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**Consider the extent to which tort law  
protects possession of bodily parts.**

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**Student No: A0086948H**

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## 1. INTRODUCTION

The unprecedented advancement of medical science and biotechnology in the twenty-first century has introduced new ways of using the individual's body parts in the production of goods and services that have allowed human body parts to take on new values "above and beyond any sentimental, dignitary, or elemental value."<sup>1</sup> Some of these technological advancements involve the use of detached body parts, for example the use of skin tissues in skin grafting while others involve the whole and living body, for instance, transplantation or surrogacy.<sup>2</sup> As market values crowd out traditionally non-market norms,<sup>3</sup> it has come increasingly urgent and pertinent to determine the nature and scope of property rights subsisting in a human body and its body parts, if any, so as to ascertain whether certain actions can be brought before the court in situations where wrongs have been committed.

Unfortunately, the law has not matched the pace of development in medical science and it has remained noticeably silent about parts of a living human body, "probably because until recently medical science did not endow them with any value or other significance."<sup>4</sup> In fact, patchwork attempts by various legislative bodies in the common law countries to address these concerns – for example, by introducing piecemeal legislation addressing specific parts of the body such as blood or organ for particular purposes – have only circumstantially and partially resolved the legal confusion in this area.

As a result, the lack of a clear and authoritative pronouncement on the modern-day legal status of human body parts, juxtaposed against the historical backdrop of entrenched judicial attitudes against recognising any form of proprietary rights in a human body, has left a lacuna in the law. Such uncertainty has not served the medical profession well since "medical practice and medical science cannot suspend procedures until such time as the law gives an answer."<sup>5</sup>

In analysing how tort law has evolved to deal with these exigencies and how it protects the possession of various body parts, this paper will examine the utility of two causes of action commonly employed in cases involving the body and parts thereof – namely, the torts of conversion and negligence.

## 2. TORT OF CONVERSION

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<sup>1</sup> William Boulier, "Sperm, Spleens, and Other Valuables: The Need to Recognise Property Rights in Human Body Parts" (1995) 23 Hofstra L Rev 693 at 694.

<sup>2</sup> Meredith Render, "The Law of the Body" (2012) 62 Emory LJ 549 at 552.

<sup>3</sup> See Michael Sandel, "What Money Can't Buy: The Moral Limits of Markets", in Martha M Ertman & Joan C Williams, eds, *Rethinking Commodification: Cases and Readings in Law and Culture* (US: NYU Press, 2005).

<sup>4</sup> *Yearworth and others v North Bristol NHS Trust*, [2009] EWCA Civ 37; [2009] 3 WLR ("Yearworth") at [29].

<sup>5</sup> Terry Kaan, "Rights, Ethics and the Commercialisation of the Human Body" (2000) Sing J Legal Stud 483 at 490.

The tort of conversion is often brought up by plaintiffs in cases where there has been an alleged wrongful interference with the body or parts thereof, albeit without much success in the common law.<sup>6</sup> One reason why courts have been reluctant in allowing for the tort of conversion in the context of human bodily parts is due to the lack of precedents.<sup>7</sup> Yet, as much as precedents *bind*, they must not *blind*. Attempting to situate the tort of conversion within the constraints of *stare decisis* “can have the effect of entrenching certain ideas within the law, so that they outlive their substantive relevance to the evolving society in which they continue to feature”.<sup>8</sup> Fortunately, as judges begin to recognise that the lack of existing authority for such novel situations “owes more to the nature of scientific and economic evolution than it does to conscious judicial deliberation”,<sup>9</sup> there are more attempts to develop the law of conversion for modern usage.

To that extent, the centre of gravity in analysing rights subsisting in a human body and parts thereof seems to be moving away from the rigidly entrenched “no-property” rule<sup>10</sup> of the 17<sup>th</sup> century towards a modern and more flexible interpretation that allows for broader exceptions. This opens up a greater likelihood of successfully utilising the tort of conversion, particularly in cases involving parts of the living body where the need to prevent commercial dealings in such things has to be balanced against the need to protect an individual’s rights in his or her body parts from wrongful interference by another.

Hence, in determining the extent to which the tort of conversion protects possession of bodily parts, this paper would first examine whether the body and its parts, living or dead, are capable of being possessed, before addressing the more contentious issue of whether property interests can vest in them.

#### *A) Capacity of the body or parts thereof to be possessed*

At common law, the body and its parts are generally capable of being possessed, with the primary exception being the living intact body. The principle against recognising any form of ownership over the living body was recently affirmed in *R v Bentham*<sup>11</sup>. In deciding whether fingers imitating the shape of a gun constitutes “possession of an imitation firearm”, the House of Lords answered in the negative on the basis

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<sup>6</sup> See *Moore v Regents of the University of California*, 793 P2d 479 (Cal 1990) (“*Moore*”) and *AB and Others v Leeds Teaching Hospitals NHS Trust*, [2004] EWHC 644 [*Re Organ Retention*].

<sup>7</sup> *Re Organ Retention*, supra note 6 (“in certain circumstances it might be arguable that a cause of action based on conversion exists... [b]ut in the absence of such a cause of action in respect of the body of a deceased person being recognised by an English court I am not prepared to hold that one does exist” at [161])

<sup>8</sup> Green & Randall, *The Tort of Conversion* (UK: Hart Publishing, 2009) at 107.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Haynes’s Case*, (1614) 12 Co Rep 113; (1614) 77 ER 1389; E Coke, *The Third Part of the Institutes of the Laws of England*, 4th ed (London:, 1669) at 203.

<sup>11</sup> *R v Bentham*, [2005] 1 WLR.

that “[o]ne cannot possess something which is not separate and distinct from oneself” and that “no one is to be regarded as being in possession of his own limbs”.<sup>12</sup> The consequences flowing from such a rule would prevent an individual from lawfully destroying one’s body parts intentionally or entering into commercial dealings in relation to them.<sup>13</sup> This represents a stark departure from the early common law when slaves were regarded as “things and the object of rights”,<sup>14</sup> and reveals the judiciary’s commitment towards abolishing slavery.

In relation to dead bodies, while ownership is generally not recognised because it may be sacrilegious<sup>15</sup> and that public health concerns give rise to the “imperious necessity for speedy burial”<sup>16</sup>, rights to possession in various contexts are readily admitted. Thus, an executor’s right to possession of unburied corpses for burial purposes was first established in *Williams v Williams*.<sup>17</sup> The rule was further expanded to include a coroner’s right to possession of body when required for the purpose of coronial inquiries<sup>18</sup> as well as a hospital’s prior right to possession of the body<sup>19</sup>.

As for parts of living or dead bodies, *R v Bentham* supports the view that detachment of body parts may sufficiently transform the body part into a “thing” capable of being the subject of property rights when the court stated that “[w]hat is possessed must under the definition be a thing... [a] person’s hand or fingers are not a thing” and that “[a]n *unsevered* hand or finger is part of oneself... [t]herefore, one cannot possess it.”<sup>20</sup> This is based on the concept that “only ‘things’ can be the proper objects of property, and that the human body and [body parts] do not qualify for entry into this category of things”.<sup>21</sup> Flowing from this distinction between persons and things, it is believed that the owner and the owned cannot be the same, thus leading to the denial of self-ownership.<sup>22</sup>

Capacity of parts of living or dead bodies for attracting property rights is therefore dependent on establishing some kind of separation between “thing” and “person”. This separability criterion is often attributed to Penner, who argues that “all property rights are rights to things that are only contingently connected to individuals and are not intrinsic aspects of human beings”.<sup>23</sup> Accordingly, he suggests that “[if]

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<sup>12</sup> *Ibid*, at [8] and [14].

<sup>13</sup> RS Magnusson, “Proprietary Rights in Human Tissue” in N Palmer & E McKendrick, eds, *Interests in Goods*, 2nd ed (London:1998); Nuffield Council of Bioethics, *Human Tissue, Ethical and Legal Issues* (London, 1995).

<sup>14</sup> JW Salmond, *Jurisprudence* (London: 1902) at 334.

<sup>15</sup> *In re Johnson’s Estate*, 7 NYS 2d 81 (1938); E Coke, *supra* note 10 at 203; W Blackstone, *Commentaries on the Laws of England, Book II*, 15th ed (London: 1809) at 429.

<sup>16</sup> *Doodeward v Spence*, (1908) 6 CLR 406 at 422.

<sup>17</sup> (1882) 20 Ch D 659 (CA).

<sup>18</sup> *R v Bristol Coroner*; ex p Kerr, [1974] QB 652 at 659.

<sup>19</sup> *Re Organ Retention*, *supra* note 6 at [128].

<sup>20</sup> *R v Bentham*, *supra* note 11 at [8].

<sup>21</sup> M Quigley, “Property in Human Biomaterials – Separating Persons and Things?” (2012) 32(4) *Oxford Journal of Legal Studies* 659 at 659-660.

<sup>22</sup> Herrying & Chau, “My Body, Your Body, Our Bodies” (2007) 15 *Med L Rev* 34 at 43.

<sup>23</sup> JE Penner, *The Idea of Property* (Oxford: 1997) at 111.

science proves capable of disconnecting an organ so that one remains essentially the same person, as is the case with a kidney, we can regard such an organ as a contingent material possession, and therefore one's property".<sup>24</sup> Hence, for a body part to be admitted into the realm of property, there has to be "the necessary normative distance" between a living individual and separated body part.<sup>25</sup> In fact, bringing the separability criterion to its logical end, dead bodies would be capable of attracting property rights given that death would necessarily create sufficient distance between the person and their body.<sup>26</sup> However, while the courts have embraced the separability notion in deciding cases involving body parts,<sup>27</sup> none has gone so far as to extend it to dead bodies.

While the theory has been criticised for not providing sufficient grounds in drawing a distinction between the whole body and its separated parts for proprietary purposes,<sup>28</sup> either because rights subsisting in a body part upon actual separation appear to be created *ex nihilo* and thus conceptually incoherent<sup>29</sup> or because the degree of personhood affectation that would deny subsistence of property rights is uncertain,<sup>30</sup> the separability criterion remains handy in line-drawing.

#### *B) Whether property interests can vest in the body or parts thereof*

Having ascertained the varying capacities of the body and its parts for attracting property rights, we now consider the conditions for creating property rights.

In the US, courts have allowed a form of 'quasi-property' to arise from possession of dead bodies in fulfilment of burial duties.<sup>31</sup> Hence, in *Whitehair v Highland Memory Gardens*, the legal fiction was employed to allow damages for the mishandling and loss of several bodies during the process of relocating a cemetery.<sup>32</sup> Courts have, however, started moving away from such an analysis because "a quasi-property theory does not protect a true ownership interest... it redresses emotional harm rather than physical injury".<sup>33</sup>

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<sup>24</sup> *Ibid*, at 122.

<sup>25</sup> Rohan Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (UK: Hart Publishing, 2007) at 128; JW Harris, *Property and Justice* (London: Oxford University Press, 2002) at 353.

<sup>26</sup> D Price, *Human Tissue in Transplantation and Research* (Cambridge University Press, 2010) at 241-242; Penner, *supra* note 23 at 122.

<sup>27</sup> *R v Bentham*.

<sup>28</sup> Quigley, *supra* note 21 at 659.

<sup>29</sup> *Ibid*, at 673-675.

<sup>30</sup> *Ibid*, at 675-679.

<sup>31</sup> *Whitehair v Highland Memory Gardens*, 372 SE 2d 438 (Wva SC 1985); *Carney v Knollwood Cemetery Association*, 514 NE 2d 430 (Ohio App 1986) at 434-35; *Scarpaci v Milwaukee County*, 292 NW 2d 816 (Wisc SC 1980).

<sup>32</sup> *Ibid*.

<sup>33</sup> *Culpepper v Pearl Street Building Inc*, 877 P 2d 877 (Colo SC 1994).

A more questionable exception to the “no-property principle” was formulated by the High Court of Australia in *Doodeward v Spence*,<sup>34</sup> where the preserved corpse of a two-headed stillborn baby was deemed property because the “lawful exercise of work or skill” by the defendant meant that the corpse acquired “some attributes differentiating it from a mere corpse awaiting burial”.<sup>35</sup> While the exception has been applied by English courts,<sup>36</sup> its application has been criticised for being too arbitrary,<sup>37</sup> and the uncertain legal foundations it stood on have been exposed for being illogical.<sup>38</sup>

The impotency of the “work or skill” exception led the Court of Appeal in *Yearworth* to embrace a broader basis for establishing property rights. The court first identified the plasticity of the ownership concept, noting that any “decision whether something is capable of being owned cannot be reached in a vacuum”.<sup>39</sup> In attempting to affix some certainty to this “convenient global descript[or]”, the court adopted Honore’s identification of eleven standard incidents of ownership and his suggestion that the “right to use at one’s discretion” is the “cardinal feature of ownership”.<sup>40</sup> Subsequently, the court held that while limitations imposed by the Human Fertilisation and Embryology Act 1990 did circumscribe the men’s rights to the use of their sperm to a limited extent, the men retained sufficient *negative* control over them for future use such that property rights subsisted i.e. their sperm could neither continue to be stored nor used for any purpose without their consent.<sup>41</sup> Such a rule would cohere well with Bridge’s observation that the classification of something as property does not need to be absolute, and that something may be “property” for some purposes and not for others.<sup>42</sup>

*Yearworth* can be seen in contradistinction to the holding in the *locus classicus* for property rights and human bodily parts, *Moore v Regent of University of California* (“*Moore*”),<sup>43</sup> where it was held, *inter alia*, that the Health and Safety Code had so eroded Moore’s right to resist disposal of excised body parts that any remaining bundle of rights did not suffice to form ownership interests.<sup>44</sup> The significant difference is that even though Moore had negative control over excised tissues similar to those of the men in *Yearworth*, i.e. Moore could “withhold consent to treatment by a physician whose research plans the patient does not approve”,<sup>45</sup> the court chose to situate any rights he may have within the doctrine of breach of fiduciary duty rather than characterising them as proprietary.<sup>46</sup> *Moore*’s position may, however, be tenuous

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<sup>34</sup> [1908] HCA 45, 6 CLR 406.

<sup>35</sup> *Ibid.*, at 414.

<sup>36</sup> *Dobson v North Tyneside Health Authority*, [1997] 1 WLR 596; *R v Kelly*, [1999] QB 621.

<sup>37</sup> Green & Randall, *supra* note 8 at 116.

<sup>38</sup> *Yearworth*, *supra* note 4 at [45], (d).

<sup>39</sup> *Ibid.*, at [28].

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*, at [45], (f).

<sup>42</sup> M Bridge, *Personal Property Law*, 3rd ed (Oxford: Oxford University Press, 2002) at 5.

<sup>43</sup> 793 P2d 479 (Cal 1990).

<sup>44</sup> *Ibid.*, at 15.

<sup>45</sup> *Ibid.*, at 18.

<sup>46</sup> *Ibid.*

given the later case of *Hecht v Superior Court for Los Angeles County*<sup>47</sup>, where the deceased was held to have sufficient decision-making authority over his sperm within the scope of the Probate Code for ownership interests to form.<sup>48</sup>

While this “broader basis” represents a marked improvement over the unwieldy exception established in *Doodeward* and adopted in *R v Kelly*, several questions remain.

First, *Yearworth* appears to conflate ownership and the right of possession, which are often not the same thing.<sup>49</sup> For example, “[t]he legal owner of any kind of property may... enter into a lawfully binding agreement by which he surrenders the right of possession and control to another for reward” and that the “[s]eparation of legal title and the right to possession and control may occur by operation of law against the will of the legal owner in other circumstances.”<sup>50</sup> Thus, where *Moore* “mistrusted the property approach because they wrongly perceive property as an all-or-nothing concept”, *Yearworth*, on the other hand, seems to have swung to the other extreme.

This leads on to the second point that there is a distinct lack of value engagement in the court’s finding of a property interest in bodily parts. The brevity of its judgment exposed a lack in meaningful engagement “with the very rich and important bioethical and legal scholarship” as well as its “fail[ure] to apply the eleven factors of Honore in a rigorous manner.”<sup>51</sup> In so doing, the court evaded any discussion on the contentiousness of commodifying the body, an issue which has proven to be one of the most steadfast ethical bulwark against recognising property rights in human bodies.<sup>52</sup> Furthermore, given that the Court of Appeal was “evidently keen to afford some recognition of the wrong done and the outcome harm that resulted”,<sup>53</sup> it “might have used the unfairness argument advanced by Broussard J in *Moore* as a platform to discuss deeper and broader issues of justice and equity in arriving at its conclusion.”<sup>54</sup>

Third, the judgment did not clearly articulate the scope of the property paradigm. Is the extension of property limited to gametes, which might be distinguished from non-reproductive bodily parts? Where does dignity, autonomy or other moral values fit into this proprietary trapping? Could they serve as “justificatory

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<sup>47</sup> 20 Rptr 2d 275 (Cal 1990).

<sup>48</sup> *Ibid.*, at 284.

<sup>49</sup> J Berg, “You Say Person, I Say Property: Does it Really Matter What we Call an Embryo?” (2004) 4 Am. J. Bioethics 17; J Berg, “Owning Persons: The Application of Property Theory to Embryos and Fetuses” (2005) 40 Wake Forest Law Rev 159.

<sup>50</sup> Kaan, *supra* note 5 at 488-489.

<sup>51</sup> Harmon & Laurie, “*Yearworth v North Bristol NHS Trust*: Property, Principles, Precedents and Paradigms” (2010) CLJ 69(3) 476 at 486.

<sup>52</sup> R Vard, “Proprietary Rights in Human Tissue” (2013) 12 Hibernian LJ 100 at 100.

<sup>53</sup> N Priaulx, “Managing Novel Reproductive Injuries in the Law of Tort: The Curious Case of Destroyed Sperm” (2010) 17 Eur J Health L 81 at 93.

<sup>54</sup> *Ibid.*

factors” for the right or “restraining factors” on its exercise i.e. “autonomy might be used to justify the existence of a property right and dignity might be used to restrict its exercise”?<sup>55</sup>

These questions await further judicial clarification.

### C) Rule interaction with Singapore Statutes

Having appraised the *Yearworth* principle, it would be instructive to determine its applicability in Singapore – an inquiry that calls for a concurrent examination of the various statutes dealing with bodies or parts thereof.

The Medical (Treatment, Education and Research) Act<sup>56</sup> (“MTERA”) deals with gifts after death and clearly represents a departure from the no-property principle.<sup>57</sup> It allows a person to make a lawfully binding gift of his own body or any part thereof to any specified statutory recipients<sup>58</sup> for any of the specified statutory purposes<sup>59</sup> during his lifetime.<sup>60</sup> Relatives may also donate the body of the deceased, subject to certain qualifications.<sup>61</sup> Once a statutory donee has removed any part required for an approved statutory purpose, the custody of the remainder of the body shall vest in the relative under obligation to dispose of it.<sup>62</sup>

Additionally, the Act was intentionally amended in 1972 to limit the right of revocation<sup>63</sup> to the donor, and not to his or her relative.<sup>64</sup> Hence, once the body has been gifted upon death, there is no longer any control vested in the relative over the body except for his or her subsequent burial obligations. In fact, based on the Comments accompanying the United States Uniform Anatomical Gift Act<sup>65</sup> (“UAGA”), which MTERA is based on since 1972,<sup>66</sup> “if the donee accepts the gift, absolute ownership vests in him... he may [even]... transfer his ownership to another person, whether the gift be of the whole body or merely a part.”<sup>67</sup>

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<sup>55</sup> Harmon & Laurie, *supra* note 51 at 487.

<sup>56</sup> (Cap 175, 2014 Rev Ed Sing).

<sup>57</sup> Jeffrey Chan, *Significant Bioethical Issues At The End Of Life* (2010) 22 SAclJ.

<sup>58</sup> Sections 7 and 12 of MTERA define who the statutory classes of donees are: “any approved hospital”, “any approved medical or dental school”, the “Director of Medical Services” in relation to unclaimed bodies, and “any specified individual”.

<sup>59</sup> The statutorily-permitted purposes for the first three classes of donees relate to the use of the body for “medical or dental education, research, advancement of medical or dental science, therapy or transplantation”. An individual in the last statutory class of donees may only use the gift “for therapy or transplant needed by him”.

<sup>60</sup> Section 3, MTERA.

<sup>61</sup> Section 4, MTERA.

<sup>62</sup> Section 11(2), MTERA.

<sup>63</sup> Section 9, MTERA.

<sup>64</sup> *Parliamentary Debates Singapore: Official Report*, vol 31 at col 1344 (2 June 1972) (“...the donor's wish takes primacy over all others. In the existing Act, any relative may forbid the removal or examination of the body and can thus veto the wishes of the deceased.”)

<sup>65</sup> UAGA?

<sup>66</sup> *Parliamentary Debates Singapore: Official Report*, vol 31 at col 1343 (2 June 1972) (“Rather than touch up our existing Act with amendments here and there, it was decided to repeal it and replace it with an entirely new Bill modeled on the United States Uniform Anatomical Gift Act.”)

<sup>67</sup> UAGA s 7 comments, 8 ULA 124-125.

The lack of any control over the deceased's body or parts thereof once consent has been given suggests that *Yearworth* would provide no assistance in establishing ownership interests. However, given the strong proprietary language in UAGA, it is submitted that property rights would nevertheless vest in the deceased's body or parts thereof for the statutorily approved purposes. Similarly, *Yearworth* would likely not apply to wrongs involving the presumed consent statutory framework for kidneys from the deceased<sup>68</sup> under the Human Organ Transplant Act<sup>69</sup> ("HOTA") because once the deceased had presumably consented to grant authorities the right to remove his or her kidney when no objection has been registered,<sup>70</sup> relative of the deceased would have absolutely no control over the organ. This prompted the observation that presumed consent statutes "effectively treat these organs as a communal form of property that escheats to the state upon the individual's death, for the benefit of the living."<sup>71</sup>

The proprietary status of detached body parts from living persons is less certain.<sup>72</sup> What is clear is that statutory law generally presumes against any kind of commercial dealings in human body parts, blood or tissues.<sup>73</sup> Thus, s 3 of the Private Hospitals and Medical Clinics Act<sup>74</sup> makes it unlawful for individuals to buy or sell, or offer to buy or sell, human blood. Similarly, s 14 of HOTA provides the same stipulations with regards to "organs and blood" whether before or after the death of the donor. However, the law does allow for the donation of specific organs for transplantation purposes.<sup>75</sup> Whether these limitations on the individual's control over his or her body or parts thereof will nevertheless constitute sufficient control for ownership interests to form remain to be seen.

#### *D) Utility of conversion*

On the whole, while there has yet been a successful conversion claim for wrongs done to human bodily parts, *Yearworth* signifies an important turning point despite the questions left in its wake. It has also been argued that in a situation similar to *Yearworth* but which involves a wrongful removal of the sperm from its storage instead of a failure to store them effectively, claimants should be able to recover in conversion given that they have likewise been denied the future use of their sperm.<sup>76</sup> The same reasoning should apply to dead bodies and it is certainly arguable that the lack of precedents in *Re Organ Retention*

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<sup>68</sup> Section 5, HOTA.

<sup>69</sup> (Cap 131A, 2012 Rev Ed Sing).

<sup>70</sup> Section 9, HOTA.

<sup>71</sup> Radhika Rao, "Property, Privacy, and the Human Body," (2000) 80 BUL Rev 359 at 381.

<sup>72</sup> Kaan, *supra* note 5 at 504.

<sup>73</sup> *Ibid*, at 503.

<sup>74</sup> (Cap 248, 1999 Rev Ed Sing).

<sup>75</sup> Part IV of HOTA to be read with s 16.

<sup>76</sup> Green & Randall at 117.

*Group Litigation* should not be fatal to the parents' claims for wrongful interference with the bodies of their deceased children.<sup>77</sup>

Additionally, it is important to observe the relationship between the finding of ownership interests and policy considerations: in *Moore*, the majority decided that the claimant's circumscribed rights were insufficient in forming ownership interests over his spleen and other body parts in part because they were persuaded by the argument that there would be potential negative repercussions for medical research in allowing for an action in conversion,<sup>78</sup> whereas in *Yearworth*, the court's observation that the law had to evolve and keep pace with modern developments in medical science convinced it to crystallise the men's negative control over their sperm into a property right.<sup>79</sup> On this note, Mosk J's dissenting judgment highlights several weaknesses of the policy consideration regarding impeding medical research: first, that the relevant exchange of scientific materials have hardly been ever "free and efficient"; and second, the requirement of records being burdensome is overstated because researchers generally keep accurate records of tissue sources for various reasons.<sup>80</sup> With regards to the argument that allowing an action in conversion would destroy economic incentive, the reverse may be equally true given that the recognition of property rights in bodily parts would incentivise people to provide bodily parts, within the bounds of what is legal, to researchers.<sup>81</sup>

Accordingly, it is submitted that the property rights analysis in relation to body parts could be used to give an individual title to sue for wrongs done in relation to those parts but it should not, where that use is proscribed by law, act as a defence to any use of the same by those from whom they came.

### 3. TORT OF NEGLIGENCE

Turning to the next tortious cause of action that is often attempted in cases involving possession of bodily parts,<sup>82</sup> this author submits that the law of negligence may not be particularly ideal for serving as the main vehicle of protecting an individual's proprietary or non-proprietary interests. As noted by Hardcastle, "[t]here may be instances where a negligence claim cannot be established because no duty of care exists, or, if it does, there has been no breach of that duty."<sup>83</sup> Additionally, the need for the patient to "prove a *causal*

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<sup>77</sup> *Moore*, *supra* note 6 at 20.

<sup>78</sup> *Yearworth*, *supra* note 4 at [45].

<sup>79</sup> *Moore*, *supra* note 6 at 24.

<sup>80</sup> *Ibid.*

<sup>81</sup> D Katsikis, "A Philosophical Justification of the Individual's Proprietary Right to sell her Body Parts" (2009) 15 UCL Jurisprudence Rev 72

<sup>82</sup> See Radhika Rao, *supra* note 71 at 386.

<sup>83</sup> Hardcastle, at 189.

connection between his or her injury and the physician's failure to inform"<sup>84</sup> in a breach of fiduciary duty situation provoked the remark that "[t]he remedy is largely illusory".<sup>85</sup> This is largely attributed to the objective requirement of proving that "in the same circumstances *no reasonably prudent person* would have given such consent".<sup>86</sup>

Regardless of the aforementioned difficulties, it is the necessity of proving a recognised injury where most plaintiffs find themselves at a legal *cul-de-sac*. The requirement is generally easily met where there is a "contemporaneous physical or pecuniary loss"<sup>87</sup>. However, in cases involving possession of dead bodies, the relatives of the deceased rarely suffer any physical or pecuniary harm, except where additional expenses are incurred in the reinterment of the deceased.<sup>88</sup> Likewise, in cases where detached body parts are involved, plaintiffs face additional complications when attempting to "elide the theoretical differences between a physical bodily injury and physical damage to bodily materials *after removal from the body*",<sup>89</sup> an argument which Lord Judge CJ dismissed for constructing "a legal fiction"<sup>90</sup> and which, if accepted, may produce absurd results when the men regained their fertility after their sperm was negligently destroyed or when the sperm was intentionally destroyed upon the expiry of the stipulated contractual time limit.<sup>91</sup> It is further submitted that such an extension is particularly undesirable when conversion is used as a parallel cause of action: accepting that the detachment of a bodily part creates sufficient normative distance for it to be deemed a 'thing' capable of being possessed only to later argue under negligence that the gap should be closed such that physical harm can be traced back to the living body would be legally incoherent.

These collective legal hurdles have therefore made it more attractive for plaintiffs to characterise losses caused by defendants' negligence as being physical damage done to *property*, an attempt which succeeded in *Yearworth*.

The consequent losses suffered by plaintiffs in such cases tend to fall under psychiatric harm. However, while the law does provide protection for the negligent infliction of a psychiatric illness,<sup>92</sup> courts are generally reluctant to allow recovery. This is evident in *Re Organ Retention Group Litigation* where most of the claims were dismissed: Harris's claim failed because psychiatric injury was held not to be

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<sup>84</sup> Martin & Lagod, "Biotechnology and the Commercial Use of Human Cells: Toward an Organic View of Life and Technology" (1989) 5 Santa Clara Computer & High Tech LJ 211 at 222.

<sup>85</sup> Moore, *supra* note 6.

<sup>86</sup> *Ibid.*

<sup>87</sup> RN Nwabueze, *Biotechnology and the Challenge of Property: Rethinking Property Rights in Dead Bodies, Body Parts, and Traditional Knowledge* (Canada: University of Toronto, 2004). See also *Tesa Tape Asia Pacific Pte Ltd v Wing Seng Logistics Pte Ltd* [2006] 3 SLR (R)116; [2006] SGHC 73.

<sup>88</sup> See *Sanford v Ware* 60 S.E. 10 (1950).

<sup>89</sup> Prialx, *supra* note 53 87.

<sup>90</sup> *Yearworth*, *supra* note 4 at [23].

<sup>91</sup> *Ibid.*

<sup>92</sup> *McLoughlin v O'Brian*, [1983] 1 AC 410 (HL) at 431; *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 (HL) at 401.

reasonably foreseeable,<sup>93</sup> and Carpenter’s claim failed because the knowledge of organ retention did not materially contribute to Carpenter’s psychiatric illness.<sup>94</sup> Only Shorter’s claim succeeded.<sup>95</sup>

#### 4. CONCLUSION

As seen from the above analysis, tort law at present remains limited in affording any protection to wrongs done to the body or parts thereof. Under the law of conversion, success under this cause of action depends heavily on whether property interests can vest in the body or parts thereof, something which would implicate the relevant statutory provisions that exert various forms of control over the particular body part involved. *Yearworth* demonstrates a shift away from the “peculiar, almost superstitious, disinclination to assign the living human body a legal status”<sup>96</sup> and signals a definite intention towards addressing the lacuna of the law. Another noticeable trend is that courts “have decreasingly shown deference to medical professionals and increasingly tried to provide remedies to aggrieved patients” and that there appears to be a “slow and selective dissolution of principles in favour of pragmatism.”<sup>97</sup> Nonetheless, it would require a greater concerted effort by various courts in the common law to build on the newly established legal foundation before the tort of conversion gains sufficient legal traction

As for the law of negligence, it faces even more significant challenges in mounting a successful action primarily because of the narrow remit of the notion of ‘personal injury’. The law at present has not extended the personal injury concept to novel harms such as the kind experienced by the men in *Yearworth*. Additionally, the proof of psychiatric illness as well as the nexus between breach of duty and loss remain a difficult task. Until the law recognises other protectable, non-proprietary interests involving wrongs done to bodily parts such as autonomy or freedom from emotional distress, the scope of protection offered by the tort of negligence would be heavily restricted.

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<sup>93</sup> *Ibid*, at [259].

<sup>94</sup> *Ibid*, at [278].

<sup>95</sup> *Ibid*, at [275].

<sup>96</sup> M Render, “The Law of the Body” (2012) 62 Emory LJ 549 at 553.

<sup>97</sup> Harmon & Laurie, *supra* note 51 at 488.