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LIVING TISSUE AND ORGAN DONORS AND PROPERTY LAW: MORE ON *MOORE*

*Bernard M. Dickens**

I. INTRODUCTION

John Moore's claim that his medical mistreatment¹ justified the award of the three billion dollars he sought was likely to attract attention, but the amount of compensation for which he sued was not as extraordinary as the basis of his claim in property law. Moore first visited the University of California's Medical Center at Los Angeles after learning that he had hairy-cell leukemia. Samples were taken of his blood, bone marrow, and other body substances to confirm the diagnosis. The defendant physicians became aware that certain of Moore's blood products and components were of great value to commercial and scientific enterprises and access to his blood afforded "competitive, commercial, and scientific advantages."² Upon recommendations, Moore consented to the removal of his spleen, which occurred in October 1976. Until September 1983, he regularly went to UCLA Medical Center from his home in Seattle in order to donate samples of blood, blood serum, skin, bone marrow, and sperm.

Moore stated that while he was under treatment by the defendant physicians, he was advised that the splenectomy and later donations of body substances were required for his health and well-being. He further complained that the physicians concealed both research on his cells and their plans to exploit financially their exclusive access to Moore as derived from the physician-patient relationship. By mid-1979, the physicians developed a cell line from Moore's blood cells for which a patent was sought by the Regents of the University of California in January 1981. The patent application listed Moore's physicians as inventors and was approved in March 1984. The patent covered various methods of using the cell line to achieve biotechnological products for which commercial firms in the industry had predicted a potential market of over three billion dollars by 1990. With the Regents' assist-

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1. See *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990), *cert. denied*, 111 S. Ct. 1388 (1991).

2. *Id.* at 481.

ance, the physician-inventors negotiated for and procured 75,000 shares of common stock in a biotechnology company and payments of at least \$330,000.³

Moore sued for conversion of his property. He also stated an additional twelve causes of action, namely lack of informed consent, breach of fiduciary duty, fraud and deceit, unjust enrichment, quasi-contract, bad faith breach of the implied covenant of good faith and fair dealing, intentional infliction of emotional distress, negligent misrepresentation, intentional interference with prospective advantageous economic relationships, slander of title, accounting, and declaratory relief.⁴

At trial, the superior court reasoned that the twelve additional claims were incorporated into the claim of conversion and expressly considered only that cause of action. In dismissing the claim, the court concluded that Moore had not stated a valid cause of action for conversion of his property. The court's decision reflected the historic "no property" rule, which provides that there are no property interests that individuals can apply prospectively to their own remains.⁵ Additionally, an individual's survivors can only assert a so-called quasi-property right of burial or cremation.⁶ On appeal, however, the California Court of Appeal held that Moore had stated a valid cause of action for conversion and remanded the case back to the superior court to decide that claim and the remaining causes of action on which no express ruling had been given. The defendants appealed the court of appeal's decision to the Supreme Court of California.

II. DECISION OF THE SUPREME COURT OF CALIFORNIA

The majority of the Supreme Court of California based its approach on the available causes of action for breach of fiduciary duty and lack of informed consent to satisfy and redress any complaint that John Moore could establish on the facts. Accordingly, the court remanded the case to the court of appeal with instructions to direct the superior court to try Moore's case regarding fiduciary duty and informed consent and sustain the superior court's rejection of the claim for conversion. The majority stated that, "the law already recognizes that a reasonable patient would want to know whether a physician has an economic interest that might affect the physi-

3. *Id.* at 482.

4. *Id.* at 482 & n.4.

5. See Paul Matthews, *Whose Body? People as Property*, 36 CURRENT LEGAL PROBS. 193, 193 (1983); see also Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1850 (1987).

6. Matthews, *supra* note 5, at 193.

cian's professional judgment."⁷ The court cited an earlier observation by the California Court of Appeal that, "a sick patient deserves to be free of any reasonable suspicion that his doctor's judgment is influenced by a profit motive."⁸

Relying on legislation regarding physicians' commercial investments in clinical laboratories and other health auxiliary services, the majority found that physicians' conflicts of interest with their patients can be resolved by prior and due disclosure to potential patients.⁹ While an alternative to prior and due disclosure of conflicts of interest is complete prohibition,¹⁰ the court modified this prohibition and analogized to California's Business and Professions Code, which prohibits a physician from charging a patient on behalf of, or referring a patient to, any organization in which the physician "has a significant beneficial interest, unless [the physician] first discloses in writing to the patient, that there is such an interest and advises the patient that the patient may choose any organization for the purpose of obtaining the services ordered or requested by [the physician]."¹¹

The court noted a similar duty of disclosing plans to conduct medical experiments under California's Health and Safety Code.¹² It emphasized, however, that "no law prohibits a physician from conducting research in the same area in which he practices. Progress in medicine often depends upon physicians, such as those practicing at the university hospital where Moore received treatment, who conduct research while caring for their patients."¹³ Although this observation does not in itself address whether such physicians may lawfully engage their own patients as research subjects without the patient's knowledge, the court found that this would be permissible if prior disclosure revealed any research interests which may be opposed to any interests of the patients. The court held that, "a physician who is seeking a patient's consent for a medical procedure must, in order to satisfy his fiduciary duty and to obtain the patient's informed consent, disclose personal interests unrelated to the patient's health, whether research or economic, that may affect his medical judgment."¹⁴

The qualified solicitude the majority showed to medical researchers and

7. *Moore*, 793 P.2d at 483.

8. *Magan Medical Clinic v. California State Bd. of Medical Examiners*, 249 Cal. App. 2d 124, 132 (Dist. Ct. App. 1967), cited in *Moore*, 793 P.2d at 483.

9. *Moore*, 793 P.2d at 483-84.

10. See John K. Iglehart, *Congress Moves to Regulate Self-Referral and Physicians' Ownership of Clinical Laboratories*, 322 NEW ENG. J. MED. 1682, 1682 (1990).

11. CAL. BUS. & PROF. CODE § 654.2(a) (West 1990).

12. CAL. HEALTH & SAFETY CODE § 24173 (West 1984).

13. *Moore*, 793 P.2d at 484.

14. *Id.* at 485.

biotechnological researchers influenced its treatment of Moore's claim of conversion of property. The court first addressed the conversion claim under existing law and observed that if the claim could not be sustained according to prevailing precedents or principles, then extending the jurisprudence that did exist would cover or absorb Moore's novel assertion of liability.¹⁵ Next, the court questioned whether Moore could show an actual interference with his ownership or his right of possession of his cells, which is necessary to establish conversion.¹⁶ Because Moore had donated his cells to his physicians, the court found that he clearly did not expect to retain possession. Furthermore, no precedents existed to support Moore's claim of ownership of his voluntarily donated tissues either directly or indirectly,¹⁷ and California's statutory law was strictly interpreted to limit patients' control over excised cells. Indeed, the Health and Safety Code superseded other state legislation in providing, "Notwithstanding any other provision of law, recognizable anatomical parts, human tissues, anatomical human remains, or infectious waste following conclusion of scientific use shall be disposed of by interment, incineration, or any other method determined by the state department [of health services] to protect public health and safety."¹⁸

This health and safety provision did not necessarily preclude Moore's ownership of the cells since its primary purpose was only to ensure the safe handling of potentially hazardous biological waste materials. Similarly, the provision did not necessarily establish a competing claim of ownership in the defendants, even though their possession of the virus infected cells derived from the plaintiff and conformed to the required level of containment set for such potentially biohazardous materials.¹⁹ Nonetheless, the majority found,

the statute's practical effect is to limit, drastically, a patient's control over excised cells. By restricting how excised cells may be used and requiring their eventual destruction, the statute eliminates so many of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to "property" or "ownership" for purposes of conversion law.²⁰

15. *Id.* at 493-97.

16. *Del E. Webb Corp. v. Structural Materials Co.*, 123 Cal. App. 3d 593, 610 (Dist. Ct. App. 1981).

17. For a discussion of the possibility of retaining an inchoate right of ownership in tissues involuntarily severed from one's own body, see Bernard M. Dickens, *The Control of Living Body Materials*, 27 U. TORONTO L.J. 142, 180-83 (1977).

18. CAL. HEALTH & SAFETY CODE § 7054.4 (West Supp. 1992).

19. See AMERICAN TYPE CULTURE COLLECTION, CATALOGUE OF CELL LINES AND HYBRIDOMAS 176 (Robert Hay et al. eds., 6th ed. 1988).

20. *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 492 (Cal. 1990), *cert. denied*, 111 S. Ct. 1388 (1991).

The majority acknowledged the distinction between physical control of the cells, which Moore did not seek, and control of the commercial exploitation of their scientific use, which was the basis of Moore's claim of ownership and ultimate control. The judges considered, however, that the plaintiff's ownership rights were suitably accommodated through his claims for breach of fiduciary duty and negligence in failing to obtain his adequately informed consent to donate tissue. Accordingly, the court directed that the case be remitted for trial primarily on the basis of those claims.

The majority summarily dealt with the suggestion that Moore could claim an ownership interest in the Regents' patent over the cell line and the products derived from it. The patented cell line was found to be both factually and legally distinct from the cells surrendered by Moore. The cell line was amenable to patent protection because it was a useful product of "human ingenuity," whereas naturally occurring organisms are not patentable.²¹ Granting the Regents' patent constituted an authoritative determination that the cell line was a product of invention since patent law rewards not only the discovery of materials that are of natural origin but also inventive efforts that make materials what they would not otherwise naturally become.

Having dismissed Moore's property claim under prevailing law, the majority then addressed whether the court should extend the existing scope of property law to accommodate Moore's action for conversion. In their review of existing law, the judges noted that legislation was promulgated for public policy purposes. They observed that it is necessary to regulate the disposition of such things as human tissues, transplantable organs, blood, fetuses, pituitary glands, corneal tissue, and dead bodies to achieve policy goals rather than abandon them to the general law of personal property.²²

Two reasons were given for the majority's refusal to extend the existing law of conversion to Moore's tissues. First, this extension was not needed to protect his rights since there were alternative actions based on theories of fiduciary duty and informed consent. Specifically, the court found that a fair balancing of the relevant policy considerations weighed against extending principles of property law and the tort of conversion to developers of cell lines and their users.²³ Second, as in the disposition of other body materials, specialized legislation was considered the preferable medium rather than judge-developed law.²⁴

The majority did not claim that human cells could never be the subject of

21. See *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980).

22. *Moore*, 793 P.2d at 489.

23. *Id.* at 493.

24. *Id.* at 493, 496.

a property claim. On the contrary, the judges specifically stated that, "we do not purport to hold that excised cells can never be property for any purpose whatsoever" ²⁵ Concluding that Moore's claim of ownership of his excised tissues should not be accommodated in property law, the judges considered it an important utilitarian matter, stating the importance of not threatening "innocent parties who are engaged in socially useful activities, such as researchers who have no reason to believe that their use of a particular cell sample is, or may be, against a donor's wishes." ²⁶

The 1987 report to Congress by the Office of Technology Assessment ²⁷ reinforced sensitivity to the restrictive effects on biomedical research of the potential for cell donor litigation. The report emphasized the uncertainty about legally resolving any dispute that might arise between tissue donors and subsequent users, which could impair the activities of both academic researchers and the infant biotechnology industry. ²⁸ Because of the way in which cell lines are developed among teams of related researchers and research facilities and often used by biotechnologically-equipped laboratories and enterprises, products of an individual donor's cells are likely to be widely distributed and employed over a considerable period of time. If researchers and laboratories were forced to account to the donor, both would be hindered by either legal or financial liability. Furthermore, the insurance costs to laboratories could prevent research and industrial development from being economically viable because insurance companies must ensure that adequate funds are available to meet high compensation awards, as demonstrated by John Moore's suit for three billion dollars.

The Office of Technology Assessment Report urged resolution of the uncertainty regarding ownership of cells and cell lines. Because this undecided factor was hampering the biotechnology industry, any resolution would be a benefit to progress. ²⁹ However, the majority in *Moore* had to make an arbitrary choice as to whether the donor possessed legal rights. If a donor had been deceived or abused by nondisclosure of material information in the acquisition of his cells, then actions based on theories of fiduciary duty and informed consent protected the donor's legal rights to privacy and autonomy. The critical unfairness and dysfunction of a conversion claim is that it

25. *Id.* at 493.

26. *Id.*

27. U.S. CONG., OFFICE OF TECHNOLOGY ASSESSMENT, NEW DEVELOPMENTS IN BIOTECHNOLOGY: OWNERSHIP OF HUMAN TISSUES AND CELLS—SPECIAL REPORT, OTA-BA-337 (Washington, D.C., U.S. Government Printing Office, Mar. 1987).

28. *Id.* at 27.

29. *Id.*

invokes a theory of strict liability in tort³⁰ in which a defendant's innocence in acquiring cells and conscientious care of the patient is no defense. Because an action in conversion would not discriminate between wrongful and innocent holders of a donor's cells and its resulting products, the majority concluded that conversion law should not be extended to Moore's claim.³¹ The majority was inspired by not only protecting innocent parties but also liberating them from the burden of ensuring that the original donors consented before acquiring and using their cells, cell lines, or other biotechnological products derived from their cells. The court stated,

Research on human cells plays a critical role in medical research. This is so because researchers are increasingly able to isolate naturally occurring, medically useful biological substances and to produce useful quantities of such substances through genetic engineering. These efforts are beginning to bear fruit. Products developed through biotechnology that have already been approved for marketing in this country include treatments and tests for leukemia, cancer, diabetes, dwarfism, hepatitis-B, kidney transplant rejection, emphysema, osteoporosis, ulcers, anemia, infertility, and gynecological tumors, to name but a few

The extension of conversion law into this area will hinder research by restricting access to the necessary raw materials.³²

The majority also noted that the patent office requires holders of patents on cell lines to make samples available to anyone, and cell lines are routinely copied and distributed to other researchers for experimental purposes, usually without charge.³³ Therefore, the court held that this beneficial degree of access and exchange would be compromised if each cell sample became the potential subject matter of property litigation.³⁴

California case law was reviewed to discern the impact that expanded tort liability had "on activities that are important to society, such as research."³⁵ The court recalled a judgment in which drug manufacturers had been held immune from strict liability lest they be reluctant to market or even develop beneficial products for fear of large damage awards for injuries not occasioned by their fault.³⁶ Analogizing this case to *Moore*, the court found that,

30. See generally *Byer v. Canadian Bank of Commerce*, 65 P.2d 67, 68 (Cal. 1937) (holding a bailee strictly liable for conversion of property despite innocent mistake).

31. *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 494 (Cal. 1990) (citations omitted), *cert. denied*, 111 S. Ct. 1388 (1991).

32. *Id.* (citations omitted).

33. *Id.* at 495 & n.39 (citations omitted).

34. *Id.* at 495 & n.40 (citations omitted).

35. *Id.* at 495.

36. See *Brown v. Superior Court*, 751 P.2d 470, 477 (Cal. 1988), *cited in Moore*, 793 P.2d at 495.

"the theory of liability that *Moore* urges us to endorse threatens to destroy the economic incentive to conduct important medical research."³⁷ In promoting research interests and protecting Moore's rights to pursue remedies for breach of fiduciary duty and lack of informed consent, the majority³⁸ denied that Moore could assert a property right through an action for conversion.

III. TISSUES AND ORGANS FOR TRANSPLANTATION

The development of products from human cells for therapeutic implantation into patients is a biotechnologically sophisticated procedure by which human tissues and organs are directly transferred from a human donor, whether or not alive, to a human recipient. The recognition that the California Supreme Court gave biotechnological medical research and cell line development in the *Moore* case might be applicable *a priori* to transplantation research and, even more so, recognized transplantation therapies. Accordingly, the instrumental reasoning on property law and conversion liability that the court applied in *Moore* might inspire similar reasoning regarding direct transplantation to achieve the same goals of facilitating research and achieving medical therapies for patients.

A legal distinction has been commonly drawn between tissues and organs. Tissues are taken to mean bodily substances that are replaceable by natural regeneration, such as blood and bone marrow; organs are understood to be more discretely located structural arrangements of tissues that the body does not regenerate,³⁹ such as kidneys. The distinction between regenerative and nonregenerative body materials continues to be insightful for a number of purposes, particularly in distinguishing materials that may lawfully be removed from child donors on the basis of a parent's or guardian's decision. For example, blood and bone marrow may be lawfully removed, while solid organs such as kidneys may not be removed regardless of parent or guardian authorization.⁴⁰

The distinction has become blurred, however, by legislation that relies not on a generic division of tissues and organs but rather on specific categorizations. For instance, the U.S. National Organ Transplantation Act defines human organ as including bone marrow.⁴¹ The distinction is naturally con-

37. *Moore*, 793 P.2d at 495.

38. For a discussion of the dissenting opinions, see Laura M. Ivey, Comment, *Moore v. Regents of the University of California: Insufficient Protection of Patients' Rights in the Biotechnological Market*, 25 GA. L. REV. 489 (1991).

39. See Human Organ Transplants Act, 1989, ch. 31, § 7(2) (Eng.).

40. See, e.g., Ontario Human Tissue Gift Act, R.S.O., ch. H-20 (1990) (Can.).

41. 42 U.S.C. § 274e(c)(1) (1988).

founded, moreover, by the realization that small areas of skin and slivers of bone regenerate, whereas greater surfaces of skin and lengths of bone do not. In fact, recent developments have shown that carefully defined liver segments regenerate spontaneously, although the liver, as a whole organ, does not.⁴² Accordingly, the distinction between tissues and organs tends to be specific to individual legal instruments and jurisdictions, since what may be classified as tissue in one may be considered an organ in another.

A sharper distinction may be drawn between living and posthumous, or cadaveric, donors. Recognizing a neurological or brain death criterion for the end of human life has widened the potential for recovering, or "harvesting," of transplantable organs immediately upon determination of death.⁴³ Confusion occurs when legislation treats fetal tissues as if they are not derived from the gestating woman but from the fetus itself. For instance, the Uniform Anatomical Gift Act deals only with *post mortem*, as opposed to *inter vivos*, recovery of transplantable materials, but includes fetal tissues.⁴⁴ While the legal personhood of previable and viable fetuses raises sensitive questions, the placenta produced following successful childbirth is considered a valuable fetal tissue since it is used for pharmaceutical research of whether drugs cross the placental barrier.

The application of *Moore's* rationale to transplantation of tissues and organs is clearly demonstrated in reference to living, adult, mentally competent donors. Blood donations, like semen donations, tend to be given without designating an individual recipient. When donations are offered,⁴⁵ the donor may be subject to human immunodeficiency virus (HIV) testing and, thereafter, the donation may be delivered to a clinic or tissue bank rather than to any individual consumer. However, individuals may specifically designate that their blood be stored in anticipation of an autologous blood transfusion either during or following surgery, or that their sperm or ova be stored for their own diagnostic or reproductive use. On the other

42. See Whittington et al., *Living Donor Nonrenal Organ Transplantation: A Focus on Living Related Orthotopic Liver Transplantation*, in *ORGAN REPLACEMENT THERAPY: ETHICS, JUSTICE, COMMERCE* 117 (W. Land & J. Dossetor eds., 1991).

43. See U.S. PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, *DEFINING DEATH: A REPORT ON THE MEDICAL, LEGAL AND ETHICAL ISSUES IN THE DETERMINATION OF DEATH* 23 (1981).

44. The Uniform Anatomical Gift Act (UAGA) defines decedent to mean "a deceased individual and includes a still born infant or fetus." UNIF. ANATOMICAL GIFT ACT § 1(b), 8A U.L.A. 30 (1983). The UAGA has been adopted, with minor variations, in all 50 states and the District of Columbia. 2 PHILLIP G. WILLIAMS, *LIFE FROM DEATH: THE ORGAN AND TISSUE DONATION AND TRANSPLANTATION SOURCE BOOK WITH FORMS* 9 (1989).

45. For a discussion of the acquisition of living body materials through gifts, sales, and gratuitous services, see Dickens, *supra* note 17, at 163, 166-71.

hand, solid organs that living donors make available are almost invariably intended for the benefit of specified recipients, such as close relatives. If an individual receives no legally enforceable assurance that tissues or organs that she may give from her living body will be employed only for her own use or the benefit of a particularly designated recipient, then she may decline to make such donations.

Individuals who provide for posthumous donation of their body materials tend to donate them randomly or otherwise identify a recipient institution such as a hospital or university. Similarly, those who exercise a dispositive legal power over the tissues and organs of dead bodies, usually the deceased's relatives, tend to dedicate them to institutions rather than specifically designated recipients. For instance, there is a practical difficulty in finding well matched cadaveric kidneys for transplantation into African Americans, which is further aggravated by the disproportionately low rate of donation by such people.⁴⁶ Programs have been designed which recommend that African Americans direct posthumous donation of their kidneys to other people of the same race.⁴⁷ Such proposals and the general legislation on posthumous donation of body materials affect the operation of the common law principle that there are no property rights in a dead body,⁴⁸ except the "quasi-property" interest regarding burial or cremation.⁴⁹ The common law rule and current legislation fail to address the issue raised by *Moore* of an individual living donor's legal interests in the tissues and organs he may make available for transplantation into designated recipients. The primary issue is legal control over tissues and organs, such as bone marrow, kidneys, and liver segments, from the time they are released or removed from the donor's body until they are implanted in designated recipients.

IV. *MOORE* AND THE RIGHTS OF LIVING DONORS

To extrapolate the rationale in *Moore* to tissue and organ gifts made to designated recipients by living donors would presuppose that the priority reflected in the court's approach to biotechnological development and progress in medical research would also be accorded to *inter vivos* tissue and organ transplantation. However, grounds exist to disfavor gifts from living donors and give priority to donations that take effect *post mortem*. In 1991,

46. See C.O. Callender, *Organ Donation in Blacks: A Community Approach*, 19 TRANSPLANTATION PROCEEDINGS 1551, 1551 (1987).

47. See Wayne B. Arnason, *Directed Donation: The Relevance of Race*, HASTINGS CENTER REP., Nov.-Dec. 1991, at 13, 13.

48. P.D.G. Skegg, *Human Corpses, Medical Specimens and the Law of Property*, 4 ANGL-AM. L. REV. 412, 412 (1975).

49. For an historical critique of the "no property" rule, see Matthews, *supra* note 5.

the World Health Organization proposed Guiding Principles on Human Organ Transplantation that included terms "intended to emphasize the importance of developing cadaveric donation programmes in countries where this is culturally acceptable, and to discourage donations from living, genetically unrelated donors, except for transplantation of bone marrow and of other acceptable regenerative tissues."⁵⁰

Under a mandate from the World Health Assembly, the World Health Organization proposed the Guiding Principles to consider provisions designed to contain "the trade for profit in human organs among living human beings."⁵¹ Courts are wary of deliberately or inadvertently facilitating living donors to traffic their tissues or organs and rendering individuals susceptible to financial inducements to enter a market of human body materials. When donors are unrelated to designated recipients genetically, by marriage, or by long-standing affinity, suspicions may arise that unsavory commercial incentives motivate the will to donate. In contrast, an individual's willingness to donate tissues or organs to others she knows is considered noble, altruistic, and honorably self-sacrificing according to the law. Legislation and practice widely accommodate designated tissue and organ donations by relatives to intended recipients, thereby offering legal protection.

The California Supreme Court resolved Moore's property claim with the express purpose of liberating commercial development of potentially therapeutic products and protecting "the economic incentive to conduct important medical research."⁵² For this reason, it seems the court would have been equally protective of altruistic incentives to contribute to important medical therapy, which many tissue and organ transplantations are considered to be. The court applied instrumental reasoning in declining to extend liability for conversion to Moore's cells, in order to enhance prospects of medical benefit for all patients. If the evidence had shown that prospective tissue and organ donors would more likely donate upon being assured that they could invoke concepts of property law through claims for conversion and give legal effect to their purposes, then the judges might recognize such claims. The court preserved this prospect when it carefully observed that "we do not purport to hold that excised cells can never be property for any

50. *Guiding Principles on Human Organ Transplantation*, Res. 40.13, World Health Assembly (May 1987), reprinted in *Human Organ Transplantation: A Report on Developments Under the Auspices of WHO (1987-1991)*, 42 INT'L DIG. HEALTH LEGIS. 389, 395 (1991) [hereinafter *WHO Report*].

51. *Id.* at 390.

52. *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 495 (Cal. 1990), *cert. denied*, 111 S. Ct. 1388 (1991).

purpose whatsoever"⁵³

There are few recorded instances when body materials donated for transplantation into designated recipients were not properly used or were rendered unuseable by negligence. In *York v. Jones*,⁵⁴ heard by the District Court for the Eastern District of Virginia, a married couple had given gametes to the Jones Institute for Reproductive Medicine in Norfolk, Virginia to combine them *in vitro* to create a pre-embryo⁵⁵ and store it by cryopreservation for eventual implantation in the wife. The couple moved to Los Angeles and asked the Institute to transfer the frozen pre-embryo to a local hospital for thawing and implantation. The Institute declined the transfer because it purportedly fell outside the options agreed to in its contract with the plaintiffs and because the transfer was not permitted by the research protocol under which the Institute operated its *in vitro* fertilization clinic. However, the court interpreted the language of the contract as affording the plaintiffs the right they claimed.

While the contract referred to property rights in pre-embryos created *in vitro*, the plaintiffs reinforced their contractual claim with an independent claim in detinue to recover their improperly retained property. This court observed,

The requisite elements of a detinue action in Virginia are as follows: (1) plaintiff must have a property interest in the thing sought to be recovered; (2) the right to immediate possession; (3) the property is capable of identification; (4) the property must be of some value; and (5) defendant must have had possession at some time prior to the institution of the act. Moreover, if the property is in the possession of a bailee, an action in detinue accrues upon demand and refusal to return the property or upon a violation of the bailment contract by an act of conversion.

After review of plaintiffs' Complaint, the Court finds that plaintiffs have properly alleged a cause of action in detinue.⁵⁶

The court's willingness to treat a pre-embryo, which has the biological potential to develop naturally into a human being, as property indicates that lesser cells such as tissues and organs which lack that natural potential may also be treated as property.

In *Moore*, the court first asked whether Moore's removed cells were property under prevailing law and concluded that they were not. Second, the

53. *Id.* at 493.

54. 717 F. Supp. 421 (E.D. Va. 1989).

55. For a philosophical contribution on the appropriateness of this expression, see Richard A. McCormick, *Who or What is the Preembryo?*, 1 KENNEDY INST. ETHICS J. 1 (1991).

56. *York*, 717 F. Supp. at 427 (citations omitted).

court asked whether existing categories of legal property should be extended to cover them and concluded that they should not. However, the court in *York v. Jones* treated the pre-embryo as property according to prevailing law. In view of the unresolved moral status of a pre-embryo *in vitro*, the awareness of its inherent potential for human development, and the fact that strongly held religious views believe that the pre-embryo is a person,⁵⁷ the court's application of principles of property law in *York* is striking. The judgment indicates *a fortiori* that transplantable tissues and organs, whose moral status is not contentious and that have never been of inherent spiritual significance, are property too. Nonetheless, *Moore* rejected the applicability of property law because of California's Health and Safety Code provisions on disposal of anatomical waste following scientific use⁵⁸ and the lack of precedents establishing a property interest. While *York*'s impact on property law remains to be seen, the provisions on waste disposal which were applicable in *Moore* are clearly not relevant to healthy tissues and organs removed for the sole purpose of transplantation.

In determining instrumentally whether property law concepts should be applied to the cells in question, the *Moore* court fashioned its rationale on a long and reputable tradition of jurisprudence. In fact, ideas about the relation of persons to things are traceable to classical Greek philosophy, including the discourse of Plato and Aristotle on the proper role of common and private property in civil life. The evolution of modern concepts of the proper role of property law has followed several paths,⁵⁹ although it appears that contemporary legal scholars generally subscribe to a utilitarian or instrumental approach. Furthermore, one scholar has observed that "[p]roperty, as a creature of law, is only justifiable (like all law) by utilitarian considerations."⁶⁰ This approach, however, is not unchallenged and the juridical nature of property remains an issue of vigorous and varied contention.

Present analytical jurisprudence dictates that the term "property" refers

57. See *Davis v. Davis*, 15 Fam. L. Rep. (BNA) 2097 (Tenn. Cir. Ct. 1989) (treating pre-embryos as the equivalent of born children), *rev'd*, 16 Fam. L. Rep. (BNA) 1535 (Tenn. Ct. App. 1990). See generally Bernard M. Dickens, *Comparative Judicial Embryology: Judges' Approaches to Unborn Human Life*, 9 CAN. J. FAM. L. 180 (1990) (addressing the implications of recent decisions which held that pre-embryos are human beings whose control is governed by principles of child custody law).

58. See *supra* notes 17-19 and accompanying text.

59. For a historical review of modern concepts of property law, see Boudewijn Bouckaert, *What is Property?*, 13 HARV. J.L. & PUB. POL'Y 775 (1990).

60. Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 730 (1938).

to the "bundle of rights" a person possesses in a thing or an interest, rather than simply the tangible thing or interest itself. Furthermore,

[t]he term "property" is sufficiently comprehensive to include every species of estate, real and personal, and everything which one person can own and transfer to another. It extends to every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value.⁶¹

The broad and abstract concept of property is molded by legislation and common law declared by the courts in accordance with pragmatic and policy reasons. Although the *Moore* majority chose to reject the plaintiff's assertion of a property right, it left room to hold differently in appropriate circumstances.⁶²

The dissenting judge in *Moore*, Justice Broussard, proposed such circumstances and found that the cells in issue were property according to prevailing law. He observed,

In the transplantation context, for example, it is common for a living donor to designate the specific donee—often a relative—who is to receive a donated organ. If a hospital, after removing an organ from such a donor, decided on its own to give the organ to a different donee, no one would deny that the hospital had violated the legal right of the donor by its unauthorized use of the donated organ. Accordingly, it is clear under California law that a patient has the right, prior to the removal of an organ, to control the use to which the organ will be put after removal.

It is also clear, under traditional common law principles, that this right of a patient to control the future use of his organ is protected by the law of conversion.⁶³

Justice Broussard's conclusion, however, is flawed because a contrast exists between *Moore*'s cells and an organ donated for transplantation. Specifically, *Moore*'s cells were without value and required the application of sophisticated biotechnological techniques to realize their commercial utility, while an organ is of imminent utility once preserved and prepared for transplantation. In other words, *Moore*'s cells had to be extensively processed and refined before their potential could be extracted, whereas a donated organ is transferred to its designated recipient fundamentally intact. Additionally, the organ directly performs functions in the recipient that are virtually identical to those performed in the donor; cell line products, in contrast,

61. *Yuba River Power Co. v. Nevada Irrigation Dist.*, 279 P. 128, 129 (Cal. 1929).

62. See *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 493 (Cal. 1990), *cert. denied*, 111 S. Ct. 1388 (1991).

63. *Id.* at 502.

depend on the artificial development of qualities in primary cells that they do not normally possess.⁶⁴ Lastly, an organ donor's control over the deployment of the organ is more feasible and immediate than a cell donor's control over cells that are of no use in themselves but, if subjected to advanced scientific processes, may form the basis of a biotechnologically engineered product.

Justice Broussard's proposition is not entirely incompatible with the majority decision. In fact, the majority did not have to reject his conclusion concerning property rights over organs for transplantation in order to assert the absence of property rights over John Moore's extracted cells. Where Justice Broussard found that prevailing law recognizes property interests in transplantable organs, the majority was never forced to address or agree that property law should be extended to such organs because the second issue would have been preempted by Justice Broussard's original finding. The majority's discussion of the benefits of organ transplantation suggests that they, too, would extend concepts of property law to transplantable organs. The court recognized that organ donations offered direct health benefits to recipients which were immediately implemented through transplantation. Further, the court suggested that potential donors may be encouraged to donate if given legal certainty that, through recourse to principles of property law, their designated purposes will be respected upon clinical assessment of the suitability of their organs and the medical status of intended recipients.

V. DONORS' ALTERNATIVES TO PROPERTY LAW

The question remains whether a remedy for lack of informed consent or breach of fiduciary duty would serve a transplantation donor better than, or as well as, a property claim. In *Moore*, the defendant physicians allegedly concealed the full purposes for which they sought consent for access to the plaintiff's cells. In reviewing basic principles of patient autonomy and informed consent,⁶⁵ the court found that,

[t]hese principles lead to the following conclusions: (1) a physician must disclose personal interests unrelated to the patient's health, whether research or economic, that may affect the physician's professional judgment; and (2) a physician's failure to disclose such interests may give rise to a cause of action for performing medical procedures without informed consent or [for] breach of fiduciary

64. *Id.* at 482 n.2.

65. The court offered three well established principles: 1) an adult of sound mind has the autonomy to choose whether to submit to medical treatment; 2) a patient's consent to treatment must be an informed consent; and 3) a physician has a duty to disclose all material information to the patient's decision. *Id.* at 483.

duty.⁶⁶

In this case, John Moore initiated his relationship with the defendants for therapeutic purposes, specifically the removal of his spleen to retard the progress of his hairy-cell leukemia. The physician performing the procedure, however, was already aware that Moore's cells had unusual potential. The court observed that the physician "had an undisclosed research interest in Moore's cells at the time he sought Moore's consent to the splenectomy. Accordingly, Moore has stated a cause of action for breach of fiduciary duty, or lack of informed consent, based upon the disclosures accompanying that medical procedure."⁶⁷

In theory, physicians who ask to remove body materials for transplantation may have similarly undisclosed purposes of their own. However, donors are more concerned with being reassured that, once organs or other materials have been excised or otherwise procured, they will not be so negligently mishandled that the purpose of transplantation will be frustrated. In contrasting remedies for negligent mishandling under property concepts with those under alternative principles of law, informed consent and fiduciary duty principles will have little to offer if they center on physicians' intentions that are undisclosed prior to acquiring the body materials.

When the risk of inadvertent or deliberate mismanagement is foreseen, contractual terms may be proposed with those likely to be at fault. However, this offers limited protection to donors because intermediate handlers of tissues or organs and those responsible for their implantation, both of whom are essential to the enterprise, may decline to enter into contractual agreements with donors. Similarly, when designated recipients or third parties pay the costs, donors are unlikely to have contract claims for the due performance of agreements, and thus no remedies for violation. Furthermore, donors may lack an insurable interest in transfer of their donations. Physicians who manage donations are unlikely to underwrite the performance of subsequent handlers. Nonetheless, the physicians' liability may arise if they accepted responsibility for choosing them expressly or by implication and were negligent in making or advising selections.

Liability for a physician's negligent damage to body materials in removing or transferring them may be sought when a legal duty of care to the donor exists either through a contract or the general tort law applicable to the doctor-patient relation. Breach of duty may also be found due to the physician's negligent failure to conform to the legally required standard of care. However, if medical personnel are paid by, or on behalf of, the intended

66. *Id.*

67. *Id.* at 485.

recipient, then the legal duty to preserve and transfer the material may be owed primarily to the intended recipient rather than the donor. If payment for the transfer service is by neither the donor nor the intended recipient, then the beneficiary of primary legal duties of care in preserving the material may be more difficult to establish. On the other hand, even when the legal duty is clearly owed to the donor, she may not successfully sue for damages if the removal procedure is completed before the intention of her gratuitous donation becomes frustrated. In this case, the donor suffers no personal injury, although the donor may pursue a remedy for negligent or deliberate infliction of emotional or psychic harm,⁶⁸ the latter of which permits punitive damages. The donor's success may depend upon the peculiar characteristics of his personality and circumstances⁶⁹ and the intermediate handlers' awareness that the tissues or organ they process comes from a live, as opposed to a cadaveric, donor. Another consideration is whether the article transplanted is destined for a designated or anonymous recipient. However, it is unlikely that intermediate handlers are legally bound to inquire about matters of this nature, although extended duties may arise if they are given appropriate notice that both the live donor and the designated recipient anticipate effective delivery of the material for transplantation.⁷⁰

Among his thirteen causes of action, John Moore's claim for negligence was interwoven with his claim of lack of informed consent to treatment,⁷¹ although the former claim was based on alleged premeditation and deliberation rather than the defendants' oversight. In addition, Moore filed claims for negligent misrepresentation, fraud, and deceit, which similarly depend on intentions alleged to have occurred prior to the induced donation of body materials. His other claims included slander of title deriving from his assertion of a property right, and unjust enrichment, which derived from the riches the defendants had already negotiated to receive. However, this claim would not avail a plaintiff when a defendant who rendered materials unsuitable for transplantation was not enriched.

68. For a comprehensive and detailed statement supporting recovery for negligently inflicted psychic harm, see Peter A. Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U. FLA. L. REV. 333 (1984); cf. Richard N. Pearson, *Liability for Negligently Inflicted Psychic Harm: A Response to Professor Bell*, 36 U. FLA. L. REV. 413 (1984).

69. See Carel J.J.M. Stolker, *The Unconscious Plaintiff: Consciousness as a Prerequisite for Compensation for Non-Pecuniary Loss*, 39 INT'L & COMP. L.Q. 82, 96-100 (1990).

70. For a discussion of the potential liability of a doctor for refusing to transplant an organ into a needy recipient until consent is obtained from the patient's next of kin, see Daniel G. Jardine, Comment, *Liability Issues Arising Out of Hospitals' and Organ Procurement Organizations' Rejection of Valid Anatomical Gifts: The Truth and Consequences*, 1990 WIS. L. REV. 1655.

71. See *Cobbs v. Grant*, 502 P.2d 1, 8 (Cal. 1972).

VI. THE MERIT OF PROPERTY LAW

Principles of property law as applied to tissues and organs donated *inter vivos* for transplantation raise questions about when the designated recipient takes possession and at what point the tissues and organs lose their status as the donor's property and become integrated with the recipient. Before the tissues or organs become wholly integrated but after they leave the donor's body, they are not necessarily *res nullius* or abandoned. With respect to pathological, diagnostic, and waste body materials, the Maryland Court of Special Appeals found that, as a matter of law, anyone who consents to surgery does not abandon all removed tissue.⁷² However, the court also stated that, "when a person does nothing and says nothing to indicate an intent to assert his right of ownership, possession, or control over such material [as comes from his body], the only rational inference is that he intends to abandon the material."⁷³ Following this logic, when a person makes clear her intention that the material should be transplanted into a designated recipient, that person asserts a right of ownership and control until the transplantation takes place, even though possession may pass to others in the interim. The observation based on body waste materials receives greater weight when it concerns healthy organs or tissues intended for transplantation.

Property law, including such incidents as bailment of goods and liability for conversion, affords those who directly procure materials for transplantation, specifically the intermediate handlers and the medical staff serving the intended recipient, the knowledge that they are accountable to the donor for their use and misuse of that material. Those who control property can lawfully direct not only its use but also its return or deliberate destruction. However, the principle remains that materials separated from the body cannot be used except in accordance with either the donor's pre-release directions or subsequent adequately informed consent, particularly when dealing with reproductive tissues. When couples deposit their gametes for *in vitro* fertilization, they intend exclusive use for themselves and possess the legal power to forbid any other reproductive use. If statutory or regulatory provisions regarding human reproduction or research do not ensure exclusive control over the materials and it is not explicitly stated in an agreement,⁷⁴ then this exclusivity nevertheless arises as an incident of property law.⁷⁵

While legal title does not exclude abandonment in particular circum-

72. *Venner v. Maryland*, 354 A.2d 483, 498 (Md. Ct. Spec. App. 1976).

73. *Id.* at 499.

74. See generally *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989) (questioning whether a Virginia human research statute precludes parents from exercising exclusive control over their frozen prezygote).

75. See Derek J. Jones, *Artificial Procreation, Societal Reconceptions: Legal Insight from*

stances, it operates more positively to facilitate transfer of ownership to tissue or organ banks, thereby confirming the legal title in the many tissue and organ banks that exist worldwide. In the United States, for instance, regional tissue banks, acting in conjunction with the American Association of Tissue Banks, are indispensable in arranging over 300,000 musculoskeletal grafts each year.⁷⁶ In Western Europe, Czechoslovakia, Poland, and Russia, tissue banking has been established for over three decades.⁷⁷ Multitissue banks now operate effectively in Thailand, China, Myanmar, the Philippines, and Vietnam.⁷⁸ It can scarcely be contended that the level of activity of these agencies, particularly in legally regulated environments, is maintained without identifiable property rights over the materials they receive, process, and transfer.

Resistance to the recognition of property rights in transplantable tissues and organs stems in large measure from the fear that such rights would inevitably lead to unsavory and exploitative commerce, including donors' sales to the highest bidder and the poor, induced by money, offering the substance of their being to trade. Likewise, John Moore's property claim may have been prejudiced because he too sought a profit from the use of his property.⁷⁹ Voluminous literature opposes the commercialization of human body parts from both living and cadaveric donors; however, emerging literature extols the virtues of the marketplace in increasing access to transplantable tissues and safeguarding personal integrity and tissue quality. The World Health Organization has stated that commerce in property rights in transplantable human organs can be restricted.⁸⁰ Furthermore, the California Court of Appeal, which upheld John Moore's property claim but was reversed by the California Supreme Court, carefully emphasized that, "[t]o the extent that unacceptable consequences, which can now only be the subject of speculation, do follow, legislative solutions are possible and likely."⁸¹

An encouraging feature of the opposing bodies of literature is that protagonists and commentators throughout the spectrum offer feasible suggestions

France, 36 AM. J. COMP. L. 525 (1988) (analyzing the impact of a French case in which a depository was ordered to return a deceased sperm depositor's sample to his widow).

76. Glyn O. Phillips, *Conference: Tissue Banks in Europe*, 338 LANCET 1514, 1514 (1991).

77. *Id.*

78. *Id.* at 1515.

79. See *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 497 (Cal. 1990) (Arabian, J., concurring), *cert. denied*, 111 S. Ct. 1388 (1991).

80. See *WHO Report*, *supra* note 50, at 396.

81. *Moore v. Regents of the Univ. of Cal.*, 249 Cal. Rptr. 494, 509 (Ct. App. 1988), *aff'd in part and rev'd in part*, 793 P.2d 479 (Cal. 1990), *cert. denied*, 111 S. Ct. 1388 (1991). In agreement with the California Court of Appeal, the California state legislature promulgated a law which prohibits donors from receiving any "valuable consideration" for donation. CAL. HEALTH & SAFETY CODE § 7155(a) (West Supp. 1992).

for legal elimination of commerce,⁸² many of which do not depend on the denial of property rights. Indeed, denial of property rights may itself lead to commercial exploitation in the regulation of tissue and organ transfers. Recognition of living donors' property rights may forestall the emergence of an unsavory and exploitative growth of payments for services associated with acquiring tissues and organs, such as finders' fees and brokerage charges. If living donors' property rights exist, then subsequent handlers may fear liability for conversion. Thus, they will ensure legal and proper management of tissue and organ acquisition. However, this principle applies to tissues and organs that retain their inherent qualities and are directly traceable to a living donor. This does not contradict the *Moore* judgment because the *Moore* decision applies to cells subjected to biotechnological processes when traceability of cells is no longer convenient.

However, it may be asserted that, despite the application of biotechnological processes, John Moore's cells were traceable because the cell line was named the Mo cell line⁸³ and because the defendants knew from whom the cells were taken. The law must determine when property rights may be recognized in cells that are subject to biotechnological development as well as in tissues and organs given by living donors for transplantation into designated recipients. The instrumental reasoning of the Supreme Court of California in *Moore* provides a starting point. The defendants certainly faced the incongruity of claiming that while John Moore cannot legally own his cells, they can.⁸⁴ Here the court draws a distinction between the cells when they were extracted from Moore, at which point they had no use or value and therefore were not property, and the cells when they were developed in the possession of the defendants, whereupon they had patentable value. This distinction raises the questions of the cells' value during their interim status and whether John Moore's property interest in the cells was limited to prohibition of use but not approval of use. A satisfactory response may be found through the legal development of inchoate rights in these cells.⁸⁵

VII. CONCLUSION

The majority in *Moore* approached the question of property rights in cells extracted from a living person's body primarily in terms of public or social

82. See, e.g., Nancy E. Field, Note, *Evolving Conceptualizations of Property: A Proposal to De-Commercialize the Value of Fetal Tissue*, 99 YALE L.J. 169, 185-86 (1989) (arguing for federal legislation prohibiting the sale of fetal tissue but permitting the acquisition of fetal tissue strictly through donative transfers).

83. See *Moore*, 793 P.2d at 510.

84. See *id.* at 492.

85. See Dickens, *supra* note 17, at 193.

policy. The majority took this approach because of the absence of a prevailing jurisprudence on whether or not property rights were already established; accordingly, they drew inferences from state legislation hostile to such rights. However, the dissenting justices in *Moore* invoked an applicable jurisprudence and found that state legislation did not oppose it but rather prohibits or could prohibit objectionable commerce of tissues and organs. Nothing in the *Moore* decision suggests that living persons who intend to donate tissues or organs for almost direct transplantation into designated recipients may not invoke their property rights in such materials to advance their own objectives. A body of case law exists that supports this contention. Nonetheless, if this case law is not considered persuasive, then property law should be extended to protect such donors' interests consistently with the reasoning applied in *Moore*.

Courts are concerned that beneficial enterprises in medical advances and individuals' health care not be obstructed. This concern would be served by living donors being able to enjoy the certainty that, through principles of property law, they could compel medical and related intermediaries to comply with their altruistic intentions and make them aware of their continuing interests in their donated materials. The *Moore* majority expressly drew back from a claim that "excised cells can never be property."⁸⁶ The speed and scope of biotechnological processing of human cells into therapeutically useful products cannot be reliably predicted, although it is anticipated that tissue and organ donations from living persons will remain significant to therapy. Accordingly, tissue and organ donations will continue to warrant the law's instrumental protection through legal recognition of donors' claims to control the destination and use of their *in vitro* body materials.

86. *Moore*, 793 P.2d at 493.