



AUTHOR(S):

TITLE:

YEAR:

Publisher citation:

OpenAIR citation:

Publisher copyright statement:

This is the _____ version of an article originally published by _____
in _____
(ISSN _____; eISSN _____).

OpenAIR takedown statement:

Section 6 of the "Repository policy for OpenAIR @ RGU" (available from <http://www.rgu.ac.uk/staff-and-current-students/library/library-policies/repository-policies>) provides guidance on the criteria under which RGU will consider withdrawing material from OpenAIR. If you believe that this item is subject to any of these criteria, or for any other reason should not be held on OpenAIR, then please contact openair-help@rgu.ac.uk with the details of the item and the nature of your complaint.

This publication is distributed under a CC _____ license.

Theft, Property Rights and the Human Body – A Scottish Perspective

Jonathan Brown

Glasgow School for Business and Society, Department of Law, Economics, Accountancy and Risk, Glasgow Caledonian University.

Abstract

*The notion of proprietary rights in human biological material is one which, until recently with the case of *Yearworth v. North Bristol NHS Trust* [2010] QB 1, the English courts have heavily resisted. Consequently it has been assumed by many legal commentators, and even some judges, that Scots law is also hostile to the notion.*

This article analyses the historical context of Scots law and avers that the law of Scotland is, in fact, quite different from that of England in this regard. The submission is substantiated by reference to historic legal cases, contemporary sociological and technological developments in Scotland and the inapplicability of the English legal tenets which prevent recognition of proprietary rights in the human body to this jurisdiction.

Having argued in favour of the existence of proprietary rights in human biological material in Scotland, the article then asks, and answers, the question ‘in whom is the ownership right vested?’.

In order to answer this question, and throughout the course of the article, relevant literature and case law are reviewed comprehensively. The benefits which may be enjoyed as a result of the recognition of such rights of property are also argued and debated and consequently the article concludes with a full summary of all relevant arguments and points of discussion.

Introduction

The law precluding the ownership of human biological material is thought to be as firmly settled in Scotland as it is in England. The recent decision by Lord Brodie in *C v. Advocate General for Scotland*¹ saw his lordship state, in passing, that there can be no rights of ownership in a human corpse.² The plain and simple nature of this statement illustrates that, although it appears that the existence of a rule precluding ownership of a human corpse or biological material has never been challenged or argued against in the Scottish courts,

¹ *C v. Advocate General for Scotland* (2012) S.L.T 103.

² *Ibid.*, para. 63.

the judiciary presently appears to assume that the legal maxim ‘Dominus membrorum suorum nemo videtur’ (‘no one is to be regarded as the owner of his own limbs’)³ applies in Scotland.

In the recent House of Lords case of *R v. Bentham*,⁴ Lord Rodger cited this maxim through the course of his judgment,⁵ illustrating that it firmly forms a part of English law.

Although it may be assumed, *prima facie*, that the law of Scotland follows a similar vein to that of England on this matter, and that there can be no property in a whole corpse or living person, this area of law nevertheless merits examination, particularly given the fact that the case of *Yearworth v. North Bristol NHS Trust*⁶ suggests that the law of England is looking to reanalyse this position with a view to permitting recognition of proprietary rights.⁷

This article assesses the applicability of the English legal reasons which preclude the ownership of a corpse to the general principles, history and development of the law of Scotland in this area. It examines the relevance of the tenets of English law in light of recent advances in medical technology and radical changes concerning sociological and spiritual thought. Further, the case of the case of *Dewar v. HMA*,⁸ in which Lord Moncrieff stated, *obiter*, that a corpse could be stolen at any point prior to interment, is considered.⁹ The 1733 case of *M’Kenzie*,¹⁰ along with the commentary on the subject of crimes by the institutional writer Burnett,¹¹ also suggest that in Scotland, unlike in England, a corpse can be the subject of theft.

The two main questions which this position raises – namely, how can a dead body be stolen if it is not property for the purposes of law and, if it can be stolen, from whom is the enjoyment of property deprived – are addressed in the course of this article. The relevance of the silence of the Human Tissue (Scotland) Act 2006¹² on the issue of proprietary rights in human biological material is critically examined and the present Scottish common law position inferred from legal analysis.

³ Ulpianus, *On the Edict*, Book XVIII, Dig. 9.2.13 18 Ad Ed.

⁴ *R. v. Bentham* [2005] UKHL18.

⁵ *Ibid.*, para. 14.

⁶ *Yearworth v. North Bristol NHS Trust* [2010] Q.B. 1.

⁷ *Ibid.*, para. 45(a).

⁸ *Dewar v. HMA* (1945) J.C. 5.

⁹ *Ibid.*, 14.

¹⁰ *M’Kenzie* (1733), heard before Lord Milton and reported in J. Burnett, *A Treatise on the Various Branches of the Criminal Law of Scotland* (Edinburgh: George Ramsey and Company, 1811), 124.

¹¹ Burnett, *A Treatise* (note 10), 124.

¹² Human Tissue (Scotland) Act 2006 asp 4, www.legislation.gov.uk/asp/2006/4/pdfs/asp_20060004_en.pdf.

The Need for a Reanalysis

In the case of *Yearworth*, it was stated that scientific developments in the United Kingdom are such that the present common law position is inadequate and requires reanalysis.¹³ The developments which related specifically to *Yearworth* concerned the storage of frozen sperm samples. It is clear from this that their lordships would have had matters such as in vitro fertilisation (IVF) treatment firmly in mind when passing their judgment, and it is not too much of a stretch to suggest that their comments may also refer to matters such as organ donation. It is quite obvious that these named developments of science, which led the Court of Appeal to state that such a need for re-evaluation exists in England, also affect Scotland.¹⁴

On a matter such as this, which raises a variety of ethical questions, it is evident that the jurisprudence of one nation in the western world may be influenced by legal reasoning in another similar jurisdiction, or at least in one where moral thinking and history may be regarded as closely linked. Indeed, on this matter specifically, one can see quite clearly that the law of England was heavily influenced by the Australian High Court decision of *Doodeward v. Spence*,¹⁵ as the cases of *R v. Kelly*¹⁶ and *Yearworth* refer to this judgment with approval. The English Human Tissue Act 2004¹⁷ utilises the words of Chief Justice Griffith from that case,¹⁸ stating the now accepted view that one may have a right to possess human biological material only if ‘human work or skill’ are applied to it, and said body part resultantly acquires different attributes.¹⁹

A reanalysis of English law in this regard may be difficult, since Lord Justice Rose stated in *R v. Kelly* that, although the common law does not stand still:

‘[I]f that principle is now to be changed, in our view, it must be by Parliament, because it has been express or implicit in all the subsequent authorities and writings to which we have been referred that a corpse or part of it cannot be stolen.’²⁰

¹³ *Ibid.*, para. 45(a).

¹⁴ IVF treatment is available on the NHS in both Scotland and England; www.nhs.uk/chq/Pages/889.aspx?CategoryID=68&SubCategoryID=154.

¹⁵ *Doodeward v. Spence* (1908) 6 C.L.R. 406.

¹⁶ *R v. Kelly* [1999] Q.B. 621.

¹⁷ Human Tissue Act 2004 ch. 30, www.legislation.gov.uk/ukpga/2004/30.

¹⁸ *Ibid.*, s. 32(9)(c).

¹⁹ The logic of confining this right of possession solely to instances where human work or skill have been applied was stated to be illogical in *Yearworth* (note 6), para. 45(d); from this it is clear that English law is moving towards proprietor rights coming into existence.

²⁰ *R v. Kelly* (note 16), 630.

But what of the Scots law position? Theft of corporeal property in Scotland is an entirely common law crime, while the crime of theft in England is almost entirely codified by statute.²¹ Although there can be no doubt that precedent from England may be regarded as persuasive or influential in a Scottish court where controversial issues are concerned, and vice versa, this procedural difference may lead to doubt as to the actual applicability of authority of one jurisdiction in the other, as established by the fact that *Dewar v. HMA* was given no consideration in *Kelly*, in spite of the relevance which the former judgment may have had on the decision of the latter case. If the authority of *Dewar* was anything other than specifically Scottish, there is little doubt that counsel would have utilised it in its submissions. As a result, an important difference between Scots and English law is revealed.

It may be inferred from this difference that there is no need for parliamentary intervention in Scotland, as direct precedent from the Inner House on a matter should be regarded as being far more persuasive in court than a multitude of English cases, even if the Scots authority is merely obiter. This is particularly true where an inter-jurisdictional interpretation of authority is not made north and south of the border. In addition, the Scottish Parliament had the opportunity, during the passing of the 2006 Act, to clarify the law in this regard by expressly affirming the allegedly extant ‘no property in a corpse’ rule, yet it neglected to do so. In failing to prohibit the existence of proprietary rights in human biological material, Parliament may have left scope for the ever-evolving common law of Scotland to look back on its distinct traditions and advance in a manner which takes into account the nature of life in the twenty-first century.²² Such scope is available since the ‘no property’ rule is not at all definite in Scotland, as will be shown, and indeed, Scots law may diverge radically from English on this matter.

That is not to say that there are no hurdles in the way of such progress being made. Indeed, it appears that the prevailing attitude of the Scottish judiciary is an assumption that no proprietary rights may be vested in a corpse, given the judgment of Lord Brodie in *C*.

It would appear that the 1898 sheriff court case of *Robson v. Robson*²³ had some impact on his lordship’s judgment,²⁴ as the sheriff in that case was of the opinion that the law of Scotland was as settled as the law of England.²⁵ However, the sheriff did briefly consider *M’Kenzie*, reported in Burnett’s treatise,²⁶ which

²¹ In the Theft Act 1968 ch. 60.

²² Techniques relating to the storage of the organs of a deceased donor are but one example of the differences between life in the twenty-first century and any other time period; see S. Mukherjee, ‘Organ Preservation’ (Medscape Reference 2011), <http://emedicine.medscape.com/article/431140-overview>.

²³ *Robson v. Robson* (1898) S.L.T 445 351.

²⁴ *C v Advocate General* (note 1), para. 52.

²⁵ *Robson* (note 23), 352.

²⁶ Burnett, *A Treatise* (note 10), 124.

he regarded as a discrepancy rather than sound law.²⁷ According to Burnett, in *M'Kenzie* a charge was brought after a corpse was stolen from a house.²⁸ Although the accused was acquitted, the charge was sustained as relevant. While the case of *HMA v. Couetts*²⁹ states that the charge in *M'Kenzie* was one of 'Ryot and Violence', the fact that Burnett discussed the case in his chapter on theft must be regarded as relevant. In light of the comments in *Dewar* it would appear that the 'better' opinion prevailing at the end of the nineteenth century was not the view held by Lord Moncrieff.³⁰ Rather, it would seem that theft of a corpse is indeed possible, if the theft is committed prior to internment, on the authority of *M'Kenzie* compounded with *Dewar*.

With the greatest respect to the judgment of Lord Brodie, the point of possible property in cadavers was not raised by counsel in *C* and the possible existence of such property rights in Scots law was not contended. Nor, in this case, were the cases of *M'Kenzie* or *Dewar* cited or considered. The sheriff in *Robson* had considered the 'no property in a corpse' rule to be firmly settled in Scotland, definitively stating that 'there is no right of property in a dead body',³¹ due to his interpretation of the prevailing legal opinion of the time which suggested that, in spite of precedent authority,³² a corpse could not be stolen. Without regard for the opinion of the sheriff, Lord Moncrieff adopted the opposite view 47 years later – thus illustrating that there may be instances in which the law appears to be quite clear, but is in fact ambiguous or unsettled.

It is also interesting to note that 'infant' children may be stolen according to Scots law.³³ While it is thought that a person cannot be stolen after the age of puberty,³⁴ the classification of a human being as 'property' in its formative years cannot be disregarded. While some legal commentators regard this form of theft as a special crime,³⁵ it is nonetheless true that the recognition of the possibility of a living person being stolen heavily implies the existence of pro-

²⁷ *Robson* (note 23), 352: '[a] charge of theft of a corpse ... was sustained; but the better opinion is that this is wrong and that a corpse is extra commercium'.

²⁸ *M'Kenzie* (note 10), heard before Lord Milton.

²⁹ *HMA v. Couetts* (1899) 3 Adam 50.

³⁰ In the words of the sheriff.

³¹ *Robson* (note 23), 354.

³² Burnett, *A Treatise* (note 10), 124.

³³ D. Hume, *Commentaries on the Law of Scotland Respecting the Description and Punishment of Crimes* (Edinburgh: Bell and Bradfute, 1797-1800) 84.

³⁴ J.H.A. MacDonald, A. *Practical Treatise on the Criminal Law of Scotland*, 5th ed., eds J. Walker & D.J. Stevenson (Edinburgh: W. Green Publications, 1948), 21; G. Gordon, *The Criminal Law of Scotland*, Vol. II, 3rd ed., ed. M.G.A. Christie (Edinburgh: W. Green and Sons Ltd 2001), para. 14.21.

³⁵ T.H. Jones & M.G.A.Christie, *Criminal Law*, 4th ed. (Edinburgh: W. Green and Sons, 2008), paras 10-15.

proprietary rights in respect of human biological material. In addition, there is case law to suggest that *plagium*³⁶ is simply a form of aggravated theft.³⁷

Accordingly, it is averred that had the distinct nature of Scots law in this regard been discussed, had the applicability of the English tenets which dictate the existence of the ‘no property’ rule been challenged, and had *M’Kenzie* been given adequate consideration alongside the dictum of Lord Moncrieff, the judgment on this point in the case of *C* would have been quite different. The applicability of the maxims of English law to the Scottish jurisdiction is discussed below.

The English Tenets and the Scottish Position

In *Yearworth*, the Court of Appeal further reaffirmed Ulpian’s maxim,³⁸ and restated the three tenets of English law which preclude ownership of human bodies and biological material.³⁹

The first stated tenet precluding ownership of human biological material is the maxim nominated by Ulpian and further extended by *R v. Bentham*; that is to say, simply the principle that there is no right of ownership, or even possession, in a human body, living or dead. The Court in *Yearworth* cites two consequences of this proposition, stating:

‘One consequence of the principle, albeit not recognised until the nineteenth century, is that, if our bodies cannot be our own property, it follows that they cannot be the property of other persons; and that therefore we cannot sell ourselves, or be sold, to others. Another consequence is that, if we do not own our bodies, we have no right to destroy them, ie to commit suicide’.⁴⁰

The latter consequence necessitated legal reform in England in the form of the Suicide Act 1961,⁴¹ which abrogated the law prohibiting suicide in England and Wales.⁴² Prior to the passing of this Act, suicide and attempted suicide⁴³ were criminal offences under English law⁴⁴ which could see one forfeiting proprietary rights in one’s estate and being sentenced to a ‘shameful’ burial.

³⁶ As child stealing is referred to by the institutional writers.

³⁷ *Rachel Wright* (1809) mentioned in Gordon, *Criminal Law* (note 34), para. 14.26.

³⁸ *Yearworth* (note 6), para. 30.

³⁹ *Ibid.*, paras 30-33.

⁴⁰ *Ibid.*, para. 30.

⁴¹ Suicide Act 1961 ch. 60, www.legislation.gov.uk/ukpga/Eliz2/9-10/60.

⁴² *Ibid.*, s.1.

⁴³ See *The King v. Mann* [1914] 2 K.B. 107.

⁴⁴ One who committed such an act would be named *felo de se* (felon of oneself).

This brings us to the first difference between the law north and south of the border, which is that suicide has not been a crime under Scottish law⁴⁵ since an indeterminate time before the start of the nineteenth century.⁴⁶ Accordingly, if the logic of the nominated consequences in *Yearworth* is reversed, it would appear that a consequence of the right of destruction which is present in Scotland through no statutory intervention is that there must be some degree of ownership in the human body, as one would have no such right if there was not.

The prohibition on the sale of the human body, or derivative parts of it, is now codified in statute in Scotland⁴⁷ and England.⁴⁸ These provisions raise a vital question; if indeed there is no right of ownership or possession in a human body, then exactly how can such material be sold? If no one in law can have any right to the thing in question then title to it cannot logically be transferred by one individual to another, as there is no recognisable real right to be passed by the sale. The buyer would, in this instance, have as much – or as little, depending on one's point of view – right to the item prior to the sale as the seller at the same point. The Romans referred to such an article as being *res extra commercium* (a thing outside commerce). There was thus no need for legislation to prohibit the sale of, for example, the city walls, as their sale was impossible as a result of this doctrine.

However, the notion of the doctrine of *res extra commercium* as being a maxim which precludes all ownership may be doubted in Scotland for two reasons. The first is Burnett's comments:

'By law of Scotland, everything that is moveable may be the subject of theft, whether it is moveable property strictly so called, or made moveable by the act and deed of the away taker... Everything may be the subject of theft that can be carried off, and is not the property of the away-taker'.⁴⁹

The second is that the Scottish Law Commission, in its 1976 report on corporeal moveable property,⁵⁰ took the view that while property which is regarded as *extra commercium* cannot be sold, it can nevertheless be the subject of ownership, on the authority of the case of *Presbytery of Edinburgh v. University of*

45 See 'Euthanasia and Physician Assisted Suicide, Do the Moral Arguments Differ?', www.bma.org.uk/ethics/end_life_issues/Euthanasia/physicianassistedsuicide.jsp?page=4#.T3CrEDGXvTo, 22 September 2006.

46 D.M. Walker, *A Legal History of Scotland VI* (Tottel Publishing: Butterworth, 2001), ch. 15, 'Criminal Law', 417.

47 Human Tissue (Scotland) Act 2005 (note 12) s. 20.

48 Human Tissue Act 2004 (note 17) ch. 30, s. 32.

49 Burnett, *A Treatise* (note 10) 124.

50 Scottish Law Commission, Memorandum No. 30 Corporeal Moveables Usucaption or Acquisitive Prescription (31 August 1976).

Edinburgh.⁵¹ In cases such as these, the owner of property *extra commercium* is the State.

This is of particular interest as the learned sheriff in *Robson* had regarded corpses as being *extra commercium* and was of the opinion that a consequence of the human corpse holding this status was that it could not be the subject of property. The above points provide further evidence that this is not the case. As a result, *Robson* is not a sound authority which can be relied upon.

It has already been stated that the Scottish Act is silent on the question of whether or not any part of the human body may be property for the purposes of law, or legally possessed. However, this is open to argument. As it is absolutely necessary for proprietary, or at least possession, rights to be vested in a thing in order for a sale or supply of said thing to occur, the fact that Parliament saw fit to introduce section 20 to this Act implies some degree of legislative recognition of the potential existence of human biological material as property. That said, it has been suggested⁵² that the prime reason the existence of property rights in human material has been denied is to prevent the commodification of such material, as it may be felt immoral or unethical to trade in human tissue.⁵³ To continue to deny such property rights on this ground is, however, fundamentally flawed, given the explicit prohibition on commercial dealings.

Scope exists for a similar argument to be advanced in England, although the likelihood of its success in that jurisdiction may be doubted, as the comments of Lord Justice Rose in *R v. Kelly* appear to suggest that the law is too firmly settled south of the border for the legislative change to be made implicitly.

Although *R v. Kelly* may fall to be considered by a Scottish court, it would not be at all legally binding on it and ergo it is open for the court to infer that recognition of rights in biological material has been acknowledged legislatively by implication. *Dewar* and *M'Kenzie* are specifically Scottish cases which recognise the possibility of corpses being stolen and, as such, provide authority that proprietary rights may be vested in a corpse. Combined with the fact that section 20 of the 2006 Act negates any argument that human biological material is to be regarded as *res extra commercium* in Scotland, and the fact that the silence of the act does nothing to prohibit the existence of proprietary rights in corpses, it would appear that there is more authority to suggest that the law of Scotland appears to recognise the possibility of ownership in dead bodies than not.

⁵¹ *Presbytery of Edinburgh v. University of Edinburgh* (1890) 28 S.L. Rep. 567, as per Lord Wellwood 573.

⁵² For a discussion on this topic, see A. George, 'Property in the Human Body & Its Parts, Reflections on Self-Determination in Liberal Society', Florence EUI Working Paper LAW 2001/8 (European University Institute, Florence, 2001), <http://cadmus.eui.eu/bitstream/handle/1814/172/law01-08.pdf>.

⁵³ See also S. Fait, 'Ethical Aspects of Genetic Engineering and Biotechnology', *Verso un Mondo Nuovo* (2012), <http://versounmondonuovo.wordpress.com/2012/05/06/ethical-aspects-of-genetic-engineering-and-biotechnology/>.

Notwithstanding these points, it is evident that the law may prohibit the sale or supply of items in which a right of property or possession may be vested without prejudicing the existence of such rights. For example, the Misuse of Drugs Act 1971⁵⁴ states that the supply of controlled substances is not lawful,⁵⁵ but this does not at all detract from the fact that such substances are property for the purposes of law and can be stolen, at least where the owner is in legal possession thereof.⁵⁶ This shows that while the law may prohibit the sale of the human corpse or derivatives thereof, such prohibition does not automatically render cadavers *res extra commercium* or incapable of being the subject of ownership.

That the law imposes limitations on personal autonomy and in some instances dictates what one may choose to do or refrain from doing with one's own body is not a convincing argument against the existence of proprietary rights, due to the fact that no one could logically deny that a homeowner who legally possesses land which is subject to a real burden or a servitude is not the rightful and lawful owner of that property, simply because this ownership is subject to conditions. Indeed, Bankton states that the law commonly places burdens on all forms of property.⁵⁷

The applicability and influence of the second nominated tenet in the twenty-first century may be disputed on rather more simple and contemporary grounds. This reason was incorporated into English law as a result of allusions made by Coke and Blackstone in their writings.⁵⁸ The notion is, quite simply, that the human body is the temple of the Holy Ghost and it would be sacrilege to do anything with it other than to, in the words of the Court of Appeal in *Yearworth*, 'bury it and let it remain buried'.⁵⁹

Setting aside, for the moment, arguments as to the status of religion and legal thought in relation to its place in twenty-first century society, the issue with the applicability of this maxim may be quickly identified; cremation has long been recognised as a legal and ethically acceptable method to dispose of corpses in the United Kingdom, with several cases in the late nineteenth century ruling the practice to be permissible,⁶⁰ prior to explicit legislation being passed in 1902 to ensure that the legality of cremation became unambiguous.⁶¹ Given that it is quite trite to say that burning a body is not following the accord of

⁵⁴ Misuse of Drugs Act 1971 ch.38.

⁵⁵ *Ibid.*, s.4(1)(b).

⁵⁶ There have been a number of reported instances of theft of controlled drugs; see *R v. Adam Mark Dyer* [2007] EWCA Crim 90.

⁵⁷ See Lord A.M. Bankton, *An Institute of the Laws of Scotland* (Stair Society, reprinted 1993), 505.

⁵⁸ *Yearworth* (note 6), para. 31.

⁵⁹ *Ibid.*

⁶⁰ See *Williams v. Williams* (1882) 20 Ch. Div. 659; *The Queen v. Price* (1884) 12 Q.B.D. 247; *In Re Dixon* (1892) P.D. 386-393, *Robson* (note 23).

⁶¹ Cremation Act 1902 ch.8.

traditional Christian principles,⁶² one may see quite clearly why this principle is not applicable to Scotland at the time of writing.

Cremation was prohibited in the Catholic Church as a result of the 1917 Code of Canon Law (No. 1203). This prohibition was waived in 1963, though as per the 1983 Code of Canon Law (No. 1173, 3) the Catholic Church continues strongly to recommend burial. The Eastern Orthodox Church continues to enforce a general prohibition on cremation as per the decision of the Council of Bishops of the Russian Orthodox Church in 1932,⁶³ which held that:

‘As a matter of principle, the incineration of the bodies of Orthodox Christians in crematoria is not permitted, in view of the fact that this custom has been introduced by atheists and enemies of the Church. In all individual, extenuating circumstances, the decision is left to the diocesan bishop’.⁶⁴

Although there is no singular, unified Protestant Church and examination of each individual theological school of thought is outside the scope of this article, the general protestant position appears far more permissive than the aforementioned sects, with the notion that ‘God can resurrect a bowl of ashes just as conveniently as he can resurrect a bowl of dust’ being cited as a valid interpretation of Christian accord.⁶⁵ As a result of the differences between denominations, however, contemporary protestant thought in relation towards cremation cannot at present be discussed in any great detail.

Regardless of current thinking, cremation was seen by early Christians to be a violation of theological thought in relation to the resurrection of Christ. Consequently, burial was necessary for the resurrection of all Christian souls. Certain biblical passages have been interpreted by many scholars as explicitly decreeing that only burial follows the accord of Christian principles⁶⁶ and as such, in spite of the fact that there is certainly no overarching consensus, it may be concluded that the permissibility of cremation is a deviation from conventional Christian dogma. Therefore, the legality of the practice in the United Kingdom suggests that the law cannot be founded on conventional Christian principles and, accordingly, the second tenet cannot be held to apply to Scotland, and indeed may no longer be regarded as applicable in England or Wales.

Although the above may possibly be regarded as adequate grounds to dismiss the applicability of the second tenet in current law, its applicability may be further disputed by following current twenty-first century jurisprudence and ob-

⁶² As the Orthodox interpretation of Genesis 3:19, ‘Earth thou art, and unto earth thou shalt return’, suggests.

⁶³ <http://orthodoxinfo.com/death/cremation.aspx#sobor>.

⁶⁴ <http://orthodoxinfo.com/death/cremation.aspx>.

⁶⁵ <http://thefuneralsource.org/alto102.html>.

⁶⁶ Notably Genesis 3:19 and Psalm 23:1.

serving the general decline in spirituality in both western society and Scotland, combined with the fact that Scotland and England are multicultural societies with a rich mosaic of differing faiths and philosophies. It is not at all logical to suggest that the law should preclude the recognition of a right of ownership over cadavers on this ground, either in Scotland or in England.

As it has now been shown why the first ground does not apply to Scotland and the second should not apply to either Scotland or to England, we turn to the third nominated tenet. This is simply that it would not serve the interests of public health to allow disputes and arguments over the precise ownership of a human corpse, as the corpse must be given a speedy burial⁶⁷ in order to prevent it rotting. While no doubt true, and indeed ostensibly applicable to Scotland, this reason is offset by advances in technology, since it is possible to preserve a corpse for a more or less indefinite period. Indeed, recent advances in cryonic technology essentially allow for a legally dead but biologically living human body to be preserved for an extended period of time without suffering the effects of age, let alone decay.⁶⁸ Although it may be conceded that this was once a relevant and logical reason to preclude ownership of corpses, it quite clearly does not apply in the twenty-first century, as public health would not be compromised should a dispute occur over ownership of a corpse – the dead body could simply be kept refrigerated in a morgue until the conclusion of the case.

This issue, unlike the others listed, lies outside the scope of legal or ethical reasoning as it is simply a consequence of advances in science. It has long been evident that the law cannot prepare for new developments in technology quickly enough, and that technology progresses at a far faster pace than most people's views of morality can accept or tolerate. However, refrigerator technology has been commonplace for at least 90 years⁶⁹ and has been extant in a number of forms for several centuries;⁷⁰ recognition of its utility in preventing corpse decay is far from new. In this instance, the law must accept what has long been scientific reality.

To conclude, it is clear that the latter two principles may have been applicable to both Scotland and England at one time. However, this is certainly no longer the case, as the influence of Christianity in the United Kingdom is no longer as great as it used to be and the nation is now multicultural. Precluding rights of ownership in dead bodies for reasons of public health is illogical and unnecessary, as technology now allows living and dead human biological material

⁶⁷ The word 'burial' having been specifically used by Mr Justice Higgins in *Doodeward v. Spence* (1908) 6 C.L.R. 406 422 and referenced again in *Yearworth* (note 6).

⁶⁸ www.cryonics.org/reprise.html.

⁶⁹ See www.history-magazine.com/refrig.html.

⁷⁰ Cooling technology was first demonstrated in 1748 at the University of Glasgow; see www.mahalo.com/refrigerator/.

to be stored for indefinite periods of time. The Court of Appeal in *Yearworth* would consider these factors to be the advancement of civilisation.

The applicability of the first principle to Scotland is doubtful, given divergences in the law between the two jurisdictions. There is authority to suggest that human corpses can be stolen in Scotland, while no such authority exists in England. It may also be suggested that the doctrine of *res extra commercium* in Scotland does not apply in respect of the human body, given Burnett's commentary on the matter combined with the fact that the Scottish government brought specific legislation into effect to preclude the sale of human biological material. That said, even if the doctrine does apply with regard to the human corpse, it does not actually serve to prevent proprietary rights existing. Finally, the right of destruction which one has over one's own body at common law in Scotland implies that one must hold some degree of ownership in oneself, given the judgment of the Court of Appeal in *Yearworth*.

This illustrates that the law of Scotland diverges quite radically from that of England, as the distinct history, developments and traditions mentioned above show that the first tenet precluding ownership of human biological material is inapplicable in Scotland. Although the English Human Tissue Act 2004 also specifically prohibits the sale of human biological material, and thus one may equally imply a recognition of ownership in England as a result of that, the lack of a common law right of destruction of one's body in that jurisdiction, combined with the comments of Lord Justice Rose in *R v. Kelly*, suggests that property rights in corpses in England cannot come into being without explicit legislation.

In whom is the Ownership Right Vested?

It is trite to say that a thing cannot be stolen if it is owned by no one.⁷¹ Therefore, as precedent authority suggests that corpses may be stolen in Scotland, it there must be an owner. Exactly who that person is, however, is difficult to determine.

A variety of persons may be considered as potential owners of the human corpse,⁷² and there are a number of instances in which ownership may arise.⁷³ In the case of deceased persons who have left no special directions as to the fate of their corpse, two parties in particular may make claim on it – the executor of the deceased's estate and the State.

The executor of the deceased's estate may claim ownership of the corpse for several legal, and a number of moral, reasons. Leaving aside the moral argument

⁷¹ See MacDonald, *Practical Treatise* (note 34), 16.

⁷² For example, the State, the Church, executors of the deceased's estate, hospitals or museums.

⁷³ For example, donation of the body for purposes of display or medical research.

for the moment, the first of these reasons is the fact that it is certainly open to argue in Scotland, although not in England as a result of *R v. Bentham*, that one may hold property rights in one's own whole⁷⁴ living body. Such an argument is grounded in classic and contemporary legal definitions of possession and ownership, combined with the fact that the maxim *dominus membrorum suorum nemo videtur* is not affirmed in any Scots precedent and, as such, there is nothing in Scots law precluding the application of these definitions to the human body itself.

It is firmly settled in Scotland that possession arises if a person who holds an object has detained the item with the intention of holding it as property.⁷⁵ It is equally settled that the existence of a right of possession presumes property in relation to moveables,⁷⁶ which is not the case in England.⁷⁷ The act necessary to cause the occurrence of detention varies, depending on the nature of the thing in question,⁷⁸ but what is always necessary to bring this to effect is the attainment of exclusive physical control.⁷⁹

The fact that an individual has exclusive physical control over his or her own body is obvious from the fact that all others are naturally debarred from attaining any legal form of control over it. As has been stated, individuals have the common law right in Scotland to choose the time and nature of their own death should they have the physical capability to bring about that end themselves. From this one may conclude that the living person is, according to Scots law, in corporeal possession of his or her own body.

There is a great deal of authority from the institutional writers to suggest that if corporeal possession is lawful, intention to possess will be presumed.⁸⁰ Notwithstanding this fact, both elements which display intention to possess can easily be illustrated with respect to the human body, by the simple fact of the individual choosing to live. The first of these is the intention to exercise exclusive physical control over the thing detained,⁸¹ which may be illustrated throughout the whole of the individual's life by the fact that they have not chosen to vacate the body by means of suicide. The second element indicative of intention is the intent to exercise control for the benefit of oneself. This intent is

⁷⁴ Parts and derivatives of the body which are disconnected from it yet still 'living' may become the subject of property in England as per *Yearworth* (note 6).

⁷⁵ See *Bell's Principles of the Laws of Scotland* (Edinburgh: T&T Clark, 1899), ch. 3, para. 1311.

⁷⁶ *Ibid.*, para. 1313.

⁷⁷ *Ibid.*

⁷⁸ See *Young v. North British Railway Co.* (1887) 14 R (H.L.) 53.

⁷⁹ *The Laws of Scotland: The Stair Memorial Encyclopaedia*, Vol. 18, *Property* (LexisNexis/Law Society of Scotland, 1991) para. 119.

⁸⁰ *Ibid.*, para. 123; Stair, *The Institutions of the Law of Scotland* (Edinburgh: Edinburgh University Press, 1981), 1, 17; Bankton *An Institute* (note 57), 1-26.

⁸¹ *Stair Memorial Encyclopaedia* (note 79), para. 123.

evidently present in all living individuals, since it is impossible to sell oneself lawfully into slavery in the United Kingdom.

In spite of the above, the argument that the executor of the deceased's estate is the owner of the corpse has a number of problems, primarily the fact that it presupposes the existence of a next of kin. This challenge may be refuted as it could be countered that, in such circumstances, ownership may nevertheless be vested in the administrators of the estate, as the duties normally placed on an executor fall to them in the absence of such a person.⁸² However, there is a great deal of authority⁸³ which states in strict terms that an executor holds no right of property in the corpse of the deceased. Such authority, although cited in *C*, is English and accordingly can be viewed as a direct result of the 'no property' rule; therefore its continuing relevance to Scotland may be brought into question. A stronger argument against the existence of proprietary rights being vested in an executor is the fact that the executor is not legally bound to follow any special direction as to the disposal of the corpse of the deceased.⁸⁴ This suggests one of two things. Either the body of the deceased was not that person's own property in life and thus the executor is disbarred from claiming any vested right in it on the grounds that if the corpse formed a part of the estate, the executor would be bound to dispose of it as directed,⁸⁵ or that the death of the individual is to be regarded as an abandonment of the property, meaning that a human corpse is rendered *res nullius*.⁸⁶

As a consequence, the possibility of State ownership should be examined. It is thought to be the case that the Crown 'fills any hiatus in ownership'⁸⁷ should property be abandoned by its owner, thus if the latter position is regarded as the legal reality then the State may be regarded as appropriating ownership on the death of the individual. In addition, the State may be able to further substantiate its claim to ownership of the corpse by arguing that a dead body is property which is *extra commercium* and is thus not subject to private ownership.⁸⁸ While it may be countered, as has been stated, that the existence of section 20 of the 2006 Act suggests that the human corpse is not *extra commercium* in Scotland, since that section would be redundant if a corpse truly was a thing outside commerce, some regard may nevertheless be paid to the comments made by the learned sheriff in *Robson*. While there is no doubt, on the basis of

⁸² *C v. Advocate General* (note 1), para. 46.

⁸³ Listed in *C v. Advocate General* paras 44-47.

⁸⁴ *Stair Memorial Encyclopaedia* (note 79), para. 506.

⁸⁵ As he/she is with all property of the testator, unless such direction in the testament is successfully challenged in court.

⁸⁶ Meaning 'owned by no one'.

⁸⁷ Jones & Christie, *Criminal Law* (note 35), paras 10-13.

⁸⁸ See R. Pound, *An Introduction to the Philosophy of Law* (Oxford: Oxford University Press, 1930), ch. V, 'Property'.

the cited authority, that the sheriff erred in his statement that the law of Scotland is as settled as the law of England with regard to the existence of property rights in corpses, the fact that he regarded them as *extra commercium* cannot be so readily overlooked. This part of the judgment remains consistent with the possible existence of proprietary rights in dead bodies and, accordingly, may continue to hold contemporary relevance.

There are several European jurisdictions⁸⁹ which recognise the existence of proprietary rights in relation to dead bodies. Notable among these nations is Hungary,⁹⁰ where state ownership of corpses is acknowledged and consequently autopsies may be carried out by the medical profession without informed consent from the family of the deceased. This is viewed as morally justifiable on the grounds of utilitarianism – medical advances may be made as a result of examination of and experimentation on human corpses.⁹¹

However, while the State having lawful ownership of the human corpse may be legally logical in Scotland, given the aforementioned argument, it may not be regarded as a particularly moral situation in spite of the utilitarian viewpoint. This difference in ethical thinking between the United Kingdom and Hungary is exemplified by the controversy surrounding the revelation that the Ministry of Defence (MoD) had maintained possession of the biological material of deceased soldiers without permission from their families.⁹² Such an event would not be considered at all scandalous in Hungary, but the fact that the event prompted an apology from the MoD,⁹³ as well as feelings of ‘anger’⁹⁴ from the families of the persons in the United Kingdom, suggests an entirely different kind of ethical thinking.

While it may be stated that the human body is no longer regarded as being as sacrosanct as it perhaps was in earlier centuries, it cannot be doubted that the family and friends of a deceased individual would hold that the human corpse should be treated with some degree of reverence. Thus the Scottish position here seems clouded. On the one hand, the law would appear to suggest that the possibility of State ownership of cadavers cannot be overlooked, on the other the notion of personal ownership of one’s own body would appear to be more favourable from an ethical standpoint. The European distaste for the idea

⁸⁹ Such as Denmark, Hungary and Germany.

⁹⁰ H.A.M.J. Have, J.V.M. Weile & S.F. Spicker, *Ownership of the Human Body: Philosophical Considerations on the Use of the Human Body and its Parts in Healthcare* (Kluwer, 1998), ch. IV, p. 9.

⁹¹ *Ibid.*

⁹² Reported at www.bbc.co.uk/news/uk-19190178; S. Malik, ‘Soldiers’ Body Parts Kept Without Permission, Says MoD’, *The Guardian*, 9 August 2012; A. McSmith, ‘Relatives of Soldiers Killed in Afghanistan Receive Public Apology over Body Parts Stored without Permission’, *The Independent*, 9 August 2012.

⁹³ McSmith, ‘Relatives of Soldiers’ (note 92).

⁹⁴ www.bbc.co.uk/news/uk-england-oxfordshire-19202191.

that the human body may be reduced to a mere commodity⁹⁵ appears to be shared by the Scottish judiciary and Parliament and accordingly, in spite of the legal logic, the ‘no property in a corpse’ position may actually be favoured by some.

In the modern age, however, this cannot be regarded as an acceptable position. There are certainly some ethical thinkers who would regard the ability to sell derivatives of one’s own body for profit as the end goal of recognition of full proprietary rights in human biological material⁹⁶ – a view to which strong moral objections may be raised – but this is not at all a necessary implication of such recognition of self-ownership. Rather, the most significant consequence of the existence of ownership of one’s own body would be the greater level of personal autonomy which would be conferred on individuals.

Cases such as *Yearworth* and *Evans v. Amicus Healthcare Ltd*⁹⁷ illustrate the benefits to the individual which are realised by the existence of property rights in living human material, even in the absence of any aspect of commercialisation. The possibility of individuals receiving compensation for negligence in relation to derivatives of their bodies and the ability of individuals to exercise some degree of control over such derivatives have greatly advanced personal rights and extended individual autonomy. While this may not necessarily be supported by someone taking a paternalistic view, it is quite clear that contemporary medical jurisprudence and bioethics favour the existence of personal autonomy overall.

There are compelling arguments which support recognition of proprietary rights in dead bodies and human biological material. However, while there may be scope in the law of Scotland to bring about legal recognition, and while there are certainly persons who provide convincing moral arguments as to why this should happen, a consensus of ethical thinking does not change overnight. Attitudes which find commercialisation of human material repugnant may continue to oppose referring to the human body in terms of property, in spite of the fact that section 20 of the 2006 Act essentially prevents their fears from becoming reality.

It has long been recognised that the law cannot keep pace with the speed of advances in medical technology. It would appear on examination that even in cases where this is not true and the law is ahead of medical technology, or may be interpreted in such a manner, the general moral thinking of individuals may nevertheless lag behind.

⁹⁵ Some ethical commentators, notably Uffe Jensen, state that it is not at all appropriate to discuss the human body in terms of property; see U. Jensen, *Property, Rights, and the Body: The Danish Context – A Democratic Ethics or Recourse to Abstract Right?* (Kluwer, 1998).

⁹⁶ See K. Wildes, *Libertarianism and Ownership of the Human Body* (Kluwer 1998).

⁹⁷ *Evans v. Amicus Healthcare Ltd* [2004] EWCA Civ 727.

Conclusion

In spite of the fact that *prima facie* Scottish law appears to reject the notion of proprietary rights existing in respect of human biological material, the above analysis appears to show that this is not in fact the case in strict legal terms.

Burnett suggested that anything may become the subject of theft if it can be carried away from its proper owner, and strong case law suggests that this principle includes corpses. The English tenets which preclude ownership rights in that jurisdiction cannot be regarded as applicable to twenty-first century Scotland, either as a result of divergences in legal thinking, the evolution of spiritual thought, or the advancement of scientific technology.

The fact that the Human Tissue Act 2006 is silent on the matter of proprietary rights existing in relation to human biological material must be read as permissive. Given the direct precedent authority which suggests that corpses may be stolen, in the absence of any statutory intervention it should be concluded that property rights must be recognised by the law of Scotland in this regard.

The argument that the human body should not be discussed in terms of property as it should not be commoditised is easily refuted since the Scottish Parliament explicitly ensured prohibition of commodification of the human body by passing section 20 of the 2006 Act. Nevertheless, it may be suggested that the human body is to be regarded as *res extra commercium*, with the State holding a right of proprietary interest over dead bodies. This possibility of State ownership is supported, albeit in an unorthodox manner, by the case of *Robson*, although there is certainly scope to argue that one may have ownership of one's own body and, as a result, the executor may have claim to proprietary rights.

However, while the legal position appears quite clear, moral thinking is slower to adapt to change. Although society no longer views dead bodies with the same degree of reverence that it once did, there is still nevertheless an element of distaste towards the notion that the rights to the body parts of a deceased person may be vested in anyone other than the family. While this particular moral view does not entirely preclude the possibility of proprietary rights existing in respect of corpses, it is nonetheless hostile to the notion, and advocates of this position are more likely to support the English position.

In spite of this possible moral objection, the view of the Court of Appeal in *Yearworth* that English law requires a reanalysis in order to respond adequately to twenty-first century technology cannot be regarded as untrue. As has been stated, technology has advanced, and quite probably will continue to advance, at such a rate that legal and ethical thinking will require more or less constant review. Given that the Scottish position appears to require no reanalysis in this area, as Scottish law is already able to recognise the existence of proprietary rights in human biological material, it may be concluded that Scotland finds itself in a position where clearer, fairer and more honest legal answers may be provided in cases, such as *Yearworth*, that have proven problematic to English law.