Book Review


The focus of this book is not on ownership of the body as a whole but on the property rights persons can claim over tissue separated from their bodies. This is not a new issue (see for example the famous case *Moore v Regents of the University of California*, 1990). However, as a result from advances in science and the collection and storage of human tissue in DNA-banks and other repositories on an ever larger scale, it has become more topical than before. The continuing discussion about ownership of and control over human tissue in the international literature shows that it remains controversial. At the same time, the development of clear legal principles is necessary both to protect the right of individuals to control biological materials separated from their bodies and to enable efficient use as well as legal certainty in medical research.

The author acknowledges that apart from property rights, individuals will also have non proprietary interests in blood and tissue, such as autonomy: a living person may claim a right to retain control of separated biological materials to ensure respect for his or her individual autonomy. However, the ‘first order legal question’ is whether there are circumstances that should be properly seen as creating property rights in tissue separated from the human body. As long as this question remains unanswered, a sufficient legal basis for the development of a coherent structure of property rights and non-proprietary interests is lacking, according to the author.

The most extensive part of the book (Part I) provides a comparative analysis of legal developments in England, Australia and the United States, exploring how the law in these jurisdictions deals with legal questions concerning bodily materials separated from the human body and what principles underlie the approaches of these leading common law countries. After a discussion of the legal position of the dead body (Chapter 2) and that of the living body (Chapter 3), it ends with a separate analysis of the 2004 UK Human Tissue Act (Chapter 4), focusing on the question to what extent it recognises property rights and non proprietary interests in human biological materials.

Part I demonstrates that common law and statutory regimes in the three jurisdictions that have been examined have failed to provide clear or coherent legal principles for determining the legal status of and the rights pertaining to biological
materials separated from dead bodies or living persons. Unfortunately, the Human Tissue Act did not remedy this. With regard to this act, it is concluded that it enshrines the doctrine of informed consent as the basis for lawful removal, storage and use of human tissue, but that it is silent on the legal status of the material, including property issues.

Part II aims at analysing the future development of the law and at elaborating a more rational approach. Chapters 5 and 6 reflect on the role of property rights. It is argued that even if English law has shown a continuing reluctance to recognize personal property rights in separated human tissue, it can (and should) develop to accommodate such rights. Assuming that biological materials are transformed into ‘things’ capable of being the subject of property rights once they are separated from the human body, the author further argues that the detachment of biological materials can be considered as the basis of a property right for the individual from whom the tissue was removed. On the contrary, the work or skill exception (originating from the Roman law doctrine of *specificatio*, meaning that who transforms an object that originally does not belong to him into a something new using his work or skill may claim to be its owner) is not a sound basis for property rights, be it only for its limited scope of application. Of course the source of the material may transfer or abandon his or her property rights, whereupon the specification doctrine might play a role in the creation and allocation of property rights in additional biological materials.

Having established the basis for the control over human tissue in property rights, the last chapter (Chapter 7) identifies what non-proprietary interests an individual can assert in relation to tissue separated from his or her body, and examines how the English law on wrongs can (further) develop so as to (better) protect these interests. According to the author, limitations in the law of wrongs reinforce the conclusion that property law provides the most appropriate framework for the control by individuals of the use and disposal of the tissue separated from their bodies. Non proprietary interests deserve protection and legal remedies and safeguards should be further developed for this purpose where necessary, but only after the initial property right of the source of the material has been fully recognized.

The book provides a very informative analysis of the law in the countries examined. Being all of them common law jurisdictions, the approach adopted and the arguments resulting from it are very much in the common law tradition (although this applies more to some chapters — like Chapter 7 — than to others). This is not to say that the book is not interesting and readable for readers from civil law jurisdictions. And the basic issue — what role the concept of property can and should play as a basis for control of the source over his or her tissue — is certainly relevant for both traditions.

At this more basic level, one can agree with the author that both the perspective of ownership and that of non proprietary interests have to be considered and