

*The Story of Seventeen Tasmanians:
the Tasmanian Aboriginal Centre and Repatriation
from the Natural History Museum*

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I Introduction

The Tasmanian Aboriginal Centre (TAC) has been involved in a legal battle with the Natural History Museum in London in regard to possession of the remains of 17 Tasmanian Aborigines which the Museum has had in its possession since the 19th Century. While the Museum has recently agreed to repatriate the remains, it still seeks to DNA test some samples taken from the remains. For present day Tasmanian Aborigines, this is viewed as representing a degrading violation of Aboriginal cultural and spiritual beliefs.¹ The TAC is therefore maintaining its stance to try and prevent the tests taking place. This has created opposition from even within the Aboriginal community, with some claiming that the money spent on this battle could be better spent on other needs of the Aboriginal community.²

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¹ Matthew Denholm, 'A bone to pick with the Brits', *The Weekend Australian*, 17 February 2007, 17; see also Lyndon Ormond-Parker, 'Aboriginal Remains Return Home' [2003] *Indigenous Law Bulletin* 23.

² Matthew Denholm and Peter Wilson, 'Museum bones legal fight a waste of \$1m', *The Weekend Australian*, 24 February 2007, 1. Note that

Even though remains have been repatriated, the case has raised many issues: moral and ethical, as well as legal. Legal issues include what property rights may exist in the remains; the legal right to a burial; legal requirements in relation to the carrying out of tests on human tissue; legal requirements in regard to repatriation, and even in this case, the question of the administration of estates. Some would argue that there is a clear moral and ethical argument that the study of a unique people (like the Tasmanian Aborigines) enhances our understanding of humanity, and therefore must override the desires of a relatively few number of people. This is balanced by the counter-argument that such testing not only infringes cultural beliefs, but also smells of 19th century imperialism that saw people like the Tasmanian Aborigines treated as little more than curiosities.³

This paper will examine some of these issues, but first it will look at the background of the Tasmanian Aborigines who are now involved in the case.

II The Human Remains from Tasmania

A The Aborigines of Tasmania: A Brief History

Aborigines entered Tasmania across the land bridge that

there are two groups who identify as being Aboriginal in Tasmania. One are those who are the descendants of the Tasmanian Aborigines taken to the islands in the Bass Strait in 1835, or who were living on those islands after becoming the wives of European sealers. This group is known as the Palawa and are associated with the TAC. The other group, known as the Lia Pootah, describe themselves as the descendants of the Aborigines who remained on mainland Tasmania as servants, or who managed to remain on mainland Tasmania in small tribal groups: see Denholm, n 1 above, 17. It is the Lia Pootah who are claiming that the legal action is a waste of money.

³ For instance, one of the skulls in the group is known as 'Lady Franklin's skull' due the fact that it was given as a memento in 1838 to Lady Franklin, the wife of the Governor of Van Diemen's Land, as Tasmania was then known. See Prof Norman Palmer (chair), *Report of the Working Group on Human Remains* (2003) 24 (Department of Culture, Media and Sport (UK)).

existed between present day Tasmania and the mainland from around 43,000 to 14,000 years ago, with the oldest site in south west Tasmania dating back 40,000 years.⁴ Tasmania's Aborigines are considered to be distinct from the Aborigines of mainland Australia, both culturally and biologically. The biological differences are linked to the genetic drift that occurred after 14,000 years of isolation when Bass Strait was formed by rising sea levels.⁵ These differences include curly hair, darker skin and a small stature: the males, on average, being 160cm, and females 152cm.⁶

Traditional Tasmanians spent most of their time living in small bands of around 40-50 people from around 10 families, moving over an area extending some 500-800km. Their lifestyle was therefore that of a nomadic people, and except when there was an abundance of a particular food source, like seals or muttonbirds, the bands rarely stayed more than two days in the same place. Bands would come together for these and other seasonally abundant foods, and also to hold ceremonies and arrange marriages. The women usually married men outside their own band, but within their own tribe. Estimates of the population put it at around 4 000 at the time of European settlement, one person per 10-12 km², though it varied from one per 6km² on the coast to one per 20 km² in the inland parts of the island.⁷

Culturally, the Aborigines of Tasmania were distinguished from mainland Aborigines by their small number of implements, with their only weapons being spears, clubs and stones. All up they had just 15 implements, compared with 60 in temperate mainland Australia, and 120 in the tropical regions. In Tasmania there were no dingoes to help the Aborigines with their hunting, the dingo only having reached mainland

⁴ Josephine Flood, *The Original Australians: The Story of the Aboriginal People* (2006) 71.

⁵ Ibid 63.

⁶ Ibid 62.

⁷ Ibid 65-6

Australia well after Bass Strait was formed.⁸ For a mainly coastal people they had curiously stopped eating fish some 3 500 years ago, with Flood suggesting that this may have been due to a major poisoning episode, possibly involving ciguatera, a poison naturally occurring in algae and plankton which may then build up to toxic levels in the large fish that are consumed by humans.⁹

The first Europeans to live in Tasmania were sealers who began hunting in Bass Strait in 1798. These sealers traded with the local Aborigines, with goods and dogs for hunting being exchanged for, amongst other things, Aboriginal women. It should be noted, however, that reports indicate that the women appeared content living with the sealers, later resisting attempts to take them away.¹⁰

The first permanent European settlement was established in 1803, east of the Derwent River, followed by the site of present-day Hobart in 1804.¹¹ More significantly for the Aboriginal population, in 1807 seven hundred settlers arrived, most of them ex-convicts. This saw the beginning of increased tension between the Aborigines and the Europeans which only heightened as the numbers of Europeans increased from 2000 in 1814 to around 12 000 by 1824.¹²

With increasing conflict and deaths of European settlers, attempts were made to force all Tasmanian Aborigines into the south eastern peninsula. When this failed, missions were set up in places like Flinders Island and Bruny Island.¹³ However disease was either killing off the population, or leaving the adults sterile, and by 1830 there were almost no Aboriginal children.¹⁴ By 1835 the population had been reduced to an

⁸ Ibid 63.

⁹ Ibid 71.

¹⁰ Ibid 76.

¹¹ Ibid 77-78.

¹² Ibid 81.

¹³ Ibid 86.

¹⁴ Ibid 90.

estimated 150¹⁵ and some 40 years later on her death in 1876, Truganini was proclaimed the last Tasmanian Aborigine. Present day Aboriginal Tasmanians who rightfully claim Aboriginal heritage, dispute this description. Truganini's body was acquired by Hobart's Royal Society Museum, where it was displayed from 1904-47. It was only reluctantly given up by the museum when forced to by legislation in 1975. Her remains were subsequently cremated.¹⁶

The treatment of Truganini's body is indicative of the treatment of remains of Aboriginal Australians over two centuries and continues to reflect the attitudes towards remains of indigenous peoples. The story of Truganini's remains also assists our understanding of the issues at stake for TAC in 2007 in regard to the remains of the 17 Tasmanian Aborigines.

B The Present Day

The remains of the 17 Tasmanian Aborigines formerly held in the Natural History Museum were either donated to, or bought by the museum. There were 16 adults and one boy: four of the adults have been identified as female, three as male, with the gender of the remaining nine being unknown.¹⁷

The UK *Report of the Working Group on Human Remains* highlights the issues for Tasmanian Aborigines in relation to repatriation of human remains, such as those being held in the Natural History Museum. The Report looks into the relevance of the method of removal of remains in determining whether this was relevant to the issue of interpreting consent for scientific research. In response, the TAC submitted that:

Nor is the argument of legitimate acquisition sound. This is just hiding behind a technicality in the case of Tasmanian material. It may have been donated to you or purchased by you on your side of the ocean, but on our side it was plundered, stolen and taken by deceit from powerless people

¹⁵ Denholm, above n 1, 17.

¹⁶ Flood, above n 4, 91.

¹⁷ Denholm, above n 1, 17.

preyed on at their most vulnerable time. It was not you [ie museums] that did it but you still have the spoils and they were not properly acquired.¹⁸

This highlights the fact that the acquisition of the remains coincided with imposition of colonial rule, cultural imperialism and denigration of Indigenous people and their culture based on an ideology of superiority of the colonists.¹⁹ The Report further points out that the 'psychological and arguably the physical and social health of these communities [remains] damaged'.²⁰

The Report notes the arguments made to the Working Group in a 2002 submission on behalf of Tasmanian Aborigines for the 'unconditional return of all Aboriginal human remains to Aboriginal people', and that 'prior approval from traditional owners' should be obtained before further research.²¹ In the UK context then, the concerns of the Tasmanian Aborigines in relation to ancestral remains are extensively documented as part of a formal review process.

Responses by the Museum to the Tasmanian Aborigines' submission denied that there was any mandate to speak for repatriation.²² One submission held that ironically the total genocide of Aborigines in Tasmania meant that demands for repatriation of Tasmanian remains were 'empty'.²³ As will be seen later in this paper, Australian law at least impliedly rejects this position.

These ideas help to contextualise the demands made by the TAC for the return of the 17 Tasmanians which, in turn, raises legal issues concerning property rights and the human body.

¹⁸ *Report of the Working Group on Human Remains*, above n 3, 151-2.

¹⁹ *Ibid* 28-9.

²⁰ *Ibid* 16.

²¹ *Ibid* 51.

²² *Ibid* 52.

²³ *Ibid* 38.

III The Legal Issues

A Property Rights and the Human Body

It has long been held by the courts that there is no property in a corpse, confirmed in Australia by *Doodeward v Spence*.²⁴ In an earlier United States case, *Pierce v Proprietors of Swan Point Cemetery*,²⁵ Potter J stated that:

Although ... the body is not property in the usually recognised sense of the word, yet we may consider it as a sort of quasi property, to which certain persons may have rights, as they have duties to perform toward it, arising out of our common humanity. But the person having charge of it cannot be considered as the owner of it in any sense whatever; he holds it only as a sacred trust for the benefit of all who may from family or friendship have an interest in it, and we think that a court of equity may well regulate it as such, and the change the custody if improperly managed.²⁶

This statement was cited with approval by the English Court of Appeal in *Dobson v North Tyneside Health Authority*,²⁷ which also reiterated the old principle that there was no property in a corpse. This centuries-old law has been recently applied in *Colavito v New York Organ Donor Network Inc*²⁸ where the New York Court of Appeal said that ‘Coke’s classic edict [that a corpse has no value] is of more than historical interest; it has been a staple of the common law’.²⁹

In *Colavito*, the US Court of Appeals³⁰ also considered the question of whether the kidney of a deceased, promised to the plaintiff by the widow of the deceased, was capable of being the subject of a claim for conversion in circumstances where it had been given away to another patient. The court accepted

²⁴ (1908) 6 CLR 406, 419 (Higgins J).

²⁵ 14 Am Rep 667 (1872). See citation in *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 691 (Young J).

²⁶ *Ibid*, 681.

²⁷ [1996] 4 All ER 474.

²⁸ (2006) 8 NY 3d 43.

²⁹ *Ibid* 50.

³⁰ (2006) 438 F 3d 214.

that there was no property in a corpse save the right of the next of kin to possess it for burial, but questioned whether application of this rule by the common law could establish a 'public policy against finding property rights in donated organs'.³¹ In terms of an argument based on property in the organ, the court stated that:

[P]laintiffs such as Colavito are not using the term "property" as a legal fiction upon which to base a claim for emotional harm. They have – or assert that they have – a practical use for the organ, not a sentimental one.³²

In answering the questions certified by the US Appeals Court, the New York Appeals Court reviewed the cases relating to recovery of body parts after death. It found the common theme was 'the concept of decent burial for an undesecrated body'.³³ The court then added that it had 'been careful about characterizing causes of action that impose liability for violating these sensibilities. In all instances, we have disclaimed any reliance on a theory of property rights in a dead body'.³⁴

The Court ultimately found no basis on which to 'forecast the circumstances in which someone may conceivably have actionable rights in the body or organ of a deceased person'³⁵ finding that the plaintiff had no enforceable right to the kidney as it was in any event histo-incompatible with his antibodies.

In spite of the common law presumption against property in a corpse and the New York Appeals Court's sidestepping the issue of property in parts of a corpse, it is possible to establish proprietary interests in a corpse in certain situations. In *Doodeward v Spence* for instance, which involved the possession of a preserved body of a child that had been born with two heads, it was held that such possession was not unlawful if

³¹ Ibid 224.

³² Ibid 225.

³³ (2006) 8 NY 3d 43, 52.

³⁴ Ibid.

³⁵ Ibid 53.

the body possesses attributes that mean its preservation may afford valuable or interesting information or instruction,³⁶ that differentiate it 'from a mere corpse awaiting burial'.³⁷ It was also suggested in this case that there may be property in a mummy due to the skill of the embalmer having turned it into something else.³⁸

Interestingly from the perspective of the 17 Tasmanians, Higgins J in dissent pointed out that in the case of a mummy, 'the dead body has been buried in foreign soil, in a country where British law does not prevail, where the common law doctrine as to burial and Christian burial does not apply'.³⁹ On the basis that 'there is no one interested in insisting that the mummy shall not be disturbed',⁴⁰ the mummy apparently is capable of being property. The case of the 17 Tasmanians tests the assumptions made in Higgins J's judgment.

B The Right to a Burial

The legal right to a burial is separate from the issue of the property rights in regard to a corpse. In *Smith v Tamworth City Council*,⁴¹ a case involving a burial rights dispute between the biological and adoptive parents of the deceased, Young J pointed out it was an issue that was complicated by a number of factors. One was that the common law had nothing to do with the burial of bodies under English law as this was left to the ecclesiastical courts,⁴² though the right of burial was a common law right, not a mere ecclesiastical right.⁴³ This then caused problems in Australia which does not have such courts.

³⁶ *Doodeward v Spence* (1908) 6 CLR 406, 413-4 (Griffith CJ).

³⁷ *Ibid*, 414.

³⁸ *Ibid*, 422 (Higgins J). See also Roger Magnusson, 'The Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions' (1992) 18 *Melbourne University Law Review* 601, 603-7.

³⁹ *Doodeward v Spence* (1908) 6 CLR 406, 422 (Higgins J).

⁴⁰ *Ibid* 423.

⁴¹ (1997) 41 NSWLR 680.

⁴² *Ibid* 685.

⁴³ *Doodeward v Spence* (1908) 6 CLR 406, 422.

His Honour noted that the estate was liable for the payment of burial after administration had been granted, which meant that, as a consequence, 'the burial right is often held to be the property of the estate', and that 'a burial ... descends to the heirs as intestate property'.⁴⁴

Young J also referred to *Polhemus v Daly*⁴⁵ stating that:

while there is no right of private property in a dead body in the ordinary sense of the word, it is regarded as property so far as to entitle the next of kin to legal protection from unnecessary disturbance and violation or invasion of its place of burial.⁴⁶

His Honour then held in favour of the adoptive parents in regard to the issues of the case.

Thus, this duty to dispose of the deceased's body can be considered to be in the nature of public duty that carries with it an enforceable right of possession of the body.⁴⁷ In regard to the case of the 17 Tasmanian Aborigines, the repatriation can be seen as a precursor to a subsequent right to conduct a burial.

C Repatriation and the Law

Property rights, as such, have not in the past been the basis of repatriation,⁴⁸ with the repatriation in the present case arising from an agreement from the Natural History Museum to do so, despite its initial reluctance, subject to the provision that the previously mentioned tests were carried out first.

Independent of property rights, dealing with human tissue, including remains in the UK, is covered by the *Human Tissue Act 2004* (UK). While this Act provides for the storage and

⁴⁴ *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 687.

⁴⁵ 296 SW 442 (1927).

⁴⁶ *Ibid* 444; *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 691.

⁴⁷ Magnusson, above n 38, 609.

⁴⁸ Chris Davies, 'Property Rights in Human Remains and Artefacts and the Question of Repatriation', (2004) 8(1) *Newcastle Law Review* 51, 57.

use of material from a deceased person with consent, this only applies in respect of material less than 100 years old.⁴⁹ These provisions, therefore, do not apply to the remains of the 17 Tasmanian Aborigines.

The Act provides for repatriation of human remains to a certain extent, but again independently of the question of property rights. Arising out of the 2000 UK-Australia joint declaration,⁵⁰ s 47 of the *Human Tissue Act* permits the 'Trustees of the Natural History Museum' to:

transfer from their collection any human remains which they reasonably believe to be remains of a person who died less than one thousand years before the day on which this section comes into force if it appears to them to be appropriate to do so for any reason.

Significantly, however, there is no compulsion to return the remains, with 'non-statutory' guidance being provided by the department administering the Act in the form of the *Guidance for the Care of Human Remains in Museums*.⁵¹

The *Report of the Working Group on Human Remains*,⁵² which preceded the enactment of the *Human Tissue Act*, provides an overview of the English legal position and acknowledges the grey legal area regarding property in human remains. In addition, it raises the possibility of the application of human rights principles under the *Human Rights Act 1998* (UK). The *Human Tissue Act*, however, seems to approach the issue of repatriation in terms of neither property rights nor human rights, but rather to grant discretion to the institution to transfer remains based on much broader, non-legal principles. Such an approach, it should be noted, is supported by the *Guidance*.

⁴⁹ *Human Tissue Act 2004* (UK) s1(4).

⁵⁰ Referred to in *Guidance for the Care of Human Remains in Museums*, below n 51, 5.

⁵¹ Department of Culture, Media and Sport (UK), *Guidance for the Care of Human Remains* (2005).

⁵² Above n 3.

While the Australian government is supportive of attempts at repatriation⁵³ existing Australian legislation only goes so far as to protect 'areas and objects in Australia and in Australian waters'.⁵⁴ Thus, the question of repatriation raises a jurisdictional question, with responsibility falling on the UK parliament, rather than any Australian parliament, to decide what should be done with any Australian remains in British museums.

It should also be noted that even within Australia, while legislation provides protection for any Aboriginal remains that are found today,⁵⁵ this does not extend, in general terms, to material that is presently in Australian museums. An exception to this is the *Museums (Aboriginal Remains) Act 1984* (Tas), which states that all the Aboriginal remains in the possession of the Tasmanian Museum and the Queen Victoria Museum are 'vested in and become property of the Crown'.⁵⁶ This then allowed the Minister to serve notices on the trustees requiring delivery of the remains to the elders of the Tasmanian Aboriginal community. There was therefore at least partial recognition, by one Australian parliament, of traditional rights in regard to these particular Aboriginal remains.

In light of an application to the Tasmanian Supreme Court,⁵⁷ the approach taken by TAC has, so far, sought to have the remains treated as property. This then raises issues in relation to the nature of the estate of the deceased, and its administration, as well as of resolution of competing proprietary interests.

⁵³ Note for example the joint declaration of John Howard and Tony Blair to that effect, as referred to in *Guidance for the Care of Human Remains in Museums*, above n 50.

⁵⁴ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 4.

⁵⁵ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 20 states that any remains that are found must be returned to an appropriate Aboriginal. Section 21 then states that if there is no such person, the remains are to be transferred to a 'prescribed authority' for safe keeping.

⁵⁶ Section 4(1).

⁵⁷ *Re An Application by the Tasmanian Aboriginal Centre Inc* [2007] TASSC 5.

D Administration of Estates

Prior to the application for an injunction in the High Court of England on 12 February 2007 to prevent the Natural History Museum from carrying out tests until the court heard the full case in March, an application was made to the Tasmanian Supreme Court.⁵⁸ This application involved the TAC seeking letters of administration, that is, an authority from the court that gives powers of administration where a person has not left a valid will.

Chief Justice Underwood noted that the relevant Act, the *Administration and Probate Act 1935* (Tas), conferred jurisdiction on the court to grant such letters with respect to the estates of deceased persons who had died both before and after the enactment of the Act.⁵⁹ Therefore, even though the persons in question had died more than 150 years earlier,⁶⁰ they were still covered by the Act. However, as His Honour pointed out, the principal stumbling block in the present case was that there was 'no evidence that any of the deceased had any estate'.⁶¹ While accepting that the power to order letters of administration was unfettered, there was a question as to the point in making the order if there was no estate.⁶²

In regard to the question of property rights in the human body, his Honour referred to *Doodeward v Spence*⁶³ as authority that under common law there could not be possession in a body. His Honour, however, also quoted Griffith CJ in regard to the fact that it does not then follow that 'from the mere fact that a human body is not the subject of ownership that it is forever incapable of having an owner'.⁶⁴ Underwood CJ also referred to *Smith v Tamworth City Council*⁶⁵ and the conclusion of Young

⁵⁸ Ibid [1].

⁵⁹ Ibid [4].

⁶⁰ Ibid [1].

⁶¹ Ibid [4].

⁶² Ibid [8].

⁶³ (1908) 6 CLR 406.

⁶⁴ Ibid 412.

⁶⁵ (1997) 41 NSWLR 680.

J in that case ‘that the law in New South Wales was that a body may be regarded as property’ “so far as to entitle the next of kin to legal protection from unnecessary disturbance and violation or invasion of its place of burial”’.⁶⁶ Underwood CJ then added that Young J had stated ‘that although the common law did not recognise property in a body, equity would intervene to protect the licence to bury the body’.⁶⁷

Chief Justice Underwood then held that ‘there was sufficient doubt here about the nature of an interest in the remains of the 17 Tasmanian Aboriginals and their burial to justify the grant of the letters of administration to enable the administrator to test, if necessary, the proprietary right to the remains for the purpose of burial’.⁶⁸

On this basis, his Honour ordered that the TAC be appointed as the administrator of the estates of the 17 deceased Tasmanian Aboriginals whose remains were in the Natural History Museum.⁶⁹ He was satisfied that it had:

a real interest in seeing that the remains get a proper burial in accordance with customary law. It has championed that cause for a long time and ... because of the lack of identification, there is no better grantee.⁷⁰

The role of administrator, however, was limited to commencement of legal proceedings to seek the return of the remains or preventing disturbance to them; taking possession of the remains; and providing the deceased a proper burial in accordance with Aboriginal law and custom.⁷¹

E Using Remains for Science

While the TAC may have obtained judicially recognised

⁶⁶ Ibid 691.

⁶⁷ *Re An Application by the Tasmanian Aboriginal Centre Inc* [2007] TASSC 5, [9].

⁶⁸ Ibid [10].

⁶⁹ Ibid [12].

⁷⁰ Ibid [11].

⁷¹ Ibid [12].

control as the administrator of the 17 remains, the Museum had already effectively conceded the TAC's right to the remains – the sticking point was (and remains) therefore the final scientific testing of the remains.

The attitude of the English Courts to the matter of testing remains has recently been raised in the case of *Re St Mary, Sledmere*.⁷² This case involved an application for the exhumation of Sir Mark Sykes and Lady Edith Sykes for the purposes of testing Sir Mark's tissue samples. Sir Mark died in 1919 of Spanish flu and the petitioner in this case, a world renowned researcher into bird flu, sought to use data from the tissue samples (if there were any remaining) to 'unravel the genetic structure of the virus'.⁷³ Lady Edith's body was buried on top of Sir Mark's and therefore had to be exhumed to provide access to Sir Mark's coffin. Importantly, the surviving members of the family of the deceased had all consented to the exhumation. The petitioner however needed to overcome the law's presumption against exhumation. Two other recent decisions on exhumation were discussed by the court,⁷⁴ and these three cases together illustrate the rigorous methodology of the court in relation to the taking of tissue samples from interred remains.

The court firstly establishes, as the norm, that the Christian doctrine that burial in consecrated ground is final and permanent.⁷⁵ On this basis, the applicant is required to show some special case warranting a deviation from the norm. This must be a 'cogent and compelling case for the legitimacy of proposed research' which could rest on national or historic importance or scientific experimentation.⁷⁶ The court then had to weigh the public benefit that may ensue from the research.

⁷² [2007] 3 All ER 75.

⁷³ *Ibid* [2].

⁷⁴ *In re Holy Trinity, Bosham* [2004] Fam 125; *In re St Nicholas, Sevenoaks* [2005] 1 WLR 1011.

⁷⁵ *Re St Mary Sledmere* [2007] 3 All ER 75, [13].

⁷⁶ *Ibid*.

In looking at the evidence, the judge was concerned that there was no guarantee that Sir Mark's coffin would yield any tissue sample at all. The quality of the tissue could only be assessed on opening the coffin, but to allow exhumation the court must first be satisfied of public benefit.⁷⁷ There was no guarantee of a public benefit though, because of the uncertainty as to the existence of tissue to sample. In addition, the scientist was only testing a theory and the result of course could not be known in advance – there was no possibility of demonstrating incontestably a public benefit on this basis.⁷⁸

The court was prepared though to accept grounds for exhumation of lesser weight as the purpose of exhumation was scientific, and in particular, this may result in treatment of 'dangerous diseases'.⁷⁹ In this case, the court found the grounds were exceptional on the basis that they were to carry out 'legitimate scientific research' and that 'proving or negating the theories advanced by [the petitioner], will advance the capability of others to combat the H5N1 virus'.⁸⁰ Thus there was no need to show that the research would directly lead to a cure for bird flu, as simply closing off a line of inquiry would bring an overall public benefit.

It is relevant to note that ecclesiastical law, cited in *Re St Mary, Sledmere*,⁸¹ affirms the legally recognised 'protection of the [Anglican] Church ... to all burials performed by the Church of England and the pre-Reformation Church on consecrated ground, which does not lapse upon their removal to a museum'.⁸² That is, the Christian norm is recognised and

⁷⁷ Ibid [18].

⁷⁸ Ibid [17].

⁷⁹ Ibid [20].

⁸⁰ Ibid [21].

⁸¹ [2007] 3 All ER 75.

⁸² Submission No 12 to Working Group on Human Remains (above n 3), (Dr Joseph Evans, Archaeological Officer, Council for the Care of Churches, on behalf of the Archbishops' Council of the Church of England). The submission refers to Council for Care of Churches, *Church Archaeology: Its Care and Management* (1999), also cited in *Re St Mary, Sledmere* [2007] 3 All ER 75.

protected by the Courts. The law affords protection to these Christian burials. This raises the issue of the extent to which the law is prepared to recognise the sanctity of non-Church of England burials, or burials other than those on consecrated grounds and the parties seeking to be the guardians of those human remains. This amounts to a human rights issue and to equality before the law, although an in depth analysis of these issues is outside the scope of this paper.

While the cases discussed above were required to decide on exhumation rather than simply dealing with tissue, they do demonstrate, in general terms, a framework within which courts can deal with such matters – including the means of providing a norm against which to measure a legal response to dealing with human remains. Without going into human rights issues, it is submitted that this framework can be applied by analogy in relation to the remains of the 17 Tasmanians where the norm instead is that of Aboriginal spiritual practice; where the consent of living descendents is a relevant factor; and where a substantial scientific contribution will be made towards a significant public benefit. In respect of the latter, it would seem that general research on human remains without identifying a particular public benefit, would not be sufficient.

Likewise, the *Human Tissue Act* provides a framework within which a decision on testing the remains can be made. The Act requires the Human Tissue Authority, established under the Act, to operate in dealing with samples post mortem with consent,⁸³ and to establish codes relating to (amongst other things) ‘communication with the family of the deceased in relation to the making of a post-mortem examination’.⁸⁴ The Authority is required to gain consent from those in a ‘qualifying relationship’⁸⁵ with the deceased.

⁸³ *Human Tissue Act 2004* (UK) s 26(3).

⁸⁴ *Human Tissue Act 2004* (UK) s 26(2)(e).

⁸⁵ *Human Tissue Act 2004* (UK) s 27(1).

The Report of the Working Group on Human Remains points out that:

Consent is either present or absent. To accept this logical premise is not to decry the value of research, but merely to place it in context. The choice lies between abrogating the principle of consent in specific cases, or accepting that consent cannot be compromised or displaced by proof of collateral benefits.⁸⁶

While these issues may be addressed in the *Human Tissue Act* in relation to more recently deceased remains, the Act has failed to make provision for cases such as the 17 Tasmanians since, as noted above, these remains are not covered by the Act. However the tenor of its provisions provides a clear framework (if not a legal framework) for dealing with human remains, in particular in light of the Report. As the Museum is given power to allow repatriation, the argument in favour of repatriation without testing is a strong one. From a legal perspective, the court has open to it sufficiently analogous law to put a heavy onus on the Museum to justify its position.

F The English High Court Challenge

The week following the application to the Tasmanian Supreme Court, an injunction was granted by the English High Court that prevented the Museum from carrying out tests before the matter was to be decided by the court. The hearing was due to take place in early March, but attempts were made to settle the matter by means of mediation.⁸⁷ Subsequently, on 27 April 2007, four remains were repatriated and negotiations commenced for the repatriation for the remaining 13.⁸⁸

⁸⁶ *Report of the Working Group on Human Remains*, above n 3, 152.

⁸⁷ See eg European Network for Indigenous Australian Rights, 'Natural History Museum agrees to Aboriginal remains talks' (2 March 2007) <<http://www.eniar.org/news/repatriation60.html>> at 9 March 2007.

⁸⁸ European Network for Indigenous Australian Rights, 'Aborigines are able to collect human remains now scientists at Natural History Museum have finished testing them' (27 April 2007) <<http://www.eniar.org/news/repatriation63.html>> at 29 January 2009.

Even to the extent that the matter has been settled by means of mediation, the case has still raised questions as to rights in regard to repatriation and the control by indigenous people of the remains of their ancestors, as well as the related moral and ethical issues.

IV The Moral and Ethical Issues

In *Tasmania v Commonwealth*,⁸⁹ Justice Murphy discussed the responsibility that Australia had to the humanity of the world as a justification to override state rights, and so protect the World Heritage listed wilderness in Tasmania. His Honour stated that the world's cultural and natural heritage was also 'the heritage of Australians, as part of humanity, as well as the heritage of those where the various items happen to be'.⁹⁰ In turn, the area in question in the case, the Tasmanian wilderness around the Gordon and Franklin Rivers, became declared a part of world heritage, and its preservation justified with reference to Australia's external affairs. Thus, there was a legal basis for the protection of the World Heritage listed Tasmanian wilderness. His Honour further noted that with the rapid depletion of the world's forests in the decades to come and its subsequent effect on the biosphere may mean that the survival of all living creatures could become endangered. In such a scenario the external affairs power could be used to prevent the destruction of any forest.⁹¹

This is a judgment which borders on the prophetic, considering the world's present pressing need for all countries to work together, across national and jurisdictional boundaries for the good of humanity in order to combat climate change brought about by human interference in the biosphere. So should Justice Murphy's call that some rights and considerations be submerged to the overall benefit of humanity be applied to the question of the repatriation of human remains that

⁸⁹ (1983) 158 CLR 1.

⁹⁰ *Ibid* 172.

⁹¹ *Ibid* 171.

are presently held by museums? Or should they not only be returned, but returned in a way that complies with the wishes of the indigenous peoples affected?

The last decade has seen the scientific community involved in tracing the connections between the various human groups in the world through the human genome project, which in itself, has created its own legal and ethical questions. It, too, was a project that involved the DNA testing of indigenous people.⁹² Museums clearly have a role to play in respect of the scientific value of human remains, and for the benefits which such inquiry may produce for humanity.⁹³ This could be seen as particularly relevant in regard to a group like the Tasmanian Aborigines who, from a global perspective, are a unique group of people within the sea of humanity. This has to be balanced against the respect a museum must place on the diversity of beliefs concerning the importance of the remains of ancestors, and the way in which they should be treated after death in order to comply with the religious and cultural beliefs of the indigenous people concerned. Within Western culture the deep concern of Christians for a Christian burial is evident from the case law.⁹⁴

Thus, in regard to the 17 Tasmanian remains, TAC legal advisor Michael Mansell has described the Natural History Museum's attempts to carry out various tests as 'an act of spite by mad scientists'.⁹⁵ To Mansell and other Tasmanian Aborigines, any such tests will adversely affect the spiritual aspects of the deceased, by interfering in the traditional burial ceremony whereby the spirit is united with the body.⁹⁶

⁹² See Josephine Thornton, 'Congratulations to the 'inventors' of our genes' (2002) 6(1) *Newcastle Law Review* 77; Jennifer French, 'Something is Rotten in the state of Iceland: deCODE Genetics, Population Research and Informed Consent', (2006) 24 *Law in Context* 113.

⁹³ *Report of the Working Group on Human Remains*, above n 3.

⁹⁴ See eg *Doodeward v Spence* (1908) 6 CLR 406.

⁹⁵ Denholm, above n 1, 17.

⁹⁶ *Ibid.* For descriptions of spiritual dimensions of burial see also Prue Vines, 'Resting in Peace? A Comparison of the Legal Control of Bodily Remains in Cemeteries and Aboriginal Burial Grounds in Australia'

The opposing view has been expressed by Professor Colin Groves from the Australian National University, who is of the opinion that such tests could be of significant value to research into human diversity and evolution. However, he also accepts that such a decision should be one that is left to the Tasmanian Aborigines.⁹⁷ It is perhaps this view that should also be accepted by the Natural History Museum.

V Conclusion

Depending on one's perspective, the question of whether a museum can carry out tests on human remains either requires groups like the TAC to establish a right at law to stop the tests, or the museum to establish a right to carry them out. No *property* right, however, appears to exist in the remains either under statute or the common law, to form the foundation for either argument. As Magnusson points out, so long as proprietary rights are not recognised in the tissue associated with Aboriginal remains, then the Aboriginal community will not be able to gain exclusive possession and control of the remains.⁹⁸ Therefore, as the possessors of the remains, the rights lie with the Natural History Museum.

There is however the possibility of an alternative framework for an argument outside of property interests on the basis of analogising from the tests cited in *Re St Mary, Sledmere*.⁹⁹ In that case the parties will need to argue on the basis of establishment of a norm relating to human remains, public benefit of interference with remains, and the interests of descendants of those remains. The museum's claims that testing would be for the 'benefit of humanity' would in fact be put to the test, within a legal framework, and having regard to the context of the testing. Such a framework

(1998) 20 *Sydney Law Review* 78; Submission No 2 to Working Group on Human Remains (above n 3), 'Indigenous Australian People, Their Defence of the Dead and Native Title' (Paul Turnbull).

⁹⁷ Denholm, above n 1.

⁹⁸ Magnusson, above n 38, 613.

⁹⁹ [2007] 3 All ER 75.

would validate the norms of organisations such as TAC. The risk for the TAC implicit in this framework is of course that the Museum would meet the public benefit test. In light of the specificity of the testing and possible benefit required in *Re St Mary, Sledmere* however, the general nature of the public benefit claims may well not be sufficient.

In spite of any apparent gains made by Indigenous Australians in recent years in the fight to repatriate their ancestral remains, it should be noted that an estimated several thousand remains have still not been repatriated.¹⁰⁰ Therefore, some of the questions raised in regard to the remains of the 17 Tasmanians will continue to surface in relation to the other remains that were also removed from their tribal lands.

One positive legal aspect that has emerged from the case is that the Tasmanian Supreme Court has acknowledged that the TAC is the right group to control the burial of the remains once they are returned. This will, for instance, prevent the problem that occurred in Western Australia where a 20 year struggle saw the repatriation of the skull of Yagan, a Nyoongar warrior, in 1997. Upon the skull's return, differences of opinion within the Aboriginal community have prevented a final burial from taking place.¹⁰¹ The Tasmanian decision is also an acknowledgment that modern Aborigines are entitled to control of the remains of their ancestors in regard to burials and an implied acknowledgement of the importance people hold in burying their dead according to cultural and religious beliefs. This idea is supported also throughout the *Report of the Working Group on Human Remains*.¹⁰²

The debate on repatriation and testing of remains centres on respect for the dead. If the capacity for reverence and

¹⁰⁰ Pia Akerman, 'Aboriginal remains in red tape limbo', *The Australian*, 5 March 2007, 7.

¹⁰¹ Denholm, above n 1, 17.

¹⁰² See eg above, n 3, 28, 79 etc.

ritual of the dead is a defining feature of humanity,¹⁰³ then the rigours the law applies to interference with Christian burials and the remains of Christians should likewise apply to non-Christians regardless of any arguments about property interests in human remains. On this argument, indigenous groups, like the TAC, have the right to control the remains of their ancestors as a reflection of their humanity.

¹⁰³ For a general discussion of human burial see Mike Parker Pearson, *The Archaeology of Death and Burial* (2002) 142, 145-6. For a specific example of archaeological evidence of respect for the dead see P Murial, B Maureille, D Peresinotto and F Geus, 'An infant cemetery of the Classic Kerma Period (1750-1500 BC)' (2004) 78 *Antiquity* 267, 275.