

**Bones of Contention: The Right to Possession of the  
Body of the Deceased as a Property Right**

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A thesis submitted for the degree of Doctor of Philosophy of  
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## **Declaration**

This Thesis is the author's original work. It contains no material which has been accepted for the award of any other degree or diploma at any university. To the best of the author's knowledge, it contains no material previously published or written by another person, except where due reference is made in the text.

This Thesis uses the style and citation guidelines set out in the Australian Guide to Legal Citation, Third Edition.

The case law analysed in this Thesis is current as of 29 February, 2020.

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A handwritten signature in black ink, appearing to read 'Kate Falconer', with a long, sweeping horizontal stroke extending to the right.

Kate Falconer

24 July 2020



## Acknowledgements

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*This Thesis was written on land that belongs to the Ngunnawal people and to the Turrbul and Jagera nations. In writing this Thesis, I pay my deepest respects to the Traditional Custodians of both the Canberra and Brisbane regions, alongside all other First Nations people of Australia, and their elders past, present, and emerging.*



## Abstract

Death comes to all. And in all cases, someone must see to the disposal of the body. In common law jurisdictions such as Australia, the person tasked with disposing of the body of a particular deceased person is said to hold a right to possession in relation to that body. By giving one particular individual physical and decision-making control over the deceased body at issue, this common law right to possession of the body of the deceased ('the right to possession') plays a vital role in the resolution of legal disputes relating to the treatment and disposal of the dead. Such disputes are increasing both in number and in frequency, and a thorough understanding of the law that underpins them is necessary. Nonetheless, judicial engagement with, and academic consideration of, the right to possession is inconsistent and inconclusive, particularly as regards that right's juridical status. This Thesis addresses this key gap in our understanding by responding affirmatively to the question 'is the right to possession of the body of a deceased person, as it currently exists in the Australian common law, a property right?'

In answering this question, this Thesis undertakes a doctrinal analysis of a core group of 56 Australian post-death dispute cases, adopting an evaluative framework that requires both internal and external consistency. The right to possession is first acknowledged as having particular, recognisable salient features that identify that right as an independent, established legal incident and allow it to operate in a predictable way in any given post-death dispute. Having determined the right to possession to be an internally consistent and cohesive legal incident, this Thesis then engages in an exercise of analytical jurisprudence to identify the essential attributes of property and to assess whether the right to possession possesses those attributes as a matter of external consistency.

This Thesis adopts an exclusion essentialist theory of property, drawing especially on the work of James Penner. It defines the taxonomical branch of the private law that is property as those legal rules that work to protect our interest in exclusively determining the use to which our 'thing' is put. Assessing the right to possession's compliance with the structural framework expected of property rights that results from this definition, this Thesis reaches the preliminary conclusion that the right to possession is indeed proprietary in nature. It then analyses the external consistency of each of the right's internal salient features with this preliminary conclusion, ultimately confirming that the right to possession of the body of a deceased person as it currently exists in the Australian common law is a property right.



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Death is unique. It is unlike aught else in its certainty and its incidents. A corpse in some respects is the strangest thing on earth. A man who but yesterday breathed and thought and walked among us has passed away. Something has gone. The body is left still and cold, and is all that is visible to mortal eye of the man we knew. Around it cling love and memory. Beyond it may reach hope. It must be laid away. And the law — that rule of action which touches all human things — must touch also this thing of death. It is not surprising that the law relating to this mystery of what death leaves behind cannot be precisely brought within the letter of all the rules regarding corn, lumber and pig iron. And yet the body must be buried or disposed of. If buried, it must be carried to the place of burial. And the law, in its all-sufficiency, must furnish some rule, by legislative enactment or analogy, or based on some sound legal principle, by which to determine between the living questions of the disposition of the dead and rights surrounding their bodies.

*Louisville & N R Co v Wilson*, 51 SE 24, 25 (Lumpkin J) (Ga, 1905)



# Chapter One

## Introduction

### 1. Introduction

On the 19<sup>th</sup> of November 2017, Charles Manson (of ‘Manson Family’ infamy) died at the age of 83 under the watchful eyes of prison guards in a hospital in Southern California. In the immediate aftermath of his death, three people stepped forward to claim the cult leader’s body. The first, Jason Freeman, was an alleged grandson of Manson; the second, Michael Channels, a pen pal who produced a will allegedly written by Manson in 2002 giving Channels control over Manson’s estate and body; and the third, Matthew Roberts, the alleged biological son of Manson given control of Manson’s estate and body in a will allegedly written by the convicted murderer in 2017. The dispute over Charles Manson’s mortal remains lasted four months. On the 12<sup>th</sup> of March 2018, in a ruling aimed at expediting the disposal of Manson’s body (which was reportedly being held in a Californian morgue under a false name, its true location known only to two staff members at the Coroner’s Office),<sup>1</sup> a Kern County Superior Court Commissioner released Manson’s body to his grandson, Jason Freeman.<sup>2</sup> Tabloid news sources reported that Manson’s decomposing body was cremated in Porterville, California on the 17<sup>th</sup> of March 2018 and his ashes scattered along a nearby creek bed.<sup>3</sup>

The dispute over Charles Manson’s body is a high profile, but by no means unique, example of the conflicts that can arise after the death of an individual as family members, friends, and occasionally even disinterested third parties seek to control the physical remains of the deceased. In the past three and a half decades, Australian courts have been asked to decide these disputes with ever-increasing frequency — the number of cases relating to the control and disposal of the body of the deceased rising to almost 60 since the first such decision appeared in the case law in 1986.<sup>4</sup>

In Australia, these disputes are resolved in a deceptively simple manner. As between the parties to the litigation, the court will decide who has the better claim to the right to possession of the

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<sup>1</sup> Kate Briquetelet, ‘The Battle Over Charles Manson’s Corpse’, *Daily Beast* (online) 8 March 2018 <<https://www.thedailybeast.com/charles-mansons-body-is-on-ice-under-a-fake-name-10>>.

<sup>2</sup> Rejecting the other claimants, the Commissioner ruled that Roberts’ adoption one week after his birth meant he had no legal claim on Manson’s estate, and that the 2002 will championed by Channels did not meet court requirements: Tim Stelloh, ‘Charles Manson’s Body Will Go To His Grandson, Judge Rules’, *NBC News* (online) 13 March 2018 <<https://www.nbcnews.com/news/us-news/charles-manson-s-body-will-go-his-grandson-judge-rules-n856026>>.

<sup>3</sup> ‘Charles Manson: Open Casket Funeral Then Burnt to a Crisp’, *TMZ* (online) 19 March 2018 <<http://www.tnz.com/2018/03/19/charles-manson-open-casket-funeral-body-cremation/>>.

<sup>4</sup> See Appendix A, listing 56 cases. The body of case law analysed in this Thesis is defined, and the methodology used in its selection set out, in Part 5.1 of this Introduction.

body of the deceased ('the right to possession'). This right has been recognised by the English common law since at least 1882,<sup>5</sup> and the Australian common law since at least 1908,<sup>6</sup> and vests the right to physical custody of, and exclusive decision-making control over, the deceased's remains in the right-holder.

Despite playing the decisive role in a growing number of intense and confronting legal disputes, however, the right to possession has been the subject of little academic scholarship. More so, and as Part 4 of this Introduction explores, within this small body of literature, scholars are divided as to the right's juridical status. On the one hand, authors such as Magnusson and Hammond point to the exclusive control over the body enjoyed by the holder of the right to possession, as well as the ability for that right to be transferred and enforced against all others, when arguing that the right to possession does indeed sound in property. Other authors, however, focus on normative concerns relating to the human condition when arguing that the right to possession is better conceived of outside of a proprietary lens. Muinzer, for example, argues that the body of the deceased is *sui generis* and must be kept removed from concepts of property, and Croucher advocates the position that the deceased retains some form of autonomy even after death, precluding a discussion of property concepts entirely.

This Thesis attempts to resolve the confusion that has surrounded the right to possession, and its juridical status, for over a century. To this end, it seeks to answer the following question: *is the right to possession of the body of a deceased person as it currently exists in the Australian common law a property right?* This Thesis adopts an exclusion essentialist theory of property not yet explored in this context to argue that the right to possession does indeed sound in property. In so doing, this Thesis provides clarity to an area of law that, despite its universal applicability, remains under-theorised and often confused.

## 2. Context and Scope

### 2.1. The Law of the Dead

This research takes place within the 'law of the dead', a field that has been identified as 'the general sphere of law extending to the dead and dead bodies'.<sup>7</sup> Despite death being an inescapable

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<sup>5</sup> See *Williams v Williams* (1882) 20 Ch D 659, 664, 665. The complete, and much longer, history of the right to possession is set out in Chapter Two.

<sup>6</sup> See *Doodeward v Spence* (1908) 6 CLR 406, 414 (reference to '[the] person ... entitled to have [the body] delivered to him for the purpose of burial').

<sup>7</sup> Thomas L Muinzer, 'The Law of the Dead: A Critical Review of Burial Law, with a View to its Development' (2014) 34 *Oxford Journal of Legal Studies* 791, 791. For examples of topics that arise in this field, see Ray D Madoff, *Immortality and the Law: The Rising Power of the American Dead* (Yale

part of the human experience since the birth of *Homo sapiens*, this field is only newly emerging within academic study.<sup>8</sup> Its fundamental principles do not exist within a single legal framework, but are instead drawn from a variety of sources, including relevant statutory provisions and common law doctrines.<sup>9</sup> This Thesis focuses on the latter — that is, that portion of the law of the dead that exists within the Australian common law.

Death plays a nebulous role within the Australian common law of the dead, the concept lacking even a consistent, universal definition.<sup>10</sup> Nonetheless, it is clear that at death the ante-mortem person as a legal individual ceases to exist in the eyes of the common law. Their personhood — the sense of the person as an autonomous, legal ‘self’ — has disappeared. Their mortal shell remains, however, and it must be dealt with. Perhaps unsurprisingly, here too the common law is on unsteady ground.

This uncertainty stems from the fact that the treatment of a dead body as a physical ‘object’ in the same way as a chair or a notebook is at odds with the socialisation of the corpse as sacred or semi-sacred in nature.<sup>11</sup> The idea of the body of the deceased as something *other* than an un-living object has deep historical roots within the common law, and is encapsulated in the legal rule that there is no property in a corpse (the ‘no-property rule’).

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University Press, 2010) at 2-4 (discussing, among others, issues related to body disposal, posthumous reproduction, and reputational harm). Despite having a very broad mandate, Conway critiques the legal study of death as being overly selective and having an undue focus on the question of property rights in the corpse and medical law issues such as organ donation: Heather Conway, *The Law and the Dead* (Routledge, 2016) 5.

<sup>8</sup> For general texts in this field aimed at practitioners, see, eg, Jennifer Green and Michael Green, *Dealing with Death: A Handbook of Practices, Procedures and Law* (Jessica Kingsley, 2<sup>nd</sup> ed, 2006); David A Smale, *Davies’ Law of Burial, Cremation, and Exhumation* (Shaw & Sons, 7<sup>th</sup> ed, 2002); Tanya Marsh, *The Law of Human Remains* (Lawyers & Judges Publishing Co, 2016). Early works in this field include Hugh Y Bernard, *The Law of Death and Disposal of the Dead* (Oceana Publications, 2<sup>nd</sup> ed, 1979); Percival E Jackson, *The Law of Cadavers and of Burial and Burial Places* (Prentice-Hall, 2<sup>nd</sup> ed, 1950); C J Polson, R P Brittain and T K Marshall, *The Disposal of the Dead* (English Universities Press, 3<sup>rd</sup> ed, 1975).

The legal study of the dead and dead bodies matches an increase in research in the field of ‘death studies’ within other social science disciplines, most notably sociology and anthropology. For a helpful list of key death studies sources, see texts listed in Conway, *The Law and the Dead*, above n 7, 5 n 21.

<sup>9</sup> Conway, *The Law and the Dead*, above n 7, 2.

<sup>10</sup> The inevitable tension being between the permanent loss of function in the brain (brain stem death), and the cessation of life-necessary functions such as a heartbeat and breathing (cardiopulmonary death). For a lengthier consideration of this issue, see Norman L Cantor, *After We Die: The Life and Times of the Human Cadaver* (Georgetown University Press, 2010) ch 1 (‘When Does a Person Become a Corpse?’); Margaret Lock, *Twice Dead: Organ Transplants and the Reinvention of Death* (University of California Press, 2002) (discussing the emergence of brain death as the predominant means of recognising death at law, and the role of organ transplants in this development).

<sup>11</sup> See Prue Vines, ‘The Sacred and the Profane: The Role of Property Concepts in Disputes about Post-Mortem Examination’ (2007) 29 *Sydney Law Review* 235, 236.

## 2.2. The ‘No-Property’ Rule

Whilst its validity is questioned by legal scholars,<sup>12</sup> the no-property rule is traditionally dated to early 17<sup>th</sup> century case law and holds that the deceased human body cannot be the object of property rights at common law.<sup>13</sup> It is generally agreed that this rule emerged in an attempt to enshrine in law the belief that a corpse was in some way distinct from an ordinary chattel and so should not be subsumed into the law of property.<sup>14</sup>

The origins of the no-property rule lie in the ecclesiastical law of the early middle ages. It was in this period that church courts obtained complete jurisdiction over the bodies of the deceased.<sup>15</sup> This ecclesiastical control made the deceased body *nullius in bonis* — the property of no one — in the eyes of the common law.<sup>16</sup> The same principle applied to both buried<sup>17</sup> and unburied bodies,<sup>18</sup> and continued despite the eventual decline of ecclesiastical jurisdiction and the growing number of bodies being disposed of other than by burial in consecrated ground from the early modern period onwards.

The common law did not remain silent on issues relating to dead bodies in the face of ecclesiastical dominance, however. The no-property rule meant that corpses could not be stolen (because they were not property),<sup>19</sup> and so other crimes were developed as a means of protecting

<sup>12</sup> See, eg, Roger S Magnusson, ‘The Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions’ (1992) 18 *Melbourne University Law Review* 601, 603-7; Paul Matthews, ‘Whose Body? People as Property’ (1983) 36 *Current Legal Problems* 193, 197-200, 208-14.

For general critiques of the no-property rule aimed at its reform or abandonment, see, eg, Mark Pawlowski, ‘Property in Body Parts and Products of the Human Body’ (2009) 30 *Liverpool Law Review* 35; Nicolas Rolf, ‘Making Something into Nothing: Reforming the “No Property” Rule for Human Tissue’ (2013) 21 *Journal of Law and Medicine* 312; P D G Skegg, ‘Medical Uses of Corpses and the ‘No Property’ Rule’ (1992) 32 *Medicine, Science and the Law* 311.

<sup>13</sup> See *Haynes’s Case* (1614) 12 Co Rep 113; 77 ER 1389; Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* (E & R Brooke, first published 1644, 1797 ed) 203.

<sup>14</sup> See, eg, Kenyon Mason and Graeme Laurie, ‘Consent or Property? Dealing with the Body and its Parts in the Shadow of Bristol and Alder Hey’ (2001) 64 *Modern Law Review* 710, 714. On this point, note the ability of a dead body to be seized as payment for debt in the middle ages and early modern period, suggesting it had some proprietary qualities: see, eg, discussion in *Quick v Copleton* (1665) 1 Lev 161, 162; 83 ER 349, 349.

<sup>15</sup> R P Taylor, ‘Right of Sepulture’ (1919) 53 *American Law Review* 359, 360. It has been suggested that this concentration of judicial power in the church courts stemmed from ecclesiastical control over the giving of alms at death: see Michael M Sheehan, *The Will in Medieval England* (Pontifical Institute of Medieval Studies, 1963) 120-1. Another explanation sees church control over the disposal of the dead emerging from church control over the performance of ecclesiastics in rituals, including the ritual of sepulchre (known as the benefit of the clergy): Jackson, above n 8, 21.

<sup>16</sup> Coke, above n 13, 203 (‘[t]he buriall of the *cadaver* (that is *caro data vermibus*) is *nullius in bonis*, and belongs to ecclesiasticall cognisance’).

<sup>17</sup> See, eg, *Haynes’s Case* (1614) 12 Co Rep 113; 77 ER 1389; *R v Sharpe* (1857) Dears & B 160, 163; 169 ER 959, 960; *Foster v Dodd* (1867) LR 3 QB 67, 77 (Byles J).

<sup>18</sup> *Exelby v Handyside* [1749] 2 East PC 652; *Williams v Williams* (1882) 20 Ch D 659, 662-3.

<sup>19</sup> It is for this reason that the no-property rule, in its attempt to limit the commodification of the corpse, has been called ‘paradoxical’: Mason and Laurie, above n 14, 714.

the bodies of the deceased. Disinterment became a criminal offence on the basis of it being *contra bonos mores*,<sup>20</sup> and unburied bodies were (and are) protected by the crimes of preventing lawful burial and disposing of the body for dissection without authority.<sup>21</sup> More importantly for our purposes, the common law also recognised what it termed a ‘right to possession’ of the body of the deceased that vests in various individuals for the purposes of disposing of that body.<sup>22</sup> And therein lies the rub. If there is no property in a corpse — if it is an entity that cannot be recognised by the common law of property — what sense is there to speak of a right to possession — a thoroughly propertied notion — of the body of the deceased?

The dilemma posed by this curious state of the common law has been nicely put by Ian Kennedy:

It has long been accepted in English law that there is no property in a dead body. It is equally the law that there is a duty placed on others including relatives to dispose of a corpse, e.g., by burial. Quite how to reconcile these propositions has remained something of a mystery. ... In asserting, however, that [certain persons] may claim the body, English law to that extent recognises a right to the body, if only to carry out the duty to dispose. But, this cannot be a property right, there being no property in a corpse.

At this point English law appears to give up and hope for the best.<sup>23</sup>

### 2.3. Beyond the ‘No-Property’ Rule

This Thesis does not adopt the common law dilemma as stated by Kennedy as its starting point. Instead, it begins from the positive presumption that the right to possession of the body of the deceased is not arbitrarily locked out of the status of property right by virtue of the no-property rule. This Thesis follows in the positivist tradition of Hart, Raz, and others in identifying the no-property rule and the right to possession of the body of the deceased *qua* purported property right as two potentially conflicting legal norms. That is, these two legal rules create a potential unresolved conflict (a ‘gap’ in the law) whereby neither norm overrides the other and there is no clear legal outcome.<sup>24</sup> This unresolved conflict receives the ‘potential’ qualifier because it will

<sup>20</sup> See, eg, *R v Lynn* (1788) 2 Term R 733, 734; 100 ER 394, 395; *R v Sharpe* (1857) Dears & B 160, 162-3; 169 ER 959, 960-1.

<sup>21</sup> Jonathan Herring, ‘Crimes Against the Dead’ in Belinda Brooks-Gordon et al, *Death Rites and Rights* (Hart, 2007) 219, 221-2. See also Imogen Jones and Muireann Quigley, ‘Preventing Lawful and Decent Burial: Resurrecting Dead Offences’ (2016) 36 *Legal Studies* 354.

<sup>22</sup> See, eg, *Williams v Williams* (1882) 20 Ch D 659, 664, 665.

<sup>23</sup> Ian Kennedy, ‘Negligence: Interference with Right to Possession of a Body: Mackey v U.S.’ (1995) 3 *Medical Law Review* 222, 223 (internal citations omitted).

<sup>24</sup> See Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 2<sup>nd</sup> ed, 2009) 74-5; John Gardner, ‘Legal Positivism: 5 ½ Myths’ (2001) 46 *American Journal of Jurisprudence* 199, 212. It is pertinent to note here that it is common for the right to possession to be identified in the literature as an exception to the no-property rule (see, eg, sources listed in n 37 below). However, this is often done without any true analysis of the right’s juridical status.

only arise if the right to possession of the body of the deceased is affirmatively identified as a property right — a task undertaken in this Thesis.

## 2.4. Scope of the Thesis

Whilst ascertaining the juridical status of the right to possession is of great importance, the ‘property question’ this Thesis seeks to answer — is the right to possession of the body of the deceased a property right? — makes up only the tiniest portion of the common law relating to the dead and their disposal. Other topics have claimed much larger portions of the field, and, correspondingly, significantly more academic interest. Accordingly, it must be clearly and definitively stated that this Thesis does not attempt to resolve the far broader question of whether the human body, deceased or otherwise, complete or parts thereof, can and should be considered an object of property as a general rule of the Australian common law. That ground has been traversed by many others (and indeed myself)<sup>25</sup> in other fora.<sup>26</sup> This is true regardless of the fact that this Thesis’ analysis includes an attempt to place the deceased body within the practice of property (that is, to assess its status as the object of a purported property right), and, as a result, that it adheres to particular normative positions relating to the placement of deceased body within the practice of property.

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<sup>25</sup> See Kate Falconer, ‘An Illogical Distinction Continued: *Re Cresswell* and Property Rights in Human Biological Material’ [2019] *University of New South Wales Law Journal Forum* 1; Kate Falconer, ‘Dismantling *Doodeward*: Guided Discretion as the Superior Basis for Property Rights in Human Biological Material’ (2019) 42 *University of New South Wales Law Journal* 899.

<sup>26</sup> As an entirely non-exhaustive list, see, eg, Rosalind Atherton, ‘Claims on the Deceased: The Corpse as Property’ (2000) 7 *Journal of Law and Medicine* 361; Michelle Bourianoff Bray, ‘Personalizing Property: Toward a Property Right in Human Bodies’ (1990) 69 *Texas Law Review* 209; Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates About Property and Personality* (Ashgate, 2001); Simon Douglas & Imogen Goold, ‘Property in Human Biomaterials: A New Methodology’ (2016) 75 *Cambridge Law Journal* 478; Gerald Dworkin and Ian Kennedy, ‘Human Tissue: Rights in the Body and its Parts’ (1993) 1 *Medical Law Review* 291; James Edelman, ‘Property Rights to Our Bodies and Their Products’ (2015) 39(2) *University of Western Australia Law Review* 47; Andrew Grubb, ‘“I, Me, Mine”: Bodies, Parts and Property’ (1998) 3 *Medical Law International* 299; Celia Hammond, ‘Property Rights in Human Corpses and Human Tissue: The Position in Western Australia’ (2002) 4 *University of Notre Dame Australia Law Review* 97; Rohan Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (Hart, 2007); Matthews, above n 12; Debra Mortimer, ‘Proprietary Rights in Body Parts: The Relevance of *Moore’s Case* in Australia’ (1993) 19 *Monash University Law Review* 217; Ngaire Naffine, ‘“But a Lump of Earth”?: The Legal Status of the Corpse’ in Desmond Manderson (ed), *Courting Death: The Law of Mortality* (Pluto Press, 1999) 95; Remigius N Nwabueze, *Biotechnology and the Challenge of Property: Property Rights in Dead Bodies, Body Parts, and Genetic Information* (Ashgate, 2007); Muireann Quigley, *Self-Ownership, Property Rights, and the Human Body* (Cambridge University Press, 2018); P D G Skegg, ‘Human Corpses, Medical Specimens and the Law of Property’ (1975) 4 *Anglo-American Law Review* 412; Loane Skene, ‘Arguments Against People Legally ‘Owning’ Their Own Bodies, Body Parts and Tissue’ (2002) 2 *Macquarie Law Journal* 165; Russell Scott, *The Body as Property* (Viking Press, 1981); Jesse Wall, *Being and Owning: The Body, Bodily Material, and the Law* (Oxford University Press, 2015).

Outside of the property context, other normative issues loom large in the law of the dead that are not addressed in this research. Importantly, and whilst critiquing certain doctrinal developments in this area, this Thesis does not set out to engage with normative questions regarding *who* Australian courts should identify as the holder of the right to possession in relation to the body of any particular deceased person.<sup>27</sup> Ascertaining the juridical status of the right to possession warrants examination of the rules and principles that govern the vesting of that right. Nonetheless, it is a fundamentally distinct inquiry from that of who should hold the right to possession by virtue of an application of those rules and principles in any given situation.

The normative ‘who’ question is of particular importance to members of Australia’s Aboriginal and Torres Strait Islander communities — something made clear by the fact that exactly half of the case law analysed in this Thesis centres around an Indigenous deceased. As at many points within the Australian legal system, within the law of the dead there is an inevitable tension between Indigenous lifeways and the underlying values, beliefs, and priorities of the common law. Regrettably, beyond noting the significant presence of Indigenous Australians in the relevant case law, this Thesis cannot address questions relating to the placement of Aboriginal custom, culture, and lore in the law of the dead, or in the common law more broadly.<sup>28</sup> The sole concern of this Thesis remains to provide an answer to the ‘property question’.

### 3. Defining the Right to Possession

Answering the ‘property question’ is made difficult by the fact that the common law of the dead lacks a recognised and consistent vocabulary. The existence of a number of superficially similar rights and entitlements within this area of law only compounds this confusion. The right to possession of the body of the deceased — being the discrete legal right to physical and decision-making control over the deceased’s remains — is often confused or conflated (even by those well-

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<sup>27</sup> For considerations of this issue, see Rosalind Atherton, ‘Who Owns Your Body?’ (2003) 77 *Australian Law Journal* 178; Heather Conway, ‘Whose Funeral? Corpses and the Duty to Bury’ (2003) 54 *Northern Ireland Legal Quarterly* 183; Heather Conway, ‘Dead, But Not Buried: Bodies, Burial and Family Conflicts’ (2003) 23 *Legal Studies* 423; Heather Conway, ‘“First Among Equals”: Breaking the Deadlock in Parental and Sibling Funeral Disputes’ (2018) 39 *Liverpool Law Review* 151; Rosalind F Croucher, ‘Disposing of the Dead: Objectivity, Subjectivity and Identity’ in Ian Freckelton and Kerry Peterson (eds), *Disputes and Dilemmas in Health Law* (Federation Press, 2006) 324.

<sup>28</sup> Prue Vines has written extensively on the impact of the common law of the dead, as well as other areas of Anglo-Australian law, on Indigenous Australians: see, Prue Vines, ‘Consequences of Intestacy for Indigenous People in Australia: The Passing of Property and Burial Rights’ (2004) 8(4) *Australian Indigenous Law Reporter* 1; Prue Vines, ‘The New South Wales Project on the Inheritance Needs of Aboriginal People: Solving the Problems by Making Culturally Appropriate Wills’ (2012) 16(2) *Australian Indigenous Law Review* 18; Prue Vines, ‘Testamentary Freedom and Customary Law: The Impact of Succession Law on the Inheritance Needs of Aboriginal and Torres Strait Islanders in Australia’ (2017) 91 *Australian Law Journal* 360.

acquainted with the case law)<sup>29</sup> with both what has become known as the ‘exclusive right of burial’ and the ‘right to a decent (or Christian) burial’. In fact, the former refers to the rights (themselves of uncertain juridical status) obtained from a cemetery or other relevant authority upon the payment of a fee for the use of a grave plot or other disposal site,<sup>30</sup> and the latter to the right, acknowledged by English ecclesiastical law, of all members of the Church of England to be buried in their Parish Churchyard.

Avoiding such misidentifications, this Thesis uses the terms ‘right to possession of the body of the deceased’ and ‘right to possession’ interchangeably to refer to the distinct, discrete legal right to control the body of the deceased and its disposal, and this right alone. The term ‘right-holder’ is used to refer to the individual in whom the right to possession in relation to a particular deceased body is vested at any one time (and as distinct from a hypothetical ‘property right holder’ in later Chapters of this Thesis).

The term ‘right-holder’ might be criticised as being overly sanitised and detached from the emotive core of those disputes that arise within the law of the dead.<sup>31</sup> However, this Thesis aims to provide a legal answer to a legal question, and it is submitted that it is appropriate that the party with the legally recognised ability to control the deceased’s remains be identified via a neutral term. The use of the term ‘disposal’ may similarly appear unduly clinical. However, it is intended to do no more than operate as an inclusive term to refer to all lawful ways by which a body can be ultimately dealt with within a particular jurisdiction — from cremation and burial to alternative methods such as aquamation (or resomation) and cryopreservation. As to what exactly is being disposed of, this Thesis uses the terms ‘body of the deceased’ and ‘corpse’ (and variants thereof) interchangeably for the purpose of avoiding repetition, despite the two terms carrying different meanings in the eyes of some.<sup>32</sup>

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<sup>29</sup> In *Vosnakis v Arfaras*, Robb J analysed the important work done by Young J, formerly of the New South Wales Supreme Court, within the Australian law of the dead, ultimately being required to ‘observe, without any disrespect, that care must be taken ... to distinguish when Young J is talking about the [right to possession], and a burial licence’: [2015] NSWSC 625 (26 May 2015) [75].

<sup>30</sup> For discussions of the exclusive right of burial, see, among others: Alan Dowling, ‘Exclusive Rights of Burial and the Law of Real Property’ (1998) 18 *Legal Studies* 438; Lynden Griggs, ‘A Problem of Modernity: Dual Burial Plots, the Right to Inter, and the Interrelationship Between the Two’ (2015) 23 *Journal of Law and Medicine* 460; Remigius N Nwabueze, ‘Property Interest in a Burial Plot’ [2007] *Conveyancer* 517; Peter Sparkes, ‘Exclusive Burial Rights’ (1991) 2 *Ecclesiastical Law Journal* 133; P W Young, ‘The Exclusive Right to Burial’ (1965) 39 *Australian Law Journal* 50.

<sup>31</sup> Although I suggest not so much as the term ‘co-ordinator’, proposed by Stephen White to describe the person responsible for disposing of the body of the deceased: see ‘The Law Relating to Dealing with Dead Bodies’ (2000) 4 *Medical Law International* 145, 148. White notes that the lack of a single accepted term for this role in the English language is surprising given the role’s importance within society.

<sup>32</sup> See Nora Machado, *Using the Bodies of the Dead: Legal, Ethical and Organisational Dimensions of Organ Transplantation* (Ashgate, 1998) 4 (distinguishing ‘the deceased’ from ‘the corpse’, with the

Alongside the common law of the dead, the lack of a fixed terminology to describe rights and interests within the bounds of property law is also marked.<sup>33</sup> This Thesis uses the terms ‘property right’ and ‘proprietary right’ (and variations thereof) interchangeably to refer to nothing more than a right that sounds in property. Neither term is used to refer to a specific property right or interest such as ‘ownership’ (itself a contested term). Thus, for absolute clarity, the question this Thesis seeks to answer is not ‘is the right to possession of the body of the deceased equivalent to a right of ownership over that body’, but rather ‘is the right to possession of the body of the deceased a right recognised as falling within the taxonomical branch of the private law that is property’?

When answering this question, this Thesis will make reference to ‘things’ that are the objects of purported property rights. In Chapter Six, for example, we will explore whether the body of the deceased is a sufficiently contingent ‘thing’ so as to be encompassed within the ‘practice of property’ (itself a term defined as ‘a way of dealing with things in which people actually engage’).<sup>34</sup> References to the deceased body as a ‘thing’ are undoubtedly liable to cause discomfort in some readers. The term is used throughout this Thesis only because the English language lacks an appropriate substitute to refer to the object of a potential property right.

#### 4. The Right to Possession in the Literature

The right to possession of the body of a deceased person has defied juridical categorisation for over a century. The first explicit reference to the right to possession in the case law saw the court in *Williams v Williams* holding that the deceased’s executor ‘[has] a right to the custody and possession of [the body of the deceased] (although they have no property in it) until it is properly buried’.<sup>35</sup> Legal scholars have interpreted this holding as a denial that the right to possession is a property right. At the same time, they maintain that the proprietary implications of this statement were obiter dicta.<sup>36</sup> Whilst case law since 1882 has repeatedly upheld the right to possession, the juridical nature of the right has been explored no further than it was in the *Williams* decision.

Given the failure of the primary sources to provide a clear answer, it is surprising that the juridical nature of the right to possession of the body of the deceased has been the subject of little academic thought. The small amount of scholarship that exists is brief, and analyses of the juridical status

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former term referring to a person who was part of a network of social relations, and the latter to an object disconnected from society).

<sup>33</sup> As Dworkin and Kennedy note, property law terminology is imprecise and often applied to mean different things in different legal contexts: above n 26, 292.

<sup>34</sup> J E Penner, *The Idea of Property in Law* (Clarendon Press, 1997) 2.

<sup>35</sup> (1882) 20 Ch D 659, 665.

<sup>36</sup> See Matthews, above n 12, 212; Magnusson, above n 12, 605-6.

of the right to possession longer than a few sentences are rare. Importantly, there is no consistent approach that emerges from the scholarship, and, perhaps because of the limited consideration given to the right to possession by each author, engagement with the views of other scholars occurs only infrequently. It is perhaps unsurprising, then, that the most common trend in the literature is for a position — either that the right to possession is a property right or it is not — to be taken by an author without further analysis.<sup>37</sup> Others simply note the confusion and move on.<sup>38</sup>

Of those authors who have considered the right to possession in any detail, two broad themes emerge. On the one hand, as Part 4.1 of this Introduction details, a large portion of the scholarship is founded on the idea of ‘body exceptionalism’ — the normative concern that the body of the deceased is unlike any other material object and should be kept far removed from the practice of property.<sup>39</sup> With its focus on the body of the deceased, this exceptionalist perspective precludes any serious analysis of the *right to possession* of that body as a discrete legal incident.

On the other hand, and as Part 4.2 explains, those focused analyses of the right to possession that *have* been undertaken have each come with their own methodological or theoretical flaws. In this way, a need continues in the literature for a comprehensive and convincing examination of the juridical status of the right to possession of the body of the deceased.

#### **4.1. Body Exceptionalism and an Unanalysed Right to Possession**

A large portion of the literature that has addressed the right to possession — small as this body of scholarship is — denies that the right is proprietary in nature. Those authors who argue against a propertied right to possession take the normative position that the body of the deceased should not be the object of property rights. Thomas L Muinzer, for example, rejects that what he refers

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<sup>37</sup> Those who hold the former position frequently list the right to possession as an exception to the no-property rule: see, eg, Conway, ‘Dead, But Not Buried’, above n 27, 425; Heather Conway, ‘Burial Instructions and the Governance of Death’ (2012) 12 *Oxford University Commonwealth Law Journal* 59, 63; Conway, *The Law and the Dead*, above n 7, 60; Steven B Gallagher, ‘Confusing Criminal and Civil Law: When May a Hospital Refuse to Release a Dead Body?’ (2014) 22 *Journal of Law and Medicine* 387, 390; Grubb, above n 26, 308-9; S G Hume, ‘Dead Bodies’ (1956) 2 *Sydney Law Review* 109, 117; Ian Kennedy and Andrew Grubb, *Medical Law* (Butterworths, 3<sup>rd</sup> ed, 2000) 2243-4; Matthews, above n 12, 214; Kieran McEvoy and Heather Conway, ‘The Dead, the Law, and the Politics of the Past’ (2004) 31 *Journal of Law and Society* 539, 540 n 5; Pawlowski, above n 12, 40-1; P D G Skegg, *Law, Ethics, and Medicine: Studies in Medical Law* (Clarendon Press, revised ed, 1988) 232.

For an example of the view that the right to possession is not a property right, see, eg, Dworkin and Kennedy, above n 26, 294.

<sup>38</sup> See, eg, Prue Vines, ‘Resting in Peace? A Comparison of the Legal Control of Bodily Remains in Cemeteries and Aboriginal Burial Grounds in Australia’ (1998) 20 *Sydney Law Review* 78, 79 n 6 (‘The executor’s duty to bury the corpse carries with it a right to deal with the body which may or may not be proprietary.’)

<sup>39</sup> Nir Eyal, ‘Is the Body Special? Review of Cécile Fabre, *Whose Body is it Anyway? Justice and the Integrity of the Person*’ (2009) 21 *Utilitas* 233, 234.

to as the ‘right to guardianship or possession over the body’<sup>40</sup> sounds in property.<sup>41</sup> He upholds the no-property rule,<sup>42</sup> advocating for a sharp body/property division whereby the deceased human body awaiting disposal is something *sui generis*, capable of possession by the individual charged with the duty of disposal, but otherwise entirely removed from ‘conventional proprietary phenomena’ such as theft offences and the property torts.<sup>43</sup>

Other scholars who similarly take the body of the deceased, rather than the right to possession, as their starting point advocate for the right to be re-labelled one of ‘custody’.<sup>44</sup> Rosalind Croucher, for example, argues that disputes regarding the right to possession and in whom it is vested have nothing to do with property and instead take place within a theoretical framework of autonomy.<sup>45</sup> Under such a framework, the deceased’s autonomy — in the form of the ability to decide what will happen to her body after death — is placed in the hands of a surrogate: the holder of the right to possession.<sup>46</sup> This right is best conceived as one of custody, as Croucher’s autonomy framework sees the body, not as merely material remains, but as a person (even after death), and the right-holder as expressing the will (that is, the intention) of the deceased.<sup>47</sup>

Rohan Hardcastle similarly argues that the right to possession should be re-framed as one of ‘custody’ over the body for the purposes of burial.<sup>48</sup> Akin to Muinzer and Croucher, he holds the view that the body of the deceased is not an appropriate object of property rights. He argues that the body of the deceased cannot be separated from the human subject, and therefore that the body

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<sup>40</sup> Thomas L Muinzer, ‘A Grave Situation: An Examination of the Legal Issues Raised by the Life and Death of Charles Byrne, the “Irish Giant”’ (2013) 20 *International Journal of Cultural Property* 23, 29.

<sup>41</sup> See Thomas L Muinzer, ‘Book Review: Heather Conway, *The Law and the Dead*, Routledge, 2016, Hardback, 298 pp., £90, ISBN 9780415706940’ (2017) 25 *Medical Law Review* 505, 508-511.

<sup>42</sup> *Ibid* 509. Muinzer refers to a ‘shroud of no property’ that has been drawn over the bodies of the dead, however acknowledges that this shroud has been lifted in places — such as in the case of the *Doodeward* work or skill exception.

<sup>43</sup> *Ibid* 510-11.

<sup>44</sup> Atherton, ‘Who Owns Your Body?’, above n 27, 184 (“[p]ossession” implies property; in some respects, however, it might be described more as a custodial or protective right, than one of possession’); Croucher, ‘Disposing of the Dead’, above n 27, 341 (‘[the right to possession] has, in fact, nothing to do with property at all’). *Contra* Atherton, ‘Claims on the Deceased’, above n 26, 374-5 (arguing for a limited property regime in the context of unburied bodies).

<sup>45</sup> Croucher, ‘Disposing of the Dead’, above n 27; Atherton, ‘Who Owns Your Body?’, above n 27, 188-9. Croucher has previously written under the surname Atherton.

<sup>46</sup> Atherton, ‘Who Owns Your Body?’, above n 27, 188. Croucher sees the right to possession as vesting in a named executor as first generation surrogate. If the deceased has not named an executor a second generation surrogate is required — be it the person most entitled to administer the deceased’s estate or a member of the deceased’s kinship network: at 188-9.

<sup>47</sup> *Ibid* 188.

<sup>48</sup> Hardcastle, above n 26, 50.

of the deceased fails the basic criterion for admission into the practice of property (this being separability).<sup>49</sup>

The work of Muinzer, Croucher, and others questions the appropriate location of the deceased human body within the Australian legal system. There is no doubt that this is a valid enterprise. Nonetheless, by focusing on the body of the deceased, and commencing with the conclusion that that body cannot be the object of property rights, the approaches taken by these authors prevent any serious analysis of the right to possession of the body of the deceased as a distinct legal incident. The result is a substantial gap in the existing law of the dead literature. This criticism is, however, less true of Hardcastle than of others. Whilst his normative concerns prevent him from proceeding far down the path, Hardcastle does in fact commence an analysis of the right to possession by questioning (and subsequently rejecting) the body of the deceased as an appropriate object of property under his preferred view of property as a bundle of rights.<sup>50</sup> This same theory of property is adopted by several scholars who actively engage in an analysis of the juridical nature of the right to possession.

## 4.2. Analysing the Right to Possession

### 4.2.1. A Bundle of Rights Perspective

The vast majority of those scholars who *do* engage with any serious analysis of the right to possession conclude that the right should sound in property. A number of these authors adopt a bundle of rights perspective when reaching this conclusion, pointing to the ability of the right-holder to enforce that right against the world as a key ‘stick’ in that property ‘bundle’. For Roger Magnusson, the fact that the right-holder is able to prevent *any* interference with the process of disposal *by anyone*, along with their ability to alienate their right to possession in favour of another, is instrumental in reaching the conclusion that the right to possession of the body of the deceased is indeed proprietary in nature.<sup>51</sup> This focus on the ability of the right-holder to enforce the right to possession against third parties is shared by Celia Hammond, who also argues that this is indicative of the right’s proprietary quality.<sup>52</sup> For Hammond, the reluctance on the part of

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<sup>49</sup> Ibid 14-15, 43, 50. Hardcastle does, however, accept that *parts* of dead bodies can become property: see at 28-46.

<sup>50</sup> Ibid 13-14.

<sup>51</sup> Magnusson, above n 12, 610-11. Magnusson refers solely to the right of the executor, however, as Chapters Two and Three will show, the categories of potential right-holders extend beyond the personal representative.

<sup>52</sup> Above n 26, 105. On the means by which the right-holder could enforce their right to possession, Hammond notes that ‘[a]rguably that action could be based in conversion’: at 107 n 44.

Australian courts to recognise the fact that the right to possession is, in practice, treated as a limited property right is ‘unnecessarily obfuscating and misleading’.<sup>53</sup>

The bundle of rights approach to property adopted by Magnusson and Hammond (and Hardcastle) is problematic. As Chapter Five will explain, such an approach, with its refusal to identify a single, stable characteristic that grounds the institution of property, provides an inadequate means of assessing whether an entirely novel right — such as the right to possession, and as opposed to a right created by splintering off a portion of a larger, established property right — is proprietary in nature. Founded on a theory of property not fit for purpose as it is, the conclusion reached by Magnusson and Hammond that the right to possession is indeed proprietary in nature cannot be taken to have decided the issue. As such, there remains scope in the existing scholarship for a more refined analysis of the juridical nature of the right to possession to be undertaken.

#### 4.2.2. Property from Public Policy

Outside of a bundle of rights analysis, attempts have been made to locate the right to possession within the practice of property on grounds of public policy. Debra Mortimer, for example, argues that the limited and purposive nature of the right reveals that, despite their use of propertied terminology, courts developing the right to possession have seen it as something less than a proprietary interest.<sup>54</sup> Nonetheless, possession, or a right to possession, of the body for the purposes of disposal is not unlawful in the eyes of the common law (in the sense that it does not violate religion, public health, or public decency), and so is a species of lawful possession that courts will protect — thus making it a proprietary interest.<sup>55</sup> Mortimer’s analysis is founded on the purpose for which possession (or the right to possession) is effected, and relies on judges, as protectors of public policy, to determine which purposes are acceptable and which are not.<sup>56</sup> In this way, Mortimer sees the proprietary interest as in fact being the *remedy* granted by courts to protect that possession deemed lawful by the courts.<sup>57</sup>

Mortimer’s public policy-based methodology leaves potential right-holders in limbo prior to an adjudication by a court that their possession (or right to) does not violate public policy and is therefore lawful, the court only then granting the potential right-holder a proprietary interest good against the whole world. This methodology neatly responds to concerns regarding the commodification of the body (something Mortimer would presumably see as falling afoul of

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<sup>53</sup> Ibid 105.

<sup>54</sup> Mortimer, above n 26, 237-8.

<sup>55</sup> Ibid 239, 240.

<sup>56</sup> Ibid 240-1.

<sup>57</sup> Ibid.

public policy). However, in the practicalities of the day-to-day disputes founded upon the right to possession, it presents significant practical difficulties.

Whilst Mortimer appears to assume that the right to possession will always be proprietary because its purpose (which Mortimer consistently refers to as burying the body of the deceased) will always be lawful, her methodology leaves this open to question. Consider, for example, the possibility that a right-holder might choose to dispose of the body of the deceased by way of large, open-air cremation.<sup>58</sup> Under Mortimer's analysis, recourse to a court of law is required to determine whether possessing the body for the purpose of cremating it in this manner would violate public policy and therefore be unlawful (thus failing to ground a property right). Thus, the potential right-holder has no way of knowing at the outset if they are in legitimate possession of the body (and thus have a proprietary right to possession of that body good against the world), and risks having another party with a more clearly 'lawful' purpose (such as simple interment) removing the body from their possession without consequence. That is, until the validity of the potential right-holder's initial possession is adjudicated on by a court having recourse to public policy — an unruly horse in its own right.<sup>59</sup>

### **4.2.3. The Right to Possession as Something Other than a Property Right**

In contrast to the conclusion reached by Mortimer, Magnusson, and Hammond, a number of authors who engage with the right to possession and an analysis of its juridical status are quick to emphasise the right's less than robust proprietary character. Daniel Sperling, for example, stresses that the protection enjoyed by the right to possession is very weak, and in this respect it can be easily distinguished from what he refers to as a 'full property right'.<sup>60</sup> He also asserts that courts are entirely willing to subordinate the right to possession to the demands of justice and the public good, and that they in fact often do so.<sup>61</sup>

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<sup>58</sup> A practice followed by adherents of a number of religious faiths — see, eg, *R (Ghai) v Newcastle City Council* [2011] 1 QB 591 (city council's refusal to set aside land for the erection of a traditional open-air funeral pyre did not violate the claimant's right to freedom of thought, conscience and religion under Article 9 of the European Convention on Human Rights, the claimant being an orthodox Hindu).

<sup>59</sup> *Richardson v Mellish* (1824) 2 Bing 229, 252; 130 ER 294, 303 (Burrough J) ('I, for one, protest, as my Lord has done, against arguing too strongly upon public policy;—it is a very unruly horse, and when once you get astride it you never know where it will carry you.').

<sup>60</sup> Daniel Sperling, *Posthumous Interests: Legal and Ethical Perspectives* (Cambridge University Press, 2008) 97.

<sup>61</sup> *Ibid* 97-8.

Writing within an American context as he is, Sperling attributes the poor property protection the right to possession receives to its quasi-property character.<sup>62</sup> Broadly speaking, quasi-property situations arise where a court seeks to simulate a propertied relationship by creating property-like entitlements, but recognises them as falling short of being fully proprietary in nature.<sup>63</sup> Sperling states that it has been clear from the establishment of the quasi-property right to possession of the body of the deceased in the 19<sup>th</sup> century that it does not protect a property interest.<sup>64</sup> As a result, the possessory and custodial interest at its heart ‘is not regarded as property in its true meaning’.<sup>65</sup> Be that as it may, Australian courts have to date declined to adopt quasi-property as a legal institution,<sup>66</sup> meaning that Sperling’s analysis is of limited value in an Australian context.

Closer to home, it has been proposed that Australian courts are ‘[determined] to avoid the use of the concept of property in relation to dealing with the disposal of the body’.<sup>67</sup> For those who take this view, such as Prue Vines, the right to possession in the Australian common law is ‘a possessory right short of property’.<sup>68</sup> Nonetheless, Vines stresses the importance of characterising rights in relation to the dead body — including the right to possession<sup>69</sup> — as proprietary so that the holder of that right can exclude others from the corpse.<sup>70</sup> This is, however, provided the sense of sacred conferred on the body is not interfered with by virtue of the property analysis.<sup>71</sup> Vines sees the sacredness of the body as encouraging a conception of property rights in relation to that body akin to those under a trust, or in Indigenous conceptions of land ownership: ‘[i]n this way a view of the dead body as property held as custodian will give the custodian control, but in turn it will control the custodian’s treatment of the body’,<sup>72</sup> thus avoiding ‘the taint of commodification’.<sup>73</sup>

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<sup>62</sup> Ibid 101-3.

<sup>63</sup> Shyamkrishna Balganes, ‘Quasi-Property: Like, but Not Quite Property’ (2012) 160 *University of Pennsylvania Law Review* 1889, 1890-1.

<sup>64</sup> Sperling, above n 60, 102. Cf Pawlowski, above n 12, 37 (arguing that the quasi-property right of the next of kin in the body of the deceased under US law contains essential attributes of property, making the quasi-property right akin to property in the corpse).

<sup>65</sup> Sperling, above n 60, 103.

<sup>66</sup> See *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479. Although see Lynden Griggs and Ken Mackie, ‘Burial Rights: The Contemporary Australian Position’ (2000) 7 *Journal of Law and Medicine* 404, 413-14 (concluding that the Australian right to possession is indeed a quasi-property right).

<sup>67</sup> Vines, ‘The Sacred and the Profane’, above n 11, 241.

<sup>68</sup> Ibid 240-1.

<sup>69</sup> Ibid 245-6, 259, 261 (‘[w]hen the person is dead, the fact that they have appointed an executor should be regarded as giving the executor property in the dead body and an exclusory custodial right ... to its possession and to determination of what will be done with it’).

<sup>70</sup> Ibid 246.

<sup>71</sup> Ibid 237.

<sup>72</sup> Ibid 257. A similar position is adopted by Mason and Laurie, above n 14, 719.

<sup>73</sup> Vines, ‘The Sacred and the Profane’, above n 11, 261.

Like Vines, Jesse Wall holds that the right to possession of the body of a deceased person should be governed by an exclusionary strategy<sup>74</sup> — although he rejects that such a strategy should sound in property.<sup>75</sup> He reaches this conclusion on the basis that deceased's body is not an object in itself, but instead remains the means by which others engage with the deceased as a matter of social experience.<sup>76</sup> This relationship of engagement between the living right-holder and the body of the deceased cannot be reduced to a defined set of activities.<sup>77</sup> Thus, the right to possession represents an open-ended spectrum of choices in relation to the body of the deceased that should be protected through the exclusion of all others from the body.<sup>78</sup> The emotional engagement of the living with the deceased via the deceased's body, however, means the right to possession does not meet the appropriate contingency requirement to be considered a property right.<sup>79</sup> Hence this exclusion should be protected by analogy with the law of privacy, not by application of the law of property.<sup>80</sup>

Whilst the analyses of both Wall and Vines provide a useful means of aligning social understandings of the deceased body within a particular community with a focused analysis of the right to possession, from the point of view of this Thesis and the 'property question' it seeks to answer, each has its own limitations. Wall rejects the possibility of a propertied right to possession on the basis of a particular, idealised view of the deceased as existing within a healthy network of social relations that, as Chapter Six will explore in detail, cannot be taken to be universally applicable. For her part, Vines notes the normative desirability of identifying the right to possession as a particular form of property right, however does not consider whether such a position is consistent, as a matter of doctrine, with the extant case law.

Clearly, then, a detailed, comprehensive, and scholarly analysis of the right to possession as it currently exists in the Australian common law is required so that the right's juridical status can be definitively determined. Exactly how this Thesis engages in such an analysis is set out in the next Part.

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<sup>74</sup> Wall, above n 26, 181-2.

<sup>75</sup> Ibid 189-90, 210.

<sup>76</sup> Ibid 63-4, 188-9.

<sup>77</sup> Ibid 182.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid 189-90, ch 4.

<sup>80</sup> Ibid 190-1.

## 5. Methodology

### 5.1. Selecting the Case Law

The theoretical assessment of the right to possession's placement within the body of legal rules that is property undertaken in this Thesis is founded on a doctrinal analysis of that right. Doctrinal research is at the core of much legal academic work, although attempts to explain and justify a doctrinal methodology are largely absent from the academic literature. Nonetheless, in recent years calls have been made for doctrinal methodologies in legal research to be both more explicit<sup>81</sup> and more rigorous<sup>82</sup> — a task this Part takes up.

Doctrinal legal scholarship is, in essence, a search for what the law *is*; that is, what the legal norms at play within the area of law under examination are.<sup>83</sup> In answering this question, a doctrinal methodology requires a close textual analysis of the case law<sup>84</sup> within a well-defined area of inquiry.<sup>85</sup> This analysis looks for consistency and coherence within the law,<sup>86</sup> as well as for explanations for any inconsistencies that emerge from the study.<sup>87</sup> In undertaking this analysis, a doctrinal methodology requires the investigator create their own interpretation of legal texts and the norms they represent and systematise. Doctrinal research also requires an explanation and argument as to why that interpretation is the most appropriate.<sup>88</sup>

This Thesis undertakes a doctrinal analysis of the right to possession of the body of a deceased person as it currently exists in the Australian common law. This analysis is founded on a core group of 56 cases, handed down in seven Australian jurisdictions between 1986 (when the first relevant dispute appeared in the case law) and February of 2020, involving disputes over the body of the deceased in which the right to possession was actively considered by the court.<sup>89</sup> As a body

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<sup>81</sup> See Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83, 98-101.

<sup>82</sup> See generally William Baude, Adam S Chilton and Anup Malani, 'Making Doctrinal Work More Rigorous: Lessons from Systematic Reviews' (2017) 84 *University of Chicago Law Review* 37.

<sup>83</sup> Martin Dixon, 'A Doctrinal Approach to Property Law Scholarship: Who Cares and Why?' in Susan Bright and Sarah Blandy (eds), *Researching Property Law* (Palgrave, 2016) 1, 2.

<sup>84</sup> *Ibid* 4.

<sup>85</sup> *Ibid* 3.

<sup>86</sup> *Ibid* 2-3.

<sup>87</sup> *Ibid* 6.

<sup>88</sup> See Mark Van Hoecke, 'Legal Doctrine: What Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed), *Methodologies of Legal Research: What Method for What Kind of Discipline?* (Hart, 2011) 1, 4-11 (describing legal doctrine as a hermeneutic, argumentative, empirical, explanatory, axiomatic, logical, and normative discipline).

<sup>89</sup> A complete case list is set out in Appendix A and is current as of 29 February 2020. The only jurisdiction not represented in the case law is the ACT. For its part, the lack of case law prior to 1986 likely reflects the reality of law reporting in the pre-internet era, rather than the absence of relevant

of case law, these 56 cases will be referred to as ‘post-death dispute cases’ (or variations thereof). These post-death disputes take many forms. The most common — labelled ‘burial disputes’ both in this Thesis and in the existing literature — occurs when those who survive the deceased are in conflict over how and where a body will be disposed of (and who has the authority to make these decisions). Other, less frequent dispute types relate to the control of burial plots, and post-disposal issues such as the retention of ashes following cremation. Despite their varied nature, however, it warrants reiteration that each of the post-death dispute cases analysed in this Thesis shares the common feature of having the right to possession as a live issue in the dispute.

This collection of 56 cases is based on the list of 48 ‘Australian Cases Involving Funeral and Burial Disputes’ compiled by the Victorian Law Reform Commission (‘VLRC’) in 2016.<sup>90</sup> Each case listed by the VLRC was located. The decisions cited in and citing to each case were also identified (in either or both of Westlaw AU and Lexis Advance, according to availability) and the nature of these disputes assessed. The purpose of this exercise was to identify those cases in which the common law right to possession of the body of a deceased person was at issue in the dispute. In addition, frequent searches were made of these case law databases in an effort to capture cases not included in the 2016 VLRC Report.<sup>91</sup> This process resulted in a number of cases being added to the list prepared by the VLRC, whilst written reasons were unable to be located for four of the disputes listed by the Commission.<sup>92</sup> It is also pertinent to note that the identification of disputes relating to a deceased person of Aboriginal or Torres Strait Islander descent by the VLRC is repeatedly inaccurate.<sup>93</sup>

This collection of 56 cases is intended to be comprehensive in terms of those decisions that actively engage with the common law right to possession; it is not, however, intended to encompass all disputes relating to the body of the deceased. It does not include, for example, the large number of cases that merely acknowledge the existence of a right to possession of the body of a deceased person. Nor does it include cases dealing with issues adjacent to the right to

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disputes: see Michael Bryan, ‘The Modern History of Law Reporting’ (2012) 11 *University of Melbourne Collections* 32, 32.

<sup>90</sup> See Victorian Law Reform Commission, *Funeral and Burial Instructions*, Report (2016) app D.

<sup>91</sup> An example search is: “‘right to possession” or “right of custody” & death or deceased & body % corporate’.

<sup>92</sup> Email from Brendon Copley, Research and Training Librarian, Supreme Court of Queensland Library, to Katy Najafi, Document Supply Services Coordinator, Australian National University Library, 5 June 2018.

<sup>93</sup> This is important to note because a disproportionate number of the post-death dispute cases involve Indigenous Australians, and these disputes can leave communities fractured for years: see Vines, ‘Testamentary Freedom and Customary Law’, above n 28, 362. In correspondence the Commission has acknowledged that the Appendix contains errors in this regard. However, as the Report has been issued, the Appendix cannot be amended: email from Natalie Lilford, Manager, Community Law Reform, Victorian Law Reform Commission, to the author, 17 May 2019.

possession, such as the reasonability of funeral expenses in the context of a particular estate, or objections to coronial autopsies. Of the cases that *are* included in this analysis, it must be noted that nearly all are first instance decisions. This reflects the time-sensitive nature of many disputes centred on the body of the deceased. After all, for both public health and public policy reasons, a deceased body cannot remain undisposed of for long.<sup>94</sup> Whilst there are several instances of appellate decisions within the body of case law analysed by this Thesis,<sup>95</sup> they are much more the exception than the rule, and the lack of authoritative status enjoyed by many of the decisions discussed must be acknowledged.

## 5.2. The Evaluative Framework

In interrogating this core group of 56 cases and the common law right to possession they instantiate, this Thesis draws on an important theme within the private law: the idea that legal rules can be divided into individual taxonomical groupings.<sup>96</sup> This Thesis proceeds on the basis that there exists a discrete, taxonomical branch of the private law under the label of ‘property’. It interrogates the case law that is at the foundation of its doctrinal analysis against the backdrop of this taxonomical branch to assess whether the right to possession of the body of the deceased that the case law represents can be appropriately placed within this branch of the private law.

In order to appropriately differentiate the discrete branch of the private law that is property, this Thesis adopts the taxonomical lens of James Penner. Penner sees any given system of legal norms as being organised around the basic human interests that these norms protect.<sup>97</sup> As Chapter Five of this Thesis will explore in detail, the law of property is clustered around our interest in exclusively determining the uses to which our ‘things’ can be put. Thus, if this Thesis’ analysis of the right to possession reveals that right to be operating in protection of the interest that grounds the legal category of ‘property’ — being our interest in exclusively determining use — and this

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<sup>94</sup> Conway and Stannard have critiqued the public health rationale given for the swift decision-making in burial dispute cases, noting that modern technology allows a body to be refrigerated (and thus decomposition prevented) for long periods of time. They propose that the time pressure felt by courts is largely based on the societal view that a dead individual is disrespected when their ultimate disposal is delayed by squabbling relatives: Heather Conway and John Stannard, ‘The Honour of Hades: Death, Emotion and the Law of Burial Disputes’ (2011) 34 *University of New South Wales Law Journal* 860, 889-90. These themes are explored in Part 2.2 of Chapter Three.

<sup>95</sup> *Jones v Dodd* (1999) 73 SASR 328, discussed in Part 4.2 of Chapter Three, is perhaps the most prominent example.

<sup>96</sup> The study of taxonomy within the private law was instigated by Peter Birks: see, eg, Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, 1985), particularly chs 1 and 2; Peter Birks, ‘Introduction’ in Peter Birks (ed), *English Private Law* (Oxford University Press, 2000) vol 1, xxxv.

<sup>97</sup> See Penner, above n 34, ch 3, particularly at 48-9.

right relates to a ‘thing’ to which it is appropriate to extend the practice of property, it is correct to locate the right to possession within the taxonomical category of the private law that is property.

This interrogative framework requires both internal and external consistency. The doctrinal case law analysis undertaken in this Thesis must first provide an internally consistent depiction of the right to possession as a discrete legal incident. That is to say, the body of post-death dispute case law under analysis, chosen because of its active engagement with the right to possession, must reveal that right to have clear boundaries and identifiable salient features<sup>98</sup> that are entirely self-contained within the parameters of that case law. This Thesis’ doctrinal analysis must also provide an externally consistent analysis, whereby the clear boundaries and salient features that make up the right to possession as an internally consistent legal incident are appropriately aligned with the taxonomical category of property.

If this analysis presents an internally consistent representation of the right to possession, any of the right’s salient features that make up this internally consistent representation, but are unable to be fitted into an externally consistent picture of the right to possession as a property right according to the theory of property adopted in this Thesis, must be examined independently. Possible explanations for this external inconsistency must be evaluated, and the possibility that this external inconsistency requires the conclusion that the right to possession does not in fact sound in property — or, alternatively, that this non-conforming salient feature is in fact not integral to the right to possession and can be ignored — must be considered.<sup>99</sup>

## 6. Argument

This Thesis will argue that the right to possession of the body of a deceased person as it currently exists in the Australian common law is indeed a property right.

As an important first step, Chapter Two argues that, far from being a creature purely of 19<sup>th</sup> century case law, the right to possession of the body of the deceased has emerged as a result of at least 1,000 years of legal development. This Chapter argues that the right to possession operates within an external legal architecture of bodily disposal that is made up of three interrelated legal incidents: a right to possession of the body, a duty to dispose of the body, and a liability for associated funeral expenses. These legal incidents have developed and accumulated since the Anglo-Saxon period in response to two prevailing social norms: the need for the body be disposed

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<sup>98</sup> This term is borrowed from Allan Beever and Charles Rickett, ‘Interpretive Legal Theory and the Academic Lawyer’ (2005) 68 *Modern Law Review* 320, 325.

<sup>99</sup> This quest for both internal and external consistency is something of an exercise in interpretive legal theory: see *ibid* 324-5.

of swiftly, and for it be disposed of decently. In order to appropriately respond to these normative concerns, English law vested each of these three incidents in a single individual easily identifiable in any given case, with a strict common law hierarchy of these individuals eventually developing.

Having set out a comprehensive overview of the historical development of the right to possession, this Thesis then delineates the modern field of inquiry. Chapter Three argues that the modern case law shows Australian courts developing the traditional common law hierarchy of potential right-holders by taking an increasingly expansive approach to the vesting of the right to possession. Rather than rejecting the need for individualised control so prevalent in the historic sources, however, this development reflects courts responding to changing social norms regarding the *identity* of the most appropriate person to be placed in charge of a particular deceased body. Chapter Four sets out the nature of the individualised control vested in the modern right-holder, and examines the scope and extent of the discretion the right to possession affords this individual. In doing so, it sets out five salient features that make up the right to possession, revealing that right to be an internally consistent legal incident.

The right to possession of the body of the deceased having been explored in Chapters Two, Three, and Four, Chapter Five sets out the theoretical approach adopted for the purpose of this Thesis' property inquiry. This Chapter eschews the conception of property as a bundle of rights and interests between persons in relation to a 'thing' that characterised property theory for much of the last century. Instead, it adopts an exclusion essentialist formulation of property rights founded on James Penner's thesis that property rights protect the interest individuals have in exclusively determining the use to which a particular 'thing' will be put. Chapter Five refines Penner's methodology for determining whether a particular novel 'thing' — such as the body of a deceased person — can be encompassed within the practice of property. It also elaborates on this methodology, setting out the exact process by which the proprietary status of a pre-existing right in relation to that novel 'thing' can be assessed.

The methodology ultimately adopted in Chapter Five is as follows. First, the exact 'thing' at issue must be appropriately and discretely identified. It then must be asked if this 'thing' is physically separable from all other persons, and if it is capable of being the subject of multiple normatively symmetrical relationships. If both questions are answered in the affirmative, then it is appropriate to extend the practice of property to encompass this novel 'thing'.

Having reached the conclusion that a particular novel 'thing' can be encompassed within the practice of property, the analytical focus moves to consider the proprietary status of the pre-existing right that attaches to that 'thing'. Here, the underlying inquiry is whether the pre-existing

right under examination aligns with the structural framework expected of property rights. One must first establish whether the ‘thing’ at issue grounds an *in rem* duty of non-interference<sup>100</sup> applicable to all bar the holder of the pre-existing right. Also to be determined is the scope of the negative sphere of liberty that duty leaves to the holder of the purported property right to make use of that ‘thing’. This sphere of liberty must enable a sufficiently open-ended set of uses in order to identify the pre-existing right at issue as a property right. Making this determination will involve consideration of the ‘thing’ as artefact — that is, a ‘thing’ that exists in the world for the purpose of achieving a particular, proper function.<sup>101</sup> Included within the open-ended set of uses enabled by the negative sphere of liberty and available to the purported property right holder must be that use that is necessary in order to achieve the proper function of that ‘thing’ as artefact.

Chapters Six and Seven apply the methodology set out in Chapter Five to the right to possession as set out in Chapters Two, Three, and Four. Adopting a physical and de-personalised view of the deceased body, Chapter Six first argues that the body of the deceased is sufficiently separate from the holder of any purported property right (and indeed the deceased themselves) so as to invoke the practice of property. This Chapter also argues, on the basis of relevant ‘pre-legal’ norms (being those norms used by a particular society to determine whether a particular body of law is applicable in a particular factual situation), that the body of the deceased is capable of being the subject of multiple normatively symmetrical relationships. Having argued that the body of the deceased is a sufficiently contingent ‘thing’, Chapter Six concludes that it is appropriate to extend the practice of property to encompass the body of the deceased.

Chapter Seven next argues that the body of the deceased grounds an *in rem* duty of non-interference imposed on all persons other than the holder of the right to possession within the specific context of disposal. This generalised duty creates a sphere of negative liberty around the body in which the right-holder is the exclusive determiner of use. Of course, being limited to the specific context of disposal, the uses to which the body of the deceased as the object of a property right can be put are limited. Nonetheless, this Chapter argues that, within this broad scheme of disposal, sufficient exclusive discretion is retained by the right-holder that the set of available uses can readily be said to be open-ended. Importantly, Chapter Seven also identifies this open-ended set of uses as including the proper function of the body of the deceased as artefact — this function being disposal. This Chapter thus successfully aligns the right to possession with the

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<sup>100</sup> A term used by Penner to refer to a singular, comprehensive duty to which all besides the holder of the purported property right are subject: see above n 34, 26-9.

<sup>101</sup> See Eric R Claeys, ‘Property, Concepts, and Functions’ (2019) 60 *Boston College Law Review* 1, 20; John R Searle, *The Construction of Social Reality* (Free Press, 1995) 19.

structural framework of property rights established in Chapter Five, leading to the preliminary conclusion that the right to possession of the body of the deceased does indeed sound in property.

Finally, Chapter Eight considers the five salient features internal to the right to possession identified in Chapter Four in the context of this preliminary conclusion. In an effort to establish the external consistency required by this Thesis' evaluative framework, it considers whether these salient features align with a propertied conception of the right to possession, or if the existence of a non-conforming salient feature requires the preliminary property conclusion to be reconsidered. After examining each salient feature and establishing its external consistency, or explaining its external inconsistency, with a propertied view of the right to possession, Chapter Eight ultimately confirms the preliminary conclusion reached in Chapter Seven. Thus, this Thesis concludes that the right to possession of the body of a deceased person as it currently exists in the Australian common law is indeed a property right.

## 7. Conclusion: Three Original Contributions

Giving the right-holder absolute authority over the deceased's body, the right to possession of the body of the deceased is the means of resolving an increasing number of complex and multi-faceted disputes relating to the deceased body, its control, and its disposal. Defying its central role in the Australian common law of the dead, however, the right to possession and its juridical status has been the subject of little sustained academic analysis. This Thesis deviates from this trend by clearly and definitively answering 'the property question': is the right to possession of the body of the deceased as it currently exists in the Australian common law a property right? In doing so, this Thesis makes three important contributions to the existing scholarship.

First, this Thesis provides a systematic and comprehensive examination of the Australian case law relating to the right to possession that has been absent from the law of the dead scholarship to date<sup>102</sup> — a lacuna that has allowed the right to possession to be misunderstood and under-theorised by both the academy and the judiciary.

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<sup>102</sup> Heather Conway has examined burial disputes, including the Australian case law, within a comparative Commonwealth context: see, eg, *The Law and the Dead*, above n 7, ch 4; 'Dead, but Not Buried', above n 27, 427-31; 'First Among Equals', above n 27. Conway's work is important, and has been highly influential in the academic consideration of these issues. However, its comparative nature means it is unable to go into the same depth and detail as this Thesis as regards the Australian case law. Specific cases within this established body of case law have also been the subject of academic attention: see, eg, Griggs, above n 30 (discussing *Vosnakis v Arfaras* [2015] NSWSC 625 (26 May 2015)); Ian Freckelton, 'Disputed Family Claims to Bury or Cremate the Dead' (2009) 17 *Journal of Law and Medicine* 178 (discussing *Joseph v Dunn* (2007) 35 WAR 94 and *AB v CD* [2007] NSWSC 1474 (17 December 2007)).

This detailed examination of the case law allows this Thesis to make its second contribution to the existing literature: the conclusive determination that the right to possession of the body of a deceased person does indeed sound in property. In reaching this conclusion, this Thesis clarifies the existing law, providing certainty to families and judicial officers alike. This certainty is of vital importance to the Australian common law of the dead as the field increases in both size and complexity. Having provided the most thorough and definitive answer to the ‘property question’ that exists in the literature — answering this question in the affirmative — this Thesis also provides a foundational understanding of this area of the law from which developments and improvements can be made.

The third contribution made by this Thesis to the existing literature stands outside of the law of the dead. This contribution is the setting out, for the first time, of a practical methodology by which the proprietary nature of a discrete, pre-existing legal right can be assessed under an exclusion essentialist theory of property. This methodology operates as an addendum to the works of other exclusion essentialist property scholars writing in the analytical tradition. These works detail a methodology by which the appropriateness of extending the practice of property to encompass a particular novel ‘thing’ (such as the body of the deceased) can be assessed. Having determined that a particular ‘thing’ is an appropriate object of property rights, however, exclusion essentialists merely assume the existence of a property right in relation to that ‘thing’. In setting out a methodology for actively assessing the proprietary nature of pre-existing legal rights for the first time, then, this Thesis fills a gap in exclusion essentialist property theory and provides a practical guide that can be adopted (or adapted) by other property theorists working in the context of other entirely novel situations.

## Chapter Two

# A History of the Right to Possession

### 1. Introduction

A detailed analysis of the historical origins of the right to possession of the body of the deceased is entirely absent from academic writings within the law of the dead, both in Australia and throughout the remainder of the common law world. This Chapter aims to remedy this lacuna — after all, ‘[h]istory must be part of the study, because without it we cannot know the precise scope of rules which it is our business to know’.<sup>1</sup>

In setting out the history of the right to possession, this Chapter makes three interrelated claims. The first is that the right to possession of the body of the deceased operates within an external legal architecture of bodily disposal. This external architecture encompasses three separate yet interrelated legal incidents. Key among these for our purposes is the right to possession — that is, the ability to exert physical and decision-making control over the deceased’s body. The primary sources reveal, however, that inherently linked to this possessory *right* is a *duty* to bury the body,<sup>2</sup> along with a financial *liability* for associated funeral expenses.

An analysis of this developing external legal architecture reveals the right to possession, alongside its related legal incidents, consistently responding to two important normative concerns. These concerns are, first, the public health requirement that the bodies of the deceased be disposed of quickly; and second, the public decency requirement that they be treated with respect and dignity.<sup>3</sup> As its second claim, this Chapter argues that the English common law<sup>4</sup> responded directly to these social norms by consistently vesting control over the body of the deceased — via the developing external architecture of bodily disposal and its internal legal incidents — in some one identifiable person.

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<sup>1</sup> O W Holmes, ‘The Path of the Law’ (1897) 10 *Harvard Law Review* 457, 469.

<sup>2</sup> Within the modern law of the dead, this duty is considered one of *disposal*, rather than merely of burial. Nonetheless, given this Chapter’s historical analysis, it will be referred to as ‘the duty to bury’ throughout this discussion.

<sup>3</sup> On the role these norms play in the modern right to possession, see, eg, Heather Conway, *The Law and the Dead* (Routledge, 2016) 59-60; Rohan Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (Hart, 2007) 50-1; S G Hume, ‘Dead Bodies’ (1956) 2 *Sydney Law Review* 109, 110.

<sup>4</sup> Throughout this Chapter I use the term ‘English common law’ (and variations thereof) to refer to the judge-made law of England. That is, including the decisions of courts of both common law and equity, and excluding the decisions of the Ecclesiastical courts (except where expressly noted): see A W Brian Simpson, ‘Common Law’ in Peter Cane and Joanne Conaghan, *The New Oxford Companion to Law* (Oxford University Press, 2008) 164, 165.

Initially, this some one person was identified as the deceased's personal representative, however in time this ceased to always be the case. This leads to the third claim made in this Chapter: that, whilst originally closely tied to the function of estate administration, the right to possession and the external architecture of bodily disposal of which it is a part would eventually be entirely severed from that administrative function. From this time, disposing of the body of the deceased ceased to be a subsidiary element of estate administration, and instead became a freestanding legal exercise.

This Chapter makes its three claims as follows. First, Part 2 uses a prominent primary source to introduce the three legal incidents that make up the external legal architecture of bodily disposal. Part 3 examines the interrelation between the early origins of two of these legal incidents — a financial liability for the deceased's funeral expenses and a duty to bury the deceased's body — with the emerging function of estate administration in the late Anglo-Saxon period. Part 4 continues this analysis in the early Norman and pre-Reformation periods, before Part 5 details the crystallisation of the personal representative's liability for the deceased's funeral expenses into a legal obligation in the centuries post-Reformation. The solidification of the duty to bury into a legal obligation in the 18<sup>th</sup> and 19<sup>th</sup> centuries, and the process by which it began to be imposed on persons other than the deceased's personal representative is examined in Part 6. Finally, Part 7 introduces the last of the three legal incidents that make up the external legal architecture of bodily disposal: the right to possession of the body of the deceased.

## 2. Three Legal Incidents within the External Architecture of Bodily Disposal

In the 1882 decision *Williams v Williams* ('*Williams*'), Kay J held that the executor '[has] a right to the custody and possession of [the body of the deceased] (although they have no property in it) until it is properly buried'.<sup>5</sup> This decision is important because it is one of the first references we have to the right to possession as an established legal principle in the case law. Crucially for our purposes here, however, this decision also emphasises that the modern right to possession of the body of a deceased person is one of several interrelated legal principles that exist in the context of bodily disposal. Thus:

the rights of executors with respect to burial ... are stated thus in *Williams* on Executors: "... first, he must bury the deceased in a manner suitable to the estate he leaves behind him." ... It has been argued that this only applies to the **expenses of the burial**; but I do not agree with that

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<sup>5</sup> (1882) 20 Ch D 659, 665.

contention. It means, and I understand the law of this country to be, that *primâ facie* the executors are **entitled to the possession** and are **responsible for the burial** of a dead body<sup>6</sup>

This passage reveals an external legal architecture of bodily disposal, made up of three interrelated, internal legal incidents. The origins and development of each of these three incidents are explored in detail in the following Parts.

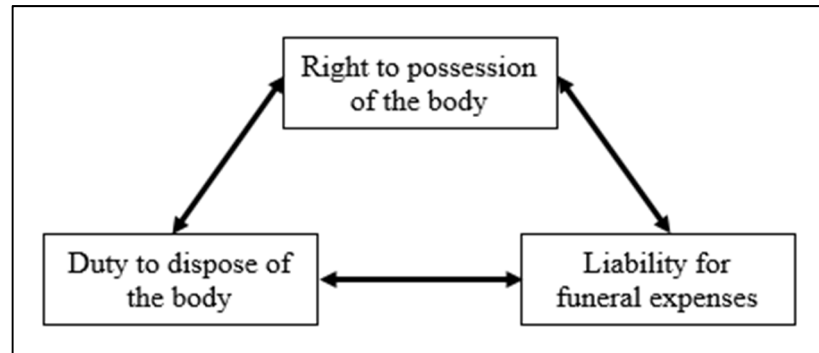


Figure 2-1: The external legal architecture of bodily disposal

### 3. The Concurrent Birth of Estate Administration, Liability for Funeral Expenses, and Duty to Bury

The first two of the three legal incidents that make up the legal architecture of bodily disposal to emerge within the primary sources were a liability for the deceased's funeral expenses and a duty to see the body appropriately buried. In the Anglo-Saxon period, the origins of these two legal incidents were closely linked with the emerging function of estate administration.

In Anglo-Saxon England, the payment of a mortuary fee — or 'sawolsceatt' — was often made to the local church so that burial (importantly, accompanied by the appropriate funeral rites) could take place.<sup>7</sup> This payment is included in extant will-documents from the late Anglo-Saxon period, these testamentary instruments expressly providing for the payment of a burial fee within their provisions.<sup>8</sup> Sheehan has shown, however, that the convention of paying a burial fee existed in the centuries prior to these testamentary documents, and was likely common practice by as early as the late 7<sup>th</sup> century.<sup>9</sup> Sawolsceatt was also listed in the first code of Athelstan, dating to the

<sup>6</sup> Ibid 664 (internal citations omitted and emphasis added).

<sup>7</sup> The primary sources detailing this payment are set out in T Northcote Toller (ed), *An Anglo-Saxon Dictionary: Based on the Manuscript Collections of the Late Joseph Bosworth* (Oxford University Press, 1898 ed) 819. See also Michael M Sheehan, *The Will in Medieval England* (Pontifical Institute of Medieval Studies, 1963) 79-81.

<sup>8</sup> See examples described in Sheehan, above n 7, 80.

<sup>9</sup> Ibid 79-80. See also F M Stenton, *Anglo-Saxon England* (Oxford University Press, 3<sup>rd</sup> ed, 1971) 152-3.

early 930s, as one of the fees the local reeve was to ensure went to the church,<sup>10</sup> and is acknowledged in the ecclesiastical writings of the influential Anglo-Saxon Bishop Wulfstan,<sup>11</sup> who died in 1023.

The customary payment of a burial fee — the origins of a later financial liability — was thus recognised at all levels of society throughout the late Anglo-Saxon period, and likely for centuries prior. The payment of this mortuary fee to the church of burial took place over the deceased's open grave within the parish churchyard,<sup>12</sup> and was made before the completion of the funeral rites.<sup>13</sup> Here, note the social and religious concerns at play with regard to the burial of the body, along with the mode and location of that burial. The practice of burying one's dead in a churchyard is said to have begun with Cuthbert, Archbishop of Canterbury in 750CE,<sup>14</sup> and as adherence to the Christian religion grew among the Anglo-Saxons, burial in any place other than a churchyard became spiritually problematic.<sup>15</sup> There was a strong social and religious need, then, for the body to be delivered to an appropriate and decent (that is to say, Christian) burial place — which, as we have seen, required the payment of a fee. If this payment was not made, the appropriate funeral rites might be refused or left incomplete. And so, whilst not yet a legal duty, strong social and religious customs existed that required some one person or group of people deliver the body of the deceased to the local churchyard for burial, and make the mortuary payment over the open grave.

As to the identity of the person or persons charged with delivering the body of the deceased to their grave, it is likely that this responsibility, along with that for the payment of the fee to the church of burial, would have fallen on a close family member of the deceased. Intestate succession was the norm at this time, and in most cases the deceased's property passed to their biological heirs as a matter of right — a practice required to preserve the foundations of Anglo-Saxon

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<sup>10</sup> 'And I will also that my reeves do, that there be given the churchscots and the soulscots at the places to which they rightly belong': Oliver J Thatcher (ed), *The Library of Original Sources* (University Research Extension Co, editors ed, 1907) vol 4, 231.

<sup>11</sup> Toller, above n 7, citing Wulfstan's Homilies.

<sup>12</sup> Sheehan, above n 7, 81; Stenton, above n 9, 153.

<sup>13</sup> Toller, above n 7. The payment was also often made alongside the giving of alms to that church for the good of the deceased's soul: Sheehan, above n 7, 79-81.

<sup>14</sup> Samuel B Ruggles (Referee), 'An Examination of the Law of Burial', Report to the Supreme Court of New York in *Case of Widening Beekman Street*, 15 January 1856, 36. Ruggles, who wrote his report with a definite anti-ecclesiastic sentiment, suggests that this was a calculated move on the part of the early ecclesiastics eager to increase attendance at their churches and participation in their religion: at 35. Similar sentiments appear in the English case law: see, eg, *Andrews v Cawthorne* (1744) Willes 536, 537; 125 ER 1308, 1309.

<sup>15</sup> Ruggles, above n 14, 37.

society.<sup>16</sup> The same social forces likely also required that it be the heirs and other family members who delivered the body of the deceased to the church and paid the appropriate burial fee.

In some circumstances, however, necessity required that Anglo-Saxon individuals deviate from this customary pattern of heredity succession and make use of one of the rudimentary testamentary schemes emerging in this period.<sup>17</sup> Such a need might arise, for example if no family of the deceased existed close enough to inherit under customary law (as was the case with childless priests),<sup>18</sup> or if the testator held property that was not governed by the customary inheritance scheme.<sup>19</sup> In cases where formal testamentary bequests were made, the bequeathing party often requested they be enforced by an intermediary.<sup>20</sup> This third party intermediary played a distinct role in Anglo-Saxon society and existed as a predecessor to the role of executor that would emerge in future centuries.<sup>21</sup> In practice, they were responsible for facilitating the movement of property between deceased donor and living donee. As with the payment of the mortuary fee, the transfer of the donor's property from the intermediary to the donee often took place at the graveside of the deceased.<sup>22</sup> This is unlikely to be a coincidence, and it is possible, if not likely, that, in addition to seeing to the bequests of the deceased, it was the third party intermediary who was responsible for delivering the body (and the burial fee) to the grave.

<sup>16</sup> Melville Madison Bigelow, 'The Rise of the English Will' in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History* (Little, Brown, and Company, 1907-9) vol 3, 770, 776-7.

<sup>17</sup> These testamentary dispositions were not the last will and testament that we know today. For a description of the testamentary will-documents and oral pronouncements used throughout the Anglo-Saxon period and into the early Norman period, see Sheehan, above n 7, ch 2.

<sup>18</sup> Members of the clergy were not at this time required to be celibate or to refrain from entering the married state, although contemporary religious authors such as Bede strongly encouraged the clergy to voluntarily abstain from such activities out of a belief that they were incompatible with religious service: see Catherine Cubitt, 'The Clergy in Anglo-Saxon England' (2005) 78 *Historical Research* 273, 284-6.

<sup>19</sup> Bigelow, above n 16, 778.

<sup>20</sup> Sheehan, above n 7, 41-4.

<sup>21</sup> This third party intermediary has its roots in the Germanic institution of the *Salmann*: Sheehan, above n 7, 41, 148-9. R J R Goffin has set out the role of the *Salmann* and its gradual transition into the testamentary executor in great detail: *The Testamentary Executor in England and Elsewhere* (C J Clay and Sons, 1901) 24-34. Scholars are divided on the question of whether this institution appeared organically in England following the Germanic invasions, or if it was a later importation of the Church from the Continent: Sheehan, above n 7, 149-50.

To mitigate the risk that the intermediary would chose not to transfer the property on to the donee, Anglo-Saxon testamentary dispositions also occasionally nominated a *mund*, or 'protector', of the deceased's arrangements. Because of this protective element, *munds* were often powerful people, the most favoured being the king himself. Sheehan has argued that, unlike the third-party intermediary, the *mund* did not receive a right in the deceased's property — their role being simply one of supervision: above n 7, 43-4. Goffin, on the other hand, tentatively links the *mund* with the Germanic *Salmann*: above n 21, 36.

<sup>22</sup> Sheehan, above n 7, 59-60. The property distributed under Anglo-Saxon testamentary schemes could include both chattels and land: see at 83-106.

Crucially, then, in this very early period we see the intertwining of the emerging role of personal representative and the financial responsibility for the burial of the deceased's body, as well as a developing responsibility to make that body available for burial. It was the prototype of the modern executor, or, alternatively, the close family members of the deceased (who, as the next Part will explain, would soon become strong candidates for the new role of administrator) — both being an identifiable person or group of people within a particular community and in relation to a particular deceased individual — who were likely responsible for the delivery of the body of the deceased to the parish churchyard, the payment of the burial fee, and the distribution of the deceased's estate. This state of affairs would continue into the early Norman period.

## **4. Liability, Duty, and Estate Administration in the High and Late Middle Ages**

### **4.1. The Personal Representative Emerges as a Legal Institution**

In the decades immediately following the Norman Conquest of 1066 there was little change in the role of the third party intermediary introduced above. As in the Anglo-Saxon period, the transfer of property from this third party to the ultimate beneficiary often took place at the time of burial,<sup>23</sup> and, crucially, by the time of the Magna Carta in 1215 there is clear reference to this third party by the title of 'executor'.<sup>24</sup>

Also corresponding with the promulgation of the Magna Carta was the emerging recognition of intestacy as a matter to be dealt with at law, rather than by recourse to customary hereditary entitlement, and the acquisition of jurisdiction over intestate estates by the ecclesiastical courts.<sup>25</sup> Initially these courts administered and distributed the estate themselves,<sup>26</sup> however they proved to be so inadequate — if not fraudulent — in their administrative role that legislative intervention was required.<sup>27</sup> In 1357, a statute was passed that required the ecclesiastical courts, not to administer the intestate estate themselves, but to grant administration to 'the next and most lawful

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<sup>23</sup> An arrangement that no doubt suited the church where burial took place, as it was often the primary beneficiary in the distribution of the deceased's property: *ibid* 117.

<sup>24</sup> *Ibid* 152. This developing role of executor corresponds, at least temporally, with the movement from more primitive forms of post-mortem property distribution to the canonical testament of the Roman civil law known to us today, this movement taking place sometime between the deaths of Henry I and King John (that is, 1135 and 1216): at 120.

<sup>25</sup> William Searle Holdsworth, 'The Ecclesiastical Courts and Their Jurisdiction' in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History* (Little, Brown, and Company, 1907-9) vol 2, 255, 303-4. Prior to this, and in contrast to the earlier Anglo-Saxon practice, it appears that attempts were made to forfeit an intestate's property to their local lord, or, perhaps, the king: Charles Gross, 'The Medieval Law of Intestacy' in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History* (Little, Brown, and Company, 1907-9) vol 3, 723, 726-8.

<sup>26</sup> Holdsworth, above n 25, 304.

<sup>27</sup> *Ibid*.

[f]riends' of the deceased.<sup>28</sup> This was commonly interpreted by contemporaries to mean the deceased's closest blood relative.<sup>29</sup> These new administrators — unnecessary in the time of customary hereditary succession — were given the same status and powers as executors of testate estates,<sup>30</sup> and indeed were sometimes referred to as a class of executor (instead of by the distinct term 'administrator') throughout this early period.<sup>31</sup>

As ecclesiastical influence over estate administration grew, intestacy, the norm in Anglo-Saxon England, began to be seen as a religious wrong.<sup>32</sup> With testacy levels increasing in the face of religious pressure, the importance of choice of executor was clear, and many wills of this period set out complex arrangements to ensure the appropriate person was appointed to the role<sup>33</sup> — common choices being spouses, children, and clerics.<sup>34</sup> Regardless of who filled the position, the social importance of the executor at this time is inescapable. Indeed, Sheehan notes that medieval executors were often asked to seal the testator's will — an act that suggests the executor was taking on a personal moral obligation to see to the completion of the testator's wishes.<sup>35</sup>

## 4.2. Financial Liability for the Deceased's Funeral Expenses

The notion of the executor taking on a moral obligation to carry out the deceased's wishes can be seen in the payment of the mortuary fee by the executor to the church of burial, a practice that continued into the centuries following the Norman Conquest. We have already seen that the payment of this fee played an important role in securing a Christian burial, something the executor would almost certainly have seen as part of their moral obligation to the deceased.<sup>36</sup> More than a moral obligation, however, the payment of a burial fee to the local church upon burial on the part

<sup>28</sup> *Administration on Intestacy 1357*, 31 Edw 3, st 1, c 11.

<sup>29</sup> See *Johns v Rowe* (1627/8) Cro Car 106; 79 ER 694 (the 1357 statute gave husband *de jure* right to administration of his wife's estate); William Nelson, *Lex Testamentaria* (Joell Stephens, 2<sup>nd</sup> ed, 1728) 14-15 ('next and most lawful friends' referred to the next of kin as determined by the common law — that is, the surviving spouse, followed by children, and then grandchildren); William Blackstone, *Commentaries on the Laws of England* (University of Chicago Press, first published 1765-9, 1979 ed) vol 2, 496. Nearly two centuries later, Henry VIII would pass a statute requiring the church ordinary grant administration to either or both of the deceased's widow or next of kin: *An Act Concerning Executors of Last Wills and Testaments 1529*, 21 Hen 8, c 5.

<sup>30</sup> *Administration on Intestacy 1357*, 31 Edw 3, st 1, c 11.

<sup>31</sup> See, eg, Nelson, above n 29, 1 (administrators often referred to as 'executor dativus'); Brian E Ferme, 'The Testamentary Executor in Lyndwood's *Provinciale*' (1989) 49 *The Jurist* 632, 638 (discussing Lyndwood's description of the ordinary-appointed administrator as 'executor dativus').

<sup>32</sup> Gross, above n 25, 723-4.

<sup>33</sup> Sheehan, above n 7, 184-5.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid* 182-3.

<sup>36</sup> As to which, see discussion in the next Part.

of the deceased's named executor was frequently required by 12<sup>th</sup> and 13<sup>th</sup> century wills. This payment was to be made in common with the payment of debts owed by the deceased's estate.<sup>37</sup>

Here, we again see clearly the close link between the function of estate administration and financial responsibility for the burial of the deceased. The testamentary documents of this time are clear that the same identifiable person — the executor — was responsible for both distributing the deceased's property and ensuring the appropriate fee was paid (from that property) so that the deceased received the Christian funeral rites that a fundamentally religious society demanded as part of a decent burial.

The payment of the mortuary fee to the local church by the executor is not the end of the matter, however. The burial fee was an additional monetary expenditure and distinct from the payment of the actual expenses incurred in burying the deceased — such as the linen shroud in which the body would be wrapped, and any grave marker that might be erected. Importantly, it is in the four and a half centuries between the Norman Conquest in 1066 and the Protestant Reformation begun by Henry VIII that we see the personal representative become responsible, not only for the mortuary fee, but also the actual expenses incurred in burying the deceased. As in the case of the payment of the mortuary fee, this liability did not exist as a binding legal rule at this time, instead being evidenced by the testamentary practice of the period. In this way, surviving will documents from this time often had as their first requirement that the executor arrange for (and presumably finance) the will-writer's funeral in accordance with their instructions as the first step in the administration of the estate.<sup>38</sup>

Clearly, then, throughout the centuries following the Norman Conquest there was a recognised interrelation between the emerging role of executor and the financial responsibility for the burial of the body of the deceased. It was a common understanding throughout society, as evidenced by the repeated pronouncements in contemporary wills, that it was the deceased's executor who was responsible for providing the funds for the deceased's funeral and any associated expenses. As the next Part discusses, closely tied to this financial responsibility was the obligation placed on the executor to see to the burial of the deceased's body.

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<sup>37</sup> Sheehan, above n 7, 194-5. The size of this burial fee was determined by custom and, in the case of the servile classes, could make up a large portion of their estate: see examples given by Sheehan at 299-300.

<sup>38</sup> Ibid 194, 258. This is a decidedly pre-Reformation concern. By the 17<sup>th</sup> century the vast majority of wills, influenced by Protestant doctrine, were not specifying burial arrangements. Instead the executor was free to choose the place of burial: Sarah Tarlow, *Ritual, Belief and the Dead in Early Modern Britain and Ireland* (Cambridge University Press, 2011) 38-9; Clare Gittings, *Death, Burial and the Individual in Early Modern England* (Croom Helm, 1984) 86.

### 4.3. The Duty to Bury the Body of the Deceased

We have seen that, in the Anglo-Saxon period, it was the early prototype of the modern executor, or the close family of the deceased in the case of intestacy, who was likely responsible for carrying out various religious and social obligations by physically delivering the body of the deceased to the local church for burial. This duty continued, at least as a matter of religious custom, in the centuries following the Norman Conquest. This is clear in the multiple references made in religious texts of this time to the first and primary duty of the executor being to bury the body of the deceased. For example in 1343,<sup>39</sup> John Stratford stated in his *Stratatum Bonae Memoriae* that the authority of an executor who had yet to submit his or her inventory of the estate's assets to the ecclesiastical court was limited to burying the deceased and spending the sum necessary to put together an inventory.<sup>40</sup> This sentiment was also present in 13<sup>th</sup> century ecclesiastical Constitutions, such as that of John of Athona in 1290.<sup>41</sup> This highlights the supreme importance of ensuring the interment of the deceased's body in the pre-Reformation period: interment was the primary duty of the executor and was to be completed even before the size and nature of the estate was truly known.

The urgency evident in these religious texts reflects the societal need that the body be disposed of quickly, a need that could be met most effectively by placing some one identifiable person (the executor) under a religious obligation to see that burial took place. Consider also that, as we saw in Parts 4.1 and 4.2, executors saw themselves as undertaking a moral obligation to carry out the wishes of the deceased. Given the pervasive religiosity of this time, this moral obligation likely included the appropriate Christian burial of the deceased's body — something the executor would have considered as being of high importance to the deceased.

That said, Sheehan has convincingly shown that by the late 12<sup>th</sup> century testators were often giving instructions to their posthumous representatives prior to death regarding arrangements for the care of the deceased testator's soul and for their burial.<sup>42</sup> And we have already seen that wills commonly set out the deceased's preferred burial arrangements as a first order of business.<sup>43</sup> The fact that testators felt obliged to expressly set out their own funerary arrangements either whilst

<sup>39</sup> Or possibly 1342: see *A Collection of the Laws and Canons of the Church of England* (John Johnson trans, John Henry Parker, first published 1720, 1851 ed) vol 2, 379.

<sup>40</sup> Ibid 389-90.

<sup>41</sup> See Lee J W Aitken, 'Negotiorum Gestio and the Common Law: A Jurisdictional Approach' (1988) 11 *Sydney Law Review* 566, 572. Aitken translates the relevant portion of Athona's Gloss as 'Indeed the universal executor is able to carry out some things which necessitate speedy action before the compilation of an inventory or approval of the will; one thinks of the funeral and the like': at 572 n 51.

<sup>42</sup> Sheehan, above n 7, 118.

<sup>43</sup> See above n 38 and text accompanying.

alive or in their last will and testament is a strong indicator that there was no legal duty on the part of the executor or any other person to see to the burial of a body in the high and late middle ages. After all, if a defined legal duty did exist for the testator to rely on as regards the disposal of their body, there would be no need (or at least, much less of a need) for the testator to make detailed disposal arrangements of their own accord.

As we have seen, however, even in the absence of a legal rule it is clear that it was the testator's nominated executor who was to ensure the burial took place with appropriate swiftness and appropriate grandeur. There is no suggestion in either these early will documents or the religious texts discussed above that the executor provide the body of the deceased to another party so that that party might arrange for and ensure the disposal of the body. A similar, non-delegable responsibility — for both seeing the body buried, and funding that burial — was likely imposed on the ordinary-appointed administrator if the body had not yet been buried at the time of appointment.<sup>44</sup> Although, note here that the persons most likely to be appointed administrator — the 'next and most lawful friends' of the deceased<sup>45</sup> — were also those most likely to feel responsible for burying the deceased's body by way of familial, societal, and religious duty regardless of their status as administrator.

Neither the duty to bury the body nor the financial liability for associated funeral expenses — as two of the three internal legal incidents that make up the external legal architecture of bodily disposal — would remain outside of the bounds of the common law for long, however. The next Part explains that, in the late 17<sup>th</sup> century, the financial liability for funeral expenses became the first of these three legal incidents to solidify into a binding legal principle.

## **5. Financial Liability Crystallises in the Post-Reformation Period**

Beginning in the first half of the 16<sup>th</sup> century, the Protestant Reformation ushered in a period of great change to English law. For our purposes, the most important of these legal developments, although apparently unrelated to the Reformation itself, was the gradual solidification of the customary responsibility on the part of the personal representative for the payment of the

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<sup>44</sup> As the primary sources relied upon in this Part are, for the most part, surviving will documents, it is difficult to assess the role of the administrator in the process of body disposal at this time. Nonetheless, given, as we have seen, that executors and administrators enjoyed the same powers and responsibilities in the period under discussion (see above n 30 and text accompanying), and indeed were often referred to by the same name (see above n 31 and text accompanying), at least some consistency across the two roles in the context of bodily disposal can be expected.

<sup>45</sup> See above nn 28-29 and text accompanying.

deceased's funeral expenses into a binding legal liability for those expenses (to be reimbursed from the estate) in the late 17<sup>th</sup> century.

Scholars who have similarly discussed the personal representative's liability for reasonable funeral expenses in connection with their right to possession of the body of the deceased cite 19<sup>th</sup> century cases.<sup>46</sup> However, this obligation has been acknowledged by English courts of common law and equity since at least 1744,<sup>47</sup> and there is strong evidence to support the liability of executors and administrators for funeral expenses as a legal rule as far back as the 1690s. In 1693, for example, the King's Bench in *Shelly's Case* limited the expenses the personal representative was able to lay out on the funeral of an indebted decedent before becoming personally liable to the creditors of the deceased.<sup>48</sup> This case concerned an action upon the case brought by a creditor against the executor of the estate who responded by pleading *plene administravit* — that is, the estate had been fully administered and there was nothing left to satisfy the creditor's claim.<sup>49</sup> Although the outcome of the case is not stated, Holt CJ is reported as declaring that 'for strictness no funeral expences [sic] are allowable against a creditor, except for the coffin, ringing the bell, parson, clerk, and bearers' fees, but not for pall or ornaments'.<sup>50</sup> *Shelly's Case* thus stands for the proposition that the executor or administrator of an indebted estate is liable for certain funeral expenses and is guaranteed reimbursement as a first priority above other creditors with regard to those certain expenses.<sup>51</sup>

<sup>46</sup> Hume, for example, cites *Green v Salmon* (1838) 8 Ad & E 348; 112 ER 869 as authority for this position: above n 3, 110. Hardcastle refers to *Sharp v Lush* (1879) 10 Ch D 468 as the first case on this point: above n 3, 47. This is not so.

<sup>47</sup> *Stag v Punter* (1744) 3 Atk 119; 26 ER 872. In this case Lord Hardwicke referred to the executor's liability for funeral expenses as a rule at law, implying that it had existed as a legal principle for some time prior to this case being heard: at 119; 872.

<sup>48</sup> (1693) 1 Salk 296; 91 ER 262.

<sup>49</sup> *Ibid* 296; 262.

<sup>50</sup> *Ibid*. Holt CJ distinguished the earlier *Offley* decision (discussed in the next paragraph), in which a huge sum had been allowed in funeral expenses, on the basis that that case had not involved a claim by creditors against the estate. On this point see also *East-India Co v Skinner* (1695) Comb 342, 342; 90 ER 516, 517 (where £150 expended on the funeral of a man who had died owing money to others, the executor could only recover £10 from the estate, this amount being sufficient to see to the burial of one who had died in debt).

<sup>51</sup> This aligns with the view that expenses incurred in the burying the deceased in fact constituted a debt that had been contracted with the deceased during their lifetime. Aitken has tentatively suggested that the origins of the inclusion of funeral expenses with other debts owed by the estate was based on Roman law — specifically Justinian's Digest: above n 41, 576 n 97. The relevant provision of the Digest (11.7.1, not 14.7.1, as stated by Aitken) sets out that 'anyone who spends something on a funeral is held to contract with the deceased, not with the heir': *The Digest of Justinian* (Alan Watson trans, University of Pennsylvania Press, revised English-language ed, 1998) vol 1, 348. For other treatments of this interesting legal transplant, see M L Marasinghe, 'The Place of Negotiorum Gestio in English Law' (1976) 8 *Ottawa Law Review* 573, 578-81; Duncan Sheehan, 'Negotiorum Gestio: A Civilian Concept in the Common Law?' (2006) 55 *International and Comparative Law Quarterly* 253, 272.

Two years earlier, in *Offley v Offley* (admittedly a case substantively about another issue), the High Court of Chancery upheld the payment of funeral expenses made in accordance with the size of the deceased's estate and reputation (albeit without mention of who was liable for these expenses).<sup>52</sup> This focus on the deceased's reputation and the value of their estate is important. It reflects a concern within the society of the 17<sup>th</sup> and later centuries that the deceased not, in death, stray from the social class they had occupied in life. This concern could be met by placing financial control of the deceased's body in a particular, identifiable person: the deceased's executor or administrator. This individual would have intimate knowledge of the social status of the deceased, and be equally as concerned as other members of their community that no anti-social behaviour (in the form of allowing the deceased to stray, either upwards or downwards, from their assigned social class) be evidenced on their (the personal representative's) part.<sup>53</sup>

Here, we can clearly see the external legal architecture of bodily disposal both responding to, and being moulded by, social norms. The social norm that the body be disposed of decently (here, meaning in a manner appropriate to the deceased's social class) required that an identifiable person familiar with that social class be placed in control of that body. At the same time, the social norm that required all persons stay within their designated social status, even after death, was actively being taken into account by courts when shaping the financial liability of the personal representative in relation to the disposal of the body of the deceased. In this way, for example, no matter what social tier a declared bankrupt (such as the deceased in *Shelly's Case*) may have belonged to in different circumstances, their inability to meet their debts and other financial obligations imposed on them an artificially produced and controlled social status. This status — as bankrupt — allowed far fewer luxuries after death than the deceased might have been accustomed to in life.<sup>54</sup>

As was clear in the discussion in Part 4.2 above, the principle that the personal representative was required to expend the funds necessary for an appropriate funeral existed, at least as a matter of social and religious obligation, in the centuries prior to the decisions in *Shelly's Case* and *Offley v Offley* in the 1690s. With these 17<sup>th</sup> century cases, however, we not only see this social obligation transforming into a legal liability, but also the emergence of the principle (likely also present in earlier centuries, although difficult to confirm through the primary sources) that the personal representative could recover funeral expenses from the estate as a matter of first priority.

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<sup>52</sup> (1691) Prec Ch 26, 27; 24 ER 14, 14.

<sup>53</sup> Gittings, above n 38, 88-94.

<sup>54</sup> On this, see cases discussed above at n 50 and text accompanying.

A financial liability for the deceased's funeral expenses differs from the other two legal incidents that make up the external legal architecture of bodily disposal, however, in that, when compared with the right to possession or the duty to bury a body, a liability for funeral expenses is less likely to require actual physical engagement with that body. After all, one can pay for a funeral without having ever sighted the corpse. Nonetheless, in the days before undertakers and coffin burials were the norm,<sup>55</sup> the making of, and payment for, funeral arrangements was certainly a far more 'hands on' process than it is today. And so the executor or administrator was likely required to make arrangements with the local church and deliver the body of the deceased to the church minister so that the latter might facilitate the burial — and collect payment for their services, the payment of a mortuary fee continuing to exist as a matter of custom throughout this period.<sup>56</sup>

In this way, the interrelation between physical control of the body and financial responsibility for its disposal in the early modern period is clearer than immediately apparent to modern eyes. We will see in the next Part that this close intertwining of financial liability — now an identifiable legal incident — and physical control over the deceased's body soon led to the imposition of a legal duty to bury the body of the deceased on those persons already under this liability.

## **6. The Legal Duty to Bury Emerges in the 18<sup>th</sup> and 19<sup>th</sup> Centuries**

So far in our discussion, the links between the emerging external legal architecture of bodily disposal and the estate administration function of the personal representative have been clear. And indeed, moving forward into the 18<sup>th</sup> and 19<sup>th</sup> centuries, it was the executor or administrator who was first placed under a legally recognised duty to bury the body of the deceased when that duty emerged into the English common law. The fatal blow to the link between estate administration and the legal process of disposing of the body would, however, be delivered by the imposition of a legal duty to bury the deceased's body on classes of persons other than the deceased's personal representative. This Part considers these developments in turn.

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<sup>55</sup> See, eg, Tarlow, above n 38, 105 (coffin burial was becoming more widespread, but was not universal, in the 16<sup>th</sup> century).

<sup>56</sup> The right of the church of burial to the payment of a mortuary fee was clearly acknowledged in 16<sup>th</sup> century wills: see Philippe Ariès, *The Hour of Our Death* (Helen Weaver trans, Oxford University Press, 1991) 91 [trans of *L'Homme devant la mort* (first published 1977)], and was the subject of case law in the 18<sup>th</sup> century: see, eg, *Dean and Chapter of Exeter's Case* (1706/7) 1 Salk 334; 91 ER 294; *Andrews v Cawthorne* (1744) Willes 536; 125 ER 1308. See also David Cressy, *Birth, Marriage, and Death: Ritual, Religion, and the Life-Cycle in Tudor and Stuart England* (Oxford University Press, 1997) 456-60.

## 6.1. A Legal Duty to Bury is Imposed on the Personal Representative

A legal duty to bury the body of the deceased was first imposed on the individual who, as we have seen, was likely already under a customary duty to bury that body — and certainly by this stage a legal liability for funeral expenses: the deceased’s executor or administrator. The imposition of the duty to bury on personal representatives over any other class of persons likely reflects the law taking a path of least resistance. It was by now clear that the most appropriate way to respond to the social norms that required swift and decent disposal of the body was by placing a single identifiable person in control of that body. And it was easiest to impose a legal duty to bury on the person already legally responsible for paying, and customarily responsible for making the body available, for that burial.

The earliest recorded reference expressly made to the personal representative’s duty to bury within the case law is found in *Tugwell v Heyman* (*‘Tugwell’*), decided by the King’s Bench in 1812.<sup>57</sup> *Tugwell* concerned a dispute over the payment of funeral expenses where the executors of the deceased had failed to give orders concerning the funeral (despite the estate having sufficient assets to do so), forcing another party to intervene and make the necessary arrangements. It was held that ‘it was [the executors’] duty to see that the deceased was decently interred; and the law allows them to defray the reasonable expense of doing so before all other debts and charges’. And so the executors were liable under an implied promise to the plaintiff undertaker to pay the funeral expenses.<sup>58</sup> Importantly, we see here a link clearly being made between the legal duty to inter the body and the legal liability for expenses arising from that interment, and the use of this link as the rationale for imposing the former on the holder of the latter.

This case also establishes that the duty to inter the body of the deceased is owed to the public at large — the King’s Bench stressing that ‘the dead body could not remain on the surface of the earth. It became necessary that someone should see it consigned to the grave’.<sup>59</sup> Underlying the apprehension of the King’s Bench, and thus the duty to bury, are concerns of public health and public sentiment should the body remain undisposed of. In this way, ‘it is a duty which decency and the interest of society render incumbent upon the executor’.<sup>60</sup> As a result of the *Tugwell* executors’ failure to act, a third party had been required to become the ‘someone’ responsible for

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<sup>57</sup> (1812) 3 Camp 298; 170 ER 1389.

<sup>58</sup> *Ibid* 298-9; 1389.

<sup>59</sup> *Ibid* 299; 1389.

<sup>60</sup> *Rogers v Price* (1829) 3 Y & J 28, 36; 148 ER 1080, 1083. See also *R v Stewart* (1840) 12 Ad & E 773, 778; 113 ER 1007, 1009 (‘the feelings and the interests of the living ... create the duty’).

consigning the body to the grave. However, this action on the part of the third party did not vitiate the duty owed by the executors to the general public, and their associated liability for funeral expenses. Here, then, we see the duty to bury arising in direct response to explicit public health and decency concerns, and English law responding to these concerns by making *some one identifiable person* — the personal representative — responsible for the physical control of the corpse.

In 1744, nearly seven decades prior to the *Tugwell* decision, a passing reference was made by the High Court of Chancery to the executor being *obliged* to bury their deceased testator in *Stag v Punter*.<sup>61</sup> This case also related to the payment of funeral expenses, albeit in the context of an insolvent estate with at least one unsatisfied creditor. If we accept this reference to ‘obligation’ as merely a restatement of the duty to inter, the personal representative’s duty to bury the deceased as an established legal principle within the external architecture of disposal dates to at least this time. This aligns with the reference in Blackstone’s *Commentaries* to the first power and duty of the executor or administrator being ‘[to] *bury* the deceased in a manner suitable to the estate which he leaves behind him.’<sup>62</sup> Published between 1765-9, the acknowledgement of the personal representative’s duty to inter the body of the deceased in the *Commentaries* provides firm evidence of this duty’s status as binding legal principle in the second half of the 18<sup>th</sup> century. Importantly, we again see the link between duty and liability — Blackstone is clear that the duty must be carried out in line with the socially determined limitations of the financial liability.<sup>63</sup>

It is worthwhile here comparing the duty of the personal representative to bury the body of the deceased with the duty of the parish minister to provide the deceased with a Christian burial. These duties were, and continue to be, separate and distinct. The duty of the church minister to provide a Christian burial to the deceased is the corollary of the deceased’s right to a *Christian* burial, as opposed to burial in some other fashion, according to the law of the Church of England. The canon law of the Church of England promulgated this parochial duty in the post-Reformation

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<sup>61</sup> (1744) 3 Atk 119; 26 ER 872.

<sup>62</sup> Blackstone, above n 29, 508 (emphasis in original).

<sup>63</sup> The complete quotation is:

1. He must *bury* the deceased in a manner suitable to the estate which he leaves behind him. Reasonable funeral expenses are allowed, previous to all other debts and charges; but if the executor or administrator be extravagant, it is a species of *devastation* or waste of the substance of the deceased, and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased.

*Ibid* (internal citations omitted, emphasis in original).

period<sup>64</sup> and it has been acknowledged by common law courts<sup>65</sup> and enforced by ecclesiastical courts<sup>66</sup> in England since this time. Interestingly, whilst the canon law imposed a three-month suspension on any minister neglecting their religious duty to provide a Christian burial,<sup>67</sup> the temporal law (exercising criminal jurisdiction) also punished such ministers for any nuisance imposed upon the public by their refusal to bury the body of the deceased.<sup>68</sup>

The ecclesiastical duty imposed on parish ministers in this way provides a useful parallel with the common law duty of the personal representative to inter the deceased. Just as the minister was liable in common law courts for any public nuisance caused by the continued failure to inter a corpse in violation of their religious duty, so too was the personal representative liable for a criminal law misdemeanour should any public nuisance result from their failure to adhere to their common law duty to bury the deceased.<sup>69</sup> Contemporary statements by judicial figures clearly uphold the public purpose of this legal position, maintaining that the common law operated to prevent the creation of a public nuisance by the continued presence of the corpse above ground by imposing a duty to bury on the deceased's executor, the violation of which would result in criminal indictment.<sup>70</sup> To reiterate the point made in *Tugwell*, then, both the duty of the minister to provide the deceased with a Christian burial and the duty of the personal representative to bury the deceased were used to respond to concerns regarding physical control of the corpse in the name of maintaining public health and decency; and both did so by placing obligations on some one identifiable person.

Whether the personal representative could be held liable under a *civil*, as opposed to criminal, action for the violation of their duty to bury the body of the deceased is uncertain, however. The difficulty for 19<sup>th</sup> century courts lay in determining who could sue to enforce the duty. Indeed, in an 1829 decision it was held by Baron Hullock, sitting in the Exchequer of Pleas, that the executor's common law duty to bury the deceased 'is not that sort of duty which can be enforced

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<sup>64</sup> See Canon 68 of the Canons of 1603, reproduced in *The Constitutions and Canons Ecclesiastical* (Society for Promoting Christian Knowledge, 1865) 38 ('[n]o Minister shall refuse or delay ... to bury any corpse that is brought to the Church or Churchyard ... in such manner and form as is prescribed in the [Book of Common Prayer]').

<sup>65</sup> See, eg, *Andrews v Cawthorne* (1744) Willes 536, 537; 125 ER 1308, 1309.

<sup>66</sup> See, eg, *Kemp v Wickes* (1809) 3 Phil Ecc 264; 161 ER 1320.

<sup>67</sup> See Canon 68 of the Canons of 1603, above n 64.

<sup>68</sup> See, eg, *Andrews v Cawthorne* (1744) Willes 536, 537; 125 ER 1308, 1309.

<sup>69</sup> See *R v Vann* (1851) 2 Den 325; 169 ER 523 (no misdemeanour found despite the creation of a nuisance by the continued exposure of the body of the defendant's infant child because the defendant did not have the means to effect interment and was not obliged to enter into debt to do so).

<sup>70</sup> This was certainly the view of Thomas Halls, a Bow Street Magistrate who gave evidence before the Select Committee prior to the passage of the *Anatomy Act 1832*: see below nn 105-107 and text accompanying.

by mandamus or other proceedings at law'.<sup>71</sup> There are multiple ways to interpret Baron Hullock's statement. He may simply have been stating the fact that mandamus — a writ used to command a local authority to do something required of them<sup>72</sup> — would not lie against executors, being private persons with no public authority whatsoever. The same would be true of the other prerogative writs,<sup>73</sup> perhaps the 'other proceedings at law' referred to by Baron Hullock.

Alternatively, his Lordship may have been stating the broader proposition that the executor's duty to bury *as owed to the public* could not form the basis of a civil action at common law. This position is to be preferred as it more accurately reflects the public nature of the duty — it would cause mayhem, for example, if each and every member of a particular community could bring a personal action against the wrongdoing personal representative. It also explains the limited body of case law relating to this clearly established legal principle. The members of a community occasioned with a nuisance by the continued existence of a corpse above ground could not bring a civil action requiring the executor or administrator comply with their duty to bury the body, and so we are left with fleeting references to the personal representative's duty to bury in cases that are substantively about another issue. As we have seen, both *Tugwell* and *Stag v Punter*, for example, related to the executor's liability for funeral expenses and were not suits to require the executor comply with their duty to inter the deceased.

It should be reiterated, however, that the criminal law could and did punish the executor or administrator for their failure to comply with their duty to inter the deceased when a nuisance resulted, thus providing for the public health and public sentiment concerns that grounded the duty in the first place. In this way, the duty to bury, as an internal incident of the external legal architecture of bodily disposal, in fact evidences a stronger response to the social concerns raised than might at first be thought. The public nature of the duty to bury was sufficiently serious so as to ground criminal law repercussions, a significantly stronger response within a social context than mere civil liability owed to one person under a recognisable right-duty relationship. Criminal liability reflects intense social sanction in response to particular norm violations; civil liability arguably does not meet this same standard.

Before we move on, it is important to note that the personal representative's duty to bury the deceased at common law is distinct from the deceased's right to a Christian burial. This latter legal incident, perhaps unsurprisingly, sounded (and indeed continues to sound) at ecclesiastical law and applied provided the deceased did not fall within various canon law prohibitions (such as

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<sup>71</sup> *Rogers v Price* (1829) 3 Y & J 28, 36; 148 ER 1080, 1083.

<sup>72</sup> See J H Baker, *An Introduction to English Legal History* (Butterworths, 4<sup>th</sup> ed, 2002) 147-8.

<sup>73</sup> See *ibid* 143-50.

excommunication and suicide).<sup>74</sup> It corresponded with the parish minister's duty, discussed above, to provide the deceased with a Christian burial. Common law courts, on the other hand, were reluctant to recognise the deceased as possessing any enforceable rights.<sup>75</sup> That is not to say that the personal representative did not believe that they had a moral duty to provide the deceased with a Christian burial as a means of giving effect to the deceased's religious right to such a burial. But this moral duty, if the executor or administrator did indeed believe themselves to be under such a duty, did not sound at common law.

This is an interesting example of the external architecture of bodily disposal (via the duty to bury as an internal legal incident) *not* responding to an established norm relating to the social and religious treatment of the dead. Instead of importing a requirement of Christian burial into the common law, the personal representative's duty remained solely to bury the body, not to bury the body in line with established religious expectations. This position perhaps reflects an acknowledgement of religious pluralism on the part of common law courts in the stirrings of the modern period. It was the courts responsible for the administration of ecclesiastical law — that is, the law of the Church of England — who developed the right to a Christian burial as a legal concept, and recourse could be had to those courts should this right be violated. To encompass this right within the personal representative's common law duty to bury would impose the requirements of one Christian denomination on all, even those who adhered to a different faith.<sup>76</sup> Thus, in 1884 the Queen's Bench noted that references to Christian burial were 'obviously inapplicable to persons who are not Christians, Jews for instance, Mahommedans, or Hindoos'.<sup>77</sup>

To this can be added the possibility that this norm of Christian burial (meaning burial within the deceased's local parish churchyard) had not met, or was no longer at, the level of social acceptance

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<sup>74</sup> See, eg, *Maidman v Malpas* (1794) 1 Hag Con 205, 208; 161 ER 526, 527; *Kemp v Wickes* (1809) 3 Phil Ecc 264, 264-275; 161 ER 1320, 1320-4; *Gilbert v Buzzard* (1820) 3 Phil Ecc 335, 352; 161 ER 1342, 1348; *Re Dixon* [1892] P 386, 393.

<sup>75</sup> See, eg, *R v Price* (1884) LR 7 QB 247, 253 ('in the case of *Reg. v. Stewart* the Court speaks of the "rights" of a dead body, which is obviously a popular form of expression—a corpse not being capable of rights'). But see *Andrews v Cawthorne* (1744) Willes 536, 539; 125 ER 1308, 1310 (reference to burial being 'of common right'); *R v Coleridge* (1819) 2 B & Ald 806, 808; 106 ER 559, 560 (right of sepulture is a common law right); *R v Stewart* (1840) 12 Ad & E 773, 777-8; 113 ER 1007, 1009. In a far more recent case decided by an ecclesiastical court it was held that '[a]t common law, every parishioner has a right of burial in the churchyard of the parish': *Re West Pennard Churchyard* [1992] 1 WLR 32, 33.

<sup>76</sup> Given that the only official census of religious worship to be conducted in England (which took place over the weekend of March 29 and 30, 1851) revealed that over half of England's population attended a church other than the Church of England, or did not attend church at all, the repercussions of developing the duty to bury in this way would have been profound. For discussions of this census, see K S Inglis, 'Patterns of Religious Worship in 1851' (1960) 11 *Journal of Ecclesiastical History* 74; Rodney Stark, Roger Finke and Laurence R Iannaccone, 'Pluralism and Piety: England and Wales, 1851' (1995) 34 *Journal for the Scientific Study of Religion* 431.

<sup>77</sup> *R v Price* (1884) LR 7 QB 247, 253.

that demanded a legal response. After all, individuals in the 18<sup>th</sup> and 19<sup>th</sup> centuries did not live the largely stationary lives of their medieval forebears, with most individuals being born, living, and dying within the same geographic location. Individuals in the 18<sup>th</sup> and 19<sup>th</sup> centuries had greater scope for movement across the country and around the world, and the possibility that an individual might die far from their parish churchyard was significantly higher than in previous centuries.<sup>78</sup> The 19<sup>th</sup> century was also a period of gradually decreasing religiosity within the context of death,<sup>79</sup> and of decreasing respect for and recourse to ecclesiastical law,<sup>80</sup> so that burial elsewhere than the parish churchyard — an act associated with those in some way outside the church — was likely also met with decreasing concern. Courts were thus not required to use the legal duty to bury as a means of responding to this religious norm.

## 6.2. Expanding the Duty in the Absence of an Executor

With the acknowledgement of a legally recognised duty to bury the body of the deceased on the part of executors and administrators in the 18<sup>th</sup> century, English courts soon found themselves in something of a predicament. The legal duty to bury had been imposed on personal representatives, as easily identifiable occupiers of a position of authority and control as regards the body of the deceased, to ensure that concerns relating to the health, safety, and morality of the community could be met. But what to do if the deceased died with no estate to administer and, resultantly, no personal representative? This was not a hypothetical concern. Large sub-sections of the population — including sub-sections with high mortality rates, such as infant children — died leaving no estate. It soon became apparent that merely acknowledging a duty to bury the body of the deceased on the part of the deceased's personal representative would not suffice. Eventually, in the absence of an executor or administrator, the duty began to be imposed on other classes of people who held a similar position of authority as regards the deceased body. And it is this development in the imposition of the duty to bury that signals the severing of the legal architecture of bodily disposal from the estate administration function of the personal representative.

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<sup>78</sup> The 18<sup>th</sup> and 19<sup>th</sup> centuries saw significant expansion within the British Empire, and the migration (voluntary or otherwise) of large numbers of people to the colonies: see generally Marjory Harper, 'British Migration and the Peopling of the Empire' in Andrew Porter (ed), *Oxford History of the British Empire* (Oxford University Press, 1998-9) vol 3, 75. Even those too poor to consider emigrating experienced increased mobility in this period: see generally the issue on 'Poverty and Mobility in England, 1600-1850' (2013) 24 *Rural History* 1.

<sup>79</sup> See generally Julie Rugg, 'From Reason to Regulation: 1760-1850' in Peter C Jupp and Clare Gittings (eds), *Death in England: An Illustrated History* (Manchester University Press, 1999) 202.

<sup>80</sup> R B Outhwaite has examined this decline in detail: see *The Rise and Fall of the English Ecclesiastical Courts, 1500-1860* (Cambridge University Press, 2006), particularly from ch 9 onwards.

The first instance of a legal duty to bury being imposed elsewhere than on the personal representative of the deceased occurred in the case of husbands in relation to the bodies of their deceased wives. In *Ambrose v Kerrison*, decided in 1851, for example, the Court of Common Pleas held that a husband was liable to reimburse a third party for the expenses incurred in burying his wife, arranging for such burial being the duty of the husband by way of ‘proper regard to decency, and the comfort of others’.<sup>81</sup> Importantly, it was by analogy with the role of executor, and the respective characters each fulfilled within society, that this legal duty to bury was imposed on the husband in *Ambrose*:

That liability [for funeral expenses] in the executor is founded upon the duty which is imposed upon him by the character he fills, and a proper regard to decency, and to the comfort of others. And I think that the same reasons which call upon the executor to perform that duty, cast at least an equal responsibility [sic] upon the husband of a deceased wife<sup>82</sup>

Why was such a duty necessary? Prior to the passage of the *Married Women’s Property Act 1882*,<sup>83</sup> and as a result of the doctrines of coverture and unity of persons, at common law a married woman was unable to own property independently of her husband,<sup>84</sup> or make a will without her husband’s permission (and even then she could only dispose of what personal property she held *outside* of her married state — such as her pin money).<sup>85</sup> In the absence of an executor, and without an estate to administer, it was the husband who stood in the necessary position of authority (both socially and financially) in relation to the body of his deceased wife. Carrying out this duty brought with it the legal liability for the expenses incurred in the disposal process that we have explored in detail throughout this Chapter.<sup>86</sup> This explains why we do not see a duty to bury being imposed on a wife with regard to the body of her husband: there was simply no point in doing so, the wife having no means of satisfying the correlative financial liability.<sup>87</sup>

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<sup>81</sup> (1851) 10 CB 776, 779; 138 ER 307, 308. See also *Jenkins v Tucker* (1788) 1 H Bl 90 (husband under strict duty to bury wife); 126 ER 55; *Bradshaw v Beard* (1862) 12 CB (NS) 344; 142 ER 1175 (affirming both *Jenkins* and *Ambrose*).

<sup>82</sup> *Ambrose v Kerrison* (1851) 10 CB 776, 779; 138 ER 307, 308.

<sup>83</sup> 45 & 46 Vict, c 75.

<sup>84</sup> See Baker, above n 72, 484-7.

<sup>85</sup> Sara Mendelson and Patricia Crawford, *Women in Early Modern England, 1550-1720* (Clarendon Press, 1998) 197. Real property was dealt with under slightly different principles than personal property: see Baker, above n 72, 485.

<sup>86</sup> See, eg, *Jenkins v Tucker* (1788) 1 H Bl 90, 93; 126 ER 55, 57 (Lord Loughborough) (husband liable for funeral expenses incurred by a third party when burying his wife’s body because the husband was under strict legal duty grounded in public decency to see his wife buried).

<sup>87</sup> Hume, above n 3, 112. Although see *Chapple v Cooper* (1844) 13 M & W 252; 153 ER 105 (infant widow liable for the funeral expenses of her husband because the contract, being for the decent, Christian burial of her husband, was equally for her benefit, and her coverture had ended at the moment of her husband’s death).

It is important to emphasise that this expansion in the classes of people on whom a duty to bury could be imposed — from personal representatives to husbands — was not made as a result of any emotional connection between the new duty-ower (that is, the husband) and the deceased. Rather, it was made of necessity and was based on the relevant position of authority and control enjoyed by both executor and husband in regard to the particular deceased body at issue. It was also on this basis that, in the 1850s, parents came under a legal duty to bury the body of their deceased child,<sup>88</sup> as well as the legal liability for expenses incurred in so doing.<sup>89</sup> The introduction of a legally recognised duty on this class of persons at this time is important because it again evidences the splintering off of the legal architecture of bodily disposal from the function of estate administration to which it had been tied for much of its history. Husbands and parents were chosen as appropriate bearers of the duty of burial because the particular bodies at issue were not covered by the existing duty owed by executors and administrators; and so in the absence of a personal representative, those close to the deceased in life who shared a similar authoritative and representative character with the personal representative were elected to bear the duty.

The imposition of a duty on husbands and parents had an additional advantage: both classes of persons were easy to identify with regard to any particular deceased person (provided the identity of the deceased was known). This is important, because the social and religious concerns that grounded the duty to bury remained even in the absence of a personal representative, and these concerns — of public health and religiously-influenced public decency — required that the body be disposed of swiftly. At least as a general rule, the personal representative of the deceased was easy to locate, and the deceased's husband or parent was no different. This ensured the duty to bury (and the normative concerns on which it was grounded) were appropriately complied with for the good of all within a given community.

Also easy to identify was the householder on whom the duty to bury was imposed in cases where the deceased left no husband, or a child died with no parent (or no solvent parent) to dispose of them.<sup>90</sup> In the 19<sup>th</sup> century, this householder was likely to be the individual in charge of a

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<sup>88</sup> See *R v Vann* (1851) 2 Den 325, 330-1; 169 ER 523, 525-6 (a father is under a duty to bury his child, but will not be liable in nuisance if he does not possess the financial means to do so); affirmed in *Clark v London General Omnibus* [1906] 2 KB 648, 659 (Lord Alverstone CJ).

Of course, the imposition of a legal duty to bury does not mean that, prior to this, parents were not *customarily* responsible for the burial of their child's body. By the same token, the imposition of a duty to bury on husbands does not mean that those husbands were not previously responsible, as a matter of accepted social practice, for the burial of their deceased wives. On this, see *Bradshaw v Beard* (1862) 12 CB (NS) 344, 348; 142 ER 1175, 1177 ('The law makes that a legal duty which the laws of nature and society make a moral duty.') (Willes J).

<sup>89</sup> Hume, above n 3, 112.

<sup>90</sup> See *R v Stewart* (1840) 12 Ad & E 773; 113 ER 1007.

workhouse, poorhouse, or asylum of some description.<sup>91</sup> And here again, the social and religious concerns that grounded the duty to bury the body were met by the common law in the absence of a personal representative by looking to an individual who shared the relevant authoritative characteristics of a personal representative.

These new classes of duty-owners — husbands, parents, and householders — could recover the expenses incurred in burying the deceased from the deceased's estate as a matter of priority just as a personal representative could. However, this was little comfort if the deceased died leaving no estate from which to fund a funeral. Hence, much of the case law at this lower end of the emerging common law hierarchy involved parties attempting to deny that they indeed held a duty to bury the body of the deceased — and thus were under no obligation to fund that burial.<sup>92</sup>

## 7. The Possessory Right to the Body of the Deceased

The recognition of a legal duty to bury the body of the deceased in the second half of the 18<sup>th</sup> century was followed swiftly by the emergence of a legal right to possession of that body. The primary sources reveal that this possessory right emerged as a legal incident to facilitate the newly acknowledged legal duty to bury,<sup>93</sup> and vested in those classes of persons placed under this legal duty. Importantly, these sources also reinforce the strength of the social norms that required swift and decent disposal of the body, and the common law's response to these norms by placing legal control over that body in some one identifiable person.

Clear evidence of the existence of a legal right to possession of the body of the deceased can be found in the 1841 case of *R v Fox*.<sup>94</sup> *R v Fox* concerned a request for a writ of mandamus brought by the executors of a deceased criminal, Henry Foster, against Francis Scott, the gaoler of the prison in which the deceased had died. Scott had refused to hand over the body of the deceased until a debt he claimed was owed to him by Foster was satisfied.<sup>95</sup> A writ of peremptory mandamus requiring Scott to transfer the body to the deceased's executors was granted by the court.<sup>96</sup> Whilst the principle was not referred to in the judgement, by requiring that the body be delivered into the possession of the executors as a matter of legal right, *R v Fox* indicates that a

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<sup>91</sup> This was rarely to the benefit of the deceased. Helen MacDonald provides an excellent description of the *R v Feist* litigation, involving a workhouse master too eager to send the bodies of his deceased inmates to the anatomy table, in 'Possessing Bodies' (2007) 66(3) *Meanjin* 88.

<sup>92</sup> See, eg, *R v Stewart* (1840) 12 Ad & E 773; 113 ER 1007.

<sup>93</sup> The continued interrelation of right and duty (and liability) into the modern period is explored in Part 2 of Chapter Four.

<sup>94</sup> (1841) 2 QB 246; 114 ER 95.

<sup>95</sup> *Ibid* 246; 95-6.

<sup>96</sup> *Ibid* 247-8; 96-7.

right to possession of the body of the deceased vesting in the personal representative existed as a legal incident in the first half of the 19<sup>th</sup> century.

In addition to evidencing an established possessory right to Foster's body on the part of his executors, *R v Fox* also provides a clear example of the legal architecture of bodily disposal reflecting social concern regarding the decent disposal of the deceased's corpse. Foster's body was being held, in essence, for ransom by Scott until a debt owed was paid, directly violating established legal and societal rules regarding the proprietary status of the corpse both generally and in the specific context of debt security. (The seizure of a corpse for the settlement of a debt had several decades earlier been declared by the King's Bench, for example, to be 'contrary to every principle of law and moral feeling. ... revolting to humanity, and illegal'.)<sup>97</sup>

Going further in his violation of social practice and religious belief, however, it was alleged that Scott also threatened to dispose of Foster's body without appropriate Christian burial rites being performed unless the debt was paid.<sup>98</sup> In *R v Fox* the Queen's Bench is clear in its anger at this '[unlawful and indecent]'<sup>99</sup> violation of public decency and Christian practice, and in its demands that the body be handed over to the executors for appropriate disposal as a means of remedying this violation. In *R v Fox*, then, we clearly see a court giving effect to the normative requirement of decent disposal of the deceased's body that existed within English society at this time (and which, of course, continues to exist) by conferring a possessory right to the body of the deceased on a single identifiable person.

Nearly a decade prior to the dispute over Foster's body, the *Anatomy Act 1832* stated that 'it shall be lawful for *any executor or other party having lawful possession of the body of any deceased person ... to permit the body of such deceased person to undergo anatomical examination*'.<sup>100</sup> In this recognition of the possibility of lawful possession we can infer the existence of the same possessory right to the body of the deceased that grounded the court's decision in *R v Fox*.

<sup>97</sup> *Jones v Ashburnham* (1804) 4 East 455, 465; 102 ER 905, 909.

<sup>98</sup> *R v Fox* (1841) 2 QB 246, 248; 114 ER 95, 97.

<sup>99</sup> *Ibid.* The Court would ultimately indict Scott for his burial of Foster's body without the appropriate rites being performed.

<sup>100</sup> 2 & 3 Will 4, c 75, s 7 (emphasis added). The *Anatomy Act* was enacted to enlarge the legal supply of bodies to medical schools for the purposes of dissection and examination and to put an end to the 'divers great and grievous crimes' of the illegal body snatchers: 2 & 3 Will 4, c 75, introductory para. For a fantastic analysis of the social and historical context of the *Act*, its drafting, passage into law, and immediate aftermath, see Ruth Richardson, *Death, Dissection and the Destitute* (Phoenix Press, 2<sup>nd</sup> ed, 2001). See also Helen MacDonald, *Possessing the Dead: The Artful Science of Anatomy* (Melbourne University Press, 2010).

That this lawful possession was intended to be individualised and exclusive on the part of one identifiable person, and to confer decision-making authority onto that person, is clear in the Parliamentary debates on the Bill that would become the *Anatomy Act 1832*. Frederick Pollock, Member for Huntingdon, for example:

approved of the principle of the Bill, although he conceived some of its provisions to be unnecessary, as only going to legalize that against which there was no law. It was provided, for example, that it should be lawful with his own consent, or the consent of his nearest known relative, to permit the body of any person to undergo anatomical examination. That power already belonged to executors.<sup>101</sup>

Similarly, William Best, the first Baron Wynford and Chief Justice of the Court of Common Pleas from 1824 to 1829, objected to the Bill on the grounds that:

[it] gave to any man in the lawful possession of a dead body, the power of selling that body. Now, who was the lawful possessor of a dead body? The executor or administrator of the deceased. But the poor had no executors or administrators, and the matron of a workhouse or the keeper of a prison would be in lawful possession of the poor man's body.<sup>102</sup>

It is clear in the statements of both Best and Pollock that neither the deceased individual nor their next of kin could exercise physical and decision-making control over the corpse in the eyes of the law. As a matter of priority, that role belonged to the personal representative. The legal position was one of individualised control located in an easily identifiable person. In the absence of a personal representative as this easily identifiable person, and according to the text of the *Anatomy Act* itself, this individualised control vested in those '[other parties] having lawful possession'.<sup>103</sup> In line with our discussion of the duty to bury in the previous Part, it is suggested that these 'other parties' were those classes of persons placed under a duty to bury a particular body in the absence of a personal representative.

Best's comments reflect the implications of this position, and a common worry among the lower classes at the time: that the absence of an executor or administrator might result in control over their body being vested in someone further down the developing hierarchy (for example a workhouse overseer) content to act solely in their own self-interest as regards the corpse (by, for example, selling the corpse to an anatomy school). These concerns did not change the need for

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<sup>101</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 17 January 1832, vol 9, col 581 (Frederick Pollock).

<sup>102</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 19 June 1832, vol 13, col 826 (Lord Wynford). Attempts by the poor and their supporters to avoid the provisions of the *Anatomy Act* (for example, by making the ability to refuse consent to dissection known to workhouse occupants) were met with righteous indignation by medical schools and the Inspectors charged with enforcing the *Anatomy Act*: MacDonald, *Possessing the Dead*, above n 100, 61-4.

<sup>103</sup> 2 & 3 Will 4, c 75, s 7.

individualised control and decision-making capability in relation to the deceased's body, however. That this control might be vested in a less than desirable party was unfortunate, but ultimately irrelevant.

The *Anatomy Act* was preceded by a Report issued by the Select Committee on Anatomy in July of 1828.<sup>104</sup> This Report detailed that on the 12<sup>th</sup> of May 1828, Thomas Halls, a police magistrate for Bow Street, gave evidence before the Committee. Apparently a man of high moral character<sup>105</sup> and a magistrate since 1821,<sup>106</sup> Halls gave the following evidence when examined by Henry Warburton, chairman of the Select Committee:

*Warburton:* Would the nearest relative not be bound to take care to order the funeral of a body, the party not dying in the poor-house?

*Halls:* The executors would be bound, they having assets in their hands; and the next of kin might certainly be indictable for a nuisance, if, by keeping the body disinterred, a nuisance was created.

*Warburton:* Would the sale of a body by the next of kin, instead of interment, be a misdemeanour?

*Halls:* I take it not.

*Warburton:* Is not the state of the law this; that where persons refuse even to administer, in consequence of the party dying insolvent, that nevertheless they are allowed to incur and discharge the funeral expenses out of the assets that are left, although not sufficient to pay the creditors?

*Halls:* Yes.

*Warburton:* Then the law prescribed the interment of a body by the next of kin, or by those persons into whose possession it may come by incidental circumstances?

*Halls:* I can only answer that, as I endeavoured to do before; that if the disinterment of the body creates a nuisance, the party who is the occasion of its remaining disinterred, is subject certainly to an indictment as for a nuisance; and if the executors have assets in their hands, they of course, from that very circumstance of their being indictable for a nuisance, are bound to see the body buried.

*Warburton:* And the creditors can make no claim upon them for that appropriation of the money to the funeral expenses?

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<sup>104</sup> Report from the Select Committee on Anatomy (House of Commons, 1828). The Select Committee and the report it issued are discussed in great detail in Richardson, above n 100, ch 5.

<sup>105</sup> In his history of the Bow Street Runners, David J Cox details Halls' frustration with the corruption and class bias rampant in the early Metropolitan Police Force: *A Certain Share of Low Cunning: A History of the Bow Street Runners, 1792-1839* (Routledge, first published 2010, 2014 ed) 51, 173.

<sup>106</sup> See James Whishaw, *A Synopsis of the Members of the English Bar* (Stevens and Sons, 1835) 261.

*Halls*: I should think not.<sup>107</sup>

In addition to the statements of Pollock and Best discussed above, this interaction details an understanding on the part of a respected local magistrate of the need for individualised control over the body of the deceased. What is also clear in *Halls*' testimony, however, is the importance of this individualised control — in the form of lawful possession and the exclusive decision-making authority that possession brought with it — in preventing the creation of a nuisance by the continued presence of a deceased body above ground.

In his repeated invocations of the need to avoid the creation of a nuisance and throughout his testimony more generally, it is also evident that *Halls* saw the need for individualised control over the body of the deceased as being inherently related to the responsibility to inter the body, and the funding of such interment. It will be recalled that the interrelation of these three legal incidents was expressly acknowledged by Kay J in the *Williams* decision, decided five decades after the passage of the *Anatomy Act*, and four decades after the decision in *R v Fox*. However, to merely cite *Williams* as the origin point for an established right to possession of the body of the deceased without acknowledging this right's complex social and legal history gives only a very small portion of the picture. This Chapter has aimed to uncover what remains of the artwork.

## 8. Conclusion: Moving Forward

This Chapter has argued that the three legal incidents that make up the external legal architecture of bodily disposal — a right to possession of the body, a duty to bury the body, and a liability for associated funeral expenses — developed over the course of at least 1,000 years. In the gradual emergence of these incidents as legal principles, we see the English common law responding to social norms that required the body of the deceased be disposed of swiftly and decently by consistently vesting control over that body in some one identifiable person.

The origins of the legal architecture that governs bodily disposal were firmly linked to the emerging function of estate administration and the emerging role of personal representative as this some one identifiable person. As the legal incidents that make up this external architecture solidified throughout the centuries, however, these ties were cut. In the absence of an executor or administrator, the duty to bury and liability for funeral expenses were vested in individuals who shared the same representative characteristics of the personal representative, these classes of people having the additional advantage of being readily identifiable in any given case. It was this imposition of a legal duty to bury the body, not only on personal representatives, but on husbands,

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<sup>107</sup> Report from the Select Committee on Anatomy, above n 104, 94-5.

parents, and householders in the 19<sup>th</sup> century that severed the legal architecture of bodily disposal from the function of estate administration to which it had previously been closely tied.

From this time on, disposing of the body of the deceased existed as a freestanding legal exercise. Within this freestanding legal exercise, the duty to bury, carrying with it the liability for funeral expenses, soon gave rise to a possessory right to carry out that duty, and the external legal architecture that governs bodily disposal in the common law of the dead was complete.

So much for the previously unexplored history of the right to possession of the body of a deceased person and the external legal architecture of which it is an important legal incident. In the next two Chapters we will narrow our focus from the broader external architecture of bodily disposal to focus on the common law right to possession of the body of the deceased in its modern context. Drawing on this Chapter's analysis of the social norms requiring swift and decent disposal of the body, and English law's consistent response to these norms, Chapter Three will next examine the common law hierarchy by which Australian courts vest the right to possession of the body of the deceased in the 21<sup>st</sup> century. Chapter Four will then turn to consider the salient features that make up the right to possession as an internally consistent legal incident.



# Chapter Three

## Vesting the Right to Possession

### 1. Introduction

Chapter Two explored the historical development of the common law right to possession of the body of the deceased, revealing that this right and its related legal incidents emerged, developed, and accumulated in response to particular normative concerns surrounding the deceased body. These normative concerns are no less present in the 21<sup>st</sup> century, and this Chapter argues that the modern case law continues to use the right to possession to respond to the social norms that require decent and speedy disposal of the body by placing control over that body in *some one identifiable person*. To this end, this Chapter details the developing methodologies used by Australian courts when deciding in whom to vest the right to possession in the more than three decades of post-death dispute case law under examination in this Thesis.

This Chapter proceeds as follows. Part 2 first reveals the position of the executor as the primary right-holder — a rule that has not once been departed from. In line with Chapter Two's historical analysis, in which the position of the executor at the top of the emerging common law hierarchy was explained as the courts taking the path of least resistance in their response to social norms that required the swift and decent disposal of the body, this Part argues that the priority position of the executor in the modern case law is removed from any possible emotional connection the executor may have with the deceased.

Part 3 next sets out the presumptive administrator rule that initially governed intestate burial disputes. As Part 4 reveals, however, in recent years Australian courts have identified multiple methods of allocating the right to possession of the body of the intestate deceased outside of and beyond the presumptive administrator rule — each of these new methods being broader than the last. Part 4 argues that these expanding methodologies reflect a recognition on the part of modern courts that social understandings regarding the appropriate identity of the some one person given physical control over the body of the deceased are changing. Finally, and by way of concluding this Chapter's novel analysis of the case law, Part 5 sets out the remaining rungs on the common law hierarchy according to which the right to possession is vested in the modern case law.

### 2. The Executor Priority Rule

The Australian case law is clear. In cases where the deceased died testate and named an executor, that executor is the primary holder of the right to possession and has an irrefutable claim to control

of the body of their deceased testator for the purposes of disposing of that body (provided they are ready, willing, and able to do so).<sup>1</sup>

The priority right-holder position of the executor as a legal principle has never been departed from, and is nearly always reiterated as the starting point for the legal analysis of post-death disputes.<sup>2</sup> It can be characterised as a binding rule of the Australian common law, and is referred to in this Thesis as the ‘executor priority rule’ or a variation thereof. The next Part explores the mandatory nature of this common law rule through the lens of a prominent case law example. Before we move on to examine the priority status of the executor, however, note that the right to possession vests in the executor from the moment of death; that is, the right to possession is not contingent on the making of a grant of probate.<sup>3</sup> Similarly, when the right to possession vests in the would-be administrator (see Part 3 below), that individual can exercise the right to possession prior to administration being awarded to them.<sup>4</sup> It would make little sense, after all, both in terms of public health and individual dignity, to require an executor to present a grant of probate, or a would-be administrator to obtain letters of administration (both being processes that can take months, if not years) before initiating arrangements for the disposal of the body.

## ***2.1. Re Boothman; Ex Parte Trigg***

*Re Boothman; Ex Parte Trigg* (‘*Boothman*’)<sup>5</sup> concerned an order nisi for a writ of certiorari against the decision made by the Kalgoorlie coroner to release the body of the deceased to his de facto wife. The applicant, the deceased’s sister and named executor of his will, contended that the coroner had made errors of law on the face of the record. According to the applicant, these errors included: finding that at common law the applicant executor had the duty to bury the deceased without also finding she had the right to custody and possession of the body prior to burial; and

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<sup>1</sup> *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 693. On the ‘ready, willing, and able’ criteria, see Part 4.2.3 of Chapter Four.

<sup>2</sup> Even in the case of intestacy, where, of course, it does not apply. See, eg, *Burnes v Richards* (1993) 7 BPR 15,104, 15,106; *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997) 6; *Manktelow v Public Trustee* (2001) 25 WAR 126, 130 [22]; *Garlett v Jones* [2008] WASC 292 (5 December 2008) [32]; *Reece v Little* [2009] WASC 30 (16 February 2009) [17]; *Spratt v Hayden* [2010] WASC 340 (23 November 2010) [5]; *Frith v Schubert* [2010] QSC 444 (26 November 2010) [52]; *South Australia v Smith* (2014) 119 SASR 247, 251 [22]; *Bertani v Bertani* [2017] WASC 78 (22 March 2017) [15].

<sup>3</sup> *Buchanan v Milton* [1999] 2 FLR 844, 846; *Beard v Baulkham Hills Shire Council* (1986) 7 NSWLR 273, 279-80 (applying the same reasoning to the exclusive right of burial in a particular grave plot).

<sup>4</sup> Heather Conway, *The Law and the Dead* (Routledge, 2016) 62 n 20.

<sup>5</sup> (Unreported, Supreme Court of Western Australia, Owen J, 27 January 1999).

finding that the de facto wife had rights that superseded those of the executor when the de facto wife had no rights.<sup>6</sup>

Justice Owen agreed with the applicant. His Honour upheld the principle set out in the 1882 decision *Williams v Williams* ('*Williams*')<sup>7</sup> that, whilst there is no property in a dead body, executors are entitled to custody and possession of the body of their deceased testator for the purposes of disposal. Nonetheless, he emphasised that the court in *Williams* had appeared to condition the executor's right to possession by immediately preceding it with the phrase 'prima facie'.<sup>8</sup> For Owen J, this left open the question of whether the right was an absolute entitlement or merely a priority which could be displaced by another, more meritorious claim.<sup>9</sup>

Justice Owen upheld the former view.<sup>10</sup> His Honour stressed that once the named executor had expressed an intention to take possession of the body and arrange for its disposal, the common law required that her right to do so be recognised. The merits of the respective parties' claims to possession were entirely irrelevant and should not have been regarded by the coroner in deciding to whom the body would be released.<sup>11</sup> The coroner had treated the dispute as one of competing, equal claims to the right to possession. As a result, he had failed to uphold the common law rule that the executor has an absolute right to possession of the body of the deceased above any other person.<sup>12</sup> The coroner had therefore made an error of law, and the writ of certiorari was made absolute.<sup>13</sup>

*Boothman* reveals the strength of the priority status of the executor. Even when the right to possession of the body of the deceased has been awarded to another party who is, presumably, at least equally invested in providing the remains of the deceased with a decent and proper disposal as the named executor (here, the deceased's de facto wife), a court will acknowledge and enforce

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<sup>6</sup> Ibid 4-5.

<sup>7</sup> (1882) 20 Ch D 659.

<sup>8</sup> *Boothman* (Unreported, Supreme Court of Western Australia, Owen J, 27 January 1999) 7-8. The relevant passage from *Williams* reads 'I understand the law of this country to be, that *prima facie* the executors are entitled to the possession and are responsible for the burial of a dead body': (1882) 20 Ch D 659, 664.

<sup>9</sup> *Boothman* (Unreported, Supreme Court of Western Australia, Owen J, 27 January 1999) 8.

<sup>10</sup> Ibid 8. *Contra* Conway, who has recently suggested that the right of personal representatives (including executors) to possession of the body of the deceased may be merely *prima facie* and refutable: *The Law and the Dead*, above n 4, 100-1.

<sup>11</sup> *Boothman* (Unreported, Supreme Court of Western Australia, Owen J, 27 January 1999) 8. Although Owen J did note that the situation would be different if the ability of the executor to arrange for the disposal of the deceased's body was seriously in doubt: at 8-9. On inability to exercise the right to possession, see Part 4.2.3 of Chapter Four.

<sup>12</sup> Ibid 8.

<sup>13</sup> Ibid 9-10.

the higher and absolute right of the executor.<sup>14</sup> The merits of the cases put forward by the parties to the dispute — their closeness with the deceased during the latter’s lifetime and the location of their preferred place of disposal, for example — are irrelevant. Consider, then, a hypothetical dispute between the surviving spouse of a deceased person and their named executor, a professional trustee company, regarding where the deceased will be buried. The strength of the executor’s priority right-holder status and the rejection of the underlying merits of the dispute evident in *Boothman* make clear that this dispute would be decided in favour of the executor — an entirely impersonal third party.<sup>15</sup>

This hypothetical exists as something of a devil’s advocate argument. Professional executors (such as the Public Trustee) are generally impartial, and in practice, in the absence of dispute, will defer to family and friends on the subject of funeral arrangements and the disposal of the deceased’s body.<sup>16</sup> In the case of dispute, however, professional executors can either insist on their decision-making authority according to their status as holder of the right to possession, or refuse to act entirely, resulting in the transfer of the right to possession to a person who is willing to take on the right (alongside its associated legal incidents within the external architecture of bodily disposal).<sup>17</sup> A situation more likely to arise is the named executor of a deceased’s will being a wife or husband from whom the deceased was separated at the time of their death. In jurisdictions in which divorce does not nullify a will (or the nomination of a separated spouse as executor), the person with the unassailable right to take possession of the body of the deceased and arrange for its disposal would remain an individual from whom the deceased was in some way detached.<sup>18</sup>

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<sup>14</sup> The strength of this position within Australia has been commented on by overseas jurisdictions: see, eg, New Zealand Law Commission, *The Legal Framework for Burial and Cremation in New Zealand: A First Principles Review*, Issues Paper No 34 (2013) 189 [14.50].

<sup>15</sup> This reasoning is supported by the decision set out in Transcript of Proceedings, *Sullivan v Public Trustee for the Northern Territory of Australia* (Supreme Court of the Northern Territory, 20210720, Gallop AJ, 24 July 2002), discussed in detail in Part 4.1 of Chapter Four.

<sup>16</sup> For example, it is the practice of the Public Trustee of Queensland, in its capacity as named executor of a deceased person’s will, to leave funeral and disposal arrangements to those closest to the deceased in all possible cases: Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of a Dead Body*, Report No 69 (2011) 76 [4.9] n 14. This is *not*, however, a transfer of the right to possession from the Public Trustee to those close to the deceased: see Part 5.4 of Chapter Four.

<sup>17</sup> See the discussion of *Keller v Keller* (2007) 15 VR 667 in Part 5.2 of Chapter Four. The person to whom the right to possession is transferred must fall within the established common law hierarchy that governs the vesting of the right to possession: see Part 5.4 of Chapter Four. The common law hierarchy is set out in Part 5 of this Chapter.

<sup>18</sup> Of course, people separate for a variety of reasons, sometimes entirely amicably (or entirely one-sidedly — perhaps the deceased had no say in the separation whatsoever and wished to maintain a close relationship with their spouse). However, the executor priority rule remains in force even if the separation is protracted and hostile, and that is the crux of the hypothetical posed here. For a discussion of this issue

For this and other reasons the executor priority rule has been criticised as presenting ‘practical difficulties’<sup>19</sup> and ‘problems of principle’.<sup>20</sup> Regardless, it continues to thrive as a principle of the Australian common law, in the process allowing the right of a disinterested and impartial (if not entirely hostile) party to possession and control of the body to trump the interests of those close to the deceased in life. Clearly, then, there is something about the role of executor in the eyes of Australian courts that entitles that individual to possession of the body of the deceased beyond the belief that their emotional ties with the deceased will ensure they dispose of the deceased’s remains appropriately. This indicates that the executor priority rule, and the modern right to possession more broadly, are founded on something other than the need for the deceased to be disposed of with love and affection.

## 2.2. Explaining the Executor Priority Rule

Several positions have been put forward as to why the named executor, over and above all other persons, enjoys this status as priority holder of the right to possession of the body of the deceased. Croucher, for example, takes the position that the continued affirmance of the executor as holding a position of primacy in burial disputes reflects the autonomy of the deceased.<sup>21</sup> Unable to issue binding directions as to how their body will be disposed of,<sup>22</sup> testators’ autonomy is limited to naming an executor. That named executor, after the death of the testator, becomes a surrogate for the autonomy of the deceased, and it is for this reason that the directions of the executor regarding the disposal of the body of the deceased must be deferred to.<sup>23</sup>

Croucher’s claim is founded on the idea of an innate, personal connection existing between the deceased and their named executor. Hence, ‘[t]he executor, *in this trusted capacity*, is the repository for the deceased’s wishes with respect to his or her body’.<sup>24</sup> The emotional, if not

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in the context of the *Coroners Act 2008* (Vic), see *Smith v Coroners Court of Victoria* [2018] VSC 307 (8 June 2018).

<sup>19</sup> New Zealand Law Commission, above n 14, 198-9 [15.4]-[15.7].

<sup>20</sup> *Ibid* 200-1 [15.13]-[15.18]. See also *Takamore v Clarke* [2013] 2 NZLR 733, 795 [203], 797-8 [208]-[213] (William Young J).

<sup>21</sup> Rosalind Atherton, ‘Who Owns Your Body?’ (2003) 77 *Australian Law Journal* 178, 188; Rosalind F Croucher, ‘Disposing of the Dead: Objectivity, Subjectivity and Identity’ in Ian Freckelton and Kerry Peterson (eds), *Disputes and Dilemmas in Health Law* (Federation Press, 2006) 324, 330-1, 336. Croucher has previously written under the surname Atherton.

<sup>22</sup> Because there is no property in a corpse, individuals are unable to dictate how their own remains will be dealt with after their death: *Williams* (1882) 20 Ch D 659, 665. See also Part 4.3 of Chapter Four.

<sup>23</sup> Atherton, above n 21, 188. Conway rejects Croucher’s reasoning, noting that the executor is not required to give effect to the wishes of the deceased. For Conway, the deceased’s autonomy is better protected by upholding any ante-mortem disposal directions they may have given, rather than merely their appointment of an executor: Heather Conway, ‘Dead, But Not Buried: Bodies, Burial and Family Conflicts’ (2003) 23 *Legal Studies* 423, 433.

<sup>24</sup> Atherton, above n 21, 188 (emphasis added).

fiduciary, implications of this statement emphasise the importance of the *individual* nominated to the role of executor in Croucher's formulation. We have seen, however, the strictness with which the executor priority rule is adhered to. The executor can be a professional (for example, the deceased's solicitor or accountant), a trustee company (such as the Public Trustee), or someone towards whom the deceased has nothing but ill-will (for example, a separated spouse). All are capable of having their right to possession of the deceased's body recognised and enforced by the courts. In this way, the executor priority rule is not linked to the testator's act of nominating *a particular trusted person* to the role of executor. It is the office of executor, and not the person nominated to that office (with their own individualised relationship with the deceased), to which the right to possession of the body of the deceased attaches. And it is their act of standing in the role of executor, and not their personal connection with the deceased, that affords an individual named to the office of executor the right to possession.

Croucher's argument also fails to account for the centuries-long development of the executor priority rule. Chapter Two maintained that the historical priority status of the executor was not due to any personal connection between executor and deceased testator. Rather, it was the result of the centuries of legal development in which the role of personal representative and the emerging legal incidents that make up the external legal architecture of bodily disposal were inherently linked. When the duty to bury the body and a financial liability for funeral expenses emerged as legal principles, it was easiest for them to be imposed on the personal representative because these legal incidents had already been the responsibility of the personal representative *as a matter of social and religious custom* for centuries. The interrelated nature of the legal incidents that make up the external architecture of bodily disposal meant that the executor's status as priority holder of the right to possession was a necessary condition precedent to the performance of their duty to inter the deceased and their liability for the deceased's funeral expenses.<sup>25</sup>

Australian courts are clear that this state of affairs has continued into the modern common law. In *Warner v Levitt*,<sup>26</sup> for example, Brownie J of the Supreme Court of New South Wales stated that the personal representative's obligation to dispose of the deceased's remains was not based on any notion of allowing the wishes of the deceased to be carried out. Instead, it reflected the fact that the personal representative would be entitled to reimbursement out of the deceased's estate for the expenses incurred in that disposal.<sup>27</sup> And in *Boothman*, Owen J stressed the onerousness of the duty imposed on the executor to dispose of the deceased's body and stated

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<sup>25</sup> On the ongoing interrelation of the three legal incidents discussed in Chapter Two into the modern period, see Part 2 of Chapter Four.

<sup>26</sup> (1994) 7 BPR 15,110.

<sup>27</sup> *Ibid* 15,113.

(with reference to the right to possession) that ‘it would be odd if the law were to impose on an executor an onerous duty of this sort and then to deny to that person the ability to carry out the duty’.<sup>28</sup>

Nonetheless, we saw in Chapter Two that, whilst closely linked to the developing function of estate administration for much of its history, the legal architecture of bodily disposal splintered from that administrative function with the imposition of a legal duty to bury the body on persons other than the personal representative in the 19<sup>th</sup> century. We also saw, however, that the executor retained a status at the top of the developing common law hierarchy. That is, courts vesting the duty to bury the body (and the concomitant right to possession) only looked beyond the executor when no such person existed. The named executor was, after all, an individual who could be easily identified in any given case, and was expected to both be closely involved and hold an authoritative position in the post-death management of the deceased’s pre-death life. Whilst the other classes of persons (being husbands, parents, and householders) who would eventually be placed under a duty to bury the body of a particular deceased person (and thus holding a possessory right to that same body) would share many of these same characteristics, none would do so with the force of legal doctrine and historical development as the executor. In short, there was no one better placed, as a matter of both law and social custom, to take physical control over the body — something the common law was keenly aware of when responding to the social norms of swift and decent disposal.

These social norms are no less present in 2020 than they were throughout the 19<sup>th</sup> century. However, whilst the 19<sup>th</sup> century case law was largely concerned with avoiding the creation of a public nuisance, in modern times the executor priority rule and its ability to easily locate physical control of the body of the deceased with one identifiable person has an additional benefit. The executor priority rule allows post-death disputes to be resolved quickly (and preferably out of court), thus avoiding social and judicial discomfort at the use of the common law to resolve disagreements relating to the control and disposal of the body of the deceased. Conway and Stannard have identified multiple reasons for this judicial discomfort regarding post-death disputes. There might be an underlying sense of revulsion at the necessity of placing the deceased’s body ‘on ice’ until the dispute can be resolved,<sup>29</sup> or a feeling that the litigants are ‘bad people’ for not coming together in a time of tragedy.<sup>30</sup> Notably, disputes relating to the body of

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<sup>28</sup> (Unreported, Supreme Court of Western Australia, Owen J, 27 January 1999) 8.

<sup>29</sup> Heather Conway and John Stannard, ‘The Honour of Hades: Death, Emotion and the Law of Burial Disputes’ (2011) 34 *University of New South Wales Law Journal* 860, 887.

<sup>30</sup> *Ibid* 888.

the deceased can also be seen as undignified and as exhibiting a lack of respect for the deceased,<sup>31</sup> a view the judiciary see as being shared by the Australian public. Hence, one judge wrote in 1992 that '[t]he conscience of the community would regard fights over the disposal of human remains such as this as unseemly'.<sup>32</sup>

Very much linked to these emotional factors, disputes over the deceased body are viewed by members of the judiciary as being inherently social, rather than of a kind capable of resulting in a satisfactory legal solution. Apparently shocked at the 'extraordinary'<sup>33</sup> and 'macabre'<sup>34</sup> cases in which parties cannot agree as to how the disposal of the deceased's remains will be effected,<sup>35</sup> Australian courts have expressed embarrassment and discomfort at having to adjudicate pyrrhic family conflicts<sup>36</sup> in which emotions, rather than legal arguments, run hot.<sup>37</sup>

This emotional response on the part of the judiciary to the litigation of disputes relating to the body of the deceased can be lessened by the swift resolution of such disputes, an outcome made possible by the application of the binding executor priority rule. This rule allows judicial officers to avoid messy, fractured disputes as to who has the most meritorious claim to control the disposal of the deceased's body in any particular case,<sup>38</sup> whilst also facilitating swift decision-making in a

<sup>31</sup> *Ibid* 868.

<sup>32</sup> *Calma v Sesar* (1992) 2 NTLR 37, 42 (Martin J). See also *Warner v Levitt* (1994) 7 BPR 15,110, 15,110 ('conscience of the community would be affronted' if there was a further delay to disposal of the body); Conway and Stannard, above n 29, 889. The increasing recourse to courts of law to resolve disputes over the body of the deceased on the part of the general public indicates, however, that such squeamishness about legal intervention into an inherently social space does not exist (or at least not to the extent claimed by members of the judiciary).

<sup>33</sup> *Derwen v Ling* [2008] FamCA 644 (22 July 2008) [14].

<sup>34</sup> *Rutherford v Wallace* [1999] NSWCA 299 (22 September 1999) [41] (Fitzgerald JA).

<sup>35</sup> Representative of these views, in *Keller v Keller*, Hargrave J opened his reasons with the following:

Sarina Keller died peacefully on Sunday 25 February 2007, aged 81 years. The aftermath of her death has been anything but peaceful. A bitter and spiteful dispute between her two children has led to the wholly undesirable situation — disrespectful of the deceased and offensive to ordinary standards of common decency — that Sarina's body has yet to be disposed of, by burial or cremation.

(2007) 15 VR 667, 668 [1].

<sup>36</sup> See, eg, *Leeburn v Derndorfer* (2004) 14 VR 100, 102 [10].

<sup>37</sup> See, eg, *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997) 8 (burial disputes involve complex factual issues that are 'the subject of hot debate and much emotion'); *Calma v Sesar* (1992) 2 NTLR 37, 42 ('[t]heir respective legal claims were subsumed by deep emotion'); *Lochowiak v Heymans* (Unreported, Supreme Court of South Australia, Debelle J, 8 August 1997) 2 ('[a] court is, understandably, reluctant to enter into sensitive disputes of this kind which, clearly, involve emotional issues of a high degree'); *Ugle v Bowra & O'Dea* [2007] WASC 82 (16 March 2007) [1] ('[p]ressures of time, stress and pain add to an already emotional situation where there are no winners and losers, only deeply held and legitimate feelings that are exacerbated by uncertainty'); *ND v LD* [2019] EWHC 3639 (Fam) (27 November, 2019) [5] ('[i]f at all possible in this dispute I shall try and de-escalate heightened emotions').

<sup>38</sup> On this, see Ashley J's comments throughout *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997) 8. The executor priority rule allows judges to take a 'non-expressive stance' when entering into an emotionally volatile dispute, and can discourage gratuitous expressions of grief on the part of the parties to that dispute: Conway and Stannard, above n 29, 885.

time of immense sorrow and loss.<sup>39</sup> By applying an established ‘bright line’ rule to a set of facts that satisfy the rule’s criteria without contention (that is, the existence of a named executor who is ready, willing, and able to dispose of the body), the public litigation of these disputes is finalised quickly and consistently. As the next Part explains, the same is true when a binding rule is applied in cases where the deceased died intestate.

### 3. The Presumptive Administrator Rule

As a basic rule, when a person dies without leaving a valid will naming an executor, the individual most entitled to take out letters of administration over the deceased’s estate will be vested with the right to possession (along with its two related legal incidents) above any and all other parties.<sup>40</sup> Heather Conway has termed this individual the ‘presumptive administrator’,<sup>41</sup> and we will refer to this basic rule as the ‘presumptive administrator rule’.

The first burial dispute involving an intestate deceased recorded in the Australian case law came before the Supreme Court of the Northern Territory in 1992.<sup>42</sup> *Calma v Sesar* (‘*Calma*’)<sup>43</sup> involved a dispute between the estranged parents of a young Aboriginal man who had died from head injuries within weeks of moving to Darwin. The dispute concerned where the deceased would be buried. The plaintiff, the deceased’s mother, had flown to Darwin upon hearing that her son was in hospital. She was with him when he died, and arranged for his body to be buried in Darwin following a Roman Catholic service. The deceased had some family in Darwin, and his mother wished for him to be buried at the place where his body lay.<sup>44</sup> His father, the defendant, opposed these plans. He instead made arrangements for his son’s body to be transported to Port Hedland in Western Australia, the deceased’s homeland, for burial in the family plot in accordance with Aboriginal custom.<sup>45</sup> Despite the body being in the possession of undertakers in the employ of the father,<sup>46</sup> Martin J ordered that the remains of the deceased be delivered to the plaintiff for burial in accordance with the arrangements she had made.<sup>47</sup>

<sup>39</sup> *Takamore v Clarke* [2013] 2 NZLR 733, 784 [153] (Tipping, McGrath, and Blanchard JJ).

<sup>40</sup> As to when the right vests, see text accompanying n 4 above.

<sup>41</sup> Conway, *The Law and the Dead*, above n 4, 62.

<sup>42</sup> Although see *Re Dempsey* (Unreported, Supreme Court of Queensland, Ambrose J, 7 August 1987), involving an intestate deceased but decided on the basis that burial was an aspect of estate administration (and thus without reference to the right to possession).

<sup>43</sup> (1992) 2 NTLR 37.

<sup>44</sup> *Ibid* 38, 40.

<sup>45</sup> *Ibid* 38-9, 40.

<sup>46</sup> *Ibid* 38-9.

<sup>47</sup> *Ibid* 42.

How was this conclusion reached? With regards to the parties before him, Martin J stated: ‘[t]he right to possession of a dead body runs with the duty to dispose of it. Each parent in this case had that duty, or at least accepted it, and attempted to carry it into effect, thus claiming that right.’<sup>48</sup> The means by which Martin J decided the dispute between the two equal claimant parents is set out in Part 4.1 of this Chapter. It is crucial for our current purposes, however, to stress that, for Martin J, the estranged parents before him had equal rights to possession of the body of their deceased son, not as a consequence of their shared emotional relationship with his body, but by virtue of them both being equal claimants for letters of administration over his estate. His Honour reached the letters of administration position in the following manner: first, and in line with our analysis in Chapter Two, he stated that the right to possession of the body of the deceased is inherently linked to the duty to dispose of that body in a manner according with the size and value of the deceased’s estate. This duty is imposed on both executors and administrators.<sup>49</sup> Consequently, as both executors and administrators have the duty to dispose of a deceased body, both must also have a possessory right to the body in order to effect that disposal.<sup>50</sup> Left unstated, but clear in Martin J’s reasoning, is the fact that the need for the body to be disposed of swiftly requires that it is the person most entitled to administer the estate, rather than the appointed administrator, who is vested with both right and duty (and liability).

The presumptive administrator rule has been criticised as having no real justification at law. Chief Justice Elias of the New Zealand Supreme Court, for example, dismissed the presumptive administrator rule as having been reached ‘by analogy’ with the executor priority rule.<sup>51</sup> Her Honour’s criticism is that the executor priority rule has existed since its ‘extrapolation’ from the *Williams* decision in 1882 (in which, it will be recalled, it was held that the executor has the right to possession of the body of their deceased testator until burial),<sup>52</sup> with the presumptive administrator rule being analogised from this rule in the years since.<sup>53</sup> As we saw in Chapter Two, however, the legal incidents that make up the legal architecture of bodily disposal were closely tied to the function of estate administration, both testate and intestate, in the Anglo-Saxon period — 1,000 years before *Williams* was handed down.<sup>54</sup> And, despite the link between estate administration and the right to possession later being severed, as Martin J correctly acknowledged in his reasoning in *Calma*, the administrator has shared the same duty to dispose of the body of a

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<sup>48</sup> Ibid 42.

<sup>49</sup> Ibid 41 (citing Blackstone’s *Commentaries* — as to which, see discussion in Part 6.1 of Chapter Two).

<sup>50</sup> Ibid.

<sup>51</sup> *Takamore v Clarke* [2013] 2 NZLR 733, 758 [55].

<sup>52</sup> *Williams* (1882) 2 Ch D 659, 665.

<sup>53</sup> *Takamore v Clarke* [2013] 2 NZLR 733, 758 [55]. Chief Justice Elias’ statement that the possessory right of the executor is *extrapolated* (in her Honour’s words, ‘without much by way of analysis’) from the *Williams* decision is interesting, given such a right is clearly acknowledged by Kay J in that case.

<sup>54</sup> See Part 3 of Chapter Two.

deceased person as a named executor since the 1760s.<sup>55</sup> As a result of being subject to this duty of disposal, and again as we saw in Chapter Two, the possessory right of the administrator to the body of the deceased has been acknowledged since at least the passage of the *Anatomy Act 1832*.<sup>56</sup> It will be remembered, for example, that William Best, former Chief Justice of the Court of Common Pleas, felt it necessary to remind Parliament in 1832 that the ‘lawful possessor of a dead body ... [was] [t]he executor or administrator of the deceased’.<sup>57</sup>

Clearly, then, the presumptive administrator rule is no recently developed subsidiary of the executor priority rule. It has a long-established history, and plays an important role in the resolution of post-death disputes in Australia. In the same way as the executor priority rule, the presumptive administrator rule operates to vest decision-making capabilities in relation to the body of the deceased in one recognisable person, responding to judicial and social concerns regarding the need for swift and decent disposal of the body of the deceased in the process.<sup>58</sup> The benefits of such an approach from a judicial perspective were set out above in the context of the executor priority rule, and need not be repeated here. Instead, the next Part examines the many alterations that have been made to the presumptive administrator rule within the Australian case law in the nearly three decades since *Calma* was handed down.

#### 4. Altering the Pattern in Intestacy

This Part examines how Australian courts have approached and altered the presumptive administrator rule since its introduction into the case law in 1992. Parts 4.1, 4.2, and 4.3 set out three increasingly expansive approaches taken by courts when vesting the right to possession. An explanation for this program of alteration is offered in Part 4.4. Importantly, whilst the discussions in this Part treats these periods of alteration as distinct stages occurring in a linear fashion, each of these three approaches, along with the unaltered presumptive administrator rule as an approach in-and-of itself, in fact coexist and overlap in the case law.<sup>59</sup> This Chapter takes no normative

<sup>55</sup> Blackstone, in a passage cited by Martin J in *Calma* (see above n 49 and text accompanying), held in his *Commentaries on the Law of England* that it was a ‘power or duty of the rightful executor or administrator’ to ‘bury the deceased in a manner suitable to the estate which he leaves behind him’: (University of Chicago Press, first published 1765-9, 1992 ed) vol 2, 508 (emphasis added to first quotation).

<sup>56</sup> See Part 7 of Chapter Two.

<sup>57</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 19 June 1832, vol 13, col 826 (Lord Wynford).

<sup>58</sup> See *Keller v Keller* (2007) 15 VR 667, 670-1 [15] (‘[i]t is consistent with the need to resolve issues such as this in a prompt fashion’) (referring to the approach taken in *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997) 8); *Takamore v Clarke* [2013] 2 NZLR 733, 782 [145], 784 [153] (Tipping, McGrath, and Blanchard JJ).

<sup>59</sup> Appendix A sets out each of the cases relied on in this analysis, and indicates the approach relied on by the court in each.

position as to the superior means of resolving disputes between multiple claimants to the right to possession in an intestacy context. Nor does it claim that every dispute that has involved the vesting of the right to possession since 1986 fits the framework set out here; instead, it presents and explains a general progressive trend that is visible when the body of Australian post-death dispute case law under analysis is considered as a whole.

#### 4.1. Early Tie-Break Mechanisms

In Part 3 of this Chapter we were introduced to the presumptive administrator rule, which holds that, in the absence of a named executor, the person with the greatest entitlement to administer the deceased's estate will hold the right to possession in relation to the deceased's body. But what if there are two or more parties who are equally entitled to a grant of administration over the deceased's estate? Resolving disputes of this kind required courts to adopt a tie-break mechanism that could be employed to decide between equal claimants to a grant of administration and, therefore, to the right to possession.<sup>60</sup>

Early tie-break mechanisms took a number of forms. In *Burnes v Richards*,<sup>61</sup> for example, Cohen J of the Supreme Court of New South Wales applied a 'test' taken from Higgins J's dissenting judgment in *Doodeward v Spence* to resolve a burial dispute between equal claimants for letters of administration. This 'test' granted the right to possession of the deceased's body to the party who, *by virtue of their close relationship with the deceased*, might be considered to be under a duty to bury them.<sup>62</sup> The next year, however, this 'close connection' test was rejected by Brownie J, also of the New South Wales Supreme Court, in *Warner v Levitt* as having been removed from the context of Higgins J's judgment in *Doodeward* and being inapplicable in disputes relating to the burial of the deceased's body.<sup>63</sup>

If not a close connection with the deceased, how then were courts to decide between equal claimants to the right to possession? For Martin J in *Calma*, discussed in Part 3, the answer was not to be found in the cultural, religious, and spiritual issues raised on the facts by the litigants before him. His Honour took the position that considerations of this kind lay outside the bounds

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<sup>60</sup> Heather Conway also refers to 'tie-breakers' in her article 'First Among Equals': Breaking the Deadlock in Parental and Sibling Funeral Disputes' (2018) 39 *Liverpool Law Review* 151, 156-9.

<sup>61</sup> (1993) 7 BPR 15,104.

<sup>62</sup> *Ibid* 15,106-7, discussing to *Doodeward v Spence* (1908) 6 CLR 406, 421.

<sup>63</sup> (1994) 7 BPR 15,110, 15,114. Even if taken out of context, however, it is interesting to note that Higgins J's reasoning in *Doodeward*, as interpreted by Cohen J in *Burnes v Richards*, resembles the rationale relied on by English courts when initially constructing and imposing a duty to dispose on parties close to the deceased in life *in the absence of an executor or administrator* explored in Chapter Two — with the caveat that the close relationship relied on by these courts was one of authority and control, rather than emotional connection.

of what it was appropriate for a court to take into account when seeking a legal solution to a dispute between equal claimants to the right to possession.<sup>64</sup> This was the case not merely on the facts of *Calma*, where evidence had been led (albeit briefly) as to the cultural, religious, or spiritual beliefs of both the father (regarding Aboriginal burial practice)<sup>65</sup> and the deceased himself (this evidence being that he had only recently begun to become acquainted with Aboriginal custom),<sup>66</sup> but as a general, methodological matter.

Instead, Martin J held in circumstances where the parties are equal claimants to the right to possession (as was the case of the parents of the deceased in *Calma*), the practicalities of the case, with the goal of facilitating the disposal of the body without any unnecessary delay and whilst maintaining respect for the deceased, must decide the dispute.<sup>67</sup> In *Calma*, the overriding practicality was the fact that the body of the deceased was physically located in Darwin. And so the deceased's mother was granted the authority to proceed with her plans to bury her son in a Roman Catholic funeral in that city.<sup>68</sup>

Looking to the person with the greatest entitlement to administer the estate of the deceased, and using the practicalities of the case to decide between two claimants of equal standing, soon became the standard approach in intestate burial disputes.<sup>69</sup> Importantly, this tie-break mechanism was adopted by Young J in his 1996 decision in *Smith v Tamworth City Council* ('*Smith v TCC*').<sup>70</sup> One of the most influential decisions in the Australian law of the dead, the approval of the presumptive administrator rule with the addition of a practicalities tie-break mechanism in *Smith v TCC* reveals the settled nature of this methodology within Australian common law — at least in this initial period.

<sup>64</sup> *Calma* (1992) 2 NTLR 37, 42 ('[a] legal solution must be found; ... [t]hat solution will not embrace the resolution of possibly competing spiritual or cultural values'). A similar approach was taken by Ashley J in *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997) 8-9.

<sup>65</sup> *Calma* (1992) 2 NTLR 37, 40.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.* 42.

<sup>68</sup> *Ibid.*

<sup>69</sup> For applications of the practicalities tie-break mechanism, see, eg, *Burrows v Cramley* [2002] WASC 47 (15 March 2002) [28]-[37]; *Joseph v Dunn* (2007) 35 WAR 94, 98-100 [21]-[29]; *Abraham v Magistrate Stone, Deputy State Coroner* [2017] NSWSC 1684 (5 December 2017) [54]-[60]; *Manktelow v Public Trustee* (2001) 25 WAR 126, 131-2 [30]-[31].

Note, however, the following decisions: Transcript of Proceedings, *Maranikuwuy v Barrara* (Supreme Court of the Northern Territory, 20203591, Bailey J, 28 March 2002) 5-6 (practicalities tie-break only turned to when cultural considerations did not point clearly in favour of either party); *Keller v Keller* (2007) 15 VR 667, 671 [18] (level of trust and confidence bestowed on the parties by the deceased used as tie-break); *AB v CD* [2007] NSWSC 1474 (17 December 2007) [63] (provision of primary care during life used as tie-break).

<sup>70</sup> (1997) 41 NSWLR 680, 694.

## 4.2. Some Minor Alterations

Cracks soon emerged in this apparently settled approach to the resolution of disputes over the right to possession of the body of the deceased in the intestacy context, however. One issue was clear from the outset: without its development and underlying rationale ever truly being explored by modern courts, some judges questioned the applicability of the presumptive administrator rule in cases where the deceased died intestate and without leaving an estate that would justify the making of a grant of administration. After all, if there was no estate to administer, why vest the right to possession in the person with the greatest entitlement to a grant of administration?<sup>71</sup> In addition, the inflexible approach taken to cultural, spiritual, and religious matters raised on the facts in equal claimant disputes resolved by recourse to the practicalities tie-breaker caused some unease among judges.<sup>72</sup>

These issues led to an initial period of minor alteration to the presumptive administrator rule. Courts following this altered methodology continue to look first to the person with the greatest entitlement to a grant of letters of administration, however will then consider whether the case at hand represents an appropriate situation within which this basic rule can be overruled or disregarded. As well as in cases where the presumptive administrator rule gives rise to an equal claimants issue, courts can engage in this secondary analysis even when the presumptive administrator rule clearly identifies one single claimant to administration (and therefore to the right to possession of the body of the deceased). Under this first stage of alteration, then, the presumptive administrator rule can be disregarded even when there is no competition between equal claimants to administration.<sup>73</sup>

This first period of alteration was instigated by *Jones v Dodd* ('*Jones 2*'),<sup>74</sup> a 1999 decision of the Full Court of the Supreme Court of South Australia. This case concerned a dispute as to the place

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<sup>71</sup> See, eg, *Warner v Levitt* (1994) 7 BPR 15,110, 15,113 ('[i]n the present case ... [t]here seems to be no estate, so that it seems to be wholly artificial to speak in terms of ... [entitlement] to obtain a grant of administration'); *Jones v Dodd* (1999) 73 SASR 328, 336 [49]-[50].

<sup>72</sup> See, eg, *Jones v Dodd* (1999) 73 SASR 328, 334 [40] ('I cannot accept that it is right to reject consideration of emotional, spiritual and cultural factors when they are present') (Perry J).

<sup>73</sup> See, eg, *Frith v Schubert* [2010] QSC 444 (26 November 2010) [75]-[90]. Similarly, in the UK, s 116 of the *Senior Courts Act 1981* (UK) c 54 allows courts to replace an executor or administrator, or to pass over another with a higher claim to the role of personal representative, in 'special circumstances' if it is necessary or expedient to do so. This provision extends to burial disputes: see, eg, *Borrows v HM Coroner for Preston* [2008] EWHC 1387 (QB) (15 May 2008) [14]-[17].

<sup>74</sup> (1999) 73 SASR 328. This case receives the shortened title '*Jones 2*' because it is the second in a series of three judgments handed down between the parties. See also *Jones v Dodd* (Unreported, Supreme Court of South Australia, DeBelle J, 10 July 1998) and *Dodd v Jones* [1999] SASC 458 (22 October 1999) — although the latter of these cases appears to relate to a different deceased body than that at the centre of the first two decisions.

of burial of a deceased Aboriginal man. The plaintiff was the deceased's father, who wanted to bury his son in his (the deceased's) home country of Oodnadatta and had in fact been awarded the right to possession in a single judge decision some days earlier.<sup>75</sup> The defendant was the deceased's former de facto partner, the relationship having ended several years prior to the death of the deceased. She had appealed the decision at first instance, wanting the deceased to be buried in Port Augusta (some 740 kilometres away from Oodnadatta) so that he might be near the two children the relationship had produced. The deceased had died intestate.<sup>76</sup>

Central to the plaintiff's case, and the dispute as a whole, was the Aboriginal custom that requires a deceased person be buried on the country in which they were born so that their spirit is able to return to the area.<sup>77</sup> Affidavits sworn for the defendant, on the other hand, stressed that the deceased was a practicing Christian to whom Aboriginal custom was not of great importance, and that it was his desire, and that of his children, that he be buried in Port Augusta where the family had lived prior to the dissolution of the de facto relationship, and where the defendant and the deceased's two children continued to reside.<sup>78</sup> For Perry J (writing for the Court), the issue to be decided was:

upon what principles does the Court determine, as between competing claims by family members, none of whom is the surviving spouse of the deceased, who has the right to possession of the body for the purpose of burial, the deceased having died intestate?<sup>79</sup>

Counsel for the defendant argued that the right fell to the person best placed to obtain a grant of letters of administration over the deceased's estate. As grant follows interest, the parties most entitled to letters of administration were the deceased's children. However both children were minors, and so (the defendant argued) the children's mother, the defendant, was most entitled to a grant of administration.<sup>80</sup>

It is here that Perry J altered the presumptive administrator rule. His Honour held that, whilst admittedly a convenient approach, the existing authorities did not set forth a principle of universal application that required recourse to the presumptive administrator rule in all cases.<sup>81</sup> Justice Perry found the presumptive administrator approach to be of more clear application in cases where it is likely that an application for administration will at some point actually be made. Where there is

<sup>75</sup> See *Jones v Dodd* (Unreported, Supreme Court of South Australia, DeBelle J, 10 July 1998).

<sup>76</sup> *Jones 2* (1999) 73 SASR 328, 329 [5].

<sup>77</sup> *Ibid* 330-1 [14]-[18].

<sup>78</sup> *Ibid* 331-2 [19]-[25].

<sup>79</sup> *Ibid* 333 [33].

<sup>80</sup> *Ibid* 333-4 [34]-[36].

<sup>81</sup> *Ibid* 334 [37].

no likelihood of such an application being made (if, for example, there is no estate to administer), ‘an approach based on extent of interest, or entitlement to apply for a grant, takes on an air of unreality’.<sup>82</sup>

Of course, we have seen that the presumptive administrator rule has a far longer history than is generally supposed, and its existence is no longer tied to the function of estate administration. Instead, it is attached to the external architecture of bodily disposal as a freestanding legal exercise by virtue of the relationship of authority and control present between administrator and deceased. Concerns about the applicability of the presumptive administrator rule in cases where the deceased left no estate on the part of Perry J and other members of the judiciary are in this way inconsistent with what we know about the nature and history of the right to possession. In addition to this misguided concern, however, and in a sharp break from previous case law,<sup>83</sup> his Honour also held that it was not the correct approach to refuse to consider emotional, spiritual, and cultural factors when these factors were present in the dispute.<sup>84</sup>

The presumptive administrator rule (coupled with a practicalities tie-break mechanism where necessary) as the standard means of resolving intestate burial disputes was thus untenable on the facts of *Jones 2*, where strong cultural factors were at play and the deceased left no estate. How, then, was the dispute resolved? Justice Perry held that

the proper approach in cases such as this is to have regard to the practical circumstances, which will vary considerably between cases, and the need to have regard to the sensitivity of the feelings of the various relatives and others who might have a claim to bury the deceased, bearing in mind also any religious, cultural or spiritual matters which might touch upon the question.<sup>85</sup>

The end result was that the rights and wishes of the deceased’s two minor children had to be balanced against other considerations — in particular, relevant Aboriginal spiritual and cultural values. In balancing these factors, Perry J focused on the unchallenged evidence given by the plaintiff that in Aboriginal custom the head of the family should prevail in relation to burial matters. On this basis, the defendant’s appeal was dismissed and the deceased’s father retained the right to possession of the body of the deceased and the authority to make the necessary funeral arrangements.<sup>86</sup>

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<sup>82</sup> Ibid 336 [50].

<sup>83</sup> Such as *Calma* (1992) 2 NTLR 37 and *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997).

<sup>84</sup> *Jones 2* (1999) 73 SASR 328, 334 [40], 336-7 [51]-[53].

<sup>85</sup> Ibid 336 [51].

<sup>86</sup> Ibid 339 [70]-[71].

Justice Perry's reasoning in *Jones 2* meant that, whilst still a consideration of great priority, the presumptive administrator rule could now be departed from if called for by the circumstances of the case. As Pullin J stated in *Burrows v Cramley* ('*Burrows*'),<sup>87</sup> however, whilst the presumptive administrator rule is only the "common or usual approach", ... it would have to be an extremely rare case to depart from the usual approach'.<sup>88</sup> *Burrows* was not such a rare case, and when the application of the presumptive administrator rule on the facts lead to an equal claimants issue, it was decided by reference solely to the practicalities of the dispute.<sup>89</sup> Circumstances in which courts have seen fit to deviate from the 'usual' presumptive administrator rule include where the deceased had a closer connection in life with a person other than the presumptive administrator,<sup>90</sup> where there was not a sufficiently close connection between the deceased and the person with the greatest entitlement to administer the deceased's estate,<sup>91</sup> or where the presumptive administrator was unfit to administer the estate,<sup>92</sup> although this is not a closed list.<sup>93</sup> As indicated above, this altered approach has also been applied when the court sees the presumptive administrator rule as inapplicable — for example if the deceased died intestate and without any estate over which to grant administration.<sup>94</sup>

Nonetheless, even after this first period of minor alteration the presumptive administrator rule continued to be the first, and occasionally sole, reference point for many courts resolving burial disputes. A forthcoming second, and more extreme, period of alteration, however, meant this would not remain the case for long.

<sup>87</sup> [2002] WASC 47 (15 March 2002).

<sup>88</sup> *Ibid* [27]. See also *Dow v Hoskins* [2003] VSC 206 (10 June 2003) [43] (Cummins J holding that looking to the party with the greatest entitlement to letters of administration was 'a sensible, practical prima facie test' regardless of whether the deceased died with an estate); *Reece v Little* [2009] WASC 30 (16 February 2009) [17] (Templeman J concluding that the first step was always to refer to the presumptive administrator rule regardless of the size [or indeed the absence] of the deceased's estate). Note also that the presumptive administrator rule (with the addition of a practicalities tie-breaker) continues to be applied by courts *without* alteration in some more recent cases: see, eg, *Joseph v Dunn* (2007) 35 WAR 94, 98 [21]; *Abraham v Magistrate Stone, Deputy State Coroner* [2017] NSWSC 1684 (5 December 2017) [53]-[54].

<sup>89</sup> *Burrows* [2002] WASC 47 (15 March 2002) [27]-[37]. Similarly, there was no good reason to depart from the presumptive administrator rule in *Reece v Little* [2009] WASC 30 (16 February 2009) [99]; *Spratt v Hayden* [2010] WASC 340 (23 November 2010) [24]; and *Bertani v Bertani* [2017] WASC 78 (22 March 2017) [30].

<sup>90</sup> See *Frith v Schubert* [2010] QSC 444 (26 November 2010) [75]-[90]. In this context, Conway has noted that members of blended families not related to the deceased by blood can be disadvantaged in post-death disputes under a strict application of the presumptive administrator rule: see *The Law and the Dead*, above n 4, 63.

<sup>91</sup> See *Mourish v Wynne* [2009] WASC 85 (1 April 2009) [30]. In this case Le Miere J applied Croucher's second stage surrogacy analysis, discussed above (see nn 21-23 and accompanying text): at [29]-[30].

<sup>92</sup> See *ibid* [35]-[36].

<sup>93</sup> See *Threlfall v Threlfall* [2009] VSC 283 (8 July 2009) [11] (Byrne J implying that the reasons for not strictly applying the presumptive administrator rule depend on the circumstances of the case).

<sup>94</sup> See cases set out above at n 71.

### 4.3. Overhauling the Pattern

The second stage of alteration to the presumptive administrator rule completed the relegation of the presumptive administrator inquiry from a position of primacy to one factor among many, even in cases in which one party to the dispute has a clear and unchallenged entitlement to administer the deceased's estate. This approach can be contrasted with that just now set out in Part 4.2 in that, under this second altered methodology, the presumptive administrator rule is never given a place of primacy. That is, a court deciding an intestate burial dispute does not first acknowledge the priority position of the person most entitled to a grant of letters of administration and then depart from that position when sufficient reason arises on the facts. Instead, the fact that a person has the greatest claim to a grant of administration over the deceased's estate is only ever one factor among several that courts will consider when deciding in whom to vest the right to possession of the body of the deceased.

This second altered methodology first emerged in 2014 with the decision of the Supreme Court of South Australia in *South Australia v Smith* ('*SA v Smith*').<sup>95</sup> This case concerned an application for various declarations brought by the South Australian Department for Communities and Social Inclusion ('the Department') to resolve a burial dispute that had arisen between competing factions of the deceased's family. The Department ran a funeral assistance program to which two separate applications had been made in respect of the deceased's funeral: the first by the deceased's purported domestic partner (the first defendant), who wanted the burial to take place in Coober Pedy; and the second by a 17-year-old son of the deceased by a previous relationship (the second defendant), who wanted to bury his father in Port Augusta.<sup>96</sup>

In resolving the dispute, Nicholson J set out the legal principle that, in the absence of a named executor, the person most entitled to take out a grant of letters of administration has the right to arrange for the disposal of a body<sup>97</sup> — that is, the presumptive administrator rule set out above in Part 3 of this Chapter. However, in reviewing the *Jones* litigation, his Honour highlighted the non-binding nature of this rule, its inapplicability when no grant of administration will ever be made, and the relevance of cultural, spiritual, and religious factors in burial dispute cases.<sup>98</sup>

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<sup>95</sup> (2014) 119 SASR 247.

<sup>96</sup> The factual background to the dispute is set out in full at *SA v Smith* (2014) 119 SASR 247, 250-1 [9]-[21].

<sup>97</sup> *Ibid* 251-2 [22].

<sup>98</sup> *Ibid* 253-4 [27]-[31].

Importantly, Nicholson J found that ‘no standard approach or hard and fast rule can be formulated and applied’ in burial dispute cases.<sup>99</sup> His Honour concluded that:

[t]he proper approach, ultimately, requires a balancing of common law principles and practical considerations, as well as attention to any cultural, spiritual and religious factors that are of importance. Further, it is the unique factual context of the dispute itself which will determine the weight which particular factors should be accorded.<sup>100</sup>

Briefly, the first defendant’s case was that she had been in a continuing relationship with the deceased up until his death; the deceased’s mother, to whom he had been close, was buried in Coober Pedy and a burial there would ensure his spirit was safe; and it was in fact the deceased’s wish that he be buried in Coober Pedy. The second defendant’s case was that the deceased identified as a Dieri man and under Dieri culture the dead should be buried with their fathers; the deceased’s father intended to be buried at Port Augusta when he died; and the deceased had wished to be buried at Port Augusta next to his infant son.<sup>101</sup>

Importantly for our purposes, Nicholson J found that there were four main considerations involved in deciding the dispute before him, of which entitlement to letters of administration was only the first.<sup>102</sup> In this regard, his Honour refused to make a finding on the nature of the relationship between the first defendant and the deceased. The evidence was too limited, and such a determination would regardless be of little weight as the first defendant was advocating a position in the interests of the deceased and his Coober Pedy family, not those of herself and her young son. Nicholson J also placed little importance on the fact that the second defendant had a strong case for letters of administration being granted to him. In any case, his Honour reiterated that the letters of administration approach was inapplicable when there is no estate to administer, and noted that it does not necessarily follow that the person with the right to take out letters of administration has the best claim to take possession of the body and arrange for its disposal. This first consideration was therefore neutral.<sup>103</sup>

The second of Nicholson J’s four considerations related to the cultural matters raised on the evidence. His Honour noted that the evidence in this regard pointed in multiple different directions, and that, the deceased descending from multiple cultural traditions, it was difficult to say which cultural beliefs should be given priority over others. Nonetheless, Nicholson J accepted that the evidence supporting a connection with Coober Pedy was stronger and more fulsome than

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<sup>99</sup> Ibid 255 [34].

<sup>100</sup> Ibid.

<sup>101</sup> Ibid 257 [42]-[44]. The factual matters supporting each defendant’s case are set out at 257-60 [45].

<sup>102</sup> Ibid 260 [46]-[47].

<sup>103</sup> Ibid 260-1 [47]-[54].

evidence supporting a connection with Port Augusta, however this was tempered by evidence that the deceased had attempted to distance himself from all Aboriginal cultural traditions. The second consideration thus pointed towards a burial in Coober Pedy, however was of limited weight.<sup>104</sup>

The third consideration was the deceased's wishes regarding his place of burial. Nicholson J saw this consideration as neutral: the deceased's wishes were not clear, the conflicting evidence likely reflecting the deceased's conflicting states of mind regarding where he wished to be buried.<sup>105</sup>

The fourth and final consideration for Nicholson J was, in his words, 'the wishes and sensitivities of the living close relatives'.<sup>106</sup> First to be considered were the wishes of the deceased's children, these favouring burial in Port Augusta. However the wishes of the children had to be considered against the wishes of the many members of the deceased's family who desired that he be buried in Coober Pedy. Nonetheless, Nicholson J was of the opinion that the wishes of the deceased's children should be given greater weight than the wishes of the extended family. This was because of the nature and closeness of the parent/child relationship, and the fact that the place of the deceased's burial would be of importance to his children for a far greater period of time than it would to the deceased's elderly relatives.<sup>107</sup> This fourth factor assumed the greatest significance for Nicholson J, and based on this reasoning his Honour found that the wishes of the second defendant should be preferred over those of the first defendant and the deceased's extended Coober Pedy family. Nicholson J thus made orders that the deceased be buried in Port Augusta.<sup>108</sup>

The many-factored approach set out in *SA v Smith* has been adopted and applied by courts in New South Wales,<sup>109</sup> Western Australia,<sup>110</sup> and Queensland<sup>111</sup> in the six years since it was handed down. To the four factors set out by Nicholson J — entitlement to letters of administration, the cultural beliefs of the parties, the wishes of the deceased, and the wishes of close relatives — have been added the need for the deceased's remains to be disposed of in a timely way, and the costs and logistics of competing disposal arrangements<sup>112</sup> (although neither of these is strictly a *new* concern, having been present in the case law as far back as *Calma*). The swiftness with which this

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<sup>104</sup> Ibid 261-2 [55]-[60].

<sup>105</sup> Ibid 262-3 [61]-[64].

<sup>106</sup> Ibid 263 [65].

<sup>107</sup> Ibid 263-5 [65]-[72].

<sup>108</sup> Ibid 265 [73]-[74].

<sup>109</sup> See *Darcy v Duckett* [2016] NSWSC 1756 (9 December 2016) [7]-[8]; *White v Williams* [2019] NSWSC 437 (17 April 2019) [21]-[23]; *Kitchener v Magistrate Thomas in His Capacity as a Coroner* [2019] NSWSC 701 (13 June 2019) [21]; *Nayacakalou v Vincent* [2020] NSWSC 24 (30 January 2020) [22]-[29].

<sup>110</sup> See *Bertani v Bertani* [2017] WASC 78 (22 March 2017) [14]-[22] (although priority was still given to the presumptive administrator inquiry in this case: see at [30]).

<sup>111</sup> See *Johnson v George* [2018] QSC 140 (14 June 2018) [12]-[13].

<sup>112</sup> Ibid [13].

second altered methodology — with entitlement to letters of administration stripped of its primacy and relegated to one factor among several — has been adopted suggests that this expanded approach to the vesting of the right of possession will soon become the governing approach in the Australian post-death dispute case law.

#### 4.4. Explaining the Overhaul

In a sharp break from the ‘bright line’ presumptive administrator inquiry, the movement towards a many-factored decision-making framework just now detailed allows potentially anyone who was close to the deceased in life to have access to the right to possession. This Chapter takes the position that, far from representing a deviation from the traditional common law framework,<sup>113</sup> this rapid change in the practices by which Australian courts vest the right to possession of the body of the deceased instead demonstrates the common law responding to changing attitudes within society regarding the identity of the appropriate person to have control over the body and its disposal. Specifically, this development in the process by which the right to possession is vested represents an increasing awareness of the vast differences between Anglo-Australian and Indigenous cultural lifeways. It has long been acknowledged, for example, that the statutory framework that determines the hierarchy of potential administrators of intestate estates operates according to Anglo family structures and does not accord with Indigenous conceptions of kinship.<sup>114</sup> The increasingly expansive methodologies explored in Parts 4.2 and 4.3 can be seen, then, as courts using the right to possession to respond to a growing social awareness of cultural differences — particularly as regards the most appropriate person to see to the disposal of a particular deceased body — and the need to respect those beliefs that fall outside of an Anglicised cultural framework by creating a legal framework that incorporates these beliefs and affords them legal significance.

Neither the first (minor) or second (overhaul) altered methodologies developed by Australian courts in order to take cultural, religious, spiritual, and related factors into account requires that

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<sup>113</sup> As Conway suggests: *The Law and the Dead*, above n 4, 100.

<sup>114</sup> See, eg, Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [337]; Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture*, Report No 94 (2006) 257-8; New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy*, Report No 116 (2007) 228-9 [14.3]-[14.5]; Prue Vines, ‘Testamentary Freedom and Customary Law: The Impact of Succession Law on the Inheritance Needs of Aboriginal and Torres Strait Islanders in Australia’ (2017) 91 *Australian Law Journal* 360, 361-2. For a promising development in this area, see *Succession Act 2006* (NSW) pt 4.4 (allowing individuals to make applications for the intestate estates of deceased Aboriginal persons to be administered according to Aboriginal lore and custom). See also Prue Vines, ‘Just and Equitable Distribution on Intestacy According to Aboriginal Tradition — The First Use of the Succession Act 2006 (NSW) Part 4.4’ (2017) 11 *Journal of Equity* 113.

the beliefs at issue be *settled*, or even strictly *identifiable*. The legal ability to consider these factors does not require that evidence be led as to the deceased's exact religious or cultural affiliation, and the depth of their devotion to that lifeway. Nor does it require that such evidence be unrefuted. Thus, for example, in *Jones 2 Perry J* agreed with the observations of the judge below that the fact that the deceased was thought by some not to engage with traditional Aboriginal law and custom was of limited evidentiary value and did not negate any connection with that law and custom.<sup>115</sup> Similarly, whilst there is some contention as to *whose* beliefs should be taken into account — be it those of the deceased, those left behind, or both<sup>116</sup> — courts do not require that one united front be presented to them before these factors are considered.

The point being made here is that courts do not require *definitive proof* of cultural, religious, spiritual, and related matters before taking them into account when deciding in whom to vest the right to possession. The emphasis is not on identifying a 'culture threshold' whereby, once beliefs reach a certain strength, they *must* be considered. Issues such as the strength of the belief and who it is held by, along with the length of time that belief was held, or the ways in which it is different from the beliefs held by others, are all questions of fact that will fall to be weighed by the court in any given dispute between claimants to the right to possession in the intestacy context (as indeed is the appropriateness of making such a determination).<sup>117</sup> Instead, the fundamentally altered methodologies used by Australian courts when vesting the right to possession that allow issues of culture, religion, and spirituality to be taken into account *at all* reveals courts adapting their practices in face of changing social norms as to the identity of the most appropriate person or persons to be placed in physical control of the body of a particular deceased person.

Note, however, that nearly all of the case law that has driven these expanding methodologies has involved the consideration of Australian Indigenous cultural beliefs. This might lead one to question whether these expanding vesting practices are *limited* to disputes involving Aboriginal cultural beliefs, rather than signalling a wider overhaul as suggested above. Nonetheless, whilst the courts' focus is often on the Indigenous beliefs at issue, in any given dispute these beliefs are

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<sup>115</sup> (1999) 73 SASR 328, 331-2 [25].

<sup>116</sup> In *Keller v Keller*, for example, Hargrave J (applying a 'minor alterations' methodology) was of the opinion that cultural and religious factors could only be allowed to override a strict application of the presumptive administrator rule if the views of the deceased with regards to these factors were not in dispute: (2007) 15 VR 667, 670 [15]. And Conway has argued that the cultural beliefs of family and other interested parties should only be upheld in burial disputes when they align with the wishes of the deceased: 'Dead, but Not Buried', above n 23, 450. On the other hand, we have seen the willingness of courts (such as the court in *SA v Smith*) to take into account both the 'wishes and sensitivities' of surviving relatives and the wishes of the deceased: see above nn 106-108 and text accompanying.

<sup>117</sup> See *Kak v Kak* [2020] NSWSC 140 (26 February 2020) [14] ('I am not in a position, nor would I consider it appropriate even if I was in a position, to assess the relative strengths of his faith or loyalty to the respective faiths') (note that this case did not involve an intestate deceased).

often directly contrasted with religious and related concerns of other origins.<sup>118</sup> And several courts have expressly considered those relationships most emphasised in non-Indigenous society when vesting the right to possession under one of the altered methodologies set out above.<sup>119</sup> A broader expansion in the vesting practices of Australian courts, including but not limited to considerations of Indigenous cultural beliefs, can, then, be identified in the case law. Nevertheless, it is clear this expansion has been driven by the courts' particular acknowledgement of Australian Indigenous beliefs (Australian courts have yet to be faced with a dispute centred on strongly held Muslim or Buddhist views, for example),<sup>120</sup> and it is these Indigenous beliefs that will likely continue to shape any further expansion in the vesting practices of Australian courts faced with disputes over the appropriate holder of the right to possession in the intestacy context.

It is important to emphasise, however, that the altered methodologies used by Australian courts when vesting the right to possession *are only relevant* in the context of the presumptive administrator rule. They have no bearing on the executor priority rule. One might wonder, then, why the former has been so readily overridden in the case law, whilst the latter has been adhered to so stringently. It is suggested here that this willingness to overlook the presumptive administrator rule, but not the executor priority rule, is a result of a misunderstanding of the former's history. As we have seen, there is a belief in the modern case law that the presumptive administrator rule is something of a modern 'stopgap' position reached out of necessity in early Australian decisions by creating a poor replica of the executor priority rule — that is, that it is a legal principle of substantially less weight than the rule that gives executors first claim to the right to possession. As both Chapter Two and Part 3 of this Chapter have shown, this is not the case. The presumptive administrator rule is of equal strength and legal historical pedigree as the executor priority rule, and, as a matter of doctrine, perhaps should not have been overridden with such ease — or at least, without significant consideration on the part of Australian courts.

That said, this is not the first time we have seen substantial development in the vesting practices attached to the legal architecture of bodily disposal. We saw in Chapter Two that a legal duty to dispose of the body of a deceased person was initially only imposed on executors and administrators. Soon, however, the classes of people placed under a duty to see to the disposal of a particular deceased body expanded to include husbands, parents, and householders.

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<sup>118</sup> See, eg, *Nayacakalou v Vincent* [2020] NSWSC 24 (30 January 2020) (conflict between Aboriginal cultural beliefs and Fijian cultural beliefs).

<sup>119</sup> See *Dodd v Jones* [1999] SASC 458 (22 October 1999) [21], [29], [32]-[33], [37]; *Darcy v Duckett* [2016] NSWSC 1756 (9 December 2016) [33].

<sup>120</sup> Whilst *Kak v Kak* [2020] NSWSC 140 (26 February 2020) involved a dispute between Muslim and Roman Catholic disposal practices, it was resolved quickly by application of the executor priority rule.

At the core of this 19<sup>th</sup> century expansion was the common law's recognition of the need for some one person to dispose of the body swiftly and decently — this need persisting in the absence of an executor or administrator. And this recognition remains in the modern Australian case law, regardless of any development in the views of society as to the identity of the appropriate person to exercise the physical control necessary to see to that disposal. Whilst the number of potential right-holders has expanded significantly under the altered methodologies employed by Australian courts in the specific context of intestacy, the underlying principle remains that the identified right-holder is the *sole* right-holder. This channels decision-making power through one person in a dispute in which many parties, with many differing views, can be present. The identification of one *sole* right-holder prevents the making of multiple differing disposal arrangements and the causing of unnecessary emotional distress to survivors. Anything else would allow a 'spectacle'<sup>121</sup> of competing claims to play out both inside and outside the courtroom — by any account 'a most unsatisfactory course in practical terms'.<sup>122</sup>

To summarise, then, there is little doubt that the Australian common law governing disputes as to who should control the body of the deceased, at least in the intestacy context, is moving away from a formalistic application of a bright line legal rule towards an acknowledged list of considerations that should be balanced against each other. Whilst some see there to be 'a counter-therapeutic level of unpredictability' in how they are treated by courts,<sup>123</sup> these considerations reflect changing social norms regarding family and culture, and ultimately the identity of the appropriate person to govern the disposal of the body of a particular deceased person, whilst simultaneously ensuring that the right to possession vests in one person, and one person alone.

## 5. Conclusion: Completing the Common Law Hierarchy

The historical development of the common law hierarchy by which the right to possession of the body of the deceased — alongside the financial liability for funeral expenses and the duty to dispose of the body with which it is closely tied — is vested was set out in Chapter Two. It is pertinent to conclude this Chapter's analysis of the changing practices of Australian courts when vesting the right to possession in contemporary post-death disputes by setting out this hierarchy in a modern context.

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<sup>121</sup> *Burrows* [2002] WASC 47 (15 March 2002) [27].

<sup>122</sup> *Ibid.*

<sup>123</sup> Ian Freckelton, 'Disputed Family Claims to Bury or Cremate the Dead' (2009) 17 *Journal of Law and Medicine* 178, 183. See also Conway, 'First Among Equals', above n 60, 160 (noting that the expanding vesting practices of modern courts allow for 'a uniquely responsive solution' to post-death disputes, but that, at the same time, '[f]lexibility and unpredictability are natural bedfellows').

First, it must be noted that in some circumstances certain public officials — such as coroners — have a statutory right to possession of the body that will temporarily override the common law right to possession, regardless of in whom the common law right vests.<sup>124</sup> This statutory right is limited to very specific purposes,<sup>125</sup> and once these purposes have been met, the common law right to possession will again become the governing legal principle.

In the context of the common law right to possession, Part 2 of this Chapter discussed at length the executor priority rule, which holds that the executor is the priority holder of the right to possession above any and all other persons. The executor thus occupies the highest rung on the common law hierarchy. As we saw in Parts 3 and 4, despite being of equal standing as the executor priority rule, the presumptive administrator rule — which places the presumptive administrator on the second rung of the common law hierarchy — is being overlooked with increasing readiness as courts diversify their vesting practices to account for changing social attitudes regarding culture, religion, and disposal. We saw in Part 4 that the rapidly expanding vesting practices of Australian courts deciding post-death disputes has meant that many more people have a legitimate basis from which to claim recognition as the appropriate holder of the right to possession in relation to a particular deceased body. Note, however, that if no such claim is made (and subsequently upheld in court), the right to possession remains with the presumptive administrator.

If there is no one to claim administration over the estate, or that they should be substituted for the presumptive administrator under one of the altered methodologies set out in Part 4 of this Chapter, the common law hierarchy moves down a rung. Traditionally, and as discussed in Chapter Two, following the personal representative the next holder of the right to possession — and, by now more importantly, bearer of a duty to dispose — is the husband of a deceased woman, followed by the parent of a deceased child. Within a modern context, however, the duty owed by a husband in relation to the body of his wife (likely abolished with the passage of the *Married Women's Property Act 1882*<sup>126</sup> in any regard),<sup>127</sup> along with the duty owed by a parent in relation to the body of their child, could be seen as being encompassed within the presumptive administrator rule — spouses and parents being high-ranking candidates for administration under relevant

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<sup>124</sup> See, eg, *Coroners Act 1997* (ACT) s 15(2); *Coroners Act 1993* (NT) s 17(1); *Coroners Act 2003* (Qld) ss 26(1)-(2); *Coroners Act 2003* (SA) s 32(1); *Coroners Act 1995* (Tas) s 31; *Coroners Act 2008* (Vic) s 22; *Coroners Act 1996* (WA) s 30(1).

<sup>125</sup> The coroner's right to possession, for example, is narrowly confined to control over the body for the purposes of conducting, or deciding to conduct, an inquest into cause of death: see, eg, the discussion of *Coroners Act 1975* (SA) s 13 in *Haydon v Chivell* [1999] SASC 315 (29 July 1999) at [36]-[39]. See also the comments of the Full Court of the South Australian Supreme Court in *Haydon v Chivell* [1999] SASC 336 (11 August 1999) at [31]-[32].

<sup>126</sup> 45 & 46 Vict, c 75.

<sup>127</sup> See *Rees v Hughes* [1946] 1 KB 517, 523-6.

intestacy legislation.<sup>128</sup> Of course, one must *claim* administration. And so there is still scope for these traditional rules to operate (again, often now phrased as the imposition of a duty to bury), with husbands occupying the third rung on the common law hierarchy, and parents the fourth, even if these individuals have, for whatever reason, actively avoiding putting themselves forward as the presumptive administrator.<sup>129</sup>

If neither spouse nor parent is in a position to dispose of the body, the right (and duty, and liability) will transfer down to the fifth rung on the hierarchy, occupied by the householder in which the deceased died. This class of duty-owners includes hospitals and medical facilities,<sup>130</sup> just as in the past it included poorhouses and asylums.<sup>131</sup> If there is no householder, statute will again intervene and vest right, duty, and liability in the relevant local authority.<sup>132</sup>

Importantly, the historical development of the right to possession — its use by the common law as a means of responding to the social need for bodies to be disposed of swiftly and decently by vesting control over the body in some one particular identifiable person — requires that the parties that occupy the various rungs of the common law hierarchy just now set out *are the only legitimate holders of the right to possession of the body of a deceased person*. This is true regardless of the fact that, in many, if not the majority, of instances in which the disposal of the body of a deceased person must be arranged, this process is carried out without any thought given to the existence of an enforceable common law right to possession of the body, let alone the identity of the person who holds this right. The limited number of potential right-holders, and the inability of these right-holders to transfer the right to possession outside of the established common law hierarchy, are two of the salient features that make up the right to possession as an internally consistent legal incident that Chapter Four now turns to explore in detail.

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<sup>128</sup> See, eg, *Succession Act 2006* (NSW) ch 4 (setting out entitlements of various parties, including spouses and parents, in the case of intestate death). As a grant of letters of administration generally follows interest (that is, a grant will normally be made to the applicant with the largest entitlement to the estate: *In the Estate of Slattery* (1909) 9 SR (NSW) 577, 578-9), spouses and parents are likely candidates for letters of administration.

<sup>129</sup> In this regard, note the following decisions upholding a duty on the part of a parent to see to the disposal of the body of their (minor) child: *Warner v Levitt* (1994) 7 BPR 15,110, 15,112; *Watene v Vercoe* [1996] NZFLR 193, 196-7; *R v Gwynedd County Council* [1992] 3 All ER 317. On the possibility of a duty flowing from wives to husbands, and from children to parents, see S G Hume, 'Dead Bodies' (1956) 2 *Sydney Law Review* 109, 112-3.

<sup>130</sup> See, eg, *University Hospital Lewisham NHS Trust v Hamuth* [2006] EWHC 1609 (Ch) (23 January 2006) [13]-[17]; *Lakey v Medway NHS Foundation Trust* [2009] EWHC 3574 (QB) (19 November 2009) [8]-[10].

<sup>131</sup> See *R v Feist* (1858) Dears & Bell 590; 169 ER 1132 and discussion in Part 6.2 of Chapter Two.

<sup>132</sup> See, eg, *Burials Assistance Act 1965* (Qld) s 3(1).

# Chapter Four

## The Right to Possession's Salient Features

### 1. Introduction

This Chapter continues the analysis of the modern Australian post-death dispute case law. Moving beyond an examination of in whom the right to possession is vested, the purpose of this Chapter is to provide a comprehensive analysis of how the right to possession of the body of the deceased *operates in practice*: actions it can and cannot authorise, the nature of the power it conveys on right-holders, how it is transferred from one party to another, and the means by which it is enforced. In short, then, the purpose of this Chapter is to provide a detailed description of the salient features that make up the modern right to possession — something that is noticeably absent from the existing law of the dead scholarship.<sup>1</sup>

This Chapter's identification of the salient features that make up the right to possession is important to this Thesis' analysis for two reasons. First, the existence of these salient features indicates that the right to possession is operating as an internally consistent legal incident with defined features and contours, rather than as an ad hoc, makeshift means of resolving post-death disputes. Second, and in line with the evaluative framework adopted by this Thesis, it is these salient features that must be externally consistent with the exclusion-based theory of property rights set out in Chapter Five and applied in Chapters Six through Eight.

To this end, Part 2 of this Chapter confirms the modern interrelation — previously introduced in an historical context in Chapter Two — between the three legal incidents that make up the external legal architecture of bodily disposal. Part 3 then sets out the basic content of the right to possession, and considers its temporal and physical outer limits. Part 4 next examines the (near) absolute discretion vested in the right-holder with relation to the possession and disposal of the body of the deceased. This Part argues that the right to possession's status as an absolute entitlement reflects the common law responding to the same social concerns identified in Chapters Two and Three: a need for the body of the deceased to be disposed of swiftly and decently, and the placement of some one person in control of that body as a result. The emerging trend in the very recent case law towards judicial intervention in the exercise of the right to possession, also addressed in Part 4, is criticised as being inconsistent with this approach. Part 5 then discusses when and how the right to possession can be transferred from one party to another, and Part 6

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<sup>1</sup> Outside of this Chapter, the most detailed description of the content and scope of the right to possession (albeit from a predominantly English perspective) can be found in Heather Conway, *The Law and the Dead* (Routledge, 2016) at 67-75. See also Rohan Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (Hart, 2007) 47-51.

details the remedial framework within which the right operates. Part 7 concludes by setting out five salient features of the right to possession of the body of the deceased revealed by this Chapter's analysis.

## 2. The Ongoing Link Between Right to Possession and Duty to Dispose (and Liability for Expenses)

As we saw in Chapter Two, from its earliest appearance in the common law, the right to possession of the body of the deceased has been linked to the duty to dispose of that body. Thus, it was clearly stated in the 1882 *Williams* decision that 'primâ facie the executors are entitled to the possession and are responsible for the burial of a dead body'.<sup>2</sup> The ongoing interrelation of these two legal incidents in the modern case law was expressly acknowledged by Martin J in *Calma v Sesar*, one of the earliest post-death disputes to arise in Australia. In that case his Honour stated that '[w]hat the law recognises as incident to the duty to dispose of the body is the right to the possession of the body until it is disposed of'.<sup>3</sup> Since Martin J's decision in *Calma*, the connection between the duty to dispose of the deceased's body and the right to take possession of it for the purposes of carrying out that disposal has been affirmed so many times as to become thoroughly entrenched within the Australian common law of the dead.<sup>4</sup>

The duty to dispose of the body of the deceased imposed on those who hold the right to possession is rigid and heavy.<sup>5</sup> The need for this disposal to be carried out in a decent manner, so prevalent in our historical discussion in Chapter Two, has continued to the present day (although the emphasis on Christian ritual has lessened significantly).<sup>6</sup> And even in an era in which a body can conceivably remain undisposed of for an extended period of time without causing any danger to public health or decency (in long-term refrigeration, for example), the person placed under this

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<sup>2</sup> (1882) 20 Ch D 659, 664.

<sup>3</sup> (1992) 2 NTLR 37, 41. And later: '[t]he right to possession of a dead body runs with the duty to dispose of it': at 42.

<sup>4</sup> See, eg, *Burnes v Richards* (1993) 7 BPR 15,104, 15,106; *Warner v Levitt* (1994) 7 BPR 15,110, 15,112; *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997) 6; *Manktelow v Public Trustee* (2001) 25 WAR 126, 131 [26]; Transcript of Proceedings, *Sullivan v Public Trustee for the Northern Territory of Australia* (Supreme Court of the Northern Territory, 20210720, Gallop AJ, 24 July 2002) 14; *Reid v Love* [2003] SASC 214 (4 April 2003) [38]; *Leeburn v Derndorfer* (2004) 14 VR 100, 102 [11]; *Reid v Crimp* [2004] QSC 304 (3 September 2004) [21]; *Spratt v Hayden* [2010] WASC 340 (23 November 2010) [5]; *Bertani v Bertani* [2017] WASC 78 (22 March 2017) [15]. Cf *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 690 (link between right and duty 'questionable').

<sup>5</sup> See *Re Boothman; Ex Parte Trigg* (Unreported, Supreme Court of Western Australia, Owen J, 27 January 1999) 8 (labelling the duty to dispose of the body 'onerous' and 'of some seriousness').

<sup>6</sup> See discussion in Imogen Jones and Muireann Quigley, 'Preventing Lawful and Decent Burial: Resurrecting Dead Offences' (2016) 36 *Legal Studies* 354, 360-2, 365-8 (noting the difficulties inherent to attempts to define 'decent' in the law of the dead context, and the problems this causes for particular criminal offences).

duty is required to at least initiate the process to see the deceased properly disposed of at some point in the future.<sup>7</sup> The duty to dispose cannot allow for idleness.

That the law requires swift compliance with the duty to dispose underscores the fact that, as in the past, the modern duty to dispose is owed to the public at large, as opposed to the individual deceased, with the right to possession developing as a related legal incident to facilitate this duty.<sup>8</sup> That is, adopting the Hohfeldian assumption that a duty cannot exist without a right and vice-versa,<sup>9</sup> the relevant right-duty relationship in the context of the duty to dispose exists between the holder of the right to possession (in their capacity as the individual placed under this duty), and the public at large (holding the public right that corresponds to this duty). The accurate identification of this right-duty relationship is important, as the close ties between right to possession and duty to dispose has led to confusion in the literature stemming from the mistaken idea that the relevant correlative relationship in fact exists between these two legal incidents.<sup>10</sup>

Given its public character, the question of who is able to bring a claim to enforce the right-holder's duty of disposal requires some consideration. We saw in Chapter Two that, historically, individual members of the public could not sue to require the right-holder carry out their duty to dispose of the deceased's body.<sup>11</sup> However, the Australian case law has since acknowledged that individual community members with some special interest in the dispute can bring an action to require the right-holder to carry out their duty to dispose (although mere membership in the community in which the corpse remained undisposed of would not be sufficient).<sup>12</sup> Note also that, as in the 18<sup>th</sup> and 19<sup>th</sup> centuries, the fact that the duty to dispose is owed to society at large allows the state to step in and exercise the community's corresponding right to be free of the creation of a nuisance. In this way, the criminal law, both historically and to the present day, can and does punish the

<sup>7</sup> *R v Raymond* [2019] 1 Qd R 100, 104-5 [19]-[21].

<sup>8</sup> See the discussion in Parts 6 and 7 of Chapter Two. See also *Rees v Hughes* [1946] 1 KB 517, 525 (referring to the 'public duty' of a husband to bury his deceased wife).

<sup>9</sup> See Wesley Newcomb Hohfeld, 'Some Fundamental Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16, 31.

<sup>10</sup> See Daniel Sperling, *Posthumous Interests: Legal and Ethical Perspectives* (Cambridge University Press, 2008) 96. The true right-duty relationship in the context of the right to possession is revealed in Part 2 of Chapter Seven to be between the **right** to possession and an *in rem* **duty** of non-interference with the body of the deceased that applies to all but the right-holder.

<sup>11</sup> See discussion in Part 6.1 of that Chapter.

<sup>12</sup> *Manktelow v Public Trustee* (2001) 25 WAR 126, 130 [19]. Of course, should an actual nuisance result from the continued failure to dispose of the deceased's body, the person/s affected would be able to bring an action in tort to recover for any loss resulting from this nuisance.

right-holder for their failure to comply with their duty to inter the deceased,<sup>13</sup> thus providing for the public health and public decency concerns that grounded the duty in the first place.<sup>14</sup>

And finally, what of the expenses incurred by the right-holder when carrying out their duty to dispose of the body of the deceased? The ongoing link between this liability for funeral expenses and both the duty to dispose and the right to possession has been confirmed in a modern setting.<sup>15</sup> And, notably, the principle that the right-holder can only recover those expenses that are ‘reasonable’ when carrying out their duty to dispose of the body remains<sup>16</sup> — an element of concern that the deceased not step outside of their pre-death social status evident even in the more recent case law.<sup>17</sup> As the focus of the modern case law has shifted to disputes between individuals fighting to have their claim as appropriate right-holder upheld by the court, however, the question of financial liability has largely faded from view. Modern post-death disputes, for the most part, no longer feature individuals attempting to *escape liability* by claiming they are not under a duty to dispose (and thus have no possessory right to the body); instead, these conflicts arise between parties fighting to be vested with the right to possession (and thus, placed under a duty to dispose), liability for expenses be damned.<sup>18</sup> As such, the question of liability for funeral expenses is largely absent from the analysis of the modern case law that occupies the remainder of this Chapter.

### 3. The Basic Content of the Modern Right to Possession

The ongoing link between right to possession and duty to dispose in the modern Australian case law has important implications for the basic content and extent of that right. Perhaps the most important point to be made in this regard is that, regardless of the identity of the right-holder, the

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<sup>13</sup> See discussion in Part 6.1 of Chapter Two. For a modern illustration, see *Criminal Code 1899* (Qld) s 236(1), which makes it a misdemeanour punishable by up to two years imprisonment for an individual ‘[to neglect] to perform any duty imposed on the person by law ... touching the burial or other disposition of a human body’. This provision was interpreted and applied in *R v Raymond* [2019] 1 Qd R 100.

<sup>14</sup> On this, note that the right-holder’s continued refusal to carry out their duty to dispose of the body will also result in the reassignment of that duty to another in accordance with the common law hierarchy governing burial disputes: see Part 5.1 of this Chapter.

<sup>15</sup> See, eg, *Warner v Levitt* (1994) 7 BPR 15,110, 15,112. Again, however, note that this proposition was labelled ‘questionable’ by Young J in *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 690.

<sup>16</sup> See, eg, *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 694.

<sup>17</sup> See, eg, *Angius v Salier* [2019] NSWSC 184 (1 March 2019) [75]. The point was forcibly put by the English Court of Appeal in *Gammell v Wilson*, Megaw LJ asking ‘was the expense claimed in all the circumstances, including the deceased’s station in life, creed and racial origin, reasonably incurred?’: [1980] 2 All ER 557, 569.

<sup>18</sup> As Brownie J noted in *Warner v Levitt*:

It is a curious fact that until the last several years, in all of the cases of which I am conscious, dealing with this area, the law spoke in terms of the obligation of people to bury dead bodies, which obligation carried with it an obligation to pay funeral and similar expenses, but in recent years all of the cases which have been litigated seem to be concerned with the right to bury dead bodies.

(1994) 7 BPR 15,110, 15,112.

right to possession ceases to exist entirely once ultimate, decent disposal has been effected.<sup>19</sup> Whilst there is no direct authority on the issue, it is likely that this is true regardless of whether this disposal was the act of the right-holder or a third party.<sup>20</sup> This is because, as we have seen, the right to possession exists *for the purpose* of facilitating the duty to dispose.<sup>21</sup> The existence of this duty ensures that *some one person* is required to see to the disposal of the body, but should another take on the task, the common law has little reason to complain. In cases in which the right to possession appears to continue following the disposal of the body by a third party and is capable of grounding an action on the part of the right-holder, then, the better view is that the right to possession in fact continues because the initial disposal by the third party was not *decent* in the circumstances. That is, the focus of the common law is on decent disposal, regardless of who carries out that disposal, and in some (but not all) instances, the fact that the body is disposed of by a particular third party will make that otherwise decent disposal indecent.<sup>22</sup>

Historically, the only 'decent' means of disposing of the body was by burial.<sup>23</sup> This would change with the recognition of cremation as lawful in the last decades of the 19<sup>th</sup> century.<sup>24</sup> Moving forward into the 21<sup>st</sup> century, and whilst its legal position is not entirely clear, it is likely that the

<sup>19</sup> See *Calma v Sesar* (1992) 2 NTLR 37, 41; *Dobson v North Tyneside Health Authority* [1997] 1 WLR 596, 600.

<sup>20</sup> Whilst they do not directly state the point, cases such as those *ibid* (and historically, cases such as *Williams v Williams* (1882) 20 Ch D 659) only require proper or decent disposal, and do not require that a particular person carry out that disposal for it to be considered decent. Cf Conway, who takes the view that the right to possession persists if the body is disposed of by someone other than the right-holder: *The Law and the Dead*, above n 1, 69-70. She cites *Clarke v Takamore* (Unreported, High Court of New Zealand, Fogarty J, 29 July 2009) [47]-[53] for this proposition. However, whilst the Supreme Court ultimately upheld this conclusion, it appeared to do so by extending the right to possession beyond the point of disposal *in all cases* (i.e. even when the initial disposal was decent and had in fact been the act of the right-holder) as a matter of New Zealand law: *Takamore v Clarke* [2013] 2 NZLR 733, 785 [159] (Tipping, McGrath, and Blanchard JJ). This is inconsistent with established authority in Australia (see n 19 above and nn 148-151 below and text accompanying).

<sup>21</sup> See Part 7 of Chapter Two. See also Conway, *The Law and the Dead*, above n 1, 67; Hardcastle, above n 1, 49-50.

<sup>22</sup> If, for example, the third party disposed of the remains in opposition to the wishes of the deceased and other family members, the right will continue: *Robinson v Pinegrove Memorial Park Ltd* (1986) 7 BPR 15,097, 15,098. And there is no question that, should a body be disposed of by a third party in the course of committing a crime (such as disposing of a body after a murder), the right to possession would continue to attach to that body — even if that disposal took place in an otherwise 'decent' manner (for example, by burial).

<sup>23</sup> In the modern law of the dead, 'burial' can include burial in the ground, burial in an in-ground vault, burial in an above-ground vault, burial in a church or mausoleum, and burial at sea: see Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of a Dead Body*, Report No 69 (2011) ch 3.

<sup>24</sup> See *R v Price* (1884) LR 7 QB 247, 254-6. For a discussion of this fascinating case (involving a septuagenarian druid and the cremation of his five-month-old son named Jesu Grist), see Stephen White, 'A Burial Ahead of its Time? The Crookenden Burial Case and the Sanctioning of Cremation in England and Wales' (2002) 7 *Mortality* 171, 179-84. For modern confirmation of cremation as lawful disposal for the purposes of the right to possession, see *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 694.

aquamation of the body of the deceased will be considered ‘decent’ (although it is less obvious whether processes such as exposure will meet this standard).<sup>25</sup>

Whilst both are considered ‘decent’, an important distinction can, however, be made between burial and cremation (and similar processes such as aquamation) in the context of ‘disposal’. There is no dispute that to bury a body is to ultimately dispose of it. When a body is cremated, however, the duty of disposal (along with the corresponding right to possession) has been held to continue for an extended, if not indefinite, period of time after the physical act of cremation and prior to the ultimate disposal of the ashes.<sup>26</sup>

In opposition to the need for ultimate disposal evidenced by the continued existence of a legal duty to dispose of the deceased’s remains in the cremation context, it was held in a recent Queensland decision that one can discharge their duty of disposal by making delivery of the body to another party so that *they* might dispose of the body, or by delivering the body to a storage facility prior to ultimate disposal taking place at some point in the future.<sup>27</sup> In other words, ‘disposal includes to cause disposal’.<sup>28</sup> It is submitted, however, that, by virtue of its inconsistency with established principle, this approach should not be followed. There is no indication, for example, that a second duty of disposal is imposed on the party or facility placed in possession of the body by the original duty-owner (that initial duty now being discharged), leaving the need for ultimate disposal unaddressed. Additionally, this approach is inconsistent with those principles that govern the transfer of the right to possession (and its related legal incidents) — discussed in Part 5 of this Chapter.

Returning to the link between right and duty, in addition to limiting the right to possession to the temporal point of disposal, it is important to note that this connection also restricts the activities that legitimately fall within the scope of the right. Thus, the right-holder cannot authorise interferences with the body of the deceased (for example, by ordering the removal of sperm or organs) on the basis of their right to possession of that body.<sup>29</sup> Such interferences are not related

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<sup>25</sup> See Queensland Law Reform Commission, above n 23, 14-21 [2.14]-[2.44]. For a good overview of the legality of various disposal methods (albeit from an English perspective), see Conway, *The Law and the Dead*, above n 1, ch 2.

<sup>26</sup> See, eg, *Robinson v Pinegrove Memorial Park Ltd* (1986) 7 BPR 15,097, 15,098; *Doherty v Doherty* [2007] 2 Qd R 259, 266 [26]. The same would presumably be true of the material that remains following the process of aquamation. The emergence of cryopreservation in the hopes of future reanimation as a means of ‘dealing with’ (can it be called disposing of?) the body of a person (can they be called deceased?) will, however, surely present challenges of both doctrine and principle in this context.

<sup>27</sup> *R v Raymond* [2019] 1 Qd R 100, 104-5 [19]-[21].

<sup>28</sup> *Ibid* [21].

<sup>29</sup> See, eg, *Re Gray* [2001] 2 Qd R 35, 40 [20] (‘[t]he principle clearly established, that [the right-holder has] a right to possession of the body only for the purposes of ensuring prompt and decent disposal has, I

to the disposal of the deceased's body, and so are not encompassed within the possessory right to the body of the deceased as recognised in the Australian common law.<sup>30</sup>

That the right to possession exists for the purpose of seeing to the decent disposal of the body of the deceased has also limited the application of that right to the physical *body* of the deceased, and not to parts and material *separated* from that body. This is clear in the English Court of Appeal's decision in *Dobson v North Tyneside Health Authority* ('*Dobson*').<sup>31</sup> This case concerned a dispute over the brain of the deceased which had been removed as part of the autopsy done after the deceased's sudden death. The brain had been held by a hospital prior to its destruction a year later. The body of the deceased had been buried — *sans* brain — in the weeks following her death. Nearly three years after the death and burial of the deceased, and two years after the destruction of the brain, an administrator was appointed to the estate. The administrator brought actions relating to the death of the deceased, an essential element of which was a claim in conversion in relation to the (now disposed of) brain.<sup>32</sup> The Court of Appeal rejected the claim, holding that any possessory rights available to the administrator had extinguished upon the final disposal of the deceased's body in the weeks following her death.<sup>33</sup> It was entirely immaterial that the body did not include a component so essential in life at the time of disposal.<sup>34</sup>

Similarly, in *Re Organ Retention Group Litigation* it was held that the parents of a baby who had died soon after birth had no possessory right to the brain, heart, lungs, and spinal cord removed from their infant daughter's body.<sup>35</sup> Their right to possession of the body of their deceased daughter, on which their claim was based, was held to have terminated when the body of their daughter was buried, regardless of the incomplete state of that body at the time of burial.<sup>36</sup>

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think, the corollary that there is a duty not to interfere with the body'); *AW v CW* (2002) 54 NSWLR 445, 449 [17]; *AB v A-G (Vic)* (2005) 12 VR 485, 507 [135]-[136].

<sup>30</sup> In contrast to the common law right to possession, the coroner's statutory right to possession (being for the purpose of conducting an inquest into cause of death as it is: see Part 5 of Chapter Three) necessarily authorises interferences with the body of the deceased. Any material removed from the deceased's body as part of a lawful post-mortem would therefore also be in the lawful possession of the coroner, and if work and skill was applied to such material it would become moveable property: see *Doodeward v Spence* (1908) 6 CLR 406, 414.

<sup>31</sup> [1997] 1 WLR 596.

<sup>32</sup> *Ibid* 600.

<sup>33</sup> *Ibid*.

<sup>34</sup> According to the Court, '[t]here was no practical possibility of, nor any sensible purpose in, the brain being reunited with the body for burial purposes': *ibid* 601.

<sup>35</sup> [2005] QB 506, 543-4 [156]-[158].

<sup>36</sup> *Ibid*. See also *WTC Families for Proper Burial v City of New York*, 567 F Supp 2d 529 (SD NY, 2008) (families had no right to possession in relation to co-mingled, unidentifiable, and minute remains of victims of the September 11 terrorist attacks on the World Trade Center).

It is suggested here, however, that this limiting of the right to possession to the clearly identifiable body of the deceased should only apply when the removal of the body parts or material at issue takes place in manner, or in a context, that ensures the removed material does not create a nuisance or a public health risk. This was the case in both *Dobson* and *Re Organ Retention Group Litigation* — the body parts being removed from the bodies of the deceased in the process of legitimately conducted autopsies and guaranteed to be ultimately disposed of. In cases where parts or material are removed from the body in a manner liable to create a public health risk, or with no intention of being decently dealt with (if, for example, a murderer removes part of their victim's body and preserves it as some kind of memento), the right to possession should continue to attach to that removed body part. This ensures the decisions in *Dobson* and related cases remain consistent with the fundamental link between the right to possession and the duty to dispose of the body decently.

The final point to note before we move on is that the right to possession of the deceased's remains can trump the private rights of other parties. Thus, in *Robinson v Pinegrove Memorial Park Ltd (Robinson)*,<sup>37</sup> the executor's right to possession of *all* of the cremated remains of the deceased trumped the private contractual right of the deceased's son (as against the defendant cemetery) to have one half of the ashes interred in the grounds of the Memorial Park.<sup>38</sup> Consider also that contracts for cremation often, if not always, allow for the return of the deceased's ashes to the person who arranged and paid for the cremation.<sup>39</sup> This is usually, but not always, the holder of the right to possession (often as executor or administrator of the deceased's estate). However, when the right-holder and the person arranging the cremation are not the same person, the latter's contractual right to the return of the cremated remains is subject to the former's right to possession of the ashes and to determine how they will be finally disposed of.<sup>40</sup>

In addition to defeating claims to possession of the remains of the deceased made by third parties based on contract, the right to possession can also defeat rights that are proprietary in nature. These include rights based on the application of work or skill to a deceased body or part thereof, resulting in the human biological material becoming movable property.<sup>41</sup> Such property rights

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<sup>37</sup> (1986) 7 BPR 15,097.

<sup>38</sup> *Ibid* 15,099 (upholding the right to possession because the right-holder did not consent to the creation of contractual rights in relation to the remains at issue).

<sup>39</sup> See, eg, *Public Health Regulation 2012* (NSW) reg 85(1)(a).

<sup>40</sup> *Doherty v Doherty* [2007] 2 Qd R 259, 263 [18]. This passage makes clear that this is true even when the contractual right to the return of the cremated remains is expressly acknowledged by statute.

<sup>41</sup> See *Doodeward v Spence* (1908) 6 CLR 406, 414.

entitle the holder to more than mere possession,<sup>42</sup> however they will be trumped by the right to possession of the body of the deceased where the two conflict.<sup>43</sup>

The ability of the right to possession to defeat the rights of third parties is important to note because, despite the fact that there is no legal relationship between the rights at issue, they are nonetheless overlapping in terms of their *content*. The right to possession, the contractual right of the deceased's son in *Robinson* or the individual who arranged for the deceased to be cremated, and the property right of one who applies work or skill to the body of the deceased all relate to, at least, the *physical possession* of the deceased's remains. Whilst this overlap in content is, itself, unexceptional, that it is the right to possession that will triumph in instances where these rival claims are asserted reveals the normative strength of this legal incident.

#### 4. The Right to Possession as an 'Absolute Entitlement'

##### 4.1. *Sullivan v Public Trustee for the Northern Territory of Australia*

The normative strength of the right to possession of the body of the deceased is also clear in the almost absolute and unimpeachable authority vested in the holder of that right. The 2002 decision of the Supreme Court of the Northern Territory in *Sullivan v Public Trustee for the Northern Territory of Australia* ('*Sullivan*')<sup>44</sup> provides a forceful illustration.

The deceased in *Sullivan* was a well-known Aboriginal artist. During his last illness, he had made a will naming the Public Trustee as executor and stipulating his desire to be buried at Napperby Downs Station next to his first wife and son.<sup>45</sup> After the deceased's passing, the Public Trustee Officer became aware that the deceased's family were unhappy with the burial arrangements set out in the will, instead wanting the deceased to be buried a four-hour drive away in Mount Allan (known in the local Indigenous language as Yuelamu) in accordance with Aboriginal lore and custom.<sup>46</sup> Nonetheless, the Public Trustee Officer was satisfied that the will was valid and that the

<sup>42</sup> They can, for example, be used as a legal basis to authorise the commencement of IVF treatment in the case of posthumously obtained sperm samples: see, eg, *Re Cresswell* [2019] 1 Qd R 403, particularly at 456-7 [232]-[233].

<sup>43</sup> In *Doodeward v Spence* Griffith CJ held that the application of work or skill to a body or part thereof granted property rights to the applier of work or skill 'at least as against any person not entitled to have [the body] delivered to him for the purpose of burial': 6 CLR 406, 414. On the interrelation of the right to possession and rights created by the application of work or skill, see Part 2.1 of Chapter Eight.

<sup>44</sup> The only copy of this decision I have been able to locate is: Transcript of Proceedings, *Sullivan v Public Trustee for the Northern Territory of Australia* (Supreme Court of the Northern Territory, 20210720, Gallop AJ, 24 July 2002).

<sup>45</sup> He had previously verbally expressed this desire on multiple occasions: *ibid* 2-3.

<sup>46</sup> *Ibid* 3-4.

deceased had expressed his wishes clearly, and that it was the role of the Public Trustee to give effect to those wishes.<sup>47</sup>

The Public Trustee Officer thus attempted to arrange for a funeral and burial to take place at Napperby Downs. He was prevented from doing so, however, by the Laramba Community Council (the body that owned the pastoral lease excision on which the burial site chosen by the deceased was located), who were of the opinion that, due to the opposition from the deceased's family, it was not appropriate for ceremony and burial to take place in their community.<sup>48</sup> As a result, the Public Trustee Officer formed the view that he was unable to carry out the wishes of the deceased, and, given the strong and unanimous view of the family, that the burial should take place in Yuelamu.<sup>49</sup> This was opposed by the plaintiff, who had been a close and personal confidant of the deceased for many years prior to his passing. She sought injunctive relief to prevent the Public Trustee from burying the body in any place other than a cemetery located on Napperby Downs Station.<sup>50</sup>

What legal principles governed the dispute? Gallop AJ first noted that the executor has the primary right and duty to dispose of the body of the deceased (a position we explored at length in Chapter Three). However, the question before the Court went further and asked how the executor was to discharge their duty when there were 'conflicting contentions'.<sup>51</sup> In answering this question, Gallop AJ expressly followed the English decision *Re Grandison*<sup>52</sup> in holding that the court would not interfere with the executor's choice of place of burial at the suit of another party unless the executor had exercised their discretion 'dishonestly, capriciously, or unreasonably'.<sup>53</sup>

Applying this holding to the facts, Gallop AJ stressed that the executor had exercised his discretion properly and conscientiously, and it was not the place of the court to re-exercise that discretion at the request of interested parties. In this case, the Public Trustee Officer had explored the possibility of burial at Napperby Downs Station and had found it to be impossible. He had then exercised his reasonable discretion in deciding to bury the deceased in accordance with the wishes of the family. Whilst the plaintiff had standing to bring the application on the grounds that

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<sup>47</sup> Ibid 5.

<sup>48</sup> Ibid 5-6, 12-13.

<sup>49</sup> Ibid 6, 13.

<sup>50</sup> Ibid 2.

<sup>51</sup> Ibid 14.

<sup>52</sup> (England and Wales High Court, Vinelott J, reported in *The Times*, 10 July 1989).

<sup>53</sup> *Sullivan* (Supreme Court of the Northern Territory, 20210720, Gallop AJ, 24 July 2002) 17-18. See also Part 4.2.2 of this Chapter. The decision in *Re Grandison* is also reported as *Grandison v Nembhard* [1989] 4 BMLR 140, where the formulation appears as 'wholly unreasonable' instead of 'dishonest, capricious, or unreasonable': at 143.

the decisions of the Public Trustee, as a public body, were open to scrutiny and challenge by members of the community, she had no right to require the Public Trustee exercise its discretion in another way.<sup>54</sup>

*Sullivan* thus reveals that the right-holder's exercise of their discretion regarding the possession and disposal of the body of the deceased is (nearly) absolute.<sup>55</sup> It will be upheld even when it directly contradicts the clearly and repeatedly expressed wishes of the deceased regarding the disposal of their remains (as to which, see Part 4.3 of this Chapter). In the same way, the right-holder's exercise of their discretion will be upheld even if those closest to the deceased are keenly opposed to that decision (as to which, see Part 4.4 of this Chapter). If the Public Trustee Officer in *Sullivan* had been given permission to inter the deceased on the pastoral lease excision controlled by the Laramba Community Council, is it clear from the judgment of the Court that this decision would have been upheld despite the intense opposition on the part of the deceased's relatives. That said, Gallop AJ is also clear that the right to possession of the body of the deceased is limited in that it cannot be exercised in a way that is dishonest, capricious, or unreasonable — one of only a few restrictions on that right that exist in either statute or common law.

## 4.2. Restrictions on the Exercise of the Right to Possession at Law

### 4.2.1. Cremation Legislation

The limitation on the right-holder's exercise of their right to possession that is most frequently at issue comes, not from the common law, but from statute. Each state and territory has legislation that governs the cremation of deceased persons.<sup>56</sup> Such legislation can affect the exercise of the right-holder's discretion in two ways. First, in some jurisdictions, if the deceased (whilst alive) gave signed instructions that they be cremated after death, steps *must* be taken to carry those instructions out.<sup>57</sup> Alternatively, if the deceased gave no such instructions, in several jurisdictions the body *cannot* be disposed of by cremation if (variably) a spouse, adult child, parent, next of

<sup>54</sup> Ibid 19-20.

<sup>55</sup> Indeed, it has been described by another court as 'unimpeachable': *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997) 6.

<sup>56</sup> See *Cemeteries and Crematoria Act 2003* (ACT); *Cemeteries and Crematoria Regulation 2003* (ACT); *Cemeteries and Crematoria Act 2013* (NSW); *Public Health Regulation 2012* (NSW) pt 8 div 5; *Cemeteries Act 1952* (NT); *Cremations Act 2003* (Qld); *Burial and Cremation Act 2013* (SA); *Burial and Cremation Act 2002* (Tas); *Burial and Cremation Regulations 2015* (Tas); *Cemeteries and Crematoria Act 2003* (Vic); *Cremation Act 1929* (WA).

<sup>57</sup> See *Cremations Act 2003* (Qld) s 7; *Cremation Act 1929* (WA) s 13(2). Note that these provisions, alongside those set out in n 58 below, only refer to the right to possession, and to the holder of that right, by implication, and not by express identification — as to which, see Part 3.2 of Chapter Eight.

kin, or personal representative objects (or the deceased themselves objected) to that cremation.<sup>58</sup> In both of these circumstances, the right-holder's discretion is limited by the operation of legislative provisions.<sup>59</sup>

#### 4.2.2. The *Sullivan* Threshold

Moving to those restrictions found at common law, it first should be noted that, as is true of all rights, the right to possession of the body of the deceased is limited in that it cannot be used to injure the rights of others.<sup>60</sup> In the express context of the right to possession, however, the common law imposes two restrictions — although neither has elicited any substantial jurisprudence.

The first of these restrictions was introduced into the Australian case law in *Sullivan*.<sup>61</sup> As we saw in Part 4.1 above, in that case Gallop AJ expressly adopted the principle that a court will not interfere with the executor's decisions regarding disposal unless the executor exercised their discretion in a way that was dishonest, capricious, or unreasonable<sup>62</sup> — a principle that, from this point forward, will be identified as the '*Sullivan* threshold'.<sup>63</sup> For the parties in *Sullivan*, this meant that the executor was under no obligation to re-exercise his discretion regarding his right to control the disposal of the deceased's body.<sup>64</sup> For the Court, it meant that, in the absence of conduct violating the *Sullivan* threshold, it lacked jurisdiction to require the executor re-exercise his discretion.<sup>65</sup>

It has been suggested that the *Sullivan* threshold is equivalent to the standard required for judicial review of a trustee's decision.<sup>66</sup> This conclusion is supported by way of contrast with the position

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<sup>58</sup> See, eg, *Cemeteries and Crematoria Regulation 2003* (ACT) reg 8(1)(c); *Public Health Regulation 2012* (NSW) reg 77(1); *Cemeteries Act 1952* (NT) s 18; *Cremations Act 2003* (Qld) s 8; *Burial and Cremation Act 2013* (SA) s 9(3); *Cremation Act 1929* (WA) s 13(1).

<sup>59</sup> In the case of Queensland's *Cremations Act 2003*, the limitation on the common law rule is expressly noted: see ss 7(3), 8(5), and 11(5) (each stating that 'this section overrides the common law'). For examples in the case law see *Reid v Crimp* [2004] QSC 304 (3 September 2004) (exercise of executor's discretion limited by s 8 of the *Cremations Act 2003* (Qld) when objections made by adult children of the deceased to the cremation of his remains); *Tufala v Marsden* [2011] QSC 222 (12 July 2011) (same).

<sup>60</sup> See, eg, *Gilbert v Buzzard* (1820) 3 Phil Ecc 335; 161 ER 1342 (right to bury deceased not absolute right to bury in highly durable coffin as the lack of decomposition would affect the right of other parishioners to be buried in the cemetery in the future).

<sup>61</sup> (Supreme Court of the Northern Territory, 20210720, Gallop AJ, 24 July 2002).

<sup>62</sup> See discussion *ibid* at 17-20.

<sup>63</sup> *Sullivan*, of course, concerned a challenge to the *executor's* decision regarding disposal of the body of the deceased made in their capacity as holder of the right to possession. Nonetheless, there is no reason to assume that this restriction is limited to executors (*qua* right-holders). For burial law to be coherent, the *Sullivan* threshold must extend to all holders of the right to possession of the body of the deceased.

<sup>64</sup> *Sullivan* (Supreme Court of the Northern Territory, 20210720, Gallop AJ, 24 July 2002) 18-20.

<sup>65</sup> *Ibid*.

<sup>66</sup> See Rosalind Croucher, 'Families in Conflict over Their Dead' in Ian Freckelton and Kerry Peterson (eds), *Tensions and Traumas in Health Law* (Federation Press, 2017) 547, 552-3. Such a suggestion is

in New Zealand. In its 2013 decision in *Takamore v Clarke*,<sup>67</sup> the New Zealand Supreme Court held that an aggrieved person could challenge the right-holder's decision regarding disposal of the body of the deceased in the High Court, and that judicial review would be granted where the applicant could show that the decision was not appropriate given the viewpoints of relevant parties and the circumstances of the case.<sup>68</sup> Interestingly, this 'appropriateness' standard was expressly selected to be lower than the *Sullivan* threshold's 'dishonest, capricious, or unreasonable' standard.<sup>69</sup> It was also a rejection of the apparent acceptance by the Court of Appeal below of the 'dishonest, capricious, or unreasonable' standard as a means of challenging decisions of the right-holder regarding disposal of the body of the deceased, and its recognition of this standard as analogous to that at play in challenges to the exercise of a trustee's discretion.<sup>70</sup>

Since the *Sullivan* threshold was introduced into the Australian case law in 2002, it has experienced a largely muted existence. In addition to its high standard for review, this must also be because the burial disputes that come before the courts are almost entirely disputes as to who is the correct right-holder. Challenges to the *exercise* of that right are rare, and are mostly limited to the statutory provisions governing cremation.<sup>71</sup> Nonetheless, the *Sullivan* threshold test of 'not dishonest, capricious, or unreasonable' remains good law. *Sullivan* indicates that a breach of this standard would invoke no more than a requirement from the court that the right-holder re-exercise

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supported by the decision itself: see *Sullivan* (Supreme Court of the Northern Territory, 20210720, Gallop AJ, 24 July 2002)18-19.

<sup>67</sup> [2013] 2 NZLR 733.

<sup>68</sup> *Ibid* 785 [160]-[162] (Tipping, McGrath, and Blanchard JJ). This position appears to have been adopted by Sir Geoffrey Vos in *Oldham Metropolitan Borough Council v Makin*: [2018] Ch 543, 555 [49].

<sup>69</sup> See *Takamore v Clarke* [2013] 2 NZLR 733, 785 [161]-[162] (Tipping, McGrath, and Blanchard JJ expressly rejecting an argument made by counsel that the 'dishonest, capricious, or unreasonable' standard for judicial review should be adopted by the court).

<sup>70</sup> *Takamore v Clarke* [2012] 1 NZLR 573, 615 [205], citing Rosalind Croucher, 'Disposing of the Dead: Objectivity, Subjectivity and Identity' in Ian Freckelton and Kerry Peterson (eds), *Disputes and Dilemmas in Health Law* (Federation Press, 2006) 324, 335. In New Zealand, judicial review of a trustee's decision regarding the management of a trust is only allowed where the trustee acted in bad faith; considered the wrong question or misinterpreted the trust deed; considered irrelevant considerations; failed to consider relevant considerations; or reached a decision that is perverse or capricious: see *Wong v Burt* [2003] 3 NZLR 526, 532-4 [18]. The last of these listed instances has been compared to the 'unreasonableness' standard in administrative law. Combined, this language lends itself to a comparison with the *Sullivan* threshold.

<sup>71</sup> Conway gives *Re Popp Estate* [2001] BCSC 183 (Supreme Court of British Columbia, 30 January 2001) as an example of a decision relating to the capricious use of the right to possession: *The Law and the Dead*, above n 1, 101 n 104. In this case a husband's decision to disinter his wife's ashes without informing her family of what he intended to do with the remains (the husband not having reached a decision in this regard) was held to be capricious, thus allowing the court to intervene. This decision must, however, be read within its statutory context — the 'capricious' finding related to s 59(e) of the *Cemetery and Funeral Services Act*, RSBC 1996, c 45 concerning disinterment resulting from family conflict and capricious change in mind, and not the *Sullivan* threshold. Closer to home, the court in *Leeburn v Derndorfer* noted that '[i]t is possible in certain circumstances for the court to intervene [in the exercise of the right-holder's discretion] on the application of an interested party', but did not elaborate: (2004) 14 VR 100, 104 [16].

their discretion in the carrying out of their right to possession. Whether a breach of the ‘not dishonest, capricious, or unreasonable’ standard would allow the court to divest the breaching right-holder of the right to possession and transfer the right down the common law hierarchy per the discussion in Part 5.1 of this Chapter remains undetermined.

As a final point, note that it is possible to view the *Sullivan* threshold in the context of the social norms we have seen repeatedly in earlier Chapters. Specifically, this common law limitation on the right-holder’s exercise of their right to possession of the body of the deceased not only encompasses, but in fact extends beyond, the ongoing social need for the deceased to be disposed of decently — ‘decently’ here being considered expansively and in the particular social context of the deceased’s family and friendship circles. The *Sullivan* threshold might, for example, prevent the right-holder from choosing to bury the body far from the deceased’s family with no reason or explanation as to why, or from burying the body of the deceased in the face of repeated requests that disposal take place via cremation. There is a social need for decent disposal, and, in the *Sullivan* threshold, the common law is at least to some degree acknowledging that incorporating the views of those close to the deceased in life may play a part in determining just what ‘decent’ is in any particular case.

### 4.2.3. The ‘Ready, Willing, and Able’ Criteria

The second common law limitation on the right-holder’s exercise of their right to possession of the body of the deceased requires that the right-holder be ‘ready, willing, and able’ to exercise the right in order to facilitate disposal of the deceased’s body.<sup>72</sup> The ‘ready, willing, and able’ criteria have never squarely arisen for consideration by Australian courts,<sup>73</sup> however many an obiter statement has been made in their support. After staunchly upholding the absolute nature of the right to possession as excluding all other parties regardless of the merits of the dispute, for example, one judge deciding a burial dispute concluded his analysis by noting that ‘[o]f course, the situation would be different if the ability of the [right-holder] to arrange for the burial was seriously in doubt’.<sup>74</sup>

It is not immediately clear what would render an individual unable to carry out the right to possession and duty to dispose. Financial inability immediately springs to mind, however, and it

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<sup>72</sup> See, eg, *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 693.

<sup>73</sup> In the body disposal context, that is. These criteria appear frequently in Australian law, including, notably, in considerations of the availability of the equitable remedy of specific performance: see, eg, *Green v Somerville* (1979) 141 CLR 594, 610-11 (Mason J).

<sup>74</sup> *Re Boothman; Ex Parte Trigg* (Unreported, Supreme Court of Western Australia, Owen J, 27 January 1999) 8-9.

is interesting to note the emphasis that is sometimes placed by courts on the ability of one or both parties to a burial dispute to fund the disposal of the deceased's body.<sup>75</sup> As to 'ready and willing', courts do not look favourably on lengthy delays in the exercise of the right to possession.<sup>76</sup> In these cases, the 'ready, willing, and able' criteria are operating as an external assessment of the ability of particular individuals to hold the right to possession.<sup>77</sup>

As an external means of assessing the ability of individuals to hold the right to possession of the body of the deceased, the 'ready, willing, and able' criteria are better characterised as limitations on who can hold the right, rather than the manner in which it is exercised. In this way, and unlike the *Sullivan* threshold discussed above, it is accepted that the right-holder being either unready, unwilling, or unable to carry out their legal obligations will result in the right to possession being transferred down the common law hierarchy to an individual who *is* ready, willing, and able.<sup>78</sup>

By way of concluding our discussion of the various restrictions on the exercise of the right to possession by the right-holder, it is suggested that the near complete absence of litigation surrounding these restrictions itself speaks to the strength of the right to possession as an 'absolute entitlement'. Right-holders have not once been restricted in their exercise of the right to possession by the Australian common law, and the statutory limitations are only applicable in relatively narrow circumstances. In short, it appears from the Australian case law that there is very little that prevents the holder of the right to possession of the body of the deceased from exercising that right exactly as they see fit.

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<sup>75</sup> See, eg, *Joseph v Dunn* (2007) 35 WAR 94, 97 [9]; *Lochowiak v Heymans* (Unreported, Supreme Court of South Australia, DeBelle J, 8 August 1997). Although note that financial *inability* has not been seriously considered in the case law to date (with the possible exception of *Mourish v Wynne* [2009] WASC 85 (1 April 2009) [43], in which the fact that the money to fund a funeral had not been collected by those on one side of a burial dispute was likely a factor that resulted in the practicalities of that dispute favouring the other party). Financial inability to dispose of a body will not result in prosecution for any nuisance caused by the body remaining unburied: *R v Vann* (1851) 2 Den 325; 169 ER 523. Instead, someone further down the common law hierarchy is burdened with the duty: see Part 5.1 below.

<sup>76</sup> See, eg, the cases set out at n 116 below.

<sup>77</sup> The 'ready, willing, and able' criteria can also operate as self-assessed personal qualifications on the part of the individual right-holder as to their ability to hold and exercise the right to possession: see, eg, *Keller v Keller* (2007) 15 VR 667 (a professional executor taking the position they were not ready, willing, and able to exercise the right to possession of the body of the deceased given the intense family conflict regarding how the body should be disposed of). This case is discussed below at nn 117-122.

<sup>78</sup> On this, see the discussion in Part 5.1 of this Chapter.

### 4.3. Excluding the Wishes of the Deceased

‘It is trite law that there is no property in a corpse.’<sup>79</sup> Of not insignificant historic pedigree,<sup>80</sup> this legal rule has the consequence of rendering all directions made by a deceased person (in testamentary form or otherwise) regarding the disposal of their body after death entirely non-binding.<sup>81</sup> Despite this established common law rule, Australian courts do acknowledge the wishes of the deceased when resolving disputes between multiple claimants to the right to possession. In at least one case, for example, it has been noted that a claim to the right to possession made by a particular party is strengthened by the fact that that party intends to comply with the uncontroverted wishes of the deceased.<sup>82</sup> And we have seen in Chapter Three that the more expansive approaches taken by courts deciding disputes between multiple purported right-holders in the intestacy context allow for consideration of the wishes of the deceased.<sup>83</sup>

Nonetheless, once an appropriate right-holder is identified, it is clear that that individual can entirely<sup>84</sup> exclude the wishes of the deceased when deciding how to dispose of the deceased’s body.<sup>85</sup> Given that the purpose of this Thesis is not to challenge the no-property rule, no more time will be spent on this point. The case for pre-mortem disposal arrangements made by the deceased to be binding on right-holder after death has been made by others.<sup>86</sup>

<sup>79</sup> *AB v A-G (Vic)* (Unreported, Supreme Court of Victoria, Gillard J, 21 July 1998) 20.

<sup>80</sup> Although, as we saw in Part 2.2 of Chapter One, its historical basis has been questioned.

<sup>81</sup> *Williams v Williams* (1882) 20 Ch D 659, 665 (‘[i]f there be no property in a dead body it is impossible that by will or any other instrument the body can be disposed of’). This principle has been incorporated into the Australian case law: see, eg, *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 693-4; *Jones v Dodd* (Unreported, Supreme Court of South Australia, Debelle J, 10 July 1998) 4; *Leeburn v Derndorfer* (2004) 14 VR 100, 104 [16]; *South Australia v Smith* (2014) 119 SASR 247, 262 [61]. Kenyon Mason and Graham Laurie provide an alternative explanation for the inability of a person to make their wishes regarding the disposal of their body binding on third parties: to do so would interfere with the right-holder’s right to possession of their post-mortem remains: see ‘Consent or Property? Dealing with the Body and its Parts in the Shadow of Bristol and Alder Hey’ (2001) 64 *Modern Law Review* 710, 719.

<sup>82</sup> See *Robinson v Pinegrove Memorial Park Ltd* (1986) 7 BPR 15,097, 15,098.

<sup>83</sup> See in particular the discussions in Parts 4.2 and 4.3 of that Chapter.

<sup>84</sup> Or nearly entirely — consider the discussion of legislation dealing with cremation above at nn 56-58 and text accompanying.

<sup>85</sup> *Sullivan* (Supreme Court of the Northern Territory, 20210720, Gallop AJ, 24 July 2002), discussed in Part 4.1 above, provides an excellent example. This Chapter leaves open the question of whether, should someone be appointed to the role of right-holder based, at least in part, on their stated willingness to carry out the wishes of the deceased, but once awarded the right to possession, refuses to carry out those wishes, the court would intervene under the *Sullivan* threshold discussed above. Note also the potential for an action in estoppel on the part of a third party affected by the issue.

<sup>86</sup> See, eg, Heather Conway, ‘Burial Instructions and the Governance of Death’ (2012) 12 *Oxford University Commonwealth Law Journal* 59; Conway, *The Law and the Dead*, above n 1, ch 5; Sperling, above n 10, ch 4; Thomas L Muinzer, ‘The Law of the Dead: A Critical Review of Burial Law, with a View to its Development’ (2014) 34 *Oxford Journal of Legal Studies* 791; Croucher, ‘Families in Conflict’, above n 66, 551; Remigius Nnamdi Nwabueze, ‘Legal Control of Burial Rights’ (2013) 2 *Cambridge Journal of International and Comparative Law* 196; Sheelagh McGuinness and Margaret

#### 4.4. Love and Affection: Limiting the Absolute?

So far we have seen that the holder of the right to possession of the body of the deceased is given near complete authority to dispose of the body (and to take possession of it in the period prior to disposal) exactly as they wish. This authority is to the exclusion of the wishes of the deceased, along with, as the discussion of *Sullivan* above indicates, the wishes of the deceased's loved ones who do not hold the right to possession.

In this last regard, however, attempts have been made to qualify the absolute nature of the right to possession. In his 1997 decision in *Smith v Tamworth City Council* ('*Smith v TCC*'),<sup>87</sup> Young J set out 15 principles that have become central tenets of the Australian common law of the dead.<sup>88</sup> Included in this list was Principle 3: '[a] person with the privilege of choosing how to bury a body is expected to consult with other stakeholders, but is not legally bound to do so'.<sup>89</sup>

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Brazier, 'Respecting the Living Means Respecting the Dead Too' (2008) 28 *Oxford Journal of Legal Studies* 297; Victorian Law Reform Commission, *Funeral and Burial Instructions*, Report (2016) 48.

<sup>87</sup> (1997) 41 NSWLR 680.

<sup>88</sup> *Ibid* 693-4. The full list reads:

1. If a person has named an executor in his or her will and that person is ready, willing and able to arrange for the burial of the deceased's body, the person named as executor has the right to do so.
2. Apart from appointing an executor who will have the right stated in proposition 1, and apart from any applicable statute dealing with the disposal of parts of a body, a person has no right to dictate what will happen to his or her body.
3. A person with the privilege of choosing how to bury a body is expected to consult with other stakeholders, but is not legally bound to do so.
4. Where no executor is named, the person with the highest right to take out administration will have the same privilege as the executor in proposition 1.
5. The right of the surviving spouse or de facto spouse will be preferred to the right of children.
6. Where two or more persons have an equally ranking privilege, the practicalities of burial without unreasonable delay will decide the issue.
7. If a person dies in a situation where there is no competent person willing to bury the body, the householder where the death occurs has the responsibility for burying the body.
8. Cremation is nowadays equivalent to burial.
9. A person who expends funds in burying a body has a restitutionary action to recover his or her reasonable costs and expenses.
10. A right of burial is not an easement, but a licence: it is irrevocable once a body has been buried in the licensed plot.
11. The cemetery authority is able to make reasonable by-laws as to the maintenance of the appearance of the cemetery.
12. Subject to such by-laws, the holder of the right of burial has the power to decide on the appearance of the grave and headstone.
13. The reasonable cost of a reasonable headstone is recoverable from the deceased's estate.
14. The holder of the right of burial cannot use his or her right in such a way as to exclude friends and relatives of the deceased expressing their affection for the deceased in a reasonable and appropriate manner such as by placing flowers on the grave.
15. After the death of the executor or administrator, the right to control the grave passes to the legal personal representative of the original deceased, not the legal personal representative of the holder of the right of burial.

<sup>89</sup> *Ibid* 694.

Justice Young's Principle 3 has received little attention in the case law beyond general acknowledgements of its existence.<sup>90</sup> This limited jurisprudence means that many elements of Principle 3 remain unexplored. First, who are the 'other stakeholders' and what is the feature that defines them (and limits their number)? And second, what does it mean for the holder of the right to possession to be expected to consult with these stakeholders without being legally obliged to do so? A third, perhaps less important question might also be posed: what is required for 'consultation' to be effected between the right-holder and other stakeholders? In this regard, note that in one case it was stated that consultation for the purposes of Principle 3 had been allowed to take place between the parties to a burial dispute as the result of an adjournment granted earlier that morning, but that no agreement had been reached.<sup>91</sup> Nothing more was said on the issue.<sup>92</sup> It therefore appears that 'consultation', although, again, not a legal requirement, can be achieved through the briefest of opportunities to communicate one's position to another party.

Outside of these issues of application, the lack of authority provided for Principle 3 by Young J in *Smith v TCC* has led to frustration. In *Milenkovic v McConnell*<sup>93</sup> McKechnie J noted that '[i]t is not clear to me precisely what authority supports principle (3) to the extent that it states the person choosing how to bury a body is expected to consult with other stakeholders'.<sup>94</sup> Nonetheless, 'this is of no moment because the authorities do support the second part of the principle that such a person is not legally bound to do so'<sup>95</sup> — a statement that, somewhat ironically, was made without reference to supporting authority.

The absence of a legal requirement to consult with those close to the deceased on the part of the right-holder, even in the face of clearly stated judicial support for such consultation, emphasises the need to focus decision-making power in the hands of some one person. To vest control in multiple separate parties — particularly when those parties are in conflict — would impede the decent and swift disposal of the body of the deceased, something we have seen to be the driving normative force in the development of the right to possession. In this way, the same concerns that underlie the *vesting* of the right to possession discussed in Chapter Three — always in some one identifiable person, regardless of the methodology employed in the vesting process — similarly

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<sup>90</sup> See, eg, *Leeburn v Derndorfer* (2004) 14 VR 100, 104 [16]; *Keller v Keller* (2007) 15 VR 667, 668 [6]; *AB v CD* [2007] NSWSC 1474 (17 December 2007) [31]; *Abraham* [2017] NSWSC 1684 (5 December 2017) [48], [54], [56]; *Kak v Kak* [2020] NSWSC 140 (26 February 2020) [19].

<sup>91</sup> *Joseph v Dunn* (2007) 35 WAR 94, 98 [20].

<sup>92</sup> *Ibid.*

<sup>93</sup> [2013] WASC 421 (22 November 2013).

<sup>94</sup> *Ibid* [33].

<sup>95</sup> *Ibid.* And later: '[t]he authorities to which Young J made reference before enunciating principle 3 in *Smith v Tamworth City Council* do not support more than an expectation of consultation': at [40].

act to prevent the expansion of decision-making power *beyond* the right-holder to include third parties close to the deceased by virtue of Young J's Principle 3.<sup>96</sup>

Before we move on, another of the *Smith* principles warrants mention. Principle 14 states that '[t]he holder of the right of burial cannot use his or her right in such a way as to exclude friends and relatives of the deceased expressing their affection for the deceased in a reasonable and appropriate manner such as by placing flowers on the grave'.<sup>97</sup> This Principle requires only a passing reference because, despite evident confusion on the part of the judiciary in this regard,<sup>98</sup> it in fact refers to an entirely different legal right than that which is the focus of Principle 3. Principle 3 refers to the right held by the person with the 'privilege of choosing how to bury a body' (that is, the holder of the right to possession of the body). Principle 14 instead refers to the right of burial, held by the person who contracted with the relevant cemetery authority or similar body to purchase the burial plot in which the deceased has been, or will be, interred. These rights may be held by the same person, but are not required to be.

We will see below that once the deceased's body has been interred in the burial plot, the (former) holder of the right to possession arguably obtains an irrevocable licence coupled with a grant of interest in the land to have the deceased's body remain undisturbed.<sup>99</sup> But this too is distinct from the right of burial, which brings with it contractual rights as defined by the terms of the purchase agreement and a very different body of remedies.<sup>100</sup> With that in mind, it is worth noting here that the relevant cemetery's internal regulations — almost certainly a term of the contract that governs the right of burial — are likely to prevent the holder of the right of burial from excluding others from the grave in the same way as Young J's Principle 14.<sup>101</sup>

<sup>96</sup> A similar view was adopted by the Queensland Law Reform Commission, who, in a 2011 report, rejected that the right-holder should be placed under a legal duty to consult with other parties. The Commission considered that the nature and the extent of the consultation required may prove difficult to determine were Young J's Principle 3 to be given the force of law: above n 23, 200 [6.624]. Importantly, they also emphasised that mandatory consultation would create additional delays and add additional complexity to disputes — something we have seen is avoided by the common law's insistence that the right to possession only ever vests in some one identifiable person.

<sup>97</sup> *Smith v TCC* (1997) 41 NSWLR 680, 694.

<sup>98</sup> See, eg, *Leeburn v Derndorfer* (2004) 14 VR 100, 104 [16]; *Spratt v Hayden* [2010] WASC 340 (23 November 2010) [8]; *Manktelow v Public Trustee* (2001) 25 WAR 126, 131 [23] (each discussing Principle 14 in the context of the right to possession).

<sup>99</sup> See discussion below at text accompanying nn 148-150.

<sup>100</sup> See discussion below at n 131 and text accompanying.

<sup>101</sup> On this, see *Milenkovic v McConnell* [2013] WASC 421 (22 November 2013) [36]-[38].

## 4.5. Judicial (Non-)Intervention in the Exercise of the Right to Possession

In addition to the exclusion of the wishes of the deceased and those close to the deceased, the ‘absolute’ nature of the right to possession of the body of the deceased is also evident in the traditional unwillingness of courts to direct the right-holder in the exercise of that right. We have already seen that Australian courts have adopted the rule that a court will not intervene in the exercise of the right-holder’s discretion with regard to the possession and control of a deceased body unless that discretion is exercised in a way that is dishonest, capricious, or unreasonable.<sup>102</sup> Similarly, there are frequent judicial pronouncements regarding the inappropriateness of courts directing outright how the right-holder should exercise their right to possession of the body.<sup>103</sup> These statements make it clear that courts deciding post-death disputes understand that they have the power to order how a body might be disposed of, however take the view that to exercise this power would be inappropriate.<sup>104</sup>

Two very recent burial dispute cases go against this position. In *Abraham v Magistrate Stone, Deputy State Coroner* (‘*Abraham*’), Rothman J ordered the father who had been granted the right to possession of the body of his deceased 17-year-old son to cremate his son’s body and divide the ashes in half, one portion to be transferred to the deceased’s mother for removal to New Zealand.<sup>105</sup> And in *Johnson v George* (‘*Johnson*’), North J expressly ordered the father (as right-holder), contrary to the father’s wishes, to hold a funeral for the deceased in Townsville before removing the body to Charters Towers for burial.<sup>106</sup> To be clear, in both disputes orders were

<sup>102</sup> See Part 4.2.2 of this Chapter.

<sup>103</sup> See, eg, *Re Bellotti v Public Trustee* (Unreported, Supreme Court of Western Australia, Franklyn J, 11 November 1993) 13:

What is a proper and decent burial in any particular case ... is a matter to be determined at the discretion of the person whose obligation it is to attend to and provide for that burial. In my view, it would be inappropriate for a Court save in the most exceptional circumstances to direct such a person as to how he should exercise that discretion.

See also *Garlett v Jones* [2008] WASC 292 (5 December 2008) [58] (‘I am of the view that it would be inappropriate in circumstances of this complexity for the court in some way to arbitrate or to determine which particular arrangement should be made’).

<sup>104</sup> See, eg, *Gillott v Woodlands* [2006] VSCA 46 (21 February 2006) [35] (‘even where the proceeding is otherwise within jurisdiction, the Court should ordinarily not determine questions concerning the mode of disposal of a body’); *Leeburn v Derndorfer* (2004) 14 VR 100, 108 [31] (acknowledging that the court had the power to order the division of ashes ‘in the appropriate case’, but declining to do so on the facts). But see *Brown v Tullock* (1992) 7 BPR 15,101, 15,102 (‘there is no law which enables a court to give directions as to how the body of a deceased person should be disposed of’); *Privet v Vovk* [2003] NSWSC 1038 (7 November 2003) [17] (‘it is not within the power of the court to control the means of disposition’); Conway, ‘Burial Instructions’, above n 86, 85-6.

<sup>105</sup> [2017] NSWSC 1684 (5 December 2017), particularly at [60]-[61].

<sup>106</sup> [2018] QSC 140 (14 June 2018) [32].

made, not only identifying the party vested with the right to possession of the body, but actively directing how that person was to dispose of the remains at issue.<sup>107</sup>

It is pertinent at this point to consider the jurisdictional basis relied on by Australian courts resolving post-death disputes. Multiple potential bases are suggested in the case law. In some instances the statutory jurisdiction of the court to intervene in the administration of deceased estates is referred to,<sup>108</sup> whilst in others the courts are stated as exercising their inherent jurisdiction.<sup>109</sup> It has also been suggested, at least in Western Australia, that the court can exercise its preserved ecclesiastical jurisdiction to resolve burial disputes.<sup>110</sup>

Cases (such as *Johnson*) in which orders directing the exact means by which the body will be disposed of are made based on the statutory jurisdiction of the relevant court to intervene in estate administration matters fail to acknowledge that, as we saw in Chapter Two, the right to possession (and indeed the entire external legal architecture of bodily disposal) has been a freestanding legal exercise for at least two centuries. The right to possession is no longer merely another facet of estate administration that can be governed by the statutory power of the court to intervene in estate administration. The right might, after all, be held by a hospital or nursing home as the householder of the place where the deceased died — and should a dispute arise in this context, it would be peculiar for a court to suggest that intervention on its part was warranted by virtue of its jurisdiction to administer estates. Even when the right to possession *is* held by the deceased's personal representative, the normative concerns that we have seen underpin the right (being public health and public decency) are distinct from those that underpin estate administration. Further, the priority vesting of the right to possession in the executor or administrator is largely for reasons of practicality and is distinct from the estate administration function of these roles. For courts to

<sup>107</sup> Similarly, in *South Australia v Smith* Nicholson J expressly ordered that the deceased be buried in Port Augusta: (2014) 119 SASR 247, 265 [74]. However this order was directed at the Department for Communities and Social Inclusion and related to the provision of its funeral assistance program. It was not, therefore, strictly made as a means of resolving a burial dispute between two private parties. And in *Burrows v Cramley* [2002] WASC 47 (15 March 2002) [38] the Court ordered that the body be buried in Perth, however this appears to be merely an affirmation of the successful party's stated intention, rather than an active intervention in the exercise of that party's right to possession.

<sup>108</sup> See, eg, *Re Dempsey* (Unreported, Supreme Court of Queensland, Ambrose J, 7 August 1987) 9-10; *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997) 1-2; *Leeburn v Derndorfer* (2004) 14 VR 100, 103 [12]; *Johnson* [2018] QSC 140 (14 June 2018) [6].

<sup>109</sup> See, eg, *Gillott v Woodlands* [2006] VSCA 46 (21 February 2006) [33]; *Doherty v Doherty* [2007] 2 Qd R 259, 262 [15]; *Minister for Families and Communities v Brown* [2009] SASC 86 (2 April 2009) [3] (acknowledging the inherent jurisdiction of the court and expressly rejecting the existence of any statutory jurisdiction); *South Australia v Smith* (2014) 119 SASR 247, 249 [5] (same); *Darcy v Duckett* [2016] NSWSC 1756 (9 December 2016) [5]; *Abraham* [2017] NSWSC 1684 (5 December 2017) [44]; *White v Williams* [2019] NSWSC 437 (17 April 2019) [18]; *Kitchener v Magistrate Thomas in His Capacity as a Coroner* [2019] NSWSC 701 (13 June 2019) [1].

<sup>110</sup> *Burrows v Cramley* [2002] WASC 47 (15 March 2002) [3]; *Mourish v Wynne* [2009] WASC 85 (1 April 2009) [21]; *Bertani v Bertani* [2017] WASC 78 (22 March 2017) [14].

intervene on this basis, then, is an overextension of their statutory jurisdiction, and represents a misunderstanding of the nature and history of the right to possession.

Intervention in the exercise of the right to possession by courts operating within their inherent jurisdiction (such as the court in *Abraham*) cannot be objected to on the same grounds, and indeed appears to be perfectly valid. Thus, the recent English decision *Oldham Metropolitan Borough Council v Makin*<sup>111</sup> saw the Court exercising its inherent jurisdiction to override the wishes of the deceased's named executor and order in great detail how the body of the deceased would be disposed of — including the location, time of day, form of ceremony, and identities of those permitted to attend.<sup>112</sup> The implications of this active intervention on the potentially propertied nature of the right to possession will be explored in detail in Part 3.5 of Chapter Eight. Outside of the property inquiry, however, the position taken in this Chapter is that, regardless of its legal validity, active intervention by the judiciary in the exercise of the right to possession is normatively undesirable.

It has been repeatedly argued throughout this Chapter and the two that have preceded it that the right to possession and the practices by which it is vested reflect the common law's concern that some one person have control — both physical and decision-making — over the body of the deceased. This facilitates both practical and moral goals in relation to that body (such as the avoidance of the creation of a nuisance, and the ability to dispose of the body swiftly and decently). Judicial intervention into the decision-making capabilities of the right-holder goes against this. It removes the decision-making power to a judicial officer, whose natural inclination is likely to seek a compromise solution to the benefit of both parties.<sup>113</sup> This removal of decision-making power to the judiciary has the potential to increase post-death dispute litigation as parties override the right-holder and bring disputes to court, hoping that the judge-decreed outcome will be such a compromise solution.

## 5. Transferring the Right to Possession

Whether as part of a compromise solution or otherwise, can the court order that the right to possession be transferred from the right-holder to another? In this regard, recall that in Chapter Three we saw that the nominated executor of a person who dies testate enjoys priority status as

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<sup>111</sup> [2018] Ch 543.

<sup>112</sup> *Ibid* 561-2 [78]-[80], 564 [88].

<sup>113</sup> See, eg, *Waldron v Howick Funeral Home* (Unreported, High Court of New Zealand, Hansen J, 17 August 2010) [12] (refusing to make an order on the issue because of uncertainty as to jurisdiction, but encouraging the parties to the dispute to reach an agreement and suggesting that the ashes be divided between them). Indeed, in *Abraham*, the orders given by Rothman J largely reflected a compromise position suggested by a party to the dispute: [2017] NSWSC 1684 (5 December 2017) [54], [60].

holder of the right to possession of the body of the deceased. Note here, however, that if the named executor's status as executor is legitimately questioned (perhaps because the validity of the will, or the character of the named executor themselves, is called into doubt), that individual loses their ability to claim the right to possession of the deceased's body.<sup>114</sup>

This is important because it reveals that the right to possession is not stagnant. Instead, the common law recognises the potential for the right — alongside its related legal incidents — to be 'transferred' down the common law hierarchy set out in Part 5 of Chapter Three to a party capable of validly engaging in the legal exercise of bodily disposal.<sup>115</sup> This Part explores the multiple ways in which this transfer can take place.

### 5.1. Forced Transfers Down the Hierarchy

There are multiple courses of conduct that can result in a forced transfer of the right to possession from the acknowledged right-holder to another individual lower on the common law hierarchy. We have just now seen that the invalidity of an individual's nomination to the role of executor will strip them of their priority right-holder status and cause the right to possession to vest in another. Similarly, if an individual vested with the right to possession of the body of the deceased does not exercise this right within a reasonable time (at the same time failing in their duty to dispose), or cannot financially afford to dispose of the body, the right will be removed from them and vested in another.<sup>116</sup> Both instances of forced transfer can be explained as the right-holder being assessed by the court as not meeting the 'ready, willing, and able' criteria discussed in Part 4.2.3 of this Chapter.

### 5.2. Voluntary Transfers Down the Hierarchy

In addition to forced transfer by the court, it is also clear that the right to possession can be the subject of a voluntary transfer down the common law hierarchy by the right-holder. In *Keller v Keller* ('*Keller*'),<sup>117</sup> for example, the Victorian State Trustee refused to decide how the body of a

<sup>114</sup> See, eg, *Privet v Vovk* [2003] NSWSC 1038 (7 November 2003). If there is contention about the executor's status, there is English case law that suggests the need to dispose of the deceased's body swiftly and with dignity takes precedence and the party otherwise in lawful possession of the body is entitled to dispose of it rather than wait for contentious probate proceedings to be resolved: see *University Hospital Lewisham NHS Trust v Hamuth* [2006] EWHC 1609 (Ch) (23 January 2006) [13]-[17].

<sup>115</sup> Mason and Laurie have termed this 'the cascade of lawful custody and possession': above n 81, 720.

<sup>116</sup> See, eg, *Lakey v Medway NHS Foundation Trust* [2009] EWHC 3574 (QB) (19 November 2009) [10]; *Re K (A Child) (Disposal of Body: Court's Power to Authorise)* [2017] EWHC 1083 (Fam) (24 March 2017) [5]-[19]. These cases involved either the householder hospital (*Lakey*) or the local council (*Re K*) actively seeking confirmation from the courts of their ability to dispose of the body of the deceased due to the inaction of parties out-ranking them on the common law hierarchy.

<sup>117</sup> (2007) 15 VR 667.

deceased woman would be disposed of, despite being named as her executor in a valid will. The deceased's two children were in bitter conflict on the issue, and the State Trustee refused to act on the instructions of either party.<sup>118</sup> To be more precise, and again drawing on the discussion in Part 4.2.3 above, the State Trustee took the position that they were not 'ready, willing, and able' to exercise the right to possession.<sup>119</sup>

The priority right-holder having explicitly disclaimed their right to possession, the Victorian Supreme Court turned to the common law hierarchy to determine in whom the right should now vest.<sup>120</sup> It will be remembered that the rung immediately below that of executor on this hierarchy is, in the absence of another individual nominated by the court, the party entitled to a grant of administration over the deceased's estate.<sup>121</sup> The two siblings in *Keller* being equally entitled to administer their mother's estate, the Supreme Court relied on a common law tie-break mechanism to ultimately vest the right in the sister.<sup>122</sup>

### 5.3. Transferring the Right to Possession Up the Hierarchy

Forced transfers up the common law hierarchy occur when a higher priority right-holder wishes to enforce their right to possession against a lower priority right-holder. Consider the example of a person passing away in hospital. Prior to other arrangements being made, that hospital is in lawful possession of the deceased's body. This lawful possession stems from the hospital's analogous position to that of the householder in which the deceased died, that householder recognised as being under a duty to dispose of the body in the absence of other, higher-ranking, parties on whom the duty can be imposed.<sup>123</sup> That is, the hospital (as householder) has a right to possession of the body of the deceased recognised at common law.

Nonetheless, if the deceased died leaving a will, their executor can claim lawful possession of their body from the hospital based on their priority right-holder status. Similarly, in the absence of an executor, a person entitled to administer the deceased's estate can claim lawful possession

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<sup>118</sup> Ibid 668 [6].

<sup>119</sup> Ibid.

<sup>120</sup> Ibid 669 [8]-[11]. Similarly, in *Laing v Laing* the Queensland Public Trustee submitted that the court, rather than themselves, should decide the method and place of disposal of the deceased's body, these issues being the subject of an intense dispute between the deceased's son and his second wife: [2014] QSC 194 (22 August 2014) [22]. On the weight of the available factual evidence, the Court vested the power to control the disposal of the body to the deceased's son: [28]-[31].

<sup>121</sup> See Part 5 of Chapter Three.

<sup>122</sup> (2007) 15 VR 667, 669-72 [11]-[22]. See Part 4.1 of Chapter Three for a discussion of common law tie-break mechanisms.

<sup>123</sup> See, eg, *R v Stewart* (1840) 12 Ad & E 773, 777-9; 113 ER 1007, 1008-9; *University Hospital Lewisham NHS Trust v Hamuth* [2006] EWHC 1609 (Ch) (23 January 2006) [13]-[17]; *Lakey v Medway NHS Foundation Trust* [2009] EWHC 3574 (QB) (19 November 2009) [10].

of the body. This does not mean that, once the personal representative has made this claim for possession, the hospital is possessing the body *unlawfully*, merely that the personal representative's right to possession is of a higher priority than the hospital's right of possession. The hospital's right therefore must give way to the right of the executor or presumptive administrator.<sup>124</sup>

If the hospital in this example willingly surrenders the body to the higher priority right-holder, this is an example of a voluntary transfer up the common law hierarchy. And indeed it is hard to imagine a hospital being unwilling to surrender the body to someone claiming not only the right to possession of the body but also the duty to lawfully and decently dispose of it (along with the responsibility for funding that disposal).<sup>125</sup> Such a transfer can only be described as 'forced' if the lower priority right-holder, for whatever reason, does not wish to surrender the body of the deceased to the higher priority right-holder and attempts to continue to assert their lower priority claim to the right to possession. Consider the example of two feuding siblings, each having a strong claim to administer the estate, however only one being named to the position of executor in the deceased parent's will. If the unnamed party takes possession of the body based on their claim as presumptive administrator, the named executor can enforce their higher priority right-holder status in court — a process described in Part 6 of this Chapter.

#### 5.4. Transferring the Right to Possession Outside the Hierarchy

Before we turn to the question of enforcement, however, we must consider the question of whether the right-holder can transfer the right to possession of the body of a deceased person *outside* of the defined common law hierarchy. It is submitted here that the answer to this question is 'no'. It was argued in Chapter Three that only those individuals situated on the common law hierarchy are legitimate holders of the right to possession, this hierarchy having been developed by the common law over centuries in an effort to respond to normative concerns that require the swift and decent disposal of the body by vesting control over that body in some one identifiable person.

It follows from this argument, then, that a right-holder can only transfer the right to possession, voluntarily or otherwise, to another individual who legitimately occupies a position on the

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<sup>124</sup> Lanham asserts that, once the executor or other right-holder forms an intention to possess the body and communicates that intention to the hospital, the executor has lawful possession of the body, with the hospital retaining only physical custody: David Lanham, 'Transplants and the Human Tissue Act 1961' (1971) 11 *Medicine, Science, and the Law* 16, 20; see also Dominique F de Stoop, 'The Law in Australia Relating to the Transplantation of Organs from Cadavers' (1974) 48 *Australian Law Journal* 21, 22.

<sup>125</sup> Indeed, the majority of cases involving hospitals asserting a right to possess and dispose of a body arise only after repeated attempts by that hospital to have the higher-ranking right-holder dispose of the body have failed: see, eg, cases set out at n 116 above.

established common law hierarchy. It is only these select individuals who have need of a possessory right to the body, having been placed under a duty to dispose of it by the common law in response to prevalent social norms relating to the body of the deceased. Through the doctrinal eyes of the common law of the dead, there is simply no other point in claiming the right to possession. As much as holding that right, and being able to control the disposal of the body of the deceased, may assist in the alleviation of emotional pain and loss on the part of the right-holder, this is simply not something the common law is concerned with.

As such, in cases in which it appears that an acknowledged right-holder has transferred the right to possession outside of the common law hierarchy, the true position is that the right-holder is merely choosing not to enforce their established right to possession against another party. This is true, for example, of professional executors such as trust companies or the Public Trustee. It is common practice for these institutions, when named as executor of a deceased person's will, to leave funeral and disposal arrangements to those closest to the deceased in all possible cases.<sup>126</sup>

Of course, as has been mentioned previously in this Thesis, in many cases the true right-holder might not be aware of their status as right-holder, or even that a right to possession of the body of a deceased person exists at all. This says nothing of the location of the relevant legal incidents as a matter of legal doctrine, however, and it is asserted here that, regardless of appearances, the right to possession remains with the right-holder identified by the common law hierarchy.<sup>127</sup>

## 6. Enforcing the Right to Possession

Despite the Australian authorities 'establish[ing] that a person entitled to possession of a dead body may enforce that right through the courts',<sup>128</sup> there is little case law from which to draw a comprehensive description of the remedial framework that surrounds the right to possession of the body of a deceased person. This is because the vast majority of post-death disputes do not involve a request for a specific remedy in response to an identified wrong. Instead, the majority of the case law under analysis involves solely a request for a court order that one or the other party is entitled to hold the right to possession. There is often no mention of who is in control of

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<sup>126</sup> See Queensland Law Reform Commission, above n 23, 76 [4.9] n 14 (discussing practice of the Queensland Public Trustee). See also *Squire v Beech* [2018] NSWLC 17 (22 November 2018) [31]-[34], [58] (suggesting, without having jurisdiction to conclude, that the executor allowing a third party to control the disposal of the deceased's body did not strip the executor of their right to possession). No consideration is given here as to the nature of the interest those parties who take possession of the body of the deceased at the sufferance of the right-holder have in relation to that body.

<sup>127</sup> This raises the interesting possibility of an estoppel claim should the right-holder represent that they did not intend to enforce their right to possession to another's detrimental reliance, but later attempted to do so.

<sup>128</sup> *Manktelow v Public Trustee* (2001) 25 WAR 126, 131 [25].

the body at issue at the time of the dispute, and the dispute is rarely styled as one in which the right-holder seeks to assert their right to possession against another. Nonetheless, in the cases that are presented as attempts by an individual to enforce their right to possession against another party, a clear remedial pattern emerges.

Throughout the body of case law under analysis in this Thesis, courts are clear: damages are not an adequate remedy for interferences with the right to possession. Instead, as the Hon Peter Young has stated, '[it] seems that in this country, if there is to be a champion of the deceased's mourners, it will be ... a court administering equitable principles.'<sup>129</sup> And indeed, when faced with interferences with the right to possession, courts will issue a mandatory injunction ensuring the body at issue is delivered into the possession of the right-holder.<sup>130</sup>

This situation can be juxtaposed with the remedies provided for interferences with one's exclusive right of burial (this being the right obtained from a cemetery or other authority to inter a body, bodies, or cremated ashes in a particular grave plot). As a contractual interest relating to land rather than an interest in a deceased body (even when a deceased body is actually interred in the plot at issue), monetary compensation is a more feasible option. And indeed it has been suggested that, should the contractual right of the holder of the exclusive right of burial vis-à-vis the relevant cemetery authority be interfered with (for example, by the burial of a body in the plot at issue without the contractual right-holder's consent), the appropriate response is for this individual to bring an action for breach of contract. As a general rule, courts will not order that the body buried without consent be exhumed.<sup>131</sup>

In contrast to the Australian position, in the United States the (quasi-property) right to possession is vested in individuals based on ties of affection and sentiment,<sup>132</sup> and can be enforced

<sup>129</sup> P W Young, 'The Exclusive Right to Burial' (1965) 39 *Australian Law Journal* 50, 56.

<sup>130</sup> *Calma v Sesar* (1992) 2 NTLR 37, 41. For a practical example, see *Roma v Ketchup* [2009] QSC 442 (10, 17 December 2009). If, on the other hand, a higher priority right-holder sleeps on their rights, a court will not enforce their right to possession as against a lower priority right-holder: *Waldron v Howick Funeral Home* (Unreported, High Court of New Zealand, Hansen J, 17 August 2010) [8]-[10]. For more on this, see discussion in Part 5.1 of this Chapter.

When the individual detaining the body is a public official, a writ of mandamus will lie: see *R v Fox* (1841) 2 QB 246; 114 ER 95.

<sup>131</sup> *Beard v Baulkham Hills Shire Council* (1986) 7 NSWLR 273, 280; *Vosnakis v Arfaras* [2015] NSWSC 625 (26 May 2015) [98]. Courts will, however, grant an injunction to restrain future breaches of the right of burial: *Matthews v Jeffrey* (1880) 6 QBD 290, 294. This case is also authority for the proposition that *Lord Cairn's Act* damages will be awarded in a claim of trespass made by the holder of an exclusive right of burial should another cause a body to be interred in the grave plot at issue without the right holder's consent.

<sup>132</sup> *Pierce v Proprietors of Swan Point Cemetery*, 10 RI 227, 242-3 (1872); *Whitehair v Highland Memory Gardens, Inc.*, 327 SE 2d 438, 441 (W Va, 1985).

at common law through a tort claim.<sup>133</sup> Thus, the American right-holder can recover damages in tort for unlawful interference with, or desecration of, the corpse both before<sup>134</sup> and after burial,<sup>135</sup> this claim fundamentally being one for emotional distress.<sup>136</sup> Importantly, the calculation of damages, which can include punitive damages, is made by reference to the amount of emotional distress suffered by the claimant, not the physical injury done to the corpse.<sup>137</sup>

To date, Australian jurisprudence has followed the English example and disavowed the existence of a tort of wrongful interference with the body.<sup>138</sup> Note in this context that, in line with our discussion of the right to possession attaching to the *body* of the deceased, and not its separated parts, in Part 3 of this Chapter, if the body is interfered with in some way that does not affect its ultimate disposal, the right to possession cannot offer a remedy. This is true even if that interference goes against society's normative concern that the body be treated decently (for example, the unauthorised removal of internal organs),<sup>139</sup> and despite being contrary to academic thought in the US and Scotland which suggests that the right to possession is a right to possess the body in the same condition as at the moment of death.<sup>140</sup>

A tort of wrongful interference with the right to possession is also elusive in the Australian post-death dispute case law.<sup>141</sup> The right to possession allows the right-holder to recover the body of

<sup>133</sup> The classic example of which is found in American Law Institute, *Restatement (Second) of Torts* (1979) § 868.

<sup>134</sup> See, eg, *Larson v Chase*, 50 NW 238 (Minn, 1891).

<sup>135</sup> See, eg, *Whitehair v Highland Memory Gardens, Inc.*, 327 SE 2d 438, 441 (W Va, 1985).

<sup>136</sup> Indeed, the *Restatement (Second) of Torts* refers to the quasi-property right as a 'mere peg upon which to hang damages for mental distress' and notes that 'in reality the cause of action has been exclusively one for the mental distress': American Law Institute, *Restatement (Second) of Tort* (1979) § 868(a). A tort of interference with a deceased body is also recognised in Scotland (see *Stevens v Yorkhill NHS Trust* 2006 SLT 889), Canada (see *Edmonds v Armstrong Funeral Home Ltd* [1931] 1 DLR 676 (Alberta Supreme Court)), and, perhaps, New Zealand (see *Mackenzie v A-G (NZ)* (Unreported, High Court of New Zealand, Bell J, 17 February 2015)).

<sup>137</sup> Hugh Y Bernard, *The Law of Death and Disposal of the Dead* (Oceana Publications, 2<sup>nd</sup> ed, 1979) 17-18.

<sup>138</sup> See *Re Organ Retention Group Litigation* [2005] QB 506, 536-44 [128]-[161]. Cf Remigius N Nwabueze, 'Interference with Dead Bodies and Body Parts: A Separate Cause of Action in Tort?' (2007) 15 *Tort Law Review* 63 (arguing persuasively that a remedial gap exists that requires the intervention of such a tort).

<sup>139</sup> See P D G Skegg, 'Liability for the Unauthorized Removal of Cadaveric Transplant Material' (1974) 14 *Medicine, Science, and the Law* 53, 56. Cf Supreme and District Courts Criminal Directions Benchbook, *Improper Interference with a Corpse: Code s 236(b)* (March 2017) Queensland Courts <[https://www.courts.qld.gov.au/\\_\\_data/assets/pdf\\_file/0004/86152/sd-bb-143-improper-interference-with-a-corpse.pdf](https://www.courts.qld.gov.au/__data/assets/pdf_file/0004/86152/sd-bb-143-improper-interference-with-a-corpse.pdf)> ('the obligation to dispose decently of the body means disposing of it intact').

<sup>140</sup> See George H Weinmann, *A Survey of the Law Concerning Dead Human Bodies*, Bulletin of the National Research Council No 73 (1929) 58; David W Meyers, *The Human Body and the Law* (Edinburgh University Press, 2<sup>nd</sup> ed, 1990) 184.

<sup>141</sup> On this, see an interesting academic back-and-forth between prominent medical lawyers Skegg and Kennedy throughout the last decades of the 20<sup>th</sup> century. This debate concerned the possibility of the right to possession grounding an action in tort should it be intentionally interfered with. See Skegg, 'Cadaveric Transplant Material', above n 139; Ian McColl Kennedy, 'Further Thoughts on Liability for Non-

the deceased by way of injunction for the purposes of disposing of that body, it does not give a right to damages for hurt feelings should the right be interfered with.<sup>142</sup> The reason for this lies in the fact that, as we have seen, the right to possession exists for the sole purpose of facilitating the disposal of the body, not to appease the feelings of the right-holder. Again, whilst there is no direct authority on the issue, this likely means that there is no relief, injunctive or otherwise, available to the right-holder should the body in fact be disposed of by another.<sup>143</sup>

This being the case, if burial is chosen as the form of disposal, it has traditionally been held that any remedy for interference with the interred body lies not with the holder of the right to possession (this right having terminated with disposal), but with the owner of the burial plot<sup>144</sup> and the law of tort via a trespass to land claim,<sup>145</sup> as well as the criminal law.<sup>146</sup> This reflects the view that once a body is interred, it becomes part of the earth in which it is entombed — the body having ‘appropriated that part of the soil for its own use’.<sup>147</sup>

This traditional view may no longer hold true, however. In an important 2015 decision, Robb J of the New South Wales Supreme Court held that, after interment of the body and the termination of the right to possession, the former right-holder gains an irrevocable licence coupled with a grant of interest in the land in which the body is buried.<sup>148</sup> This ongoing legal relationship of the

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Observance of the Provisions of the Human Tissue Act 1961’ (1976) 16 *Medicine, Science, and the Law* 49; P D G Skegg, ‘Liability for the Unauthorized Removal of Cadaveric Transplant Material: Some Further Comments’ (1977) 17 *Medicine, Science, and the Law* 123; Ian Kennedy, *Treat Me Right: Essays in Medical Law and Ethics* (Clarendon Press, 1988) 235-6; P D G Skegg, *Law, Ethics, and Medicine: Studies in Medical Law* (Clarendon Press, revised ed, 1988) 254-5; Ian Kennedy, ‘Negligence: Interference with Right to Possession of a Body: Mackey v U.S.’ (1995) 3 *Medical Law Review* 222.

<sup>142</sup> David Price, *Human Tissue in Transplantation and Research: A Modern Legal and Ethical Donation Framework* (Cambridge University Press, 2009) 248.

<sup>143</sup> See above n 19-22 and text accompanying. Although see *White v Williams* [2019] NSWSC 437 (17 April 2019) [6], in which it was implied that, if the person under whose instructions the body was disposed of was held to not have been vested with the right to possession at the time of disposal, the appropriate right-holder might apply for the body to be exhumed.

<sup>144</sup> Likely the relevant cemetery authority, although the terms of the contract between that cemetery authority and the holder of the exclusive right to bury in the particular grave plot at issue may vest a property interest in the holder of that right.

<sup>145</sup> See, eg, William Blackstone, *Commentaries on the Laws of England* (University of Chicago Press, first published 1765-9, 1992 ed) vol 2, 429 (‘[t]he parson indeed, who has the freehold of the soil, may bring an action of trespass against such as dig and disturb it’).

<sup>146</sup> *R v Lynn* (1788) 2 Term R 733; 100 ER 394 (unauthorised disinterment a criminal offence); *R v Sharpe* (1857) Dears & B 160; 169 ER 959 (same); *Foster v Dodd* (1867) LR 3 QB 67, 77 (Byles J) (same). For statutory iterations of this principle, see *Cemeteries and Crematoria Act 2003* (ACT) s 23; *Public Health Regulation 2012* (NSW) reg 69; *Cemeteries Act 1952* (NT) s 30A; *Land Act 1994* (Qld) s 83; *Burial and Cremation Act 2013* (SA) s 13(1)(a); *Burial and Cremation Act 2002* (Tas) s 38(3); *Cemeteries and Crematoria Act 2003* (Vic) s 155; *Burial Act 1857*, 20 & 21 Vict, c 81, s 25.

<sup>147</sup> *Beard v Baulkham Hills Shire Council* (1986) 7 NSWLR 273, 280. See also *Doodeward v Spence* (1908) 6 CLR 406, 412; *Robinson v Pinegrove Memorial Park Ltd* (1986) 7 BPR 15,097, 15,098-9; *Leeburn v Derndorfer* (2004) 14 VR 100, 106 [25].

<sup>148</sup> *Vosnakis v Arfaras* [2015] NSWSC 625 (26 May 2015) [65]-[104], [141]. This discussion makes clear that the irrevocable licence coupled with a grant cannot be excluded by the terms of the contract that

former right-holder with the land in which the deceased is interred exists so that the peaceful repose of the deceased is not disturbed,<sup>149</sup> and likely lasts until the natural dissolution of the body.<sup>150</sup> In contrast to the contractual right of the holder of the exclusive right of burial discussed above, and akin to the right to possession prior to interment, the irrevocable licence that the (former) holder of the right to possession gains following the interment of the body of the deceased can be enforced via an injunction, the common law failing to give a remedy.<sup>151</sup>

## 7. Conclusion: Five Salient Features of the Right to Possession

The discussions throughout this Chapter reveal the right to possession of the body of a deceased person as it currently exists in the Australian common law to have the following salient features:

1. Inherent within the right to possession itself exist certain limitations that restrict the temporal and physical extent of the right (*inherent limitations*);
2. Outside of these limitations (as well as those found in the applicable legislation governing cremation), and provided the right-holder acts in a manner that is not dishonest, capricious, or unreasonable, the right to possession exists as an absolute entitlement on the part of the right-holder, and that right-holder can rightfully exclude the wishes of all other interested persons, including the deceased themselves — subject to the possibility of judicial intervention in the exercise of the right to possession (*an absolute entitlement with external restrictions*);
3. The right to possession is only capable of being held by a prescribed list of potential right-holders, among whom there exists an accepted idea of the relative strength of each potential right-holder's claim to the right to possession (*a prescribed list of right-holders*);

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exists in relation to the burial plot at issue between the holder of the exclusive right of burial and the relevant cemetery authority.

<sup>149</sup> Ibid [97]-[98].

<sup>150</sup> Ibid [96], [143]-[145].

<sup>151</sup> *Smith v TCC* (1997) 41 NSWLR 680, 691. Cf *Vosnakis v Arfaras* [2015] NSWSC 625 (26 May 2015) [152] ('there is some doubt as to the remedies that will be available in particular situations'). Note also that *Bone v Clancy* (1881) 2 LR (NSW) 176, relied on by Young J in *Smith* to prove the non-existence of a common law remedy in the context of the post-interment irrevocable licence, did not in fact concern such a licence. Instead, it related to an infringement of the applicant's exclusive right of burial.

4. The right to possession can be transferred both up and down the rungs of the established common law hierarchy either voluntarily or by force of law, however it cannot be transferred *outside* of the established common law hierarchy (*transfer restrictions*);
5. The holder of the right to possession in relation to a particular deceased body who is dispossessed of that body can enforce their right to possession through the courts, and such enforcement will take the form of injunctive relief, damages being entirely inappropriate (*enforceable in equity*).

Having identified these five salient features of the modern right to possession of the body of the deceased, this Thesis must next determine their external consistency with the exclusion-essentialist theory of property rights proposed in Chapter Five and applied to the right to possession in Chapters Six, Seven, and Eight. Only in this way can the right to possession be legitimately identified as a property right.



# Chapter Five

## Towards an Exclusion Essentialist Definition of Property

### 1. Introduction

The purpose of this Chapter is to set out the theory of property against which the right to possession of the body of a deceased person, detailed in Chapters Two, Three, and Four, will be measured throughout the remainder of this Thesis.<sup>1</sup> To this end, Part 2 describes the bundle of rights theory of property prevalent in current academic thought. This Part concludes that the bundle metaphor provides an adequate means of measuring whether a subsidiary right splintered from a broader, established property right retains the proprietary characteristics of its source. Nonetheless, the metaphor's anti-essentialist and contingent nature means it is ill-fitted to the task of assessing whether an entirely novel right — such as the right to possession of the body of the deceased — sounds in property. Part 3 considers an alternative theoretical means of assessing this right's proprietary nature: exclusion essentialism. This Part adopts the work of James Penner in defining property as the right to exclusively determine the use to which a 'thing' will be put, this right being protected by a duty of non-interference imposed on all others besides the holder of the purported property right.

How and when this definition of property can be applied in novel situations — that is, to 'things' currently outside the bounds of the law of property — is considered in Part 4. This is crucial for the development of this Thesis' argument, as the body of the deceased is one such novel 'thing'. Parts 4.1 and 4.2 build on Penner's established methodology for determining whether it is appropriate to place a particular novel 'thing' within the practice of property. Drawing on the philosophical idea of 'things' as artefacts with proper functions, Part 4.3 then sets out a previously unexplored methodology by which the compliance of a pre-existing right in relation to a particular novel 'thing' with the structural framework expected of property rights can be assessed. Finally, Part 5 examines how property rights can be legitimately restricted, and the extent to which these restrictions can extend without entirely eliminating the property right at issue.

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<sup>1</sup> In achieving this purpose, this Chapter does not address the interesting academic commentary relating to possession as a concept and its role within the institution of property. For work in this vein, see, eg, Eric Descheemaeker (ed), *The Consequences of Possession* (Edinburgh University Press, 2014); D R Harris, 'The Concept of Possession in English Law' in A G Guest (ed), *Oxford Essays in Jurisprudence: A Collaborative Work* (Oxford University Press, 1961) 69; Carol M Rose, 'Possession as the Origin of Property' (1985) 52 *University of Chicago Law Review* 73; A E S Tay, 'The Concept of Possession in the Common Law: Foundations for a New Approach' (1964) 4 *Melbourne University Law Review* 476. It is also pertinent to note that this Chapter does not seek to offer a *justification* for the institution of private property. For an overview of the various philosophical justifications given for the institution, see Lawrence C Becker, *Property Rights: Philosophic Foundations* (Routledge & Kegan Paul, 1977).

## 2. Property as a Bundle of Rights

### 2.1. The Bundle Metaphor: An Overview

Private property has a rich and detailed history.<sup>2</sup> For much of the past century, this history has been dominated by the theoretical approach that sees property as a bundle of rights. Largely a product of the American legal realist movement of the early 20<sup>th</sup> century,<sup>3</sup> in its early decades, the metaphor was used as a rhetorical device to counter the notion of property rights as natural rights that could not be interfered with by the government without payment of compensation.<sup>4</sup> After all, if property is just a bundle of rights, no particular configuration of rights should enjoy a privileged position under the Constitution, and addition or subtraction to that bundle by the state should be an expected feature of social life.<sup>5</sup> The adoption of the bundle of *rights* metaphor in the first decades of the 20<sup>th</sup> century went hand-in-hand with a continued downplaying of the role of *things* in the law of property,<sup>6</sup> a stark change from the thing-centric notions of property of prior centuries.<sup>7</sup>

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<sup>2</sup> A helpful work in this context is Richard Schlatter's *Private Property: The History of an Idea* (Russell & Russell, first published 1951, 1973 ed).

<sup>3</sup> Although the metaphor of property as a bundle of rights pre-dates the realists. The earliest reference to property as a bundle of rights is generally considered to be John Lewis, *A Treatise on the Law of Eminent Domain in the United States* (Callaghan & Co, 1<sup>st</sup> ed, 1888) 43 ['The dullest individual among the *people* knows and understands that his *property* in anything is a bundle of rights.']. For a far more detailed discussion of the intellectual rise of 'bundle' thought in American property law scholarship than space allows here, see Jane B Baron, 'Rescuing the Bundle-of-Rights Metaphor in Property Law' (2013) 82 *University of Cincinnati Law Review* 57, 62-7.

<sup>4</sup> Thomas W Merrill, 'The Property Prism' (2011) 8 *Econ Journal Watch* 247, 247-8.

<sup>5</sup> *Ibid.* Cf Epstein, who rejects that the bundle metaphor encourages state intervention in property and suggests it could in fact work to prevent such expansions of state power: see generally Richard A Epstein 'Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property' (2011) 8 *Econ Journal Watch* 223.

<sup>6</sup> Henry E Smith, 'The Thing About Exclusion' (2014) 3 *Brigham-Kanner Property Rights Conference Journal* 95, 114.

<sup>7</sup> Such a view of property is encapsulated in Blackstone's (in)famous conception of property as 'that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe': William Blackstone, *Commentaries on the Laws of England* (University of Chicago Press, first published 1765-9, 1979 ed) vol 2, 2.

Blackstone's view of property was, in reality, far more complex than this quote suggests. Burns has convincingly argued that Blackstone saw the right to property as absolute in theory alone, and accepted that such rights could be limited by the legislature: see Robert P Burns, 'Blackstone's Theory of the "Absolute" Rights of Property' (1985) 54 *University of Cincinnati Law Review* 67. It is also likely that, in practice, Blackstone viewed property as relational and disaggregated rather than as a form of absolute individualised sovereignty: see David B Schorr, 'How Blackstone Became a Blackstonian' (2009) 10 *Theoretical Inquiries in Law* 103, 106-14. For these reasons Harris has labelled the totality conception of ownership traditionally associated with Blackstone 'an Aunt Sally erected to be knocked down': J W Harris, *Property and Justice* (Clarendon Press, 1996) 134.

In its modern form, the ‘property as bundle’ theory is generally conceived of as a theoretical fusion of the works of Wesley Newcomb Hohfeld and A M (Tony) Honoré.<sup>8</sup> To Hohfeld, the bundle theory owes the conception of rights *in rem* as rights between persons rather than between an individual and a thing, and property in particular as being a complex aggregate of individual *in rem* jural relations.<sup>9</sup> Hohfeld’s framework rejects the idea that property rights require even a minimum association with a tangible thing, and holds that the legal relations that make up ‘property’ are in no way absolute or fixed.<sup>10</sup> To Honoré, the bundle theory owes the identification of specific relational incidents that commonly fall within the bounds of ‘property’ in his oft-quoted list of eleven ‘standard incidents of ownership’.<sup>11</sup>

The bundle of rights theory sees property as a contingent arrangement of any number of distinct elements.<sup>12</sup> Bundle theorists are in this way anti-essentialist, holding that there is no necessary core of these distinct elements required for the label of property to attach to a particular relationship. They maintain that individual property relations can be mixed and matched *ad infinitum*, creating endless combinations of property rights according to the relevant economic and social circumstances.<sup>13</sup>

<sup>8</sup> This fusion is acknowledged by both sides of the bundle/essentialist debate: see, eg, Stephen R Munzer, *A Theory of Property* (Cambridge University Press, 1990) 22-3; J E Penner, ‘The “Bundle of Rights” Picture of Property’ (1996) 43 *University of California Los Angeles Law Review* 711, 712-13; J E Penner, *Property Rights: A Re-Examination* (Oxford University Press, 2020) 6-7.

<sup>9</sup> See Wesley Newcomb Hohfeld, ‘Some Fundamental Conceptions as Applied in Judicial Reasoning’ (1913) 23 *Yale Law Journal* 16; Wesley Newcomb Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1917) 26 *Yale Law Journal* 710.

<sup>10</sup> Kenneth J Vandavelde, ‘The New Property of the Nineteenth Century: The Development of the Modern Concept of Property’ (1980) 29 *Buffalo Law Review* 325, 360-1.

<sup>11</sup> See A M Honoré, ‘Ownership’ in A G Guest (ed), *Oxford Essays in Jurisprudence: A Collaborative Work* (Oxford University Press, 1961) 107, 112-28. The eleven standard incidents identified by Honoré are: the right to possess; the right to use; the right to manage; the right to the income; the right to the capital; the right to security; the incident of transmissibility; the incident of abuse of term; the prohibition of harmful use; liability to execution; and residuary character. These incidents are not ownership ‘interests’ but instead describe ownership as a working institution: Tony Honoré, ‘Property and Ownership: Marginal Comments’ in Timothy Endicott, Joshua Getzler and Edwin Peel (eds), *Properties of Law: Essays in Honour of Jim Harris* (Oxford University Press, 2006) 129, 134, and Honoré acknowledges that the list is imperfect and might plausibly be added to or subtracted from: at 135.

It should be noted that Honoré has rejected the bundle theory’s insistence that property rights pertain, as a matter of first instance, between persons and not between persons and things. His preferred view is that the relation between the right holder and the ‘thing’ is primary, and the relations between the right holder and all other persons is secondary. Any other conclusion is the result of ‘*illegitimate* inferences’ drawn from his work and that of Hohfeld: 131 (emphasis in original). Penner has pointed out, however, that Honoré is not always faithful to this primary/secondary distinction: J E Penner, *The Idea of Property in Law* (Clarendon Press, 1997) 24.

<sup>12</sup> Adam Mossoff, ‘What is Property? Putting the Pieces Back Together’ (2003) 45 *Arizona Law Review* 371, 373-4.

<sup>13</sup> Katrina M Wyman, ‘The New Essentialism in Property’ (2017) 9 *Journal of Legal Analysis* 183, 188, citing Shane Nicholas Glackin, ‘Back to Bundles: Deflating Property Rights, Again’ (2014) 20 *Legal Theory* 1, 3-6. *Contra* Baron, who acknowledges that this position leaves the bundle metaphor open to

As such, for bundle theorists, the term ‘property’ is merely a conclusory label attached to a collection of conceptually independent rights and obligations associated with a particular object or resource.<sup>14</sup> Proponents argue that the bundle theory makes the normative choices inherent in the decision to attach this conclusory label more transparent,<sup>15</sup> and that it makes it easier to understand the ‘complicated thicket’ of the liberties, powers, rights, and duties involved in the practice of property.<sup>16</sup> In doing so, the ‘property as bundle’ theory provides a richer, more nuanced understanding of the complicated practice of property than other theoretical approaches (such as exclusion essentialism).<sup>17</sup>

The bundle metaphor does not in-and-of-itself, however, present a means of determining whether a specific ‘bundle’ of legal relations is in fact a bundle of property. To this end, Honoré has proposed that prospective property ‘bundles’ be measured against the model case, with its defined list of standard incidents and normative consequences.<sup>18</sup> This ‘paradigm case’ has all eleven standard incidents of ownership present,<sup>19</sup> the normative consequences, unstated by Honoré, presumably being those legal and social rules that attach to the practice of property (trespassory protection etc.). With this paradigm case in mind, it can then be considered whether would-be property ‘bundles’, with some lesser degree of standard incidents present, should result in the same normative consequences.<sup>20</sup> Here, it is important to stress that Honoré’s methodology is used to identify whether a lesser interest — for example, an easement — can be considered a property right by comparing the incidents of ownership inherent in that easement with the standard incidents inherent in the ‘paradigm case’ of ownership of the land over which the easement is claimed.<sup>21</sup> It does not address the question of when an entirely novel ‘bundle’, unconnected from any pre-existing acknowledged property ‘bundle’, can justify the conclusory label of ‘property’ being attached to it.

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accusations of ad hocery, and argues that the *numerus clausus* principle and the idea of property as democracy provide two potential limiting devices (albeit from different theoretical perspectives) on the possible combinations of ‘sticks’ in a property ‘bundle’: above n 3, 70-2.

<sup>14</sup> Glackin, above n 13, 16-17.

<sup>15</sup> Baron, above n 3, 82-5.

<sup>16</sup> Stephen R Munzer, ‘A Bundle Theorist Holds On to His Collection of Sticks’ (2011) 8 *Econ Journal Watch* 265, 268.

<sup>17</sup> See generally *ibid.*

<sup>18</sup> Honoré, ‘Marginal Comments’, above n 11, 132.

<sup>19</sup> Honoré, ‘Ownership’, above n 11, 108-10.

<sup>20</sup> Honoré, ‘Marginal Comments’, above n 11, 132.

<sup>21</sup> Thus, Honoré discusses his comparative methodology in the context of interests falling short of ownership, when both ownership and the lesser interest co-exist with regard to the same ‘thing’: *ibid.*

## 2.2. The Bundle Metaphor: A Sustained Critique

Despite its dominance in modern property thought,<sup>22</sup> the bundle theory of property is not without its critics. Penner, for example, presents a fierce critique of what he terms the ‘substantive’ conception of the bundle of rights theory of property.<sup>23</sup> This conception entails, in essence, a full-blown belief in the bundle as containing every possible ‘stick’ that the Hohfeldian notion of *in rem* rights entails.<sup>24</sup> Penner accuses this version of the bundle theory as confusing potentiality with actuality.<sup>25</sup> By conceiving of each and every interest in (for example) a piece of land as existing within the owner’s bundle at any given time, with relevant interests being selectively plucked by the owner to be given to (for example) the holder of a non-exclusive licence over that land, the bundle theory sees the owner as having an infinite number of rights within their property bundle. The bundle must (again, for example) contain at least as many rights as the number of possible uses to which *every* possible licensee could put the land.<sup>26</sup> Given that these ‘sticks’ will conflict (the owner will, for example, hold the right to lease the land to A for 2020 and the right to lease the land to B for 2020 within her bundle concurrently), the rights they represent must only be potential and subject to creation by the owner when she exercises her powers (in this example, by actually granting the lease to either A or B).<sup>27</sup> Such a theory of property cannot serve as the basis for any practical engagement with the practice of property.<sup>28</sup>

The bundle theory presents additional practical difficulties. It remains unclear, for example, whether the label ‘property’ attaches to each individual stick, or only to the bundle as a whole.<sup>29</sup> Further, given the anti-essentialist nature of the bundle inquiry, it is open to question whether

<sup>22</sup> In an oft-quoted passage, Bruce A Ackerman has noted that the bundle of rights theory of property is so pervasive that ‘even the dimmest law student can be counted upon to parrot the ritual phrases on command’: *Private Property and the Constitution* (Yale University Press, 1977) 26.

<sup>23</sup> See Penner, ‘The “Bundle of Rights” Picture of Property’, above n 8, 739-67.

<sup>24</sup> Munzer argues that this confuses the bundle *metaphor* with a bundle *theory* and states that no bundle theorist ‘has either allowed the number of normative modalities to metastasize into the hundreds or thousands, or reduced the number to two or three’: ‘A Bundle Theorist’, above n 16, 270. Belying Munzer, such a view *is* adopted by Glackin, who refers to the possible number of sticks in the property bundle as ‘in a literal sense astronomical’: above n 13, 24.

<sup>25</sup> Penner, ‘The “Bundle of Rights” Picture of Property’, above n 8, 759. See also J E Penner, ‘Potentiality, Actuality, and “Stick”-Theory’ (2011) 8 *Econ Journal Watch* 274. Penner has recently repeated and expanded his criticism of the bundle of rights theory in this respect: see *A Re-Examination*, above n 8, 18-26.

<sup>26</sup> Penner, ‘The “Bundle of Rights” Picture of Property’, above n 8, 757-9.

<sup>27</sup> Penner, ‘“Stick”-Theory’, above n 25, 277.

<sup>28</sup> *Ibid.*

<sup>29</sup> Merrill, ‘The Property Prism’, above n 4, 248.

there is at least an essential *number* of sticks that are required, or whether any *particular* sticks must be present, before a particular bundle can warrant the label ‘property’.<sup>30</sup>

These practical difficulties are, however, representative of more fundamental problems. With its focus on various *disaggregated and individual* use-rights (such as the right to lease a piece of land to A, and the right to lease the land to B), the bundle metaphor struggles to offer an account of property as a legal concept.<sup>31</sup> The metaphor reveals the complexity of the institution of property without going further, leaving the formal nature and content of property undefined as a result.<sup>32</sup> It is so flexible as to be of little assistance in novel situations, and leaves the discussion open to policy debates about the need for property protection.<sup>33</sup> And even bundle theorists have acknowledged that the metaphor’s analytical Hohfeld-Honoréian vocabulary can specify the rights at issue within any particular dispute, but cannot justify their existence.<sup>34</sup>

Nonetheless, the bundle theory remains appealing as an organisational structure. It is an immeasurably helpful tool when used to examine a dispute and isolate its exact content, for example.<sup>35</sup> After identifying the dispute’s content, however, a bundle theory of property is unable to accurately identify whether it falls within or without the bounds of property. We have seen, for example, that in the hands of Tony Honoré the bundle metaphor provides a means of examining whether the fraction that has been splintered off from a larger property right retains the proprietary nature of the whole (the ‘paradigm case’) from which it was splintered. The absence of any consensus as to the exact number or nature of the normative modalities that must be accumulated

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<sup>30</sup> Munzer alludes to the idea that a bundle containing only a small number of rights could not be labelled ‘property’ (and indeed would not be a bundle at all), however does not seriously propose criteria of numerical or content sufficiency: see ‘A Bundle Theorist’, above n 16, 270.

<sup>31</sup> Eric R Claeys, ‘Property, Concepts, and Functions’ (2019) 60 *Boston College Law Review* 1, 9-10.

<sup>32</sup> Merrill, ‘The Property Prism’, above n 4, 249. For this reason, Penner has accused the bundle metaphor of being nothing more than a ‘slogan’ that conjures up an image but does not represent a clear thesis: ‘The “Bundle of Rights” Picture of Property’, above n 8, 714. Henry E Smith has similarly referred to the bundle of rights as ‘more of a description than a theory’: ‘Property as the Law of Things’ (2012) 125 *Harvard Law Review* 1691, 1694.

<sup>33</sup> Penner, ‘The “Bundle of Rights” Picture of Property’, above n 8, 721-2. Merrill also argues that the bundle metaphor is too malleable to offer any guidance in important questions of property law: ‘The Property Prism’, above n 4, 247. Munzer, on the other hand, applauds this flexibility as allowing the comparative study of the concept of property across different cultures: *A Theory of Property*, above n 8, 25-6.

<sup>34</sup> Eric R Claeys, ‘Property 101: Is Property a Thing or a Bundle?’ (2009) 32 *Seattle University Law Review* 617, 622, citing Munzer, *A Theory of Property*, above n 8, 18-19 and Stephen R Munzer, ‘Property as Social Relations’ in Stephen R Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001) 36, 45-6. Although Baron argues that this is not to the detriment of the bundle metaphor. Baron takes the view that the bundle metaphor forces the transparent production of information that can be used to answer difficult questions about property, but is not designed to answer those questions in-and-of itself: above n 3, 89-90.

<sup>35</sup> Baron, above n 3, 79-81 (identifying its ability to clearly specify the various rights at play in complex property disputes as a key advantage of the bundle theory); Jesse Wall, *Being and Owning: The Body, Bodily Material, and the Law* (Oxford University Press, 2015) 15.

together in order to garner the label ‘property’, combined with an anti-essentialist view that says no such consensus can or should exist, means, however, that the bundle theory is ill-placed to consider the analytical question of property rights *in the absence of a relevant paradigm case*. In situations where the proprietary nature of a particular, distinct, and unique right is under question, recourse must be had to another, more stable theory of property law. Such a stable theory can be found in exclusion essentialism.

### 3. An Exclusion Essentialist Definition of Property

#### 3.1. An Introduction to the New Essentialism

Essentialist thought — the quest to find property’s irreducible centre — has existed for centuries and has a patron saint in the form of William Blackstone.<sup>36</sup> Having fallen out of favour with the legal realists, the revitalisation of the essentialist thought of the 18<sup>th</sup> and 19<sup>th</sup> centuries in modern property law scholarship has earned the moniker ‘the new essentialism’.<sup>37</sup>

It is in their search for property’s stable core that the new essentialists locate their differences with the bundle theorists — although, as new essentialists point out, essentialism need not necessarily reject the bundle metaphor in its entirety. In contrast to the bundle theory, the new essentialism maintains that there exists a particular ‘stick’ that is a necessary and sufficient condition for a bundle to attract the label of property; it does not (necessarily) reject that there are other important attributes that might be contained within the bundle.<sup>38</sup> The stable core of property law, according to many essentialists,<sup>39</sup> is exclusion: the right of the owner to exclude all others from her ‘thing’, her right to exclusively determine how she will make use of her ‘thing’, and/or

<sup>36</sup> For Blackstone’s essentialist definition of property, see n 7 above. The religious terminology is Merrill’s (see Thomas W Merrill, ‘Property and the Right to Exclude’ (1998) 77 *Nebraska Law Review* 730, 734), however the sentiment is fully endorsed here. As Wyman points out, however, the new essentialists acknowledge too many limits on the authority of the owner to be considered the true heirs the conception of property as ‘that sole and despotic dominion’ traditionally attributed to Blackstone: above n 13, 198.

<sup>37</sup> See, eg, Wyman, above n 13.

<sup>38</sup> See, eg, Merrill, ‘The Property Prism’, above n 4, 248-9.

<sup>39</sup> Although not all. Some new essentialists see the stable core of property as *use*: see, eg, Claeys, ‘Property 101’, above n 34, 631-634; Larissa Katz, ‘Exclusion and Exclusivity in Property Law’ (2008) 58 *University of Toronto Law Journal* 275 (ownership as a position of ‘agenda-setting authority’); Christopher M Newman, ‘Using Things, Defining Property’ in James Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (Cambridge University Press, 2018) 69. Space constraints prevent any detailed analysis of these views here, although I note that in this regard I am sympathetic to the position that any right to determine the use of something must be founded on a right to exclude: see, eg, Thomas W Merrill, ‘Property and the Right to Exclude II’ (2014) 3 *Brigham-Kanner Property Rights Conference Journal* 1, 4-5; Arthur Ripstein, ‘Possession and Use’ in James Penner and Henry E Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press, 2013) 156. In any case, this debate is better seen as a ‘minor division of opinion’ within the essentialist camp rather than ‘a substantive disagreement about property’: Wyman, above n 13, 200.

the duty of all others to exclude themselves from her ‘thing’.<sup>40</sup> Thus, exclusion is the *sine qua non* of property.<sup>41</sup>

The new essentialist view of property — and particularly views that see the essential stable core of property as exclusion — is not without its detractors, however. ‘Progressive property’ theorists reject attempts by essentialists to reduce property to a stable core, and argue that, by defining property rights by reference to the owner’s right to exclusive use (or other variants on ‘exclusion’), exclusion essentialists overlook the effects property rights can have on others.<sup>42</sup> Instead, property law should establish a framework within which the plurality of values implicated by the practice of property work together to create a social life appropriate for a free and democratic society.<sup>43</sup> Fundamental to progressive property, then, is the idea that the distributive consequences of property cannot be divorced from the concept of property.<sup>44</sup>

Progressive property theorists are right to highlight the potentially unequal and otherwise damaging outcomes that can result from property’s distributive practices. Nonetheless, the position taken in this Thesis is that identifying the nature of property and property rights is an important task that must be undertaken before the (separate) issue of property distribution can be addressed.<sup>45</sup> This Thesis identifies the nature of property in an essential stable core of exclusion.

Exclusion essentialism is not one monolithic entity, however, with a ‘continuum’ of exclusionist views being taken by scholars.<sup>46</sup> Stern argues that differences between competing conceptions of exclusion essentialism are often overlooked, despite each conception giving rise to a different understanding of the nature of property and resulting in different practical implications.<sup>47</sup> This

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<sup>40</sup> The ‘and/or’ ambiguity is intentional in light of the discussion below at nn 46-47 and text accompanying.

<sup>41</sup> Merrill, ‘Right to Exclude’, above n 36, 730.

<sup>42</sup> Gregory S Alexander et al, ‘A Statement of Progressive Property’ (2009) 94 *Cornell Law Review* 743, 743.

<sup>43</sup> *Ibid* 743-4.

<sup>44</sup> Laura S Underkuffler, ‘A Theoretical Approach: The Lens of Progressive Property’ in Susan Bright and Sarah Blandy (eds), *Researching Property Law* (Palgrave, 2016) 11, 21.

<sup>45</sup> Such a view is common in the literature, and has been expressed by authors on both sides of the essentialist/bundle debate. Penner, for example, argues that concerns over the *distribution* of property are of minimal significance when forming an understanding of the *nature* of property: *The Idea of Property in Law*, above n 11, 203; J E Penner, ‘Misled by ‘Property’’ (2005) 18 *Canadian Journal of Law and Jurisprudence* 75, 77-8. See also Munzer. ‘A Bundle Theorist’, above n 16, 269; Glackin, above n 13, 2-3.

<sup>46</sup> Eric R Claeys identifies the difference conceptions of exclusion as existing on a continuum from complete, unquestionable blockade right (as per the views of Thomas Merrill), to blockade right limited to protecting a normative interest in use (as per the views of James Penner): ‘Exclusion and Exclusivity in *Gridlock*’ (2011) 53 *Arizona Law Review* 9, 23-4.

<sup>47</sup> James Y Stern, ‘The Essential Structure of Property Law’ (2017) 115 *Michigan Law Review* 1167, 1170-1. See also at 1173-7 (setting out the various approaches taken to exclusion essentialism in the literature); Shyamkrishna Balganes, ‘Demystifying the *Right* to Exclude: Of Property, Inviolability, and

Chapter avoids this misstep by adopting James Penner's 1997 book *The Idea of Property in Law*<sup>48</sup> — a work that revitalised exclusion essentialism within modern property theory — as the primary text upon which the works of other essentialist scholars are annotated.

There are several reasons for focusing on Penner's work. First, Penner provides an analytic jurisprudential justification for an exclusion essentialist conception of property rights as compared with the law and economics-based views of other prominent exclusion essentialists, notably Thomas Merrill and Henry Smith.<sup>49</sup> Put simply, law and economics scholars favour exclusion essentialism because of its ability to reduce information costs. Exclusion allows a small amount of information (this is not yours, stay away) to be conveyed to a large number of people (at its peak, everyone in the world other than the holder of the property right), and is both low-cost and low-precision.<sup>50</sup> This small amount of information is policed by 'the bright-line rules of trespass'.<sup>51</sup> To remedy this lack of precision, under the architecture of property these bright-line rules of exclusion are 'supplemented' with governance strategies,<sup>52</sup> examples of which include voluntary governance structures undertaken by the owner (through the law of contract, for example), as well as the law of nuisance and government regulations (such as zoning laws). These governance strategies are *in personam* in nature<sup>53</sup> and allow a large amount of information to be conveyed to a small number of people.<sup>54</sup>

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Automatic Injunctions' (2008) 31 *Harvard Journal of Law and Public Policy* 593, 610-16 (describing four different analytical approaches to the right to exclude); Katz, above n 39, 279-81 (describing different normative and methodological approaches to exclusion essentialism, and the elements common to all).

<sup>48</sup> Above n 11. Penner's body of work is large and covers many topics, however this text remains his central contribution to the bundle/essentialism debate. This remains true despite suggestions that Penner no longer holds all of the views espoused in his early works: see Stephen R Munzer, 'Property and Disagreement' in James Penner and Henry E Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press, 2013) 289, 289.

<sup>49</sup> Merrill and Smith have co-authored a large body of work in addition to writing individually. A very brief list of representative works includes: Thomas W Merrill and Henry E Smith, 'The Property/Contract Interface' (2001) 101 *Columbia Law Review* 773; Thomas W Merrill and Henry E Smith, 'What Happened to Property in Law and Economics?' (2001) 111 *Yale Law Journal* 357; Merrill, 'Right to Exclude', above n 36; Merrill, 'The Property Prism', above n 4; Thomas W Merrill, 'The Property Strategy' (2012) 160 *University of Pennsylvania Law Review* 2061; Merrill, 'Right to Exclude II', above n 39; Henry E Smith, 'Exclusion Versus Governance: Two Strategies for Delineating Property Rights' (2002) 31 *Journal of Legal Studies* S453; Henry E Smith, 'Property is Not Just a Bundle of Rights' (2011) 8 *Econ Journal Watch* 279; Smith, 'Property as the Law of Things', above n 32; Smith, 'The Thing About Exclusion', above n 6.

<sup>50</sup> Smith, 'Exclusion Versus Governance', above n 49, S485.

<sup>51</sup> Merrill and Smith, 'What Happened to Property in Law and Economics?', above n 49, 389.

<sup>52</sup> Merrill and Smith, 'The Property/Contract Interface', above n 49, 797.

<sup>53</sup> *Ibid.*

<sup>54</sup> See, eg, *ibid* 797-8; Merrill and Smith, 'What Happened to Property in Law and Economics?', above n 49, 394-7 (comparing trespass and nuisance); Smith, 'Property is Not Just a Bundle of Rights', above n 49, 281-4; Smith, 'Exclusion Versus Governance', above n 49.

Whilst the recent revival of interest in the essentialist nature of property rights owes much to law and economics scholars, and the academic respectability afforded to law and economics has increased greatly in recent decades,<sup>55</sup> the wealth maximisation norm upon which the movement's call for economic efficiency is based plays an uncertain role in property law.<sup>56</sup> Penner's analytical jurisprudential approach, in contrast, does not carry this functionalist baggage. More importantly for our purposes, however, Penner's work also provides a thorough account of how an exclusion essentialist definition of property rights can be applied to novel 'things' — a topic largely overlooked by other new essentialists. Given that this Thesis exists to consider the potential application of an exclusion-based theory of property rights in the context of the novel 'thing' that is the body of the deceased, consistent reference to Penner's work is apposite.

### **3.2. Property as the Right to Exclusively Determine the Use of a Thing**

For Penner, the role of property within the law (and within society) is to isolate a particular area of human practice dealing with 'things'. This is in contrast with the practice of dealing with persons, or what Penner calls 'personality-rich' relationships: relationships in which the identity of the parties is of fundamental importance.<sup>57</sup> Penner's core claim regarding the practice of property — what he calls his 'exclusion thesis' — is that the right to property is 'the right to determine the use or disposition of a separable thing ... in so far as that can be achieved or aided by others excluding themselves from it'.<sup>58</sup>

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Note, however, that instead of supplementing the exclusion strategy within the inherent architecture of property, these governance strategies (and in particular governance strategies imposed involuntarily on the right holder) can be viewed as limits on a previously unqualified property right under an analytical approach to property theory. This point is acknowledged by Merrill, who has expressly stated that governance strategies can also be seen as limitations on property rights: see Merrill, 'The Property Strategy', above n 49, 2068-9, 2069 n 24. Limitations placed on property rights are discussed in greater detail below in Part 5 of this Chapter.

<sup>55</sup> Claeys, 'Property 101', above n 34, 624.

<sup>56</sup> Critical legal scholars in particular have emphasised that a law and economics perspective of property ignores the role of coercion, power, and other social relations in property law: see, eg, Duncan Kennedy, 'Law-and-Economics from the Perspective of Critical Legal Studies' in Peter Newman (ed), *The New Palgrave Dictionary of Economics and the Law* (Macmillan, 1998) vol 2, 465; Duncan Kennedy, 'Cost-Benefit Analysis of Entitlement Problems: A Critique' (1981) 33 *Stanford Law Review* 387; Duncan Kennedy and Frank Michelman, 'Are Property and Contract Efficient?' (1980) 8 *Hofstra Law Review* 711. For a more general discussion of the critiques levelled at law and economic theory, see David Driesen and Robin Paul Molloy, 'Critiques of Law and Economics' in Francesco Parisi (ed), *The Oxford Handbook of Law and Economics* (Oxford University Press, 2017) vol 1, 300.

<sup>57</sup> Penner, 'The "Bundle of Rights" Picture of Property', above n 8, 801-3. For further discussion, see Penner, *The Idea of Property in Law*, above n 11, ch 5.

<sup>58</sup> Penner, *The Idea of Property in Law*, above n 11, 152.

Penner follows Joseph Raz in holding that a legal right emerges when a person claims an interest that is of sufficient weight to ground duties in other persons.<sup>59</sup> The right to property — and indeed the individuation of ‘property’ as a separate taxonomical category within our legal system — is founded upon our interest in the exclusive use of ‘things’, and emerges as a result of the duty this interest imposes on all other persons not to interfere with that ‘thing’.<sup>60</sup> Thus, property does not give the right to exclude for exclusion’s sake, instead only allowing the property right holder to engage in exclusion when it furthers their interest in exclusively using the ‘thing’ over which the property right is claimed.<sup>61</sup> Penner’s individuation of property law on the basis of this interest in *use* means that arrangements not invoking this interest fall outside the bounds of property. The most important example of this is the alienation of a ‘thing’ for value — this invoking the interest in forming co-operative relationships by making bargain agreements: that is, the interest that grounds the law of contract.<sup>62</sup> The concept of property includes alienability (a legal system that did not allow gifting, for example, would be ‘odd and atrocious’),<sup>63</sup> and is certainly advanced by our ability to make binding contracts of which alienation for value is the subject, but property does not depend on the existence of a *right* to make such binding contracts.<sup>64</sup>

In order for their interest in exclusively using their ‘thing’ to be invoked, the holder of a property right must have available to them a sufficiently open-ended set of uses to choose from. If the holder of the purported property right can only select between a limited number of prescribed uses to which their ‘thing’ can be put, they do not have a property right — because there is no true *determination* of use.<sup>65</sup> Despite protecting this interest in use, however, a right of property (that is, a right to exclusively determine the use to which a ‘thing’ is put) finds its ‘practical essence’ in exclusion.<sup>66</sup> Thus, whilst exclusion and use are two sides of the same coin, it is an

<sup>59</sup> Ibid 13, citing J Raz, ‘On the Nature of Rights’ (1984) 93 *Mind* 194, 195, 199, 211. This reflects Penner’s broader position as a subscriber to the interest theory of rights: see J E Penner, ‘The Analysis of Rights’ (1997) 10 *Ratio Juris* 300.

<sup>60</sup> Penner, *The Idea of Property in Law*, above n 11, 13, 26-31, 71, ch 3. This interest is of sufficient weight to ground legal duties in part because of the freedom it provides to shape our lives: at 49.

<sup>61</sup> Ibid 70-1. Cf Ripstein, who rejects that exclusion is merely a means to an end (this end being use). Instead, he takes the view that the use-related ‘ends’ of property law cannot be characterised except in terms of exclusion: above n 39, 161-78. Thus, ‘your interest in using the thing is protected not only *to the extent* to which you have exclusive right to it, but also *because* you have exclusive right to it’: at 180 (emphasis in original).

<sup>62</sup> Penner, *The Idea of Property in Law*, above n 11, 51, 91-2.

<sup>63</sup> Ibid 88; cf Merrill, ‘The Property Strategy’, above n 49, 2079-80 (ability to alienate makes the property strategy more robust, but is not necessary to its existence); Harris, above n 7, 5 (transmissibility only necessary in the case of money).

<sup>64</sup> Any more than contract depends on the existence of the right to exclusively use things: Penner, *The Idea of Property in Law*, above n 11, 91.

<sup>65</sup> See Harris, above n 7, 31 (discussing ‘authorized self-seekingness’). As to what constitutes a valid use, see Part 3 of Chapter Seven.

<sup>66</sup> Penner, ‘The “Bundle of Rights” Picture of Property’, above n 8, 743; Penner, *The Idea of Property in Law*, above n 11, 71. Thus, the right to exclude is a means to an end, the end being our interest in using

analysis of exclusion and not use that reveals the true contours of the right to property.<sup>67</sup> In this way, property law does not protect the positive right to use an object or resource, but rather acts to preserve a ‘negative liberty’ to engage in an open-ended set of uses and activities on the part of the property right holder.<sup>68</sup>

Our interest in the exclusive use of our ‘thing’ — although not necessarily any particular use<sup>69</sup> — is protected by an *in rem* duty shared by all besides the holder of the property right *to exclude themselves from that thing*. To the extent, then, that there exists an *in rem* duty of non-interference in relation to a particular ‘thing’, there also exists a right to exclusively determine the use of that ‘thing’. That is, a property right exists in relation to, and not beyond, that portion of the uses available to the holder of that right that is protected by the *in rem* duty of non-interference imposed on all others.

The duty of non-interference that protects the right holder’s interest in exclusively determining the use of her ‘thing’ is conceptually related to the idea of property as not protecting personal rights or rights in personality-rich relationships.<sup>70</sup> In short, for the purposes of property, the duty of non-interference in relation to a ‘thing’ cannot be imposed on the duty-ower by virtue of a personal relationship with the property right holder.<sup>71</sup> Instead, the duty is mediated via the ‘thing’ that is the object of the right holder’s right. In this way, the ‘thing’ stands between the holder of the property right and all persons who owe an *in rem* duty to exclude themselves from the thing; it is itself the object of the duty *in rem* that forbids interference<sup>72</sup> and in turn broadcasts this duty to the world.<sup>73</sup> There is no personal element to the relationship between the property right holder and duty-ower, because the ‘thing’ that stands between them in essence removes the need for any personal engagement between the parties. Thus, the duty-ower is not required to know to whom the duty is owed, only that it is owed to someone in respect of a particular ‘thing’.<sup>74</sup>

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things: Smith, ‘Property is Not Just a Bundle of Rights’, above n 49, 281; Smith, ‘Property as the Law of Things’, above n 32, 1704.

<sup>67</sup> Penner, *The Idea of Property in Law*, above n 11, 70-4.

<sup>68</sup> *Ibid* 50.

<sup>69</sup> James Penner, ‘Ownership, Co-Ownership, and the Justification of Property Rights’ in Timothy Endicott, Joshua Getzler and Edwin Peel (eds), *Properties of Law: Essays in Honour of Jim Harris* (Oxford University Press, 2006) 166, 168.

<sup>70</sup> Penner, ‘The “Bundle of Rights” Picture of Property’, above n 8, 807-8.

<sup>71</sup> As would be the case, for example, of the duty arising from a contract entered into by two parties that forbade one from interfering with the other’s ‘thing’.

<sup>72</sup> Penner, *The Idea of Property in Law*, above n 11, 128.

<sup>73</sup> Merrill and Smith, ‘What Happened to Property in Law and Economics?’, above n 49, 359.

<sup>74</sup> Penner, ‘The “Bundle of Rights” Picture of Property’, above n 8, 808; Merrill and Smith, ‘What Happened to Property in Law and Economics?’, above n 49, 359 (‘[b]ecause core property rights attach to persons only through the intermediary of some thing, they have an impersonality and generality that is absent from rights and privileges that attach to persons directly’).

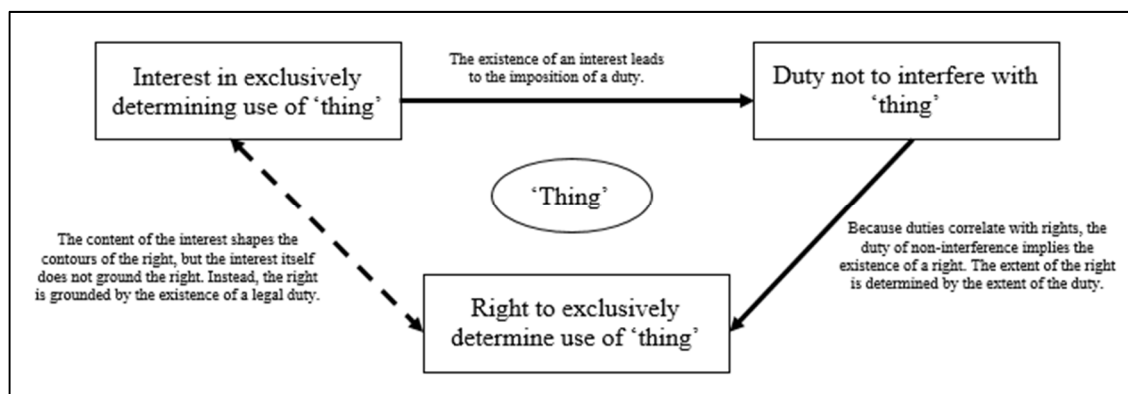


Figure 5-2: The framework of a property right

This discussion reinforces that the right to property as defined in this Chapter does not provide that right holder with a legal *right to exclude others* from the use of a particular ‘thing’. Any ‘right to exclude’ others the property owner can avail themselves of is an auxiliary right to the right to property. And an individual can have a right to property (that is, the right to exclusively determine the use of a thing) with no literal ‘right to exclude’ — thus, landowners must call the police in order to have trespassers removed; they have no *right* (beyond the use of reasonable force) to physically remove them from the property themselves.<sup>75</sup> Nonetheless, the right to property — being the right to exclusively determine how one’s ‘thing’ will be used — is at the core of our engagement with the practice of property. We must, then, turn to consider how and when this definition of property can be applied to entirely novel ‘things’ and the rights that attach to them.

#### 4. Applying this Definition in Novel Situations

The application of property principles in novel situations is a question of great importance in property theory. Despite this, property theorists rarely present a framework by which their respective theory of property can be applied in relation to a new ‘thing’.<sup>76</sup> This Part sets out the process by which a novel ‘thing’ can be encompassed within the practice of property, and the proprietary status of a pre-existing right in relation to that ‘thing’ confirmed, that Chapters Six,

<sup>75</sup> Penner, *The Idea of Property in Law*, above n 11, 71-2. Douglas and McFarlane explain this position from a Hohfeldian perspective, noting that, as exclusion relates to a positive act on the part of the owner, it cannot be protected by a claim-right in the strict sense (claim-rights being confined to demanding action or inaction on the part of others). Thus, any claim-right to exclude can only be examined from the perspective of duties owed to the owner by all others not to interfere with the owner’s property: Simon Douglas and Ben McFarlane, ‘Defining Property Rights’ in James Penner and Henry E Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press, 2013) 219, 224.

<sup>76</sup> As Gray notes, ‘the factors weighing on [the decision to leave a resource outside the property regime]—even the fact that there is a decision to be made—remain largely unrecognised and unanalysed in legal discussions of property’: Kevin Gray, ‘Property in Thin Air’ (1991) 50 *Cambridge Law Journal* 252, 256-7.

Seven, and Eight will follow when considering the body of the deceased and the right to possession that attaches to it.

#### **4.1. Identifying the Novel ‘Thing’**

The question of whether it is appropriate to extend the practice of property to encompass a particular novel ‘thing’ cannot be answered without first precisely identifying the ‘thing’ at issue. An appropriate identification of the novel ‘thing’ under examination is crucial to our property analysis for a number of reasons. Perhaps most obviously, in the same way that a scientist must know the boundaries of the particular phenomenon they are investigating, the property scholar must know exactly the subject matter of the property inquiry they are undertaking. Under the methodology adopted in this Thesis, and as described in Part 4.3 and Part 5 of this Chapter respectively, however, the appropriate identification of the novel ‘thing’ at issue also plays a vital role in assessing the proprietary status of a pre-existing right in relation to that ‘thing’, and in determining whether a sufficient degree of authority is retained by the property right holder so that they maintain their property right in the face of various restrictions.

In many cases, the appropriate identification of the ‘thing’ at issue will be a relatively simple task. An empty coffee mug is readily identifiable as a coffee mug, the outer boundaries of its physical and conceptual existence are clear. Were we to use the example of the plasma being removed from my blood stream as I sit in a chair at the Red Cross Donor Centre, however, we would have to ask if the ‘thing’ that is the bag of plasma extends to the tube that is attached to the needle that is inserted into the crook of my elbow (and if so, does it include me?). Or is the ‘thing’ that is the bag of plasma confined to the physical limits of the bag itself (does it even extend to the plasma contained within it?), that will soon be disconnected from the tube (and from my person) and absorbed into the wide world of blood product transfusion? When we talk of appropriately identifying the novel ‘thing’ at issue, then, all that is meant is that we must have, and be able to justify to others, a clear idea of the subject matter of our property inquiry before we in fact conduct that inquiry.

#### **4.2. Extending the Practice of Property to the Novel ‘Thing’**

##### **4.2.1. Penner’s ‘Separability Thesis’**

Having appropriately and accurately identified the novel ‘thing’ at issue, we must next determine whether it is a suitable candidate to be encompassed within the practice of property. It first must be noted that, in order to warrant the application of property principles, the ‘thing’ must be sufficiently scarce. If there is an abundance of suitable substitutes, excluding others from *your*

‘thing’ is unlikely to warrant the protection of property law. If I pick up a piece of mulch at the local playground, for example, property law will have little to say should another snatch it from me. I am free to pick up one of the multitude of other pieces of mulch that surround me. Simply put, human demand must outstrip supply for the law of property to be invoked. In the same way, if there is no demand for a ‘thing’, no matter how scarce that ‘thing’ is (consider a rare, but still very annoying, mosquito), it will not fall within the purview of property law.<sup>77</sup>

Assuming it is sufficiently scarce, Penner’s threshold for incorporating a particular novel ‘thing’ into the practice of property is what he has called his ‘separability thesis’:

Only those ‘things’ in the world which are contingently associated with any particular owner may be the objects of property; as a function of the nature of this contingency, in theory nothing of normative consequence beyond the fact that the ownership has changed occurs when an object of property is alienated to another.<sup>78</sup>

If we parse this statement, we see it embodies two distinct but related propositions: separability, and normative symmetry. Whilst Penner acknowledges separability and symmetry as discrete propositions,<sup>79</sup> this distinction is not reflected in his analysis. This Part sets out Penner’s largely undifferentiated approach to these two criteria. Part 4.2.2 argues that a clearly bifurcated, two-step framework is the stronger position.

We begin with Penner’s discussion of separability. Any potential object of property must be separable from us. This basic rule explains why ‘things’ such as my eyesight, sense of humour, and voice cannot be the object of property rights. These ‘things’ cannot be separated from me in any meaningful sense,<sup>80</sup> maintaining an irrevocable link with me as a person even as they are

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<sup>77</sup> These points underscore Merrill’s important early article on exclusion: see ‘Right to Exclude’, above n 36, especially at 730 (‘property’ is the right to exclude others from a resource ‘that is scarce relative to human demand for it’). See also Merrill, ‘The Property Strategy’, above n 49, 2063-4; Merrill, ‘Right to Exclude II’, above n 39, 4; Harris, above n 7, 23-4; Penner, *The Idea of Property in Law*, above n 11, 69; Thomas W Merrill and Henry E Smith, ‘The Architecture of Property’ in Hanoch Dagan and Benjamin Zipursky (eds), *Research Handbook on Private Law Theories* (forthcoming) 6, available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3462643](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3462643)>.

<sup>78</sup> Penner, *The Idea of Property in Law*, above n 11, 111. Penner’s separability thesis reflects the importance of the ‘thing’, as opposed to merely exclusion, in property law: Smith, ‘The Thing About Exclusion’, above n 6, 117-8.

<sup>79</sup> See Penner, *The Idea of Property in Law*, above n 11, 111-12.

<sup>80</sup> Ibid; Penner, ‘The “Bundle of Rights” Picture of Property’, above n 8, 803. See also Merrill, ‘The Property Strategy’, above n 49, 2064 (discussing the requirement that a resource must be sufficiently ‘discrete’ and ‘thing-like’ — that is, not too abstract or closely connected to persons — before it can be the object of property rights).

projected into the world. Separability, then, ‘supplies a rough-and-ready test’ that ‘keeps the field of property away from ... persons and focused on non-personal resources’.<sup>81</sup>

The requirement of a separation between ‘thing’ and property right holder is linked to the disjunction between the practice of property and ‘personality-rich’ relations. In the separability context, a personality-rich relationship between person and ‘thing’ occurs when the ‘thing’ is not able to be separated from the person who holds it; the ‘thing’ and the person are indivisible. An example is the relationship between a doctor and her licence to practise medicine within a particular jurisdiction. This relationship is dependent on the history and skill-set of the individual, and the licence cannot be separated from that doctor’s history and skill-set.<sup>82</sup> In contrast, the relationship between a taxi driver and her taxi licence is not so personal, and the licence can be alienated at will without reference to the original holder of the licence *as a person*.<sup>83</sup>

Another example can be found in the distinction between a chose in action and a bare personal right of action. A chose in action is an incorporeal property right that can only be obtained through legal action, rather than taking possession — it is a right in respect of someone else’s property that the law is content to treat as a propertied ‘thing’ in-and-of-itself.<sup>84</sup> In order to benefit from the *in rem* duty of non-interference that characterises property rights, a chose in action must not be closely connected with the personality of the individual who holds it. It must, in essence, be so personality-poor that it can be reduced to a mere monetary value.<sup>85</sup> The classic example of a chose in action is thus a debt, being a right to be paid a certain sum of money that the law treats as a ‘thing’ of its own account for the purposes of property. If, however, the purported chose in action is inherently connected to the personality of the individual who holds it (such as the right to sue

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<sup>81</sup> Claeys, ‘Property, Concepts, and Functions’, above n 31, 49. It is for this reason that separability, and not transferability, is the conceptually defining feature of property. Separability, after all, defines the ‘things’ that can be transferred from one owner to another: Penner, *The Idea of Property in Law*, above n 11, 113.

Note that Wall argues that it is not the ‘thing’ that must be separable from the purported property right holder, but rather the right itself, because ‘property is not things but rights’: above n 35, 127 (internal citations omitted). With respect, this is not the case. Penner, who similarly subscribes to the view that property is a right, not a thing (albeit a right *to* a thing: Penner, *The Idea of Property in Law*, above n 11, 2), is clear that the relevant separability is that of the object of the purported property right.

<sup>82</sup> Penner, ‘The “Bundle of Rights” Picture of Property’, above n 8, 803-4.

<sup>83</sup> *Ibid*; Penner, *The Idea of Property in Law*, above n 11, 114. Although, as Wyman points out, a person’s individual characteristics (such as age, traffic history, and quality of character) can determine whether they are able to hold a taxi licence: above n 13, 231.

<sup>84</sup> Penner, *The Idea of Property in Law*, above n 11, 129-30. *Contra* Douglas and McFarlane, who take the uncommon view of confining property rights to physical things: see above n 75.

<sup>85</sup> Penner, *The Idea of Property in Law*, above n 11, 130.

in negligence or defamation), it is not a chose in action at all, but instead a bare (and non-property) personal right of action against another, specific individual.<sup>86</sup>

It is important to note that, for Penner, the question is not one of legal or physical ability to separate the ‘thing’ from ourselves — after all, we can transfer the value of a ‘thing’ that is indivisible from us as persons (think of our labour under an employment contract),<sup>87</sup> or a ‘thing’ that is incapable of definition or delineation (for example, an abstract idea).<sup>88</sup> Rather, the separability criterion relates to the ‘things’ we as members of a society see as being separate from ourselves and our personality-rich relationships so that the basic role of property as governing our dealings with *things* (and not persons) is fulfilled. For Penner, the separation of the ‘thing’ from the property right holder (and indeed all other persons) must be conceptually satisfying, not merely physically possible.<sup>89</sup> Similarly, Merrill and Smith both hold the view that the object of a purported property right must enjoy a distinct, discrete existence.<sup>90</sup> For these authors, whether something is distinct from something else depends not only on physical facts; it is also a function of context, which includes both social and (importantly) economic practice, norms, and customs.<sup>91</sup>

Importantly, the lack of personality that renders a *particular* ‘thing’ conceptually separable from the individual who controls it must apply equally to every *other* ‘thing’ of that kind. Thus, when engaging in the separability inquiry, it is not the subjective attachment of a *particular* person to a *particular* ‘thing’ that prevents that ‘thing’ from being the object of property rights; the same must be true, in general, of every instance of that ‘thing’ as an objective matter.<sup>92</sup>

The second element of Penner’s separability thesis proposes that the contingent nature of property requires that there is nothing special about *my* relationship with a ‘thing’. That is, my relationship with a ‘thing’ might just as well be anyone else’s relationship with that ‘thing’; my relationship and that of any other person are normatively symmetrical.<sup>93</sup> In order for a ‘thing’ to be an object

<sup>86</sup> See discussion in *Monk v Australia and New Zealand Banking Group Ltd* (1994) 34 NSWLR 148; Penner, *The Idea of Property in Law*, above n 11, 115-18.

<sup>87</sup> Penner, ‘The “Bundle of Rights” Picture of Property’, above n 8, 806.

<sup>88</sup> Merrill and Smith, ‘The Architecture of Property’, above n 77, 6.

<sup>89</sup> Penner, ‘The “Bundle of Rights” Picture of Property’, above n 8, 805, 806-7.

<sup>90</sup> Wyman, above n 13, 195-6 (referring to views set out in American Law Institute, *Restatement (Fourth) of Property* (Preliminary Draft No 3, 15 September 2017), of which both Smith and Merrill are reporters).

<sup>91</sup> *Ibid* 196, citing American Law Institute, *Restatement (Fourth) of Property* (Preliminary Draft No 3, 15 September 2017) 4. Munzer rejects the emphasis placed by both Smith and Merrill on the role of economic value in identifying discrete resources. He argues that they do not consider how discrete resources that are valued for other, non-economic reasons fit within a property system: ‘A Bundle Theorist’, above n 16, 268-9.

<sup>92</sup> Penner, ‘The “Bundle of Rights” Picture of Property’, above n 8, 807; Penner, *The Idea of Property in Law*, above n 11, 126.

<sup>93</sup> Penner, *The Idea of Property in Law*, above n 11, 112; Penner, ‘The “Bundle of Rights” Picture of Property’, above n 8, 802.

of property, then, there can be nothing personal in the legally recognised relationship between that ‘thing’ and the holder of the purported property right.<sup>94</sup> This entirely impersonal right will, then, remain the same through any number of transfers to other persons.

The fundamental question in relation to normative symmetry is thus: ‘does a different person who takes on the relationship to the thing stand in essentially the same position as the first person?’<sup>95</sup> This is determined by asking whether the right in question is essential to the identity of the right holder as the subject of a moral or legal system.<sup>96</sup> If the right in question can be disposed of, or taken away from, the right holder without altering the right holder’s full legal and moral status (that is, with no normative consequence beyond the re-allocation of rights and duties associated with the transfer), there is normative symmetry to the allocative transaction<sup>97</sup> — the first right holder will lose no more than what the new right holder will gain.<sup>98</sup>

Whether the new right holder will stand in the same position as the original right holder (that is, whether the right is normatively symmetrical or not), can change given the surrounding personal, cultural, and technological circumstances.<sup>99</sup> Technological advancements may now allow one person (the donee) to stand in much the same position as another person (the donor) in the case of a separated kidney, for example;<sup>100</sup> or perhaps more controversially, a woman’s separated eggs. But whether societal custom and practice will allow this kidney exchange (or the implantation of one woman’s genetic material into another’s uterus) to be considered sufficiently normatively symmetrical so as to invoke property protection is unclear. If public opinion is split on the question of normative symmetry (as current debates regarding surrogacy and the ‘ownership’ of embryos suggest is the case in that context), the legal decision-maker will be forced to decide which set of considerations to favour and which to discard.<sup>101</sup>

### 4.2.2. A Preferred Approach

As the above discussion makes clear, Penner’s methodology for drawing novel ‘things’ into the bounds of property is somewhat repetitious. His requirement that ‘things’ be capable of *conceptual*, as opposed to merely *physical*, separation from the potential property right holder

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<sup>94</sup> Penner, *The Idea of Property in Law*, above n 11, 112. See also Wall, above n 35, 125.

<sup>95</sup> Penner, *The Idea of Property in Law*, above n 11, 114.

<sup>96</sup> Penner, ‘Misled by ‘Property’’, above n 45, 76.

<sup>97</sup> Ibid. Penner suggests a ‘bankruptcy test’, whereby those things that society accepts as falling into one’s estate upon bankruptcy for redistribution to others are the subject of property rights: at 76-7.

<sup>98</sup> Wall, above n 35, 126-7.

<sup>99</sup> Penner, *The Idea of Property in Law*, above n 11, 126.

<sup>100</sup> Wall, above n 35, 133.

<sup>101</sup> Wyman, above n 13, 208-9.

requires recourse to the same (or very similar) social norms and customs relevant to an analysis of the potential normative symmetry between right holders — being the surrounding personal, social, and economic circumstances.

This analysis is duplicative, and can be streamlined. It is here proposed that the most appropriate framework for determining whether the practice of property can be extended to incorporate a novel ‘thing’ is a bifurcated, two-step process. A determination of whether something is capable of being *physically* separated from the purported property right holder must first take place. This is a purely factual inquiry. Normative concerns relating to social practice and the like are dealt with under the second step: a consideration of whether multiple parties can stand in normative symmetry in relation to a particular ‘thing’.

The normative inquiry required by the second stage of this bifurcated analysis will, of course, result in hard cases, and these hard cases will, in turn, only be capable of resolution by the decision-maker in the exercise of their discretion.<sup>102</sup> But this normative inquiry accounts for the fact that property is a social, as well as a legal, construct, and this inevitably plays a role in determining what objects are governed by its principles, and when they are so governed, and for how long.<sup>103</sup> The practice of property is socially contingent<sup>104</sup> and the hard cases that emerge as a result of this second stage normative analysis merely reflect that the social norms surrounding the position of (for example) a separated kidney or reproductive material within the practice of property are not yet settled. This recourse to normative practice is not a limitation on Penner’s framework by which a novel ‘thing’ is incorporated into the practice of property. Instead, it is an inescapable feature of human society. What is a limitation on Penner’s framework *as set out by Penner* is its repetitive reliance on this normative practice. When treated as part of a bifurcated, two-stage inquiry as advocated for here, this recourse to social practice is clarified and targeted.

### **4.3. Assessing the Proprietary Status of the Pre-Existing Right**

Having determined that it is appropriate to extend the practice of property to encompass a particular identifiable and novel ‘thing’, the approach taken by many (if not all) property theorists is to assume that such a ‘thing’ must be the object of rights of confirmed proprietary status. Given the focus of this Thesis is a right of uncertain juridical nature, however, this Part cannot so assume. Instead, it sets out a methodology for assessing the proprietary nature of an already existing, as

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<sup>102</sup> Ibid 208.

<sup>103</sup> Gray, above n 76, 295-6.

<sup>104</sup> Merrill, ‘The Property Strategy’, above n 49, 2064-5 (listing various ‘contingent social circumstances’ that can influence whether a resource is considered the object of property rights or not).

of yet not recognised as proprietary, right that exists in relation to a particular novel ‘thing’. This methodology involves an assessment of this pre-existing right’s compliance with the structural framework expected of property rights, and proceeds as follows.

First, it must be determined whether the novel ‘thing’ that is the object of the right under examination grounds an *in rem* duty of non-interference. As we have seen, this duty must be personality-poor and be imposed on all except the holder of the purported property right under examination. The scope of this generalised duty will in turn, as the second step in the methodology, establish the scope of the negative liberty enjoyed by the holder of the purported property right. Finally, it must be shown that, within this sphere of negative liberty, the right holder has available to them a sufficiently open-ended set of uses to which the novel ‘thing’ can be put, so that the interest in exclusively determining use is invoked.

This methodology is to be preferred over one that takes as its first step an assessment of the scope of the uses available to the holder of the purported property right, before asking which, if any, of those uses are protected by an *in rem* duty of non-interference. As Penner points out, it is the generalised duty of non-interference, rather than the particular uses that duty protects, that will often form the starting point of a court’s analysis when faced with a ‘thing’ newly encompassed within the practice of property.<sup>105</sup> This is because the right to property — the right to exclusively determine the use of an object — does not *enable* the property right-holder to use that object. Rather, it disables, via an *in rem* duty of non-interference, the ability of all other parties to interfere with the property right-holder’s freedom to decide how to use that object.<sup>106</sup>

In proceeding with the methodology just now set out, this Thesis makes an important claim: when assessing the proprietary status of a pre-existing right under the methodology set out here, and in line with the proposed property right at issue relating to a distinct and definable ‘thing’, the open-ended set of uses available to the purported property right holder *must include* one particular use. This use is the socially determined purpose — or proper function — of the ‘thing’ at issue.

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<sup>105</sup> Penner, *The Idea of Property in Law*, above n 11, 73-4.

<sup>106</sup> J E Penner, ‘Hohfeldian Use-Rights in Property’ in J W Harris (ed), *Property Problems: From Genes to Pension Funds* (Kluwar Law, 1997) 164, 171-2; Penner, ‘Co-Ownership’, above n 69, 167-8.

This claim draws on the philosophical concept of artefacts.<sup>107</sup> Traditionally defined, artefacts are ‘things’ that have been intentionally produced by persons to perform a purpose.<sup>108</sup> In recent years, however, the ontological divide between human-made and naturally occurring objects has been significantly reduced,<sup>109</sup> and, for reasons that are obvious given its subject matter (being the body of the deceased and the right to possession of that body), this Thesis uses the term ‘artefact’ to encompass ‘things’ both manufactured and natural. Crucially, it also adopts the idea of ‘things’ as having ‘intended’ or ‘proper’ purposes (or ‘functions’) that are determined by social practice and agreement.<sup>110</sup> Such a function is ‘(a) a typical activity (b) that brings about a valuable (c) goal (d) that the [‘thing’] is expected to perform *because* it realizes the goal.’<sup>111</sup> When determining whether the holder of a particular right in relation to a particular ‘thing’ has a sufficiently open-ended set of uses available to them in relation to that ‘thing’, then, consideration must be given to this normatively determined purpose (or proper function).

To use a common example, a clock has the normatively determined purpose, the proper function, of telling time. In order for a property right to exist in relation to that clock, the *in rem* duty of non-interference *must* protect a negative sphere of liberty on the part of the property right holder, and one of the uses that exists within this sphere *must* be the use of the clock to tell time. In the same way, the function of a chair is to be sat on, and so out of the many uses to which the purported property right holder can put their chair, the *in rem* duty that requires others to avoid interfering with the chair *must* protect the right holder’s ability to use their chair as a means of support whilst sitting if their right in relation to that chair can be said to be proprietary.

In taking this position, this Thesis is not diverting from its central claim that property rights protect our interest in exclusively determining the use to which a ‘thing’ is put. Acknowledging that a ‘thing’ has a proper purpose, and that this purpose must be present in the structural framework of a right attached to that ‘thing’ if that right is to be considered proprietary in nature, does not require the property right holder *to actively use their ‘thing’ in order to achieve that purpose*. I can choose to use my ‘thing’ to achieve its proper function, or any other function, or no function

<sup>107</sup> I am not alone in doing so: see Claeys, ‘Property, Concepts, and Functions’, above n 31; Eric R Claeys, ‘Use and the Function of Property’ (2018) 63 *American Journal of Jurisprudence* 221. Claeys’ focus is on *property rights and property concepts* as artefacts with specific functions, whereas our focus is on *the objects of property rights* as artefacts with specific functions.

<sup>108</sup> See Beth Preston, *Artifact* (21 June 2019) Stanford Encyclopedia of Philosophy <<https://plato.stanford.edu/entries/artifact/>>; Claeys, ‘Property, Concepts, and Functions’, above n 31, 5.

<sup>109</sup> See, eg, Lynne Rudder Baker, ‘The Shrinking Difference Between Artifacts and Natural Objects’ (2008) 7(2) *American Philosophy Association Newsletter on Philosophy and Computers* 2.

<sup>110</sup> John R Searle, *The Construction of Social Reality* (Free Press, 1995) 13-23 (functions are ‘observer-relative’).

<sup>111</sup> Claeys, ‘Property, Concepts, and Functions’, above n 31, 20 (emphasis in original). See also Searle, above n 110, 19.

at all. In taking this position, this Thesis is, however, acknowledging the broader role that property plays within society as a means of managing resources.

We have already seen that ‘things’ must be sufficiently scarce in order to invoke the practice of property — there must be a disparity between supply and demand. The idea of a proper function goes to the idea of demand. Why is this ‘thing’ desired, so that the practice of property must manage that ‘thing’ by allowing one person to exclusively determine its use? What has society at large determined to be the proper purpose of a ‘thing’, so that demand for that ‘thing’ now outweighs supply? Whilst a ‘thing’s’ proper function might change over time, and despite the fact that a ‘thing’ can be put to many other uses outside of its proper function, control of this proper function is an integral element of the practice of property.

Further, in a world in which the absolute vast majority of ‘things’ have already been brought within the practice of property (and in many cases have been there for a very long time), for those novel ‘things’ that remain *outside* the practice of property, this approach provides an effective means of precisely identifying *why* we might seek to bring that novel ‘thing’ within property’s boundaries. What is it about this ‘thing’ that leads us to ask whether it should be protected by a property right, access to that ‘thing’ managed by the normative practice of property? Why do we seek to assess whether others must exclude themselves from this ‘thing’? What is our motivation for doing so? And does it accord with what society expects of that ‘thing’?

Nonetheless, the claim that each ‘thing’ that exists in the world exists to perform a distinct, socially determined function is not without its practical difficulties.<sup>112</sup> It is not here suggested that the identification of a ‘thing’s’ socially determined purpose will always be a simple or easy task, or even that it can be carried out successfully in each and every situation. The search for the socially determined purpose of any given novel ‘thing’ will necessarily be a contextual inquiry to be determined by reference to the established norms of the relevant society — and these norms might not always point clearly to one obvious function. Both clocks and chairs, for example, can be considered antiques, or make up part of an art exhibition, and so on — in which case their normatively determined purposes would perhaps not be to tell time or to provide structural support, but instead to provide ornamentation or historical value.

This ‘fuzziness’ is to be expected in the case of certain artefacts, however, and does not invalidate the analytical, function-based approach to property rights and sufficient use adopted here.<sup>113</sup> In

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<sup>112</sup> See, eg, Amie L Thomasson, ‘Realism and Human Kinds’ (2003) 67 *Philosophy and Phenomenological Research* 580, 594.

<sup>113</sup> Claes, ‘Use and the Function of Property’, above n 107, 234-5.

any case, to be clear, this Thesis does not make the claim that the person asserting a property right in relation to a particular ‘thing’ *must themselves know* what the socially determined function of that ‘thing’ is in order to claim that property right. The only claim being made here is that all, or at least the absolute majority, of ‘things’ within Australian society have a socially determined purpose for their existence (or at most a confined list thereof), and that these purposes are central when assessing the proprietary nature of a pre-existing right in relation to that ‘thing’.

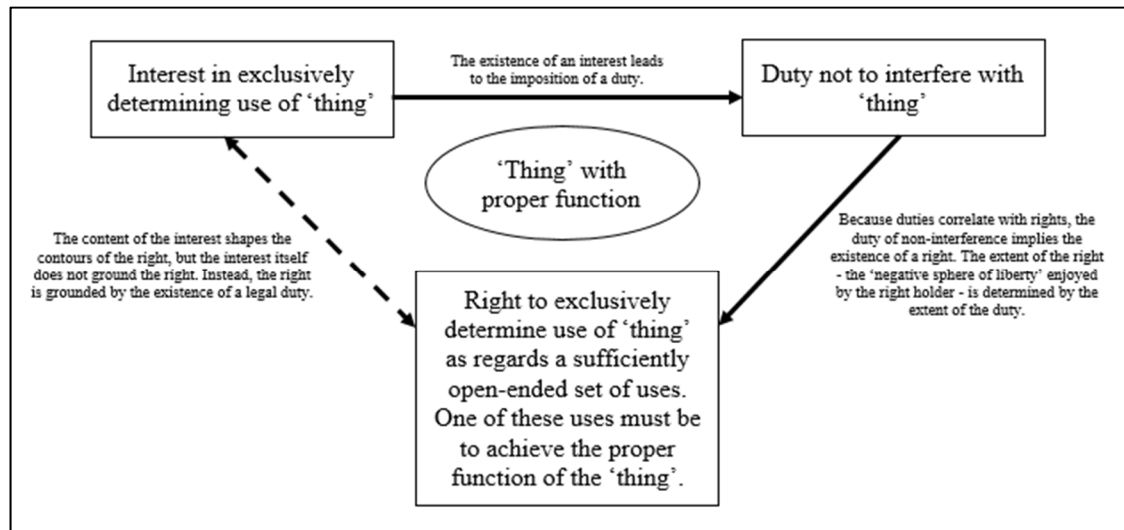


Figure 5-3: An elaboration on the framework

## 5. Restricting Property Rights

The methodology for assessing the proprietary status of a pre-existing right in relation to a particular novel ‘thing’ set out in the previous Part is the direct result of this Thesis’ definition of property rights as protecting our interest in exclusively determining the use to which that ‘thing’ will be put. On the other hand, an unfettered right to exclusively determine the use of an object, with which no person (or indeed the state) could object or interfere, would invite anarchy. How, then, can the law legitimately restrict a particular property right, and how far can such restrictions extend without entirely extinguishing that right?<sup>114</sup> On the first point Penner argues that

restrictions on the scope of property rights diminish one’s recognition of a right as a property right only where the purpose of the restriction is just that, to prevent holders of the right from treating it as a property right.<sup>115</sup>

<sup>114</sup> In addressing these questions, we are not concerned with the normative question of whether a particular property right *should* be restricted in such a way and to such a degree that its proprietary quality is entirely lost. We are concerned solely with the analytical question of whether the restriction at issue *did in fact* lead to that outcome.

<sup>115</sup> Penner, *The Idea of Property in Law*, above n 11, 101.

If the restriction on the property right applies regardless of the property right holder's unique relationship to the 'thing' that is the object of the property right, the purpose of the restriction is not to affect the propertied relationship between right holder and thing, and so the property right remains unaffected.<sup>116</sup> It is a property-neutral prohibition, the application of which is in no way dependent on whether somebody is a property right holder or not.<sup>117</sup> Thus, I may have a property right in a drone, but I cannot use this drone to disrupt flight traffic at a major international airport by flying it into restricted airspace. This is true also of my neighbour, friend, or the complete stranger to whom I might allow the use of my drone. The fact that the neighbour, friend, or stranger has a different, lesser property right in the drone than myself (or indeed no property right at all) does not mean they are any less liable under regulations limiting the piloting of drones in restricted airspace. Thus, any law restricting the flying of drones in particular airspace cannot be said to also be a restriction on the property rights of drone owners. This is simply not the intended consequence of the legal restriction.

The situation might be different, however, if a law was passed restricting drone owners from lending their drones to others. Again, it would come down to the purpose for which the law at issue was brought into being. If it was passed out of concern that irresponsible drone owners, perhaps already required by law to have a drone-flying licence, were lending their drones to unlicensed hooligans at will and causing public safety issues as a result, it could not be said to strike at the heart of the propertied relationship and thus be a restriction on the owner's property right in relation to the drone. This is because the purpose for restricting the propertied relationship between drone and drone owner is public safety. However, if the legislature instead intended the law prohibiting the lending of drones to others to reduce the possible utilities of drone ownership — perhaps from an underlying desire to see drones forced from the market — such a restriction would limit the propertied nature of the property right holder's right in her drone. Each individual drone owner would have one possible use of the variety of exclusive uses she could engage in with her drone — the lending of that drone to others — removed from her by passage of law.<sup>118</sup> The rule is premised on the assumption that, if the restriction were not in place, the nature of the

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<sup>116</sup> Ibid. Both Penner and Harris give the example of a murder weapon: the property right I might have in my knife, for example, does not empower me to murder another. Criminal laws forbidding murder are not restrictions on property rights: see Penner, 'Co-Ownership', above n 69, 169 n 10; Harris, above n 7, 32-3. Honoré takes up a similar argument in his discussion of prohibitions on harmful use as a standard incident of (rather than restriction on) ownership: 'Ownership', above n 11, 123.

<sup>117</sup> Harris, above n 7, 32-3. Harris himself refers to 'property-independent prohibitions'. The change in terminology here does not signify any change in meaning.

<sup>118</sup> Note that the same might not be true if the hypothetical law restricted the owner's ability to *sell* her drone, this going to her interest in forming voluntary obligation-inducing agreements with others (i.e. the interest in contract): Penner, *The Idea of Property in Law*, above n 11, 102. On the distinction between the interest in property and the interest in contract, see above nn 60-64 and text accompanying.

relationship between owner and object would otherwise enable the property right holder to use the object in the particular way now prohibited. In this sense, the rule is property-affecting.<sup>119</sup>

For Penner, the purpose of a particular restriction must be interpreted in light of the prevailing normative context.<sup>120</sup> As with our discussion of both normative symmetry in Part 4.2.2 above, and proper functions in Part 4.3 above, note that this can present problems in practice.<sup>121</sup> Also note that Penner appears to accept that a particular restriction, provided it was implemented with a wholly property-neutral purpose, might legitimately remove every available use from the hands of the property right holder, or indeed require the expropriation of the object of the property right, in the process of achieving this intended, property-neutral purpose.<sup>122</sup>

This is not the end of the story, however. As Wall points out, in the case of single-use limitations on property rights (such as the example of the prohibition on lending my drone to others), there remains conceptual space for the drone owner to engage in an undefined, but now slightly limited sphere of activity.<sup>123</sup> This highlights the second issue for consideration in this Part: how to determine if the holder of a property right enjoys sufficient authority over the object of their right after the imposition of a property-affecting restriction so that the right can continue to be said to be proprietary in nature.

Wyman is one of a few scholars to consider this issue. She suggests that there are two steps to determining if a purported property right holder maintains sufficient authority over a ‘thing’ for the purposes of property. First, a normative determination of *how much authority* is required in the context of that particular ‘thing’ to invoke property protection must be made, followed by an interpretive legal analysis of whether the purported right holder *does in fact have that degree of authority* after the imposition of the restriction at issue.<sup>124</sup>

Relying on the work of Merrill and Smith, Wyman’s normative determination of *how much* authority requires a decision as to which degree of authority results in the greatest net benefit, where benefit is measured in economic terms.<sup>125</sup> This Thesis has, however, rejected a law and economics approach to questions of property in favour of an analytical jurisprudential lens.<sup>126</sup>

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<sup>119</sup> Harris, above n 7, 34. Harris refers to ‘property-limiting rules’ (see at 33-6). Again, the change in terminology here does not signal a change in meaning.

<sup>120</sup> Penner, *The Idea of Property in Law*, above n 11, 103.

<sup>121</sup> Wyman, above n 13, 221.

<sup>122</sup> Penner, *The Idea of Property in Law*, above n 11, 102-3.

<sup>123</sup> Wall, above n 35, 184-5.

<sup>124</sup> Wyman, above n 13, 231-4.

<sup>125</sup> *Ibid* 233.

<sup>126</sup> See nn 55-56 above and text accompanying.

Instead of a cost-benefit analysis aimed at determining the greatest economic net benefit, then, it is suggested that the determination of the necessary degree of authority capable of being exercised over a ‘thing’ (or, to put it differently, the question of whether the right holder maintains a sufficiently open-ended set of uses) be analysed by reference to that ‘thing’s’ socially determined proper function.

It was proposed in Part 4.3 of this Chapter that, in order to assess the proprietary nature of a pre-existing right in relation to a particular novel ‘thing’, the negative sphere of liberty available to the purported property right holder must include the use decreed by society to be the proper purpose for which that ‘thing’ exists. It is here suggested that, when examining restrictions placed on this property right, the question to be asked is: does the property-affecting restriction at issue remove the ability of the property right holder to make use of their ‘thing’ in the way that society has determined to be the proper function of that ‘thing’?<sup>127</sup> If not, the restriction limits the property right at issue, but is not fatal to that right’s existence. If, however, the restriction at issue *does* remove the ability of the right holder to achieve the purpose for which their ‘thing’ exists within society, then the restriction does not merely limit that property right, but nullifies it entirely.

It is important to note here that the need to maintain the requisite degree of authority so as to achieve the proper function of the ‘thing’ at issue in the face of a property-affecting restriction does not contradict the need for a sufficiently open-ended set of uses in the assessment of a pre-existing right’s proprietary status. As our discussion of sufficient use in the context of the right to possession in Chapter Seven will reveal, a ‘thing’s’ proper function will often be something of an umbrella use that encompasses multiple individual uses (or different ways of achieving the ‘thing’s’ proper function). And even in cases where there is only one, or very limited, means of achieving the proper function of the ‘thing’ at issue, there is always the possibility that choosing *not* to achieve that proper function is also a valid use available to the property right holder. What is key is the ability to *exclusively determine* how the proper function of the ‘thing’ at issue is achieved (or not achieved). Thus, in those rare instances where non-use has been removed from the property right holder as an available use, and an external restriction requires not only that the proper function of the ‘thing’ at issue be carried out, but dictates how that function will be achieved, the property right at issue is nullified. Whilst the property right holder might in fact retain the necessary degree of authority to achieve the proper function of the ‘thing’ at issue, the

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<sup>127</sup> Here, to be clear, we are taking of *legal* and not *physical* ability to make use of the ‘thing’. After all, a broken screwdriver can still have the *function* of driving screws, even if it is not physically capable of performing that function: Thomasson, above n 112, 593-4.

mere existence of requisite authority is not enough. The need for exclusive determination in the exercise of that authority remains.

Wyman's requirement that we next examine whether the purported property right holder retains this level of authority is unproblematic, and is largely a question of determining what authority the purported right holder *does in fact have* over a thing. To continue an example given above, if I as the 'owner' of a chair lack the authority to sit in that chair — perhaps because the state has declared that only sofas may be sat on — then any property right I had in that chair cannot be said to survive the restriction. This is true despite the fact that I, as the holder of a property right in that chair, can continue to put the chair to any number of other uses besides being a source of physical support whilst sitting — the point is that it is the chair's socially determined proper function to provide this physical support.

The relatively recent developments in Australia's public health laws regarding the marketing of tobacco products provide a good example of the usefulness of the means of assessing restrictions placed on property rights suggested here. In Australia, a trademark is a type of personal property<sup>128</sup> that is 'used, or intended to be used, to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services so dealt with or provided by any other person'.<sup>129</sup> The *proper function* of a trademark, including those held by tobacco companies, then, is to distinguish one product from another by way of identification. In 2011, the Australian Government passed the *Tobacco Plain Packaging Act* and the *Tobacco Plain Packaging Regulations*, which require tobacco products to be packaged in drab, olive coloured packaging.<sup>130</sup> The brand name and product variant must be set out in a uniform font, size, and colour.<sup>131</sup> Whilst an applicable trademark can be displayed, it must conform to similar formatting restrictions, and cannot constitute tobacco advertising or obscure a very prominent health warning.<sup>132</sup>

This plain packaging legislative scheme was upheld by the Australian High Court in 2012. The Court found that the legislative provisions and regulations did not result in the acquisition of property other than on just terms in violation of s 51(xxxi) of the *Australian Constitution* on the basis that the benefit 'acquired' by the Commonwealth Government was not proprietary in nature.<sup>133</sup> For our purposes, however, we are not concerned with what the Commonwealth did or

<sup>128</sup> *Trade Marks Act 1995* (Cth) s 21(1).

<sup>129</sup> *Ibid* s 17.

<sup>130</sup> *Tobacco Plain Packaging Regulations 2011* (Cth) reg 2.2.1(2).

<sup>131</sup> *Ibid* reg 2.4.1.

<sup>132</sup> See *Tobacco Plain Packaging Act 2011* (Cth) ss 20-21; *Tobacco Plain Packaging Regulations 2011* (Cth) div 2.3.

<sup>133</sup> *JT International SA v Commonwealth* (2012) 250 CLR 1, 33-4 [42] (French CJ), 61-4 [144]-[154] (Gummow J), 70-2 [180]-[188] (Hayne and Bell JJ).

did not *receive*. When examining the restrictions placed on a particular property right, we are instead concerned with what was *taken* from the property right holder — a decidedly different question.<sup>134</sup>

The *Tobacco Plain Packaging Act 2011* allows holders of tobacco trademarks to continue using their trademarks in a variety of ways, including labelling tobacco products in accordance with the relevant regulations, licencing another to use the trademark, and assigning the trademark to another party.<sup>135</sup> Despite retaining these traditional property indicia, however, under the methodology suggested here, the question of whether the tobacco trademark holders have retained their property right in the relevant trademark is determined by examining whether the plain packaging regulations removed the degree of authority required to achieve the trademark's intended purpose from the trademark holder. This is a question of fact.

Whilst not in direct response to the question just posed, Hayne and Bell JJ were of the opinion that an appropriate degree of authority *was* retained by the tobacco trademark holders, because they, and they alone, had the ability to decide whether or not to use their trademarks to sell their products — albeit, in accordance with the Commonwealth's restrictive regulations.<sup>136</sup> However, we have seen that the purpose of a trademark is not merely to attach it to products; instead, it is to attach it to products in a way that actively identifies that product and differentiates it from another. The restrictions imposed on tobacco trademarks in the Australian Government's plain packaging legislative scheme remove any prospect of differentiation, instead focusing on drab, olive uniformity. As Hayne and Bell JJ note, 'the [legislative scheme] greatly restricts, even eliminates, [the tobacco trademark holders'] ability to use their packaging as they would wish'.<sup>137</sup> And therein lies the proprietary rub. Under the *Tobacco Plain Packaging Act 2011* (Cth) and its accompanying *Regulations*, tobacco trademarks can no longer be used as a means of product identification and differentiation. The property rights of the tobacco trademark holders has been restricted to such an extent that the socially determined purpose of the trademark cannot be achieved. Their property right has been extinguished.

## 6. Conclusion: An Exclusion Essentialist Definition Reached

This Chapter has set out the exclusion essentialist theory of property against which the right to possession of the body of a deceased person will be measured in Chapters Six, Seven, and Eight.

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<sup>134</sup> Ibid 33-4 [42] (French CJ).

<sup>135</sup> See *Tobacco Plain Packaging Act 2011* (Cth) s 28(1)-(3).

<sup>136</sup> *JT International SA v Commonwealth* (2012) 250 CLR 1, 71 [182] (Hayne and Bell JJ).

<sup>137</sup> Ibid.

This exclusion essentialist theory, largely drawn from the work of James Penner, is founded on the interest of the property right holder in exclusively determining the use to which their ‘thing’ will be put. This Chapter has proposed that the question of whether a ‘thing’ is a suitable candidate for the practice of property (that is, a suitable candidate to ground an interest in exclusive use) is determined, first, by examining whether the ‘thing’ is factually separated from the purported property right holder and, next, considering whether social practice allows another person to stand in the same position as the initial right holder without any normative change in the relationship between right holder and ‘thing’.

When assessing the proprietary nature of a pre-existing right in relation to this novel ‘thing’, the exclusion essentialist definition of property adopted in this Thesis requires that the ‘thing’ grounds an *in rem* duty of non-interference that applies to all except one person — the holder of the purported property right. This generalised duty must protect a sufficiently open-ended set of uses so that the interest that grounds the law of property — being our interest in exclusively determining the use of our ‘thing’ — is invoked. Crucially, this duty must protect, and the open-ended set of uses contain, the use that is the socially determined proper function of the ‘thing’ at issue. The existence of such a duty and open-ended set of uses in the context of the novel ‘thing’ at issue means that the right under examination conforms to the structural framework we expect of property rights. This being the case, this right can be identified as proprietary in nature.

Once a right has been identified as proprietary, any restrictions placed on that property right can be considered. This Chapter has set out a methodology for determining whether a property right has survived the imposition of a particular restriction. First, by determining the authority that must be allowed at law in order for the thing’s socially determined purpose to be carried out, and second, by determining whether the holder of the property right at issue in fact retains that required degree of authority.

Restrictions on the right to possession of the body of the deceased will be discussed in detail in Chapter Eight’s consideration of the right to possession’s salient features and their external consistency with the right’s potential proprietary nature. For its part, Chapter Seven will assess the proprietary status of the right to possession against the structural framework of property rights established in this Chapter. In Chapter Six, we next turn to consider whether the practice of property can be appropriately extended to encompass the novel ‘thing’ that is the body of the deceased.



# Chapter Six

## Extending the Practice of Property to the Body of the Deceased

### 1. Introduction

Chapter Five set out the definition of property — as those legal rules that protect our interest in exclusively determining the use of a particular ‘thing’ — against which this Thesis will measure the right to possession of the body of a deceased person. In this Chapter we will determine the preliminary issue of whether the practice of property can be extended to encompass a particular novel ‘thing’: the body of the deceased.

There is no denying that the body of a deceased person is sufficiently ‘novel’ so as to not fall into an already well-recognised category of ‘things’ *qua* objects of property rights. It is also clear that the body of the deceased — that is, the body of *a particular deceased person* — is a sufficiently scarce resource so as to warrant the application of property principles.<sup>1</sup> As we saw in Chapter Five, however, in order for the practice of property to be extended to encompass a novel ‘thing’, that ‘thing’ must be a separable resource that is capable of being the subject of multiple normatively symmetrical relationships. This Chapter considers these elements in turn.

First, however, and in line with the methodology set out in Part 4 of Chapter Five, Part 2 of this Chapter sets out this Thesis’ identification of the body of the deceased as a material object, as opposed to a deceased person. Part 3 then argues that the body of the deceased as material thing is sufficiently separate (both physically and conceptually), both from the purported property right holder (that is, the holder of the right to possession), and all other persons, including the deceased themselves.

Whether the body of the deceased is capable of being the object of a relationship that is normatively symmetrical no matter who stands at the other end of that relationship is addressed in Part 4. Part 4.1 first sets out a framework of legal, social, and what this Thesis terms ‘pre-legal’ norms. Part 4.2 then moves on to directly consider the various pre-legal norms relevant to the body of a deceased person, arguing that each of these norms points to the possibility of multiple people holding normatively symmetrical relationships in relation to that body.

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<sup>1</sup> See Part 4.2.1 of Chapter Five. Deceased bodies as a general category are not so scarce (the dead far outnumber the living, after all), although are arguably still scarce enough to warrant invoking property principles. Nonetheless, as the right to possession relates to one particular deceased body at any given time and in any given context, it is the individual deceased body with which this analysis is concerned.

## 2. Identifying the Body of the Deceased

As per the methodology set out in Part 4 of Chapter Five, before considering whether the body of the deceased is a sufficiently contingent ‘thing’, we first must appropriately and accurately define what is meant by ‘the body of the deceased’ as a novel ‘thing’ for the purposes of our property inquiry. An analysis of the body of the deceased as an artefact, along with the identification of that artefact’s socially determined proper function, takes place in Part 3.1 of Chapter Seven.

It is first important to note that when we speak of the body of the deceased as a ‘thing’, we are speaking of a specifically identifiable ‘thing’ that occupies a unique position within society and is separate and distinct from any other ‘thing’. The body of the deceased is, for example, a separate ‘thing’ for the purposes of the property inquiry from the body of a living person, and the organ taken from the body of the deceased for transplantation, and, indeed, the hospital bed on which the body lies. It cannot be denied that the body of the deceased is conceptually *related* to both the body of a living person and the parts removed from it for insertion elsewhere. But the point remains: *the body of the deceased* is a distinct ‘thing’; it occupies a separate position within our lived experience than its living counterpart, or the separate ‘things’ of which it is made up.

As a separate and distinct ‘thing’, the body of the deceased is generally viewed from either side of a corpse-as-person or corpse-as-object dichotomy. Each position is valid; there is no one ‘right’ way to view the body of the deceased. One’s views on the issue are liable to change given the identity of the person whose corpse is at issue, or the content of the particular dispute.<sup>2</sup> Given there is no correct way to consider the corpse, no one infallible way to place it within a coherent legal framework, this Thesis approaches the body of the deceased as the material human remains left behind, and not as the person who has departed. This position is grounded in the terminating fact of death. Our body is the medium through which we experience the physical world, and our body is crucial to our independent idea of individual self.<sup>3</sup> After the moment of death, however, the deceased ceases to engage with the physical world. The body *of* a deceased individual is no longer a medium crucial to the deceased *as* individual and their lived experience — because there is no more experience to ‘live’, the ‘self’ that previously inhabited the body having permanently departed. Death is an end-point, and the position taken here is that it is the end-point of the body as a physical encasement of a living ‘self’, and the start-point for the body as merely a physical shell. To borrow the words of Hammond: ‘a corpse can be seen to be the physical matter which

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<sup>2</sup> Ellen Stroud, ‘Law and the Dead Body: Is a Corpse a Person or a Thing?’ (2018) 14 *Annual Review of Law and Social Science* 115, 122 (‘[the] distinction ... will always be, for most people, an amorphous and changeable distinction grounded in individual emotion and belief’).

<sup>3</sup> See Jesse Wall, *Being and Owning: The Body, Bodily Material, and the Law* (Oxford University Press, 2015) 57-64 (discussing physical subjectivity and drawing on the philosophy of Maurice Merleau-Ponty).

remains when a human life dies. Objectively, it can be viewed as a shell and disassociated from the human life which inhabited it'.<sup>4</sup>

Such a view of the body — as a solely material thing — aligns with the physicalist views prominent in contemporary philosophy of the mind.<sup>5</sup> At its core, physicalism is the belief that all things that exist are entities recognised by the laws of physics.<sup>6</sup> When it comes to the body, physicalism holds that every mental state has a physical cause (that is, the mental supervenes the physical),<sup>7</sup> and that the exact form a particular mental state takes is entirely dependent on, and determined by, its physical cause.<sup>8</sup> Whilst physicalists differ in their views as to whether the mental can be reduced to the physical,<sup>9</sup> all agree that the former cannot exist without the latter. Thus, with the cessation of neural processing (and all other bodily functions) at the time of, or very soon after, biological death, the mental — the 'mind' or 'soul' of the person whose physical body has died — also ceases.

This point is made in order to establish the validity of the view of the body as material thing in the face of objection from those who hold the substance dualist views common in Western thought. Substance dualism advocates the existence of entirely non-physical substances — thus, the 'mind' or the 'soul' is separate and distinct from, and entirely without reliance on, the physical body.<sup>10</sup> This lack of dependence of the mental on the physical means the former is entirely capable of surviving the death of the latter, and, potentially, that elements of the former persist inside the physical shell of the latter even after this death. Substance dualism — largely in 'folk' form — is clear in the long Christian tradition, with its emphasis on the distinction between body and soul, that has dominated Western society and religious practice for two millennia.<sup>11</sup> And outside of this 'folk' context, dualist views remain influential in philosophical thought.<sup>12</sup>

That said, the view of the body as material thing is not necessarily incompatible with dualist thought. Dualism, in its most simple form, holds only that the physical body and the non-physical

<sup>4</sup> Celia Hammond, 'Property Rights in Human Corpses and Human Tissue: The Position in Western Australia' (2002) 4 *University of Notre Dame Australia Law Review* 97, 113.

<sup>5</sup> Jaegwon Kim, *Philosophy of Mind* (Westview Press, 3<sup>rd</sup> ed, 2011) 11 ('physicalism, broadly understood, is the basic framework in which contemporary philosophy of mind has been debated'); Daniel Stoljar, *Physicalism* (Routledge, 2010) 2 (physicalism has been a consensus position in analytical philosophy since the 1960s).

<sup>6</sup> Kim, *Philosophy of Mind*, above n 5, 11.

<sup>7</sup> Ibid 9.

<sup>8</sup> Ibid 12-13.

<sup>9</sup> See ibid 13-14 (comparing nonreductive and reductive physicalism).

<sup>10</sup> Ibid 32-5; Stoljar, above n 5, 32.

<sup>11</sup> See Jaegwon Kim, *Physicalism, or Something Near Enough* (Princeton University Press, 2005) 72-3.

<sup>12</sup> An overview of the variety of dualist perspectives alive in modern philosophy of the mind can be found in Andrea Lavazza and Howard Robinson (eds), *Contemporary Dualism: A Defense* (Routledge, 2014).

mind (or soul, or other ‘mental’ state or collection of properties) are entirely distinct. And whilst the body as shell view aligns most strongly with the physicalist perspectives that see the mental as incapable of existing after the death of the physical, this material view of the body only technically requires the *absence*, rather than the *death*, of the mental. In this way, dualist views that see the distinct mental dimension as *departing* from the body after death are compatible with view of the deceased body as material (that is, physical) shell with no inherent, ongoing mental component adopted in this Thesis.<sup>13</sup>

Whether one approaches it from a physicalist or a dualist perspective, however, the acceptance of the view of the body of the deceased as merely a physical object, the separate mind having departed at the time of biological death, in no way diminishes the importance of that physical object within Anglo-Australian society. Cultural histories of death have revealed the important role played by the corpse throughout the history of the Western world, emphasising that the treatment of the dead body is, to the members of the society in which that body exists, a reflection of that society. In this way, and quite apart from any discomfort felt by a particular individual at the mistreatment of a particular dead body, the discomfort and revulsion felt at a societal level at the mistreatment of the corpse stems from a fundamental concern that this mistreatment of the bodies of the dead represents a failing on the part of the society of the living. These emotions — and the related social practices that see to the decent treatment and disposal of the dead — are, then, not necessarily, or entirely, based on concerns of the ongoing personhood of the deceased, but instead the ongoing relationship between the living and the corpse as a material thing within a particular society, the quality of that relationship speaking loudly as to the social and cultural health of that society.<sup>14</sup>

### 3. The Separability Inquiry

Having identified the novel ‘thing’ at issue in our analysis, we can now move on to examine whether this ‘thing’ can be encompassed within the practice of property. The first criterion that must be met in order for the practice of property to be extended to encompass a particular novel ‘thing’ is the separation of that ‘thing’ from the holder of the purported property right, alongside all other persons. In the context of this Thesis, we must consider whether the body of the deceased

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<sup>13</sup> On this, see Kim, *Physicalism*, above n 11, 72 (noting that ‘folk dualism’ often sees the soul or spirit as rising up from — that is, departing from — the physical body after death).

<sup>14</sup> This discussion draws on Thomas W Laqueur, *The Work of the Dead: A Cultural History of Mortal Remains* (Princeton University Press, 2015), particularly the ‘Introduction’ (setting out the major themes of the text).

is able to be separated from not only the purported property right holder (being the holder of the right to possession), but also the deceased person themselves.

### 3.1. Penner's Conceptual Separability Criterion

As we saw in Chapter Five, Penner defines the separability criterion in terms of conceptual separation — the distinction between the 'thing' and the personality (and indeed the personhood) of all individuals in the eyes of society. Penner appears doubtful as to whether this conceptual separation can be true of a dead body. He argues that society continues to recognise a possessive relationship between the deceased and their body even after the moment of death. The respect society affords to the body is a respect for the self, not the physical remains.<sup>15</sup> The implication of this argument is that, in the eyes of society, the body of the deceased cannot be separated from the deceased as a person.<sup>16</sup>

Two arguments can be made against this. The first is based on the conception of the body of the deceased adopted in this Thesis — a conception that Penner would likely reject. Part 2 of this Chapter defined 'the body of the deceased' as a mere physical shell from which the 'self' that previously inhabited the body has permanently departed. When we are alive, and our 'self' continues to inhabit our body, our body is the means through which we engage with the physical world and construct our idea of self. It is for this reason that one's *own* body is incapable of being separated from oneself as a living individual in any meaningful sense so as to satisfy Penner's requirement of conceptual separation.<sup>17</sup> The same is not true after the moment of death, however, when the 'self' has departed and only the physical shell remains. The body of the deceased must, therefore, be separable from the deceased as an individual.

The idea of the body as the necessary medium used by individuals to experience the world around them also explains why the body *of another* must be conceptually distinct from ourselves as individuals. If *my own* body is the medium through which I experience the external world, the

<sup>15</sup> J E Penner, *The Idea of Property in Law* (Clarendon Press, 1997) 122.

<sup>16</sup> Rohan Hardcastle also appears to adopt this view, although less clearly. He states that one cannot separate their own body from themselves, meaning the body of the living cannot be the object of property rights (as to which see discussion in Part 4.2.1 of this Chapter): *Law and the Human Body: Property Rights, Ownership and Control* (Hart, 2007) 14-15. He then indicates that, for this reason, the body of the deceased is not a separable thing: at 43, 50. Whilst Penner points to the conception he sees society as having of the dead body, Hardcastle does not elaborate on the link between the impossibility of one's living body being the object of property rights and the impossibility of one's dead body being the object of property rights.

<sup>17</sup> Penner, above n 15, 121. Daniel Sperling emphasises that Penner's separability thesis can explain why detached body parts, organs, and waste material can be considered 'our' property, but our own whole body cannot be: *Posthumous Interests: Legal and Ethical Perspectives* (Cambridge University Press, 2008) 124-5.

body of another must be part of that external world. This is true regardless of whether the body at issue is another's living body or their corpse. That said, as we saw above, at the same time that the body of a living person is external to the all other persons, it cannot be separated from the person who inhabits it. And so it is ill-placed within the practice of property. Thus, only the deceased body is external, not only to myself, but to all other persons (i.e. including the deceased themselves).

The second argument against any ongoing link between the deceased and their body in the eyes of Anglo-Australian society is one of semantics and goes to the possessory relationship Penner suggests society sees between the deceased and their body — that it is *his* body, rather than *the* body, that was recovered from the Thames (to borrow Penner's example).<sup>18</sup> But the same is true of many things left behind by the deceased following their departure from this life. It is common, for example, to speak of selling *his* house as part of the estate administration process, or for *his* clothes to be donated to a local charity. A bride might speak of wearing *his* watch as a means of remembering a deceased loved one on her wedding day, or a grandchild of receiving *his* car in *his* will. The recognition of this supposed possessory relationship might continue for years (I passed by *his* house today, I am still driving *his* car ten years on). And whilst one might more readily speak of *the* house and *the* car (and *the* watch and *the* clothes), one can just as easily speak of *the* body — particularly when the identity of the deceased remains unknown. We can still acknowledge that the house, car, clothes, and watch — perhaps integral to the deceased's identity and lived experience in life — are separate from them in death. The possessory relationships we see between the deceased and what they leave behind, including their body, are opaque at best.

It is also possible to object to Penner's position that it is the possessive relationship that (he claims) exists between the deceased and their body that deeply affects our treatment of that body after the death of the deceased.<sup>19</sup> The respect we offer to the bodies of particular, identifiable deceased persons can just as easily be seen as a specific instance of a generalised respect offered to 'the dead', than as a respect offered uniquely to that one identifiable deceased person. And indeed, as we have seen, cultural histories have shown that just such a communal, anonymised respect has existed in Western societies for millennia.

All of this is to say that it very much remains open to find the body of the deceased capable of being separated, as a conceptual matter, both from those who survive the deceased, and the deceased themselves. Indeed, to quote Penner out of his intended context, 'a corpse has no

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<sup>18</sup> Penner, above n 15, 122.

<sup>19</sup> Ibid.

necessary attachment to any living human. So it can be as much the subject of a property right as anything else.’<sup>20</sup> As Part 4.2, and particularly Part 4.2.1, of this Chapter will make clear, however, many of the themes that underlie this consideration of conceptual separability will be repeated in our discussion of normative symmetry as the second criterion for extending the practice of property to encompass a novel ‘thing’. This speaks to the duplicative nature of Penner’s methodology, and emphasises the need for a more streamlined approach when extending the practice of property.

### **3.2. A Preferred Approach: Physical Separability**

It was proposed in Part 4.2.2 of Chapter Five that the superior means of extending the practice of property to encompass a particular novel ‘thing’ looks first, not to conceptual separation, but to the *physical* separation of that ‘thing’ from all persons. This is a purely factual inquiry, and in the specific context being considered here (and again remembering our definition of the body of the deceased as a purely physical, material thing set out in Part 2 of this Chapter), can be answered succinctly: yes, the body of the deceased person is clearly physically separate from all persons, including the holder of the purported property right (being the holder of the right to possession) and the deceased themselves. This being the case, we can now move on to consider the question of normative symmetry.

## **4. Normative Symmetry**

As set out in Part 4.2.1 of Chapter Five, the normative symmetry criterion requires that each new person who takes on a particular relationship with the ‘thing’ at issue stands in the same position as the former occupier of that position. Fundamentally, when considering the question of normative symmetry, we are asking whether something is so closely related to any one individual that to allow another to stand in the place of that individual would cause irreparable harm to that individual as a person — or, to be more precise, to them as a person in the sense of how we, as members of Australian society, conceive of personhood, taking into account the moral, legal, and political requirements that attach to this concept.

This Part examines whether the body of the deceased satisfies this normative symmetry criterion. Part 4.1 first sets out a framework of legal, social, and pre-legal norms. It identifies the applicable norms in the context of the normative symmetry inquiry as being ‘pre-legal’ norms — that is, those social norms used by a particular society to determine whether a particular body of law is

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<sup>20</sup> Ibid.

applicable in a particular situation. Part 4.2 then considers the three pre-legal norms that are most relevant when considering the body of the deceased and the potentially normatively symmetrical nature of the relationships with this body in Australian society: the anti-slavery norm that prevents living bodies from being the object of property rights; the norm that those close to the deceased in life should care for them in death; and the norms that the body be disposed of swiftly and decently.

#### 4.1. A Framework of Legal, Social, and Pre-Legal Norms

The legal institution of property is based on *in rem* norms — impersonal practices that allow strangers to interact with each other in the practice of property in a rule-governed way.<sup>21</sup> A norm, for its part, is a standard that guides behaviour; and in a legal context, a standard that guides behaviour in a way that produces legal consequences.<sup>22</sup> Thus, laws (including the recognised common law rules of property) are norms — and quite powerful norms at that, providing exclusionary reasons for individuals to entirely discount other possible courses of action.<sup>23</sup> But not all norms that shape our behaviour are laws, and not all norms that govern our interactions with ‘things’ are the formalised, legal norms of property law.

Norms that do not take the form of legal rules (or rules of another formal character) are social in nature. Social norms, like legal norms, are reasons for acting in a particular way — and the ramifications for failing to adhere to a social norm can be high.<sup>24</sup> As ‘[i]nformal systems of external social control’<sup>25</sup> social norms are distinct phenomena that can diverge entirely from legal rules.<sup>26</sup> As extra-legal elements, social norms can also, however, take on the appearance and content of legal concepts such as property rights. Social norms thus become moral analogues to these legal concepts, and operate in situations outside the law that resemble those situations inside

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<sup>21</sup> Ibid 30.

<sup>22</sup> Ibid 7.

<sup>23</sup> See Joseph Raz, *Practical Reason and Norms* (Oxford University Press, 1975, 1999 ed) 35-48.

<sup>24</sup> Cass R Sunstein, ‘Social Norms and Social Roles’ (1996) 96 *Columbia Law Review* 903, 915.

<sup>25</sup> Robert C Ellickson, ‘Law and Economics Discovers Social Norms’ (1998) 27 *Journal of Legal Studies* 537, 540.

<sup>26</sup> In his important book *Order Without Law: How Neighbours Settle Disputes* (Harvard University Press, 1991), Robert C Ellickson detailed how informal rules are established within particular, discrete communities and the role these rules play in resolving disputes that would otherwise be dealt with under the formal rules of property law. Ellickson’s detailed analysis of the practices of cattle ranchers in Shasta County, California proved that these social norms can and do contradict the established legal rules designed to govern a particular situation. Briefly, according to the formal law in Shasta County, in closed range areas, ranchers are legally responsible for damage to crops caused by their grazing cattle, whereas in open range areas, farmers are legally responsible for fencing the cattle out of their cropland: at 44. In contrast to this formal legal position, however, the norm that has developed among Shasta County residents states that the owner of livestock is *always* responsible for damage caused by her animals — regardless of whether this damage occurred in an open or closed range area: at 52-3.

the law in which the relevant legal concept operates.<sup>27</sup> In this way, the social consequences faced by a person convicted of robbing a local convenience store (ostracism, disapproval etc.) reflect the breaking of the social norm that frowns upon robbery; this social norm aligning with the legal rule that makes robbery both a criminal act and a civil tort.

The social norm that requires we exclude ourselves from the property of others is one such norm that takes on the appearance of the aligning legal norm (or vice-versa). Merrill, for example, has argued that the respect we give others' possession of objects and resources — that is, the social norm that requires we exclude ourselves from property that is in the possession of another — is how exclusion came to become the *sine qua non* of property.<sup>28</sup> And Merrill and Smith suggest that the *legal* norm of exclusion that operates to protect our possession and use of a 'thing' (evidenced in the torts of trespass, conversion, and detinue, as well as the criminal law) reflects the particular social morality surrounding the property of others that has existed in certain societies since a time before law.<sup>29</sup> This social morality sees interferences with the property of another as a moral wrong subject to severe disapprobation,<sup>30</sup> something reflected in the acceptance given by society to the physical protection of our possessory relationships with our 'things'.<sup>31</sup>

Moving from the specific context of exclusion to speak more broadly, there exists a sub-section of social norms that we will call pre-legal norms. In the sense used in this Chapter,<sup>32</sup> pre-legal

<sup>27</sup> Tony Honoré, 'Property and Ownership: Marginal Comments' in Timothy Endicott, Joshua Getzler and Edwin Peel (eds), *Properties of Law: Essays in Honour of Jim Harris* (Oxford University Press, 2006) 129, 130.

<sup>28</sup> More precisely, he sees respect for possession as an ingrained human instinct shaped by social norms: see Thomas W Merrill, 'Property and the Right to Exclude II' (2014) 3 *Brigham-Kanner Property Rights Conference Journal* 1, 13-21. Going further, respect for possession established by others has been characterised as an evolutionary trait, selected for its superior survival value, which is universal throughout human (and indeed some non-human) societies: see, eg, Jeffrey Evans Stake, 'The Property 'Instinct'' in Semir Zeki and Oliver Goodenough (eds), *Law and the Brain* (Oxford University Press, 2006) 185, 188-90; James E Krier, 'Evolutionary Theory and the Origin of Property Rights' (2009) 95 *Cornell Law Review* 139.

<sup>29</sup> See Thomas W Merrill and Henry E Smith, 'The Morality of Property' (2007) 48 *William and Mary Law Review* 1849, 1852-70.

<sup>30</sup> Ibid 1852-3. The particular signs that are used to communicate possession and an intention to possess are socially contingent, and are provided by the norms of each society: Merrill, above n 28, 17-18. See also Carol M Rose, 'Possession as the Origin of Property' (1985) 52 *University of Chicago Law Review* 73.

<sup>31</sup> Merrill and Smith, above n 29, 1855. As a social matter, for example, I can attempt to physically prevent someone from interfering with my possessory relationship with my 'thing'. This physical retaliation is accepted within socially determined limits (I cannot, for example, use excessive force — although what is excessive in the social determination of force might be different from the legal definition of force that goes beyond what is reasonable). Similarly, I can expect some socially sanctioned retaliation should I attempt to interfere with another's possessory relationship with their 'thing' without legitimate cause.

<sup>32</sup> Others use the term 'pre-legal' in a different sense. Merrill and Smith, for example, refer to the 'prelegal moral intuitions' that underlie legal rules: *ibid* 1867, 1894.

norms operate in the ways members of a society engage with each other in order to determine if and how a particular body of law is applicable to a particular situation at hand. That is, pre-legal norms are those social norms that determine the validity of the application of a particular body of law to a particular situation (hence the label ‘pre-legal’ — these norms operate prior to the invocation of legal norms). Pre-legal norms differ from other social norms that exist in alignment with an identical or near-identical legal norm, and even from those social norms that exist *prior to* an aligning legal norm coming into being. Pre-legal norms refer solely to those social norms that determine *whether a particular body of law is applicable to a particular situation*. This determinative function might indicate that pre-legal norms are confined to those bodies of law that people enter into by choice — is this the appropriate subject matter of a contract binding at law, for example; or, more importantly for our purposes, is this ‘thing’ sufficiently contingent so that the law of property should apply to it. This is not so, however. After all, pre-legal norms determine what actions sufficiently violate social norms so that a crime has been committed, or whether a ‘thing’ can only be acquisitioned by the government ‘on just terms’.<sup>33</sup>

In the context under consideration here, the social, moral, financial, and other considerations that determine whether multiple individuals can stand in normatively symmetrical positions as regards the body of the deceased are, in essence, determining whether the practice of property can extend to encompass that body. That is, they are operating as pre-legal norms that determine whether the law of property is the appropriate body of law in this specific context. We now turn to consider these pre-legal norms.

## **4.2. Pre-Legal Norms and the Body of the Deceased**

### **4.2.1. The Living Body and the Anti-Slavery Norm**

Perhaps the strongest pre-legal norm at play when considering whether multiple parties can stand in normative symmetry with the body of a *deceased* person (and thus whether the practice of property can be extended to encompass that body) is the norm which requires that the *living* human body be kept far removed from the grasps of property law. This norm is fundamental to modern Western societies,<sup>34</sup> and operates across the normative framework just now set out in Part 4.1. It is enshrined in the criminal law of many jurisdictions (including the Commonwealth of Australia),<sup>35</sup> making it a clear legal norm. Superimposed on top of this legal norm is a

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<sup>33</sup> *Australian Constitution* s 51(xxxi).

<sup>34</sup> It is surely also fundamental in societies that are not considered ‘modern’ or ‘Western’, and it is accepted that these terms are problematic regardless. However, given this Thesis addresses the law of Australia, this qualification is appropriate.

<sup>35</sup> See *Criminal Code 1995* (Cth) div 270.

corresponding social norm. Allegations of slavery made against a person or corporation are met by society with distress and disgust. In addition to attaching to this legal norm of the criminal law, however, the social norm against slavery also operates in another sense. In the context of the common law of property, this social norm operates as a pre-legal norm to prevent the application of property principles in the context of the body of a living person.

In this pre-legal sense, the anti-slavery norm prevents any person from standing in a normatively symmetrical relationship with the body of another living person. This norm draws on the generally accepted idea within Australian society that the only person who can stand in a relationship of control and determination with their body is that person themselves. Of course, there are some potential exceptions — minor children, prisoners, and those under guardianship orders, for example — however, even with the existence of these exceptions, the unique nature of the relationship between living person and their body means that interests such as that in one's own bodily integrity are in no way contingent. Quite the opposite, in fact: these interests are incapable of being wielded by another without normative consequence.<sup>36</sup> Should another be (legally) capable of exercising my right to bodily integrity (and thus, potentially, approving breaches of that integrity), for example, my moral status as a human being would be diminished, and there would be a normative consequence beyond the mere reallocation of my right to bodily integrity.<sup>37</sup>

This lack of normative symmetry — the deeply damaging effect on myself as a person that would result should another stand in my place in my relationship with my body — thus keeps my body (as that of a living person) outside of the bounds of property. Should another attempt to stand in my place, taking possession of my body and becoming the exclusive determiner of the uses to which my body is put, my legal and moral status as a human being would be dramatically, and detrimentally, altered.<sup>38</sup> In response, the intensely social, pre-legal norm against slavery, founded on underlying moral beliefs of autonomy, self-determination, and equality across the human condition,<sup>39</sup> rejects the law of property as being the appropriate body of law to govern the bodies of the living.

The existence of this anti-slavery norm in the context of the living body necessarily raises the question of whether the same is true of the body of the deceased. Once someone has passed away,

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<sup>36</sup> The exceptions just now mentioned are, then, examples of situations in which Australian society has agreed that there is an appropriate justification for the normative consequences that flow from one party having at least partial control over the body of another.

<sup>37</sup> Wall, above n 3, 126-7.

<sup>38</sup> A point discussed by Penner, above n 15, 123-5.

<sup>39</sup> See generally Eileen H Richardson and Bryan S Turner, 'Bodies as Property: from Slavery to DNA Maps' in Andrew Bainham, Shelley Day Sclater and Martin Richards (eds), *Body Lore and Laws* (Hart, 2002) 29 (linking the collapse of slavery with the rise of norms of individualism and social equality).

however, the moral concerns that underlie the anti-slavery norm are no longer enlivened. Under the material, physical view of the body of the deceased adopted in this Thesis, the *person* whose autonomy, self-determination, and equality with others was rightfully so important to themselves, others, and the law whilst they were alive has departed, and only their physical shell remains. There is a qualitative difference between the bodies of the *living* and the bodies of the *deceased* when these bodies are considered as the object of a purported property right.

Without the concerns of autonomy, equality, and self-determination enlivened, the path is open to consider the body of the deceased as being the object of multiple normatively symmetrical relationships. Here, it can be said that allowing others to stand in a relationship with the body of the deceased that only the deceased might have stood in whilst alive in no way alters the legal or moral status of the deceased as a person — because, as a person, they are no longer here. Nonetheless, the argument could be made that normative symmetry, regardless of whether it is *possible* in the case of the body of the deceased, should not be recognised because of the resulting commercialisation and commodification of the human body. This commercialisation is inappropriate, so the argument would run, given its similarity to the historic practice of slavery.

This type of argument is common in the literature surrounding the potential for property rights to be found in separated human biological material such as organs and tissue.<sup>40</sup> However, the notion that a finding of property rights necessarily introduces the human body or parts thereof onto the open capitalist market is misguided. Contrary to popular perception (and indeed some legal thought),<sup>41</sup> the institution of property (at least as conceived in this Thesis) is not concomitant with the practice of commerce, nor is the latter a direct consequence of the former. And on a narrower level, we have seen that one can exclusively determine the use to which a ‘thing’ is put so that the interest of property is invoked without alienation of that ‘thing’ for value being one of the available uses.<sup>42</sup> Given the definition of property and property rights adopted by this Thesis, then, the (very valid) concerns expressed in the literature regarding the potential commercialisation of the body of the deceased can, for the purposes of this Thesis, be set aside.

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<sup>40</sup> See, eg, Debra Mortimer, ‘Proprietary Rights in Body Parts: The Relevance of *Moore’s Case* in Australia’ (1993) 19 *Monash University Law Review* 217, 232-3; Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia*, Report No 96 (2003) vol 1, 531-2 [20.21]; Kate Greasley, ‘Property Rights in the Human Body: Commodification and Objectification’ in Imogen Goold et al (eds), *Persons, Parts and Property: How Should We Regulate Human Tissue in the 21<sup>st</sup> Century?* (Hart, 2014) 67.

<sup>41</sup> See, eg, E Richard Gold, *Body Parts: Property Rights and the Ownership of Human Biological Materials* (Georgetown University Press, 1996) 9.

<sup>42</sup> See Part 3.2 of Chapter Five.

### 4.2.2. Keeping it in the Family: Caring for the Body of a Deceased Loved One

Regardless of the absence of commercialisation concerns, however, other difficulties present themselves when considering whether each and every holder of a purported property right stands in the same position as regards the object of that right when that object is the body of the deceased. There is, after all, a generally accepted view within Australian society that the body of the deceased should be cared for by those close to the deceased in life.<sup>43</sup> That the body of a deceased loved one might just as easily be under the control of *any other person in the world* (even a complete stranger or the deceased's worst enemy) would likely be antithetical to the views of many members of Australian society. There is arguably a pre-legal norm, then, that prevents multiple individuals, regardless of their identity, from standing in normatively symmetrical positions as regards the body of the deceased, because caring for the deceased's body is a role that society has deemed should only be performed by those close to the deceased in life.<sup>44</sup>

Jesse Wall advocates this position, arguing that the exercise of the open-ended choices that control over the body of the deceased entails by anyone other than those close to the deceased in life has normative consequences.<sup>45</sup> For Wall, this is because the body of our deceased loved one remains the mediator of our relationship with the deceased, just as it was when the deceased was alive.<sup>46</sup> It is this personal relationship between a particular living individual and a particular deceased body that both grounds and justifies the ability of the former to control the latter.<sup>47</sup> This justification is, by definition, not present in any relationship of control over the body of the deceased where the still-living member of that relationship was not close to the deceased in life.

For Wall, it is because each individual at the 'still-living' end of the relationship will necessarily have a personal connection with the body of the deceased that

[i]f [that individual] were deprived of the ability to determine how and by whom the body of a loved-one is used and treated, there would be normative consequences (beyond mere allocative consequences) since [that individual] would be deprived of a set of preferences and choices that a subsequent possessor of the body cannot exercise.<sup>48</sup>

<sup>43</sup> See Victorian Law Reform Commission, *Funeral and Burial Instructions*, Report (2016) 29-30 [4.11]-[4.16] (describing the prevalent community value that is the need to respect the wishes of the bereaved).

<sup>44</sup> Note again that our focus here is on the *body of the deceased*, rather than the *right to possession* of that body. For the purposes of this discussion we are, then, putting aside the fact that we have seen the right to possession of the body of the deceased to be commonly vested in persons other than those close to the deceased in life.

<sup>45</sup> Wall, above n 3, 189.

<sup>46</sup> Ibid 63-4, 188-9.

<sup>47</sup> Ibid 189, 203.

<sup>48</sup> Ibid 189.

Here, however, Wall overlooks an important element of the normative symmetry criterion: the fact that the law of property is simply not concerned with the ‘idiosyncratically personal’ relationship that a particular individual might have with a particular ‘thing’.<sup>49</sup> Whilst I may mediate my relationship with those to whom I was close in life through their body after their death, and this relationship may form part of my own personal experience in the world, my personal attachment to the body at issue cannot, of itself, remove that body from the realm of property.<sup>50</sup>

Indeed, the only way this personal attachment could act as a reason to remove the body of the deceased from the reach of the law of property is if *all* bodies of *all* deceased persons became crucial to the way in which whoever happened to be at the still-living end of the relationship with a particular deceased body engaged with the world at large.<sup>51</sup> This stems from the requirement that all relationships between persons and every instance of the ‘thing’ that is being brought into the practice of property be personality-poor. If these relationships are, as a rule and outside of individual instances and personal emotion, personality-rich, that ‘thing’ cannot be encompassed within the practice of property.<sup>52</sup> This is not true in the case of the body of the deceased. In any given situation, the person ‘closest’ to the deceased (and therefore, presumably, having the highest entitlement to enter into a relationship of control as regards the deceased’s body under Wall’s analysis) could range from sharing a deep romantic connection with the deceased, to having a strong affection for the deceased, to having little more than a passing acquaintance with him (or even, as is sometimes the case in especially fractured family situations, an active dislike for him).

Whilst those who share a deep and personal connection with the deceased are likely to view the body of their deceased loved one as integral to their own experience within the world, this will likely not be true of the casual acquaintance, or paid employee (or disaffected family member). Consider the example of an elderly, childless person who has survived their spouse and all of their friends (hardly an extreme example, given the growing number of senior Australians, as well as the daunting statistics on senior isolation). The person closest to this individual in life might be their carer, for example, or perhaps their neighbour, or even the person who delivers their mail. As the strength of the relationship between the person deemed ‘closest’ to the deceased in life and the deceased themselves loses its emotive strength, it also loses its ‘personality-rich’ quality. It is

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<sup>49</sup> Penner, above n 15, 126.

<sup>50</sup> Ibid, discussing Margaret Jane Radin, *Reinterpreting Property* (University of Chicago Press, 1993) 35-71.

<sup>51</sup> Penner, above n 15, 126.

<sup>52</sup> See Part 4.2.1 of Chapter Five.

simply not true that each and every body of each and every deceased person will play an integral role in the experience the person placed in control of that body has in the world.

Of course, Wall might respond that his argument does not necessarily envision *one* person closest to the deceased in life suffering normative loss upon the transfer of the legally recognised relationship of control over the deceased's body to another. Rather, it sets out the broader normative idea that those close to the deceased *as a general class of persons* will suffer detrimental normative consequences if the ability to control the body of the deceased is transferred outside of that class of persons. (After all, Wall considers the body of the deceased to be *for-others*, not necessarily *for-a specific other*.)<sup>53</sup> It is suggested, however, that this position similarly fails to account for the very real possibility that a person will die with *no one* sufficiently close to them in life so as to suffer normative detriment if control over the deceased's body is removed from them and vested in another. This clarification also fails to take into account the fact that, as the sheer (and increasing) number of post-death disputes appearing before Australian courts indicates, among those close to the deceased in life there is often significant disagreement as to how the choices and preferences at play should be exercised. That is to say, even among the broad class of persons deemed sufficiently close to the deceased in life to suffer normative consequences should the ability to control the body of the deceased be exercised by someone *outside* of that class of persons, there is a strong possibility that the exercise of this ability by a particular person *within* that class of persons will cause normative consequences (beyond the mere reallocation of rights and duties) to other members of the class.

We have so far seen that Wall's notion of normative asymmetry should someone other than those close to the deceased in life control the deceased's body after death is misguided because of the 'idiosyncratically personal' relationships on which it relies. We must also, however, question the very possibility of detrimental normative consequence in this context. It will be remembered that normative asymmetry (that is, normative consequence other than the mere reallocation of rights and duties) requires a constitutive change to either the former or the current holder of the purported property right in the novel 'thing' at issue *as a person within the moral and legal systems of Anglo-Australian society*. If we consider Wall's analysis through this lens (and, to be clear, he does not claim to do so himself),<sup>54</sup> the normative loss on which he is focused, grounded in the personal and emotional as it is, must be located in the context of moral personhood. That is to say, the normative consequence beyond reallocation that he identifies, should another replace

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<sup>53</sup> See, eg, Wall, above n 3, 63-4, 188.

<sup>54</sup> Wall instead focuses his discussion of separability on the preferences and choices available to the holder of the right at issue (and the contingency or dependency of the same): see *ibid* 125-8.

those close to the deceased in life to stand in a legally recognised relationship with the body of the deceased, must be the lessening of the status of those close to the deceased as moral persons. It is difficult to see how this might be the case.

We saw in our discussion of the anti-slavery norm above that to allow another to stand in any relationship of control over our living bodies would be to lessen our status as moral humans — we would be less autonomous, less equal, and entirely incapable of self-determination. Does allowing another person to stand in the same place as us as regards the body of a deceased person, loved one or otherwise, carry the same consequences for our moral personhood? The answer must be no. My autonomy, equality with others, and ability to determine my own path in life are not altered. All that has occurred is the removal of my ability to exercise a relationship of control over some ‘thing’ that is entirely external to my own individual personhood and the vesting of that relationship in another. In short, my ability to experience the world as a moral and legal person is in no way dependent on my having the ability to control the body of a deceased loved one. Whilst my experience of the world will undoubtedly change should another enter into this relationship of control, my capacity to experience the world is not altered. Of course, the body of a deceased loved one is a unique ‘thing’ within my experience of the world, but it is a ‘thing’ — separable and external to me — nonetheless. There is no change in my moral or legal status when a person other than myself stands in a relationship of control with the body of the deceased. I remain myself, fully and completely. When it comes to this ‘thing’, my relationship and that of any other person are normatively symmetrical.

### **4.2.3. Swift and Decent Disposal of the Body**

The norms of decent and swift disposal of the body of the deceased and the important roles they play within Anglo-Australian society have already been influential in our analysis of the right to possession in Chapters Two, Three, and Four. Briefly put, these norms require that the body of the deceased be disposed of quickly, so as to avoid the creation of a nuisance or a public health risk, and decently, so as to assuage religious and moral concerns regarding the treatment of the remains of the dead. For our purposes here, and outside of the context of the right to possession, these norms operate in a pre-legal sense in that they identify the content of the relationship each individual is expected to have with the body of the deceased as a physical ‘thing’. If these norms indicate that the content of the relationship can be carried out by anyone, or any member of an identified sub-set of people, without normative consequence, they will also indicate that the body of the deceased is capable of being the subject of multiple normatively symmetrical relationships.

The most important thing to note in this regard is that the pre-legal norms that require the body of the deceased be disposed of within a reasonable period of time and in an appropriately decent manner are, on their face, blind to the identity of the person who enforces them. There is nothing inherent in these norms that says one particular person over and above any other must see these norms complied with in any given society. This is reinforced by the anonymous, de-individualised, concern with the treatment of the dead as a broad category within a particular community, the prevalence of which in Western societies has already been noted in this Chapter. What is inherent in these norms, however, and as we saw repeatedly throughout our analysis in Chapters Two, Three, and Four, is that, regardless of their identity, the responsibility for enforcing these norms must be vested in some one identifiable person. To do otherwise would invite chaos in one of two forms: either multiple competing attempts to observe these normative concerns are made, or no attempt is made. These outcomes are, of course, not guaranteed in each and every case, but the mere possibility that the body might remain undisposed of, or disposed of in a potentially indecent manner — and that the normative concerns of swift and decent disposal might remain unmet — means these pre-legal norms require individual, albeit impersonal, control.

To reinforce the point, the necessary identity of this some one identifiable person is not clear in the social norms of swift and decent disposal. Instead, the public nature of the pre-legal norms of public health and public decency allows them to be met by any member of the relevant society, and similarly means that any other member of that society could be placed under the applicable obligations to ensure these pre-legal norms are carried out. This necessarily requires normative symmetry in the relationship of each member of the affected society with the body of the deceased. The public nature of these normative concerns means that they cannot attach to any one individual more than any other. There can be no normative consequence to the parties involved in the transfer of a relationship that requires swift and decent disposal of the body of the deceased from one person to another, when each of these individuals is equally as affected (in terms of the consequences to their society's health and sense of morality) should the content of this relationship be disregarded. Nor is there any change in the content of the relationship between living person and deceased body when one living person is replaced with another — decent and swift disposal will always need to be effected.

Without meaning to put the cart before the horse regarding the proprietary nature of the right to possession, it is pertinent to note that the common law has recognised this need for the body of the deceased to be placed under the impersonal control of a third party. As we saw in Chapters Two, Three, and Four, the common law has responded to the social norms of swift and decent disposal by taking one clear, overarching approach: vesting the control of the body of the deceased

in some one identifiable individual. In placing someone into this role, the common law has turned largely to questions of practicality. It has identified broad classes of persons most capable of enforcing these norms (through both physical proximity to, and legal control over, the deceased) and ensuring the concerns they are intended to prevent are not realised. In identifying these classes of persons, we see the common law recognising the impersonalised need for control over the body, and its focus on authority rather than emotion when seeking to vest that control and meet the social norms at issue.

## **5. Conclusion: The Practice of Property Extended**

Each of the three pre-legal norms (being norms that, in this context, dictate whether the practice of property can be extended to encompass the deceased body) we have discussed, then, point towards multiple individuals being able to stand in normatively symmetrical relationships with the body of the deceased. The anti-slavery norm prevalent in Anglo-Australian society at first appears to indicate that no two people can stand in the same relationship with the body of another — indeed, that no *one* person other than the person whose body is at issue can do so. We have seen, however, that the concerns this norm invokes — concerns of autonomy, equality, and self-determination — relate to the bodies of the still-living, and are not raised when the body at issue is deceased. Further, we have seen that the concern that a finding of property rights in the body of the deceased necessarily places a commercial value on the deceased body is misguided.

The norm that the body of a deceased person be cared for by those close to the deceased in life similarly appears to undermine the possibility of normative symmetry when taken on its face. Nonetheless, our discussion of this norm has shown that the concern on which it is founded — the idea that an individual will suffer normative consequences if the ability to control the body of a deceased loved one is removed from them — is mistaken for two reasons: first, it is based on idiosyncratically personal relationships between particular individuals and particular deceased bodies; and second, this concern does not in fact lead to the normative asymmetry required in order to disrupt our property inquiry.

For their part, the norms of swift and decent disposal require that some one person be placed in control of the body. The purpose of this control remains constant, although these norms are blind to the identity of the person who enters into this relationship — clearly allowing for the existence of multiple normatively symmetrical relationships in relation to the body of a particular deceased person.

Importantly, the normative symmetry established in Part 4 relates to an entirely separable ‘thing’. Part 3 of this Chapter showed that the body of the deceased is capable of both physical (under the preferred methodology set out in Chapter Five) and conceptual (as per Penner’s approach) separation from all other persons, including the deceased themselves. These two elements combined — a separable ‘thing’ and normative symmetry — identify the body of the deceased as an appropriate ‘thing’ to be encompassed within the practice of property.

Where to from here, then? Having determined in this Chapter that it is appropriate to extend the practice of property to encompass the body of the deceased, in Chapters Seven and Eight we transition our focus to the right to possession of that body. Using the methodology set out in Part 4.3 of Chapter Five, Chapter Seven will measure the right to possession against the structural framework expected of property rights, leading to the preliminary conclusion that the right does indeed sound in property. Chapter Eight will then examine the salient features identified in Chapter Four, and ask whether the right to possession, already acknowledged as an internally consistent legal incident, also exists as an externally consistent property right, or whether non-conforming salient features require that its proprietary nature be re-examined.



# Chapter Seven

## Assessing the Proprietary Status of the Right to Possession

### 1. Introduction

In Chapter Six, we established the foundational point that the deceased body is a novel ‘thing’ to which it is appropriate to extend the practice of property. In this Chapter and the next we turn to consider *the right to possession* of that deceased body, and question whether it does, in practice, operate as an externally consistent property right.

This Chapter considers the right to possession of the body of the deceased within the context of property rights as protecting a negative liberty to exclusively determine which, if any, of an open-ended set of uses the object of property will be put, the proprietary extent of this right being determined by reference to the portion of those uses protected by an *in rem* duty of non-interference. In doing so, it uses the methodology set out in Part 4.3 of Chapter Five to assess whether the right to possession conforms to the structural framework expected of property rights.

Part 2 of this Chapter will first consider whether the body of the deceased grounds an *in rem* duty of non-interference from which none except the holder of the right to possession is exempted. This Part argues that such a duty does indeed exist, albeit only as regards the process of disposing of the body. Part 3 next considers whether the generalised, albeit narrow, sphere of liberty that surrounds the body of the deceased by virtue of this *in rem* duty of non-interference encompasses a sufficiently open-ended set of uses on the part of the holder of the right to possession so that the interest that grounds the law of property — that in exclusively determining the use to which our ‘thing’ can be put — is invoked.

### 2. Identifying an *In Rem* Duty of Non-Interference

As the first step of assessing whether the right to possession of the body of the deceased, as a pre-existing right in relation to a novel ‘thing’, conforms to the structural framework of property rights, we must consider whether the body of the deceased grounds a generalised duty of non-interference that applies to all except the holder of the right to possession.

When a particular ‘thing’ falls into a category of ‘things’ that are well-recognised as being part of the practice of property (for example, an entirely new and not-seen-before, but still recognisable, chair), a duty of non-interference on the part of all persons who do not hold a property right in relation to that ‘thing’ is assumed.<sup>1</sup> The same is not true in considerations of

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<sup>1</sup> J E Penner, *The Idea of Property in Law* (Clarendon Press, 1997) 83-4, 98.

entirely novel ‘things’. In novel situations, the duty must be constructed from existing legal norms. Such a duty will, generally speaking, protect against both specific interferences with the purported property right holder’s actual use of the ‘thing’ at issue, and unauthorised use of the ‘thing’ by someone other than the purported property right holder that dispossesses that right holder to some extent.<sup>2</sup>

The legal norms relevant to the construction of an applicable *in rem* duty of non-interference in relation to a novel ‘thing’ are those found in the law of wrongs, including those actions available in tort.<sup>3</sup> If we were to look no further than the law of tort as a means of identifying a generalised duty of non-interference in relation to the body of the deceased, however, we would quickly run into trouble. As we saw in Part 6 of Chapter Four, there is simply no such tort liability that prohibits interference with the body of the deceased as a means of protecting the right-holder’s right to possession of that body in existence within the Australian common law.

As Harris points out, however, tort liability presents only some of the picture, with the criminal law also providing relevant trespassory rules.<sup>4</sup> In this way, and mimicking English common law both past and present,<sup>5</sup> each Australian jurisdiction has a criminal offence that variably prohibits indecent, improper, and offensive interferences with the body of the deceased, as well as conduct that offers an indignity to that body.<sup>6</sup> The generalised duty of non-interference in relation to the body of the deceased that stems from the criminal law is broad in scope. *Any* interference with the body that a jury might see as indecent, improper, offensive, or as offering an indignity to the body (except those authorised at law, such as a coronial autopsy) will violate the duty owed.

This being the case, it can easily be argued that the scope of the negative liberty granted to the holder of a property right in relation to the body of the deceased — such as, for the sake of this Thesis’ argument, the right to possession of that body — must be similarly broad. That is, of course, until it is recalled that it is not only *all other persons besides the right-holder* who must refrain from interfering with the body of the deceased in a manner that is indecent or offensive;

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<sup>2</sup> Ibid 128.

<sup>3</sup> Ibid 139-41. See also Simon Douglas and Ben McFarlane, ‘Defining Property Rights’ in James Penner and Henry E Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press, 2013) 219, 224-6.

<sup>4</sup> J W Harris, *Property and Justice* (Oxford University Press, 1996) 25. See also Penner, *The Idea of Property in Law*, above n 1, 73-4, 139 (referring to the civil and criminal law of wrongs).

<sup>5</sup> For a discussion of the various common law offences in existence, see Stephen White, ‘And End to D-I-Y Cremation?’ (1993) 33 *Medicine, Science and the Law* 151, 152-4; cf Jonathan Herring, ‘Crimes Against the Dead’ in Belinda Brooks-Gordon et al, *Death Rites and Rights* (Hart, 2007) 219, 231.

<sup>6</sup> With the apparent exception of South Australia. See *Crimes Act 1900* (ACT) s 48; *Crimes Act 1900* (NSW) s 81C; *Criminal Code Act 1983* (NT) s 140(b); *Criminal Code Act 1899* (Qld) s 236(2); *Criminal Code Act 1924* (Tas) s 139(b); *Crimes Act 1958* (Vic) s 34BB; *Criminal Code Act Compilation Act 1913* (WA) s 214(2).

the duty of non-interference upheld by the criminal law will fall on the holder of the right to possession as it does every other person.<sup>7</sup> This duty is, then, *too* broad: it excludes *all*, including the holder of the right to possession, from engaging in particular conduct in relation to the deceased body. Unlike the crimes of burglary and theft that exist to protect the interests property right holders have in the objects of their property rights, the criminal provisions preventing indecent interferences with the body of the deceased cannot be said to protect the holder of the right to possession's interest in relation to that body.<sup>8</sup>

From another perspective, however, this criminal duty of non-interference is quite narrow in scope, only relating to those interferences that are indecent, improper, offensive, or offer an indignity to the body. This duty does not prohibit physical interferences with the body of the deceased that are considered *decent* within Australian society — for example, physical dealings with the body for the purposes of preparing it for disposal (by way of dressing the body, or applying makeup). All that can be said from our analysis of the duty of non-interference that arises from the criminal law is, then, that *all* are prohibited from indecently interfering with the body of the deceased. In order to establish an *in rem* duty of non-interference that attaches to the body of the deceased and is fit for purpose within the practice of property (in that it applies to all persons *bar one*), then, we must look elsewhere.

Consider that, as we saw in Part 6 of Chapter Four, the right to possession is vindicated by way of injunctive relief to see the body of the deceased returned to the possession of the right-holder so that they might dispose of that body. This relief is, however, only available provided the original interference with the body did not culminate in disposal (such disposal terminating the right to possession and the ability to obtain an injunction along with it) or culminated in indecent disposal (meaning, potentially, that the right remains active and capable of enforcement despite the fact of disposal). In the same way as the criminal law duty established above, however, injunctive relief is not available to the right-holder to prevent 'decent' interactions with the body, such as stroking the cheek of a deceased loved one, or the transportation of the body from the hospital bed to a hospital morgue. This reveals that an *in rem* duty of non-interference attaches to the body of the deceased that applies to all *bar* the holder of the right to possession *in relation to the process of disposal*, as it is only this right-holder who can demand the return of the body to them *in order to carry out the process of disposal*.<sup>9</sup>

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<sup>7</sup> See *Re Gray* [2001] 2 Qd R 35, 40 [17]-[20]; *AB v A-G (Vic)* (2005) 12 VR 485, 507 [136].

<sup>8</sup> Instead, as we saw in Chapters Two and Four, this criminal law duty protects the public's interest in the swift and decent disposal of human remains.

<sup>9</sup> In making this claim I am aware that this duty is not drawn from the law of wrongs *per se*.

The *in rem* duty of non-interference that is established by the right-holder's ability to seek injunctive relief to have the body of the deceased that is the object of their right to possession returned to them — albeit within the narrow context of disposal — is supported by other sources. The same criminal statutes that prohibit *any* indecent treatment of the body of the deceased by *any* person also acknowledge an additional legal relationship between the body of the deceased and *one identifiable person*. Section 236(1) of the *Criminal Code Act 1899* (Qld), for example, makes it an offence for an individual to neglect to perform a duty imposed on them by law touching on the disposal of a deceased body.<sup>10</sup> These provisions clearly envisage that some identifiable individuals have particular responsibilities with regard to the body of the deceased (these responsibilities relating to disposal), and are expected to engage with the body of the deceased in a way not required of other individuals. And as we saw in Chapters Two, Three, and Four, the common law has similarly developed a requirement that some one identifiable person engage with the body of the deceased in a manner not required of others: this person being the individual under a duty to dispose of that body (and, consequently, the holder of the right to possession of that body, as well as a financial liability to finance that disposal).

Matching the criminal and civil duty imposed on one person to see to the disposal of the body is an understanding within society that, if I am not charged with the duty of disposal in relation to a particular corpse, I should exclude myself from physically engaging in the disposal of that corpse. Such an understanding is clear in the social norms that surround the body of the deceased. One such social norm, introduced in Chapter Six, governs the practice by which we exclude ourselves from those 'things' that are clearly in the possession of another.<sup>11</sup> To grab the book held in the hands of my office neighbour from her possession would, absent extenuating circumstances, be a violation of this strong social norm. Similarly, taking this book from her desk while she is in the kitchen making a cup of coffee would raise some eyebrows. But what if we encounter an object and cannot immediately ascertain whether it is in the possession of another? Balganesch here argues that a norm of inviolability has developed so that when we come across an object to which we personally do not have a legitimate claim, we presume that someone else has a legitimate claim and stay away from that object.<sup>12</sup>

When this conception of 'things' we encounter in the world as being inviolable (that is, assumed to be under the control of another) is combined with the strong social norms that have developed

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<sup>10</sup> As do s 214(1) of the *Criminal Code Act Compilation Act 1913* (WA), s 139(a) of the *Criminal Code 1924* (Tas), and s 140(a) of the *Criminal Code Act 1983* (NT).

<sup>11</sup> See Part 4.1 of that Chapter.

<sup>12</sup> Shyamkrishna Balganesch, 'Demystifying the *Right to Exclude*: Of Property, Inviolability, and Automatic Injunctions' (2008) 31 *Harvard Journal of Law and Public Policy* 593, 621-2.

specifically in the context of the body of the deceased — namely that a body must be disposed of quickly and decently, a feat best achieved by vesting control of the body in one identifiable person — we can more accurately visualise the *in rem* duty of non-interference that is relevant for our present property analysis. It is here argued that there exists within the Australian common law a broad, socially recognised duty imposed on all persons not to interfere with the disposal of any bodies they come across in their day-to-day lives, save those they have the legally recognised right to exercise control over. As we have seen, this socially recognised duty not to interfere with the process of disposal of a body that one has no right to exercise control over is matched by a legal ability on the part of the person who *has* the right to exercise control over the disposal process to have the body of the deceased returned to their possession.

Locating the relevant duty in the process of disposal ensures that this duty meets the personality-poor standard that is required of all *in rem* duties of non-interference within the practice of property.<sup>13</sup> The social norms that require swift and decent disposal of the body necessitate a general recognition on the part of all persons, other than the person charged with the disposal of the body of a particular deceased person, that the body at issue is under the control of *another person*. The fact of disposal compels the understanding that if you are not personally responsible for the disposal of a particular body, *someone else must be*. There is no personality involved in this transaction; I am not variably entitled to interfere or not interfere with the process of disposal depending on who has the right to possession in relation to a particular deceased body. Nor does the person who stumbles across a deceased body need to enquire as to whether there is a person out there in the world responsible for its disposal;<sup>14</sup> the nature of the corpse and the social norms that surround it require that someone must be.

The impartial and personality-poor nature of this generalised duty of non-interference can be contrasted with the example of a contract undertaken between the holder of the right to possession and a funeral director. Should this contract stipulate that the deceased's body not be interfered with outside of, say, standard embalming procedure, that duty of non-interference (outside of standard embalming procedure) is personal to the parties to the contract. Should the body be interfered with (by, say, the unauthorised removal of locks of hair), this is a violation of the *in personam*, contractual duty of non-interference owed by the funeral director to the right-holder.

It must be reiterated, however, that the *in rem* duty of non-interference that we have just established prohibits me from interfering with the process of disposal — because the various

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<sup>13</sup> See Part 3.2 of Chapter Five.

<sup>14</sup> Penner, *The Idea of Property in Law*, above n 1, 84.

social norms at play tell me this responsibility is held elsewhere — but does not extend to prohibit me from interacting with the body in a way that does not affect the process of disposal and is not covered by the broader *in rem* duty that prohibits indecent or improper interferences. Thus, I can stroke the cheek of my deceased grandmother, regardless of the fact that the duty of seeing to the disposal of her body is imposed on another. The *in rem* duty that attaches to the body of the deceased and is applicable to our property analysis here is that duty, grounded in both civil and criminal law, that all others besides the holder of the right to possession (*qua* property right holder) exclude themselves from the process of disposing of the particular deceased body to which that right attaches. It extends no further.

Nonetheless, even this very narrow duty of non-interference serves its purpose in terms of the conduct it protects against. Interferences with the *actual* use of the body by the right-holder are rare (because, as the discussion in Part 3.2 of this Chapter reveals, this would involve *interference with the actual act of disposal* — this being the only use available to the right-holder),<sup>15</sup> but the right-holder can have another's inconsistent use of the body (in the form of the making of alternative disposal arrangements) halted and the body returned to their possession.

It is true, however, that the vast majority of post-death disputes (and in particular burial disputes) arise *because* multiple individuals believe they ought to have the right to possession in relation to a particular deceased body, and are refusing to exclude themselves from the disposal of that body as a result. Nonetheless, this does not point to the absence of a generalised duty of non-interference that exempts the right-holder. One knows which, if any, deceased body one has the right to possession of and control over (and can recognise that this does not extend to the right to take possession and control of all other deceased bodies) in the same way one knows which, if any, plot of land one has the right to possession of and control over when walking down a residential street. One does not need to know who holds the right to possession over a particular deceased body to know that it is not you and as such you should not interfere with it.<sup>16</sup> Whilst there might be some *legal* confusion as to who exactly is the legitimate holder of the right to possession as regards any particular deceased body, this is no different from legal disputes as to the legitimate holder of the fee simple in land. There will always, however, be only one legitimate holder (or, at most, a confined list of co-owners) of the fee simple in land, and there will always

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<sup>15</sup> Here, note the possibility that a jury might find interference with the actual act of disposal to be an improper, indecent or offensive interference that offered an indignity to the body (that is, as a crime in-and-of-itself): see above n 6 and text accompanying. See also *R v Cheere* (1825) 4 B & C 902; 107 ER 1294 (criminal indictment for interrupting a burial); *Cemeteries Act 1952* (NT) s 26 (interference with burial ceremony subject to penalty).

<sup>16</sup> Penner, *The Idea of Property in Law*, above n 1, 75, 86; Thomas W Merrill and Henry E Smith, 'The Morality of Property' (2007) 48 *William and Mary Law Review* 1849, 1853-4.

be only one holder of the right to possession (with the practical exception of joint executors, who, in any case, share the one role of executor).

Clearly, then, the holder of the right to possession (via their recognised duty to dispose of the body of the deceased) is, under the authority of both the civil and criminal law, as well as established social norms, able to physically engage with the body of the deceased in a manner in which all others cannot. That is, there exists a sphere of negative liberty in which the holder of the right to possession can operate, but from which all other persons must exclude themselves. Importantly, this generalised duty of non-interference that prevents any person other than the legally recognised right-holder from controlling the body of the deceased during the process of disposal fills a gap that was alluded to in Chapter Four: the absence of a recognisable Hohfeldian right-duty relationship between the right to possession and another legal incident. It will be recalled that Part 2 of Chapter Four refuted the existence of any bilateral relationship between the right to possession and either the duty to dispose or the duty of an English parish minister to provide the deceased with a Christian burial. The *in rem* duty of non-interference applicable to all bar the right-holder within the context of disposal fills this gap by providing a duty that directly engages in a bilateral relationship with the right to possession of the body of the deceased.

We have succeeded, then, in establishing a generalised duty of non-interference with the body of the deceased on the part of all persons other than the holder of the right to possession — albeit in the narrow context of the process of disposing of the body of the deceased. The right to property, however, protects our interest in *use*, not our interest in excluding others from engaging with the object of our property right. This being the case, let us now move on to consider the scope of the negative liberty granted to the right-holder by virtue of this duty of non-interference.

### **3. Does the Right to Possession Protect the Ability to Exclusively Determine Use?**

We saw in Chapter Five that property rights protect our interest in exclusively determining the use to which our ‘thing’ will be put. In order for this interest to be invoked, the duty of non-interference that attaches to the ‘thing’ at issue must protect a sufficiently open-ended set of uses — a sphere of negative liberty — so that the purported property right holder can truly be said to *determine* use.<sup>17</sup> This Part argues that the negative sphere of liberty granted to the holder of the right to possession in relation to the body of the deceased by virtue of the *in rem* duty of non-interference just now established in Part 2 is both sufficiently open-ended and sufficiently

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<sup>17</sup> See discussion in Parts 3.2 and 4.3 of that Chapter.

exclusive in terms of the uses it encompasses (these uses importantly including the use that is the proper function of the deceased body as artefact) so as to invoke the property interest.

Just what, however, does it mean to use one's 'thing'? Property scholars have defined 'use' in very broad terms. For Penner, for example, 'use' refers to any purposeful disposition the holder of a property right can make of a 'thing' that can be interfered with by others.<sup>18</sup> 'Use' thus includes abandoning the 'thing', sharing it with others, licensing it to others (exclusively or otherwise), and gifting it to others,<sup>19</sup> as well as the conscious decision to *refrain* from making active use of the 'thing' entirely.<sup>20</sup> That 'use' can also involve the creation of additional, lesser interests (including lesser property rights) in the same 'thing' is undisputed.<sup>21</sup> Similarly, Smith notes that 'use' can include non-consumptive uses such as conservation,<sup>22</sup> and Claeys gives 'use' a 'capacious' definition encompassing 'any purposeful, beneficial, and justifiable engagement a person can have with an ownable resource'.<sup>23</sup>

Importantly, even those uses that are required by law remain viable uses for the purposes of the property inquiry.<sup>24</sup> That is, the practice of property is not blind to those uses that I have no choice in undertaking as regards my 'thing'. Such uses are certainly not necessary for the practice of property, however, and whether they are sufficient is a fundamental question to keep in mind as we move to consider the exact uses to which the body of the deceased can be put.

### **3.1. The Body of the Deceased as an Artefact with a Proper Function**

Vital to an analysis of use as Part 3.2 will explain, and a necessary preliminary step in line with the methodology set out in Part 4.3 of Chapter Five, however, is the identification of the socially determined purpose of the body of the deceased — that is, its proper function as an artefact within society.

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<sup>18</sup> Penner, *The Idea of Property in Law*, above n 1, 70.

<sup>19</sup> *Ibid* 103, 152.

<sup>20</sup> *Ibid* 70.

<sup>21</sup> See, eg, *ibid* 77-8. The residential lease is the classic example. Note, however, that these lesser interests cannot contradict each other — that is, a residential lease of Blackacre for the same three years cannot be granted to both Amy and Alice. The same is true for the residual property right held by the grantor of any lesser interest. Property interests must be mutually exclusive: James Y Stern, 'The Essential Structure of Property Law' (2017) 115 *Michigan Law Review* 1167, 1177-83.

<sup>22</sup> Henry E Smith, 'Property as the Law of Things' (2012) 125 *Harvard Law Review* 1691, 1702

<sup>23</sup> Eric R Claeys, 'Property, Concepts, and Functions' (2019) 60 *Boston College Law Review* 1, 46.

<sup>24</sup> J E Penner, 'Misled by 'Property'' (2005) 18 *Canadian Journal of Law and Jurisprudence* 75, 91.

To reproduce the definition given in Chapter Five, a ‘thing’s’ proper function is ‘(a) a typical activity (b) that brings about a valuable (c) goal (d) that the [‘thing’] is expected to perform *because* it realizes the goal.’<sup>25</sup> As something of a shorthand, then, the proper function of a particular ‘thing’ is the most prominent and easily identifiable use to which that ‘thing’ can be put. That said, a ‘thing’ can *be expected* to perform a particular function (or for a confined list of particular functions), whilst also being able to be put to a variety of other uses (and being valued for this ability). A chair, for example, can be used to provide the necessary structural support to sit comfortably at a table, or to recline in front of the television. At a different time, however, that same chair might be used as a means of accessing the spider on the ceiling, or of ensuring that a particular door cannot be opened. In some situations, a chair can be used to provide the necessary structural support, not to sit or recline in, but to lean back against as you sit on the floor, or to rest your feet on top of as you sit on the couch. In the same way, agricultural land can be used as a suitable location for children to play hide and seek in, or as a means of producing grass clippings for use in a community compost heap. Neither of these is the *proper function* of agricultural land, however. Nor is being stood on to reach the ceiling or being wedged against a door the *proper function* of a chair.

Of course, when we speak of ‘things’ *being expected* to perform a particular purpose, our tendency is to think of ‘things’ expressly *created* for that purpose.<sup>26</sup> It is easy to speak of the purpose of the chair being to provide structural support for those who wish to sit down, for example, because the chair was brought into existence with this exact purpose in mind. This is true despite the fact that it can perform a variety of other uses.<sup>27</sup> Nonetheless, ‘things’ that exist in the natural world (that is, ‘things’ that are not created by humans) can also have artefact functions attached to them by the society in which they exist.<sup>28</sup>

The body of the deceased is such a natural thing.<sup>29</sup> The question then becomes: what is the *purpose* to which the body of the deceased, as a natural ‘thing’, is socialised in our world? What is the proper function of the body of the deceased? The position taken in this Thesis is that, consistent

<sup>25</sup> Claeys, above n 23, 20 (emphasis in original).

<sup>26</sup> Indeed, the traditional definition of ‘artefact’ within philosophy is ‘[an object] made intentionally, in order to accomplish some purpose’: Beth Preston, *Artifact* (21 June 2019) Stanford Encyclopedia of Philosophy <<https://plato.stanford.edu/entries/artifact/>>. As stated in Chapter Five, this Thesis does not adopt this element of the philosophical definition of artefacts.

<sup>27</sup> A neat overview of the different approaches taken in the philosophical literature to standard, proper functions as compared with alternative, occasional functions can be found in Beth Preston, ‘Philosophical Theories of Artefact Function’ in Anthonie Meijers (ed), *Philosophy of Technology and Engineering Sciences* (Elsevier, 2009) 213.

<sup>28</sup> See John R Searle, *The Construction of Social Reality* (Free Press, 1995) 14-16.

<sup>29</sup> Even the murderer cannot be said to have *created* the body of their deceased victim in the sense of *bringing it into existence*. They have merely instigated the organic, biological process of death.

with our detailed discussion of the right to possession in Chapters Two, Three, and Four, the purpose for which the body of the deceased exists in our society is solely to be disposed of. Here we are reminded that the *purpose* of a particular ‘thing’ is distinct from the plurality of other uses (and the value attached to those uses) associated with that ‘thing’. In the same way as both a chair and a piece of agricultural land, the body of the deceased can be *valued* in different ways at different times by different people.<sup>30</sup> The body can, for example, be valued as the physical remains of a deceased loved one. It can be valued as a much-needed source of organs within the national organ donation scheme. It can even be valued as the material for a new exhibit within the travelling *Body Worlds* exhibition.<sup>31</sup> None of these is the *purpose* of the body of the deceased; none is the *reason for the corpse’s existence within society*. They are merely other uses to which the body of the deceased can be put.

There is a clear understanding within modern Australian society that the body of the deceased exists solely for the purpose of disposal — to borrow our shorthand definition, disposal is the most easily recognised and understood use to which the body can be put. There is no question of the *prima facie* position within Australian society being that, following death, the body should be made available to anatomy schools for dissection, for example (although of course, anatomy schools and the students within them place value on the body being used in such a way). This is true even when the body is put to another use. If a body is used as a source of organs, or as a teaching tool in a school of anatomy (or as the subject of a state-sanctioned autopsy, or even, perhaps, as a *Body Worlds* exhibit, and so on), at the conclusion of this particular use, the socially determined purpose of the body remains disposal. That this disposal must take place in a decent manner reflects both the value placed on individual, particular bodies as the bodies of individual, particular loved ones, as well as the society-wide concern that the treatment of the physical remains of a society’s members reflects the overall health of that society.

Given that the proper function of the body of the deceased is to be disposed of, and by way of concluding this discussion, it must be noted that the requisite degree of authority over the body that must be retained by the holder of a property right in relation to that body in the face of restrictions placed on that right is the authority needed to see to the disposal of the body. This conclusion is of great importance to Chapter Eight’s analysis of the various restrictions placed on the exercise of the right to possession. Now, however, we turn to the issue of use.

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<sup>30</sup> E Richard Gold, *Body Parts: Property Rights and the Ownership of Human Biological Materials* (Georgetown University Press, 1996) 10 (a particular ‘thing’ can be valued for many different reasons, and these reasons can vary at different times and according to different people).

<sup>31</sup> See *Body Donation*, *Body Worlds* <<https://bodyworlds.com/plastination/bodydonation/>>.

### 3.2. The Uses to which the Body of the Deceased Can be Put

The question for this Part is whether the negative liberty that is enjoyed by the holder of the right to possession encompasses a sufficiently open-ended set of uses as regards the body of the deceased so that the right to possession can be said to invoke the interest that grounds the law of property: that is, our interest in exclusively determining the use to which our ‘thing’ is put. These uses cannot exist as a prescribed list. And, whilst the available uses can be restricted at law, there must be sufficient discretion on the part of the purported property right holder as to which, out of all the available uses minus those very few that have been restricted, the ‘thing’ at issue is put.<sup>32</sup>

Does the holder of the right to possession enjoy such a sufficiently open-ended set of uses as regards the body of the deceased? As a starting point for our analysis, note that many of the standard uses identified by property theorists (and set out above) are not applicable in the case of the right to possession. The right-holder cannot abandon a corpse, for example — to do so would be to commit a criminal offence, and civil actions might also arise. Nor can they physically divide and share the corpse among warring relatives (although note that the same is not true of cremated ashes). Indeed, as we have seen, all that the right-holder is empowered to do as regards the body of the deceased — all that the generalised duty of non-interference reserves to them, and them alone — is see to the *disposal* of that body. That is to say, and for the sake of absolute clarity, the sphere of negative liberty enjoyed by the holder of the right to possession and protected by the *in rem* duty of non-interference extends only to encompass the process of disposal.

Here, an important point must be made. We just now concluded in Part 3.1 that the purpose for which the body of the deceased exists within society — that is, its proper function — is to be disposed of. That the *in rem* duty of non-interference allows, and facilitates, the achievement of this proper function is of vital importance to our property analysis. As per the methodology set out in Part 4.3 of Chapter Five, for an individual to claim a property right in relation to a particular ‘thing’, one of the uses available to that individual *must be* the proper function of that ‘thing’. There is clear alignment, then, between the proper function of the body of the deceased and the use available to the holder of the right to possession by virtue of the generalised duty of non-interference that the body of the deceased grounds. The right to possession satisfies this most basic of criterion for admittance into the taxonomical branch of the private law that is property.

Despite meeting this basic criterion, however, it remains to be seen whether, within the context of disposal, the right-holder has a sufficiently open-ended set of uses available to them so as to

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<sup>32</sup> See Harris, *Property and Justice*, above n 4, 29-32.

invoke the property interest. A list of one available use, after all, will not meet this standard, regardless of whether this one use is the proper function of the ‘thing’ at issue. And here we face an additional hurdle: not only is the list of uses available to the right-holder, at least on its face, a list of one, this one available use is prescribed by law. In this regard, and whilst, as we have seen, engaging in a particular use under a duty imposed by law is still a valid use for the purposes of property,<sup>33</sup> ‘[it] is quite clear that we would generally balk at the idea that property ownership gave us the right to the use of a thing, but not the right to decide which use that was.’<sup>34</sup> Can the right to possession of the body of a deceased person really be said to comply with the structural framework of property rights when it only appears to allow for the object of that right to be put to one use (being disposal), with this one use being required by law?

J W Harris answers this question firmly in the negative. For Harris, the restriction on the available uses to which the body of the deceased can be put (an enumerated list essentially limited to disposal) means that the right to possession cannot be a property right. Whilst sufficient trespassory rules are in place that prevent interactions with the corpse by persons other than a select individual or individuals, the enumerated nature of the role-duties and disposal-powers (to borrow Harris’ terminology) imposed on these select individuals deprive the right of any sense of open-endedness.<sup>35</sup> Hence, rather than sounding in property (or, again to borrow Harris’ terminology, rather than falling on the ‘ownership spectrum’), the right is a ‘protected non-property holding’.<sup>36</sup>

There are two issues with Harris’ analysis. The first is minor, and relates to the fact that, in conducting his analysis of the right to possession and its position on his ‘ownership spectrum’, Harris appears to place some reliance on the traditional rule that there is no property in a corpse. In his 1996 book, for example, he ends his brief discussion of the nature of interests in the corpse with the statement ‘[c]orpses could not be owned at common law.’<sup>37</sup> It is unclear how this statement relates to his analysis of protected non-property holdings and the enumerated nature of the potential uses to which the body of the deceased can be put, but it reflects an underlying belief

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<sup>33</sup> See above n 24 and text accompanying.

<sup>34</sup> J E Penner, ‘Hohfeldian Use-Rights in Property’ in J W Harris (ed), *Property Problems: From Genes to Pension Funds* (Kluwer Law, 1997) 164, 166.

<sup>35</sup> See J W Harris, ‘Who Owns My Body’ (1996) 16 *Oxford Journal of Legal Studies* 55, 75-6.

<sup>36</sup> J W Harris, ‘What is Non-Private Property?’ in J W Harris (ed), *Property Problems: From Genes to Pension Funds* (Kluwer Law, 1997) 175, 184-5; Harris, *Property and Justice*, above n 4, 351. See also at 111 (discussing the nature of a protected non-property holding). Note that Harris does not spend more than a few sentences on his analysis of rights relating to the corpse. His discussion represents more of a throw-away idea than an established position. Nonetheless, we will take it at its full force.

<sup>37</sup> See Harris, *Property and Justice*, above n 4, 351 (citing J C Smith, *The Law of Theft* (Butterworths, 7th ed, 1993) 32).

that no interest relating to a corpse can fall on the ownership spectrum. As was stated in Chapter One, this Thesis does not adopt the no-property rule as its starting point.

The second issue with Harris' identification of the right to possession as a protected, but entirely non-property, relationship between the right-holder and the body of the deceased lies in his insistence that the number of uses available to the right-holder in relation to the body are so limited and enumerated that the property interest cannot be invoked. This Chapter rejects this position.

At first glance, it might appear that the right to possession of the body of the deceased, by virtue of the narrow *in rem* duty of non-interference and exactly as Harris claims, protects only a very confined set of uses. Things are not as they first appear, however. Whilst the generalised duty of non-interference only protects the right-holder's use of the body in the sense of 'disposing of' the body, 'disposal' in itself represents an entirely open-ended set of potential uses. Even at a very basic level, for example, two possible uses exist in that the body can be disposed of by either burial or by cremation. Move beyond this basic level, however, and an unquantifiable series of potential uses emerge.

Consider that, as we saw in Chapter Four, the right to possession continues in existence until the ashes that result from cremation are ultimately disposed of. This means that the number of uses available to the right-holder in the cremation context is almost endless. Ashes can, of course, be left in an urn on the mantelpiece, or scattered in a place loved by the deceased in life, or divided among relatives for individual disposal ceremonies. They can also, however, be made into pieces of jewellery or gemstones, catapulted into space or mixed with tattoo ink, placed inside fireworks or the furnace of a steam train, or used to create a vinyl record, an artwork, or a piece of stained glass. There are even reports that Keith Richards mixed some of his father's ashes with cocaine and snorted them.<sup>38</sup>

It is also important to note that, as more and more disposal mechanisms — such as aquamation and cryopreservation — come to be recognised at law, the possible uses to which the body of the deceased can be put, all under the umbrella of 'disposal', will only increase. In each case, it is the determination of use by the right-holder, rather than the use itself, that is key.<sup>39</sup>

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<sup>38</sup> Richards later clarified that this had only occurred when some of the ashes had fallen on to the table by accident. Nonetheless, he appears open to his daughters repeating the process after his own death: Luke Morgan Britton, *Keith Richards Wants His Daughters to Snort His Ashes: 'I'll Give Them a Straw'* (10 September 2015) NME <<https://www.nme.com/news/music/keith-richards-9-1225978>>.

<sup>39</sup> Penner, 'Hohfeldian Use-Rights in Property', above n 34, 166-7.

The question of a sufficiently open-ended set of uses is necessarily one of scale. If one defines ‘use’ at an abstract, umbrella level, the use to which the dead body can be put is limited to disposal. It would thus follow that the right-holder has the right to dispose of the body (that is, to make use of it), but not the right to determine the use to which the body is put (both because there is only one available use, and that use is required by law). If, on the other hand, one defines ‘use’ at a more specific level, the list of uses to which a corpse can be put multiplies dramatically. ‘Disposal’ remains the sole umbrella use that the body can be put towards, but the various uses nested within this one, broad use are almost infinite.

The practical, specific approach to use is to be preferred. Consider the following analogies. A plot of land might be zoned for residential use, but no one can deny that building a high-rise apartment block is an entirely different use of that land than building a Californian-style bungalow. Certainly, there is no value in taking the position that building the apartment complex and building the bungalow are merely two different ways of carrying out the one use that is erecting a residential structure. Similarly, land that has been zoned for the sole use of agriculture can be used to plant corn, or for the grazing of cattle or sheep. It might even be used for the production of medical grade marijuana. These are all modes of agriculture. To refer to these potential practices as all being modes of performing the one umbrella use to which the agricultural land can be put serves no purpose whatsoever.

Of course, the analogies of residential and agricultural land are not perfect. The difference is that one can choose *not* to develop a block of land, or to cultivate corn, graze livestock, or grow marijuana (indeed, one can choose not to put their land to any use at all). As we have seen repeatedly, however, one cannot choose *not* to dispose of the body of the deceased.<sup>40</sup> In this regard, it is vital to recall that non-use is just as much a use of a ‘thing’ as any active use.<sup>41</sup> The decision not to drive my car or not to wear my favourite outfit does not reflect a *non*-use on my part; in fact, it reflects the opposite. The decision not to drive and not to wear are uses of my property in the same way as choosing to drive and choosing to wear. In the context of the right to possession, then, the fact that non-disposal of the body of the deceased is not permitted by law reflects only one use being withheld from the right-holder’s otherwise still very open-ended set of uses that exist under the umbrella of disposal. (Here, note that this use is withheld from the right-holder *a priori*, rather than removed from the right-holder via an *ex ante* restriction, as a

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<sup>40</sup> And retain the right to possession, that is. As we saw in Part 5 of Chapter Four, unwillingness or inability to dispose of the body on the part of the right-holder can result in that right being transferred to another.

<sup>41</sup> See n 20 above and text accompanying.

result of the scope of the *in rem* duty of non-interference limiting the uses available to the right-holder from the outset.)

In any case, the umbrella use (identical to the deceased body's proper function) that is allowed — being disposal — is a use of such strong normative character so as to defeat objections based on the non-existence of its inverse use of non-disposal. Disposing of the body of the deceased (or indeed any 'thing' that is the object of a property right), and to dispose of it in such a way that no other person can *ever* assert a property right in relation to that 'thing' again is an immensely powerful use. Disposal — which perhaps could be analogised with 'destruction'<sup>42</sup> — ensures that the property right holder responsible for that disposal is the final, if not the only, person who will ever hold a property right in relation to that 'thing'. Following disposal or destruction, the 'thing' has been removed from the practice of property entirely. Restoring it is impossible. In this way, then, the umbrella use of 'disposal' that is available to the holder of the right to possession is an absolute assertion of exclusive use; of exclusive control over the 'thing'. Once disposal has been effected, there will be no 'thing', and there will be no property right. The fact that this assertion of control — this removal of the body of the deceased from the practice of property — is required by law does not alter the fact that the act of disposal, of preventing any other person from ever asserting a property right over the 'thing' ever again, is a use of the body that has immense normative force.

Further, the discussion above has taken a very narrow view of the uses that sit under the umbrella of 'disposal'. Alongside the nearly infinite number of uses associated with burial and cremation (and other disposal mechanisms) sit other uses. The holder of the right to possession can, for example, choose to cremate the body of the deceased, in the process going against the strongly-held wishes and perhaps even religious beliefs of others who have survived the deceased.<sup>43</sup> In this context, the body, in line with its socially determined purpose and its proper function, is being put to the use of disposal. It is also, however, being used for another purpose: to frustrate the wishes of other survivors, causing pain as a result. 'Piggy-backed' onto the use that is disposal as this separate, additional use is, it too is protected by the *in rem* duty of non-interference that requires all others not interfere with the right-holder's disposal of the body of the deceased. In this way, the deceased body can serve as the locus for a variety of other uses beyond the umbrella use that is disposal.

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<sup>42</sup> But not *wrongful* destruction: see J E Penner, *Property Rights: A Re-Examination* (Oxford University Press, 2020) 197.

<sup>43</sup> At least in the absence of any statutory provision to the contrary: see Part 4.2.1 of Chapter Four.

A possible argument might be that, when the right-holder chooses to cremate the body against the wishes of other survivors, the body is not in fact being ‘used’ to cause emotional distress to those survivors. The use remains disposal, any emotional distress caused is merely a repercussion of that use. It is argued here, however, that the position set out in the previous paragraph is the stronger one. After all, to continue the opposed cremation example, the body is being ‘used’ with a purpose (to cause pain to those close to the deceased) that can be interfered with by others<sup>44</sup> — if, perhaps, I misunderstood the situation and in fact no distress is caused by my actions, or if the other party is a better person than I am and chooses to put aside their emotion in the spirit of coming together in grief. In the same way, I might choose to use my t-shirt as a means of clothing myself by putting it on before I leave the house in the morning (almost certainly the use that aligns with the proper function of the t-shirt). However, if I do so knowing that, sitting at the desk next to me, you will undoubtedly see the t-shirt, and that the slogan on the t-shirt will cause you distress, and indeed have so selected this particular t-shirt for this exact reason, is causing you distress not also a use to which I have put the t-shirt? The active use of the body by disposing of it in a particular way designed to cause distress to another is nothing more than the proverbial killing of two birds (that is, the achieving of two uses) with one stone.

Clearly, then, within the negative sphere of liberty granted to the holder of the right to possession by virtue of the *in rem* duty of non-interference that attaches to the body of the deceased, the right-holder has a sufficiently open-ended set of means of disposing of the body, alongside a series of other uses, so as to invoke the interest that grounds the law of property: our interest in exclusively determining the use to which our ‘thing’ is put. Rather than the relationship between right-holder and deceased body being protected at law, but entirely non-proprietary, as Harris suggests, then, the existence of this sufficiently open-ended set of uses on the part of the right-holder, with the proper function of the body of the deceased being one of the available uses, points to the right to possession as being a property right. The question now is whether the right to possession allows the right-holder to *exclusively* determine the use to which the body of the deceased is put.

### **3.3. The Right to Possession and Exclusive Determination of Use**

Under the theory of property adopted in this Thesis, merely having a sufficient range of uses available to the holder of a particular right in relation to a particular ‘thing’ is not sufficient to identify that right as proprietary. The right holder must also be able to determine which, if any, of the available uses they will choose to engage their ‘thing’ in, and this determination must be

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<sup>44</sup> See Penner’s definition of ‘use’ set out in the text accompanying n 18 above.

exclusive. Such exclusive determination of use is evident in what we know of the history of the right to possession. We saw in Chapter Two that, throughout its development, the right to possession and its related legal incidents consistently vested the necessary control function required to see to the disposal of the body of the deceased in some one identifiable individual. Chapter Two's analysis also made clear the fact that this control function was vested in this identifiable individual *to the exclusion of all others*, this being necessary to meet the normative concerns to which the right (and its related incidents) was developing in response.

In the modern context, it first warrants reiteration that the right to possession in its modern form will always vest in *one* person (or multiple persons fulfilling one role, as in the case of joint executors), and one person alone. As we saw in Chapter Three, whilst responding to social concerns regarding the *identity* of this one person, the increasingly expansive approaches to resolving intestate burial disputes taken by Australian courts in recent years have not altered this basic fact. Even as the classes of persons in whom the right to possession is vested by courts expands, the right itself remains exclusive.

That this is so is clear in the fact that the common law has not responded to the newly emerging social concerns that surround the modern deceased body by creating a regime of shared or communal control. Whilst acknowledging, for example, that particular cultural beliefs warrant variation from the traditional approach of vesting the right to possession in the person most entitled to a grant of administration,<sup>45</sup> courts have not gone so far as to acknowledge that some of these same beliefs are founded on an idea of community-based mourning. Instead, even when varying from the presumptive administrator rule in order to appropriately encompass these cultural beliefs, courts have moulded these beliefs to conform with the idea that control over the body must be vested in one person. This reflects in part the adversarial nature of the common law — one party against another, with the court to decide in favour of one party as against the other. And of course, many individual parties to burial disputes will in fact represent the views of a particular faction of the family or community at issue. Regardless, that courts continue to approach these disputes as conflicts between two individual claimants to the right to possession, even within their increasingly nuanced, flexible, and expanding approaches to the vesting of that right, speaks to the individualised nature of the control that the right to possession carries with it.

Beyond the right to possession being 'exclusive' in the sense that it is always vested in one person, however, the exclusive nature of the decision-making capability conferred on that one person by virtue of the right to possession is clear. In Chapter Four, we spent some time analysing the nature

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<sup>45</sup> See discussion in Part 4 of Chapter Three.

of the modern right to possession as an ‘absolute entitlement’ — this being an essential salient feature of that right. An important element of this discussion was our analysis of the refusal on the part of Australian courts to acknowledge anything more than a moral or social duty on the part of the holder of the right to possession to take into account the opinions and beliefs of others who had survived the deceased but did not enjoy the status of right-holder. Thus, we saw that a fundamental principle of the Australian common law of the dead, as set out by Young J in *Smith v Tamworth City Council*,<sup>46</sup> is that ‘a person with the privilege of choosing how to bury a body is expected to consult with other stakeholders, but is not legally bound to do so’.<sup>47</sup> Nonetheless, courts have interpreted this principle (‘Principle 3’) as requiring only an *expectation* of consultation with other stakeholders.<sup>48</sup>

In Chapter Four we examined this Principle through the lens of the social norms of swift and decent disposal, and concluded that the absence of a legal requirement to consult with others works to focus decision-making power to ensure the body is disposed of appropriately. Here, we are considering this Principle in the context of the exclusivity of the right-holder’s decision-making regarding the disposal of the body of the deceased. In this context, the fact that legal enforcement of this Principle is not possible (not even by way of lip service — consider, for example, the fact that mandatory mediation is never countenanced) is important. The impossibility of judicial enforcement of Principle 3 emphasises that the right-holder has an absolute right to determine how the body in their possession is disposed of, and to engage in the physical act of disposal. This absolute right allows for the complete exclusion of the wishes of all other parties. And it can be *complete* exclusion — the holder of the right to possession can, for example, choose to ultimately dispose of cremated ashes by scattering them over the water, necessarily preventing loved ones of the deceased from visiting a particular place of disposal to pay their respects and express their affection. Similarly, the right-holder may choose to retain the ashes in a container and place them within their house, or to bury the body on private property, the common law rules of trespass (alongside the criminal law) preventing loved ones from entering onto that private property to visit the remains.<sup>49</sup>

Importantly, as we saw in Chapter Four, the decision of the right-holder to exclude (or, conversely, consider) the wishes of others close to the deceased is one made outside of the legal sphere. Justice Young’s Principle 3 is nothing more than a judicial tap on the shoulder to holders

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<sup>46</sup> (1997) 41 NSWLR 680.

<sup>47</sup> *Ibid* 694.

<sup>48</sup> See discussion in Part 4.4 of Chapter Four.

<sup>49</sup> We saw in our discussion of Young J’s Principle 14 in Part 4.4 of Chapter Four that the same is not true when the body (or cremated remains) is buried in land controlled by a cemetery authority or similar body.

of the right to possession to consider their status as right-holder within their social context. Regardless of this social context, however, the right-holder can choose to draw the exclusionary curtain to the views of other stakeholders, so to speak, and that decision is for the right-holder alone.

Here, an analogy can be made. Throughout his writing, Penner makes repeated use of the example of an aesthetically and aromatically pleasing garden.<sup>50</sup> If I hold a property right in relation to this garden (perhaps because I am the tenant of the house to which the garden is attached), I will be able to have exclusive use, and to exclusively determine the use of, that garden. I, and I alone (presuming I am the sole tenant of the property) will be able to stroll in the garden, to rearrange the garden gnomes, and to tear up the rose bush so that it might be replaced with sunflowers (subject to the terms of my tenancy agreement, of course). This will not stop those walking past gaining value and enjoyment from the garden, however. If I, as tenant, were jealously to grow a large hedge around the garden, these passers-by would have their enjoyment taken from them. Nonetheless, choosing to grow such a hedge is a valid exercise of my ability to exclusively determine the use of the garden.

Just as I, as the tenant of a house with a beautiful garden, might take advice from a passer-by who has far greater knowledge of the lifecycle of sunflowers than me, so might I, in my position as holder of the right to possession, take into account the views of other stakeholders as to how the body will be ‘used’ (that is, disposed of). However, I am equally as entitled to draw the exclusionary curtain around the body of the deceased — to refuse to take into account the views of any other party, including the deceased themselves — just as I might grow a large hedge around my garden. Similarly, and just as a passer-by might appreciate my garden and value the sight of the flowers I have planted, whilst I alone will determine the use to which the body is put in the process of disposal, others can take value from this use by, for example, attending the funeral. Again, however, in all cases it is not who benefits from the use at issue, but instead my exclusive determination of how my garden, or the body that I have in my possession, is ‘used’, that is central to the practice of property.

#### **4. Conclusion: The Right to Possession as a Property Right**

This Chapter has argued that the body of the deceased grounds an *in rem* duty of non-interference that applies to all but the holder of the right to possession and is limited to the context of disposing

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<sup>50</sup> See, among other references, Penner, *The Idea of Property in Law*, above n 1, 73, 120; J E Penner, ‘The “Bundle of Rights” Picture of Property’ (1996) 43 *University of California Los Angeles Law Review* 711, 744, 818.

of that body. This narrow, but still generalised, duty facilitates an open-ended, set of uses to which the holder of the right to possession can put the body of the deceased. Importantly, included within the uses available to the right-holder is the socially determined purpose, the proper function, of the body of the deceased in Anglo-Australian society: disposal. Going further, this Chapter has shown that the uses to which the body of the deceased can be put are subject to the sole and exclusive determination of the holder of the right to possession. The right to possession therefore invokes the interest that grounds the law of property — being our interest in exclusively determining the use to which our ‘thing’ is put.

The astute reader will have noticed that the *in rem* duty of non-interference, and the sphere of negative liberty that this duty protects, established in Parts 2 and 3.2 of this Chapter respectively, are nearly entirely commensurate with the proper function of the body of the deceased — disposal — set out in Part 3.1 of this Chapter. Consequently, the *in rem* duty of non-interference and the sphere of negative liberty it protects are also (almost) equal in scope to the requisite, residual degree of authority that the holder of the right to possession must maintain over the body of the deceased in order to *retain* a property right in the face of restrictions — the subject of much of Chapter Eight’s analysis. Through the eyes of our theory of property, however, this is merely coincidental. In the case of the body of the deceased, as unlikely as it would be in practice, *in theory* the *in rem* duty of non-interference and the sphere of negative liberty that attaches to it could have been far larger than both the proper function assigned to the body, and the requisite, residual degree of authority required to be maintained over that body — as is true of more ‘standard’ objects of property rights (a chair, for example).

All of this is to say that the right to possession of the body of a deceased person as it currently exists in the Australian common law conforms to the structural framework expected of property rights. And, as we saw in Chapter Six, the body of the deceased is a novel ‘thing’ to which it is appropriate to extend the practice of property. At this stage in this Thesis’ analysis, then, we can, as a preliminary matter, conclude that the right to possession of the body of the deceased is indeed a property right. In Chapter Eight we will examine the external consistency of the right to possession’s five internal salient features with this preliminary conclusion.

# Chapter Eight

## The Right to Possession as an Externally Consistent Property Right

### 1. Introduction

This Chapter completes this Thesis' analysis by working to confirm or refute the preliminary conclusion reached in Chapter Seven that the right to possession of the body of a deceased person is indeed a property right. In accordance with this Thesis' evaluative framework, it does so by examining the external consistency of the salient features identified as being internal to the right to possession in Chapter Four with this preliminary conclusion.

It will be remembered that Chapter Four identified five salient features of the right to possession:

1. Inherent within the right to possession itself exist certain limitations that restrict the temporal and physical extent of the right (*inherent limitations*);
2. Outside of these limitations (as well as those found in the applicable legislation governing cremation), and provided the right-holder acts in a manner that is not dishonest, capricious, or unreasonable, the right to possession exists as an absolute entitlement on the part of the right-holder, and that right-holder can rightfully exclude the wishes of all other interested persons, including the deceased themselves — subject to the possibility of judicial intervention in the exercise of the right to possession (*an absolute entitlement with external restrictions*);
3. The right to possession is only capable of being held by a prescribed list of potential right-holders, among whom there exists an accepted idea of the relative strength of each potential right-holder's claim to the right to possession (*a prescribed list of right-holders*);
4. The right to possession can be transferred both up and down the rungs of the established common law hierarchy either voluntarily or by force of law, however it cannot be transferred *outside* of the established common law hierarchy (*transfer restrictions*);
5. The holder of the right to possession in relation to a particular deceased body who is dispossessed of that body can enforce their right to possession through the courts, and such enforcement will take the form of injunctive relief, damages being entirely inappropriate (*enforceable in equity*).

Parts 2 through 6 of this Chapter consider these salient features, and their external consistency with a propertied right to possession, in turn.

## 2. Limitations Inherent to the Right to Possession

### 2.1. Physical Limitations

It will be recalled from our analysis in Chapter Four that the right to possession of the body of the deceased does not extend to body parts and bodily material separated from that body. That is, the holder of the right to possession cannot assert their right as a means of having a separated body part returned to their possession so that it might be disposed of on the basis that that body part is part of the body of the deceased over which they hold the right to possession.

The first thing to note in this regard is that this salient feature entirely aligns with the conceptualisation of the body of the deceased as a distinct physical ‘thing’ adopted in this Thesis. It will be recalled that Part 2 of Chapter Six set out a conception of the deceased body as a distinct ‘thing’ within society; a ‘thing’ that, as a whole, is recognisably distinct from the parts of which it is made up. The analogy can be made with a car — a distinct ‘thing’ that is recognisable on its own, despite the fact that its constituent parts (such as the engine, tyres, and steel screws) are also individually identifiable as ‘things’ in-and-of themselves. One can maintain a property right over the car that has had its engine removed, and a separate property right over the removed engine, because, following the removal of the engine, the two are separate and distinct ‘things’.<sup>1</sup> Of course, many would find it macabre to think of the body of the deceased as an entity that is the sum of its parts. But the fact remains that one will look at a deceased body and think ‘that is a deceased body’, whereas one will look at a severed limb and think ‘that is a leg’, or perhaps ‘that is a severed limb’, and not ‘that is a leg, an integral constitutive part of a body’.<sup>2</sup>

We saw in our discussion of *Dobson v North Tyneside Health Authority (Dobson)*<sup>3</sup> in Chapter Four that the Court of Appeal for England and Wales took a near identical view of the body of

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<sup>1</sup> Of course, the individual who maintains a property right over the car is also likely to maintain the distinct property right over the engine removed from that car. This is a question of title (as to which, see Part 4 of this Chapter) and is distinct from considerations of the discrete physical thing that is the object of the property right at issue.

<sup>2</sup> On the other hand, it is true that there will be occasions where people seek to bring back together body parts that have been separated from the body as ‘thing’ and are identifiable as individual ‘things’ in-and-of themselves in an attempt to reconstruct the body as ‘thing’ as best as possible. When parts of the body are separated by external forces — such as a natural disaster — for example, an attempt is often made to bring the separated parts back together for the purpose of disposal. A more recognisable example might be the return of removed organs following an autopsy or dissection in a medical school anatomy class. This does not alter the fact, however, that, whilst separated, these body parts remain independent ‘things’.

<sup>3</sup> [1997] 1 WLR 596.

the deceased as that adopted in this Thesis. The Court in that case declined to extend the right to possession to the brain of a woman whose body had been buried some three years previously. The Court of Appeal's reasoning can be read as taking the position that, provided the deceased's body was still readily identifiable as *a body* (not even necessarily *her body*), the fact that interment took place without an important internal organ was irrelevant.<sup>4</sup> In reaching this conclusion, the *Dobson* court focused on the lack of practical need to see the brain returned to the right-holder for disposal.<sup>5</sup> This is an important point to make in the context of the inherent limitation on the right to possession under discussion here. We have seen repeatedly throughout this Thesis that the right to possession of the body of a deceased person exists to facilitate the duty to dispose of that body. That is, the purpose of the right is to see to the disposal of the body. The purpose of the right is not, however, to see to the disposal of those parts of the body that are removed from that body for one reason or another.

With this in mind, it is unsurprising that the right to possession does not extend to removed body parts and human biological material. These body parts and bodily material, *once removed from the body of the deceased*, become separate and distinct 'things' to which the right to possession does not, and does not need to, apply. That this is true is shown by the fact that much, if not all, human biological material removed and/or separated from the body of the deceased is liable to become the object of property rights by virtue of the application of work or skill to that material.<sup>6</sup> That is to say, in addition to being readily identifiable as a distinct and separate entity from the body of the deceased, when work or skill is applied to the removed body part or material, the law of property intervenes to vest the party who applied that work or skill with a property right in the part or material quite apart from consideration of the right to possession and the body to which it attaches. And whilst the Australian High Court has held that the right to possession can trump property rights created by the application of work or skill,<sup>7</sup> the best reading of this finding is that it applies only where both legal rules apply to the same material 'thing' — that is, the entire body of the deceased recognisable as such — and not where the 'thing' at issue is something other than the entire body of the deceased. That is, there exists a rule of priority that favours the right to possession over the right that emerges as a result of the application of work or skill to the deceased body.

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<sup>4</sup> See *Ibid* 600-1.

<sup>5</sup> *Ibid* 601.

<sup>6</sup> *Doodeward v Spence* (1908) 6 CLR 406, 414; cf material removed from living persons: Kate Falconer, 'Dismantling *Doodeward*: Guided Discretion as the Superior Basis for Property Rights in Human Biological Material' (2019) 42 *University of New South Wales Law Journal* 899, 912-17.

<sup>7</sup> *Doodeward v Spence* (1908) 6 CLR 406, 414 (property right acquired by the application of work or skill good 'at least as against any person not entitled to have it delivered to him for the purpose of burial').

The inherent limitation that restricts the right to possession to the body of the deceased, and not its separated parts or material, as a salient feature of the modern right to possession fits easily, then, within the property analysis undertaken in this Thesis. So too does the limiting of the scope of the right to possession to the physical act of disposal, that right being unable to serve as a legal basis for other physical engagements with the body of the deceased (such as the authorisation of organ donation). Here again, the purpose-driven nature of the right to possession is key. It exists to see to the disposal of the body, not to benefit the national organ donation scheme (or the anatomy schools of local universities, and so on).

Beyond this, however, in its inability to act as a lawful basis for other forms of engagement with the deceased body, the right to possession is in alignment with other recognised property rights. The holder of a residential lease, for example, whilst undoubtedly holding a property right in relation to the land in question, and being able to use this property right as a legal basis to occupy the land to the exclusion of all others, cannot use this right as a legal basis to *sell* the land. Nor (perhaps) can they use their property right as authorisation to paint the walls of the house, or to hang a tapestry on the wall with the aid of large metal screws. Their property right has been limited in scope from the outset. In the same way, the holder of the right to possession can use their right to authorise the disposal of the body, but not other forms of engagement with the body, the purpose of the right limiting its scope from the outset. This inherent physical limitation, then, whilst highlighting the weak and purposeful nature of the right to possession, is unproblematic from a propertied perspective.

## 2.2. Temporal Limitations

We saw in Chapter Four that the right to possession terminates at the moment of disposal. It is uncontroversial that this temporal limitation reflects the fact that the right has developed over centuries for the sole purpose of facilitating disposal in a decent manner. The issue faced here is that we tend to own property for an undefined period of time; that ‘there is, in general, no fixed period attached to the ownership of any particular thing’.<sup>8</sup>

Nonetheless, it is a fact of both life and property law that property rights are liable to terminate should the object of that right cease to exist. This is not a phenomenon unique to the right to possession. I have a property right in the lunch I brought to the office today, but once consumed, that property right will cease to exist. If I write off my car on the way home from the office this evening, my property right in that car will cease to exist. When I am required to return the hire

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<sup>8</sup> J E Penner, *The Idea of Property in Law* (Clarendon Press, 1997) 97.

car I am using as a temporary replacement at the end of the hire period, my property right in that car will cease to exist. When I bury the body of a deceased loved one, my right to possession of their body will cease to exist.

We must look a little closer, however. In the first two of the examples just given, it is the object of the property right (my lunch, my car) that has ceased to exist. In the example of my rental car, it is my possessory right that has ceased, with the car hire company's residual ownership interest again coming to the fore — that is, the object of the property right still exists, the property right is merely vested elsewhere. In the case of the body of the deceased, however, the property right has terminated, but, at least arguably, the object of the right continues to exist — albeit below ground.<sup>9</sup> And if the body does indeed continue to exist after burial, why should the right to possession not continue to exist also? After all, one does not lose their property right in their crop seeds, or their compost bin, or their treasure chest, simply because these items are placed below ground. The difference is, of course, that crop seeds and even a compost bin (and particularly a treasure chest) are designed to re-emerge from the ground in which they are placed. One does not continue to insist on a property right in seeds that do not sprout — these have returned to the natural state and become *res nullius*.<sup>10</sup> The body of the deceased, once placed in the earth is intended to stay there.<sup>11</sup> It will not be removed lightly.<sup>12</sup> The act of burial is intended, and is treated, as an act that removes the body of the deceased from the material world.<sup>13</sup> Even its reintroduction to the material world in the period following exhumation and prior to reinterment will not necessarily result in the reintroduction of the common law of property.<sup>14</sup>

In the same way as the physical limitations inherent within the right to possession discussed above, then, the inherent limitation that sees the right to possession terminate at the moment of disposal is also easily integrated into our understanding of the right to possession as a property right. This being the case, we now turn to consider the restrictions that are placed on that right *ex*

<sup>9</sup> This is assuming the body is buried, of course. We saw in Chapter Four that when the body is cremated, the right to possession continues to attach to the ashes that result from that cremation until they are ultimately disposed of. It is likely the same would be true of any material remaining after the process of aquamation, should this disposal mechanism become commonplace in Australia.

<sup>10</sup> J H Baker, *An Introduction to English Legal History* (Butterworths, 4th ed, 2002) 387.

<sup>11</sup> Indeed, as we saw in Part 6 of Chapter Four, the traditional view is that, upon burial, the corpse becomes part of the land in which it is buried.

<sup>12</sup> Heather Conway, *The Law and the Dead* (Routledge, 2016) 180-1. See also *Cemeteries Act 1952* (NT) ss 30A-30F, particularly s 30C(3) (setting out 10 matters in respect of which an applicant for exhumation must satisfy the relevant Minister).

<sup>13</sup> So much so that in Part 3.2 of Chapter Seven we compared the disposal of the body with the destruction of any other chattel.

<sup>14</sup> Although note that in instances where the exhumation is for forensic purposes, the coroner or other relevant party will obtain a limited statutory right to possession in relation to the body.

*ante* and from an external source, and their consistency with a propertied conception of the right to possession.

### **3. External Restrictions Imposed on an Otherwise Absolute Entitlement**

#### **3.1. Methodology**

As we saw in Chapter Five, the appropriate means of assessing whether external restrictions placed on the exercise of a property right limit that right to such an extent that it can no longer be said to retain its proprietary nature (that is, can no longer be said to protect our interest in exclusively determining use) is as follows. First, the restriction must be identified as either property-affecting or property-neutral. That is, does it attach to the specific, proprietary nature of the relationship between the holder of the property right and the object of that property right, or does it apply to all regardless of their relationship with that object? If the restriction applies to all persons, it is property-neutral and does not affect the proprietary quality of the property right under examination. If, on the other hand, the restriction is property-affecting — that is, it attaches to the proprietary relationship between property right holder and ‘thing’, then a second stage of analysis must be entered into. This second stage of analysis requires a determination of whether the holder of the property right retains sufficient authority over the ‘thing’ at issue so that their property right remains intact.

When engaging in this second stage of analysis, recourse must be had to the amount of authority required to be exercised over a ‘thing’ in order to achieve that ‘thing’s’ proper function. This is the degree of authority a property right holder must maintain if they are to retain a property right over the ‘thing’ at issue. What follows is a purely factual inquiry: does the holder of the property right in relation to a particular ‘thing’ in fact retain the requisite degree of authority regardless of the existence of the property-affecting restriction at issue, and is the exercise of this authority left to the exclusive determination of the property right holder?

Part 3.1 of Chapter Seven identified the body of the deceased as a purely physical artefact with the proper function of disposal. The degree of authority required to be exercised over the body by the holder of the right to possession in order for that right to be considered a property right was identified as the authority needed to dispose of the body. This Part considers the various external restrictions placed on the exercise of the right to possession revealed in Chapter Four in light of this necessary degree of authority.

### 3.2. Cremation Legislation

It will be recalled from our discussion in Chapter Four that the most frequently encountered restrictions on the exercise of the right to possession of the body of the deceased are the statutory provisions found in each Australian state and territory variably prohibiting and/or requiring that the body of the deceased be cremated. Here, we will consider the *nature* of these restrictions.

The first thing that must be noted in this regard is that these statutory restrictions are directed at multiple classes of people — sometimes, but not always, including the holder of the right to possession (albeit by implication, rather than clear identification).<sup>15</sup> That is, they bind more people than just the right-holder. This is our first indicator that the restrictions placed on the exercise of the right to possession by virtue of state legislation that governs cremation are property-neutral.

There is another, equally strong indicator of the property-neutral nature of these restrictions, however. In many cases, the individual punishable under modern cremation legislation is the person who ultimately *authorised* the cremation and/or the person in charge of the infringing crematorium, not the person who inappropriately applied for permission to cremate the body of the deceased.<sup>16</sup> Given that the central reason for the passage of this legislation was to prevent the destruction of evidence via the cremation of the body of a person who had died under suspicious circumstances,<sup>17</sup> this punishment focus is unsurprising. It also clearly reveals that the purpose of the restrictions present within the various pieces of cremation legislation that exist within Australia today is not to attach to the propertied relationship between the holder of the right to possession and the body of the deceased.

<sup>15</sup> See *Cremations Act 2003* (Qld) s 7(2) (personal representative to apply for cremation if deceased left written instructions to this effect); *Cremation Act 1929* (WA) s 13(2) (same); *Cemeteries and Crematoria Regulation 2003* (ACT) reg 8(1)(c) (operator of crematorium not to cremate if deceased left directions opposing cremation); *Public Health Regulation 2012* (NSW) reg 77(1) ('a person' may not cremate if deceased left written instructions opposing cremation); *Cemeteries Act 1952* (NT) s 18(2) (the cemetery Board of Trustees or the relevant Minister not to grant a permit for cremation if objected to by certain named individuals); *Cremations Act 2003* (Qld) s 8(3) (the person in charge of a crematorium not to allow cremation if objected to by certain named individuals); *Burial and Cremation Act 2013* (SA) s 9(3) ('a person' may not cremate, or cause, suffer, or permit such cremation, should objected to by certain named persons); *Cremation Act 1929* (WA) s 13(1) ('no person' shall cremate a body if objected to by certain named persons). Those provisions that apply to a 'person' or 'persons' apply to the holder of the right to possession by implication.

<sup>16</sup> See *Cremations Act 2003* (Qld) s 8(3); *Cemeteries Act 1952* (NT) s 18(2) (although note no penalty mentioned); *Cemeteries and Crematoria Act 2003* (ACT) s 21 (although note also s 20). Cf *Cremation Act 1929* (WA) s 13; *Burial and Cremation Act 2013* (SA) s 9(3); *Public Health Regulation 2012* (NSW) reg 77(1).

<sup>17</sup> See, eg, Queensland, *Parliamentary Debates*, Legislative Assembly, 3 December 2002, 5223 (R J Welford, Attorney-General and Minister for Justice).

The property-*neutral* nature of these restrictions is of great importance. If, for some reason, the legislation governing cremation in each Australian jurisdiction was found to include property-*affecting* restrictions — perhaps because the only person targeted by each piece of legislation was the holder of the right to possession — such restrictions would go to the heart of the degree of authority that the right-holder must be able to exercise over the body of the deceased in order for the right to possession to be considered a property right. This is because the cremation restrictions directly implicate the disposal of the body of the deceased by the right-holder.

Here, a distinction must be made between those legislative provisions that *prohibit* cremation in the face of familial objection, and those that *require* cremation if it is the deceased's clearly stated wish. Whilst restrictions of the *prohibitive* variety necessarily remove a large swathe of the uses available to the right-holder, they leave the degree of authority required to achieve the proper function of the deceased body in the hands of the property right holder — the holder of the right to possession can, after all, continue to dispose of the body by way of burial (if not also aquamation, cryopreservation, and so on), and the choice to do so remains a matter for the exclusive determination of the right-holder.

*Mandatory* legislative restrictions — such as the provisions in at least two Australian jurisdictions that *require* disposal take place via cremation if the deceased left written instructions to this effect<sup>18</sup> — are a different thing entirely. If these restrictions were property-*affecting*, this would not merely be the barring of one potential use from the right-holder. Instead, it would be the removal from the right-holder of any pretence of exclusive determination as to how disposal, being the proper function of the deceased body, will take place, nullifying the property right in the process.

This is not the position we find ourselves in, however. The restrictions found in the legislation governing cremation in each Australian state and territory are property-neutral for the reasons stated earlier. And as we saw in Part 5 of Chapter Five, property-neutral restrictions, provided they are indeed property-neutral, can entirely restrict the property right at issue (for example, by requiring that a body be disposed of via cremation) without the property right holder, at least as a matter of doctrine, losing their property right. Thus, there is no need for us to consider the restrictions found in the various pieces of cremation legislation any further.

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<sup>18</sup> See *Cremations Act 2003* (Qld) s 7; *Cremation Act 1929* (WA) s 13(2).

### 3.3. The *Sullivan* Threshold

Moving on from the legislative restrictions placed on the right to possession, we must now consider the limitations placed on the exercise of the right to possession at common law. As we saw in Parts 4.2.2 and 4.2.3 of Chapter Four, these restrictions are that the right-holder be ‘ready, willing, and able’ to exercise the right to possession, and that they do so in a way that is not ‘dishonest, capricious, or unreasonable’. As Chapter Four noted, the former is, in practice, best characterised as a qualification to hold the right to possession — and will be considered as such in the discussion of title in Parts 4 and 5 of this Chapter. This Part will address the common law limitation on the right-holder’s exercise of the right to possession to a manner that is honest, consistent, and reasonable (‘the *Sullivan* threshold’).

Our analysis of this restriction can be brief. Whilst the *Sullivan* threshold is clearly property-affecting (relating, after all, to how the right to possession is exercised by the right-holder), restrictions on the manner in which property rights are exercised are not uncommon. To borrow the analogy prevalent in property law scholarship, the fact that I have a property right in my knife does not allow me to use the knife to harm another. And to make the analogy more precise, I am perfectly able to make use of my knife — say, to cut onions within a commercial kitchen — but I must not do so in a manner that causes fear or panic in others — say, by cutting onions menacingly close to another’s fingers. Thus, I am perfectly able to dispose of the body of the deceased, but I must not do so in a way that is dishonest, capricious, or unreasonable.

More importantly, whilst the *Sullivan* threshold is property-affecting, it leaves undisturbed the requisite degree of authority that the right-holder must exercise over the body of the deceased in order to retain their property right in relation to that body. The ability of the right-holder to dispose of the body remains unaffected; the *Sullivan* threshold simply dictates *the standard* the right-holder must maintain while doing so. Restrictions on the manner in which it is exercised by the right-holder are, then, entirely consistent with the right to possession’s status as a property right.

### 3.4. Overriding the Wishes of the Deceased and Others

In Parts 4.3 and 4.4 of Chapter Four we saw that the holder of the right to possession is in no way required (in a legally relevant sense) to take into account the views of others who have survived the deceased, and even those of the deceased herself, when deciding how the body will be disposed of. This was discussed in the context of the right to possession allowing the right-holder to *exclusively* determine the use (that is, the means of disposal) to which the body will be put in Part 3.3 of Chapter Seven. All that need be noted here is that the right-holder’s ability to override

the wishes of the deceased and others is externally consistent with our conception of the right to possession of the body of the deceased as a property right.

Rights — including property rights — are self-serving, and allow the right holder to place their own interests, ideas, and beliefs over and above those of any other person. Of course, the holder of any particular right is not *required* to so privilege their views and interests, but they are *entitled* to do so by virtue of their status as a right holder.<sup>19</sup> And indeed, as we saw in Chapter Four, and confirmed in Chapter Seven, the holder of the right to possession *can* take into account the views of the deceased and other relevant parties regarding the disposal of the deceased's body, but the common law will not intervene to ensure this takes place. Instead, and consistent with their status as holder of a property right, the right-holder retains an absolute entitlement to dispose of the body — that is, to exclusively determine the use to which that body will be put — as they see fit.

### **3.5. Judicial Intervention in the Exercise of the Right to Possession**

Given the strength of the right-holder's ability to entirely exclude all others from the exercise of the right to possession, the potential for judicial intervention in the exercise of that right (identified in Part 4.5 of Chapter Four) is of concern. Judicial intrusion into the exercise of the right-holder's discretion in an effort to force a compromise between the parties necessarily detracts from the 'absolute' quality of the right to possession of the body of the deceased and the right-holder's absolute prerogative in issues of disposal.

Of course, court orders compelling a property right holder to make use of their property in a particular way are not unheard of. The holder of a freehold estate, for example, might be required to honour a residential lease (that is, be required to use the object of their property right by way of creating a lesser property interest in relation to that object). In these cases, however, alternative and additional uses remain available to the property right holder. In the case of a freehold owner required to uphold a lease over their property, their ability to use their property by occupying it will revert to them at the end of the lease period. And throughout the duration of the lease, they might use their property as security for a personal loan, for example. The same is not true in the case of the right to possession. The issue in this context is that a court order requiring the right-holder to dispose of the body of the deceased in some way prevents that right-holder from exclusively determining the use to which the object of their property right is put. Judicial intervention in the exercise of the right to possession in essence sees judges *exercising* (and

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<sup>19</sup> Penner, above n 8, 16.

*exhausting) the property right themselves* — a state of affairs that is inimical to the existence of a property right at all.

Judicial intervention in the exercise of the right to possession on the part of the right-holder, then, is a salient feature that stands outside of our propertied analysis of the right to possession. Indeed, it has the potential to directly contradict this analysis. At the crux of this issue is the fact that the right to possession is a very weak property right. We have seen that it is limited in scope, purpose, duration, and content. Significant intervention is not required in order to nullify its existence. Key here, however, is that, at least for now, this external inconsistency remains a matter of *potential*. Two swallows do not make a summer, and two cases resolved by way of judicial intervention in the exercise of the right to possession (and we do only have two cases)<sup>20</sup> do not make a salient feature fatal to a property right. For now, under this Thesis’ evaluative framework these cases can be explained as anomalous, and disregarded for the purposes of our property analysis. Should this anomaly develop into an identifiable trend in the case law, however, the propertied status of the right to possession of the body of the deceased would be required to be reconsidered.<sup>21</sup>

#### 4. A Prescribed List of Right-Holders

Leaving behind external restrictions placed on the right to possession, the purpose of this Part is to interrogate the salient feature that is the restriction on the number and identity of the individuals able to hold and exercise that right to the prescribed common law hierarchy set out in Part 5 of Chapter Three. Exactly why sitting at a particular rung of the common law hierarchy in relation to a particular deceased body (and being prepared to dispose of that body — as to which, see Part 5.1 of this Chapter), allows one person to claim the right to possession as against another is a question of title.

To borrow the words of J W Harris, “[t]itle’, as a term of art, refers to the conditions, within a particular property institution, which must be satisfied before a person can slot into the protection of its trespassory rules’.<sup>22</sup> In the sense adopted in this Chapter, the term ‘title’ relates not to the content of one’s proprietary interest as regards a particular ‘thing’, but to the strength of one’s

<sup>20</sup> See *Abraham v Magistrate Stone, Deputy State Coroner* [2017] NSWSC 1684 (5 December 2017); *Johnson v George* [2018] QSC 140 (14 June 2018).

<sup>21</sup> Here, note that the most recent burial dispute included in this Thesis’ analysis resoundingly rejected the possibility of judicial intervention in the right-holder’s exercise of their discretion regarding the right to possession: see *Kak v Kak* [2020] NSWSC 140 (26 February 2020) [18] (‘Even if it was within my jurisdiction to impose such conditions, I would not impose them because it is for [the right-holder] to arrange the burial as she considers appropriate and the proposal could be considered to be an unexplained departure from principles to which adherence was said to be required.’) (Hammerschlag J).

<sup>22</sup> J W Harris, *Property and Justice* (Oxford University Press, 1996) 39.

claim to that interest relevant to the claims of others.<sup>23</sup> When we talk of title, then, we are not referring to various types of interests recognised by the law of property (for example, an ownership interest, a lease interest, or a bailment interest). Instead, we are referring to *claims* to a particular, identified property interest. One has title — has the strongest claim to a particular property right — to a particular ‘thing’ if they fill certain criteria determined by the common law. In meeting these criteria they gain the protection of the generalised duty of non-interference that is grounded by their interest in exclusively determining the use to which the object of their property right is put.

Perhaps the most obvious example of a condition that allows a particular person to claim a particular property right in a particular object is first appropriation. First appropriation occurs when a person, *for the first time*, takes possession and/or control over an object that falls within the practice of property. That is, the ‘default rule’ within the common law holds that a right of property — or, more precisely in the context of our discussion of title, the ability to *claim* a particular right of property to the exclusion of all others — in relation to a new ‘thing’ that is otherwise *res nullius* will vest in the person who intends to, and in fact does, take possession of that ‘thing’.<sup>24</sup> Consider, for example, the first person to (ever) come across a particular plot of land, or to (ever) pick up a rock that is conveniently shaped like an adze. In the eyes of the common law, the first appropriator gains, by virtue of their first possession of the land or of the adze, a legitimate claim of good title to that land or adze.

Of course, as these examples suggest, first appropriation is an infrequent occurrence in 2020 (unowned land is an increasingly rare phenomenon, after all, and rocks conveniently shaped like adzes are, outside of an archaeological context, no longer in sufficient demand to warrant the application of property principles). Instead, modern claimants to the property right at issue trace their title *back to the first appropriator*. Having legitimately obtained the property right at issue from that first appropriator (or from the person who obtained it from the first appropriator, and so on), is in itself a sufficient condition for that claimant to have title to the object of the property right.

As we have seen, the right to possession is very different (in terms of how it is vested) to the default rule of first appropriation. It is interesting to consider why this is the case. It was just now

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<sup>23</sup> David Fox, ‘Relativity of Title at Law and in Equity’ (2006) 65 *Cambridge Law Journal* 330, 333.

<sup>24</sup> See Simon Douglas and Imogen Goold, ‘Property in Human Biomaterials: A New Methodology’ (2016) 75 *Cambridge Law Journal* 478, 480. See also William Blackstone, *Commentaries on the Laws of England* (University of Chicago Press, first published 1765-9, 1979 ed) vol 2, ch 16 (entitled ‘Of Title by Occupancy’).

suggested that the rule of first appropriation as good root of title is a rare occurrence in the modern world. As Penner has noted, '[w]e are already in a world where most things are owned'<sup>25</sup> — that is, we are already in a world where most 'things' are the object of another's valid title (being a legitimate claim to a recognised property right in relation to that 'thing'). This is not true of the body of the recently deceased, however. After all, until the moment of their death, the deceased was a living person who, as was discussed in Chapter Six, was thankfully incapable of being the object of another's property right. At the moment of death, the 'person' ends and the corpse begins its existence independent of the legal person who previously inhabited the body. From the moment of death, then, the body of the deceased becomes a new and not yet appropriated 'thing' in a world where nearly all 'things' are propertied. Surely it would make sense, then, for the default rule of the common law to apply, and for the first person to take possession of the body of the deceased to gain a property right in relation to that body?

There are many fact illustrations that could be given to show that the first possessor rule makes little practical sense in the context of the body of the deceased. Consider the example of a young man dying in a tragic plane crash in rural South Australia, leaving a will naming his husband as executor. An ambulance arrives to take the body to the hospital morgue. The man's death is a reportable death under s 3(1) of the *Coroners Act 2003* (SA), however this report has not yet been made. Once the report is made, the State Coroner will have a limited right to possession in relation to the man's body for the purpose of conducting an inquest.<sup>26</sup> For now, however, the first possessor remains the ambulance officer currently racing the body to Coober Pedy hospital, that officer having intended to take the body into her possession and in fact doing so.

If we accept that any property right vesting in the first appropriator of a body would develop along the same trajectory as the right to possession (i.e. it would develop in response to the norms of decent and swift disposal to encompass the various salient features that make up the modern right to possession established in this Thesis), it would appear perfectly acceptable to vest this property right in the ambulance officer.<sup>27</sup> After all, this officer is easily identifiable, actually has the body of the deceased under her authority (however temporarily), and (being an employee of the South

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<sup>25</sup> Penner, above n 8, 81.

<sup>26</sup> This statutory right briefly overrides the right to possession at common law: see Part 5 of Chapter Three.

<sup>27</sup> I am here ignoring the possibility that the property right might vest vicariously in the state of South Australia as the ambulance officer's employer. There is also an alternative possibility that, for the sake of completeness, warrants mention. Given the death is reportable under the relevant legislation, it is possible that the Coroner obtains a statutory right to possession, not from the moment they receive the report of death, but from the moment the reportable death occurred: see *Coroners Act 2003* (SA) s 32(1). If this is indeed the case, the ambulance officer as first possessor will never have the strongest claim to possession of the body of the deceased because a prior claim vests in the Coroner from the moment of death.

Australian government) presumably has the financial means to arrange for the disposal of that body (these being vital concerns in the historical development of the right to possession, as we have seen). That this unknown ambulance officer might be placed in charge of seeing the body of the deceased decently disposed of would, nonetheless, undoubtedly cause immense pain to the deceased's husband and other family members.<sup>28</sup> It is also problematic when considered from the other perspective. It is unlikely the ambulance officer wishes to be saddled with the responsibility of seeing the deceased decently disposed of, nor of financing that disposal. After all, to foist onto first possessors a possessory right to the body of the deceased is also to place them under a legal duty to dispose of that body, and render them liable for funeral expenses (albeit with a guarantee of reimbursement from the estate). To vest a property right in the first appropriator of the body of the deceased has the potential to create an unwillingness on the part of many people — bystanders and first responders alike — to assert any authority whatsoever (perhaps even, for example, by cautioning people to stay away from the body and calling the police) over a deceased body.

We have already seen the common law respond to these concerns in its development of the right to possession. Whilst the public nature of the concerns to which the right has developed — that is, public health and public decency — suggest that any member of the particular society at issue might be vested with the right to possession to see these concerns avoided, this is not the path the law has followed. Instead, the right to possession is vested in certain classes of individuals who stand in recognised relationships of authority and control as regards the body of the deceased. There is a reason that those more transient relationships — such as that between the deceased's body and the householder of the premises in which the deceased died — are relegated to lower positions on the common law hierarchy by which the right to possession is vested than the executor or spouse. If this relationship, akin to the ambulance driver in the above example, was propelled to the top of the hierarchy by virtue of the first possessor rule, and a property right akin to the right to possession vested in the first possessor, people might begin to refuse the elderly and sick, if not people altogether, admittance to their premises out of fear of incurring a legal duty to dispose of their guest's body. (This possibility is particularly problematic when it is remembered that the parties most likely to occupy the status of 'householder' rung in the 21<sup>st</sup> century are hospitals and nursing homes.)

Clearly, then, a property right in relation to the body of the deceased, akin to the right to possession, cannot vest in the first individual to exert control over that body as a default rule. To do so would cause distress to families and first appropriators alike. The right to possession, the

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<sup>28</sup> Although this concern might also be true of executors and presumptive administrators, who, as we saw in Chapter Three, occupy high-ranking positions on the established common law hierarchy.

hierarchy by which it is vested, and the rules used to allocate it among competing parties, must then be *sui generis* exceptions to the default first possessor rule developed by the common law.<sup>29</sup> In this way, the right to possession can be analogised with the rule that governs the allocation of property rights in ‘things’ legally classed as treasure, whereby the Crown becomes the holder of a stronger claim to the ‘thing’ as against both the finder of the ‘thing’ and the title-holder to the land in which the ‘thing’ was found;<sup>30</sup> or the rule that vests the strongest claim to property rights in human biological material removed from the body of a deceased person in the person who applies work or skill to that material, and not the first possessor.<sup>31</sup>

The existence of this *sui generis* title criterion in the context of the right to possession is, perhaps, to be expected. As we saw in Chapter Six, the introduction of a novel ‘thing’ into the practice of property is largely governed by normative concerns. Property law is not blind to these normative concerns, and no more is it blind to the distribution of the property rights that result from the extension of the practice of property to encompass a novel ‘thing’.<sup>32</sup> In the case of the right to possession of the body of a deceased person, the norms that govern this right (that is, the norms of swift and decent disposal) require that control over the body of the deceased vest elsewhere than in the first possessor of that body.

It is also important to note that the common law hierarchy that governs the vesting of the right to possession aligns with the doctrine of relativity of title. The occupier of each rung on the hierarchy has good title to the body of the deceased, subject only to the stronger claims of those occupying higher rungs on that hierarchy. Hence, the executor’s claim to the right to possession will eclipse that of the householder, the deceased’s parent, their spouse, and even the presumptive administrator — relative to these other parties, the executor has the strongest claim, the best title, to hold the right to possession in relation to the body of their deceased testator.

The *sui generis* system of title that governs the vesting of the right to possession is also the reason why the right to possession can trump the contractual rights of another in the case of cremated ashes.<sup>33</sup> Only an individual on the established common law hierarchy can claim the right to possession. The crematorium responsible for the act of cremation is unlikely ever to be such an

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<sup>29</sup> To this end, note Martin J’s (obiter) comment in *Calma v Sesar* that ‘[the fact that] the father’s agents had first obtained possession of the body in fact does not alter the position at law and could not be a weighty consideration’: (1992) 2 NTLR 37, 42. Daniel Sperling takes an alternative position, arguing that the first possessor rule cannot apply because there is always someone who has the right to possession of the body: *Posthumous Interests: Legal and Ethical Perspectives* (Cambridge University Press, 2008) 122.

<sup>30</sup> This example is borrowed from Douglas and Goold, above n 24, 500-1.

<sup>31</sup> See *Doodeward v Spence* (1908) 6 CLR 406, 414.

<sup>32</sup> Penner appears to tacitly acknowledge this point: above n 8, 98.

<sup>33</sup> See discussion in Part 3 of Chapter Four.

individual. The crematorium does not, therefore (and assuming no other property rights are at play), have title to the ashes that can be transferred to a third party as part of the contract for the cremation services provided. And even if another property right were to enter the picture, we have already seen that the right to possession is likely to win in a priority dispute between itself and any other property right capable of being exercised over the entire deceased human body.<sup>34</sup>

By way of concluding our examination of the salient feature that is the existence of a prescribed list of potential holders of the right to possession, it is pertinent to note that issues would arise for our property analysis if the Australian common law decreed that *no one person* could exert control and decision-making power over the body of the deceased. If *no one person* can exert the requisite degree of authority over the ‘thing’, as distinct from certain, and perhaps even large portions of the population being unable to exert the requisite degree of authority over that ‘thing’, that ‘thing’ falls outside the bounds of property. Property, after all, requires not just an identifiable ‘thing’, but also an identifiable right holder.<sup>35</sup> This is not so in the case of the right to possession. Whilst the common law has established a defined and somewhat immutable hierarchy (although again note the expanding vesting practices adopted by Australian courts in the intestacy context explored in Chapter Three), and this hierarchy does indeed prevent large swathes of the Australian population from ever holding the right to possession in relation to any one deceased body, there still remain sufficient potential right-holders as regards that one body that the right to possession is not, on this count, excluded from the realm of property.

## 5. Transfer Restrictions

### 5.1. Forced Transfers Within the Common Law Hierarchy

The discussion of title just now set out is also relevant to considerations of the forced transfer of the right to possession among individuals who sit on the established common law hierarchy. We saw in Chapter Four that merely sitting at a particular rung on the established hierarchy is not sufficient to maintain a claim to the right to possession. The right-holder must also be ‘ready, willing, and able’ to see to the disposal of the body of the deceased. If the individual sitting at a higher rung and holding the right to possession is deemed by a court to not meet this standard, the court will force the transfer of the right to possession from that person to a lower priority right-holder. In this case, what is in fact happening is the higher priority right-holder has lost title to — has lost the ability to claim — the right to possession by virtue of their being unready, unwilling,

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<sup>34</sup> See above nn 6-7 and text accompanying.

<sup>35</sup> Thomas W Merrill, ‘The Property Strategy’ (2012) 160 *University of Pennsylvania Law Review* 2061, 2065-6.

and/or unable to see to the disposal of the body. The lower priority right-holder then has better title to hold the right to possession relative to all other persons, including the higher ranking right-holder.

For its part, the forced transfer of the right to possession from a lower priority right-holder *up* the established common law hierarchy to a higher priority right-holder is a straight-forward application of the doctrine of relativity of title also set out in Part 4 of this Chapter. Regardless of whether the transfer is up or down the established hierarchy, then, the forced transfer of the right to possession in the circumstances accepted by the case law is similarly consistent with our preliminary conclusion that the right to possession is indeed a property right.

## 5.2. Inability to Transfer Outside the Common Law Hierarchy

What, then, of the inability of the right-holder to transfer the right to possession of the body of the deceased *outside* of the established common law hierarchy? We saw in Part 5.4 of Chapter Four that, in situations where it appears that the right-holder has transferred the right to possession outside of this hierarchy, the stronger view is that the right-holder is merely choosing not to enforce their right to possession as against another party. With a salient feature of the right to possession being that it can only be transferred within the established common law hierarchy, the question then becomes: if you have no, or at least very little, choice in whom you can transfer your property right to, do you have a property right at all?

In line with the methodology reiterated in Part 3.1 of this Chapter, we must first ascertain the true nature of the restriction at issue. In doing so, we must be careful to distinguish between transfer (or alienation) for value, and alienation through gift. That the right to possession cannot be transferred outside the established common law hierarchy *for value* is not problematic. We have seen that the interest that underlies the transfer of property rights (along with the ‘thing’ to which such rights attach) for value is not the interest around which property law has developed.<sup>36</sup> And so the inability of the right-holder to transfer the right to possession (and the body of the deceased to which the right attaches) for value is irrelevant to our property analysis.

Instead, the issue for our property analysis arises when we consider the inability of the right-holder to transfer the right to possession outside of the established common law hierarchy by way of gift. For Penner, the ability to gift the object of our property right to another is an inherent and important element of that property right and the interest that grounds it. If we accept, as Penner

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<sup>36</sup> Instead, this interest grounds the law of contract: see Part 3.2 of Chapter Five.

argues, that the right to exclusive use necessarily entails the ability to gift the object of one's property right to another,<sup>37</sup> and that an absolute restriction on gifting might fundamentally alter the otherwise proprietary relationship between property right holder and 'thing',<sup>38</sup> the inability of the holder of the right to possession to transfer that right outside of the common law hierarchy by way of gift might appear fatal to our property analysis. Such a claim is undermined, however, by the fact that transfers *within* the established hierarchy are entirely possible.

We saw in Chapter Four that the right-holder can divest themselves of the right to possession and force its transfer down the common law hierarchy by declaring themselves to be unready, unwilling, or unable to exercise the right. Similarly, a person in the role of executor can transfer the right to possession to another within the established common law hierarchy by renouncing probate. Whilst these might not be the transfers or assignments familiar within property law, these actions are nonetheless sufficient to guarantee that, at the instigation of the former right-holder, the right is alienated from them and vested in another. In our discussion of *Keller v Keller*<sup>39</sup> in Chapter Four, for example, we saw the executor (the Public Trustee), clearly lacking any desire to continue in the role of right-holder, actively seeking to have the right to possession transferred to another by way of asserting that they (the Public Trustee) were unwilling to exercise the right.

Of course, the holder of the right to possession has no *choice* to whom the right is transferred upon leaving their hands. Our discussion of title set out in previous Parts requires that, by default, the right to possession will be assigned to a party who occupies a rung further down on the established common law hierarchy (often the party occupying the next highest rung). In some situations, such as where the identity of the person most entitled to take out a grant of letters of administration over the estate (that is, the person on the rung below that of executor) is unclear, the transfer of the right to possession from the executor right-holder (occupying the highest rung on the hierarchy) to the party on the next highest rung will require judicial intervention — as was the case in *Keller*. Regardless, in these instances of voluntary transfer down the common law hierarchy, that the former right-holder has the ability to instigate the transfer process is clear.<sup>40</sup>

The inability of the holder of the right to possession to transfer that right outside of the existing common law hierarchy, and to choose to whom it is transferred, are, then, not absolute

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<sup>37</sup> See, eg, Penner, above n 8, 87 ('the right of exclusive use entails, and comprises, a right to give'). I do not propose to examine Penner's conception of gifting as involving the donor taking on the interests of the donee (and hence being inherent to the social practice of property). For the purposes of this Thesis, it is sufficient to accept Penner's conclusion that gifting is not a hybrid branch of law and is squarely a matter of property (at 94), and as such its restriction must be addressed.

<sup>38</sup> *Ibid* 126.

<sup>39</sup> (2007) 15 VR 667.

<sup>40</sup> Penner would recognise this as 'transfer from abandonment': above n 8, 84-5.

prohibitions on the gratuitous assignment of the right to possession (and the body to which it attaches), but instead non-absolute limitations on such gratuitous assignment (transfer within the common law hierarchy remaining possible).

Having established the true nature of the restriction under discussion, let us move on to conduct our analysis proper. This need only be done briefly. It must first be noted that restrictions on the ability of the right-holder to transfer the right to possession are, by their very nature, property-affecting restrictions. It is only the holder of the right to possession, by virtue of their status as holder of the right to possession, who is subjected to this restriction, and it directly attaches to their property right in relation to the body of the deceased. Our next step is, then, to consider whether the inability of the right-holder to transfer the right to possession outside of the established common law hierarchy leaves the necessary degree of authority on the part of the right-holder intact.

It was argued in Part 3.1 of Chapter Seven that the degree of authority required to vest in the right-holder so that they retain their property right in relation to the body of the deceased is that authority necessary to exclusively control the dispose of the body. Clearly, the inability of the right-holder to transfer the right to possession outside of the established common law hierarchy is entirely removed from this requisite degree of authority. As much as they might not *wish* to be responsible for the act of disposal, and as willing as they might be to transfer the right to possession to another outside of the established hierarchy, the holder of the right to possession retains the degree of control necessary to dispose of the body of the deceased on their own account regardless of any restriction placed on their ability to transfer the right to possession outside of the established hierarchy. This transfer restriction is, then, entirely consistent with our preliminary conclusion regarding the proprietary status of the right to possession

## **6. Enforcing the Right to Possession**

The final salient feature we have to consider is of great practical importance: the holder of the right to possession can enforce their right through the courts, but this enforcement will only take the form of injunctive relief so that the body might be returned to the right-holder prior to disposal. Monetary damages are entirely out of the question, as are remedies for interferences with the body that do not interrupt the disposal process. Outside of shaping the scope of the right by virtue of

its role in establishing an *in rem* duty of non-interference,<sup>41</sup> what can this limited enforcement regime reveal about the proprietary nature of the right to possession of the body of the deceased?

There are two important points to note in this regard. First, the fact that a dispossessed right-holder can seek to have the body of the deceased returned to them by way of injunction, regardless of who is in possession of that body, is in itself a strong indicator that the right to possession does indeed sound in property.<sup>42</sup> The ability of a right-holder to enforce that right against all others has been held by many to be the defining feature of property rights.<sup>43</sup> The fact that this enforcement takes the form of the return of the ‘thing’ itself, as opposed to mere compensation for the interference with the property right at issue, strengthens this claim. The normative force of this position remains despite the fact that we have identified the defining feature of property, not in enforcement, but in the role property rights play in protecting our interest in exclusively determining the use to which our ‘thing’ will be put.

The second point to note regarding the enforcement of the right to possession through injunctive relief as opposed to monetary damages is that this remedial preference is far from unique. Many rights recognised at common law will be enforced in equity by way of injunction or similar relief. A contract for the sale of land provides the classic example. Damages as a general rule being inadequate in land sale contracts breached by a failure to transfer the land in question, the remedy most commonly sought by the wronged party lies in equity with a decree of specific performance.<sup>44</sup>

That said, the right to possession of the body of the deceased is not in perfect remedial alignment with the contractual right that arises in the land sale context. Whilst the supposed uniqueness of land means the hurdles put in place before a decree of specific performance will be issued (such as the inappropriateness of financial compensation) are nearly always met in sale of land contracts breached by a failure to transfer the land, it is possible to imagine cases in which one’s interest in

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<sup>41</sup> See Part 2 of Chapter Seven.

<sup>42</sup> Contrast this with the discussion of remedies offered for breaches of the contractual (and definitely non-proprietary) exclusive right of burial discussed in Part 6 of Chapter Four.

<sup>43</sup> Roger S Magnusson, ‘The Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions’ (1992) 18 *Melbourne University Law Review* 601, 610-11 (discussing David C Jackson, *Principles of Property Law* (Law Book Co, 1967) 43-5); Celia Hammond, ‘Property Rights in Human Corpses and Human Tissue: The Position in Western Australia’ (2002) 4 *University of Notre Dame Australia Law Review* 97, 105.

<sup>44</sup> The rationale for this position is set out neatly by Dixon J in *Dougan v Ley* (1946) 71 CLR 142, 150. As the *Dougan* decision makes clear, specific performance is not limited to contracts for the sale of land, but is available whenever the subject of a contract for sale is unique or has a special value for some other reason: at 147 (Rich J), 150-1 (Dixon J), 153 (Williams J).

receiving a transfer of land is wholly financial, so that damages might be an adequate remedy.<sup>45</sup> In contrast, our normative interest in the bodies of the deceased within our society, and their swift and decent disposal, means that the concept of financial compensation *ever* being sufficient as a means of enforcing the right to possession is foreign to many.<sup>46</sup> Whilst in the past this has been attributed to the negligible monetary value of the corpse,<sup>47</sup> today the inadequacy of damages is more likely to be attributed to the potentially insurmountable difficulties in identifying and quantifying the harm suffered.<sup>48</sup>

Consider also the possibility of the right-holder receiving damages for the unlawful retention of the body of the deceased by a third party. Their right having (apparently) been vindicated, what of their duty to dispose of the body? If damages are awarded but the body is not returned (and it remains undisposed of), the right-holder will be unable to carry out their duty of disposal. We have seen that this carries harsh penalties.<sup>49</sup>

It must be reiterated here that no enforcement mechanism is available to the right-holder if either their right to possession or the body of the deceased is interfered with in some way other than by the removal of the body of the deceased from the possession of the right-holder, thus disrupting the disposal process. A remedial gap surrounds the body of the deceased in this regard. We saw in our discussion of the *in rem* duties of non-interference that attach to the body of the deceased in Chapter Seven, for example, that criminal sanctions do not extend to prohibit interferences with the body that might be ‘decent’ whilst at the same time interfering in the exercise of the right to possession by the recognised right-holder — if, for example, someone other than the right-holder was responsible for the disposal of the body. Here, the civil law is similarly silent. The body has been disposed of, the right has terminated, and the former right-holder is entirely out of luck. And so, interferences with the body of the deceased that would appear to violate the sphere of negative

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<sup>45</sup> Consider, for example, if the land is purchased by a disinterested commercial entity solely for investment purposes that can be replicated elsewhere.

<sup>46</sup> Although on this point note the possibility of a separate tort of intentional wrongful interference with the body of the deceased, aimed at compensating resulting mental distress and not the initial interference with the exercise of the right to possession, discussed in Part 6 of Chapter Four.

<sup>47</sup> George H Weinmann, *A Survey of the Law Concerning Dead Human Bodies*, Bulletin of the National Research Council No 73 (1929) 30 (‘[b]ut the dead body of a human being has little or no intrinsic value. Some chemists have estimated the value of a man’s body at approximately ninety-eight cents in actual value. Therefore, one is naturally led to inquire just what measure of damages can be awarded’).

<sup>48</sup> See, eg, Debra Mortimer, ‘Proprietary Rights in Body Parts: The Relevance of *Moore’s Case* in Australia’ (1993) 19 *Monash University Law Review* 217, 232-3 (discussing the inherent difficulties that would attach to an ‘inappropriate and misconceived’ attempt to quantify damages in a proprietary claim for the unauthorised use of body parts).

<sup>49</sup> See Part 2 of Chapter Seven, discussing provisions such as s 236(1) of the *Criminal Code Act 1899* (Qld) (failure to carry out legal duty in relation to a corpse [such as the duty to dispose] is a misdemeanour with a maximum penalty of two years imprisonment).

liberty protected by the duty of non-interference that allows the holder of the right to possession, and the right-holder alone, to make disposal decisions, but that do in fact result in the disposal of the body, are not remediable at law.

In the case of other property rights, such an outcome might find a remedy in the tort of conversion, regardless of the fact that the ‘thing’ at issue is no longer in existence.<sup>50</sup> Why is a similar claim not available in the case of the right to possession? The answer lies in the fact that the right to possession is a right of extraordinarily limited scope. The right to possession of the body of the deceased exists, and has always existed, for the purposes of ensuring the bodies of the deceased are disposed of in order to uphold public health and public decency. Whilst its status as a property right (according to the preliminary conclusion reached at the end of Chapter Seven) allows the holder of the right to possession to exclusively determine how this process will take place, the right to possession’s focus remains disposal. The act of disposal, done by another and in violation of the right to possession, is simply not an act that requires a remedy at common law.<sup>51</sup>

## **7. Conclusion: An Externally Consistent Property Right**

This Chapter has completed this Thesis’ examination of the right to possession of the body of a deceased person and its status as a potential property right. Following on from our preliminary conclusion reached in Chapter Seven that the right to possession does indeed sound in property, this Chapter has examined whether the salient features of the right to possession identified in Chapter Four are externally consistent with this propertied conclusion.

This Chapter’s analysis has revealed that each salient feature that makes up the modern right to possession is consistent with our preliminary conclusion regarding that right’s juridical status. Those salient features that reflect external limitations on the right, for example, are either property-neutral (such as the various legislative provisions governing cremation), or leave the degree of authority that the right-holder is required to retain (being that authority necessary to exclusively determine the disposal of the deceased’s body) entirely intact (such as the *Sullivan* threshold). In the same way, the inability of the right-holder to transfer the right to possession

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<sup>50</sup> Conversion involves ‘a dealing with a chattel in a manner repugnant to the immediate right of possession of the person who has the property or special property in the chattel’: *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204, 229 (Dixon J). Its essence is ‘[a]n intent to do that which would deprive “the true owner” of his immediate right to possession’ and ‘[i]t may take the form of ... the destruction or change of the nature or character of the thing’.

<sup>51</sup> To put it in Penner’s recently adopted language of results and consequences, the *result* of the disposal of the body by a third party is that the right-holder’s right to possession has been violated, however there is no remedy available at law that arises as a *consequence* of the disposal of the body by a third party: J E Penner, *Property Rights: A Re-Examination* (Oxford University Press, 2020) 114.

outside of the established common law hierarchy in no way affects their ability to see to the disposal of the body of the deceased. The one outlier in our analysis of the external restrictions imposed on the right to possession — being judicial intervention in the right-holder's exercise of that right — can, at this time, be disregarded as anomalous.

For their part, the physical limitations inherent within the right to possession, and the limited enforcement mechanisms available to the right-holder, are explicable by virtue of that right's narrow and purpose-driven nature. The right to possession's inherent temporal limitation, on the other hand, merely reflects that a property right will cease to exist at the same time as its object, and the ability of the right-holder to entirely ignore the wishes of others underscores the exclusory nature of rights of confirmed property character. Finally, we have seen that the prescribed list of right-holders established by the common law hierarchy that governs the vesting of the right to possession exists as a *sui generis* rule of title to property, this unique title system also underlying the circumstances in which the right to possession is forcefully transferred up and down the established common law hierarchy.

It is clear, then, that each salient feature that makes up the right to possession as an internally consistent legal incident aligns with the external interpretation of the right to possession as a property right. At the end of this Chapter's analysis, and in line with this Thesis' evaluative framework, it can therefore be conclusively stated that the right to possession of the body of a deceased person as it currently exists in the Australian common law is a property right.



# Chapter Nine

## Conclusion

### 1. Introduction

This Thesis began with a description of the legal battle that emerged following the death of convicted Californian serial killer Charles Manson in 2017. It might have concluded with a lengthy setting out of any number of similarly dramatic disputes that have arisen in relation to other bodies — (in)famous and unknown alike. After all, as this Thesis has shown, post-death disputes relating to the control and disposal of the body of a deceased person have become staples within the Australian law of the dead, this body of case law growing rapidly in the years since 1986 to number nearly 60 in 2020.

In the Australian common law of the dead, these post-death disputes are resolved by reference to the right to possession of the body of the deceased, and throughout this Thesis we have explored this right's exclusive conferral of control and decision-making power in detail. Despite being the decisive legal rule in a growing number of disputes, however, prior to this Thesis the juridical status of the distinct, discrete legal incident that is the right to possession had remained almost entirely unexplored in the law of the dead literature and the post-death dispute case law alike. In responding affirmatively to the question 'is the right to possession of the body of a deceased person as it currently exists in the Australian common law a property right?', this Thesis has, for the first time, appropriately and conclusively identified the juridical status of this established legal incident. In doing so it has brought a strong theoretical foundation to a previously uncertain and ephemeral body of law.

In investigating this 'property question', this Thesis engaged in a detailed, systematic, and comprehensive analysis of the publicly available Australian post-death dispute case law. As summarised in Part 2 of this Conclusion, this analysis revealed five salient features that make up the right to possession as an internally consistent legal incident. Each of these five salient features was determined to be externally consistent with the right to possession's status as a property right according to the definition of property rights adopted in this Thesis. That is to say, each salient feature was assessed as being consistent with the right to possession's status as the right to exclusively determine the use to which the body of the deceased will be put.

The 'property question' this Thesis has answered is a discrete question within the Australian law of the dead, and, as Part 3 of this Conclusion reiterates, in answering this question this Thesis has made three significant contributions to the existing literature, both within and beyond this emerging field of study. In considering this discrete question, however, other issues have arisen

that this Thesis has not directly engaged with. The most important of these are the *normative* question of who, in any given post-death dispute, should be awarded the right to possession in relation to the body of a particular deceased person, and the potential reform of the rule that there is no-property in a corpse. Nonetheless, as Part 4 explains, the examination of the ‘property question’ in this Thesis has important implications for the existing scholarship in both areas.

Beyond its impact on the existing scholarship, this Thesis’ analysis also has important practical implications. As Part 5 of this Conclusion explores, for example, this Thesis’ definitive identification of the right to possession as a property right may encourage Australian judges faced with post-death disputes to refrain from intervening in the exercise of the right to possession by the right-holder. This is important, as Part 6 identifies the possibility of judicial intervention in the exercise of the right to possession as one of several areas of potential further research to be carried out.

Ultimately, however, this Thesis has shown, and this Chapter concludes by noting, that the right to possession is an unusual sort of property right, its anomalous nature unavoidable given the peculiarity of the object to which it attaches.

## **2. The Right to Possession as a Property Right**

Throughout the preceding seven substantive Chapters, this Thesis has argued that the right to possession of the body of a deceased person as it currently exists in the Australian common law is indeed a property right. The right to possession does not exist in the abstract, however, and it was first crucial for this Thesis to determine whether it was appropriate to extend the practice of property to encompass the body of the deceased to which that right attaches. Perhaps unsurprisingly, this question has been the subject of debate among lawyers and laypersons alike for decades.

It was explained in Chapter Five that, in order to be the object of property rights, a particular ‘thing’ must be both separable from all other persons, and capable of being the subject of multiple normatively symmetrical relationships. Whilst authors such as Penner have argued that the body of the deceased cannot be separated from the deceased themselves in the eyes of (Western) societies,<sup>1</sup> this view relies on a particular conception of the corpse as maintaining some ongoing sense of personhood even after death. When instead an entirely physicalist view of the deceased body as a mere shell is adopted (as was done in Chapter Six), arguments based on posthumous

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<sup>1</sup> J E Penner, *The Idea of Property in Law* (Clarendon Press, 1997) 122.

personhood can be put to one side. Far from any ongoing link between the deceased and their body, adopting this physicalist view of the corpse leads to the conclusion that the body of the deceased is a distinct physical entity from all persons — including the deceased themselves.

Despite being entirely separable, however, it is undeniable that the body of the deceased remains a unique ‘thing’ within Australian society. Its close relationship with the bodies of living persons, for example, means that concerns of autonomy and self-determination, responsible for the rejection of property principles in the context of those living bodies, must also be considered in the context of the corpse. Here again, emphasis can be placed on the body as a physical shell with no ongoing personhood. As Chapter Six argued, this physicality allows more than one person to stand in an identical relationship with the deceased body with no normative consequence to either party — or indeed to the deceased — in a way that would be impossible with the more-than-physical bodies of the living.

Similarly, Chapter Six rejected that the unique relationships that exist between the body of the deceased and the deceased’s loved ones remove the possibility of normative symmetry in relation to that body, as scholars such as Wall have advocated.<sup>2</sup> Wall’s position is reliant on the type of idiosyncratically personal relationships that the normative symmetry inquiry, and the practice of property more broadly, is simply not concerned with. That multiple people can indeed stand in normative symmetry with the body of the deceased is confirmed by the fact that the public need for the swift and decent disposal of the corpse means that each person within a particular community will be equally as affected should that body remain undisposed of, or be disposed of indecently. In meeting this public need, then, any one person can carry out the task of disposal with no normative consequence. This being the case, Chapter Six ultimately concluded that it is appropriate to extend the practice of property to encompass the novel ‘thing’ that is the body of the deceased.

The ‘things’ that are encompassed within the practice of property — such as the body of the deceased — are at the centre of the theory of property and property rights set out by James Penner and adopted in this Thesis. Drawing on Penner’s leading work *The Idea of Property in Law*,<sup>3</sup> Chapter Five defined property as that body of legal rules that protect our interest in exclusively determining the use of our particular ‘thing’. Our right to that particular ‘thing’ can be considered a property right to the extent others have a duty to exclude themselves from that ‘thing’, leaving

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<sup>2</sup> Jesse Wall, *Being and Owning: The Body, Bodily Material, and the Law* (Oxford University Press, 2015) 188-9, 203.

<sup>3</sup> (Clarendon Press, 1997).

us with a sphere of negative liberty within which to exclusively determine which, if any, use out of a sufficiently open-ended set of uses that ‘thing’ will be put.

The body of the deceased — as an appropriate novel ‘thing’ to be placed within the practice of property — attracts a generalised duty of non-interference that protects a negative sphere of liberty on the part of the holder of the right to possession. This generalised duty is largely founded in criminal law and requires that *all* persons exclude themselves from indecently interfering with the body of the deceased. Nonetheless, as Chapter Seven explored, there also exists a narrower duty of non-interference that requires all persons bar one (being the holder of the right to possession) exclude themselves from the process of *disposing of the body of the deceased*. The sphere of negative liberty that this narrow, but still generalised duty of non-interference protects has, as its content, one broad use to which the body of the deceased can be put: disposal. Importantly, this is the proper function of the body of the deceased as an artefact within Anglo-Australian society.

One should not approach the need for a sufficiently open-ended set of uses on such an unnecessarily broad footing, however. And indeed it was argued in Chapter Seven that the broad umbrella use of ‘disposal’ encompasses a sufficient number of potential means of carrying out that disposal so as to make a sufficiently open-ended set of uses available to the holder of the right to possession. Going further, Chapter Seven revealed that the modern right to possession allows the right-holder to decide upon, and carry out, one of the potential disposal uses with sufficient *exclusivity* that it can be said to protect the interest with which property law is characteristically concerned: our interest in exclusively determining use. In this way, then, the right to possession of the body of the deceased as it currently exists in the Australian common law conforms to the structural framework expected of property rights.

Whilst conforming to the structural framework expected of property rights, this Thesis has shown that the propertied right to possession is inherently constrained by the fundamentally public rationale — the concerns of public health and public decency, requiring that the body be disposed of swiftly and decently — that has underpinned it for a millennium. Throughout its historical development, these normative concerns led to the gradual construction of an external legal architecture of bodily disposal within which the right to possession would eventually emerge. Chapter Two revealed this external architecture to include a financial liability for the deceased’s funeral expenses and a duty to dispose of the body of the deceased, as well as a possessory right to that body — these legal incidents developing independently and accumulating over the course of 1,000 years. The same social concerns that shaped the development of this external architecture

also saw the common law consistently vest these legal incidents in some one identifiable person in order to ensure that person would have the requisite legal authority to see the body of the deceased disposed of.

This historical practice has continued unaltered into the modern case law, despite social conceptions regarding the appropriate identity of that some one identifiable person changing over time. Chapter Three set out the modern common law hierarchy that governs the vesting of the right to possession (first to the executor, then to the presumptive administrator or court-appointed replacement, followed by the husband, the parent, the householder, and finally the local council). The identity of these few prescribed right-holders has been determined by the historical need just now set out for someone in a position of authority to take control of the body of the deceased quickly, and to dispose of the body decently.

In addition to leading to the development of a fixed common law hierarchy of potential right-holders, however, the fundamentally public rationale that has moulded the right to possession for centuries is evident in the development of the five salient features that make up the modern right to possession as an internally consistent legal incident identified in Chapter Four. That these salient features have been shaped by the persistent, and restrictive, concerns of public health and public decency does not, however, prevent them from being externally consistent with the right to possession's juridical status as a property right.

As we saw in Chapter Eight, for example, the common law hierarchy and its *prescribed list of right-holders* is explicable as a *sui generis* means of assessing title to the right to possession — a process entirely familiar in the context of property rights. This idea of title underpins the forced transfer of the right to possession, both up and down the established common law hierarchy, on the part of Australian courts when required in the circumstances (this being a *transfer restriction* placed on the right to possession). If a right-holder is held to be unready, unwilling, or unable to dispose of the body, for example, they will lose title (that is, the strongest claim) to the right to possession in relation to that body, and that right will be transferred to another.

The need to see the body disposed of that grounds this *sui generis* system of title to the right to possession requires some one person to exercise exclusive control over the body of the deceased. It is this exclusive control that underpins the right to possession's status as a property right, and gives the right-holder an *absolute entitlement* to dispose of the body how she sees fit. The ability of the right-holder to, for example, override the wishes of both the deceased and all others in the context of disposal is clearly in line with the exclusive self-prioritisation at the core of exclusion essentialist views of property such as that adopted in this Thesis.

Whilst the right-holder has an *absolute entitlement* in the exercise of her discretion, however, the normative concerns of swift and decent disposal and the public rationale they instantiate also place *inherent limitations* on the right to possession's physical and temporal extent. In this way, prescribed right-holders can insist on their right to possession only to the extent required to see the *body* (as opposed to its separated parts) decently disposed of, and their right to possession of that body terminates at the time of disposal. That the right to possession has a confined existence for a singular purpose as these *inherent limitations* reveal makes it highly susceptible to nullification by way of *external restrictions* placed on the exercise of that right. Whilst rejecting the potential for judicial intervention in the exercise of the right to possession by the right-holder as anomalous, for example, Chapter Eight emphasised that, should more case law emerge solidifying this judicial practice, it would entirely nullify the right to possession's proprietary status. This is a direct result of the constrained and purpose-driven nature of the right to possession — judicial intervention in the carrying out of its purpose entirely depriving the right-holder of the exclusive determination required of a property right.

Other *external restrictions* placed on the exercise of the right to possession do not represent the same threat of nullification, however. Several of these restrictions — such as the legislation governing cremation in the various Australian states and territories — are property-neutral, meaning they apply to all and do not specifically attach to the propertied relationship that exists between property right holder and the object of that right. Other restrictions are property-affecting, meaning they apply only to the holder of a property right and only *because they are the holder of a property right*. Nonetheless, Chapter Eight explained that, whilst directly attaching to the propertied relationship between right holder and object, these property-affecting restrictions leave the requisite degree of authority required to be retained by the holder of the right to possession for that right to sound in property entirely untouched.

This requisite degree of authority was identified in Chapter Seven as being the authority needed to see to the disposal of the body of the deceased — this being the proper function of the deceased body within Anglo-Australian society. And this degree of authority remains wholly unaffected by virtue of, for example, the common law rule that restricts the right-holder in their exercise of the right to possession to a manner that is honest, consistent, and reasonable. In the same way, the *transfer restrictions* that limit the ability of the right-holder to alienate their right to possession outside of the established common law hierarchy, whilst directly affecting the right-holder because of their status as the holder of a propertied right to possession, leave entirely intact the ability of the right-holder to dispose of the body of the deceased (as much as they might wish for this ability to be transferred to another).

When the right-holder *does* wish to dispose of the body, however, the right to possession's public underpinnings play out in the limited enforcement mechanisms available to that individual. The right-holder cannot, for example, prevent others from engaging with the body in a decent manner outside of the disposal context, nor is the possibility of recovery available to them should the body in fact be disposed of by another. The purpose of the right to possession is, after all, to see to the disposal of the body of the deceased, and a remedy is only required prior to that disposal taking place, to ensure that disposal does indeed take place. The inability of the right-holder to seek redress for interferences with their right that have in fact resulted in the disposal of the body (in a manner similar to, for example, a trespass to goods claim resulting from the intentional destruction of another's computer) in this way both reflects and emphasises the fundamentally limited nature of the propertied right to possession. That said, and as Chapter Eight explained, in the limited circumstances in which the right-holder *can* enforce their right to possession through the courts, that this *enforcement takes place in equity alone* is entirely to be expected given the right's unique subject matter. Interferences with the right to possession (when these interferences result in the inability of the right-holder to dispose of the body, and the body has not yet been disposed of by another) can only be remedied by the grant of an injunction to see the body of the deceased returned to the possession of the right-holder. In the context of the corpse, damages at common law were, are, and likely always will be, entirely inadequate.

Each of the salient features that make up the right to possession as an internally consistent legal incident in its own way reveals the fundamentally public normative forces that have shaped the right's development and led to its limited and purpose-driven nature. Each is also, however, externally consistent with the right to possession's status as a property right (the one possible exception to this — being judicial intervention in the exercise of the right to possession — for now being explicable as an anomaly within the case law). The evaluative framework adopted in this Thesis, requiring both internal consistency within the right to possession as a legal incident, and external consistency between the inherent features of that legal incident and its proprietary status, is, then, satisfied. The right to possession as it currently exists in the Australian common law is indeed a property right.

### **3. This Thesis' Contribution to the Existing Literature**

This Thesis has presented a doctrinal analysis of the right to possession of the body of a deceased person as it currently exists in the Australian case law, and a theoretical assessment of that right's placement within the taxonomical branch of the private law that is property. In the Introduction to this Thesis it was claimed that this doctrinal analysis and theoretical assessment would allow this research to make three contributions to the existing literature within two distinct fields: the

Australian common law of the dead and the theoretical study of property law and property rights. A brief reminder of these three contributions is warranted here.

The first of these contributions lies in this Thesis' systematic and comprehensive analysis of the right to possession as it exists within the modern Australian post-death dispute case law. Never before has this body of case law been the subject of a detailed, comprehensive, and wide-ranging doctrinal analysis such as that set out in this research. In conducting this analysis for the first time, this Thesis has filled the substantial gap within the Australian common law of the dead left by this lack of comprehensive study, creating a complete picture of the right to possession in place of the slight glimpses and sideways glances offered by previous scholarship. In doing so, it has revealed the complex history of the right to possession, as well as the normative concerns in response to which it has developed and continues to operate.

Going beyond this important and entirely novel doctrinal analysis, however, in its second contribution to the existing literature this Thesis has addressed an acknowledged and pervasive confusion within the law of the dead across the common law world regarding the juridical status of the right to possession of the body of the deceased. As was noted in Chapter One, English law (and the common law more broadly) has largely given up on reconciling the rule that there is no-property in a corpse with the right to possession of the body of the deceased.<sup>4</sup>

Refusing to merely accept this area of law as unsettled and inconsistent, this Thesis has definitively responded to the 'property question': is the right to possession of the body of the deceased a property right? In doing so, it has, for the first time, engaged in an analytical jurisprudential analysis of the right to possession, confirming, based on its contours, content, and constrictions, that the right does indeed fall within the taxonomical branch of the private law that we call 'property'.

In answering the 'property question' (and *only* the 'property question'), this Thesis has avoided the philosophical and normative trap often associated with considerations of the body, body parts, and bodily material in conjunction with property rights and property law. This Thesis has examined the right to possession of the body of a deceased person, its emphasis being on the *nature of the right*, rather than the deceased body and the normative considerations that attach to the same. Whilst these two themes cannot, of course, be entirely severed from each other, immense value remains in focusing on the former at the expense of the latter. This value lies in the greater clarity and precision that emerges within the Australian common law of the dead from

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<sup>4</sup> See Part 2.2 of that Chapter.

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our newly-reached understanding of the right to possession of the body of the deceased as a property right.

The third contribution made by this Thesis to the existing literature goes beyond the Australian common law of the dead and ventures into the realm of property theory and exclusion essentialist conceptions of the nature of property. This contribution exists in this Thesis' setting out of, for the first time, a practical methodology by which the propertied nature of a pre-existing right attached to a particular novel 'thing' can be assessed. Whilst property theorists have considered the requirements for a novel 'thing' to be incorporated into the practice of property, following this incorporation the existing literature has always assumed that a right attaches to this 'thing', and that this right is proprietary in nature (the assumption generally being the existence of an ownership interest). This Thesis has not so assumed, and instead has set out a methodology by which the propertied nature of pre-existing rights in relation to novel 'things' can be measured that other theorists working in the context of other novel situations can utilise going forwards.

#### **4. Implications for Existing Scholarship**

Both the conclusion reached in this Thesis — that the right to possession of the body of the deceased is a property right — and its three contributions to the literature more broadly have important implications for the existing scholarship in two key areas.

##### **4.1. Potential Reform of the No-Property Rule**

The first of these key areas is the rule that holds that the body of the deceased cannot be the object of property rights — known as the 'no-property' rule. It was noted in the Introduction to this Thesis that, in legal positivist thought, the no-property rule and the right to possession (if affirmatively identified as a property right) create a legal 'gap', whereby the two legal norms conflict and neither makes room for the other.<sup>5</sup> This Thesis has conclusively identified the right to possession as a property right, confirming the existence of this legal 'gap'.

It remains to be seen how this 'gap' in the common law of the dead — that is, the clear conflict between the long-held rule that there can be no property in the body of the deceased, and the status of the right to possession of the body of the deceased as a property right — will be resolved. If resolved in favour of the right to possession *qua* property right — i.e. the right to possession is held to override the traditional common law rule that there is no property in a corpse — then it is possible that large swathes of the law that are predicated on the no-property rule will have to be

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<sup>5</sup> See Part 2.3 of that Chapter.

reconsidered. After all, if the supposedly binding common law rule that there is no property in a corpse cannot prevent the existence of this one property right, why should it stand in the way of others?<sup>6</sup>

This research, then, has important implications for the question of property rights in removed body parts and human biological material, particularly when this removal is from the bodies of deceased persons, but also in the context of material removed from living individuals. By unintentionally, but inevitably, adding momentum to calls for the abolition of the no-property rule, this Thesis opens the door for potential legal developments in the law of the dead and beyond into medical law (where questions regarding the legal status of human biological material are common), the law of tort (does harm done by another to my separated biological material constitute trespass to goods?), and perhaps even the criminal law of theft (is the human body and parts thereof capable of being stolen?).

## 4.2. The Normative ‘Who’ Question

The second area for which this research has important practical implications is the normative question of who should hold the right to possession in relation to a particular deceased body. Whilst it was expressly not addressed in this Thesis, the normative ‘who’ question has been considered by others writing within the law and the dead. These scholars have constructed various frameworks to govern the vesting of the right to possession in ways they see as preferable to the fixed hierarchy established by the common law. Croucher, for example, argues that, following a named executor, the deceased’s next of kin (in place of the presumptive administrator) should be vested with the right to possession of the body of the deceased so as to better account for both the autonomy of the deceased as well as any cultural, religious, or spiritual issues at play.<sup>7</sup>

As Croucher’s framework suggests, in an Australian context, the normative question of *who* should hold the right to possession in any given case is heavily underpinned by the significant Indigenous presence in the post-death dispute case law, and the unique cultural and spiritual considerations that arise in this context. The identification of the right to possession as a property right in this Thesis may warrant the revisiting of frameworks that have emerged against this Indigenous backdrop. Of particular concern in this context is the reluctance, generally speaking,

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<sup>6</sup> Note here that the rule by which human biological material removed from the body and subjected to work or skill becomes the object of a property right similarly overrides the no-property rule: see *Doodeward v Spence* (1908) 6 CLR 406, 414.

<sup>7</sup> See Rosalind Atherton, ‘Who Owns Your Body?’ (2003) 77 *Australian Law Journal* 178, 188-9; Rosalind F Croucher, ‘Disposing of the Dead: Objectivity, Subjectivity and Identity’ in Ian Freckelton and Kerry Peterson (eds), *Disputes and Dilemmas in Health Law* (Federation Press, 2006) 324, 336-9.

on the part of many Australian Indigenous communities to adopt Anglicised and individualised notions of property in the context of the deceased and their bodies. The identification of the right to possession as a property right may, then, warrant reconsideration of its appropriateness as a means of resolving post-death disputes, at least when the parties to that dispute are Indigenous. In this regard, consideration of other means by which post-death disputes involving Indigenous Australians might be resolved (such as alternative dispute resolution processes, for example)<sup>8</sup> is apposite.

## 5. Practical Implications

Beyond having important implications for the existing scholarship, however, this Thesis also has significant practical implications. In defining the right to possession as a property right, this Thesis has provided a previously absent foundation upon which Australian courts can develop their post-death dispute jurisprudence. How a right is defined or identified directly influences how courts apply and interpret that right. By identifying the right to possession as proprietary in nature, this Thesis provides a basis for courts to make use of this right in a particular way. This Thesis' work may, for example, result in judges refusing to intervene in the exercise of the right to possession, this result being, from certain perspectives, a necessary and natural consequence of that right's identification as a property right. In this way, this research has the potential to greatly influence future post-death disputes and the law of the dead more broadly.

This is particularly true given that, as we have seen, the majority of post-death disputes are decided *ex tempore* or otherwise within a very tight timeframe. In cases where there is little time to conduct extensive research, having a solid foundation for one's understanding of the various legal rights, duties, and interests at play is of far greater importance than might be the case in a dispute with a less urgent schedule. In this way, this Thesis, having drawn together the publicly available case law, and having analysed this case law in a thorough and systematic manner, has the potential to become an immensely useful reference resource for Australian courts faced with post-death disputes in the years ahead. The identification of the right to possession as a property

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<sup>8</sup> For discussions of the role alternative dispute resolution processes can play in conflicts over the bodies of the deceased, see Brian L Josias, 'Burying the Hatchet in Burial Disputes: Applying Alternative Dispute Resolution to Disputes Concerning the Interment of Bodies' (2004) 79 *Notre Dame Law Review* 1141; Yvonne Oldfield, 'Disputes Over Interment and Cremation: The Mediation Option' (2014) *Victoria University of Wellington Law Review* 613. For a practical example involving Indigenous parties, see *Reece v Little* [2009] WASC 30 (16 February 2009), where the two mediation sessions between the parties resulted in an agreement being reached that was subsequently violated by the plaintiff.

right made in this Thesis is thus of broad practical importance in a society that will undoubtedly witness increasing numbers of post-death disputes in the coming decades.<sup>9</sup>

It is almost certain that at least some of the post-death disputes that will emerge as we head further into the 21<sup>st</sup> century will involve new and emerging disposal mechanisms and related technologies. Here also this Thesis' propertied conclusion is liable to have practical implications. If the right to possession were to be held to apply in relation to the bodies of those under cryopreservation (being the process by which those close to death are, in essence, frozen and preserved in anticipation of being 'thawed out' at a later date), for example, this suggests that the body of that person — still, by all accounts, alive — is the object of a property right — something we have seen to be antithetical to the legal, social, and pre-legal norms of Anglo-Australian society. In this case, another legal 'gap' would emerge between two directly conflicting legal norms (being the anti-slavery norm and the propertied right to possession) that would require resolution by the courts.

Alternatively, the application of a propertied right to possession to a cryopreserved body may indicate that that individual is in fact no longer alive (their body being the object of a property right as it is). Reaching this conclusion as a result of this Thesis' analysis allows for the resolution of issues of estate administration (one cannot administer [in a testamentary sense] the estate of a person who is not dead, after all), and the transfer of property from one generation to the next — undeniably a substantial practical implication.

## 6. Further Research

Important implications aside, this Thesis' conclusion that the right to possession of the body of a deceased person sounds in property presents several avenues for further research.

### 6.1. The *Numerus Clausus* of Property Rights

Whilst this Thesis has identified the right to possession of the body of the deceased as a property right, it has not sought to identify the exact *form* of property right — that is, is the right to possession akin to ownership of the body, or is it equivalent to a lease, or an easement, or some other, subsidiary interest. The first area in which further research is warranted is, then, the precise placement of the right to possession among the *numerus clausus* of property rights.

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<sup>9</sup> New Zealand Law Commission, *Death, Burial and Cremation: A New Law for Contemporary New Zealand*, Report No 134 (2015) 194 [19.15]-[19.16].

It has long been accepted that only certain classes of property rights will be acknowledged by, and that no new types of property rights will be admitted into, the common law. That is, there is a *numerus clausus* — a closed list — of the forms a property right can take. Traditionally, the common law of Australia (and of other jurisdictions, such as England and the United States) has included 12 or so such forms, from full interests in land (such as the fee simple), to lesser interests (such as the easement), and down to security interests (such as the mortgage).<sup>10</sup> Whilst undoubtedly more influential in considerations of real, as opposed to personal, property, this closed list is nonetheless ‘jealously guarded’,<sup>11</sup> and novel property rights will only be upheld when they can be characterised as ‘close analogies’ to one of the traditional property forms.<sup>12</sup>

Work is needed, then, to identify which, if any, of the traditional closed list of property right forms the right to possession is a ‘close analogy’ of, thus successfully placing it within the *numerus clausus* of property rights. Alternatively, the analysis undertaken in this Thesis may add to calls already present in the literature for the common law of property to move away from the *numerus clausus* and towards a flexible approach to property law concepts that reflects our ever-developing world.<sup>13</sup> In either case, the need for further research is clear.

## 6.2. Judicial Intervention in the Exercise of the Right to Possession

The second area in which further research — or at least, continued monitoring of the post-death dispute case law — is warranted lies in judicial intervention in the exercise of the right to possession of the body of the deceased. It was concluded in Chapter Eight that, for now, this salient feature of the modern right to possession can be explained as an anomaly in the case law and disregarded when examining that right’s proprietary nature. It was also noted, however, that this conclusion would change if this anomaly solidified into standard judicial practice. Whilst such an outcome is doubtful,<sup>14</sup> further consideration of this issue into the future will be necessary.

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<sup>10</sup> Brendan Edgeworth, ‘The *Numerus Clausus* Principle in Contemporary Australian Property Law’ (2006) 32 *Monash University Law Review* 387, 389.

<sup>11</sup> Michael Weir, ‘Pushing the Envelope of Proprietary Interests: The Nadir of the *Numerus Clausus* Principle?’ (2015) 39 *Melbourne University Law Review* 651, 652.

<sup>12</sup> Edgeworth, above n 10, 390, citing *Clos Farming Estates Pty Ltd v Easton* [2001] NSWSC 525 (28 June 2001) [26].

<sup>13</sup> See generally Weir, above n 11.

<sup>14</sup> As we saw in Part 3.5 of Chapter Eight, the most recent post-death dispute analysed in this Thesis firmly rejected the possibility of judicial intervention in the exercise of the right to possession.

### 6.3. The Repatriation of Ancestral Remains

The third area in which further research is recommended is an investigation of the potential role of a property right to possession in the repatriation of ancestral Indigenous remains held in both domestic and international institutions.

The struggle of Indigenous groups to see their ancestor's remains returned from colonial institutions, both in Australia and overseas, is well-documented (as is the reluctance of a number of these institutions to return the remains at issue, often collected under circumstances of violent conflict, on the basis that they constitute an important research tool). To date, the quest for the repatriation of ancestral remains has been largely based on political goodwill and grassroots advocacy. This Thesis, having identified the right to possession as a property right, allows Indigenous groups to argue that they (being the relevant group of Indigenous persons in any particular case) should be considered by Australian courts to be the appropriate holder of that property right in relation to particular ancestral remains (again, going back to the normative 'who' question), and that this right should be enforceable (as a matter of both Australian domestic private law and private international law) against those institutions still refusing to return remains. After all, as we have seen, the right to possession can trump other property rights that exist in relation to the body of the deceased — such as that claimed on the basis of work or skill,<sup>15</sup> likely to be the basis of the institution at issue's responding property claim.

Of course, even briefly sketched as it is here this line of reasoning gives rise to a number of issues — not least the above discussed reluctance on the part of Aboriginal and Torres Strait Islander people to consider the remains of their ancestors as the object of a property right. The enforceability of the common law right to possession in a private international law setting also presents difficulties.<sup>16</sup> Nonetheless, the role that a property right to possession has the potential to play in the repatriation context is of immense interest, and is an area that strongly warrants academic consideration going forward.

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<sup>15</sup> See *Doodeward v Spence* (1908) 6 CLR 406, 414, discussed in Part 3 of Chapter Four.

<sup>16</sup> Although does not appear to be considered impossible: see *Re Tasmanian Aboriginal Centre* (2007) 16 Tas R 139 (grant of administration made in Tasmania to allow the applicant to test the right to possession in an English court in an effort to prevent invasive scientific examination of ancestral remains being carried out); *Re Estate of Tupuna Maori* (Unreported, High Court of New Zealand, Greig J, 19 May 1988) (grant of administration made in New Zealand for the limited purpose of initiating legal proceedings relating to the proposed sale of ancestral remains by a London auction house and according the deceased a decent burial).

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## 7. Conclusion: The Strangest ‘Thing’ on Earth

Death is ever present, and it comes to all. In Australia, the body of each and every deceased person will be the object of a right to possession held by some one person among the still-living. This Thesis has provided not only the most detailed and comprehensive analysis of the right to possession of the body of the deceased as it currently exists within the Australian case law, but also the most definitive analysis of its juridical status to date. By measuring the right to possession against an appropriate theory of property, this Thesis has definitively identified this discrete legal incident as sounding in the taxonomical branch of the private law that is property. In doing so, it has provided a solid foundation, previously lacking within the law of the dead, from which robust and doctrinally sound analysis can take place.

That said, there is no doubt that the right to possession of the body of the deceased is an odd and constrained sort of property right. It exists only for a short period of time to see that only one task — the disposal of the body — is carried out. And whilst the propertied nature of the right to possession ensures that this task is done according to the exclusive determination of one person: the holder of the right to possession, the individuals liable to fill this role are limited in number. Much of this is at odds with our traditional conception of property rights as broad, powerful, and (relatively) unfettered. But the common law cannot be blind to the body of the deceased, its mere existence requires a legal response. Is it any wonder this response appears anomalous within our traditional conception of property? A corpse, after all, ‘in some respects is the strangest thing on earth’.<sup>17</sup>

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<sup>17</sup> *Louisville & N R Co v Wilson*, 51 SE 24, 25 (Lumpkin J) (Ga, 1905).



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*Coroners Act 2003* (Qld)

*Coroners Act 1975* (SA)

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## Appendix A

### List of Post-Death Disputes

	Jurisdiction	Year	Case Citation	Subject of Dispute	ATSI Deceased?*	Intestacy Code
1	NSW	1986	<i>Robinson v Pinegrove Memorial Park Ltd</i> (1986) 7 BPR 15,097	Ashes	No	N/A
2	NSW	1986	<i>Beard v Baulkham Hills Shire Council</i> (1986) 7 NSWLR 273	Burial plot	No	N/A
3	NT	1992	<i>Calma v Sesar</i> (1992) 2 NTLR 37	Body (not disposed of)	Yes	2
4	NSW	1992	<i>Brown v Tullock</i> (1992) 7 BPR 15,101	Body (not disposed of)	No	1
5	NSW	1993	<i>Burnes v Richards</i> (1993) 7 BPR 15,104	Body (not disposed of)	Yes	7
6	WA	1993	<i>Re Bellotti v Public Trustee</i> (Unreported, Supreme Court of Western Australia, Franklyn J, 11 November 1993)	Body (not disposed of)	Yes	1
7	NSW	1994	<i>Warner v Levitt</i> (1994) 7 BPR 15,110	Body (not disposed of)	No	6
8	Vic	1997	<i>Meier v Bell</i> (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997)	Body (not disposed of)	Yes	1
9	NSW	1997	<i>Smith v Tamworth City Council</i> (1997) 41 NSWLR 680	Burial plot	No	N/A
10	SA	1997	<i>Lochowiak v Heymans</i> (Unreported, Supreme Court of South Australia, Debelle J, 8 August 1997)	Body (not disposed of)	No	N/A
11	SA	1998	<i>Jones v Dodd</i> (Unreported, Supreme Court of South Australia, Debelle J, 10 July 1998)	Body (not disposed of)	Yes	7
12	WA	1999	<i>Re Boothman; Ex Parte Trigg</i> (Unreported, Supreme Court of Western Australia, Owen J, 27 January 1999)	Body (not disposed of)	No	N/A
13	SA	1999	<i>Jones v Dodd</i> (1999) 73 SASR 328	Body (not disposed of)	Yes	4
14	SA	1999	<i>Dodd v Jones</i> [1999] SASC 458 (22 October 1999)	Body (not disposed of)	Yes	4
15	WA	2001	<i>Manktelow v Public Trustee</i> (2001) 25 WAR 126	Body (not disposed of)	No	N/A
16	WA	2002	<i>Burrows v Cramley</i> [2002] WASC 47 (15 March 2002)	Body (not disposed of)	No	4
17	NT	2002	Transcript of Proceedings, <i>Maranikuwuy v Barrara</i> (Supreme Court of the Northern Territory, 20203591, Bailey J, 28 March 2002)	Body (not disposed of)	Yes	3
18	NT	2002	Transcript of Proceedings, <i>Milanka Sullivan v Public Trustee for the Northern Territory of Australia</i> (Supreme Court of the Northern Territory, 20210720, Gallop AJ, 24 July 2002)	Body (not disposed of)	Yes	N/A
19	SA	2003	<i>Reid v Love</i> [2003] SASC 214 (4 April 2003)	Body (not disposed of)	Yes	1
20	Vic	2003	<i>Dow v Hoskins</i> [2003] VSC 206 (10 June 2003)	Body (not disposed of)	Yes	4
21	NSW	2003	<i>Privet v Vovk</i> [2003] NSWSC 1038 (7 November 2003)	Body (not disposed of)	No	1
22	Vic	2004	<i>Leeburn v Derndorfer</i> (2004) 14 VR 100	Ashes	No	N/A
23	Qld	2004	<i>Reid v Crimp</i> [2004] QSC 304 (3 September 2004)	Body (not disposed of)	No	N/A
24	Vic	2006	<i>Gilliot v Woodlands</i> [2006] VSCA 46 (21 February 2006)	Body (not disposed of)	No	N/A
25	Qld	2006	<i>Doherty v Doherty</i> [2007] 2 Qd R 259	Ashes	Yes**	1

Appendix A

26	Tas	2007	<i>Re Tasmanian Aboriginal Centre</i> (2007) 16 Tas R 139	Ancestral Remains	Yes	1
27	WA	2007	<i>Ugle v Bowra &amp; O'Dea</i> [2007] WASC 82 (16 March 2007)	Body (not disposed of)	Yes	3
28	Vic	2007	<i>Keller v Keller</i> (2007) 15 VR 667	Body (not disposed of)	No	3
29	WA	2007	<i>Joseph v Dunn</i> (2007) 35 WAR 94	Body (not disposed of)	No	2
30	NSW	2007	<i>AB v CD</i> [2007] NSWSC 1474 (17 December 2007)	Body (not disposed of)	No	3
31	WA	2008	<i>Garlett v Jones</i> [2008] WASC 292 (5 December 2008)	Body (not disposed of)	Yes	4
32	WA	2009	<i>Reece v Little</i> [2009] WASC 30 (16 February 2009)	Body (not disposed of)	Yes	4
33	WA	2009	<i>Mourish v Wynne</i> [2009] WASC 85 (1 April 2009)	Body (not disposed of)	Yes	4
34	SA	2009	<i>Minister for Families and Communities v Brown</i> [2009] SASC 86 (2 April 2009)	Body (not disposed of)	Yes	4
35	Vic	2009	<i>Threlfall v Threlfall</i> [2009] VSC 283 (8 July 2009)	Body (not disposed of)	No	4
36	Qld	2009	Transcript of Proceedings, <i>Liston v Pierpoint</i> (Supreme Court of Queensland, 7292, Douglas J, 15 July 2009)	Body (not disposed of)	Yes	4
37	Qld	2009	<i>Roma v Ketchup</i> [2009] QSC 442 (10, 17 December 2009)	Body (not disposed of)	No	1
38	WA	2010	<i>Spratt v Hayden</i> [2010] WASC 340 (23 November 2010)	Body (not disposed of)	Yes	4
39	Qld	2010	<i>Frith v Schubert</i> [2010] QSC 444 (26 November 2010)	Body (not disposed of)	Yes	4
40	Qld	2011	<i>Tufala v Marsden</i> [2011] QSC 222 (12 July 2011)	Body (not disposed of)	Yes**	N/A
41	Vic	2012	<i>Carter v Coroners Court of Victoria</i> [2012] VSC 561 (9 November 2012)	Body (not disposed of)	Yes	N/A
42	WA	2013	<i>Milenkovic v McConnell</i> [2013] WASC 421 (22 November 2013)	Ashes	No	N/A
43	SA	2014	<i>South Australia v Smith</i> (2014) 119 SASR 247	Body (not disposed of)	Yes	5
44	Qld	2014	<i>Laing v Laing</i> [2014] QSC 194 (22 August 2014)	Body (not disposed of)	No	7
45	NSW	2015	<i>Vosnakis v Arfaras</i> [2015] NSWSC 625 (26 May 2015)	Burial plot	No	N/A
46	WA	2015	<i>Price v Metropolitan Cemeteries Board</i> [2015] WASC 501 (12 December 2015)	Ashes	No	N/A
47	NSW	2016	<i>Darcy v Duckett</i> [2016] NSWSC 1756 (9 December 2016)	Body (not disposed of)	Yes	5
48	WA	2017	<i>Bertani v Bertani</i> [2017] WASC 78 (22 March 2017)	Body (not disposed of)	Yes	4
49	NSW	2017	<i>Abraham v Magistrate Stone, Deputy State Coroner</i> [2017] NSWSC 1684 (5 December 2017)	Body (not disposed of)	Yes**	2
50	Qld	2018	<i>Johnson v George</i> [2018] QSC 140 (14 June 2018)	Body (not disposed of)	Yes	5
51	NSW	2018	<i>Squire v Beech</i> [2018] NSWLC 17 (22 November 2018)	Ashes	No	N/A
52	NSW	2019	<i>Dragarski v Dunn</i> [2019] NSWSC 300 (21 March 2019)	Body (not disposed of)	No	7
53	NSW	2019	<i>White v Williams</i> [2019] NSWSC 437 (17 April 2019)	Body (interred)	Yes	7
54	NSW	2019	<i>Kitchener v Magistrate Thomas in His Capacity as a Coroner</i> [2019] NSWSC 701 (13 June 2019)	Body (not disposed of)	Yes	7
55	NSW	2020	<i>Nayacakalou v Vincent</i> [2020] NSWSC 24 (30 January 2020)	Body (not disposed of)	Yes	5

56	NSW	2020	<i>Kak v Kak</i> [2020] NSWSC 140 (26 February 2020)	Body (not disposed of)	No	6
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\*This only answered affirmatively if the deceased clearly identified as Australian Aboriginal or Torres Strait Islander in the judgement. As a result, it is possible that an identification of 'No' may, in some cases, be inaccurate.

\*\* Indigenous person other than ATSI (e.g. Maori)

Intestacy Code	
1	Presumptive Administrator rule decides (no equal claimant issues)
2	Presumptive Administrator rule + tie-break (practicalities)
3	Presumptive Administrator rule + tie-break (practicalities and other factors)
4	Can depart from Presumptive Administrator rule in appropriate case
5	Presumptive Administrator rule one factor among several to be considered
6	Other rung on hierarchy
7	Different reasoning