



Bond University
School of Law

Property Law

LAWS 311

Skills Module
Legal Research & Analysis

John Moore v Regents of UCLA et. al.

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Introduction

The division among the court in this case can to some extent be explained as the coming together of two schools of thought on the role of the Court system. On the one hand, the common law is thought to be dynamic, evolving to meet the needs of society through the coaxing of the Courts. In this sense, a judge's role includes something more than simply deciding cases according to pre-existing 'law' – they must in some cases adapt that law to meet changed circumstances.

On the other hand, America has a strict doctrine of separation of powers – the Courts are separate from the legislature, thus it is thought that 'changing' the law is beyond the scope of the Court's mandate. As such, 'judicial activism', as the former school of thought is sometimes known, gives way to a strict adherence to the doctrine of *stare decisis* where the Court should strictly *apply* the law, leaving it to the sovereign legislature to *make* it.

In this case, the Court was faced with a totally new situation. There was no case law on which to rely, no statute to simply 'apply'. Thus the Court attempted to reconcile these two views.

The application of Law

All the judgements followed essentially the same structure, as laid out in the majority decision delivered by Panelli J. That is, they first asked if the claim could succeed under existing law, if not, they wondered whether the law should be extended. In order to answer the first question, it was necessary to determine whether there could be said to be a proprietary interest in body tissues after they have been extracted. To answer the second, the court needed to assess whether there *should* be such a proprietary interest.

It is useful to examine the majority decision in some detail, as the dissenting judges delivered theirs essentially as a step by step criticism of the majority's reasoning. The majority found three reasons to hold that the claim must fail under existing law, of which two are relevant.

The first was because there was no precedent to follow.

The majority decision in this case took a ‘black letter law’ approach, favouring a conservative role in the balance between activism and conservatism. As such, in the absence of easily applicable law they sought guidance from the legislature, drawing inferences from existing statutes on similar topics.

The result was the second reason for finding that the claim could not succeed – that legislation¹ “drastically limits any continuing interest of a patient in excised cells”². As the majority felt it could not change the law, it sought to apply a rule as near to the intention expressed in existing legislation as possible – that is, they too limited the control Moore could have over the cells.

Although the result reached was different, Broussard J took a very similar approach, looking to a different statute³, and inferring the reverse legislative intention. The finding that a patient does have the right to control body parts after they are extracted gave rise to the finding that the patient did have a property right in those body parts. Broussard J found “... under traditional common law principles, that this right of a patient to control the future use of his organ is protected by the law of conversion.”⁴

Mosk J took the line that the common law is the domain of judges, and did not feel bound to make any reference to partially related legislative schemes. In answer to the majority decision he said

The majority next cite several statutes regulating aspects of the commerce in or disposition of certain parts of the human body, and concludes that in the present case we should also “look for guidance” to the legislature rather than to the law of conversion. Surely this argument is out of place in an opinion of the highest court in this state.⁵

and then

My point is that if the cause of action for conversion is otherwise an appropriate remedy on these facts we should not refrain from fashioning it simply because another court has not yet so held or because the Legislature has not yet addressed the issue. We need not wait on either event...”⁶

¹ The *Health and Safety Code* particularly section 7054.4

² *Moore v Regents UCLA et al.* At Paragraph 61 per Panelli J.

³ The *Uniform Anatomical Gift Act*

⁴ *Moore v Regents UCLA et al* At Paragraph 113, per Broussard J (in dissent)

⁵ *Moore v Regents UCLA et al.* At Paragraph 135 per Mosk J (in dissent).

⁶ *Moore v Regents UCLA et al.* At paragraph 137 per Mosk J (in dissent)

That being the case, Mosk J answered the majority's contention that excised tissue could not be property not with reference to statute, but to the common law. The argument was that 'property' is a "bundle of rights"⁷, and that simply because the legislature chose to extinguish some did not mean that all were destroyed.

The two basic points of view taken by the court are good representations of the two general views of the role of the Courts. On one side Panelli⁸ and Broussard JJ were of the view that the court should apply existing law, seeking to resolve hard cases by reference to legislation, and on the other, Mosk J sought to expand the common law in place of the legislature.

Having found that the claim must fail under the existing law, the majority then asked whether the law should be extended to cover the instant case. They found three reasons why it should not, of which again, two are relevant⁹. The second was that this was an area better left to the legislature. The position of the majority was perhaps most succinctly stated by Arabian J, who said

"Where then shall a complete resolution be found? Clearly the Legislature, as the majority opinion suggests, is the proper deliberative forum."¹⁰

Mosk J gave a very similar answer to this proposition as to the previous one – that although it is clear that the legislature is competent in the area, that fact alone does not relieve the court of its obligation to administer the common law¹¹.

The first reason the majority found for choosing not to expand the law of conversion was that the balance of *public policy* did not support the expansion.

Application of Public Policy

Unlike in their application of law, all of the judges agreed on the method they used to weigh public policy considerations in their decisions. The differences in opinion arose not from

⁷ *Moore v Regents UCLA et al.* At Paragraph 145 per Mosk J (in dissent) – from *Union Oil Co. v State Bd. Of Equal.* (1963) 60 Cal. 2d 441 at 447

⁸ With Lucas CJ, Eagleson and Kennard JJ concurring jointly and Arabian J concurring in a separate judgement.

⁹ *Moore v Regents UCLA et al.* Paragraph 71 per Panelli J for the majority.

¹⁰ *Moore v Regents UCLA et al.* Paragraph 96 per Arabian J.

conflict about the approach to be taken, but because the court split over which considerations should be considered, and which should be given the greatest weight.

All of the judgements took public policy into account – all acknowledging that where it falls to the court to expand the law (or to decline to expand it) they must take into account the effect that such an expansion could have on the community.

The majority were very concerned with the effect that an expansion of liability for researchers might have on the medical research industry¹². They felt that risking the loss of possible advances in medical research was too great a cost for granting donors the right to a share in the profits made by research conducted on their cells. Their decision was largely concerned with the public and commercial interests.

Broussard J was unconvinced by the majority's public policy arguments, attacking the justifications put forward by the majority for their assessment of the seriousness of the threat rather than suggesting alternative, more cogent policy considerations.

Mosk J did both, arguing that the risk to the biotechnology industry was exaggerated in the majority decision, and finding other considerations that outweighed that relied on by the majority. Mosk J's concerns were more with the private interest, that

- 1) "our society acknowledges a profound ethical imperative to respect the human body as the physical and temporal expression of the unique human persona"¹³, and
- 2) "Our society values fundamental fairness in dealings between its members, and condemns the unjust enrichment of any member at the expense of another."¹⁴.

The different conclusions reached on the cogency of each policy consideration are probably the result of different personal values, and a different concept of what 'the public interest' really means. To the majority it meant preserving the commercial interest in medical research in order that the research continue to be funded. To Mosk J it meant preserving the rights and

¹¹ *Moore v Regents UCLA et al* Paraphrasing Mosk J at paragraph 171.

¹² "The extension of conversion law into this area will hinder research by restricting access to the necessary raw materials." *Moore v Regents UCLA et al*. Per Panelli J for the majority at paragraph 79.

¹³ *Moore v Regents UCLA et al* per Mosk J at paragraph 166.

¹⁴ *Moore v Regents UCLA et al* per Mosk J at paragraph 167.

liberties of the individual, and upholding the community's standards of fairness. The difference is less in the *approach* taken to applying policy considerations than in the choices made during that application.

Observations

The court in this case sought to answer a difficult question. Even those who took the same approach reached different conclusions on some issues. In cases like these there is probably no conclusion that will evenly balance all the competing interests. Arabian J, rightly said that “A mark of wisdom for us as expositors of the law is the recognition that we cannot cure every ill, mediate every dispute, resolve every conundrum.”¹⁵ In order to achieve stability some degree of flexibility must be sacrificed, and some questions must be left for the deliberation of the legislature.

¹⁵ *Moore v Regents UCLA* per Arabian J at paragraph 95.