Bioethical Inquiry (2014) 11:437–440
DOI 10.1007/s11673-014-9574-8

RECENT DEVELOPMENTS

Property in Tissue (Again) and Negligent Conception

Bernadette Richards

Received: 17 August 2014 / Accepted: 25 August 2014 / Published online: 26 September 2014

Property in Human Tissue (Again)

It seems that a recurring theme in our Recent Developments is the issue of property rights in tissue (see, for example, Stewart 2009; Richards, Madden, and Cockburn 2011; Giancaspro 2014). This has most commonly been associated with access to reproductive material and begins from the presumption of no property in tissue. A recent decision for the Superior Court of Justice, Ontario, whilst unsuccessful on largely procedural grounds, warrants a brief note because it adds to the general discourse on property in tissue and adopts a different approach. *Piljak Estate v Abraham* 2014 ONSC 2893 addressed the question of whether or not the family of a deceased person could access liver tissue for genetic testing. The property question arose because the family applied for access to the tissue under Rule 32.01 (Rules of Civil Procedure) and in order for the tissue to fall within the ambit of the Rule it must be defined as real or personal property.

Background

In 2008, Ms. Piljak had a colonoscopy to remove a polyp in her colon; it was diagnosed as a benign tumour. One year later, however, she had a CT scan for "unrelated reasons" and lesions were noted on her liver and colon. She was subsequently diagnosed with colorectal cancer and died in 2011 ([1]–[3]). This action was brought shortly after her death and central to the action is a claim of negligence in the conduct of the original biopsy. One of the claims is that the lesion in the colon should have been detected at that time. The family thus sought an order under Rule 32.01 to enable the plaintiffs to request genetic testing of the original tissue block; this testing would be aimed at determining whether or not Ms. Piljak had hereditary non-polyposis colorectal cancer. As Ms. Piljak had a familial history of colon cancer, the plaintiffs argue that the tests "might reasonably go to the issue of Dr Abraham's standard of care" ([5]–[7]).

Master Dash explored the background rationale of the request and established several key points, some of which went to the procedural issue that ultimately defeated the claim (and are not relevant to this brief discussion). It was noted that the purpose of such testing is primarily as a treatment aid for the patient and provides screening information for other members of the family. Of course there could no longer be a benefit for the now-deceased patient and can only be viewed in light of the impact on the family. Master Dash touched on the implications for the family and noted that the testing doctor would be ethically bound to tell them the result, but as it was not raised by the plaintiffs then it could not factor into the ultimate decision ([16]).

The discussion was therefore focused on the reason for the request and the nature of the tissue.

Why Property?

The legal question in this case is unusual as it is procedural in nature. The relevant law is the Rules of Civil Procedure, but for the tissue to come within that law it must be identified as property. The applicable Rule

B. Richards (✉)
Law School, University of Adelaide,
North Tce, Adelaide 5005, Australia
e-mail: bernadette.richards@adelaide.edu.au

"permits the inspection of personal property where it appears necessary for the determination of an issue in the action and to permit the taking and conducting tests on samples" ([18]). Thus there are two clear issues: First, the tissue must be identified as personal property and, second, the testing must be necessary to the determination of the requisite standard of care in the negligence case.

Is the Tissue Property?

Master Dash stated that the identification of the excised tissue was not a simple issue but noted that there was no relevant jurisprudence presented by either party. This is an extraordinary oversight given the increasing body of jurisprudence in this area, not only in Canada but also in the United Kingdom and Australia. (See, for example, *JCM v ANA* 2012 BCSC 584, *Lam v University of British Columbia* 2013 BCSC 2094, *Bazley v Wesley Monash IVF* [2010] QSC 118, *Jocelyn Edwards; Re the Estate of the late Mark Edwards* [2011] NSWSC 478, and of course *Yearworth v North Bristol NHS Trust* [2009] EWCA CIV 37.) However, as none of this jurisprudence was raised it was not discussed in the judgment and Master Dash resorted to first principles, choosing to focus on the nature of property (as opposed to the nature of human tissue).

The significance of rights was highlighted with the discussion, beginning with the observation that all definitions of property involve legal rights over a thing or an object. These rights all focus on what can, or cannot, be done with the identified material ([23]–[24]), and the plaintiffs argued that they had a right to take and test the tissue. The defendants, on the other hand, pointed to the underlying purpose of the excision of the tissue, which was primarily for "diagnostic purposes/medical care or research purposes" ([25]). It was further argued by the defendants that the tissue was to be sampled and processed and then retained as archived diagnostic tissue, and that once it had been excised it became a "component of the medical record" ([26]), thus transferring both possession and ownership to the hospital.

In considering these arguments Master Dash chose not to address the long and well-established principle that generally there is no property in human tissue. Neither was there any discussion of the "work and skill" exception (*Dooderwood v Spence* (1908) 6 CLR 406); rather, the focus was on the purpose of the excision, and the diagnostic role of the excised tissue was decisive and property rights were identified.

The complexities of identifying human tissue as property were therefore overcome by categorising it as a part of the medical records. The conclusion was simple: The tissue is "owned by Sunnybrook Hospital, whose pathology department performed the diagnostic tests and in whose archives the tissue is kept. As the excised tissue is subject to rights of ownership, and since it is clearly moveable," it was a simple matter to conclude that it "is personal property to which inspection and testing under rule 32.01 may apply" ([27]). Thus, the focus was not on the material as "human tissue," rather it was on what could be done with it. The ethical and legal complexities of ownership in human tissue were therefore neatly sidestepped.

This decision does not therefore truly add to the broader discourse on the nature of human tissue. It could be said that the narrow focus on the purpose for the excision of the tissue simplifies the discussion but it does not provide any insight into the adoption of a broad property principle. In the absence of any principled discussion of the nature of human tissue, *Piljak* is best categorised as representing an interesting diversion from the well-trodden judicial path.

Negligent Conception

In June 2006, James Molloy was born with trisomy 21 (Down syndrome) and his mother claimed that he would not have been born if she had not been negligently treated by her doctor in December 2005. This, once again, required judicial consideration of whether or not the birth of a child could constitute an identifiable loss (*Molloy v El Masri* [2014] SADC 53). Interestingly, the question this time did not turn on the nature of the loss; instead, the focus was on the requisite standard of care and the possibility of contributory negligence on the part of the patient.

Background

The plaintiff was 48 years old when she consulted the defendant (her general practitioner) complaining of asthma, tiredness, emotional outbursts, and vaginal bleeding. She was given some asthma medication and the issue of menopause was discussed. She was advised to

return if the gynaecological symptoms persisted. The original appointment occurred in December 2005. In April 2006, the plaintiff took a home pregnancy test, which indicated that she was pregnant. The pregnancy was confirmed by her doctor, and when she made it clear that she did not want to proceed she was informed that as she was 33 weeks pregnant she had no option but to continue with the pregnancy. Her son was born in June 2006 with trisomy 21 (Down syndrome).

The claim was that if she had been appropriately advised at her original appointment the pregnancy would have been terminated. The plaintiff sought damages for undergoing childbirth and for the increased costs of raising a child with Down syndrome ([1]–[8]). The legal basis of the claim was that Dr. El Masri had failed to meet the appropriate standard of care in her provision of counselling and examination.

It is important to note here that given the background of so-called wrongful life and wrongful birth decisions there was no assertion that the life of her child was a loss in and of itself. Rather, the identified losses were as follows ([12]–[15]):

- Pain, suffering and trauma associated with pregnancy and after effects,
- Ongoing psychological trauma,
- Costs associated with medical care,
- Further costs including ongoing counselling,
- Increased cost of care of their child over and above that which would be provided to an otherwise healthy child,
- Increased time involved in active caring role,
- Increased medical costs,
- Learning aids, speech therapy and medical assistance,
- Indefinite care rather than until he reaches adulthood, and
- Mr Molloy also clams for a loss of consortium.

The focus therefore was not on the existence of her son but on the costs incurred as a result of his disability, along with the personal trauma associated with the pregnancy and subsequent birth.

In response to this claim, Dr. El Masri asserted that there were insufficient clinical indications for an examination or pregnancy test and that the original consultation focused on the asthma and shortness of breath and that menopause was only raised at the end of the discussion. Dr. Masri claimed that she advised the plaintiff that if the bleeding continued she needed to make an appointment in about a month, not a few months as claimed. In addition to this, the defence of contributory negligence was raised because the plaintiff did not provide a complete medical history and failed to seek further advice when the symptoms persisted ([16]–[20]).

The Judgment

In presenting the judgment, Sulio J began with the clear assertion that the child has no claim as an unwanted child (*Harriton v Stephens* (2006) 226 CLR 52) but noted that in *CES v Superclinics* the Court of Appeal in NSW held that negligent advice resulting in the loss of a chance to have a lawful abortion could give rise to a claim for damages ([31]–[32]). He also explained the related decision of *Cattanach v Melchior* (2003) 215 CLR 1 and explored the relevant legislative provisions that set out the requisite standard of care of a doctor in the provision of medical treatment ([33]–[39]). Of importance was his categorisation of the asserted negligence as the provision of diagnosis and treatment as opposed to advice, which meant that it fell within the ambit of the relevant Act (*Civil Liability Act 1936* (SA), s 41) as opposed to the common law.

A further point of interest was the reference to conclusions reached in *Sydney Southwest Area Health Service & Anor v MD* (2009) 260 ALR in dealing with the equivalent provision (*Civil Liability Act* 2002 (NSW), s 5O). The relevant point was that Hodgson JA concluded that "it is clear that s5O modifies the common law and provides a defence not available at common law, with an onus of proof lying on a defendant" ([21]). Therefore, the remainder of the judgment is best categorised as a consideration of the statutory defence provided by s 41.

The remainder of the judgment focused on the rejection of the defence that the counselling and advice were consistent with accepted medical practice and explored the evidence provided by each party. As the discussion is largely fact-driven, it is not worth considering in detail with only the broad conclusions being relevant here. Soulio J rejected Dr. El Masri's assertions that the treatment provided was appropriate and in fact rejected much of her evidence regarding the consultation. He further concluded that there was no contributory negligence on the part of the plaintiff and held the defendant wholly responsible. This decision is of interest,

therefore, as it demonstrates that despite the clear judicial rejection of life as a loss, there is support for claims seeking recompense for the incidental personal and financial costs as well as any additional expense incurred if the child has any special needs beyond those of a healthy child. It is therefore incorrect to state that negligent medical treatment that leads to the birth of a child will not attract liability.

References

Giancaspro, M. 2014. Reproductive tissue and contract. *Journal of Bioethical Inquiry* 11(2): 131–134.

Richards, B., B. Madden, and T. Cockburn. 2011. Considering the "born-alive" rule and possession of sperm following death. *Journal of Bioethical Inquiry* 8(4): 322–327.

Stewart, C. 2009. Recent developments. *Journal of Bioethical Inquiry* 6(2): 153–158.