

# *A Twitch upon a Thread*

## **REGULATION OF HUMAN TISSUE USE IN AUSTRALIA AND THE APPLICATION OF PROPERTY LAW**

*by*

*Imogen Goold, BA(Hons), LLB*

*Submitted in fulfilment of the requirements for the Degree of Doctor of Philosophy (Law)*

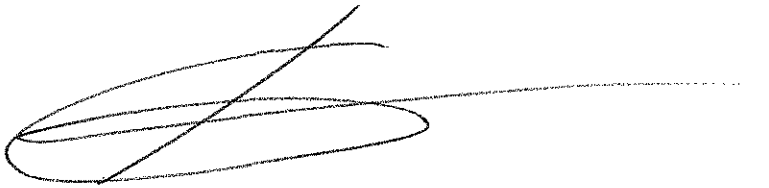
*University of Tasmania, November 2004*

I caught him with an unseen hook and an invisible line which is long enough to let him wander to the ends of the world and to bring him back with a twitch upon the thread.

as quoted in *Evelyn Waugh*, *Brideshead Revisited*

## *Declaration of Originality*

I declare that this thesis contains no material which has been accepted for a degree or diploma by the University or any other institution, except by way of background information and duly acknowledged in the thesis, and to the best of my knowledge and belief no material previously published or written by another person except where due acknowledgement is made in the text of the thesis.

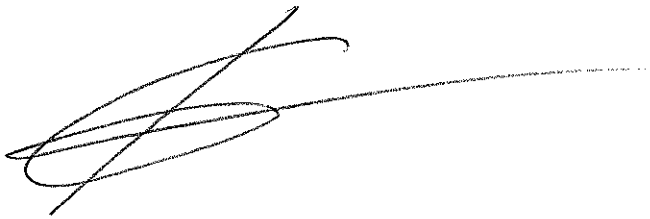
A handwritten signature in black ink, consisting of a large, stylized 'G' followed by a horizontal line extending to the right.

Imogen Goold

November 2004

*Statement of authority of access*

This thesis may be made available for loan and limited copying in accordance with the  
*Copyright Act 1968* (Cth).

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke extending to the right.

Imogen Goold  
November 2004

## ABSTRACT

Since the days of the body-snatchers, human bodies and their parts have been a valuable resource for science and medicine. They have been used for study, as the raw material for therapeutics and genetic research, as a source of transplant organs and for the creation of artistic works. In effect, human body parts are treated in many respects as items of property for they are possessed, controlled, used, transferred and destroyed. We even use the language of property to express how we experience our bodies – “I broke my arm”, “He donated his kidney”.

However, the Australian legal system has baulked at placing excised human tissue within the ambit of property laws. Mostly a consent approach is taken through legislation and ethical guidelines, with the exception of some case law that has upheld limited property rights in tissue. This situation is problematic in part because these guidelines and legislation cover only some limited uses of tissue, leaving the remainder in a legal vacuum. In the absence of any clear status for tissue having been established, it is not clear how the courts will or should approach alleged misuse of. In addition, the doctrine of consent fails to determine who may hold rights in tissue in a variety of circumstances. As a result, situations may arise where it is unclear how tissue may be used and who may use it. Given the value of tissue for biotechnology and medicine, this should be remedied.

One suggested approach to these problems has been the application of property law to human tissue. Due in part to the intuitive practicality of this approach given the current uses of tissue, and the common law cases upholding such an approach, this issue has generated considerable academic debate. This thesis seeks to examine the foundational issues that affect this debate to determine whether a case can reasonably be made for applying property law to human tissue. In drawing conclusions on the issues that face the debate, this thesis lays the groundwork for developing a comprehensive legal approach to tissue use that will address the current lack of consistency in the Australian legal system’s method of regulating tissue use.

It is concluded that it would be possible to regulate the use of human tissue through the laws of property and that the arguments in favour of doing so outweigh those against.

However, this conclusion is conditioned on the recognition that these rights should be subject to certain limitations.

## ACKNOWLEDGEMENTS

*For my mother.*

My first thanks goes to Professor Donald Chalmers, who guided me through many of the pitfalls of thesis writing. Always charming and entertaining, working with him was a pleasure and I owe him much gratitude for the opportunity he gave me when he first suggested I might perhaps 'like to write a little thesis'.

Thanks also to Professor Margaret Otlowski and Dr Dianne Nicol for encouragement, wise comments and esteem-bolstering support at critical moments of self-doubt. To them I am deeply grateful.

During the course of my candidature I spent time in the United Kingdom and the USA and would like to extend my appreciation to Professors Tony Honoré and James Harris of the University of Oxford for helpful discussions. My thanks also to Dr Jane Kaye, Dr Charles Erin, Sally Newman, Sister Mary Dorcan, Dr Mike Parker and to Drs Lucia Zedna and Josh Getzler for providing me with a bed and some challenges to my ideas. My thanks also to all who gave me interviews.

To all members of the Hastings Centre, New York, I am indebted to them for their time and hospitality, and thank Professor Thomas Murray, Ashby Sharpe, Professor Donna Dickenson and Mary Ann Hasbrouck. This research travel was funded by the McDougall Postgraduate Scholarship in Law and the Sir Henry Baker Memorial Fellowship, awarded by the Faculty of Law, University of Tasmania, to which I am also grateful.

My thanks also to the support staff of the Law School, Rachel Davis, David McGuire, Sue Butterworth, Gayle McElwee and particularly Peter Edwards

Many thanks to the staff at the Australian Law Reform Commission, who were all supportive as I struggled to complete this thesis while working on the Genetic Information Inquiry. Particular thanks to Professor David Weisbrot, Associate Professor Brian Opeskin, Professor Anne Finlay and Rosemary Adams for allowing me much-needed leave to complete.

For their particular help along the way, I thank my brother Benjamin Goold and his wife Lisa Gourd, Eliza Burke, Professor Loane Skene, Dr Roger Magnusson and Rohan Hardcastle. Also, my fond affection to Sebastian for all he did.

Last of all, my heartfelt thanks to my husband Mark for his love and support over the last six years.

# CONTENTS

<i>Introduction</i>	2
<i>Part I: Acquisition and Use of Human Tissue</i>	
INTRODUCTION	18
CHAPTER ONE: <i>Early History</i>	22
CHAPTER TWO: <i>Utilising the Body</i>	44
CHAPTER THREE: <i>Changing Technologies: The Body as Commodity</i>	81
CONCLUSION	106
<i>Part II: Regulating the Body</i>	
INTRODUCTION	109
CHAPTER FOUR: <i>Legislative Regulation: The Human Tissue Acts</i>	110
CHAPTER FIVE: <i>Guidelines</i>	149
CONCLUSION	185
<i>Part III: The Common Law and the Body</i>	
INTRODUCTION	189
CHAPTER SIX: <i>Corpses and the Common Law</i>	192
CHAPTER SEVEN: <i>Modern Uses: Straining at the Confines of the Coffin</i>	208
CONCLUSION	258
<i>Part IV: Human Tissue and the Concept of Property</i>	
INTRODUCTION	262
CHAPTER EIGHT: <i>What is Property?</i>	268
CHAPTER NINE: <i>Can Human Tissue Fit Within the Concept of Property?</i>	280
CHAPTER TEN: <i>Human Tissue and Philosophical Justifications for Property</i>	299
CONCLUSION	321
<i>Part V: Should Human Tissue Be Property?</i>	
INTRODUCTION	325
CHAPTER ELEVEN: <i>Can Property Law Meet the Challenges of Tissue Use?</i>	328
CHAPTER TWELVE: <i>The Commercialisation Debate</i>	373
CONCLUSION	404
<i>Conclusion</i>	406
<i>Bibliography</i>	419