights issues, it is submitted that this framework can be applied by analogy in relation to the remains of Indigenous people in museums. Rather than applying a property-based framework and an exception to the ‘no property in a corpse rule’ per *Doodeward v Spence*, the law could mark the remains as human and apply the norm of the spiritual practice relevant to the culture from which the remains were taken. Like *St Mary Sledmore*, consent of living descendents would remain a relevant factor; and the court must be satisfied that a substantial scientific contribution will be made towards a significant public benefit. In respect of the latter, it would seem that general research on human remains without identifying a particular public benefit, would not be sufficient to justify the right to possession of human tissue samples.

Marking the Legal Character of Live Human Tissue

The leading authority in relation to the marking of human tissue from a live person, is *Moore v Regents of University of California*.²⁴ This 1990 decision in the US Supreme Court concerned the legal status of a ‘cell-line’ produced by researchers from cells

²³ Ibid [21].

²⁴ 793 P.2d 479 (Cal. 1990).

taken from Mr Moore's spleen. They were taken with consent, but the scientific purpose was not disclosed. Like *Colavito*, Mr Moore sued in conversion. By a majority, the court looked at public policy issues regarding research and development and consent, and while it didn't deny the possibility of marking human tissue as property, it held that 'the novelty of the claim demanded express consideration of the policies to be served by extending liability'.²⁵

This approach has been extensively debated. It's safe to say that it's unlikely that it definitively denies marking the human tissue as property. After all, as Broussard J pointed out in dissent, if the cell line were stolen, surely an action in conversion would lie? This presupposes legal status of property in the human tissue.

Exceptions to the 'No Property' Rule

In spite of the common law presumption against property in a corpse applied so directly in *Colavito*, it is possible to establish proprietary interests in a corpse in certain situations. In *Doodeward v Spence* for instance, it was held that such possession was not unlawful if the body possesses attributes that mean its preservation may afford valuable or interesting information or instruction,²⁶ that differentiate it 'from a mere corpse awaiting burial.'²⁷ It was also suggested in this case that there may be property in a mummy due to the skill of the embalmer having turned it into something else.²⁸ (I wonder if Mr Woods could use this argument in relation to his apparently preserved leg.) In addition, Barton J considered a foetus not to fall within the definition of a corpse.

²⁵ Ibid, 493.

²⁶ *Doodeward v Spence* (1908) 6 CLR 406, 413-4.

²⁷ Ibid, 414.

²⁸ Ibid, 422. See also Roger S. Magnusson, 'The Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions', (1992) 18 *Melbourne University Law Review* 601-29, 603-7.

While *St Mary Sledmore* cannot be construed as an exception to the ‘no property’ rule, it does identify a way of allowing possession of human tissue. In the case of *Colavito*, the *Uniform Anatomical Gift Act* provided the original authority for possession of the kidney – but not it seems *property* in the kidney. The court expressly disclaimed any analogy to be drawn from the legislation that property vested in the human tissue.

Colavito discussed the means the US courts had used to compensate relatives of decedents in cases of unauthorised autopsies and removal of body parts. These were not marked as property cases, but rather as claims for emotional distress. Again, not an exception to the ‘no property’ rule but an alternative means of affirming the humanity of the deceased while vesting some rights in the surviving relatives.

This points to the fact that in spite of the reluctance of the law to mark the human body as property the law has recognised the challenges inherent in this demarcation between human and property. It has therefore developed a range of devices to address these challenges.

The *Doodeward v Spence* approach of creating an exception to the no property rule may not hold currency in today’s society. Other approaches though, giving a right of possession of a human body or tissue through court supervision (*St Mary Sledmore*) or legislative provision (*Colavito*, the court’s suggestions in *Moore v Regents*) are the most likely methods of retaining the mark of humanity while allowing for

development of our society both culturally in the case of repatriation of indigenous remains, and scientifically where tissue is required for benefiting human life.

Conclusion

Like *Doodeward v Spence*, there was human skill and ingenuity applied to the spleen cells in *Moore v Regents*. The sanctity of the human in this case is not made explicit, in contrast to the attitudes expressed in *St Mary Sledmore*. The upshot though, I think, is the same in *Colavito* and *Moore v Regents* – the common law is reluctant to move away from marking the human as such. *St Mary Sledmore* still supports this, however provides a framework for consideration of ways to consider legitimating claims for possession and use of human tissue that affirm the humanity of the deceased, rather than entering into a debate about marking a human as property.

The result in *Moore v Regents* and the critique of the decision since, indicates that the law has some way to go in finding the right balance for its marking of the boundary between human and property, in particular in light of the commercial advantages to be found in biotechnology and even in relation to the medical need, as in *Colavito*, for organ or tissue donation.

Post Script

So if we conclude that the law to date has fairly consistently marked the body and parts thereof as human and has denied it character as property, what is the outlook for our friends from North Carolina?

In the case of the lost leg, the marking of the boundary between person and property seems to be supported by comments in *Colavito*. Mr Whisnaut's use is 'not just a sentimental attachment'. His claim for property is no 'mere legal fiction'. On the US decisions, this would predicate against any action for emotional harm due to the 'loss' of the leg, and by extension, any action for its recovery. Conversely, this argument would assist Mr Woods in recovery of the leg and would support the marking of the body part as human, rather than property.

On the other hand, the *Doodeward v Spence* exception may assist Mr Whisnaut, to the extent that it allows for property in human tissue to which skill has been applied. If the mummification process undertaken by Mr Woods changes the nature of the leg into property, Mr Whisnaut may be successful in his claim that he 'paid for it, it's [his]'.