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THE CURIOUS CASE OF DOODEWARD V SPENCE (1908)

Reference: [1908] 6 CLR 40
Coram: Griffith CJ, Barton J, Higgins J

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One reason why the case of Doodeward v Spence[1] has been so influential in Australian law is that there have been no cases in the High Court of Australia on these issues since Doodeward was decided. There have been a number of cases in State courts that have raised similar issues. However, under the principles of legal precedent in Australia, State courts are bound by decisions of the High Court and there has been no opportunity for the High Court to re-examine the fundamental principles of law stated in Doodeward. Until Parliament intervenes, State judges are bound by the 'no property' principle that was established in Doodeward and they must adapt it so that it can be applied fairly in modern situations that could not have been envisaged when Doodeward was decided. The High Court held that a person from whom bodily material has been removed ('the originator') does not have proprietary rights in that material after it has been removed — a principle commonly stated in the terms ' there is no property in bodily material' or 'you don't own your own body'. However, another person may gain a proprietary right in an originator's removed bodily material by undertaking 'work or skill' on it; or changing it so that it has 'different attributes'.

The appellant brought an action for conversion and detinue for the recovery of the preserved body of what was called in the case 'a two headed baby' (a malformed foetus), delivered still-born to a New Zealand woman 40 years earlier. The mother 's medical attendant had taken away the foetus, 'preserved it with spirits in a bottle, and kept it in his surgery as a curiosity, that at his death … was sold by auction with his other personal effects'. The appellant's father purchased the bottle and contents at the auction for about £ 36 and exhibited them for gain. The respondent, a Sub- Inspector of Police, seized them under warrant. He later returned the bottle and the spirits but retained the foetus for the University museum.

The case of R v Fox[2] related to corpses awaiting burial and established that human bodies after death do not vest in anyone, though certain persons have a duty to bury the body and may bring an action for mandamus to have the body delivered to them for that purpose. However, a body could not be the subject of larceny if it was wrongfully taken, as no one 'owned' it.

Judgements

Griffiths CJ said that there were two main issues in the case. First, is an unburied human corpse (or removed human bodily material, in a wider context) property? And secondly, can a person gain property rights in relation to such a corpse or material, so that [he or she] can sue for its recovery if it is unlawfully removed?

Regarding the 'no property' argument, Griffiths J did not accept that a thing that could not be subject to larceny could therefore not be the subject of detinue if it

[1] Doodeward v Spence (1908) 6 CLR 406

[2] R v Fox (1841) 2 QB 246.

were taken. For example, 'the dead body of an animal is not at death the property of any one, but it may be appropriated by the finder'. Adopting this approach, he focused on the appellant's right to possession of the preserved foetus. There was no reason for the possession to be unlawful, either in *re ipsá* or on the grounds of 'religion or public health or public decency'. And if the appellant was in lawful possession of the foetus, 'the law will by appropriate remedies redress any … disturbance [with that lawful possession]'. Griffiths CJ's statement regarding the circumstances in which a person has a legal right to retain possession of bodily material has been widely quoted in cases up to the present day:

"When a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial, but subject, of course, to any positive law which forbids its retention under the particular circumstances."

Barton J focused on whether there was a duty to bury the foetus so that retaining it without burial would be a misdemeanour; and thus, make the doctor's initial possession or retention of the foetus unlawful. He concluded that there was no duty to provide a Christian burial for 'a dead-born foetal monster' that 'was never alive in the ordinary sense of human life … has never drawn the breath of life' and has been 'preserved in spirits as a curiosity during four decades'. This was a 'well-preserved specimen of nature's freaks' and it 'could not fall within 'the meaning conveyed by the term "unburied corpse"', to which the cases and textbooks have referred in stating that there is a duty to bury a human corpse.

Higgins J did consider the 'work or skill' argument and appeared to accept it. He gave the example of a mummy that may be property because 'the mummy has been turned into something very different by the skill of the embalmer'. However, he said that, in the present case, 'No skill or labour has been exercised on [the foetus]; and there has been no change in its character'. He was satisfied that the foetus was not property but he said that 'if this corpse can be the property of any one, it is the property of the plaintiff as against the defendant. It is enough that the plaintiff was in possession of the corpse, and that the defendant took it having no better title to it than the plaintiff'.

Since Doodeward was decided, the general principle that bodily material cannot be property has been rejected in many cases in different areas of the law, For example, in 1974, an English court held that urine was property so that taking it without authority was theft[3]; in 1976, a similar ruling was made regarding blood[4];in 1992, an Australian court held that blood products are goods covered by consumer protection legislation[5]; in 1998, a court held that an artist who removed body parts from the Royal College of Surgeons to draw them had stolen them[6]; and in 2000, a Master of the Supreme Court of Western

[3] R v Welsh [1974] RTR 478.
[4] R v Rothery [1976] RTR 550.
[5] PQ v Australian Red Cross Society [1992] 1 VR 19.
[6] R v Kelly; R v Lindsay [1998] EWCA Crim 1578; [1999] QB 621.

Australia held that stored tissue was property, and granted access for forensic tests[7].

Doubt has been cast upon another principle stated in Doodeward — the requirement that a person must be lawfully in possession to obtain a proprietary right by undertaking 'work or skill'. In Moore v Regents of the University of California[8], the court held that a researcher who developed a new cell line without consent from the originator whose cells were used in the research (so arguably acting unlawfully) was still entitled to the profits, and the originator had no right to share in the profits. The issue of the 'lawfulness' of the researcher's initial possession of the cells did not affect the decision, no doubt influenced by the public interest in protecting the vitally important developing biotechnology industry.

Therefore, some aspects of the Doodeward judgments have been largely rejected in the years since the case was decided, for example, that human bodily material cannot become property unless 'work or skill' has been undertaken on it; or it has acquired 'different attributes'. However, the so-called 'Doodeward exception' to the 'no property' rule, whereby undertaking 'work or skill' or conferring 'different attributes', on bodily material, may give rise to proprietary rights in favour of the person who did those things, has continued to be influential,

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[7] Roche v Douglas [2000] WASC 146.

[8] Moore v Regents of the University of California, 51 Cal 3d 120, 271 Cal Rptr 146