Introduction to Professional Formation

Session 5: Legal Reasoning & Multiple Choice

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Wednesday, August 19, 2015

1:30 to 3:00 PM

Caruso Auditorium

What Is Property?

As you read the attached case, keep in mind that "property" is often divided into two main categories. "Real property" includes land and things more or less permanently attached to land (such as buildings). You are probably familiar with the more common term for real property, real estate.

"Personal property" is movable property, and can be tangible (clothes, books, furniture) or intangible (stocks, bonds, intellectual property).

In the attached case, the court debates whether Mr. Moore still owns his spleen: Is it his property? If the answer is "yes," it would be his tangible personal property.

Moore v. Regents of University of California

Supreme Court of California
51 Cal. 3d 120 (1990)

Panelli, Justice

I. Introduction

We granted review in this case to determine whether plaintiff has stated a cause of action against his physician and other defendants for using his cells in potentially lucrative medical research without his permission. Plaintiff alleges that his physician failed to disclose preexisting research and economic interests in the cells before obtaining consent to the medical procedures by which they were extracted. …We hold that the complaint states a cause of action for breach of the physician's disclosure obligations, but not for conversion.

II. Facts

The plaintiff is John Moore (Moore), who underwent treatment for hairy-cell leukemia at the Medical Center of the University of California at Los Angeles (UCLA Medical Center). The five defendants are: (1) Dr. David W. Golde (Golde), a physician who attended Moore at UCLA Medical Center; (2) the Regents of the University of California (Regents), who own and operate the university; (3) Shirley G. Quan, a researcher employed by the Regents; (4) Genetics Institute, Inc. (Genetics Institute); and (5) Sandoz Pharmaceuticals Corporation and related entities (collectively Sandoz).

Moore first visited UCLA Medical Center on October 5, 1976, shortly after he learned that he had hairy-cell leukemia. After hospitalizing Moore and "withdr[awing] extensive amounts of blood, bone marrow aspirate, and other bodily substances," Golde confirmed that diagnosis. At this time all defendants, including Golde, were aware that "certain blood products and blood components were of great value in a number of commercial and scientific efforts" and that access to a patient whose blood contained these substances would provide "competitive, commercial, and scientific advantages."

On October 8, 1976, Golde recommended that Moore's spleen be removed. Golde informed Moore "that he had reason to fear for his life, and that the proposed splenectomy operation . . . was necessary to slow down the progress of his disease." Based upon Golde's representations, Moore signed a written consent form authorizing the splenectomy.

Before the operation, Golde and Quan "formed the intent and made arrangements to obtain portions of [Moore's] spleen following its removal" and to take them to a separate research unit. Golde gave written instructions to this effect on October 18 and 19, 1976. These research activities "were not intended to have . . . any relation to [Moore's] medical . . . care." However, neither Golde nor Quan informed Moore of their plans to conduct this research or requested his permission. Surgeons at UCLA Medical Center, whom the complaint does not name as defendants, removed Moore's spleen on October 20, 1976.

Moore returned to the UCLA Medical Center several times between November 1976 and September 1983. He did so at Golde's direction and based upon representations "that such visits were necessary and required for his health and well-being, and based upon the trust inherent in and by virtue of the physician-patient relationship . . . ." On each of these visits Golde withdrew additional samples of "blood, blood serum, skin, bone marrow aspirate, and sperm." On each occasion Moore travelled to the UCLA Medical Center from his home in Seattle because he had been told that the procedures were to be performed only there and only under Golde's direction.

"In fact, [however,] throughout the period of time that [Moore] was under [Golde's] care and treatment, . . . the defendants were actively involved in a number of activities which they concealed from [Moore] . . . ." Specifically, defendants were conducting research on Moore's cells and planned to "benefit financially and competitively . . . [by exploiting the cells] and [their] exclusive access to [the cells] by virtue of [Golde's] ongoing physician-patient relationship . . . ."

Sometime before August 1979, Golde established a cell line from Moore's T-lymphocytes. On January 30, 1981, the Regents applied for a patent on the cell line, listing Golde and Quan as inventors. "[B]y virtue of an established policy . . ., [the] Regents, Golde, and Quan would share in any royalties or profits . . . arising out of [the] patent." The patent issued on March 20, 1984, naming Golde and Quan as the inventors of the cell line and the Regents as the assignee of the patent. The Regent's patent also covers various methods for using the cell line to produce lymphokines. Moore admits in his complaint that "the true clinical potential of each of the lymphokines . . . [is] difficult to predict, [but] …. competing commercial firms in these relevant fields have published reports in biotechnology industry periodicals predicting a potential market of approximately $ 3.01 Billion Dollars by the year 1990 for a whole range of [such lymphokines] . . . ."

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Based upon these allegations, Moore attempted to state 13 causes of action. …

With one justice dissenting, the Court of Appeal held that the complaint did state a cause of action for conversion.

III. Discussion

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B. *Conversion*

Moore also attempts to characterize the invasion of his rights as a conversion -- a tort that protects against interference with possessory and ownership interests in personal property. He theorizes that he continued to own his cells following their removal from his body, at least for the purpose of directing their use, and that he never consented to their use in potentially lucrative medical research. Thus, to complete Moore's argument, defendants' unauthorized use of his cells constitutes a conversion. As a result of the alleged conversion, Moore claims a proprietary interest in each of the products that any of the defendants might ever create from his cells or the patented cell line.

No court, however, has ever in a reported decision imposed conversion liability for the use of human cells in medical research. While that fact does not end our inquiry, it raises a flag of caution. In effect, what Moore is asking us to do is to impose a tort duty on scientists to investigate the consensual pedigree of each human cell sample used in research. To impose such a duty, which would affect medical research of importance to all of society, implicates policy concerns far removed from the traditional, two-party ownership disputes in which the law of conversion arose.[1] Invoking a tort theory originally used to determine whether the loser or the finder of a horse had the better title, Moore claims ownership of the results of socially important medical research, including the genetic code for chemicals that regulate the functions of every human being's immune system.

We have recognized that, when the proposed application of a very general theory of liability in a new context raises important policy concerns, it is especially important to face those concerns and address them openly. Moreover, we should be hesitant to "impose [new tort duties] when to do so would involve complex policy decisions"*Nally v. Grace Community Church*,, especially when such decisions are more appropriately the subject of legislative deliberation and resolution. This certainly is not to say that the applicability of common law torts is limited to the historical or factual contexts of existing cases. But on occasions when we have opened or sanctioned new areas of tort liability, we have noted that the 'wrongs and injuries involved were both comprehensible and assessable within the existing judicial framework.'

Accordingly, we first consider whether the tort of conversion clearly gives Moore a cause of action under existing law. We do not believe it does. Because of the novelty of Moore's claim to own the biological materials at issue, to apply the theory of conversion in this context would frankly have to be recognized as an extension of the theory. Therefore, we consider next whether it is advisable to extend the tort to this context.

1. *Moore's Claim Under Existing Law*

To establish a conversion, plaintiff must establish an actual interference with his *ownership* or *right of possession*. . . . Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion.

Since Moore clearly did not expect to retain possession of his cells following their removal, [20] to sue for their conversion he must have retained an ownership interest in them. But there are several reasons to doubt that he did retain any such interest. First, no reported judicial decision supports Moore's claim, either directly or by close analogy. Second, California statutory law drastically limits any continuing interest of a patient in excised cells. Third, the subject matters of the Regents' patent -- the patented cell line and the products derived from it -- cannot be Moore's property.

Neither the Court of Appeal's opinion, the parties' briefs, nor our research discloses a case holding that a person retains a sufficient interest in excised cells to support a cause of action for conversion. We do not find this surprising, since the laws governing such things as human tissues, transplantable organs, blood, fetuses, pituitary glands, corneal tissue, and dead bodies deal with human biological materials as objects sui generis, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property. It is these specialized statutes, not the law of conversion, to which courts ordinarily should and do look for guidance on the disposition of human biological materials.

Lacking direct authority for importing the law of conversion into this context, Moore relies, as did the Court of Appeal, primarily on decisions addressing privacy rights.

[1] Conversion arose out of the common law action of trover. By 1554 the allegations of the complaint had become more or less standardized: that the plaintiff was possessed of certain goods, that he lost them, that the defendant found them, and that the defendant did not return them but instead converted them to his own use.

[20] In his complaint, Moore does not seek possession of his cells or claim the right to possess them. This is consistent with Health and Safety Code section 7054.4, which provides that "human tissues . . . following conclusion of scientific use shall be disposed of by interment, incineration," etc.

One line of cases involves unwanted publicity. These opinions hold that every person has a proprietary interest in his own likeness and that unauthorized, business use of a likeness is redressible as a tort. But in neither opinion did the authoring court expressly base its holding on property law. Each court stated, following Prosser, that it was "pointless" to debate the proper characterization of the proprietary interest in a likeness. For purposes of determining whether the tort of conversion lies, however, the characterization of the right in question is far from pointless. Only property can be converted.

Not only are the wrongful-publicity cases irrelevant to the issue of conversion, but the analogy to them seriously misconceives the nature of the genetic materials and research involved in this case. Moore, adopting the analogy originally advanced by the Court of Appeal, argues that "[i]f the courts have found a sufficient proprietary interest in one's persona, how could one not have a right in one's own genetic material, something far more profoundly the essence of one's human uniqueness than a name or a face?" However, as the defendants' patent makes clear -- and the complaint, too, if read with an understanding of the scientific terms which it has borrowed from the patent -- the goal and result of defendants' efforts has been to manufacture lymphokines. Lymphokines, unlike a name or a face, have the same molecular structure in every human being and the same, important functions in every human being's immune system. Moreover, the particular genetic material which is responsible for the natural production of lymphokines, and which defendants use to manufacture lymphokines in the laboratory, is also the same in every person; it is no more unique to Moore than the number of vertebrae in the spine or the chemical formula of hemoglobin.

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The next consideration that makes Moore's claim of ownership problematic is California statutory law, which drastically limits a patient's control over excised cells. Pursuant to *Health and Safety Code section 7054.4*, "[n]otwithstanding any other provision of law, recognizable anatomical parts, human tissues, anatomical human remains, or infectious waste following conclusion of scientific use shall be disposed of by interment, incineration, or any other method determined by the state department [of health services] to protect the public health and safety." Clearly the Legislature did not specifically intend this statute to resolve the question of whether a patient is entitled to compensation for the nonconsensual use of excised cells. A primary object of the statute is to ensure the safe handling of potentially hazardous biological waste materials. Yet one cannot escape the conclusion that the statute's practical effect is to limit, drastically, a patient's control over excised cells. By restricting how excised cells may be used and requiring their eventual destruction, the statute eliminates so many of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to "property" or "ownership" for purposes of conversion law.

It may be that some limited right to control the use of excised cells does survive the operation of this statute. There is, for example, no need to read the statute to permit "scientific use" contrary to the patient's expressed wish. A fully informed patient may always withhold consent to treatment by a physician whose research plans the patient does not approve. That right, however, is protected by the fiduciary-duty and informed-consent theories.

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Finally, the subject matter of the Regents' patent -- the patented cell line and the products derived from it -- cannot be Moore's property. This is because the patented cell line is both factually and legally distinct from the cells taken from Moore's body. Federal law permits the patenting of organisms that represent the product of "human ingenuity," but not naturally occurring organisms.

Human cell lines are patentable because "[l]ong-term adaptation and growth of human tissues and cells in culture is difficult -- often considered an art . . .," and the probability of success is low. It is this *inventive effort* that patent law rewards, not the discovery of naturally occurring raw materials. Thus, Moore's allegations that he owns the cell line and the products derived from it are inconsistent with the patent, which constitutes an authoritative determination that the cell line is the product of invention.

2. Should Conversion Liability Be Extended?

As we have discussed, Moore's novel claim to own the biological materials at issue in this case is problematic, at best. Accordingly, his attempt to apply the theory of conversion within this context must frankly be recognized as a request to extend that theory. While we do not purport to hold that excised cells can never be property for any purpose whatsoever, the novelty of Moore's claim demands express consideration of the policies to be served by extending liability rather than blind deference to a complaint alleging as a legal conclusion the existence of a cause of action.

There are three reasons why it is inappropriate to impose liability for conversion based upon the allegations of Moore's complaint. First, a fair balancing of the relevant policy considerations counsels against extending the tort. Second, problems in this area are better suited to legislative resolution. Third, the tort of conversion is not
necessary to protect patients' rights. For these reasons, we conclude that the use of excised human cells in medical research does not amount to a conversion.

Of the relevant policy considerations, two are of overriding importance. The first is protection of a competent patient's right to make autonomous medical decisions. That right, as already discussed, is grounded in well-recognized and long-

standing principles of fiduciary duty and informed consent. This policy weighs in favor of providing a remedy to patients when physicians act with undisclosed motives that may affect their professional judgment. The second important policy consideration is that we not threaten with disabling 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.

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We need not, however, make an arbitrary choice between liability and nonliability. Instead, an examination of the relevant policy considerations suggests an appropriate balance: Liability based upon existing disclosure obligations, rather than an unprecedented extension of the conversion theory, protects patients' rights of privacy and autonomy without unnecessarily hindering research.

To be sure, the threat of liability for conversion might help to enforce patients' rights indirectly. This is because physicians might be able to avoid liability by obtaining patients' consent, in the broadest possible terms, to any conceivable subsequent research use of excised cells. Unfortunately, to extend the conversion theory would utterly sacrifice the other goal of protecting innocent parties. Since conversion is a strict liability tort, [38] it would impose liability on all those into whose hands the cells come, whether or not the particular defendant participated in, or knew of, the inadequate disclosures that violated the patient's right to make an informed decision. ***

Research on human cells plays a critical role in medical research. This is so because researchers are increasingly able to isolate naturally occurring, medically useful biological substances and to produce useful quantities of such substances through genetic engineering. These efforts are beginning to bear fruit. The extension of conversion law into this area will hinder research by restricting access to the necessary raw materials. ***

To expand liability by extending conversion law into this area would have a broad impact. The House Committee on Science and Technology of the United States Congress found that "49 percent of the researchers at medical institutions surveyed used human tissues or cells in their research." Many receive grants from the National Institute of Health for this work. In addition, "there are nearly 350 commercial biotechnology firms in the United States actively engaged in biotechnology research and commercial product development and approximately 25 to 30 percent appear to be engaged in research to develop a human therapeutic or diagnostic reagent. . . . Most, but not all, of the human therapeutic products are derived from human tissues and cells, or human cell lines or cloned genes."

In deciding whether to create new tort duties we have in the past considered the impact that expanded liability would have on activities that are important to society, such as research. For example, in *Brown v. Superior Court,* the fear that strict product liability would frustrate pharmaceutical research led us to hold that a drug manufacturer's liability should not be measured by those standards. ***

As in *Brown*, the theory of liability that Moore urges us to endorse threatens to destroy the economic incentive to conduct important medical research. If the use of cells in research is a conversion, then with every cell sample a researcher purchases a ticket in a litigation lottery. Because liability for conversion is predicated on a continuing ownership interest, "companies are unlikely to invest heavily in developing, manufacturing, or marketing a product when uncertainty about clear title exists." In our view, borrowing again from *Brown*, "[i]t is not unreasonable to conclude in these circumstances that the imposition of a harsher test for liability would not further the public interest in the development and availability of these important products."

If the scientific users of human cells are to be held liable for failing to investigate the consensual pedigree of their raw materials, we believe the Legislature should make that decision. Complex policy choices affecting all society are involved, and "[l]egislatures, in making such policy decisions, have the ability to gather empirical evidence, solicit the advice of experts, and hold hearings at which all interested parties present evidence and express their views . . . ." (*Foley v. Interactive Data Corp.* ***

Finally, there is no pressing need to impose a judicially created rule of strict liability since enforcement of physicians' disclosure obligations will protect patients against the very type of harm with which Moore was threatened. So long as a physician discloses research and economic interests that may affect his judgment, the patient is protected from conflicts of interest. Aware of any conflicts, the patient can make an informed decision to consent to treatment, or to withhold consent and look elsewhere for medical assistance. As already discussed, enforcement of physicians' disclosure obligations protects patients directly, without hindering the socially useful activities of innocent researchers.

For these reasons, we hold that the allegations of Moore's third amended complaint state a cause of action for breach of fiduciary duty or lack of informed consent, but not conversion.

[38] "'The foundation for the action for conversion rests neither in the knowledge nor the intent of the defendant. . . . [Instead,] "the tort consists in the breach of what may be called an absolute duty: the act itself . . . is unlawful and redressible as a tort."' (*Byer v. Canadian Bank of Commerce* (1937). See also *City of Los Angeles v. Superior Court* (1978) ["[c]onversion is a species of strict liability in which questions of good faith, lack of knowledge and motive are ordinarily immaterial."].)