

BOOK REVIEW

LAW AND THE HUMAN BODY: PROPERTY RIGHTS, OWNERSHIP AND CONTROL

By Rohan Hardcastle

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The question of ownership and control over the human body or parts thereof has been discussed for a long time, but so far remains unresolved. It is, however, gaining relevance as science keeps advancing and genetic and genomic research progresses continuously. In this book, the author examines the current state of the regulation in the UK and traces its origins in other jurisdictions and, in the second part, provides suggestions as to how the legal problems could be resolved.

The book is divided into three parts – an introductory chapter and two main parts. The latter parts are subdivided into three and four chapters, respectively.

In the introduction, Hardcastle sets the scene by outlining the conflicting interests in the area and describing four situations in which control over bodily material can be of relevance: control over the forms of scientific research undertaken; commercial aspects of the use of biological materials; immortalisation through creation of a cell-line; and obtaining personal information from genetic data. The author raises the question of which pecuniary and non-pecuniary interests should be protected and how this should occur. The introductory chapter then proceeds to explain the type of biological materials and how these are used in research in order to set out the basic legal problems and outline the structure of the book. As regards the types of biological materials, Hardcastle distinguishes between physical manifestations in their original state, such as on microscopic slides, amplified DNA, cell-lines and modified biological materials – for example through the introduction of foreign DNA – and genetic information. Methods of scientific use he examines are tissue collection and genetic databases. In the remainder of the introduction, Hardcastle introduces briefly the existing legal framework, or lack thereof, in the UK, the US and Australia, as regards proprietary and non-proprietary protection.

Part One begins by examining the legal framework surrounding the dead body in Chapter 2, then continues to discuss the law relating to the living body in Chapter 3 and finishes with an analysis of the Human Tissue Act 2004 in Chapter 4. Hardcastle traces the origins of the “no property principle” in human corpses found in English and Scottish common law before considering exemptions to that general principle. He follows on with the non-proprietary interests in a dead body, such as the right to possession for burial, quasi-proprietary rights and protection under tort law. Three jurisdictions are looked at – England, the US and Australia. Chapter 3, concerned with the living body, begins with a very brief paragraph on the most extreme case of property rights in the living body – namely slavery and the demise of that legal

concept. The chapter then continues to develop four main points. The first point leads on from the famous *Moore* case in the USA, as well as *Greenberg* and *Catalona* and states that there is no common law authority in any of the jurisdictions examined analysing a person's property rights in material removed from his/her body. The second and third points Hardcastle makes are that statute and common law allow property rights in separated bodily materials on an ad hoc basis, through the work or skill exception, the act of detachment and the latter combined with the intention to treat the material as property. The final point is that, as regards non-proprietary rights, neither common law nor data protection law extends any protection. The concluding section of the first part deals with the Human Tissue Act and examines whether it recognises property rights or non-proprietary rights in any way, deciding that the 2004 legislation did not resolve the problem of the legal status of biological materials from both dead bodies and from living persons. Similarly, no answer is given as to what rights pertain to the same. What the Act does provide is an emphasis on the doctrine of informed consent as the basis for the use of any human tissue.

Part Two is concerned with analysis of the future development of the relevant law as well as a more rational approach. Chapter 5 examines property rights, Chapter 6 looks at the creation and allocation of property rights, chapter 7 is concerned with non-proprietary interests and Chapter 8 provides a brief conclusion.

Chapter 5 reflects on the central question of the book, namely whether legal principle supports the creation of a property right to separated bodily materials from either the living or the dead body. To attempt an answer to the question, Hardcastle looks at two aspects: whether physical separation can transform biological materials into things that can be the subject of property rights; and what circumstances support the creation of these property rights. The author suggests that, although English law has proven to be reluctant to recognise such rights, this point of view should be reconsidered in favour of a property right for the individual from which the separated material had been taken. The work or skill exception, however, should not be relied on too heavily, as it cannot be utilised as a general principle – what the author calls “a misguided application of the specification doctrine”. Chapter 6 considers a coherent framework for creating and allocating property rights, examining possible explanations for creating a property right – such as the physical act of detachment together with the intention to use the body part as property. Hardcastle examines the situation where the source of the material – as well as somebody else – expresses the requisite intention and suggests some solutions to the problem. In Chapter 7, Hardcastle examines the protection of non-proprietary interests in biological material and concludes that there is only limited potential protection under English law. Only article 8 of the European Convention on Human Rights and the law of negligence provide some protection for the principle of autonomy. He continues to consider how the English law on wrongs can further be developed to encompass the protection of these non-proprietary interests.

This book provides an excellent overview of the legal problems of proprietary and non-proprietary rights to the human body – not just under English law, but also under other common law jurisdictions. While the book may be interesting for readers from civil law jurisdictions, it is certainly of greater interest to scholars from common law countries.

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