'Orphaned' Transplantable Organs: Law, Ethics, and Ownership

Remigius N Nwabueze*

The legal status of an organ, in the period between its extraction from the body of a donor and its implantation in the body of a recipient, is unclear. In that period, the excised organ might be said to be orphaned because of its ambiguous custodial and proprietary status, and a host of activities might take place which could jeopardise its safety or viability for transplantation. For instance, what happens if the organ was lost or damaged in transit? Not inconceivably, a thief might snatch the organ from the possession of the transplant team; a transplant surgeon could use the organ for the treatment of their relative or close friend, a celebrity, or an influential political figure, instead of transplanting the organ into the properly selected and designated recipient contrary to the established allocation criteria. The excised organ might be damaged maliciously by a third party, say, an enemy of the proposed recipient who was bent on frustrating the recipient's only means of receiving a life-saving treatment. Further, a live donor might change their mind on donation to the potential recipient after the organ has already been extracted.

While these scenarios raise an interesting mix of legal, ethical, political and social questions, a fundamental enquiry that permeates the whole gamut of issues engendered by the hypothetical above is the question of ownership and proprietary entitlement to an excised (orphaned) organ. Accordingly, this article interrogates the question of proprietary control or ownership of an orphaned organ.

---

* Dr Remigius N Nwabueze, Associate Professor of Law, School of Law, University of Southampton, UK. Visiting Professor of Law, Faculty of Law, Thompson Rivers University, Kamloops, BC, Canada. Many thanks to my former students at TRU, Curtis Simmonds and Kendall Cholak, JD Candidates at the Faculty of Law, Thompson Rivers University, for their excellent research assistance.

I. Introduction

The legal status of an organ,[1] in the period between its extraction from the body of a donor and its implantation in the body of a recipient, is unclear.[2] In that period, the excised organ might be said to be *orphaned* because of its ambiguous custodial and proprietary status. Recently, Kowal deployed a similar conceptualisation to capture the ethical ambiguity shrouding the problematic use of indigenous Australian DNA samples collected many decades ago for medical and scientific research, which are now stored away in institutional freezers around Australia.[3] She

1. An organ is defined as a "differentiated and vital part of the human body, formed by different issues, that maintains its structure, vascularisation and capacity to develop physiological functions with an important level of autonomy." Human Tissue Authority, *Code of Practice 2*: *Donation of Solid Organs for Transplantation* (UK: Department of Health, 2013) at Glossary, online: Human Tissue Authority <http://www.hta.gov.uk/legislationpoliciesandcodesofpractice/codesofpractice.cfm> [*HTA, Code of Practice 2*].
2. Similarly, the Nuffield Council on Bioethics observed that there is "uncertainty around the legal status of materials that are donated for transplantation: for example, the status of an organ that is being treated prior to transplantation." Nuffield Council on Bioethics, *Human Bodies: Donation for Medicine and Research* (London: Nuffield Council on Bioethics, 2011) at para 7.21, online: Nuffield Council on Bioethics <http://www.nuffieldbioethics.org/project/donation>.
3. Emma Kowal, "Orphan DNA: Indigenous Samples, Ethical Biovalue and Postcolonial Science" (2013) 43:4 Social Studies of Science 577.

considers such DNA samples to be *orphaned* because of their separation from the underlying affective networks, in that both the sources and the scientific collectors or guardians of the samples are no longer traceable.[4] However, analytical commentaries on the question of orphaned organs are generally few and far between. Yet, in the context of donation and transplantation of organs, the resolution of a significant range of legal liability issues depends on the appropriate legal characterisation of an *orphaned* organ.

In that penumbral period within which an organ is orphaned, a host of activities might take place which could jeopardise the safety or viability of the organ for transplantation. Pertinently, the Nuffield Council on Bioethics has drawn attention to the increasingly complex transactions and multiple intermediaries involved in the process of organ donation and transplantation,[5] which not only highlights the central role played in the process by organisations and organisational structures, but also points to "the added complexities in the form of … liabilities and obligations that may arise where donated material is transformed, banked or otherwise handled as a commodity by successive intermediaries."[6] For instance, the prevailing organ allocation criteria and donor-recipient matching result in a particular case might warrant the transportation of an excised organ across local, regional, state or national boundaries. But what happens if the organ was lost or damaged in transit? Not inconceivably, a thief might snatch the organ from the possession of the transplant team; a transplant surgeon could use the organ for the treatment of their relative

4. *Ibid* at 589.
5. Similar complexities and transactional variability are also evident in the biobanking arena and use of excised body parts for research. See Bronwyn Parry, "Entangled Exchange: Reconceptualising the Characterisation and Practice of Bodily Commodification" (2008) 39:3 Geoforum 1133. See also Nils Hoppe, *Bioequity – Property and the Human Body* (Farnham: Ashgate Publishing, 2009) at 25-26.
6. Nuffield Council on Bioethics, *supra* note 2 at para 1.31.

or close friend,[7] a celebrity,[8] or an influential political figure,[9] instead of transplanting the organ into the properly selected and designated recipient contrary to the established allocation criteria. It might also be the case that the excised organ was maliciously damaged by a third party,[10] say, an enemy of the proposed recipient who was bent on frustrating the recipient's only means of receiving a life-saving treatment. Further, and quite imaginatively, a live donor might change their mind on donation to the potential recipient after the organ has already been extracted.[11]

While these scenarios raise an interesting mix of legal, ethical, political and social questions, which are often quite difficult to segregate,[12]

---

7. While Norrie suggested that such a surgeon could be held liable '"for abuse of his position," he did not specify the cause of action or the basis for such a legal liability. Kenneth M Norrie, "Human Tissue Transplants: Legal Liability in Different Jurisdictions" (1985) 34:3 ICLQ 442 at 467.
8. Consider the controversy surrounding the liver transplant received by the legendary American baseball star, Mickey Mantle, who stayed on the waiting list for only two days. Peter Gorner & Peter Baniak, "Mantle's New Liver: A Question of Ethics: Experts Find No Favoritism After Speedy Transplant", *Chicago Tribune* (9 June 1995) 3N.
9. Also, consider the controversy surrounding the heart-liver transplant to Governor Casey of Pennsylvania in 1993 – he received his transplant after waiting for only twenty-four hours on the list. Claudia Coates, "Casey's Quick Transplant Renews Ethics Debate: Medicine: Pennsylvania governor got heart and liver within 24 hours of getting on list, under guidelines giving priority to those who need multiple organs", *Los Angeles Times* (25 July 1993). See generally Phyllis Coleman, "'Brother, Can You Spare A Liver?' Five Ways To Increase Organ Donation" (1996) 31:1 Val U L Rev 1.
10. This compares to the US case of *US v Arora*, 806 F Supp 1091 (Md Dist Ct 1994), where a scientist employed by the US government destroyed human cells cultured by his colleague as an acute expression of the animosity existing between the two. The US government succeeded in a conversion action against the wrongdoer.
11. This might be well taken care of by an excellent informed consent procedure, in which the donor is informed, and agrees, that they can no longer change their mind after a particular point had been reached in the procedure; this point might be defined differently by others and could be fixed, for instance, at the point of extraction from the donor, at the commencement of the recipient's surgical procedure, or after implantation in the recipient.
12. Childress observed that "[o]rgan allocation policy involves a mixture of ethical, scientific, medical, legal, and political factors, among others."

a fundamental enquiry that permeates the whole gamut of issues engendered by the hypothetical above is the question of ownership and proprietary entitlement to an excised (orphaned) organ. Put differently, who owns or should exercise proprietary control over an orphaned organ? Interestingly, Nelson observed that the "question of how viable human organs ought to be categorized remains tricky," mainly because "organs aren't fully property, as they cannot be sold. Nor are they fully public goods, as society may not use them at will."[13] Similarly, Childress observed that it "took me some time to discern that our debates about 'equitable access' and 'equitable allocation' were, in part, debates about who 'owns' donated organs."[14] In the same vein, Cronin and Price, after suggesting that the debate on directed and conditional organ donation could be resolved on the basis of donor ownership or control, observed that the question of ownership was "no longer an issue that can be skirted around."[15] However, the paucity of judicial and academic commentaries on that question belies the increasing recognition of its criticality in potentially resolving the conundrum highlighted in the hypothetical above.

It might be, as Cronin and Douglas have suggested, that the "complexities of transplantation appear to have discouraged litigation. Few, if any, judicial rulings or comments exist," meaning that the "law of organ donation is rather unsatisfactory."[16] As if in anticipation of this problem, Lord Justice Rose observed, in *R v Kelly*,[17] that an excised organ that has a use or significance beyond its mere existence, such as where it is "intended for use in an organ transplant operation," might be regarded

---

James F Childress, "Putting Patients First in Organ Allocation: An Ethical Analysis of the U.S. Debate" (2001) 10:4 Cambridge Quarterly of Healthcare Ethics 365 at 365.

13. James L Nelson, "Trusts and Transplants" (2005) 5:4 American Journal of Bioethics 26 at 27.
14. Childress, *supra* note 12 at 366.
15. Antonia J Cronin & David Price, "Directed Organ Donation: Is the Donor the Owner?" (2008) 3:3 Clinical Ethics 127 at 130.
16. Antonia J Cronin & James F Douglas, "Non-Standard Kidneys For Transplants: Clinical Margins, Medical Morality, and the Law" (2013) 21:3 Med L Rev 448 at 458.
17. [1999] QB 621 (CA).

as property.[18] Unfortunately, the facts in *R v Kelly* did not require Rose LJ to resolve the question of title to an excised organ, as it was sufficient for that case to hold that the scientifically preserved anatomical specimens belonged to the Royal College of Surgeons, through the work or skill exception,[19] and, therefore, those specimens were capable of being stolen under the *Theft Act*.

Accordingly, this article interrogates the question of proprietary control or ownership of an orphaned organ: does it belong to the donor, the donee, the state or community, or the potential recipient? Also, what are the justifications for the proprietary control exercised by the owner of an orphaned organ? In that sense, the concern here is not about devising an effective framework for increasing the supply of transplantable organs,[20] nor is it generally about negligent liability arising from the transfer of defective organs or performance of a transplantation procedure.[21] It should also be stated that the focus is on the law of England and Wales, though relevant comparisons have been made to comparable jurisdictions.

II. Donor's Proprietary Entitlement

Is an orphaned organ the property of the donor? If it is, the donor should retain certain rights over the organ and, in addition, be subject to certain liabilities in relation to the organ. The following analysis requires a distinction between living and cadaveric donors since different considerations apply to each category.

---

18. *Ibid* at 631.
19. The origin of the exception is the Australian High Court case of *Doodeward v Spence*, (1908), 6 CLR 406 (HCA) [*Doodeward*] (establishing ownership of a cadaver or a part of cadaver through transformative work on it).
20. However, for a regulated market framework for increasing organ supply, see James S Taylor, *Stakes and Kidneys: Why Markets in Human Body Parts are Morally Imperative* (Farnham: Ashgate Publishing, 2005); for retaining the current altruistic approach, see Debra Satz, *Why Some Things Should Not Be For Sale: The Moral Limits of Markets* (New York: Oxford University Press, 2010); for a hybrid of altruism and limited market, see Michele Godwin, *Black Markets: The Supply and Demand of Body Parts* (New York: Cambridge University Press, 2006).
21. Norrie provides a good analysis of that aspect. See Norrie, *supra* note 7.

A. Cadaveric Donor's Entitlement

Analysis of the cadaveric donor's proprietary entitlement should begin with the *Human Tissue Act 2004*[22] which regulates cadaveric organ donation in England, Wales and Northern Ireland; the Act established the Human Tissue Authority as the regulatory body. In Scotland, however, cadaveric donation is regulated by the *Human Tissue (Scotland) Act 2006*,[23] and the Human Tissue Authority established under the 2004 Act helps to administer the 2006 Act.[24] Both statutes contain fairly similar provisions, with the difference that while the 2004 Act uses the language of *consent* as its overall and fundamental regulatory principle, the 2006 Act uses the language of *authorisation* for cadaveric donation. The focus here is on the 2004 Act.

The 2004 Act is a product of scandal relating to the unauthorised removal, use and storage of cadaveric paediatric tissues and body parts in England,[25] prompting Mason and Laurie to say that it was "born under the wrong star."[26] A brief overview of the scandal is necessary, not only to unpack the moral, ethical and legal underpinnings of the 2004 Act, but also to illuminate the proprietary analysis undergirded by the 2004 Act. It all started with a public inquiry, chaired by Sir Ian Kennedy, into children's heart surgery at the Bristol Royal Infirmary.[27] In the course of that inquiry, Professor RH Anderson, a professor of Morphology at the Hospital for Sick Children, London (Great Ormond St Hospital),

22. (UK), c 30 [2004 Act].
23. (UK), Asp 4.
24. See JK Mason & GT Laurie, *Mason & McCall Smith's Law & Medical Ethics*, 9th ed (Oxford: Oxford University Press, 2013) at 581.
25. For a discussion of the scandal and the litigation that followed it (*AB v Leeds Hospital NHS*, [2004] EWHC 644 (QB)), see Remigius N Nwabueze, "Interference with Dead Bodies and Body Parts: A Separate Cause of Action in Tort?" (2007) 15 Tort Law Review 63.
26. Mason & Laurie, *supra* note 24 at 581.
27. Bristol Royal Infirmary Inquiry, *The Report of the Public Inquiry into Children's Heart Surgery at the Bristol Royal Infirmary 1984-1995*: Learning from Bristol (London: Stationery Office, 2001); see also the Interim Report published by the inquiry: Bristol Royal Infirmary Inquiry, *Interim Report - Removal and Retention of Human Material* (London: Stationery Office, 2000).

testified and commented on the benefits of heart collections for research and study. He particularly commended the excellent collection of hearts at the Royal Liverpool Children's NHS Trust in Alder Hey hospital; this triggered another inquiry into the removal, use and storage of cadaveric organs at Alder Hey, chaired by Michael Redfern, QC.[28] The Redfern inquiry heard evidence relating to the emotional distress suffered by the parents of the deceased children when they learned that some parts of their children's bodies were removed, used or retained without their consent. For instance, one of the parents testified that "[i]t feels like body snatching. The hospital stole something from me. They have taken us back 11 years in our healing process."[29] Other parents expressed similar anguish: "[t]hey gave me skin and bone back"; "Alder Hey stole 90% of my child"; "I feel devastated. I am wondering how much of her body was left"; and "I have learnt to live with my daughter's death and now I have found out that they removed her heart. It is like losing her all over again."[30] However, other parents were not as much opposed to the removal and use of their deceased children's tissues as they were opposed to the failure of the hospital authorities to study those tissues. For instance, a parent lamented: "[s]tudying her brain would help explain why her brain did not form properly and it might help treat the next child born with a similar condition. Unfortunately her brain has not been studied. Instead it sits in a jar in a storeroom somewhere."[31] In short, the Redfern Report catalogued a series of deception on the part of the medical authorities, in part engendered by the lack of transparency and insufficient disclosure procedures adopted for post-mortem examinations carried out on the deceased children.[32] As a result, there was significant public distrust of the medical system and healthcare professionals.[33]

Importantly, the Redfern inquiry observed that the practice of

---

28. The House of Commons, *The Royal Liverpool Children's Inquiry* (London: Stationery Office, 2001).
29. *Ibid* at 19.
30. *Ibid*.
31. *Ibid.*
32. *Ibid* at 22-23.
33. Margaret Brazier, "Retained Organs: Ethics and Humanity" (2002) 22:4 LS 550 at 556.

unauthorised removal, use or retention of cadaveric tissues was facilitated by the ambiguous provisions of the *Human Tissue Act 1961*.[34] The 1961 Act, which was then the relevant legislation, enabled a hospital in lawful possession of a dead body to remove its tissues or organs for research or transplantation, even when it was not known to the hospital that the deceased or their family objected to the removal, use or storage of the body part. Thus, under the 1961 Act, it was not clear whether the hospital should be proactive and seek or obtain the consent of the deceased's families, where the deceased did not express wishes in that regard prior to their deaths, or whether it was the burden of the deceased's families to make conscious efforts to register their objection to cadaveric donation. Among other things, therefore, the Redfern inquiry recommended the repeal of the *Human Tissue Act 1961*, and the promulgation of new legislation that would make explicit consent the cornerstone requirement for the removal, use and storage of cadaveric tissues and body parts. The government accepted this recommendation, and accordingly the 2004 Act was enacted. It contains seven scheduled purposes, including organ donation and transplantation, which can only be performed with the prior consent of a specified person.[35] Thus, consent is the conceptual framework upon which the superstructure of the 2004 Act rests.

Under the 2004 Act, an organ might be retrieved from the body of a deceased person in two situations.[36] First, where the deceased consented to donation during his or her lifetime, the organ could be lawfully removed by the transplant team without reference to the deceased's family.[37] In practice, however, organ retrieval authorities endeavour to inform the family of the deceased about the donation, and are unlikely to

---

34. (UK), c 54.
35. 2004 Act, *supra* note 22, s 1.
36. Note that the *Human Tissue Act 2004* does not govern coronial activities. In circumstances where coronial jurisdiction is triggered, such as the sudden and unexplained death of a person, the Coroner is entitled to the lawful possession or custody of the deceased for the purposes of coronial inquiry, and might therefore order the anatomical examination of the deceased and authorise the removal of any organ of the deceased that bears on the cause of death. See generally John Jervis et al, *Jervis on the Office and Duties of Coroners,* 12th ed (London: Sweet & Maxwell, 2002).
37. HTA, *Code of Practice 2*, *supra* note 1 at para 95.

proceed with the donation against the family's objection.[38] Second, where the deceased's prior wishes about donation are not known, their family might be contacted with a view to ascertaining what the deceased's wishes were, or might have been,[39] and if positive, the family would be asked to consent to donation.[40] Thus, going by the history and express provisions of the 2004 Act, it is clear that a deceased donor is empowered to exercise significant control and decisional authority over the use of their organs.[41] Control power of this sort over one's organs qualifies as a proprietary interest. Interestingly, this sort of psychological aspect of property has been highlighted by the Nuffield Council on Bioethics, by observing that the concept of ownership can be "used with a broader moral resonance," in the sense that "when people talk about 'owning' their bodies or body parts, even if they use the language of property, their primary concern is with *control* over those materials."[42]

A control-based property right, that is, "a person's position as the primary arbiter over what is to be done with a thing,"[43] acutely expresses the title holder's personhood and promotes their autonomy.[44] The ability to isolate and particularise the control elements of property, as analysed

---

38. *Ibid* at para 99. See also Sonya Norris, *Organ Donation and Transplantation in Canada* (Ottawa: Library of Parliament, 2009) at 14, online: Parliament of Canada <http://www.parl.gc.ca/Content/LOP/researchpublications/prb0824-e.htm>.
39. For a detailed discussion of the family's fallibility in predicting the deceased's wishes regarding donation, as well as the role of families in cadaveric organ donation, see TM Wilkinson, *Ethics and the Acquisition of Organs* (Oxford: Oxford University Press, 2011) at 64-79.
40. HTA, *Code of Practice 2*, *supra* note 1 at paras 98, 100.
41. But this power could be significantly undermined by the family's (practical) power of veto, which, as Wilkinson observed, might conflict with the deceased's posthumous personal sovereignty. See Wilkinson, *supra* note 39 at 76-79.
42. Nuffield Council on Bioethics, *supra* note 2 at para 5.18 [emphasis in the original].
43. John Christman, "Distributive Justice and the Complex Structure of Ownership" (1994) 23:3 Philosophy & Public Affairs 225 at 231 [Christman, "Distributive Justice"].
44. Margaret J Radin, "Property and Personhood" (1982) 34 Stan L Rev 957. For an interesting criticism of Radin, see Neil Duxbury, "Do Markets Degrade?" (1996) 59:3 Mod L Rev 331.

above, has been facilitated by the bundle of rights theory's disaggregation of property.[45] For instance, the bundle of rights theory projects *property* as an indefinite bundle of sticks, in which each stick represents a separate and protectable proprietary interest.[46] The greatest accumulation of such sticks, qualitatively and quantitatively, amounts to ownership.[47] However, Christman has argued that *full ownership*, in the sense of comprising all the sticks in the bundle, is neither possible nor justifiable on the basis of the Lockean natural rights theory of property, because Locke's theory embeds positive duties to others, entailing equal rights to the share of resources, which countervails the idea of full ownership.[48] For this reason, Christman has suggested that there is no unified or monolithic concept of ownership; rather, ownership is comprised of two congeries (or a bipartite package) of sticks in the bundle of rights concept of property,[49] and thus, there is "no *conceptual* reason to understand ownership only as the full set of liberal rights."[50] Nevertheless, a single stick or lesser collection of sticks not approximating to ownership is still protectable as a proprietary interest,[51] even when not coextensive with the stick of alienation.

---

45. Grey provides an excellent analysis of the fragmentation of property. TC Grey, "The Disintegration of Property" in JR Pennock & JW Chapman, eds, *Property*, *Nomos 22* (New York: New York University Press, 1980) at 69-85.
46. SR Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990) at 23 (however, Christman disagreed with this view, arguing that *property* is better normatively seen as a collection of rights that fall into two categories of *control* and *income* rights). Christman, "Distributive Justice", *supra* note 43 (thus, Christman suggested that a single stick in the bundle of property rights, considered individually and in isolation from the bipartite groups of property rights, does not carry much normative importance).
47. GP Wilson, "Jurisprudence and the Discussion of Ownership" (1957) 15:2 Cambridge LJ 216 at 222.
48. John Christman, "Can Ownership Be Justified By Natural Rights?" (1986) 15:2 Philosophy & Public Affairs 156.
49. John Christman, "Self-Ownership, Equality, and the Structure of Property Rights" (1991) 19:1 Political Theory 28 at 37.
50. Christman, "Distributive Justice", *supra* note 43 at 229 [emphasis in original].
51. Grey in Pennock & Chapman, *supra* note 45.

The bundle of rights theory of property is exemplified by Honoré's classic work on ownership,[52] in which he listed eleven standard incidents of ownership, all or congeries of which might be recognised by a mature legal system as constituting ownership.[53] More interestingly, Honoré's list serves to highlight some of the individual sticks in a bundle of property rights; these include an owner's management right – that is, the right to control the use of a particular resource. Apparently, this right is coextensive with the statutory requirement for *inter vivos* consent to cadaveric donation under the 2004 Act. Put differently, by making lawful cadaveric donation dependent on the *inter vivos* or pre-mortem consent of a donor, the 2004 Act has imbued donors with (control-based) proprietary interests in their excised organs. Envisioning a similar analytical strategy for the US, Robertson observed that there were no third party rights to a donated cadaveric organ that could supersede the wishes of the donor because "the donor's autonomy is fundamental, and … the organs are hers until she donates them."[54] As could be surmised from the above quotation, the only question that remains to be considered is when the donor's proprietary interest could be understood as exhausted or transferred to a potential recipient: is it at the point of extraction of the organ, or at any point up to implantation into the body of the recipient? This question requires an interrogation of the law of gifts, which, for completeness, is fully examined below in connection

52. Wall argued that Honoré's framework is incomplete unless coupled with trespassory rules, especially the trespassory rules developed by Guido Calabresi & A Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85:6 Harv L Rev 1089; Jesse Wall, "The Legal Status of Body Parts: A Framework" (2011) 31:4 Oxford J Legal Stud 783. For a criticism of Wall, arguing that trespassory rules are remedial or compensatory, rather than normative, see Remigius N Nwabueze, "Body Parts in Property Theory: An Integrated Framework" (2014) 40:1 Journal of Medical Ethics 33. Nwabueze's view also resonates with Getzler's. Joshua Getzler, "Theories of Property and Economic Development" (1996) 26:4 Journal of Interdisciplinary History 639 at 660.
53. AM Honoré, "Ownership" in AG Guest, ed, *Oxford Essays in Jurisprudence* (New York: Oxford University Press, 1961) 107.
54. Christopher Robertson, "Who Is Really Hurt Anyway? The Problem of Soliciting Designated Organ Donations" (2005) 5:4 American Journal of Bioethics 16 at 17.

with living donations. It suffices to say that significant policy and pragmatic considerations would infuse any answer to the question above. Meanwhile, and consistent with the analysis below on the delivery of gifts, it is suggested that a cadaveric donor's gift is effective to transfer a proprietary interest to the recipient when the organ is retrieved from the donor with the intention of transplanting it to a recipient already selected from the waiting list, according to the prevailing allocation criteria,[55] or to a recipient specified by the donor (in systems that permit directed cadaveric donation).

A view favouring the proprietary entitlement of a cadaveric donor is bound to impact significantly on a wide-range of issues relating to organ donation and transplantation. For instance, consider the current public policy on organ procurement and allocation in England, which generally prohibits a *directed* or *conditional* donation of organs of deceased persons.[56] Such a policy would be gravely undermined by the recognition of the deceased donors' proprietary interests, since it would enable them to determine the specific beneficiary of donated organs, or the destination of the organs. Similarly, a proprietary interest would empower donors to attach certain lawful conditions to the use of their

---

55. Generally, a recipient is selected from the relevant waiting list before a donated organ is excised from the cadaveric donor. See Institute of Medicine, *Organ Procurement and Transplantation: Assessing Current Policies and the Potential Impact of the DHHS Final Rule* (Washington, DC: National Academy Press, 1999) at 115.

56. A *directed* donation occurs when an organ is donated for the benefit of a specific person. A donation is *conditional* when it is meant for the use of a class defined by race, religion or similar factors. The policy prohibiting directed and conditional cadaveric donation was enunciated following a scandalous donation of a deceased relative's organ subject to the condition that it be used for Caucasians only. Department of Health, *An Investigation into Conditional Organ Donation* (London: Department of Health, 2000); for a severely limited exception to the prohibition, see Department of Health, *Requested Allocation of Deceased Donor Organ* (London: UK Health Administrations, 2010). See generally Antonia J Cronin & James F Douglas, "Directed and Conditional Deceased Donor Organ Donations: Laws and Misconceptions" (2010) 18:3 Med L Rev 275 [Cronin & Douglas, "Directed and Conditional"]; Shaun D Pattinson, "Directed Donation and Ownership of Human Organs" (2011) 31:3 LS 392.

donated organs.[57] While no view is taken here on the propriety of such an outcome (as it is not the focus of this article), the point is that it would jeopardise the current criteria for organ donation based on altruistic and unconditional donation,[58] and organ allocation based on clinical factors, such as the relative urgency of a potential recipient's medical needs, and the probability of a successful transplantation outcome. Nevertheless, a proprietary approach in favour of the donor creates legal certainty and would help to resolve some of the conundrum highlighted in the introduction. For instance, the estate of the deceased should be able to sue for the loss of an orphaned organ, or damage to it. Similarly, the theft of an excised organ could be the subject of a criminal prosecution since the organ would qualify as property belonging to the deceased. In addition, the deceased's estate could maintain an action in conversion against the unauthorised use or malicious destruction of the organ. But as with rights, liabilities also are bound to follow. Thus, the estate of the donor could (potentially) be sued for various issues in connection with the donation, such as the withdrawal of the organ in violation of the recipient's settled expectations or reliance on the donation; the donor's estate could also be sued where the organ turned out to be infectious due to contamination by an undisclosed disease.[59]

B. Justification of Cadaveric Donor's Proprietary Entitlement

While the proprietary approach above provides a neat solution and framework of analysis for the hypothetical in the introduction of this article, it still begs the question of justification. In other words, why should the deceased donor be the owner of an orphaned organ?[60] What

57. This view is supported by both Cronin & Douglas, *ibid*; Pattinson, *ibid.*
58. Alasdair Maclean, "Organ Donation, Racism and the Race Relations Act" (1999) 149 New LJ 1250 at 1250-52.
59. The issue arose, but was not litigated, in *Ravenis v Detroit General Hospital*, 234 NW (2d) 411 (Mich App Ct 1975), where the defendant-hospital transplanted to the claimants infected corneas harvested from a deceased donor. While the donor was not sued, the defendant was held liable to the claimants in negligence.
60. Nor, arguably, should the organ belong to the deceased's family. Note that Wilkinson has argued persuasively that the deceased's family interest in an

are the moral, ethical and legal justifications for vesting such proprietary entitlement in the deceased donor? In the wake of the Alder Hey and Royal Liverpool Infirmary scandals discussed earlier, there was a collective sense of morality in England and Wales that the removal, use and storage of cadaveric organs (and other body parts) must be based on prior consent from the deceased, the deceased's designated representative, or a family member of the deceased. Arguably, this moral consensus not only inspired the public policy enshrined in the 2004 Act; it also justifies the recognition of a cadaveric donor's proprietary interest. For Harris, however, the requirement of the deceased's consent to donation serves no ethical function and misconstrues the role ordinarily played by consent in the context of healthcare treatment, such as the promotion of a patient's agency and ability to make an informed choice.[61] In other words, consent safeguards a person's right to self-determination: the right to determine what should be done to one's body.[62] Thus, Harris argued that, as the dead have no autonomy, their consent to donation was generally irrelevant,[63] implying that the recognition of a cadaveric donor's proprietary interest would be ethically unjustifiable.

However, a deceased donor's proprietary interest in an excised organ could be justified on the basis of posthumous autonomy. For instance, Wilkinson argued that the concept of *personal sovereignty*, the idea that a person should be able to run their own life, extends beyond biological life.[64] In other words, certain interests survive death; a phenomenon Harris acknowledged as *persisting critical interests*, although he went ahead to argue that such interests are generally weak and must give way to an overriding public interest, such as the use of cadaveric organs.[65] A set back of posthumous interests engenders harm, albeit to the person

---

organ does not rest on any freestanding right of the family in relation to the organ (that is, in their own right), although the family could vindicate any distress they suffered where retrieval was done without their consent. Wilkinson, *supra* note 39 at 66-70.

61. John Harris, "Law and Regulation of Retained Organs: The Ethical Issues" (2002) 22:4 LS 527 at 531.
62. *Canterbury v Spence*, 464 F (2d) 772 at 780 (DC Cir 1972).
63. Harris, *supra* note 61 at 534-38.
64. Wilkinson, *supra* note 39 at 44.
65. Harris, *supra* note 61 at 534-35.

who is now dead, that is, the *ante-mortem person*.[66] Sperling provides a stronger defence of posthumous interests in his suggestion that they should be protected as legal rights when such interests "accord with some significant moral attributes characterizing the dead."[67] Thus, he observed that although a person might be dead, they nonetheless continue to exist symbolically in the minds, thoughts and language of other existing creatures.[68] Similarly, McGuinness and Brazier argued that the dead is not just a deceased person, but remains in our minds, as the case may be with our father, mother, brother, sister or friend.[69] In essence, posthumous interests recognise "one's symbolic existence."[70] These sorts of interests have been recognised in the area of testamentary disposition; thus, a person's interest in the distribution of their property after death is recognised and protected through laws and statutes on wills. For similar reasons, Brazier deployed this analogy, along with religious and cultural factors, to argue for the legal recognition of a deceased person's burial wishes.[71] A few cases are beginning to respond positively to posthumous interests by way of recognising the burial wishes of a deceased person.[72]

In *Burrows v HM Coroner for Preston*, one of the issues was whether the wishes of the deceased (a young man who committed suicide while in a penitentiary) regarding cremation should be recognised. Justice Cranston observed that "[o]ne thing is clear, that in as much as our domestic law says that the views of a deceased person can be ignored it is

66. See generally Joel Feinberg, *Harm to Others* (New York: Oxford University Press, 1984); Wilkinson, *supra* note 39 at 34-35.
67. Daniel Sperling, *Posthumous Interests: Legal and Ethical Perspectives* (Cambridge: Cambridge University Press, 2008) at 84. For a similar argument, see Heather Conway, "Dead, But Not Buried: Bodies, Burial and Family Conflicts" (2003) 23:3 LS 423 at 433.
68. Sperling, *ibid* at 40-41.
69. Sheelagh McGuinness & Margaret Brazier, "Respecting the Living Means Respecting the Dead Too" (2008) 28:2 Oxford J Legal Stud 297.
70. Sperling, *supra* note 67 at 41.
71. Brazier, *supra* note 33 at 564-65.
72. *Buchanan v Milton*, [1999] 2 FLR 844 (FamD); *X v Federal Republic of Germany*, [1981] 24 DR 137; *Burrows v HM Coroner for Preston*, [2008] EWHC 1387 (QB) [*Burrows*]. See Remigius N Nwabueze, "Legal Control of Burial Rights" (2013) 2:2 Cambridge Journal of International Comparative Law 196.

no longer good law."[73] The outcome in *Burrows*, which gave effect to the wish of the deceased, is arguably in dissonance with the orthodox legal doctrine that "[t]he dead have no rights and can suffer no wrongs."[74] Hence, in *Ibuna v Arroyo*,[75] Justice Smith refused to attribute interests or rights to a dead body "as if it has some independent right to be heard which is in effect what Cranston J is saying."[76] Unsurprisingly, therefore, Norrie argued that the taking of an organ from the deceased, even without consent or in the face of an express refusal of such consent by the deceased person, while morally wrong and even criminally punishable, could not ground the surgeon's civil liability.[77] Moreover, based on Getzler's suggestion that control-based proprietary entitlements attract the expressive justificatory theory of property, geared towards enhancing the personhood and autonomy of the entitlement holder,[78] it is obvious that such a framework cannot avail the deceased because the dead, on the orthodox view, has no autonomy.

In sum, these justificatory difficulties may discourage the recognition of a cadaveric donor's proprietary entitlement in an excised organ. Consequently, the analysis turns on the proprietary entitlement of the live donor.

C. Live Donor's Entitlement

In the case of an excised organ from a live donor, awaiting transplantation or use, the question is whether the organ should be considered the property of the live donor. Of course, the *Human Tissue Act 2004* regulates live donation, under which it is an offence to remove an organ from a live donor with the intention of using it for the purposes of transplantation contrary to the provisions of the Act.[79] An offence would be committed under the Act, for example, upon giving or receiving a payment for organ

---

73. *Burrows, ibid* at para 20.
74. *R v Ensor* (1887), 3 TLR 366 at 367, Stephen J. See also, *Silkwood v Kerr-McGee Corporation*, 637 F (2d) 743 (10th Cir 1980).
75. [2012] EWHC 428 (Ch).
76. *Ibid* at para 50.
77. Norrie, *supra* note 7 at 461.
78. Getzler, *supra* note 52.
79. 2004 Act, *supra* note 22, s 33.

donation (other than for necessary expenses), or non-compliance with the necessary consent requirements. Live donation could be *directed*, in the case of genetic or emotional relationships, and also *directed and altruistic*, such as when the donor and recipient are brought together through a social networking website.[80] In such cases, assessment by an Independent Assessor[81] and consent of the Human Tissue Authority Transplant Approval Team are required.[82] In the absence of an established relationship of some sort, live donation should be altruistic, non-directed and unconditional, in which case consent of the Human Tissue Authority is required – after the donation has been approved by a Panel set up for that purpose by the Human Tissue Authority.[83] Thus, as in the case of a cadaveric donor above, and for the reasons stated therein, the *Human Tissue Act 2004* has vested in live donors significant control over the use of their excised organs, which arguably amounts to a proprietary interest.

Such control powers offer good justification for vesting property interest in an orphaned organ in the live donor. Furthermore, on the basis of the work or skill exception, Cronin and Douglas suggested that organs donated for clinical transplantation should be viewed as the property of the donor because "[e]xtensive skills have been applied to them to make them suitable for transplantation. These include not only surgical removal and preparation, perfusion with preserving fluid and sterile cold storage, but also the establishment of recipient compatibility by means of tissue typing and cross-matching procedures."[84] The work or skill exception was more famously enunciated by the Australian High Court in *Doodeward v Spence*, where the claimant sued to recover possession of a double-headed stillborn foetus seized from him by the police. Chief Justice Griffith held that a "human body, or a portion of a human body, is capable by law of becoming the subject of property" when, by lawful exercise of work or skill, "it has acquired some attributes differentiating it from a mere corpse awaiting burial."[85] Thus, this exception anticipates

80. HTA, *Code of Practice 2*, *supra* note 1 at para 27.
81. *Ibid* at paras 34, 60-64.
82. *Ibid* at paras 39, 66.
83. *Ibid* at para 38.
84. Cronin & Douglas, "Directed and Conditional", *supra* note 56 at 287.
85. *Doodeward, supra* note 19 at 414.

a more substantial transformative work, which makes it inapplicable to transplantable organs, whose utility lies in the preservation of their original state.[86]

In the same vein, Hardcastle observed that the work or skill exception is a conceptual derivation from the Roman law's doctrine of *specification*, which determines the proprietorship of a *new* object produced from a different thing.[87] He opined that the "work or skill exception is a misguided application of the specification doctrine because often the work performed is for preservation purposes and does not result in the creation of a new thing."[88] Moreover, the exception usually applies in favour of the provider of the work or skill (here, the transplant team), rather than the source or donor of the organ,[89] although this could be remedied by considering the transplant team as having applied their skill to the organ as an agent of the donor.[90]

Apart from the potential justification of a live donor's proprietary entitlement based on the work or skill exception, it is possible to agree with Rose LJ's inference, in *R v Kelly*, that a donor's proprietary interest in his or her organ is created upon its detachment from the donor's body with the *intention* of it being used for the purpose of transplantation.[91] This sort of *intention-plus* argument for the justification of a property

---

86. For this reason, the exception was not applied in *Dobson v North Tyneside Health Authority*, [1997] 1 WLR 596 (CA), where the deceased's brain was merely fixed in paraffin. Also, while the Court of Appeal, in *Yearworth v North Bristol NHS Trust*, [2009] EWCA Civ 37 [*Yearworth*], observed that the work or skill exception was potentially applicable to sperm samples of the claimants that were negligently preserved in a liquid nitrogen, it preferred to base the claimants' proprietary interests on their right to control the use of their sperm samples extracted and stored for their benefit.
87. Rohan J Hardcastle, *Law and the Human Body: Property Rights, Ownership, and Control* (Oxford: Hart Publishing, 2007) at 135-42.
88. *Ibid* at 142.
89. Brazier, *supra* note 33 at 563.
90. This was the approach of the Australian case of *In re Mark Edwards*, [2011] NSWSC 478, involving proprietary interests in stored sperm samples.
91. *R v Kelly*, *supra* note 17; but this approach creates difficulties where the source has not stated any intention as to the use of the separated material. See Hardcastle, *supra* note 87 at 152-53.

right was, again, used by the Court of Appeal in *Yearworth* when it held that the claimants, from whom negligently damaged sperm samples originated, had property rights in their sperm samples because the "sole object of the ejaculation of the sperm was that, in certain events, it might later be used for their benefit."[92] More liberally, Penner[93] and Hardcastle have suggested that a source's (or donor's) proprietary interest should become extant on the detachment of the body part, whether or not accompanied with an intention as to use, and that the separated body part should be considered the property of the source.[94]

In addition, a sound justificatory framework for the live donor's ownership of an excised organ could be based on the principles of dignity and right to bodily integrity. Although these principles protect the *person* rather than their separated body parts, Hardcastle has observed that "[r]ecognising that property rights are created on detachment represents a natural extension of the right to bodily integrity", and that "[i]t would seem inconsistent if the act of detachment changed biological materials from material fully protected by the law into material receiving no legal protection whatsoever."[95] This sort of dignitarian justificatory framework resonates with Christman's analysis of property as constituted, in part, by a collection of control rights which facilitate the holder's psychological control over their environment and conduces to the development of their self-concept and promotion of their autonomy;[96] something that Getzler categorises as an expressive theory of property.[97] Thus, the live donor's proprietary interest in an excised organ is reasonably justifiable. Additional support could also be inferred from some of the decided cases.

Moore v Regents of the University of California[98] is an interesting example. In this well-known case, Moore's tissues were surreptitiously harvested by his physicians under the guise of a post-operative splenectomy

92. *Yearworth, supra* note 86 at para 45.
93. JE Penner, *The Idea of Property in Law* (Oxford: Oxford University Press, 1997) at 111.
94. Hardcastle, *supra* note 87 at 145-50.
95. *Ibid* at 147.
96. Christman, "Distributive Justice", *supra* note 43.
97. Getzler, *supra* note 52 at 641.
98. 271 Cal Rptr 146 (Sup Ct 1990) [*Moore*].

procedure. Moore succeeded in his action for breach of informed consent, but the majority rejected his action for conversion. In his concurring and dissenting judgement, however, Justice Broussard observed that Moore's "right to determine, prior to the removal of his body parts, how those parts would be used after removal" qualified as a property right, which was infringed by the defendants and, thus, remediable in conversion.[99] To emphasize Moore's proprietary entitlement to his excised body parts, Broussard J delineated a hypothetical scenario where "[i]f, for example, another medical center or drug company had stolen all of the cells in questions from the UCLA Medical Center laboratory and had used them for its own benefit, there would be no question but that a cause of action for conversion would properly lie against the thief."[100] Thus, Broussard J thought that this hypothetical put Moore's proprietary entitlement beyond doubt.

Similarly, while *Greenberg v Miami Children's Hospital Research Institute*[101] and *Washington University v Catalona*[102] both involved body parts donated for research, their propositions extrapolate to the organ donation context. In *Greenberg*, the claimants, parents of children suffering from Canavan disease and charitable research foundations that support research on Canavan disease, provided tissues and body parts, as well as funding, to the defendant-scientists in order to facilitate the defendants' research on Canavan disease. The research collaboration was fruitful, leading to the isolation and patenting of the Canavan gene, and the development of prenatal testing for the disease. However, the patent was obtained without the knowledge of the claimants, who alleged that the defendants' licensing practice had the effect of defeating the claimants' intention which was to make the prenatal testing generally available. In *Catalona*, Professor Catalona had assisted the Washington University in developing a biorepository, using tissues donated by his cancer patients and research participants, as well as tissues from the patients of his colleagues. However, Washington University objected to his claim

99. *Ibid* at 168.
100. *Ibid*.
101. 264 F Supp (2d) 1064 (Fla D 2003) [*Greenberg*].
102. 437 F Supp (2d) 985 (Mo D 2006) [*Catalona*], aff'd 490 F (3d) 667 (8th Cir 2007) [*Catalona*, 8th Cir].

when he got a professional appointment at Northwestern University and sought to leave with some of the tissues in the biorepository, with the consent of the sources.

While the claimants in both of these cases brought several causes of action, the concern here is on the courts' treatment of the claimants' conversion claims, touching on their proprietary entitlement to separated body parts. In dismissing the claimants' causes of action in *Greenberg* (except for the action for unjust enrichment), Justice Moreno observed that "the property right in blood and tissue samples … evaporates once the sample is voluntarily given to a third party."[103] In the same vein, in *Catalona*, Justice Limbaugh "found the research participant to be a 'donor' who had parted with any semblance of ownership rights once their biological materials had been excised for medical research."[104] The United States Court of Appeals, Eighth Circuit, affirmed the decision of Limbaugh J in *Catalona*, on the ground that the research participants had practically made a gift of their bodily tissues to the biorepository.[105] Thus, by anchoring the decisions in both cases on the legal concept of a gift, the courts implied that the claimants in *Greenberg*, and the research participants in *Catalona*, had proprietary interests in their excised body parts, at least initially, since you cannot make a gift unless it is yours to give in the first place.[106] This suggests that a live donor possesses proprietary interest in their excised organ, which remains extant until validly transferred to a third party. Before considering the legal requirements for such a transfer, it is useful to look at two additional interesting cases.

In the Canadian case of *Urbanski v Patel*,[107] the claimant's daughter had only one kidney due to congenital defect; however, the kidney was accidentally removed during an exploratory surgical procedure, due to the mistaken belief of the surgeon that the kidney was an ovarian cyst. To

---

103. *Greenberg, supra* note 101 at 1075.
104. *Catalona*, *supra* note 102 at 997.
105. *Catalona*, 8th Circuit, *supra* note 102.
106. For a fuller discussion of the proprietary implications of both cases, see Remigius N Nwabueze, "Donated Organs, Property Rights and the Remedial Quagmire" (2008) 16:2 Med L Rev 201 at 218-21 [Nwabueze, "Remedial Quagmire"].
107. 84 DLR (3d) 650 (Man QB) [*Urbanski*].

save his daughter who was left without any kidneys, the claimant donated one of his kidneys. Unfortunately, although the transplant operation was competently performed, it was not successful and the kidney had to be removed three days later. The claimant's daughter succeeded in an action for negligence against the hospital for the loss of her only kidney. The claimant joined in the suit in his own right, alleging that the defendant's negligence caused him to lose one of his kidneys. Justice Wilson agreed with the claimant and awarded damages on the ground that it was reasonably foreseeable that the defendant's negligence which led to the loss of the claimant's daughter's kidney would cause the claimant to offer one of his kidneys to his daughter.[108]

While *Urbanski* was entirely based in negligence rather than property law,[109] it is suggested that the successful outcome, as well as the claimant's standing to bring the action, was facilitated by the intuitive recognition of his proprietary interest in the excised kidney; an interest that was kept alive by the failed transplant, in the sense of preventing a complete transfer of the claimant's separated kidney to his daughter. *Sirianni v Anna*[110] renders this view more compelling. *Sirianni*'s facts closely mirror those of *Urbanski*. Just as in *Urbanski*, the claimant's son in *Sirianni* had only one kidney due to congenital defects. That kidney was, unfortunately, mistakenly removed in a surgical procedure. Consequently, the claimant volunteered her kidney, which was successfully implanted in her son. The claimant then brought an action, alleging that the defendant's negligence in treating her son caused her to lose one of her kidneys. Justice Ward held that the claimant had not stated a viable cause of action, and that her son's (separate) action in negligence could not be extended to her, because her donation was a voluntary and independent act done with full knowledge of the consequences. Accordingly, Ward J observed that the "premeditated, knowledgeable and purposeful act of this plaintiff in donating one of her kidneys to preserve the life of her son did not extend or reactivate the consummated negligence of these defendants."[111]

---

108. *Ibid* at paras 104-06.
109. Negligence was probably the only relevant cause of action in the circumstances.
110. 55 Misc (2d) 553 (NY Sup Ct 1967) [*Sirianni*].
111. *Ibid* at 556.

Interestingly, in *Urbanski*, Wilson J distinguished *Sirianni* on the ground that it was decided in the 1960s, when transplantation procedure had not become routine and, therefore, could not be reasonably foreseeable in medical accidents involving the loss of a kidney.[112] I suggest, however, that the outcome in *Sirianni* was dictated by the successful transplant operation in that case, on the basis of which ownership of the claimant's excised organ had been completely transferred to her son. As the claimant no longer had an extant interest in her separated organ, it was difficult for her to ground her case on any recognisable cause of action. Ward J may have had this in mind when he asked: "[s]tripped of emotionalism, the issue here is, does a cause of action exist in favour of a donor of a human organ against the defendants who removed vital organs from the donee in a negligent manner?"[113] In essence, both *Urbanski* and *Sirianni* suggest that a live donor enjoys proprietary interest in an excised organ which has not yet been lodged in the body of a recipient.

D. Effect of a Live Donor's Gift

The analysis above suggests that the ownership of an excised organ vests in its source, the live donor. However, having made a *gift* of it, the critical question becomes when that gift could be said to have taken effect so as to exhaust or transfer the live donor's proprietary interest to the donee. Recall that this question was also put forward in connection with the cadaveric donor, where I raised the issue of whether the effective moment of transfer was at the point of extraction, implantation or somewhere in-between. In essence, a live donor remains the owner of an orphaned organ until a valid transfer has taken place. This requires a legal analysis of gifts.

Bowman v Secular Society Ltd[114] is a classic case on the validity of gifts. The claimant (the testator's next of kin) challenged a bequest to the corporate defendant on the ground that its objects or purposes were subversive of Christianity, though not criminal, in the sense of being punishable under the common law of blasphemy. The claimant argued

112. *Urbanski*, *supra* note 107 at paras 101-03.
113. *Sirianni*, *supra* note 110 at 554-55.
114. [1917] AC 406 (HL) [*Bowman*].

that with Christianity being part of the law of England, the defendant's purposes amounted to a denial of or an attack on Christianity, which rendered the gift unenforceable for being contrary to public policy. However, with a gift approach that deemphasized the nature of the defendant's purposes, Lord Parker expounded on the tripartite requirements as to the validity of gifts. First, there must be certainty as to the subject matter of the gift; second, the "donor must have the necessary disposing power over, and must employ the means recognized by common law as sufficient for the transfer of, the subject-matter;"[115] and third, the "donee must be capable of acquiring the subject-matter."[116] When these conditions are satisfied, the "property in the subject-matter of the gift passes to the donee, and he becomes the absolute owner thereof and can deal with the same as he thinks fit."[117] It should be added that while Lord Parker's second condition above implies the presence of donative intention,[118] the third condition implies the requirement of donee's acceptance.[119] In that sense, and in light of Hill's very clear exposition on the topic, *Bowman* should be taken as evincing a two-sided analysis of gift, in contradistinction to an equally contending one-sided analysis of gifts, in which a gift is taken to be validly constituted by the unilateral act of the donor, subject to the donee's right of repudiation.[120]

A live donor's gift of an excised organ potentially satisfies *Bowman's* conditions above. The only possible doubt relates to when the *transfer* (in condition two above) could be said to have been effectuated. Transfer of chattels by gift usually takes effect upon delivery.[121] If, analogically, an excised organ intended for transplantation was categorised as a chattel,[122]

115. *Ibid* at 436.
116. *Ibid*.
117. *Ibid*.
118. *Re Ridgway* (1885), 15 QBD 447.
119. Jonathan Hill, "The Role of the Donee's Consent in the Law of Gift" (2001) 117 Law Q Rev 127.
120. *Ibid*.
121. Duncan Sheehan, *The Principles of Personal Property Law* (Oxford: Hart Publishing, 2011) at 53.
122. Such a possibility looms large with the characterisation of an embryo as a chattel by an Alberta court in *CC v AW*, 2005 ABQB 290 ("[t]he remaining fertilized embryos remain her property. They are chattels that can be used as she sees fit"at para 25). However, the controversial

the question becomes when the organ could be said to have been *delivered*. In the law of gifts, delivery is an analytically torturous concept.[123] The clearest form of delivery is actual delivery, the physical or manual transfer of the object of the gift to the donee. This method of delivery is impossible in gifts of choses in action;[124] parental gifts to young children;[125] gifts of bulky objects;[126] gifts of property in faraway places; gifts of a symbol of title (such as a key to a house);[127] or gifts of objects already in the possession of the donee.[128] Hence exceptions were made for symbolic or constructive delivery.[129] Two theories underpin the requirement of delivery. The first trenches on the historical school of thought, which hypothesized that delivery was a relic of the historical requirement that the transfer of seisin in any property was not recognisable unless there was a change of possession.[130] On the basis of this theory, delivery is not indispensable, and not a fundamental requirement of the law of gift, because it is a mere historical accident. However, Sheehan has affirmed the necessity for the requirement of delivery, observing that "English law has been reluctant to allow even the clearest words of gift to override the need for an unequivocal change of possession."[131] On the other hand,

---

nature of such characterisations is put into bold relief by Justice Arabian's concurring judgement in *Moore*, *supra* note 98 ("[p]laintiff has asked us to recognize and enforce a right to sell one's own body tissue *for profit*. He 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" at 164).

123. Some dated, but historically relevant, analyses of the subject include: Frederick W Maitland, "The Mystery of Seisin" (1886) 2 Law Q Rev 481; Frederick Pollock, "Gifts of Chattels Without Delivery" (1890) 6 Law Q Rev 446; Samuel Stoljar, "The Delivery of Chattels" (1958) 21 Mod L Rev 27.
124. *Milroy v Lord* (1862), 4 De GF & J 264 (CA in Ch).
125. *Jones v Lock* (1865), 1 Ch App 25.
126. *In Re Cole*, [1964] Ch 175 (CA).
127. *Wrightson v McArthur and Hutchinson*, [1921] 2 KB 807.
128. *In Re Stoneham*, [1919] 1 Ch 149.
129. Sheehan, *supra* note 121 at 54-55. See also Patrick Rohan, "The Continuing Question of Delivery in the Law of Gifts" (1962) 38:1 Ind LJ 1 at 7-8 [Rohan, "Delivery in the Law of Gifts"].
130. Rohan, "Delivery in the Law of Gifts", *ibid* at 4.
131. Sheehan, *supra* note 121 at 55.

the second theory of delivery emphasizes its functionality, rather than the manual tradition; this includes the need to protect a donor against the enforcement of rash or impulsive promises of gift, the evidentiary advantage of having witnesses of the gift, and the prevention of fraud.[132] Thus, delivery should be adjudged to have taken place whenever these functions are satisfied, whether or not accompanied by a physical transfer of the gift. In practice, however, the cases on gifts do not fit neatly into any of the two theories above, hence the courts' approaches have been rather eclectic.[133]

All of the above means that the delivery of an excised organ could be actual or symbolic. However, actual delivery by the live donor is not practically possible since the organ has to be extracted after the live donor had been physically immobilised by the administration of anaesthetic agents. Also, the excised organ is usually taken into the immediate possession of the transplant team for lodgement in the recipient. While this difficulty could be met by construing the transplant team as agents of the live donor for the purpose of actual delivery, it is more plausible to hold that delivery in the transplantation context is effected symbolically. Thus, the intention to donate, coupled with extraction of the organ, should be regarded as effecting the delivery of a live donor's excised organ to the recipient.[134] In essence, the recipient of a live donation becomes (thanks to Lord Parker in *Bowman* above) the "absolute owner"[135] of a donated organ from the moment the organ is extracted from the donor.[136] Consequently, it is the designated recipient of an excised organ that should exercise legal rights in relation to the organ.

Before examining the recipient's proprietary interest in detail, it remains to put aside the often unstated assumption that any property

---

132. Rohan, "Delivery in the Law of Gifts", *supra* note 129 at 4-6.
133. *Ibid*.
134. This is consistent with Rohan's suggestion that delivery should be taken to be complete where an overt act accompanies the expression of a donative intent. *Ibid* at 18.
135. *Bowman*, *supra* note 114 at 436, 440.
136. Pattinson makes a suggestion to the contrary, observing that the transfer of proprietary interests to the recipient takes place only after implantation of the organ in the recipient. However, Pattinson did not discuss the law of gifts. Pattinson, *supra* note 56 at 407.

right in an excised organ vests in the state and, thus, the state is entitled to distribute donated organs on the grounds of efficiency and justice.

III. State Ownership or Entitlement to Donated Organs

Although not given much dialogue, it is often assumed that altruistically donated cadaveric organs belong to the state – local, provincial, regional, or national government (as the case may be); thus, such organs constitute a national resource, a sort of community property. Quite often, this sort of argument is used to justify the state's exclusive control over organ donation and allocation criteria. For instance, Prottas observed that both the federal and state governments in the US became increasingly involved in the organ transplantation process because of the belief that the "organs were not the property of the physician procuring them but of the public at large."[137] For the same reason, Zink and colleagues argued that the "only body that is qualified to determine who will receive donated organs in a fair and ethical manner is the medical community."[138] In the same way, Nelson suggested that "we ought to move closer toward seeing such organs as communal resources."[139]

While this presumption of state ownership is generally common and strong, its provenance is not entirely clear. Cronin and Price have suggested that the idea of state ownership of donated organs might be based on the questionable no-property rule for cadavers, in the sense that parts of cadavers suitable for transplants might be taken into the possession and ownership of professionals as first possessors, on behalf of society. The authors, however, concluded that the "[n]otions of collective property in body parts are anathema to most liberal societies."[140] The issue was much more seriously debated in the US, especially in the mid-2000s; the immediate context of the debate was the proprietary status of UNOS (United Network of Organ Sharing) in relation to donated

137. Jeffrey Prottas, *The Most Useful Gift: Altruism and the Public Policy of Organ Transplants* (San Francisco: Jossey-Bass Publishers, 1994) at 18.
138. Sheldon Zink et al, "Examining the Potential Exploitation of UNOS Policies" (2005) 5:4 American Journal of Bioethics 6 at10.
139. Nelson, *supra* note 13 at 27.
140. Cronin & Price, *supra* note 15 at 129.

cadaveric organs. Particularly, the debate was focused on whether UNOS could override a donor's wishes regarding the designation or direction of their organ.[141] Truog rightly observed that the debate hinged on the "question of whether transplantable organs should be considered personal property or a societal resource."[142] Truog argued that legal distinctions are commonly made between the living and the dead, and that such differentiations sometimes justify the invasion of the body of the dead for public purposes (such as forensic autopsy), although such invasions are not permissible in the case of a living person. For that reason, Truog opined that "organs obtained from cadaveric donors should be regarded as a societal resource;"[143] as such, only a limited direction of the donor should be allowed. In the same vein, Childress argued that cadaveric organs are a national or community resource and, thus, they should be allocated based on efficiency and utilitarian considerations, rather than extraneous factors, such as the accident of geography.[144] Cohen, however, disagreed on the conceptualisation of cadaveric organs as a public resource;[145] he observed that donated "cadavaric organs do not belong to UNOS. UNOS is given custody and control of organs."[146] Thus, he suggested that UNOS is a trustee that should remain faithful to its responsibilities by respecting the conditions placed on donated organs by the donors. In part, the weakness of the argument for state ownership of donated organs is the incontrovertible fact that property in the organ, as shown above, is vested in the donor, at least initially. The burden, therefore, is on the proponents of state ownership to show how the organ has suddenly transmogrified to state ownership.

Furthermore, an altruistically donated organ is usually meant for the benefit of a potential recipient on the waiting list, rather than as a gift to the state. In that sense, the organ might be considered as the property

141. Note that the US *Uniform Anatomical Gift Act* permits the designation of recipients of cadaveric organs.
142. Robert D Truog, "Are Organs Personal Property or a Societal Resource?" (2005) 5:4 American Journal of Bioethics 14 at 14.
143. *Ibid* at 15.
144. Childress, *supra* note 12.
145. Lloyd R Cohen, "UNOS: The Faithless Trustee" (2005) 5:4 American Journal of Bioethics 13.
146. *Ibid* at 13.

of a potential recipient on the waiting list, subject to the state's *power* to select the actual recipient according to the established allocation criteria. Consequently, the state is neither an *owner* nor a *trustee* of donated organs, but a *donee* of power. Describing the state as a trustee would inadvertently recognise it as the legal owner of an organ, albeit without beneficial content. As a donee of power, however, the state is empowered to select a recipient in order to complete the transfer to that recipient; before the state exercises its power of selection, the right of action in relation to the organ belongs to the donor. Since the state is, however, in physical possession of the organ before implantation in the recipient, it might wish to vindicate such possessory interests in the event of an unauthorised interference. This approach resonates with the observation of the Nuffield Council on Bioethics that an excised organ intended for transplantation should be "conceptualised as being in the 'custodianship' of third parties," which should include "rights of possession and use, but only for the purposes envisaged in the original consent."[147] Thus, the Nuffield Council on Bioethics implies that the state has custody and possession, but not ownership of donated organs.

IV. Entitlement of the Recipient

As analysed above, the *delivery* of an excised organ has the effect of vesting the proprietary interest in the recipient. Thus, the potential recipient, rather than the donor, is the appropriate person to seek legal remedies for any unlawful or unauthorised interference with an excised organ. This conclusion engages the interesting case of *Colavito v New York Organ Donor Network,*[148] which is more fully discussed elsewhere.[149]

In *Colavito*, the deceased's wife made a directed donation of her late husband's kidneys to Colavito, a long-time family friend who was suffering from end stage renal disease. The kidneys were retrieved from the deceased in a New York hospital, and were intended to be air-lifted

147. Nuffield Council on Bioethics, *supra* note 2 at para 7.21.
148. 356 F Supp (2d) 237 (NY D 2005) [*Colavito*], aff'd 438 F (3d) 214 (2d Cir 2006) [*Colavito*, 2d Cir 2006]; *Colavito v New York Organ Donor Network*, 8 NY (3d) 43 (NY Ct App 2006) [*Calavito*, Ct App], aff'd 486 F (3d) 78 (2d Cir 2007) [*Colavito*, 2d Cir 2007].
149. Nwabueze, "Remedial Quagmire" *supra* note 106 at 209-16.

to Miami, Florida, for lodgement in Colavito. Under the relevant New York statute, however, Colavito was only entitled to one kidney at a time, so only the left kidney was taken to him. Minutes before the transplant surgery, Colavito's doctor discovered that the left kidney was irreparably damaged; he therefore made an immediate request for the right kidney from the New York hospital, but was told that the right kidney had already been allocated to another patient whose transplant operation was then in progress. Eventually, histo-compatibility test results showed that the kidneys were histo-incompatible with Colavito's anti-bodies; thus, the transplant could not have taken place in any event. Nevertheless, Colavito sued for conversion, fraud and breach of statutory duties, though the conversion claim is the most relevant here. The District Court dismissed Colavito's conversion claim on the ground that there was no property right in the dead body of a human being or parts of it.

On appeal, the US Court of Appeals, Second Circuit, observed that the cases supporting the no-property rule in the human body were utterly anachronistic, and that those cases could not anticipate the modern revolution in biomedical technology and its application to body parts. Moreover, the Second Circuit observed that those earlier cases were mainly concerned about claimants whose only injury sounded in emotional distress, in contradistinction to Colavito, who suffered a real deprivation through the loss of an organ. Thus, the Second Circuit certified certain questions to the New York Court of Appeals, which returned a negative answer, observing that under the New York organ donation statute "it is enough to say … that plaintiff, as a specified donee of an incompatible kidney, has no common-law right to the organ."[150] When the matter came back again to the Second Circuit, it agreed with the New York Court of Appeals, adding that "as a matter of law … Colavito could not have derived a medical benefit from the organ and did not 'need' it."[151]

More importantly, *Colavito's* case demonstrates an implicit acceptance by the courts adjudicating the matter that Colavito, as the specified recipient of an excised kidney, was the owner thereof and, thus, was competent to bring the claim for conversion. Unsurprisingly, the

150. *Colavito*, Ct App, *supra* note 148 at 53.
151. *Colavito*, 2d Cir 2007, *supra* note 148 at 81.

District Court described the donated kidneys as "Mr Colavito's kidneys," although it confusingly added that they "are not property."[152] Similarly, Justice Sack of the US Court of Appeals, Second Circuit, observed that while Colavito's right of action could be supported under the relevant New York statute on organ donation, his proprietary interests in the kidney could be grounded in his common law rights by analogy to the beneficiary of a trust of the benefit of a covenant, a concept that does not rely on the doctrine of consideration or privity of contract.[153] Furthermore, *Colavito* provides support for the view that the *delivery* of a donated organ takes place at the point where the organ is excised with the intention of transplanting it to a specified recipient.

V. Conclusion

Considerable legal liability issues may arise in connection with an excised organ in the period between its extraction from the donor and implantation in the recipient. Where the organ is stolen, damaged, maliciously destroyed, or used without authority, one of the questions that would arise is that of ownership; in other words, whose organ is it and who can sue for the damage or unlawful interference with it?

What has been done above is to provide a tiered analysis of the ownership of orphaned organs and its justificatory underpinnings. The issue is one that is bound to increase in importance in light of both the general shortage of transplantable organs and further improvements in transplantation technology. Accordingly, it is suggested that after delivery the proprietary interests in an excised organ vests in the designated or selected recipient. Delivery takes place after the organ has been excised with the intention of lodging it in the body of a designated or specified recipient. Thus, the recipient is empowered to sue for any interference with an orphaned organ. Before delivery, however, the donor remains the owner, and should be able to exercise his or her ownership rights or control over the organ. Furthermore, the state is neither the owner nor trustee of donated organs, but, as a custodian thereof, the state might wish

152. *Colavito*, *supra* note 148 at 244.
153. *Colavito*, 2d Cir 2006, *supra* note 148 at 228. For enunciation of the principle, see *Fletcher v Fletcher* (1864), 67 ER 564 (Ch).

to vindicate its possessory interests. In this way, the current proprietary gaps surrounding an excised organ are closed, and its orphaned status is eliminated.