

Raising the Bar Sydney 2018

Sascha Callaghan – Who owns you?

Welcome to the podcast series Raising the Bar Sydney. Raising the Bar in 2018 saw 20 University of Sydney academics take their research out of the lecture theatre and into bars across Sydney, all on one night. In this podcast, you'll hear Sascha Callaghan's talk, Who owns you? Enjoy the talk.

[Applause]

Thank you. Okay, so most of us here tonight are pretty familiar with the idea that we can own things. And we've all got a sense of what ownership means. You know, when we own things, we can sell them, we can give them away, we can leave them in our will. And we understand that ownership can extend to any type of thing, really. You know, we all understand that we can own small things like the clothes we're standing up in, our mobile phones, larger things like plots of land. A lot of us understand that we can own abstract things as well like intellectual property rights or the rights in our labour. But if there's one thing that we might intuitively feel a sense of ownership over, it's our bodies.

The very thing that we use to walk around and mediate the world, the thing that we call me. And it is there that our intuitions, especially if we think the law will back us up in those intuitions is wrong. And in fact, if anyone owns parts of your body, it's highly unlikely that it's you. Now I might sort of – you might want to say, "But hang on, you know, you can't come up to me and take pieces of my body. You can't just come and steel my arm or my leg or my blood." And that's absolutely true. I can't so much as touch a hair on your head without your consent, without my acting unlawfully. And that's because the law does a very good job at protecting your right to bodily integrity while you are a living, breathing, going concern as a human. But the basis upon which the law does that is actually in the law of assault. And it's got nothing to do with property rights and whether or not you actually own your body.

So the fact is that once body parts are separated from the whole – so once the semen is separated from the testes, once the germ lines are separated from the tumour, once the beating heart is taken from the body – and on and on it goes – those things become a *rheas nullius*. So that's a Roman term and a concept in Roman law which means nobody's thing. *Rheas* is a thing, *nullius*, nobody's thing. And that concept in Roman law underlies a general concept in law which is that there is no property in the body living or dead. So if the origins of this law are ancient, its implications were quite different when body parts and corpses were just scraps really. And the only thing any decent person would want to do with a corpse was give it a Christian burial. That was the language of the time. But advances in modern technology have really invested these erstwhile scraps, often taken from the sick or the dead, with vast new possibilities.

So while the old cases really have these kind of macabre Dickensian characters in them, they're full of like slavers and grave robbers and things like that, the modern cases are these kind of operatic David and Goliath stories. With you now, ailing people or their bereaved families fighting large pharmaceutical companies, or grieving women wanting to fulfil a lifelong dream of parenthood with a partner who's recently died. So you know, these Roman law principles are being raised in these new contexts. And they're really soaked in human anguish as any great tragedy. So they're very compelling stories that find their way inside. Anyway, there are a number of roads that we can go down to explore this world of property in the body.

So I thought that really the best thing to do would be to give you a choice. And so I'm going to do a bit of quick and dirty research. So in order to protect your privacy, I want you all to look directly at me. Don't look at each other. Look directly at me. Now when I say go, I want you to raise your eyebrows if you want to talk about pharmaceutical patents. And I want you to blink once if you want to talk about sex. Okay, so one, two, three, go. Serious? This iPad is full of pharmaceutical patent stories.

[Laughter]

All right, well look, okay, let's talk about sex. Or actually, you know, really what we're going to talk about is love, sex, death and the desire to have babies. All of the grand narratives in life. And I think it's that path that we're going to wend our way through the tangled wood that this kind of area of law is.

But before we get into the good stuff, we might take a diversion into the sordid history of the rule that there's no property in the body. So the fact of the matter is that the law did once recognise rights in human beings. I mean, there was a legal slave trade and that was underpinned by the law. But even before the slave trade was abolished, English common law judges were already leery of acknowledging that the human body or human tissue could be property. And so you see in early cases in the 19th century and even before, judges kind of scrambling around deep into the historical record and drawing on Roman law principles, statements by judges here and there and learnt commentary. And then you start to get these bold statements in cases saying that there's a general rule. It's a general rule of law that there is no property in the human body, living or dead. But the interesting thing is that as soon as that starts to be stated as a general rule, the cases actually involve people making attempts to find exceptions to that rule.

And it's not hard to figure out why, because if there's no property in the body, that means it can't be stolen, it can't be desecrated, it can't be taken by somebody else for gain. And so you can imagine that there's going to be many circumstances in which people are going to sort of find themselves exercised till the injustice has been caused and approach the courts. So the first major exception that arose in the courts was to do with the general rule that a corpse couldn't be stolen. Which frankly, strained the public's patience with the law when you had cases like – there's a famous case called the Queen and Cundick. So it's an 1822 case where a fellow called George Cundick was hired to bury the body of a chap called Edward Lee. Lee's relatives came around to view the body and Cundick told them that he'd buried it already. And he'd actually gone through the trouble of having a fake ceremony. He got a coffin and filled it with rubbish and rocks and stuff and buried it. But unfortunately for him, he'd been seen in the dead of night taking a heavy package from his house and putting it into a hackney coach which is like a taxi coach. And he was later found at a surgeon's house having dissected and mangled the body, in the words of the judge, to the disgrace of religion, decency and morality and to the evil example of all other persons.

So this report caused a major sensation. You know, it's the sort of thing that you know is published in newspapers and gets around. And it was a sort of celeb. And yet despite the fact that everyone was sort of universally horrified by this happening, it wasn't clear that any crime had been committed, because the corpse couldn't be stolen. So the court had to deal with that and a law came to be developed where there was a misdemeanour of theft of a corpse, even though you can't be charged with ordinary larceny. You can be charged with theft of a corpse.

A second major exception, and it's also related, is that next of kin have a right to obtain a corpse for burial. So when someone dies, the next of kin or actually the executor of the estate has an obligation to properly dispose of the corpse. So the old parlance was give it a Christian burial. So a corollary of that duty is a right to possession of the corpse. And that

means that people with that right can also do things like raise the tort of wrongful autopsy and things like that if there's medical interference with the corpse without their consent.

But for people who want to do more than just bury a dead body, probably the most useful exception that emerged was the so-called work and skill exception. So this particular exception originated in a bizarre 1908 High Court case in Australia that began with a stillborn baby that had been born in New Zealand some 40 years prior to a woman who was unknown. Her history just disappears. So the birth was attended by a Dr. Donahue who when the body came out noticed that it was a perfect specimen, apart from the notable fact that it had two heads. Obviously they were actually twins, but it was a body with two heads.

So he took the body home, put it in a jar, filled it with alcohol, put a stopper in it and kept it as a curiosity for the rest of his life. When he died, his effects were sold off, including the baby in the bottle. They were actually sold off to a chap who ran a travelling show and it ended up in the possession of his son, a chap called Reuben Dudwood who continued the family business. Unfortunately for Reuben Dudwood, he made a fatal PR error in 1906 when he opened the Come and See the Two-Headed Baby show at a school sports carnival at the Sydney Cricket Ground. The abject horror of the contrast between wholesome children running in a sports carnival and a two-headed or in fact what the policeman called a naked, dead body of a child with two heads, caught the attention of the local constabulary.

And a police officer bought a ticket to the show, saw the artefact and confiscated it along with some other items. Dudwood said, "My father bought that in New Zealand from a doctor some 20 years ago. He made a living out of it. I intend to do the same." And he sued for return of the property. The police returned to him the bottle and the alcohol in it, but not the corpse. So the High Court unanimously confirmed the rule that there was no property in the body, but they said that an exception could be created if the body was transformed from a mere corpse awaiting burial, the *res nullius*, by the lawful exercise of work and skill. So that's the same as how other *res nullius* can be transformed into property.

So other examples of *res nullius*, nobody's stuff, found things, things like shells washed up on the beach, wild animals, the air we breathe, wild fruit growing on a tree. So you can transform those examples of *res nullius*. You can make a necklace from the shells and by your work and skill that then becomes property that you can sell. You can make jam from the wild fruit and so on. And so in much the same way, this corpse, just a sort of scarp like cut toenails, could be transformed into property that could enter the estate and then sold by the application of work and skill. And it was decided that Donahue's work and skill in putting the baby in a bottle and pouring alcohol on it was sufficient to transform that corpse into property that could then be sold, could enter his estate, be sold and end up in the lawful possession of Reuben Dudwood who was entitled to its return. Okay, so that particular case, as odd as it was, has been taken up – that's actually the basis for the modern law of property in the body.

There has now been a string of Australian and UK cases which have had to use that because it's the High Court precedent, so it has to be used and reflected on. But the problem with the exception is that it vests ownership in the doer of the work, not the origin of the tissue. So the sort of cases that it's been used in is like where there were body part stolen from a morgue from a sculptor and there was a wig made of human hair stolen. Urine and blood samples which had been taken for alcohol testing. That sort of thing has been sufficiently transformed by work and skill to become property and the courts have found that they've had to be returned, or people have done a wrong. But it is the applier of the care and skill, not the origin of the tissue that gets the property, which causes a problem.

But along came a cluster of recent sperm cases – here we are. We've finally gotten here – which have led to some creative developments in that context.

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So now we can twist the dial on the time machine forward a little bit to about 2003. In fact, 2003, in fact the evening of the 28th of June in 2003. When a refrigerator at Bristol Hospital in the UK went on the fritz and inside the refrigerated tanks were sperm samples, a number of which had been deposited by a group of six men, including a man called Jonathan Yearworth who the case is named after.

And those men had been diagnosed with cancer and were receiving chemotherapy treatment in the hospital. So those men had been encouraged by their doctors to preserve the sperm because there was a good chance that the treatment they were having would destroy their natural fertility. And in the midst of this traumatic experience, the diagnosis and the rigours of treatment, they discover that their last chance of fertility might also have been crushed. So these men, evidence was that these men were devastated, and they sued the hospital – five living men and the widow of one of the men sued the hospital for destruction of the samples, and the attendant mental distress and psychiatric injury.

The problem was in order to succeed on that basis, they had to show that the sperm was property that could be damaged and they could get compensation for. So in another landmark decision in the court of appeal of England and Wales, the court said that there was sufficient property in that sperm for the men to be able to recover on the grounds that they sought recovery from. But in getting to that, they were a little bit sort of creative in the way that they did it. So the first thing they did was they looked to the *Dudwood* case, the baby in the bottle case.

And they basically said, weird, you know, old and Australian thankfully, so we don't have to follow it. And they basically said, "Look, that case is good as far as it goes, but it probably isn't a solid enough foundation to start looking at how we want to treat sperm in the future." So they sought a slightly different basis for finding that those men had property in their sperm. They said that there was a natural sort of entitlement to be able to use their sperm to procreate.

They had effectively converted the *rheas nullius*. So if they had spilled sperm on their trousers, that would have been a *rheas nullius*. But by purposefully depositing it in a facility that cleaned it up and got it ready for a later specified purpose, that *rheas nullius* had become a valuable piece of property that could be treated as a bailment and they could recover damages for. So this was the first time that the source of human tissue had been recognised as the holder of property rights, sort of a right to possession. So this has inspired some creative thinking in Australian courts too.

So fast forward now to Sydney in 2010. So on the 6th of August, a woman called Jocelyn Edwards received the devastating news that her partner Mark had been killed in an accident at work. Jocelyn was 40 years old. The couple had been actively trying to conceive a baby for some time. They'd already consulted a fertility specialist that had a number of tests. And in a particularly cruel twist of fate, they had an appointment booked the very next day at the IVF clinic to sign all the consent forms and the papers and begin active treatment.

But as it happened, Mark was killed and his body was taken to Royal Northshore Hospital. So Jocelyn was a forward-thinking woman and she immediately turned her mind to the possibility of extracting sperm from Mark's body. So that can be done. It's done by needle aspiration. It's taken directly from the tubes in the testes. But there's urgency to it. So really viable sperm need to be obtained within 24 hours of death, although maybe up to 48 hours at a stretch. But ideally within 24 hours you get the sperm from the body.

So she did what a lot of other people in this situation have done and she went to court seeking an emergency order. So you can knock on the door of the court in the evening as she did and a duty judge will look at that overnight. So she had an order by early in the morning saying that the sperm could be extracted but it made no orders about what could be done with that sperm. The idea being that that was a more complicated – there was urgency attached to this. Frankly, no judge wants to squash some woman's chance of having a baby because they don't have time to think it through. So as has often happened in those cases, there's an order made to extract the sperm. But to be able to do anything with that sperm, you've got to go back to court for another order.

So one of the major problems that Jocelyn Edwards had was that in New South Wales the law that regulates IVF says that you can't use gametes. Gametes are sperm or eggs. You can't use gametes without the gamete donor's written consent. So Jocelyn Edwards had interesting evidence that Mark had actually said, "If anything happens to me," – he actually thought he had a terminal illness at one point. "If anything happens to me, I want you to go ahead and have a baby without me." His parents were supportive and so on. But despite all this, despite the fact that they were booked in the very next day to sign all of those documents which contained those kinds of consent, they didn't get there. It never happened. And so she didn't have what was necessary to use the sperm for IVF in Sydney.

So she needed to go to court to have an order that she had a right to possession of the sperm in order for the clinic to be able to release it to her so she could take it to another jurisdiction where she could have the treatment. So that could be done in Tasmania or in the ACT for example. So Jocelyn's lawyers argued that she had a right to possession of the sperm which was a corollary of her right to possession of the body for burial. And they also said no one else has a better right, so that should be sufficient to allow her to have access to the sperm.

But the lawyers for the attorney general said that the right to possession of a body for burial is very specific and it doesn't extend to being able to use sperm to create a baby. And they said that really she had to assert a property right. So interestingly in this case, the court wouldn't ignore the physical reality of the situation. So they said there is an actual sample of sperm sitting in the clinic at IBF Australia. That's valuable. It's not just a bit valuable. It's life-changingly valuable to Jocelyn Edwards and her family. And these were matters that you know – when something frankly looks like property, looks like it – it's hard, you can pick it up and whatever – and people value it, then you know, that's the sort of thing that it becomes a problem for the law to ignore that. So the judge decided that that had to be taken into account. But then whose property was it? How can you kind of ship that home to somebody?

So they looked at the Yearworth decision and okay, that was a UK case so it's not strictly binding. But the other problem with that was that the owners of the sperm in the Yearworth case were the men themselves. So it was the men themselves saying, "I own this sperm. I've given it to the IVF clinic to clean up and use it for this particular purpose." That wasn't what was happening here. This sperm was taken from Mark Edwards after he died.

It was a rhesus nullius when he died. He didn't have any property rights in it at the time that he died. It was taken after that and he had expressed sort of no intentions towards it at all. So it wasn't quite analogous. The other thing was that the only authority that was actually binding on the New South Wales court was the Dudwood decision, the two-headed baby decision. And that required the court to look at the question of the application of work and skills. So they did that.

They said, "Okay, fine. That's great. We can call this property because there's been an application of work and skill." But whose is it? The line of authority from the Dudwood case and other cases that followed it here and in the UK said that the clinic should own it. But the judge said, "Look, I'm just going to say that that's not the better view." Because the clinic wasn't

acting on their own behalf, so the purposes of research or whatever. They were acting as agents for Jocelyn Edwards for her specific purpose. So the better view is that they don't own it.

But could Jocelyn Edwards actually own it? What is her connexion to this sperm? So the court said yes, she owns it, but they sort of did it in a – it was basically a monumental blag. They said the straws of sperm exist. It came from Mark Edward who was Jocelyn Edwards' husband. It was lawfully removed on her behalf and treated for her specified purposes. And no one else in the world has any interest in it or any better right to possession of it. So all things considered, it's property. And if Jocelyn doesn't exactly own it, she's certainly got the best right to possession. So that was how Jocelyn Edwards came to be able to have the sperm released to her and take it to another jurisdiction to do whatever she wanted with it.

So all good for ladies wanting sperm, right? Not quite. So just this last August, just two months ago, Justice Fagan in the Supreme Court of New South Wales found that it's actually unlawful to authorise extraction of sperm from an unconscious or dead patient, dead person, unconscious patient or dead person in New South Wales. So despite the fact that there have been all these orders, and they're usually emergency orders – they happen you know, overnight. The judge doesn't have the assistance of counsel. They don't have time to really look at the precedent. And they do it expediently. They say, "Okay, fine. Take the sperm. We'll deal with it later."

And he said having had the chance to consider this with submissions from the attorney generally – he made one of those decisions himself not that long prior. "I've come to the conclusion that it's not actually lawful to authorise release of sperm because of the conflict of that with the Assistive Reproductive Technology Act." So unless there's written consent, it can't be done. So that's quite a major blow for women in New South Wales who want to access the sperm of their dead husbands without their written consent. You know, it happens.

So where to from here, really? The question is, I suppose, whether there is a basis since the no property rule has been sort of chipped away at and you know, so many exceptions have been found and it clearly leads to a number of injustices, where the time has come to recognise property rights in the body. And when we think about that, it's important to think about the fact that the work and skill exception, which is really the only one that we've got, hasn't done a great job in protecting the rights of the source of human tissue.

Except in these sperm cases where we've got very narrow rights to possession of the gametes for specific use in reproductive technology. But there are other circumstances where people want to claim rights in human tissue. So you know, there have been a number of cases that are quite well-known, like Henrietta Lacks who had a very virulent cervical cancer in the '50s and died within nine months of diagnosis. It just popped up out of nowhere and it killed her really quickly. And pieces of the tumour were sent to the lab where it just proliferated. And in fact, the cells multiplied so quickly that they could be carried on dust particles and infect other samples.

It was really an amazingly prolific tumour. And out of that they created an immortal cell line that's still used now, that's still the basis of lots and lots of medical research. But her family only found that – it's called the HeLa after Henrietta Lacks cell line. And her family only found out about that in the '70s and they didn't have any kind of – they had no right or interest in the huge profits that have been made out of that cell line. There have been lots of examples of similar things, people whose tumours and cancers have led to amazingly profitable breakthroughs. Tragedy for the family but amazingly profitable breakthroughs, and there's no ability to kind of trace that property through. It's a rhesus nullius until it's converted by the laboratories into property. So should we have property rights in the body? I mean, the main arguments against it are, you know, we don't want to commodify humans, but you know, we

really kind of – they're being commodified anyway, but just the rights ending up in the wrong place. You know, people say it can effect the attitudes of – sorry, people say it's really complicated and there's lots of unintended consequences.

So you know, there's universities and museums with old samples and things. You know, what happens to them if they're suddenly liable? How do they return them? That kind of thing. And also there's concerns about the cooling effect on research. So if we suddenly give people property rights, then does that mean that labs and stuff have to start paying people for their tissue samples? And does that mean that research becomes too hard? You know, but there's many arguments in favour as well.

So you know, I mean it arguably also increases the value of the human body rather than diminishing it. You know, there's a sort of injustice also involved in not being able to claim interest in those profit-making cell lines.

[**Applause**]

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