NORTON ROSE FULBRIGHT

Legal update

Human tissues as moveable property

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Life sciences and healthcare

The question of whether persons have ownership of their samples or body specimens has been a topic of legal debate for a considerable time. However, it now appears the law has developed incrementally to adjust to cultural and social changes and advances in science.

Already in 2004, Canada adopted the *Assisted Human Reproduction Act.* The federal act also regulated *inter alia*, the use that could be made of human fluids and samples such as sperm and ova. This federal law declared that, "*Trade of reproductive capabilities […] for commercial ends raises health and ethical concerns,*" and to that end prohibited payment for donating human gametes – without, however, prohibiting Canadians from importing gametes from commercial entities outside of Canada – and proscribed any purchase or offer to purchase gametes.

Re-assessment by provincial courts

Seemingly, this position would have put an end to "ownership" issues as traditionally understood with respect to body samples or biological specimens. Yet, Canadian provincial courts have recently asserted that medical sciences have evolved to the point where the common law requires a rethinking and re-analysis of the approach to the issue of ownership of products of the human body, and concluded that the foregoing can constitute a form of "property."

BC rulings

For instance, in *Lam v University of British Columbia,* the Court of Appeal had to determine whether patients can have ownership of the sperm they produced, such that they can conclude a facility agreement for its storage to enable later personal use. In that respect, the court held that, "*Medical science had advanced to the point where sperm could be considered to be property,*" such as for the purposes of the *Warehouse Receipt Act,* and accordingly that sperm was capable of being owned.

The fact the parties did not contemplate the application of this act when they signed the facility agreement, that the act was not – in the light of its historical context – intended to apply to storing human samples, and that a federal law dealt differently with such specimens and further, that not all incidents of ownership were present with these specimens, did not prevent the court from concluding as such. Instead, the court stressed that broad statutory categories can be held to include things unknown when a statute was passed. In the court's view, the plain meaning of "goods" included human sperm, and nothing in the act suggested the need to reframe that term's definition.

To reach this conclusion, the court construed the relevant statutory provisions according to a textual, contextual and purposive analysis. In doing so, the court distinguished the issue before it from the Supreme Court of Canada's 2002 ruling in *Harvard College*. The court emphasized that even if a statute may limit a person's ability to use his or her property, such limitation should not be interpreted as denying all rights of ownership, thereby upholding property as a bundle of rights.

Another example is found in *J.C.M. v A.N.A.* In that case, the claimant was seeking a declaration that the sperm straws stored at a clinic in BC were her sole property. This request was made pursuant to the *Supreme Court of Family Rules*, after the claimant and the respondent entered into a separation agreement that failed to divide the straws purchased from a third party.

After careful consideration of the authorities provided, the Supreme Court of British Columbia declared it was "*persuaded that on the facts of this case the sperm straws […] should be treated as property and divided between the claimant and respondent as such.*" The court's ruling was based on the fact that: (i) the sperm has been treated as property by everyone; (ii) the sperm has been purchased; and (iii) the moral objections to the commercialization of reproduction or the commoditization of the body were made after significant time has passed. According to the court, a person shall be able to own property even if not entitled to sell it.

Ontario decision

Finally, in *Piljak Estate v Abraham*, the defendants moved under Rule 32.01 of the *Rules of Civil Procedure of Ontario* (pertaining to the inspection of property) for the genetic testing of liver tissue taken from a patient since deceased. This application raised the question as to whether excised human tissue was personal property within the meaning of that rule.

Since no jurisprudence has been rendered on that point, the court relied on a *Canadian Medical Association Journal* article dealing with rights to access excised human tissue. For human tissue excised for diagnostic purposes and obtained in a procedure for patient care, the authors opined that such tissue shall be owned by the institution or hospital performing the intervention. In that respect, the authors stressed that while, "*It is unquestionably true that patients own their tissue before it is excised,*" diagnostic tissue once excised becomes pursuant to applicable laws a "component of the medical record."

Accordingly, as both possession and ownership are transferred to the hospital or institution, then the tissue could no longer be owned by the patient, who can have, at best, "reasonable access" to it. In view of the foregoing, and since human tissue it is clearly moveable, the court concluded that human tissue constituted a form of personal property to which inspection and testing under Rule 32.01 may apply.

Who can own body specimens and samples

In view of these recent decisions, it appears that samples and specimens constitute a type of "moveable property" capable of being owned. In this respect, the law espouses modern science. This avoids legal aberrations where, for instance: (i) someone stealing sperm in a lab could not be charged with theft, as theft is a crime against property; (ii) people could not validly donate their body fluids such as blood, or could claim them back afterward; or (iii) cancer patients could not cut and store their hair to later make a wig, as they would not "own" their hair. Thus, it appears the uncertainty with samples and tissues does not rely on whether they can be considered as "property" or capable of being "owned," or in which contexts human samples can be considered as moveable property, but rather on determining by whom they can be owned in different contexts.

For medical care, clinical trials or research, it will be interesting to see if Canadian courts adopt the same approach as American courts and hold that automatic transfers of ownership occur when samples or tissues are submitted in these contexts, thus assimilating sampling procedures to an irrevocable donation rather than any form of temporary disposition.

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