

## **Take My Spleen, But Not My Picture: *Moore v. Regents of University of California* and Suggestions for Remedies in Future Conversion Lawsuits**

### **Introduction**

Even before students come to law school and attend a single property class, there are some things we think we know about the subject. What is mine, is mine. Someone cannot rightfully take my book, or my pencil, because they belong to me. I have a right to them. And most certainly someone cannot take my finger, or my hand, or any other part of my body—and then profit from what they have taken—can they? I learned to keep a more careful eye on my physician after reading *Moore v. Regents of University of California*,<sup>1</sup> because the California Supreme Court decided doctors and researchers could do exactly that. In denying a man the right to compensation from the use of his own tissue in profitable medical research, even in light of the fact that informed consent was neither sought nor given, the court fails to recognize basic property rights that students understand before opening a single textbook or treatise. The court relies heavily on misconceptions about what was unique about the plaintiff’s cells in this case and on outdated, unjustified concerns about a possible lack of access to research materials. This paper will outline the problems in the *Moore* opinion and state why the court should have extended the tort of conversion in this very unique situation, and will then go on to suggest procedures and remedies for dealing with this type of problem in the future.

### **Spin the Wheel, and Hide the Scalpel: Property Law for Celebrities, and the Rest of Us**

The judiciary in the United States has made it abundantly clear that it will go out of its way to protect the property interests of celebrities. From robots that merely “remind”<sup>2</sup>

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<sup>1</sup> Packet 28 (Cal. 1990).

<sup>2</sup> *White v. Samsung Electronics America, Inc.*, Packet 22 (9th Cir. 1993) (Kozinski, J., dissenting)

advertisement viewers of a game show hostess<sup>3</sup> to portable toilets that bear the name of a catchphrase used to introduce a late-night talk show host,<sup>4</sup> judges across the country have broadly interpreted the “right of celebrity.”<sup>5</sup> Many of these cases arise in California, where the legislature has codified a cause of action arising from a violation of the right of publicity<sup>6</sup> to go along with the common-law right to publicity that already existed. California’s expansive definition of property rights in this context makes the *Moore* decision all the more perplexing. In the land of movie stars and television shows, you might think that property rights in your own body would be at least as well protected as your picture or your likeness. *Moore* shows that you would be wrong.

John Moore went to the UCLA Medical Center several times to undergo tests and treatment for hairy-cell leukemia. Each time he visited the center, the defendant physician took samples of “blood, blood serum, skin, bone marrow aspirate, and sperm,”<sup>7</sup> presumably for diagnosis and treatment of his disease. Unbeknownst to him, his physician and other defendants had “formed the intent and made arrangements to obtain portions of [his] spleen following its removal” so they could “benefit financially and competitively” from the use of his unique tissue in the production of lymphokines.<sup>8</sup> The defendants never “informed Moore of their plans to conduct this research or requested his permission.”<sup>9</sup> After learning what had transpired, Moore brought an action for conversion in California state court, claiming the defendants wrongfully converted his spleen cells to their own use. The Supreme Court of California declined to extend

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<sup>3</sup> *White v. Samsung Electronics America, Inc.*, Packet 17 (9th Cir. 1992).

<sup>4</sup> *Carson v. Here’s Johnny Portable Toilets*, Packet 12 (6th Cir. 1983).

<sup>5</sup> See also *Wendt v. Host International, Inc.*, Packet 16 (9th Cir. 1997) (holding that actors who portrayed characters on the television show “Cheers” could take the issues of the physical similarity of “animatronic robotic figures” placed in airport bars to them, and accordingly, of a violation of their right of publicity, to the jury).

<sup>6</sup> California Civil Code § 3344 (1997), as quoted in *Wendt*, at 16.

<sup>7</sup> *Moore* at 29.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

the tort of conversion in this context, holding that Moore did not have “ownership or right of possession” of his excised spleen cells as is required to recover under this tort.<sup>10</sup>

### **The Human Body as Personal Property**

Justice Mosk, dissenting from the majority decision, describes some of the hallmarks of the “bundle of rights” that has defined property law for ages: “the rights to possess the property, to use the property, to exclude others from the property, and to dispose of the property by sale or gift.”<sup>11</sup> There are numerous instances where the human body and its products are accorded these characteristics. We allow people to exclude others from themselves by refusing medical treatment. We allow people to dispose of all or portions of their bodies through donations, whether it is a pint of blood, a single organ, or their entire bodies after their death. We allow people to sell or donate the products of their bodies—blood, plasma, sperm, bone marrow, and spinal fluid, among others.<sup>12</sup> This is why Mosk correctly writes in his dissent that at “the time of [Moore’s spleen] excision, [Moore] at least had the right to do with his own tissue whatever the defendants did with it.”<sup>13</sup>

The majority denies Moore any recompense for the loss of this right. Their argument is that the defendant’s “goal...has been to manufacture lymphokines,” which are “the same in every person” and are not “unique to Moore.”<sup>14</sup> Obviously, there was something unique about Moore’s tissue, or the defendants would not have obtained his spleen tissue in such a clandestine manner and they would not have used this material to develop their successful cell line. The majority is correct in that everyone’s lymphokines are essentially the same. What the majority

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<sup>10</sup> *Id.* (emphasis removed).

<sup>11</sup> *Id.* at 32 (Mosk, J., dissenting).

<sup>12</sup> We even allow them to make tax deductions for certain incurred expenses surrounding these sales. *See, e.g. Green v. Commissioner of Internal Revenue*, Packet 27 (U.S. Tax Court 1980).

<sup>13</sup> *Moore* at 32 (Mosk, J., dissenting) (emphasis removed).

<sup>14</sup> *Id.* at 29.

overlooks is that Moore's spleen cells produced them in a unique manner. This is what made Moore's cells unique, and unique to him, and what made them incredibly valuable to the defendants. The goal was not simply to produce lymphokines—it was to produce them quickly and profitably, something the defendants could not have done without obtaining Moore's unique tissue. As the defendants appropriated Moore's cells for their unique characteristics in order to produce their cell line, the court should have extended the law of conversion in this case.

Justice Arabian's concurrence further describing why the court declined to extend conversion liability is often quoted, incredibly forceful, and ultimately incorrect. “[Moore] entreats us to regard the human vessel—the single most venerated and protected subject in any civilized society—as equal with the basest commercial commodity. He urges us to commingle the sacred with the profane. He asks much.”<sup>15</sup> If Moore “asks much” by asking for the right to control what is done with cells taken out of his own body, then the defendants are asking for much more by asking for the right to exclude the individual from whom they secretly took those cells from sharing in the profits resulting from its use. If Moore asks the court to “commingle the sacred with the profane,” then the defendants ask the court to steal and profit from that sacred and profane mixture. And the court grants them the right to do just that.

By holding that Moore has no property rights in his excised cells, the court does not only permit the defendants “to retain and exploit the full economic value or their ill-gotten gains,”<sup>16</sup> it practically gives them an *incentive* to use such deceitful tactics in the future. In these circumstances, a plaintiff's main remedies will lie in actions for the violation of a fiduciary duty and for lack of informed consent, where the monetary interest protected—and the possible related damages—will be negligible. The plaintiff might also be able to seek a medical

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<sup>15</sup> *Id.* at 30 (Arabian, J., concurring).

<sup>16</sup> *Id.* at 31 (Brousard, J., concurring and dissenting).

malpractice action against the physician in question, where the threat of losing a license to practice could actually deter this type of behavior. But with damages in medical malpractice actions being capped at lower and lower amounts by state legislatures around the country, and with the possible windfall from such research activities rising into the billions of dollars, how many physicians might still take a chance on engaging in this type of behavior? The possible rewards are very substantial,<sup>17</sup> and the risk, thanks to cases like *Moore*, is minimal.<sup>18</sup>

### **Remedies for Conversion Actions Involving Medical Research**

Even after deciding that excised spleen cells are not the property of the patient from whom they came, the *Moore* court considers whether to extend the tort of conversion to these situations in order to “[indirectly] enforce patients’ rights.”<sup>19</sup> The majority decides that protecting “a competent patient’s right to make autonomous medical decisions” in this manner would completely sacrifice the competing policy consideration involved in this case, protecting from potentially crippling civil liability “innocent parties who are engaged in socially useful activities, such as researchers who have no reason to believe that their use of a particular cell sample is, or may be, against a donor’s wishes.”<sup>20</sup> The basic concern is that since conversion is a “strict liability tort [that] would impose liability” even on innocent parties and “liability for conversion is predicated on a continuing ownership interest,”<sup>21</sup> this type of liability would crush medical research companies and would prevent anyone from investing in this type of research where massive liability could arise at any time.

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<sup>17</sup> One can only imagine the myriad of future possible scenarios where this issue might come up—for example, what if future advancements allow researchers to use excised tissue from athletes to perform gene therapy on patients at a substantial profit?

<sup>18</sup> The risk is made even more minimal given the unique circumstances giving rise to cases like *Moore*. Physicians and researchers can freely engage in this kind of behavior, and only need to be worried in the rare instance that the plaintiff discovers the illicit activity *and* the research line is financially successful. If the prospective defendants have not made money off of their deceit, there is nothing for the plaintiff to gain through a lawsuit.

<sup>19</sup> *Moore* at 30.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

A cynic might inquire as to how often the court really thinks this type of liability would become an issue. Are doctors stealing patients' tissues with enough frequency to require an exception? For this type of argument to be viable, there would have to be a lot of potential liability floating around that the court wanted to prevent from arising and compromising researchers' ability to provide new medicines and treatments. If physicians and researchers actually *need* this type of protection from conversion liability, then our system is failing already as these thefts are occurring commonly enough that this liability would hinder or destroy their ability to function. One can only hope that we do not already live in such a world.

The court also seems to believe that such an extension of conversion liability would open the floodgates, drowning doctors, researchers, and the very progress of human medicine in a papered sea of lawsuits. This need not be the case. Such an extension can be incremental, and can contain exceptions commonly seen in other strict liability causes of action that will adequately protect innocent parties while granting plaintiffs some measure of relief so that they can be made whole.

The best examples of these exceptions come from property and environmental law, where bona fide and innocent purchasers are protected from strict liability where they have made diligent efforts to determine who had title to purchased land and whether there was environmental damage or contamination that needed to be addressed or cleaned up prior to the transaction. Similar exceptions could apply to this extension of the conversion tort. No one wants to punish later innocent parties who truly believed that the research materials they used were obtained through honest means. Parties who can prove that they took proper steps to ensure that they had obtained legally-acquired materials could be shielded entirely from liability, or could have their liability capped at some small amount. Some might question whether proper

records exist to enable researchers to prove good faith in purchasing research materials, as title searches and due diligence records can protect bona fide and innocent purchasers in property and environmental law, but there is little doubt that record keeping concerning medical research and its raw materials is quite extensive. Massive databases cataloguing tissue and cell line specifications, uses and histories are already kept, often so that these materials can easily and readily be “copied and distributed to other researchers for experimental purposes.” Even if these records are not already sufficient to prove good faith intent in purchasing and diligence in determining who owned the research materials, requiring an extra entry or two in database entries for newly obtained materials will not cripple the research industry.<sup>22</sup>

Justice Mosk in his dissent provides a good starting point for trying to come up with a method for determining the damages that should be awarded a victorious plaintiff in these types of cases when he describes the rights Moore *should* have had regarding his excised cells: “he could have contracted with researchers and pharmaceutical companies to develop and exploit the vast commercial potential of his tissue and its products.”<sup>23</sup> The plaintiff should be given an opportunity to show, if he had the opportunity, how much he could have obtained on the open market for his cells. Two problems immediately come to mind. First, many of these plaintiffs would have simply waived their right to any profits from their cells had they simply been asked—why give them the possibility of obtaining a damage award at all? The point is precisely to make sure they are asked, and to protect the patient’s rights. If someone knows that his cells are valuable, he has the right to know about their worth and to profit from them. He has this right at least as much, and probably more, than anyone else. Second, can any plaintiff ever hope

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<sup>22</sup> Courts can also easily make these exceptions and this new liability only apply prospectively, to research materials acquired after some starting date, as in some cases it may be difficult or impossible to determine from where an initial tissue sample originated.

<sup>23</sup> *Moore* at 32 (Mosk, J., dissenting).

to prove these amounts with any certainty? Both sides will undoubtedly bring forth armies of competing experts to show how much the plaintiff could have obtained for the sale and use of his cells.<sup>24</sup> The plaintiff will argue for a tremendously high amount, the defendant an incredibly small one, and it will be up to the jury to decide the correct compensation in a complex case. It is true that this fact determination will be quite a hard one to make, but we ask judges and juries to make these types of decisions in every court every single day. The difficulty of coming up with a perfect answer should never allow an injustice to be done.

## **Conclusion**

The California Supreme Court should have extended the tort of conversion in *Moore* to cover situations where physicians and researchers do not obtain consent from a patient before extracting and using that patient's cells in profitable research activities. In their decision, the court fails to recognize basic property rights that have been well established regarding the human body and its products, and the court relies too heavily on prudential concerns about lack of access to research materials. Courts and juries can use established exceptions to liability and methods of determining damages to make plaintiffs in such cases whole without jeopardizing the rapidity of medical innovation and progress or the health and economic vitality of the pharmaceutical and medical research industries.

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<sup>24</sup> I do not address in this paper the dizzying number of variables that can enter this calculation—flat payments versus percentage agreements, risk factors and multipliers, divergent cell lines that bear little resemblance to the original—but judges and jurors are more than capable of sorting through any formulas that an expert can devise.