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Part 1

The concept of property

1

Property law: the issues

1.1. Basic definition

To put it at its simplest, property law is about the legally recognised relationships we have with each other in respect of things. We will want to expand and qualify this statement later – what kinds of relationship, what kinds of thing? – but our starting point is an introduction to the moral, political, social and economic context in which property law operates.

1.2. Illustrative example

Consider the following hypothetical situation, a variation of facts which actually occurred in California in 1976 and which became the subject of a celebrated decision of the Supreme Court of California, *Moore v. Regents of the University of California*, 51 Cal 3d 120; 793 P 2d 479 (1990).

John went into hospital to undergo an exploratory operation to aid diagnosis of unexplained stomach pains he had been suffering. During the course of the operation, Dr A removed tissue from John's stomach lining and stored it so that he could carry out further analysis if his initial diagnosis proved to be incorrect. No further analysis proved necessary: Dr A's initial diagnosis was confirmed, John was successfully treated and made a full recovery, and Dr A gave no further thought to the tissue sample.

By chance, however, it became included in material that Dr B was using in research he was carrying out at the hospital. This material included primary cells (i.e. cells taken directly from the body) taken from a number of different patients in the hospital. Dr B was trying to produce a cell line from these primary cells: it is difficult to locate a gene responsible for producing a particular substance or effect using primary cells, because primary cells typically reproduce a few times and then die. One can, however, sometimes continue to use cells for an extended period of time by developing them into a 'cell line', a culture capable of reproducing indefinitely. This is not, however, always an easy task. 'Longterm growth of human cells and tissues is difficult, often an art', and 'the probability of succeeding with any given cell sample is low' (the *Moore* case). Dr B managed to develop from one

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4 Property Law

of John's primary cells a cell line containing genetic material with the potential for development into a cheap, effective and safe cure for AIDS. Dr B sold this cell line to the Columbian Drug Company Ltd for £10 m.

The drugs company, which already owned the patents for a very expensive, not very effective treatment for AIDS, and also for various palliatives for AIDS symptoms, bought the cell line to delay the development of a new drug. It believed, on the advice of its accountants, that it would be in its own financial best interests to continue to market its existing products for as long as possible, and not take steps to develop the new drug until a similarly cheap and effective cure seemed likely to emerge from elsewhere.

What rights and interests might each of these four protagonists plausibly lay claim to in respect of the cell line and its commercial exploitation?

1.2.1. John

Any legally protected interest that John might have in the cell line must derive from an interest in the cell out of which it was developed, which itself must derive from whatever interest John had in the cell when it was still part of his body. Does John own his body, and, if he does, does it follow that he also owned his body cell?

1.2.1.1. The unexcised body cell and the question of ownership

At one level, it might seem strange to question whether one owns a part of one's own body, but on closer consideration the issue is rather complex. We need first to take a brief look at what we mean by ownership. We consider the concept in detail in Chapter 6, where we see that, although 'ownership' is often used loosely as a synonym for 'property', it is more accurately used to describe a particular type of property interest – specifically, the most extensive property interest that any individual can have in a mature legal system that recognises the institution of private property. Most Western legal systems recognise the concept of ownership, but characteristically they also recognise lesser property interests as well (such as the right you acquire in a car if you hire it for a fortnight, or the right I acquire over your land if you grant me a right of way over your driveway to reach my garage). For the moment, however, we will concentrate on ownership itself, not on these other types of property interest.

We see in Chapter 6 that, in attempting to formulate a concept of ownership which would be recognisable in any developed Western market economy, Honoré identifies eleven 'standard incidents' of ownership. He sees these incidents as characteristic of a Western conception of ownership (by which he means ownership by an individual, as opposed to ownership by the state or by a corporation or by a group of people). They are not to be applied mechanically: he is not suggesting that you cannot possibly be said to be an owner of a thing in any mature legal system if the law does not recognise you as having each one of these incidents. What he does say is that, if you do enjoy all these incidents in relation to a particular thing, most mature legal systems would say you owned it – together

they are sufficient conditions for ownership, but no one of them is a necessary condition. We look at all eleven of these incidents in Chapter 6, but for present purposes six of them are of particular interest. According to Honoré, in a mature legal system you would typically be said to be the owner of a thing if you have:

- 1 The right to possess the thing. Possession has a technical meaning and a special significance in English law, which we look at in Chapter 7. For present purposes, you have the right to possess something when the law allocates exclusive physical control of it to you.
- 2 The right to use the thing. Unlike possession, use is not a technical term. Here Honoré confines use to *personal* use and enjoyment, so he would say that you have the right to use something if you may, at your discretion, make whatever personal use and enjoyment of the thing you wish (leaving aside, for present purposes, use in a way that harms others – this is something we will consider later).
- 3 The right to manage, which is essentially the right to control the use of the thing, in the sense of being entitled to license others to make personal use of it.
- 4 The right to the income of the thing. This covers both any naturally accruing profits – the apples produced by your apple tree – and also what Honoré describes as ‘a surrogate of use, a benefit derived from forgoing the personal use of a thing and allowing others to use it for reward’, for example income produced from capital you invest, or rent received from a flat you let out.
- 5 The right to the capital. This is the right to deal with the thing itself in any way you choose (although again we must put aside for the moment a dealing which harms others). It includes the right to sell or give it away, or to consume it or damage it or destroy it, or to dictate who should have it when you die.
- 6 The right of transmissibility. This is quite complex: it concerns the *interest* you have in the thing (i.e. the rights and other claims you have over it) rather than the thing itself. Your interest is transmissible if it is capable of being transferred intact to someone else, in the sense that the consequence of the transfer would be that the transferee would acquire all the rights and claims that you had had in that thing, and you would cease to have them. In other words, a transmissible interest is the antithesis of an interest that is purely personal. My right to legal protection for my reputation is a good example of a right that is not transmissible in English law. If it was transmissible, I would be able to sell it to you, with the result that *you* (and not I) would be entitled to complain and recover damages if a tabloid newspaper published a libellous article about *me*. There are other examples of interests in things that are inherently personal and not transmissible. In Chapter 9 we look at a long-standing controversy (now resolved by Parliament) over the nature of the right that a wife has to occupy her matrimonial home when it is solely owned by her husband (rather than jointly owned, as would now be more usual). It was always accepted that, as long as the couple remain married, she does have such a right, enforceable *personally* against her husband. The issue was whether it was a *property* right that could be enforced against anyone else – specifically, whether her estranged husband could cause her to be evicted from what had been their matrimonial home by selling it to someone else: if her right was a property right, the buyer would have been bound by it and would have had no more right to evict her

6 Property Law

than her husband had had; whereas if it was enforceable only personally against her husband it would not affect the buyer and he could evict her. We see later that one of the reasons why the courts were reluctant to recognise that this right was a property right was that it is inherently non-transmissible: my right to occupy the house that my husband and I have been living in as our matrimonial home could not conceivably be held by anyone other than me – if transferred to anyone else, it would necessarily become different in nature. We can also note here why the issue of transmissibility is controversial: if we were to say that transmissibility was a *necessary* condition for an interest to qualify as a property interest, it would exclude a significant category of rights from proprietary status.

Which of these incidents characterise John's relationship to parts of his body while they still form part of his body? As long as we are talking about a small cell in an expendable bit of one's stomach lining, there seems no particular problem with the first five incidents (although some are rather difficult to visualise). However, the sixth does not seem right: we surely would not expect any legal system to treat John's rights in his body parts as transmissible. Whatever rights a legal system recognises we have in our body tissue *while it is still part of our bodies*, they are almost certainly going to be very different from those (if any) it would want to confer on someone who acquires a bit of that tissue after it has been excised: both the moral and the physical context have changed. If this is true, it means that, while we might have a legal system that allows John a right to sell *this bit of body tissue*, his *interest* in it (or at least the interest he has while it is still part of his body) is not transmissible – the buyer will acquire a different set of rights from those that John had when the tissue was still part of his body.

Once we start talking about more important bits of unexcised body tissue, or about live bodies as a whole, the other incidents begin to look inappropriate as well, or at least not acceptable without significant qualifications. The right to possess your body and unexcised parts of it might initially seem unproblematic. In any legal system operating in a society which respects personal autonomy we would expect the law to allocate exclusive physical control over our own bodies and body parts to us. However, even here there may be controversial claims to make exceptions. Can young children (or mentally incapacitated adults) really be given the right to exclusive physical control over their own bodies, and, if not, who should have the ultimate control? Their parents? The state? And what about, for example, hunger strikers, or adult individuals who refuse medical treatment that could benefit them (perhaps blood transfusions) or prevent harm to others (treatment for infectious diseases, or medication to prevent violent behaviour)? And, once we are past this first incident of ownership, everything becomes even more dominated by difficult moral, political and social issues. The second and fifth incidents – the right to use our bodies in any way we want and our right to deal in the capital interest in them – raise fundamental questions about the nature of the society in which we want to live. The first and obvious point is that an absolute right to use our bodies as we want would leave us free to behave in ways that harm,

affront or annoy others. A balance must inevitably be struck between our freedom to behave as we want and the rights of others to be free from harm, affront and annoyance, but it is not easy to arrive at a consensus as to where the balance should be struck. Another difficult issue, and if anything even more controversial, is that a right to use our bodies as we choose, and an absolute right to deal in the capital of our bodies, would leave us free to harm ourselves. Is it necessary, or morally or pragmatically justifiable, for the law to curtail our freedom to abuse, harm or destroy ourselves or parts of our bodies?

The right to destroy the thing is only one aspect of the right to the capital interest in a thing. The other aspects – the right to sell it or to give it away – also cause problems when applied to human bodies. Should I be entitled to sell or donate an essential part of my body, without which I cannot function at all, such as my liver, my brain or my heart? Would it make any difference if I was dying anyway, and the donation was for a transplant to someone else which could not succeed if the organ was removed after my death? Rather different, but no less complex, issues arise when we start talking about body parts without which one could function tolerably well, and the removal of which would not be life-threatening – should I be entitled to sell, for example, a limb, an eye, or a kidney? And would it make a difference if it was not a sale but a donation, or if it was prompted by altruism, familial love or duty, or by an inability to withstand family pressure? And what about renewable body parts such as blood, hair, bone marrow, sperm or ova? Should we have an absolute right to sell such body parts to anyone in any circumstances, or should it be absolutely prohibited, or permitted only in some circumstances and subject to certain conditions? It quickly becomes apparent that very different considerations apply depending on the type of body product, and that sale and donation raise quite different issues.

The second and third incidents – the right to manage and the right to income – may also cause us varying degrees of disquiet. Most people would agree that respect for bodily integrity dictates that, if anyone should have the right to permit others to make use of parts of my body, it should be me and no one else. Similarly, if anyone should be entitled to any profits or income accruing from my body or from unexcised body parts, it should be me and no one else. Nevertheless, a formidable range of philosophical, moral, religious and political objections could be made to a legal system that always and in all circumstances allowed me to forgo personal use of parts of my body (or, indeed, the whole) and to license others to make surrogate use of it, whether for my reward or theirs.

So, if we were slavishly to adopt Honoré's incidents here (something he would not himself have advocated), we might be tempted to conclude that you can 'own' some of the small/inessential parts of your body, or at least those not regarded as having any moral, religious or reproductive significance, but not the essential parts. Initially, this may seem a strange conclusion, but it tells us some important things about ownership. First, it tells us that legal systems typically recognise ownership of some things but not of others. Secondly, it demonstrates that, when

deciding whether a particular type of thing should or should not be ownable, a legal system is likely to be influenced by a wide range of pragmatic and principled considerations. The same considerations will not necessarily apply in relation to all types of thing, or if they do apply will not carry the same weight – consider, for example, the considerations that would be relevant in deciding whether to recognise ownership of white tigers, water supplies in a desert, sunlight or weapons of mass destruction.

Thirdly, it tells us that ownership is too simple a concept to encompass all the different types and ranges of rights and interests in things that we would expect a mature, efficient and humane legal system to provide. Many of the difficult questions posed above could more appropriately be answered by giving John property rights in his body which fall short of ownership, or by giving him personal rather than property rights. These crucial questions of what amounts to a property right, and the distinction between property and personal rights, are explored in the next four chapters. The specific question of the extent to which English law does in fact recognise property in human bodies and body parts is something we return to in the ‘Notes and Questions’ section at the end of this chapter.

1.2.1.2. John’s interest in the excised body cell

Meanwhile, we have to return to the question of whether John had a property interest in the cell *after* it had been removed from his body. This was the precise issue faced by the Supreme Court of California in the case on which this story is based, *Moore v. Regents of the University of California*, 51 Cal 3d 120; 793 P 2d 479 (1990). The *Moore* case, being a decision of the American courts, is not determinative of the issue in this jurisdiction, but it provides a good illustration of the spectrum of moral and philosophical standpoints taken by common law judges on such issues. In the *Moore* case, there was only one doctor involved, not two as in our fictitious example, and the cell was removed from Moore’s body in the course of an operation to remove his spleen, as part of his treatment for hairy-cell leukaemia. Moore had consented to the operation and to the removal of his spleen, but he had not been told that the doctor in charge of his treatment had already spotted the potential value of his cells and had already decided to take and use them for a particular research project. The issue was whether Moore had any cause of action against that doctor. It was decided that he had, but the majority held that he had only a personal action for breach of the doctor’s disclosure obligations, not an action in conversion, which is the cause of action available to someone who can show an unlawful interference with property rights. The issue that divided the majority from the minority was therefore whether Moore could be said to have property rights in the cells which had been removed from his body. If he had been able to show that he had, this would have given him a basis for a claim to a share in the gigantic profits now being made out of the cell line developed from his body tissue. The majority conclusion was that, for the purposes of conversion law at least, a person cannot be said to have ‘property’ or ‘ownership’ in his own body

cells once they have been excised from his body (although they were careful to emphasise that ‘we do not purport to hold that excised cells can never be property for any purpose whatsoever’). The reasoning which led the majority to this conclusion is important: broadly, they said that to decide otherwise would inhibit socially important medical research, and would give Moore ‘a highly theoretical windfall’. The minority, on the other hand, felt strongly that to deny that we have property rights in our own bodies violates the ‘profound ethical imperative to respect the human body as the physical and temporal expression of the unique human persona’, as Mosk J put it. Also, they were persuaded by the argument that, because the profits to be made from the cell line were a product of both the researcher’s skill and Moore’s cell, they accordingly ought to be shared proportionately between them (an argument we come across again in Chapter 3). Here, however, we want to note some rather more general points not fully articulated in the *Moore* case, and which we can best appreciate by moving back to our fictitious example, where the question of John’s property rights is still open.

1.2.1.3. Continuity of interests and John’s interest in the cell line

Assuming for the moment that John does have a property interest in the excised cell, it is worth spelling out why that might give him a proprietary claim in respect of the cell line and the profits made and to be made from it. His claim is essentially a mechanistic one, and it tells us some important (if rather obvious) things about the way property interests behave and the way they are allocated by a legal system. His argument is that, if he had a property interest in his body cell when it was still part of his body, that property interest must necessarily still continue for as long as the cell itself continues to exist, despite changes in form and/or enhancements in value, unless and until something happens to extinguish the interest. Moreover, as long as the *interest* continues to subsist, he must necessarily continue to hold it unless it can be shown to have been passed on to someone else. Property interests do indeed have this mechanistic quality. Leaving aside interests which are specifically limited in time (for example, a ten-year lease of a shop), a presumption of continuance exists, and a person will be presumed to continue to hold an interest which has become vested in him unless there is positive evidence that it has been divested, for example by a sale or gift (we do not lightly find that someone has simply abandoned a property interest). This feature of property interests – essentially, they stay put unless positively ended or moved – is important. Property interests in things carry with them liabilities as well as rights. Also, unlike personal interests, they affect everyone who comes into contact with the thing in question. For both these reasons, it is essential that we know at any given time exactly who has what interests in what thing – consider, for example, the case of contaminated land, or a share in a company on which a dividend has just been declared.

So, if we accept for the purposes of this argument that John did own his cell when it was a part of his body, we need to ask whether anything happened *to the cell* that would have extinguished or modified his interest, or alternatively whether at

some stage he disposed of his interest before the cell was developed into a cell line. We know that two things happened to the cell. The first was that it ceased to be part of his body, and we have already said that this event causes such a profound change in John's relationship to it that we might be justified in saying that it changes the nature of his interest, or even extinguishes it altogether. The second thing that happened was that Dr B exercised his skill on it to develop it into a cell line. In other words, as the minority dissent in *Moore* pointed out, even if we assume that John's cell was *an* ingredient in or component of the cell line, it was not the only one: the cell line was the irreversible product of two things – the cell and Dr B's skill and labour. Sophisticated legal systems will necessarily have rules about what happens when things of different ownership become physically and irreversibly mixed. To a certain extent, similar considerations should apply if one of the ingredients is a physical process (such as heat) rather than a tangible thing. The addition of human skill or labour to a thing raises some of the same considerations but also quite different ones. There is an argument that exploitation of resources to the benefit of society as a whole can best be achieved by conferring property interests on those who expend skill and labour on things, regardless of whether in any particular case their contribution has added value to the thing in question. This is the basis of John Locke's arguments justifying property rights that we consider in Chapter 3, and it also forms the basic premise of intellectual property law. In the *Moore* case, it was regarded as axiomatic by the majority. They took the view that the value to society of promoting medical research was so high that it was justifiable – in fact necessary – to allocate the whole of the property interest in the cell line to the doctor: to allow Moore even a proportionate share in the valuable commodity produced when the doctor mixed his skill and labour with Moore's cell would unacceptably lower the incentive for doctors to carry out medical research on human tissue.

There are other things to be said about Dr B's position, and about Dr A, but first there are some other points to be made about John's proprietary claims.

1.2.1.4. Enforceability of John's interest in the cell line

If John had a property interest in the cell line produced by Dr B which was enforceable against Dr B, does it necessarily follow that it would also be enforceable against the drugs company once the cell line had been sold to the company? We see in Chapter 2 that it is a fundamental characteristic of a property interest in a thing that it is enforceable against everyone who comes into contact with that thing. However, that statement requires some qualification. Common law systems have developed fairly complex sets of rules curtailing the enforceability of interests where, as here, there has been a fragmentation of ownership, as we see in Chapters 14–15 where we look at enforceability in detail. In particular, there are circumstances in which a property interest in a thing will be extinguished by a sale of the thing. The reason for this is that, in a market economy, a legal system that recognises multiple interests in a thing has to reconcile conflicting aims. On the one hand, the full benefits of private property ownership depend on security of

interest, and this is best served by a rule that property interests are enforced by law against all the world in all circumstances. On the other hand, the free marketability of resources is hindered by the presence of multiple interest holders whose interests cannot be overridden. For the market to function properly it must be easy for the ownership of resources to pass to those who value them most, but transactions become prohibitively expensive if they require the concurrence of multiple interest holders, especially if their existence is not easily discoverable and identification is difficult. We look more closely at these arguments in Chapter 2. The point we are concerned with here is that most systems balance these competing aims by allowing for some circumstances in which lesser property interests in things can be overridden on a sale of a larger interest in the thing.

In order to understand how this works, it is necessary to appreciate that there are at least two ways of structuring multiple property interests in things, either of which could apply if we conclude that both John and Dr B have property interests in the cell line. One of them is by co-ownership: we could say that John and Dr B co-own the cell line in shares proportionate to the value of their respective contributions. If we adopt Honoré's view of ownership, we would then say that they co-own each of the incidents of ownership. Alternatively, ownership can be fragmented, so that some rights and liabilities become split off and vest in one person while the rest remain vested in or are transferred to someone else. As we see in Chapter 8, only set patterns of fragmentation are permissible, but it would be possible to adopt a pattern of fragmentation which, in effect, gave Dr B all the Honoré incidents of ownership except the right to income, with that right being shared proportionately between John and Dr B. We would then say that Dr B owned the cell line, but his ownership was subject to or encumbered by John's property interest (consisting of a right to a share in the income). However the multiple interests are structured (i.e. whether by co-ownership or by fragmentation) it is the person who holds what Honoré calls the capital interest in the thing who has the capacity and power to sell the thing itself (that, after all, is what the capital interest is). In the case of co-ownership, the capital interest is co-owned, and so there can be no sale or other transfer of ownership without the concurrence of each of the co-owners (although we see later how English law uses the trust to get round the inconvenience this can cause when dealing with co-owned land). If, however, ownership has been fragmented, the capital interest in the thing may well be held by only one of the interest holders. So, for example, if a landowner grants a five-year lease to a tenant, the tenant acquires the right to possess the land for five years (and, in the Honoré classification, the rights to use, income and control for the same period) while the landlord retains the right to capital (and, incidentally, a present right to have possession, use, income and control revert to him in five years' time).

In the interests of marketability, the common law has evolved rules which enable the holder of the capital interest to transfer full ownership of the thing in certain circumstances, so effectively obliterating or overriding any other property