Singapore Journal of Legal Studies
[2000] 483 – 508

RIGHTS, ETHICS AND THE COMMERCIALISATION OF THE HUMAN BODY

In the current race towards the staking of claims in the new life sciences, some of the most important and fundamental legal and ethical questions relating to rights and property in the human body, organs, tissue and other human by-products remain unanswered. This paper explores the current approach of the common law to the question of rights to the human body and human body tissue or organs. Relevant existing statutory provisions in Singapore are also examined. Is it possible to assert a legal right to property in the human body at common law? Is there a distinction between organs and tissues obtained from cadavers, and from that which is obtained from living donors? What is or should be the proper balance of rights between tissue donors, commercial concerns and end users? What is the proper object of public policy in relation to the protection of individual dignity and the encouragement of biotechnological advances? In section I of this article, the underlying assumptions of the common law are examined. In section 2, the impact of the absence of clear law in this area is explored in the context of the Bristol Royal Infirmary Inquiry case. In section 3, the dimension of consent to the taking of human tissue is explored, and its relevance to claims to rights to retention, and of property. In section 4, relevant Singapore statutory provisions are examined. In section 5, the rights of living donors in the common law are considered. Section 6 deals with living donors and their rights under the statutory law.

I. Rights to the Human Body: The Common Law

IN recent years, the question of whether a claim to property in the human body has attracted a great deal of interest in academic circles.[1] The interest has been fuelled by the realisation that there are uses of great commercial significance for human body tissue beyond simply that of transfusion or transplantation. Transfusion or transplantation are uses which are generally regulated by governments,[2] but there is much less in the way on law on

1 One of the classic primers on this question is P Matthews' "Whose Body? People as Property" (1983) 36 Current Legal Problems 193. For an excellent recent example summarising in a comparative fashion the approach of the common law in various common law jurisdiction, see Roger Magnusson, "Proprietary Rights in Human Tissue" in N Palmer & E McKendrick (eds), *Interest in Goods* (1998: Lloyds Commercial Library).

2 In Singapore, these are regulated under the Private Hospitals and Clinics Act (Cap 248, *cf* s 3), the Private Hospitals and Clinics Regulations (see Regulation 18 and Second Schedule thereto), and Part IV of the Human Organ Transplant Act (Cap 131A).

other uses of the human body or of human tissue. Many academic writers have focused on the concept of property in the human body as a starting point to the question of whether any person may claim any kind of rights in the human body. In general, however, the chief stumbling block has been an English case which was decided more than a century ago,[3] which essentially laid down the general rule that no person was entitled to claim any general property in a human body. In the result, some authors have tried to move away from using the concept of property as a basis. For example, Professor Rosalind Atherton of Macquarie University has advocated that the whole question should be viewed and examined from the perspective of control instead of focussing on property. So she writes:

> The problem at its most fundamental level, is not so much a question of property models or any other models, but rather one of control. The real questions are now not so much whether the answers should be found through the law of property, tort or contract, but rather who is given the control and how far that control goes. These questions need to be considered as between the individual, the family, institutions and organisations that have custody of bodies or body products, medical practitioners and the state. Law expresses the balance of control among these often competing groups. The balance contains moral, ethical and sometimes religious elements in response to such fundamental matters as the meaning of life and the meaning of death, and the rights of other human beings to make decisions in respect of such things.[4]

Unfortunately, there is much less actual judicial precedent to go on than academic debate. The question of property in the body (at least in dead bodies) has never come before the courts in Singapore, and rarely in England. And in the rare instances that they have come before the English courts, the courts have not shown the same appreciation as Professor Atherton does for the wider social and ethical implications and dimensions of the question put to them.

A good recent example is that of a case which came before the Criminal Division of the English Court of Appeal in May 1998, in the shape of *R* v *Kelly & Anor.*[5] Two young men had appealed against their conviction for theft under the English Theft Act 1968. What was unusual about the case was the property in question. They were, to quote: about "35 to 40

3 *Williams* v *Williams* [1882] 20 ChD 659.

4 Rosalind Atherton, "Claims on the Deceased: The Corpse as Property", in (2000) Journal of Law and Medicine, Vol 7 (May 2000), 361 at 363.

5 [1999] QB 621 (CA), [1998] 3 All ER 741, [1999] 2 WLR 384.

human body parts, including three human heads, part of a brain, six arms or parts of an arm, ten legs or feet, and part of three human torsos". The two appellants were alleged to have stolen them from the Royal College of Surgeons. The parts had been part of the College's anatomical collection for the training of surgeons. The first appellant was an artist, and had been given permission by the College to make drawings of the specimens at the premises of the College. He had persuaded the second appellant, a junior technician employed by the College, to remove the body parts from the College. He used some of the parts to make casts, which were exhibited in an art gallery. None of the parts were returned to the College. Most of the parts were buried in a field, and the remainder distributed between the attic of the first appellant and the basement of his friend's house.

The parts had been acquired over very many years by the College. A considerable amount of work had gone into the parts:

> [a]ll the specimens taken had been preserved or fixed by college staff or other medical agencies. All were subject to a regular scheme of inspection, preservation, and maintenance and most of them had been the subject of further work, by prosection, whereby they had been expertly dissected so as to reveal, in highlighted form, the inner workings of the body.[6]

The defence to the charge of theft was simple, and ingenious. The two appellants said that they had acted in the belief that nobody could claim property in human dead bodies, or in body parts. They therefore considered that they had no obligation to return them. Their trump card was a 19th century case, *Williams* v *Williams*[7] which had settled that at common law, nobody (not even the State) could claim property in a human body. That being the case, they said, the Royal College of Surgeons could not claim to be in lawful possession of the property in the body parts. In short, the body parts in question were not capable of being stolen because they were simply incapable of being owned by anyone in law. As the first appellant put it, they were merely "intercepting parts which were 'on their way to the grave'".[8]

In *Williams* v *Williams,* a man had died, but not before leaving to the plaintiff (a lady friend of his) a codicil to his will, in which he directed the lady friend (who was not either of his executors under the will) to take possession of his body upon his death, and to have the body cremated and put into a Wedgwood jar which he had provided the plaintiff for the purpose.

6 At 624.
7 [1882] 20 ChD 659.
8 At 624.

Upon his death, the executors had refused to deliver up the body for cremation, despite the plaintiff's protestations. Instead, they had the body buried in accordance with the wishes of the deceased's widow and family. The plaintiff fraudulently obtained a permit from the authorities for the exhumation of the body, and managed to have the body disinterred and spirited off to Italy before the fraud could be discovered. There the plaintiff carried out the deceased's wishes: she had his body cremated and the ashes put into the Wedgwood jar, and this she brought back to England for burial. She then sued the executors, widow and sons of the deceased for £321 in reimbursement of her expenses in carrying out the wishes of the deceased.

Strictly speaking, the court could have decided this case simply on the issue that a court of equity ought not lend its aid to a cause tainted by illegality, or at the very least, by fraud. Kay J did indeed hold that the plaintiff's claim was fatally tainted by illegality on her part, or in the alternative, by fraud. But the Court chose to also consider the issue of entitlement to possession in the body, and thereby established the basic common law rule governing claims to ownership in human bodies.

No one, said the Court, could claim property in a dead body. The formulation is simple and exclusive: "Our law recognises no property in a corpse."[9] The family of a deceased person has no claim to his body. But the court allowed one qualification: "[t]he law in this country is clear, that after the death of a man, his executors have a right to the custody and possession of his body (although they have no property in it) until it is properly buried".[10]

That being the case, the deceased's body could not form part of the property of his estate. It followed therefore that a deceased person could not bind his executors to specific modes of disposal – executors were entitled to ignore whatever instructors given by testators as regards disposal of the body, because the body was not property in the deceased's power to give. For that reason, therefore, the lady friend's claim failed, for the executors were entitled to dispose of the body in any dignified manner they thought fit, in this case, by burial. Significantly, the court in *Williams* conceded that although the executors did not have any general property in the body of the deceased, they did have a special right to possession of the body. But this special right of possession was given to them only in the public interest for the purposes of disposing of the corpse in a timely and dignified way. And so there the matter stood, until the 1990s, at least in England.

In raising the principle in *Williams* as a defence, the appellants in *Kelly* had a seemingly foolproof argument. Under the Theft Act 1968, it was

[9] At 663.
[10] At 665.

necessary to prove that the appellants had dishonestly appropriated "property *belonging to another* with the intention of permanently depriving the other of it" [emphasis mine]. If the *Williams* principle were to be upheld, then it would mean that the body parts would from the legal point of view be in principle no different from love and fresh air, or from bodily wastes left behind at a public toilet. Accepting this argument, however, would mean that valuable anatomical collections and human tissue collections painstakingly assembled over many years would suddenly become open to all takers, because no one could then legally claim property in them. That was clearly unpalatable. On the other hand, if the *Williams* principle was denied, a whole Pandora's box would be opened. If the court ruled in favour of upholding the convictions, then it followed that the decision had to be on the basis that the College *had* some legal property in the body parts. Despite the implications, the court in *Kelly* chose to open the box, and upheld the convictions.

Their grounds for doing so were curious. Without mentioning the *Williams* case, the Court of Appeal accepted that "however questionable the historical origins of the principle, it has now been the common law for 150 years at least that neither a corpse, nor parts of a corpse, are in themselves and without being more capable of being property protected by rights".[11] If *Williams* remained the law, it followed that a corpse, or any part of a corpse, was incapable of being stolen, at least under the Theft Act 1968.

To overcome this lacuna created by *Williams,* the Court of Appeal held that there was a special exception to this general rule. It chose to follow a turn-of-the-century Australian case, *Doodeward* v *Spence,*[12] in holding that "parts of a corpse are capable of being property within section 4 of the Theft Act, if they have acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques, for exhibition or teaching purposes". There was no question that much work and skill had been applied to at least some of the body parts in question, as they had been painstakingly fixed, dissected and prepared for anatomical demonstration and study. The convictions of the accused were accordingly upheld.

Kelly's case provides an interesting perspective on how the common law rules in relation to questions relating to the idea of property in the human body have evolved in recent years. For over 150 years, the English common law has been frozen in time, holding simply that nobody but nobody is entitled to any property in bodies or body parts, except for the purposes of disposal. That such an important issue should come to be settled in such

[11] At 630.
[12] (1908) 6 CLR 406 (High Court, Australia).

a way by the English courts in a case on the facts of *Kelly* is in my view unfortunate, because in that case the issue of property was of use only tangentially as a technical defence. The court did not have, and could not have, an opportunity to consider the full implications of making a finding of the existence of a property right in human bodies or body parts.

It is interesting while the court in *Kelly* chose to affirm (if reluctantly) the general rule in *Williams,* it created an important exception to the *Williams* without explaining the basis for the exception. Nor did the court consider the implications of bringing into being a new right of property previously unknown to the common law. The court in *Kelly* was aware of the *Williams* rule: recognizing the existence of the rule, it even conceded "[i]f that principle is now to be changed, in our view, it must be by Parliament, because it has been express or implicit in all the ... authorities and writings ... that a corpse or part of it cannot be stolen".[13]

Yet in the very next sentence, the court simply decided, without further explanation, to adopt the principle in *Doodeward* v *Spence*. The court appears to have simply ignored the submission of counsel for the second appellant, who had argued that "no amount of skill expended on a body part can affect its ownership; at the highest, it might affect possessory rights". A conservative interpretation of the decision may be that *Kelly* only considered property from the perspective of possession or control: the Theft Act 1968 provides that the notion of "property" covered "money and all other property, real or personal, including things in action and other intangible property",[14] and that it should "be regarded as belonging to any person having possession or control of it, or having any proprietory right or interest."[15] The court in *Kelly* chose to find that it *was* possible to have property in a corpse (or part thereof) within the meaning of section 4 through the application of the principle in *Doodesward* v *Spence, and* also found that the Royal College of Surgeons had and was entitled to possession within the meaning of section 5.

It is especially unfortunate that the *Williams* case is not referred to at all in the judgment of the Court of Appeal, although the case must have almost certainly been cited before it. It is also perhaps unfortunate that a clearer distinction was not made between a right of ownership (the subject matter of section 4), and the right to possession and control (the subject matter of section 5). At common law, ownership and the right of possession and control is not the same thing. The legal owner of any kind of property

[13] At 630-631.
[14] S 4(1).
[15] S 5(1).

may, for example, enter into a lawfully binding agreement by which he surrenders the right of possession and control to another for reward. Contracts for the lease, hire and rental of property are common examples. Separation of legal title and the right to possession and control may occur by operation of law against the will of the legal owner in other circumstances.[16] In finding the appellants guilty, the court thereby indirectly confirmed that ownership could be asserted over a corpse or parts of a corpse (as under section 4), that the Royal College of Surgeons were entitled to a claim of ownership which they could assert before the law, and that they were entitled to possession and control (under section 5). Conferring a simple right to possession and control is less controversial, because rights to possession and control can be conferred without conferring a right of ownership, or even conceding that the thing in question can be owned (and therefore property in the eyes of the law). Indeed, that much was made clear by the decision in *Williams:* it is not possible to claim ownership or property in a corpse, but it is possible to assert a right of possession and control for a particular purpose (in the *Williams* circumstances, for the proper disposal of the corpse by the executors). A bare right of possession and control does not amount to ownership.

In the aftermath of *Kelly,* we now have a decision which is authority for the proposition that at least in *some* cases, people can claim property in human bodies, or body parts, and by analogy, human tissues. It is possible to limit the impact of the *Kelly* decision by arguing that the court made it clear that its finding of a special property was only in the context of the Theft Act. But it is difficult to see why what qualifies as stealable property ought not in principle be property recognised by the general law. After *Kelly,* does it now mean that for example I may legitimately intercept amputated limbs intended for incineration (which would not be theft because nobody can claim property to them under the *Williams* rule), take them home, preserve them, dissect them and turn them into marvels of anatomical art, and then sell them to B at a nice profit? And if C steals them from B for profitable display at a carnival sideshow, can C be charged for theft, and can B sue C in conversion, and for compensation arising from the profits that C made from displaying the prepared parts, which in their original form were incapable of being property? Can the original owner of the limbs (assuming that he is still alive) claim against both B and C for a cut of the profits earned by them from his limbs?

[16] See for instance, the provisions of ss 21 to 26 of the Sale of Goods Act (Cap 393).

Kelly opened the door to these questions, without providing the answers. If the court was prepared to accept (as they did) that the general principle in *Williams* was still the common law, and that any change to the existing law was not a matter for them but for Parliament, perhaps it might have been better if the court simply recognised that the lacuna laid not in the common law, but in the definition of theft in the Theft Act itself. But in creating an exception to *Williams* that not only created a new basis for asserting rights to possession and control, but created the entirely new notion of a right of property itself, the court failed to define the limits of its creation: in time, the exception in *Kelly* may well prove to be more important than the general rule in *Williams* itself.

In failing to address the basis for new exception, the decision in *Kelly* threatens to undermine the general rule altogether. If a third party can claim property in the body of a stranger, why may not the deceased himself assert that his body should form part of the property of his estate? Would the perverse result of the *Kelly* case be that if the deceased had put work into his body, he might be able to assert a right to property in his own body? For example, what if I decide to invest many hours in having extensive tattoos applied to my entire body?

II. Rights to the Human Body: The Absence of Law and its Social Impact

The uncertainty of the law has not served the medical profession well, which has had to essentially operate in a legal vacuum. Medical practice and medical science cannot suspend procedures until such time as the law gives an answer, and in the result, professional practice has had to be accepted sometimes in lieu of the law. But where professional practice differs from public sentiment, misunderstanding and controversy may arise, as well illustrated by the unfortunate circumstances surrounding the public controversy about the alleged practice of certain British hospitals in retaining organs of people who had died. The allegation was that in some cases, some of the organs removed had been used for research and teaching, while others were removed and stored without being used. At least two large hospitals were alleged to have been involved. The British government has since constituted two separate public inquiries into the allegations about the retention of organs at two large hospitals, the Bristol Royal Infirmary, and the Alder Hey Children's Hospital in Liverpool.[17] In respect of the Bristol Royal Infirmary,

[17] See *Hansard,* 14 December 1999, and the statement of Mr John Hutton, Minister of State in the Department of Health (http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmhansrd/vo991214/halltext/9124h01.htm). The Bistol Royal Infirmary Inquiry Panel, chaired by Professor Ian Kennedy, has set up its own website at http://www.bristol-inquiry.org.uk/

it was alleged that the hearts and other organs of children who had died following unsuccessful cardiac surgery at the hospital had been removed and subsequently retained without the knowledge of their parents. The report of the inquiry panel into the Alder Hey is still pending. But in May this year, the Bristol Royal Infirmary Inquiry Panel released their Interim Report,[18] with the Final Report to follow towards the end of the year. The Interim Report makes for disturbing reading.

Between 1984 and 1995, 265 post-mortems were carried out on children who died following heart surgery at the hospital.[19] Following publicity in the media,[20] it was found that at least 140[21] of these children had had their organs removed and retained, with the result that the grieving parents were now faced with the prospect of arranging for the disposal of their child's heart or other organs.

In many of these cases, more than just the heart had been retained. It was explained to the Inquiry Panel that in order for proper pathological examination to be carried out to determine the cause of death and the nature of the abnormality, it was often "desperately necessary to remove the thoracic organs en bloc, fix them, recolor them, and then look at them with the aid of magnifying spectacles television camera, dissected against a clean and bloodless background, and – it takes 10 days to do it properly and

, at which website it has made available an extensive collection of documents such as its Interim Report, other reports, submissions and other materials. The terms of reference of the Bristol Royal Infirmary Inquiry are set out in the documents available on the site. The terms of the separate Alder Hey Inquiry were given in Parliament as (see *Hansard,* 10 January 2000, http://194.128.65.4/pa/cm199900/cmhansrd/vo000110/text/00110w17.htm). the "independent inquiry team's terms of reference are to inquire into the circumstances leading to the removal, retention and disposal of human tissue, including organs of the body, from children at the Royal Liverpool Children's Hospital National Health Service Trust (and its predecessor NHS organisations) who have undergone post mortem examinations; to inquire into the extent to which the Human Tissue Act 1961 has been complied with; to examine professional practice and management action and systems, including what information and in what form that information was given to the children's parents or, where relevant, other family members in respect of the removal, retention and disposal of tissue; to examine the role of the NHS and other bodies or persons involved; to consider other issues relating to the above matters as necessary; to report to my right hon. Friend the Secretary of State by the end of March and make such recommendations as are appropriate).

18 The Bristol Royal Infirmary Inquiry, *The Inquiry into the management of care of children receiving complex heart surgery at The Bristol Royal Infirmary: Interim Report: Removal and retention of human material* (10 May 2000), available at http://www.bristol-inquiry.org.uk/interim/index.htm. Reference numbers for quotations from the Interim Report in this article are the paragraph numbers given in the Interim Report.

19 37, Part II.

20 See 48, Part II.

21 52, Part II.

you would have to delay the funeral for 10 days if you return the organs to the body".[22] So the parents were not told about the removal of the organs. A majority of the post-mortem had been done as Coroner's cases, so in these cases it was not necessary for consent to be taken from the parents for the purposes of the post-mortem. In the remaining cases, the parents had been asked to sign a consent form, by which the parents authorised the taking of "tissue". Organs were not mentioned, and therein laid one of the main criticisms against the hospital. The Inquiry Panel found that while "the pathologists and clinicians understood the word "tissue" to refer to anything from whole organs to slides and frozen sections, the very great majority of parents had no appreciation of this."[23] The Inquiry Panel noted however that this was not "how the term "tissue" is understood in everyday language. Indeed, most people would not regard organs as being properly described as tissue."[24] Evidence was also given that it was not clearly explained to the parents what the post-mortem might involve, or how the organs might be retained and used by the hospital: "There was a great deal of shock among parents when they learned first that their children's hearts and, alter, other organs and human material had been removed and stored rather than returned to their bodies".[25]

The Inquiry found that it "was common practice, in Bristol and elsewhere, for human material removed during a post-mortem to be retained for long periods of time by pathologists. In a large number of cases, parents seem to have been unaware of this practice."[26]

Indeed, the Inquiry Panel noted that there was:

> a long-standing habit among pathologists of taking and keeping human material, other than that required to establish the cause of death, for other purposes; for example, for research or education. Equally, once the post-mortem was concluded, it was common among pathologists to keep human material; removed for the purposes of establishing cause of death, and similarly, use it for other purposes.[27]

Two quite separate practices are therefore involved: the first is the taking of tissue (or organs) *not* directly required to establish the cause of death, for use for other purposes such as research and education; and the other

[22] 10, Annex B.
[23] 45, Part II.
[24] 8, Part I.
[25] 47, Part II.
[26] 2, Annex A.
[27] 27, Part II.

is the continued keeping and use of tissue (or organs) removed for the purposes of the post-mortem for other uses *after* the original purpose of its removal had been exhausted.

It is important to note that what was happening at Bristol was not unusual: the Inquiry Panel observed that the "practice at Bristol appeared to accord with that adopted generally in England and Wales. It was only over the period of our terms of reference that the general notion of a greater involvement of patients in their medical care along with the principle of informed consent gradually developed."[28] In other words, the law failed the staff at Bristol: they had to operate in a legal vacuum because there was no clear law on the many important issues which they had to confront daily. The Inquiry Panel observed that the "law *is* complex and obscure", and in the absence of clear law, "[p]ractice had developed over decades which suited the interests and needs of those involved: the medical profession".[29]

What is clear from the Interim Report is that the retention of the organs by the staff of the hospital had been done in good faith. The main dispute arose out of the difference in perception between the parents and the pathologists as to the retention and use of the organs *after* the object of their post-mortem removal and examination had been satisfied. Evidence was given by a hospital pathologist "human material removed during a Coroner's post-mortem could be retained and used by the pathologist once the Coroner was *functus officio*, having established the cause of death" and that "our views are based on common practice, the law and ethics – ... that tissue which was lawfully obtained and was no longer required for its original purpose could ethically be used for the greater good, if you like."[30] Indeed, other experts took the view that at least in Coroner's post-mortems, the pathologist *had* to "retain any tissue, organ or fluid which in his opinion might have a bearing on the cause of the death."[31] The difficulty was, for how long? And for what other permissible purposes? And what was the precise nature of the right?

In my mind, the Bristol Royal Infirmary case exposes the poverty of the existing common law in addressing the issues arising out of property claims to the human body, and underlines the inadequacy of leaving such issues entirely to the common law process. Courts can only decide legal questions put to them on specific facts and situations. They cannot, unlike Parliament, take into account the myriad ethical, philosophical, social and wider public interest considerations and competing claims which have to be taken together with the legal issues in deciding such questions. From

[28] 55, 58-60, Part II.
[29] 58, Part II.
[30] 33, Annex A.
[31] 49, Annex A.

this perspective, the Bristol Royal Infirmary case presents a valuable opportunity and a compelling argument, in contrast to the *Kelly* case, for the many issues raised to be examined holistically with a view to the wider implications. The question of right to property to the human body is one of these issues.

The first issue raised by the Bristol case is of course the very question of the existence of property itself. Clearly, the retained organs meant *something* to both the parents and to the pathologists – it is lame for the common law to reply that they are things which are incapable of being owned. Should emotional attachment count for nothing in the law? Should religious sentiments? And I do not think that anyone would dream of asserting the exception in *Kelly* against the bereaved parents. Nor can I imagine that the courts would ever uphold such an application of *Kelly.* Quite apart from legal considerations, it would involve grave questions of ethics and public policy which the courts would be compelled to consider. So by these several yardsticks, there is something fundamentally wrong with the assertion that you can create property out of something which the law asserts is incapable of being property simply by dint of adding your skill and ingenuity to it.

Even if it were lawfully correct, I would have grave doubts about the ethical implications if a hospital in such a situation should insist on asserting its property claim under *Kelly.* I should immediately add that the hospital of course, did not, and once it became aware of the parents' concerns, took immediate steps to identify and return the remains. If the *Kelly* principle falls so easily in the face of the situation in the Bristol case, it may be because the end result was practically dictated by the equities of the situation. Essentially, the court in *Kelly* had to decide between finding a right to property or letting the two accused walk free. The Bristol case illustrates that in many other situations, it is not quite so easy to find the difficult and just path between the many competing interests, claims and considerations that attend the question of property in the human body.

I would like to address some of the considerations that emerge from the Bristol case.

III. Rights to the Human Body: The Dimension of Consent to the Taking

One is the question of consent. In the case of *Kelly,* the court did not go into the issue of whether consent had been given for the donation of the body parts, and if so, by whom that consent had been given. In the Bristol case, the issue of consent became one of the focal issues. If the *Williams* principle is applied on its original formulation, then it may be argued that the issue of consent is simply and completely irrelevant because no one can give consent to the donation of a corpse or any part of it because no one can claim to have any property in it. But *Kelly* changes things: *if* it

is the law that a person can in certain circumstances claim not only the right of possession and control of a corpse, but also to the property in it, then the question of consent *may* well in some circumstances be a relevant question.

As the common law currently stands, consent is required for the taking of *any* tissue from a living person, as it is for any test, treatment or procedure, whether or not that test, treatment or procedure is or is not generally regarded as invasive. This has not been in doubt since at least the decision of the House of Lords in *Airedale National Health Service Trust* v *Bland.*[32] In that case, the House of Lords finally gave its whole-hearted approval to a doctrine which had been long known to American but not English jurisprudence when it approved[33] of the words of Justice Cardozo in the 1914 case of *Schloendorff* v *Society of New York Hospital.*[34] In *Schloendorff,* Justice Cardozo had made the famous statement that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body." This principle applies even to procedures that pose little or no risk to the person, or indeed to procedures that cannot harm but can only help: in decisions regarding his or her own (*living)* body, "the patient's right of veto is absolute.[35]

Yet no more than 20 years ago, such a position would have been unimaginable. In the case of S*idaway* v *Board of Governors of the Bethlem Royal Hospital*,[36] Lord Scarman had sought to characterize "the patient's right to make his own decision ... as a basic human right protected by the common law,"[37] but he was in a minority of one. But perhaps Lord Scarman spoke a little ahead of his time. But the wheels of the common law do eventually turn, however slowly or reluctantly. As the House of Lords Select Committee on Medical Ethics recognised,[38] one legal relationship that has undergone fundamental change in recent years is:

> the relationship between doctor and patient. The increased importance attached to individual autonomy, or the freedom to make decisions for oneself, has meant that relationships between state and citizen,

[32] [1993] 2 WLR 316 (HL).
[33] *Cf* Lord Goff at 367F.
[34] 105 NE 92.
[35] Lord Ward in *Re A (Children)* (Case No: B1/2000/2969) Court of Appeal, 22 September 2000, the case of the Siamese twins "Jodie" and "Mary", at para 1 to 3 of Part III ("Medical Law") of the draft report of the decision made available at http://www.courtservice.gov.uk/info/news_items/siamese.htm.
[36] [1985] AC 871 (HL).
[37] At 882.
[38] House of Lords, *Report of the Select Committee on Medical Ethics* (31 January 1994: HMSO), vol 1, at p 7.

> between doctor and patient, teacher and pupil, parent and child, have all become less paternalistic. Most individuals wish to take more responsibility for the course of their lives, and this applies equally to decisions about medical treatment. Whereas in the past decisions were often left to the doctor alone, decisions are usually now the result of consultation between the patient and the health-care team, with the patient's relatives generally playing a role as well.

So far, however, the English courts have only extended their inquiry about consent to cases in which disclosure about the risks of treatment is in issue. There has been very little discussion about the question of consent in the context of donations where there is no risk to the donor. Can the current consent to treatment cases have any application to situations where no therapy is contemplated or possible, as in where a family is being asked for permission for a post-mortem to be carried out, and possibly for some organs to be removed and retained for study? At first sight, there does seem to be very little connection between the two.

But I would argue that there is, because in the final analysis, the same foundation principles must apply. In *Airedale National Health Service Trust* v *Bland,* the House of Lords held that the foundation of the physicians' authority and right to touch or treat rested on the principle of the autonomy of the individual and his right to self-determination. In other words, the onus is on the physician to justify his interference with the body of the patient. The authority to do so must either come from the patient himself, if he is an adult and of sound mind. Or the authority must be vested in him by law, either through the operation of law (as in the emergency cases) or by the courts through the application by the courts of the best interests test.

At the heart of the autonomy principle is respect for the human person. Since *Airedale,* the autonomy principle has become the first among equals of the many principles which the English courts apply in medical law cases. It does not require any particular leap of imagination to look into the future and ask whether the same principle ought not to be applied to the question of consent to the removal, retention and use of human tissue. The question here, of course, is not a question of the disclosure of risks to a patient. The question here is a question of the fate of body parts and tissue, which though already dead, remain of great emotional and social importance to the surviving relatives. The respect demanded by the law for the dignity of the person is not altogether ended by death: the statutory law through

[39] See comments on the relevant provisions in the Penal Code and in the Environmental Public Health Act, below.

various provisions[39] protects the dignity of the remains of the person, as well as the feelings of the family that he leaves behind.[40] And my point is that these emotional and social considerations demand respect from a social and ethical point of view, and are worthy of protection by the law in the same way that the law now protects the autonomy of the living person.

I think it is not a very big logical step from the principle in *Airedale* to the first and paramount recommendation advanced by the Bristol Inquiry Panel. Their first recommendation, one of two described as "overarching principles, was that the "ruling principle in the removal, retention, use and disposal of human material must be respect for the dead child and for the concerns and, to the extent allowed by law, the wishes of the parents".[41] This first recommendation has much to commend it in its simplicity, consonance with existing common law, and in its recognition that beyond purely legal considerations, the concerns of the family, society and ethics should have an equally important voice in the legal debate over property in the body.

The obvious flaw in the argument just presented is of course that it may be pointless to ask the family of the deceased at all in the first place, on the footing that the *Williams* principle gives the estate of the deceased no property in the body. Yet to so argue is to precisely adopt the purely legalistic approach rejected by the Inquiry Panel. For good reason: if this argument had any validity, then it would be pointless to ask consent for any kind of taking of parts from a corpse, so long as one could show that it was not for an unlawful purpose, or to bother to ask for consent at all from the deceased's family for the removal of organs for transplantation, or for non-statutory post-mortem examinations. There are two answers to this argument in Singapore. One is grounded in an examination of the law in Singapore, and the other in ethics and social values.

IV. Rights to the Human Body: Singapore Statutory Provisions

There was a time when the *Williams* principle applied in full force, without exception, in Singapore. But after the enactment of the Medical (Treatment, Education and Research) Act[42] ("the MTERA"), that was clearly no longer

[40] Interestingly in this context, the Medical (Therapy, Education and Research) Act (Cap 175) in s 11(2) mandates that a statutory donee of a gift under the Act has a duty to remove any required part "without unnecessary mutilation".

[41] 120, 125, Part V.

[42] Cap 175.

[43] Cap 131A.

the case. And with the passage of the Human Organ Transplant Act[43] ("the HOTA"), the picture becomes even more complicated. For the MTERA was enacted to (among other things) give the next-of-kin the right and authority in law to confer the gift of organs and tissue for transplants and medical research.[44] Indeed, the MTERA also makes clear that, contrary to *Williams,* a person may in his lifetime make a lawfully binding gift of his own body or any part thereof to any of the specified statutory recipients for any of the specified statutory purposes.[45]

The central principle of the MTERA is that such gifts must be *consensual:* a person must consent to his body being used after his death, or his next-of-kin must consent after his death. Equally, too, the MTERA makes clear that there *are* specific persons in a specific order of priority who are entitled to give, or to withhold or even veto, such consent. Simply put, there can be no gift of a corpse or any part thereof without the requisite consent: no one can claim a right to a corpse, however compelling the purpose may be, whether for research or education, without the express consent of the deceased given in his lifetime, or his next-of-kin after his death. If the concept of consent to donation is such a central theme of the MTERA, any argument that consent at common law is irrelevant to the taking and use of human organs and tissue begin to look decidedly shaky.

Indeed, it is my contention that not only do the two Acts not make clear that consent is necessary, but in fact limits any concept of property in the body as far as Singapore is concerned. The Human Organ Transplant Act is no exception, for the Act merely provides for presumed consent in certain situations, which presumption a donor may in his lifetime rebut by lodging an objection.

Let me deal with the provisions of the Medical (Therapy, Education and Research) Act. The Act concerns itself only with gifts *after* death. Enacted in 1973,[46] the Act was designed to put donation and possession of a dead body for medical purposes on a sound legal footing, given the uncertainties of the common law. The scheme of the MTERA is simple. The body (or any part thereof) of a deceased person may be donated by the deceased's next-of-kin to specific classes of authorised donees, and only for the purposes permitted by the Act. Sections 7 and 12 define who the statutory classes of donees are: "any approved hospital", "any approved medical or dental school", the "Director of Medical Services" in relation to unclaimed bodies, and finally "any specified individual". The statutorily-permitted purposes for the first three classes of donees relate to the use of the body for "medical

[44] Ss 3 and 4.
[45] S 7.
[46] 25 May 1973.

or dental education, research, advancement of medical or dental science, therapy or transplantation". An individual in the last statutory class of donees may only use the gift "for therapy or transplant needed by him".

There are *no* other permitted donees. There are *no* other permitted purposes. The MTERA therefore does not appear to contemplate that the gift of a body or any part thereof can be made to private individuals, as opposed to hospitals and medical schools, for purposes other than transplantations. It does *not* seem possible for a person to donate a dead body or part thereof to specific individuals for research or education, as distinct from fulfilling a direct need for a transplant organ.

To summarise, these may be some of the conclusions which we might draw from the scheme of the MTERA. First, that, contrary to the *Williams* case, the deceased or his family have the lawful right in principle, to make a gift of the body after death, or any part of a body, including individual organs, or any kind of blood or tissue sample. Second, that the classes of donees are limited by statute. Finally, the gifts are only to be used for the specific purposes set out in the statute (which are different for some donees).

The MTERA does not answer a crucial question: what kind of property right in the body, if any, does the statute confer? It may be significant that the Act chooses to speak of permitted purposes, rather than use the language of proprietary rights. In this, it remains faithful to the background of the common law dominated by the *Williams* case. In short, statutory donees simply have the right to hold and use the body for the specific purposes prescribed by the Act, and no more. But it is of note that the MTERA appears to echo the *Williams* no-property rule in providing that after a statutory donee has removed any part required for any of the approved statutory purpose, "the *custody* of the remainder of the body shall *vest* in the surviving spouse, next of kin or other person under obligation to dispose of the body"[47] [emphasis mine]. The MTERA does not speak of *property*. Thus, contrary to *Kelly,* the MTERA does not appear to contemplate that statutory recipients acquire *any* right of property over the donated organ or tissue.

But what of *Kelly?* The short answer may be that a case like *Kelly* is unlikely ever to arise in Singapore. I do not mean to say that it is impossible to launch a raid on the tanks in the Anatomy department, but simply that those foolish and unfeeling enough to attempt to perpetrate such an outrage would find themselves charged for a range of possible offences – none of them involving theft or the issue of property in the body. For example, the Penal Code[48] already provides that "any person ... with the knowledge

[47] S 11(2).
[48] Cap 224.

that the feelings of any person are likely to be wounded ... offers any indignity to any human corpse" may be charged under section 297, and subject to punishment by imprisonment or fine or both. Likewise, Part VIII of the Environmental Public Health Act[49] ("the EPHA") places strict restricts on how and where corpses may be disposed of[50] – presumably therefore, it is unlawful to keep or have possession of a corpse or any part thereof in a place that has not been expressly sanctioned by the Government. The question, of course, is what is meant by a "corpse" in the Penal Code and the EPHA, but there is no reason why that word should not be construed to include part of a corpse as opposed to a whole, intact corpse. Otherwise, it may be that bodies which have had their organs lawfully retained for post-mortem examination would not qualify as a corpse. And perhaps that should have been the case in *Kelly*. I think that for most people, the real outrage in *Kelly* did not concern any question of property, but simply respect for the dignity of dead people. And it is in this area where the second answer to *Williams* in Singapore arises: this is one of those areas in which law, ethics and social values are joined, and are *ad idem* – all three are agreed that while living the body of a person should be respected, to the extent that he and only he should decide what should be done with it (or not done, as the case may be) in his lifetime. And on his death, both in the statutory intent expressed in the two Acts, and from an ethical and social viewpoint, it is clear that the body of a deceased person is to be treated with dignity and respect, and that the consent of the surviving next-of-kin to any taking or use or retention of the body does matter.

V. Rights in the Human Body: Living Donors and the Common Law

Ownership and property claims to blood and tissue taken from *living* (as opposed to cadaveric) donors are fraught with even more problems. If, for example, consent is given by a patient for blood and tissue samples to be taken from him for examination by a pathologist, does the law permit the retention of the samples by the reporting pathologist? Or does the law require that the samples be returned, and in that case, to whom: the patient, or the referring doctor? Can any of the parties, including the patient, claim any property interests in the samples? Even if full and informed consent was given by the patient to retention, what kind of property would the

[49] Cap 95, 1999 Rev Ed.

[50] See in particular s 72(1), which provides that "no place shall be used or prepared for the burial or cremation of any corpse except cemeteries or crematoria" provided or licensed by the Government.

recipient acquire? Just as importantly, would the patient retain any kind of residual rights to the tissue, as for example, if a commercial discovery leading to profits was produced from the tissue? Would full consent by the patient give the recipient the power of alienation?

In the United States, the common law has not been generally supportive of claims to property in such cases. The most famous case is that of *Moore* v *The Regents of the University of California.*[51] In that case, a patient was diagnosed with a form of leukaemia. Blood, bone marrow aspirate and "other bodily substances" were taken from him for investigation, in the course of which the discovery was made that his blood contained components which were commercially valuable. The patient was induced to return to the medical centre several times and to give samples of "blood, blood serum, skin, bone marrow aspirate, and sperm" on the representation that these were necessary for his continued health. The defendants concealed from the plaintiff that they were working to establish a commercially valuable cell-line from his T-lymphocytes. In 1979, they succeeded and patented the cell-line in the name of two of the defendants, with the University as the assignee of the patent. It was alleged that the potential benefit to the defendants exceeded US$3 billion.

The plaintiff sued in conversion, which the court characterised as a "tort that protects against interference with possessory and ownership interests in personal property". In short, the plaintiff was asserting a right to property in the blood and tissue that had been taken from him without his informed consent. The claim was disallowed by the majority of the Court. They cited a Californian statutory provision which they held had the effect of "drastically limit[ing] any continuing interest of a patient in excised cells", as well as the absence of any judicial precedent supporting the plaintiff's claim to property, "either directly or by close analogy". One passage from the majority judgment is however revealing of the Court's concerns:

> In effect, what Moore is asking us to do is to impose a tort duty on scientists to investigate the consensual pedigree of each human cell sample used in research. To impose such a duty, which would affect medical research of importance to all of society, implicates policy concerns far removed from the traditional, two-party ownership disputes whether disputes in which the law of conversion arose. Invoking a tort theory originally used to determine whether the loser or finder of a horse had the better title, Moore claims ownership of the result of socially important research, including the genetic code for chemicals that regulate the functions of every human being's immune system.

[51] P 2d 479 (1990, California Supreme Court).

Yet perhaps that is precisely the point. Issues of property in the body clearly demand an analysis going beyond the traditional two-party ownership (or non-ownership, as the case may be) approach. Yet it seems fair to characterise *Kelly* as precisely having been decided in such a way. My difficulty with the majority decision in *Moore* is that if they had thought a wider examination of the implications was desirable, then perhaps those implications should have been examined. As it was, denying the plaintiff's claim on the basis of uncertain ramifications is no fairer than the approach which the court criticised. Or indeed, it may be argued, any different in effect.

I have no ready answers to the questions which I raised earlier about the retention and rights (if any) to human organs, blood or tissue samples taken from living persons. In most cases, there are simply no clear answers in the law. But in relation to them, I have these observations to offer:

One consideration is that given the paramount position given by the current common law to the principle of respect of the autonomy of the individual, the common law clearly requires consent for any kind of interference with the body of a living person. You may not touch the person of a conscious patient of sound mind, even if it is for the purposes of administering life-saving treatment which he has made clear that he does not want. Interference clearly covers the taking of organs, blood or tissue samples from the body of a living person, even if that interference is unlikely to harm the donor. So far so good: you must have clear, and informed consent of the donor before you take a sample from him. But the next logical link is weaker. Having consented to the donation, does the donor thereby relinquish all rights of control over the retention, use and disposition of the sample, so that it may be used for purposes not originally contemplated by the donor?

I do not think that *Moore,* or analogies of *Kelly* or the *Doodeward* case satisfactorily answers the question. Instead, I think that the question may be better framed in terms of the following series of questions. Firstly, was the donor made aware of the possibility that his organs, blood or tissue samples might be retained and applied for purposes other than those disclosed to him for the purposes of obtaining his consent? Was the investigator retaining or using the sample aware that the consent was given without the donor putting his mind to the retention and use in question? If the answer is no to either question, it may be that it can be argued that the consent of the donor has been vitiated or exceeded for that particular *use.* I think this approach of dealing with the question of consent is consonant with the statutory framework of the MTERA as earlier outlined.

In this respect, I note with interest the recommendations made by the United Kingdom's Royal College of Pathologists recently in its March 2000

Guidelines for the retention of tissues and organs at post-mortem examination ("the RCP Guidelines").[52] I will discuss these guidelines later in the context of the obligation to give information (as distinct from the obligation to obtain consent), but for now will simply note that the College expressed the view that it was:

> unlawful for a pathologist to perform a post-mortem examination or retain any tissue, regardless of the amount, without proper authorisation. Although the retention of very small amounts of tissue, *eg,* for histology, may not seem to warrant agreement or authority, this retention is no less susceptible to the need for proper authorisation than the retention of larger specimens or whole organs.[53]

Until the Singapore courts decide a case otherwise on this point, I have no reason to think that the law in Singapore is likely to be any different.

VI. Rights in the Human Body: Living Donors and the Statutory Law

My next observation is that, in Singapore, there *are* already statutory provisions governing organ and tissue taken from living donors, and for their retention and use. Those dealing with such organs and tissues must be aware of these provisions, and their wider implications in the context of the existing common law.

The first is that the statutory law appear to generally presume against any kind of commercial dealings in human body parts, blood or tissues. The earliest clear example of this is to be found in section 3 of the Private Hospitals and Medical Clinics Act,[54] which makes it unlawful for anyone to buy or sell, or offer to buy or sell, human blood. The question then of course is whether the provision relates only to whole blood, or whether it covers blood components and extracts as well. This is elaborated upon by the provisions of Part IV of the HOTA, which bears the title "Prohibitions of Trading in Organs and Blood". Under section 14 of the HOTA, it is clear that one may not buy or sell, or even agree to buy or sell, "any organ or blood" whether before or after the death of the donor. However, section 14 also allows the Minister for Health to exempt "specified class or classes of products derived from any organ or blood that has been subjected to processing or treatment". As far as I am aware, this power has so far only

[52] Available from the website of the Royal College of Pathologists at http://www.rcpath.org.
[53] At para 2.2.
[54] Cap 248.

been exercised to exclude "human blood products and plasma fractions", "human hormones", "vaccines and toxoids", and "diagnostic agents derived from human blood".[55]

I think the legislative intent and principle is clear. It is a criminal offence to enter into any kind of contract for any body, body part, blood or tissues *before or after death,* unless one can avail oneself of a specific statutory exception. It may be argued that it must follow that no person can assert any commercial or contractual right in physical body parts or tissues. I say "physical body parts or tissues" very carefully because I have no comment on the question of any other kind of proprietary right based on other than contract.

In the statutory scheme of things, the MTERA is the general statute dealing with cadaveric donations. The HOTA also contains provisions for a special kind of cadaveric donation: the presumed-consent donation of the kidneys of accident victims. What is not so well known is Part IV of the Act, which I have just discussed. And then there is section 16 of Part V of the Act.

Section 16 is difficult of interpretation. In relation to claims to rights in organs, it presents special problems for organs intended for transplantation. Unlike the presumed consent statutory framework for kidneys from deceased accident victims, section 16 Part V deals with the consensual donation of organs from a living person. It is cast in the form of a general exception to the entire Act, providing that "nothing in this Act shall apply to or in relation to the removal of any organ from the body of a living person" if it is "in the interest of the health of the person ... or in circumstances necessary for the preservation of the life of the person".

The big question is whether "the person" is to be read as referring to the donor only, or to a person to whom the removed organ is transplanted. On this reading, it would appear at first sight that the Act would appear to contemplate transplants *inter vivos* only in cases where the organ has to be removed from the donor for compelling medical reasons, and not simply for the benefit of the recipient. Yet that cannot be. The alternative reading is then that in cases where organs have been removed in the interests of the health of the donor, the organs so removed are not subject to the restrictions contained in Part IV of the Act, since section 16 operates as a general exception. This reading however, is unpalatable from my point of view, because of the huge hole that it creates in the scheme of prohibitions against trade in organs and blood in Part IV. Legislative clarification of section 16(1) – there is no section 16(2) – is therefore urgently required.

In summary, if Part IV and section 16 of the HOTA are read together

[55] See The Human Organ Transplant (Specified Products) Notification of 1987.

in this way, there would seem to be a statutory provision expressly prohibiting any person from claiming any kind of commercial interest or property, other than as expressly provided for, in any kind of human organs or tissue.

In recent years, one of the particular use of human tissue which is attracting public interest and discussion is the collection of human tissue samples in the practice of human tissue banking. In this connection, I would like to note that human tissue banking is regulated at least in part by the Private Hospitals and Medical Clinics Regulations 1993. Regulation 18 and Schedule II of the Regulations require that where "a private hospital intends to perform any specialised procedure or service ... the licensee of the hospital shall obtain the prior approval of the Director in writing by making an application to the Director not less than 30 days in advance of the commencement of the specialised procedure or service." The classes of controlled specialised services are listed in Schedule II. These include assisted reproductive services, neonatal intensive care unit, nuclear medicine, imaging and assay services, renal dialysis, sperm banking, radiation oncology, and yes, tissue banking. There is no mention in the Regulation about a private individual or individuals (as opposed to a hospital) being permitted to engage in the controlled specialised services.

I have discussed the law at length. But in matters of the body, living or dead, or parts thereof, law cannot and is not the only governing consideration. I have discussed the necessity of obtaining full and informed consent from living donors, and from the relatives of deceased donors. The law requires consent for all aspects of retention and use. Consent or statutory authory given for one specific kind of use will not cover other kinds. But beyond the legal obligation of seeking consent, there may be a separate and independent ethical obligation to give information which is not to be confused with the legal obligation to seek consent.

VII. Conclusion: Beyond the Letter of the Law

For this, I want to turn back again to the facts of the Bristol case. First, a quote from the evidence received by the Inquiry from one of the parents involved in that case:

> Mrs Lorraine Pentecost stated that she had: 'received a letter [in February 1999] from the UBHT telling me that they had my son's brain, heart and liver. Previous to the letter arriving, I had a telephone call from the UBHT telling me that they had my son's heart, brain and lungs. [In September] I had a letter saying that they had kept Luke's brain, heart, lungs, liver, kidney, spleen and stomach.'[56]

[56] 128, Annex A.

The point of this is that mistakes happen, but a great deal of the grief and trauma caused to the parents from the retention of the organs appear to have stemmed from a profound gulf in the appreciation of what might be and what was in the event actually involved and required in a post-mortem examination. As previously mentioned, many parents were simply unaware that a post-mortem could often necessitate the removal of many organs, or that the word "tissue" could mean entire sets of organs instead of just small samples of tissue.

In the Bristol situation, the hospital authorities took the view that it was unnecessary to take consent from the parents when the post-mortem was mandated by law, as it was in the majority of the cases. We too have in Singapore a similar provision in Part XXX ("Inquiries of Deaths") of our Criminal Procedure Code.[57] But it was pointed out that while a Coroner's direction for a statutory post-mortem might substitute for consent insofar as the purposes of the statutory post-mortem was concerned, it did not necessarily extend to the authorisation of the subsequent retention and use of the human organs and tissue removed for the purposes of the post-mortem, even if such subsequent retention and use was generally accepted as customary and accepted practice by some medical circles. If pathologists or other clinicians propose to retain tissue for further study or use unconnected with the post-mortem report to the Coroner, they will have to seek consent from the family of the deceased. That appears to be the basic legal requirement. But, as I have said, the bare law is not and cannot be the only consideration in dealing with such matters.

I believe it is of significance that the Royal College of Pathologists, have declared[58] in the RCP Guidelines that even in cases where "the post-mortem examination is directed by law, where possible and practicable the relatives should be fully informed before the examination of what is to be done and its purpose," recognising that physicians may have to take into account "the symbolic, religious and cultural significance of individual organs and of the body as a whole."

I think the College put it well when they ruled that:

> [e]thically, it is important that any tissue retained must match the relatives' perception of what they agreed to being retained and its purpose. The form of agreement for post-mortem examination and the accompanying information must be sufficiently explicit and unambiguous so that the relatives' understanding of what they are likely to be

[57] Cap 224.
[58] 5.2, RCP Guidelines.

> requested to agree for retention will match the pathologist's requirement where these are known in advance. The form of agreement must also distinguish between retention for the purpose of verifying the cause of death and investigating the effects of treatment and retention for medical education and research.[59]

In other words, no organ is an organ *in vacuo,* it is always the organ of some person's deceased father, mother, brother, sister, or son. Respect for what remains after a human person dies, and for the grief and dislocation cause by the death to the family of the deceased, are fundamental and enduring human responses and values in all civilised societies, and in all ages.

The Royal College of Pathologists, however, drew a distinction between organs and tissues removed for examination and "residual tissue (*ie,* tissue that would normally be discarded or archived after diagnostic examination) may not require individual agreement provided that, first excess tissue was not collected for this purpose at the time of the post-mortem examination and, second, it is used by the investigator without patient identification details".[60] I am not sure that a distinction between residual and non-residual tissue can be confidently and clearly drawn in all cases, and again the medical profession may have to be careful to ensure that what they regard as "residual" also meet the common lay person's idea of "residual". But I think the statement also makes clear the idea that if you know in advance that you will be eventually retaining and putting to use tissue samples for a purpose other than the specific purpose for which it was given (*ie,* diagnosis), then it may be that you have an obligation to make full disclosure of your intentions and ask for permission.

Even so-called residual tissues may not be free of legal complications. For an illustration of this, one need only to consider the case of *Penney* v *East Kent Health Authority*,[61] an English Court of Appeal case in which an action was brought against a health authority by three women who took part in a cervical screening programme, and were told that their results were negative. They all eventually developed invasive adenocarcinoma of the cervix. The case is important because it took away another brick in the *Bolam* wall. But my concern with it today is on the possible greater implications of the finding of liability in that case. What if physicians take blood or tissue samples from patients or bodies, and on examination discover a disorder or condition with ramifications for the donor or the family members of the deceased? As the College notes in its Guidelines, a "post-mortem

[59] 5.2, RCP Guidelines.
[60] 5.9, RCP Guidelines.
[61] [2000] Lloyd's Rep Med 41.

examination may reveal a possible hereditary disorder incidental to the cause of death, but with implications for other family members".[62] The College suggests that in these cases, "appropriate samples should be retained, unless there are known to be particular religious or cultural reasons why this should not be done, and testing deferred until relatives have been informed of the possible outcomes and given their agreement". I think that the situation is even more uncertain in the situation where donors have been told that their tissue will be used for a specific kind of study on a specific disease. The worst case situation is where a donor gives a tissue sample under the impression that it will be studied and that he will be informed if abnormalities are detected. I cannot predict how the law will develop in this area. But I think as a matter of prudence, those undertaking such an exercise should be careful to ensure that there is no misunderstanding or gap of appreciation between themselves and the donors of the purposes and limitations of the exercise. And this of course, can only be achieved if the principle of giving full information is fully respected and given effect to, to the living patient for therapeutic purposes and non-therapeutic purposes (such as tissue donations) alike, and to the families of deceased persons.

To summarise my final points: the ethical obligation to give information is quite different and separate from the legal obligation to seek consent. Statutory consent covers only those uses sanctioned by the statute, and no more. Uses sanctioned by statute may not imply any proprietary right. And finally: issues in relation to property in the body is highly unlikely to be matters which are to be settled purely in the legal arena, least of all solely by notions of commerce or property. Social, ethical, philosophical, cultural and religious considerations all have a legitimate part to play. And those who seek to live solely by the uncertain law in this area may find that they have to die also by the law.

KAAN SHEUNG-HUNG TERRY*

[62] 3.6, RCP Guidelines.

* LLB (Hons) (NUS), LLM (Harvard), Advocate & Solicitor (Singapore), Associate Professor and Vice-Dean, Faculty of Law, National University of Singapore. This paper was first delivered at the Faculty of Law's Alumni Day Seminar "Rights, Ethics & the Commercialisation of the Human Body" on Saturday, 16 September 2000 at the Faculty of Law, organised by the Faculty as part of its celebration of the National University of Singapore's Alumni Day 2000.