

This inaugural lecture is based on material that was submitted to a journal for consideration.

Title: The infringement of the right to bodily integrity where a body part has been separated from the body

Introduction

Up until recently, the law regulated the human body as a whole but with the rapid development in science and medicine where separated body parts and human tissue have acquired not only research value but economic value, there is a need for the law to regulate and protect these separated body parts. Separated body parts include for example, organs, skin, blood, stem cells from bone marrow, body parts such as a shin bone, sperm, gametes and embryos.

I want to refer to an example that was mentioned by Brown and will be use throughout this lecture. In October 2020, during the COVID-19 pandemic, a cancer patient remained at a hospital in Scotland while her left tibia, the shin bone was removed from her body and transported to another facility for radiation treatment, approximately 11 kilometres away from the hospital. The patient's tibia was treated at this other facility, safely returned to the hospital and successfully reattached to her. This out-of-body radiation treatment was necessary as a result of the Covid-19 pandemic and associated lockdown rules applicable at the time in Scotland. Now, in this instance the body part that was removed from the patient and reintegrated in her body was done so successfully but imagine if for example some harm or injury occurred to the removed tibia while it was being transported back to the hospital where the patient was awaiting the reattachment. In terms of the law of delict in South Africa, questions arise such as, which rights are infringed and what type of remedies are available to the patient.

Turning to the example of the tibia, the common law rights that may be infringed include the right to body, which is the right to physical and psychological integrity, the right to dignity, the right to privacy, the right to self-determination, and the right to identity. The Bill of Rights contained in Chapter 2 of the Constitution protects among others the personality rights to life; security of the person which includes bodily and psychological integrity; the right to self-determination or autonomy; dignity and privacy. Therefore, these constitutionally protected personality rights enjoy both delictual and constitutional protection.

A question raised is whether the personality rights, in particular the right to bodily integrity continues to exist when a body part is removed from the body. Closely related to this question is the question of ownership or proprietary interests of removed body parts. Generally, the idea of the right of ownership in a severed body part has been recognised in international case law and legal doctrine although there has been long standing ethical, moral, philosophical, and policy questions around proprietary interests in removed body parts or products of the body.

On the one hand, there is the view that the moment the body part is separated from the body, the personality interests or rights in respect of that body part cease to exist, the body part is considered as a kind of *res extra commercium*, a thing, but one that is not subject to private ownership, and damage to the separated body part may depending on the circumstances amount to property damage. This is the dominant approach followed in Anglo-American law. On the other hand, in German tort law, in instances where a body part is permanently separated from the body, for example, in the case of a donated organ to be implanted into another person, ordinary 'personal property rules apply'. However, in instances where a body part is separated, to be later reintegrated into the body, such as the tibia, in order to preserve or improve bodily functions, it forms a 'functional unity' with the remaining body and the personality interests or rights in them continue to exist. The question is, which approach should be followed in South African as our courts have not yet dealt with separated body parts in this sense. It will be necessary to look at the case

law dealing with separated body parts in Anglo-American and German law. Unfortunately, in international law, no case law has come before the courts dealing with a body part like the example of the tibia, all the cases in foreign law that deal with this research area relate to sperm which is perhaps not the best example of a body part but at least we can apply the principles enunciated in these cases to the separated body part such as the tibia.

Before we look at the case law, it should also be noted that the South African law of delict and German tort law follow a similar generalising approach to determining a delict but the source of German tort law is the German Civil Code whereas Anglo-American tort law comprises of a system of numerous torts mainly broken down into the tort of negligence and the intentional torts. Each specific tort in Anglo-American law has its own requirements and is based on common law.

Anglo-American law

In the English decision of *Yearworth v North Bristol NHS Trust*, frozen sperm samples provided by the claimants were stored by the defendant. It transpired that the defendant negligently allowed the samples to thaw and perish. The samples were provided by the claimants before they underwent chemotherapy treatment for cancer as they were advised that the treatment could affect their fertility. The claimants instituted claims for depression, mental distress, and psychiatric harm due to the loss of their sperm and their ability to father children. The claimants alleged a breach of a duty of care in the tort of negligence and a breach of the bailment terms by the defendant who had undertaken to take due care of the samples. The defendant alleged that the loss of the sperm did not constitute 'personal injury' nor damage to their 'property' in the tort of negligence. The court was of the view that there was no personal injury, and the main question was whether the loss of the samples amounted to property damage. The court held that 'products of a living human body intended for use by the persons whose bodies have generated them' can be deemed property for the purposes of a claim in the tort of negligence. The court held that the claimants' stored sperm was their property and that

they had retained the right to prevent it from being used in other ways without their consent. The court also found that the storage of the sperm amounted to a bailment which is not a tort but affiliated with a breach of contract, more specifically with breach of a promise, and the claimants had a cause of action in bailment for the foreseeable psychiatric and mental harm sustained due to the negligent destruction of the plaintiffs' property.

In the American decision of *Moore v Regents of the University of California* a cancer patient's bone marrow, blood, aspirate and other bodily substances were removed by a medical practitioner in order to establish a 'cell line' for medical research. The medical practitioner applied for and received a patent on the 'cell line' whereby the defendants would share in any royalties or profits stemming from the patent. The patient then sued the defendant and others alleging that conversion of his bodily fluids had occurred by the defendants and wanted a share in the profit that would be generated by the 'cell line'. Now, the intentional tort of conversion deals with possessory and ownership or proprietary interests in personal property. The court had to consider whether conversion had occurred and whether the patient had a cause of action against the medical practitioner and other defendants for using his biological material without his permission in potentially profitable medical research. The court held that the patient had a cause of action for breach of the medical practitioner's disclosure obligations or lack of informed consent but not for conversion. The court held that the patient did not expect to retain possession of his cells after removal and in order to sue for their conversion, the plaintiff must have retained an ownership interest in them. The court concluded that the patient did not retain any such interest as 'California statutory law drastically limits any continuing interest of a patient in excised cells ...[and] the patented cell line and the products derived from it — cannot be' the patient's property'.

In the American decision of *Hecht v Superior Court of Los Angeles County*, the deceased prior to his suicide cryogenically preserved his sperm at a sperm bank with the intention that it could be used after his death to enable his girlfriend to give birth to their child. The

deceased in his will bequeathed the samples of his sperm to his girlfriend. The estate as well as the children of the deceased obtained an order from the trial court to destroy the samples. The girlfriend then obtained an order to stay the order of the trial court and appealed to the California Court of Appeal. The appeal court had to decide whether the deceased's sperm was something capable of being disposed of in a will. The court held that the deceased, at the time of his death, had an interest in the nature of ownership, to the extent that he had decision making authority as to the use of his sperm for reproduction. Such interest is sufficient to constitute "property" within the meaning of the Californian Code. The court concluded that the deceased sperm could be disposed of in a will.

To sum up with regard to Anglo-American case law, in *Yearworth*, the court acknowledged that that claimants intended to use their sperm for future possible procreation — thus the negligent destruction of the sperm required intervention from the law but deemed the stored sperm as property also retaining the claimants right to prevent the sperm samples from being used without their consent. The court held that parts of the human body can be deemed property for the purpose of a claim in the tort of negligence and that the claimants had a cause of action in bailment for the foreseeable psychiatric and mental harm the claimants had sustained. In *Hecht*, the court followed a similar approach in that it held that the sperm samples were deemed 'property' as the deceased had intended it to be used for future procreation. In *Moore* on the other hand, it was held that the patient did not expect to retain possession of his cells after removal and the excised biological material was not deemed the claimant's property once excised according to the regulating legislation.

German Law

In the German case, the plaintiff prior to undergoing an operation as treatment for cancer of the bladder which would have rendered him infertile, stored and froze his sperm samples with a hospital. The sperm samples were subsequently negligently destroyed

without the plaintiff's consent by the hospital. The plaintiff claimed damages for pain and suffering for non-patrimonial loss from the hospital for interference with his bodily integrity and health as an enunciation of the breach of the general right to personality and the right to autonomy. Due to the destruction of the plaintiff's sperm samples, the plaintiff was unable to impregnate his wife and become a father. The German Federal Supreme Court considered the dominant Anglo-American approach but found it too narrow. The court held that 'physical injury' in paragraphs 823 I and 847 I of the German Civil Code expressed a much wider meaning whereby the right to one's own body is a part of the general right of personality. Furthermore 'physical injury' in terms of paragraph 823 I applies to "every unjustified intrusion of bodily integrity, unless the owner of the right has given his consent. It is not the physical matter as such that is protected ... but rather a person's entire area of existence and self-determination, which is materially manifested in the body. The provisions of [paragraph] 823 I BGB protect the body as the basis of human personality. ... Where, with the consent of the person affected, parts of a body are taken out in order later on to be [re-integrated] as a means of preserving or improving bodily functions ... These extracted parts continue to form a functional unity with the remaining body even during their separation from it. It therefore seems necessary to classify the damage to or destruction of such extracted body parts as a physical injury The result is different where, according to the wishes of the person concerned, the separated parts of his body are not intended to be used or re-integrated at a later stage [such as in the case of donating an organ]. For such cases of final severance, the normal legal consequence applies, [that is] that at the point of separation the severed body parts lose all links to the ... "body" and become "objects" in the legal sense. The reason for the latter result lies in the concept that, given every person's right to self-determination, the body and its now separate parts no longer form a functional unity'.

The court held that a man's sperm is just as valuable as any other parts of a body with regard to autonomy and bodily integrity requiring protection from tort law and that the culpable destruction of it constituted interference with his bodily integrity. The plaintiff was entitled to the damages he claimed for pain and suffering.

Commentary

Looking at the approaches followed in Anglo-American and German law, which of these should be followed in our law? As a start, in South African law, it is necessary to look at any applicable legislation regulating separated human tissue or biological material before considering the principles of delictual liability.

Mahomed, Nöthling-Slabbert and Pepper point out that various pieces of legislation in South Africa collectively refer to human tissue and biological material as flesh, bone, a gland, an organ, skin, bone marrow or body fluid, cells and tissue, DNA, RNA, blastomeres, polar bodies, embryos, gametes, progenitor stem cells, tissue biopsies as well as growth factors from them, blood and blood products. There is however no uniform definition of human tissue, no legal classification for it and ownership of human tissue has not yet been tested by our courts. The authors point out that there are regulations dealing with artificial fertilisations of persons which give some guidance regarding ownership rights. In the instance where the male and female gametes (sperm and egg cells) that are to be used by spouses, the ownership of the removed gamete vests in the husband and wife (sperm and egg cells respectively), however after artificial fertilisation, the ownership of a zygote (fused sperm and egg cell) or embryo (referred to as such for up to eight weeks of or from conception) vests in the recipient (wife or other carrier of the foetus). South African legislation does not provide any guidance on the exact categorisation of an embryo and whether it can be considered as property. The authors state that it is important that legislation in South Africa relating to the regulation of human tissue be amended to provide clarity on any proprietary interests as well as the meaning and practical implications of among other things possession, custodianship and ownership.

So far, the South African legislation that deals with separated body parts, human tissue or biological material seems to deal with instances of permanently separated body parts, tissue or biological material with a focus on the use and control of it in terms of

implantation in another person, research and import and exportation of it. Thus, in this sense it can be concluded that in all jurisdictions including South African law, in instances where a body part is permanently removed to be donated, used for research and so on, the body part is considered as a unique type of property. In South African law, only with regard to sperm to be used for artificial fertilisation, ownership vests in the husband prior to the artificial fertilisation. This example of the sperm used in case law in Anglo-American and German law, strictly speaking is not the best example of a separated body part to be reintegrated because the sperm is in fact not to be reintegrated into the man's body but rather the women's body. That being said, there is no legislation in our law that deals with liability for damage of separated body parts, such as the example of damage to a tibia to be reintegrated in the source body and we have to then rely on our common law, and my focus will be on the law of delict which includes the law of personality, as well as the constitutional provisions. It is necessary to briefly look at the requirements of general delictual liability in South African law in order to investigate whether this lacuna in our law can be covered by the law of delict.

The general elements that must be present in order to ground liability include, conduct whether in the form of an omission or a commission; wrongfulness; fault in the form of intention or negligence; causation and harm. In terms of wrongfulness, it may easily be found where there is unjustified harm to the separated tibia, even if it is deemed property, that according to the *boni mores*, there was an infringement of right or breach of a legal duty to prevent harm. In addition, that it is reasonable to hold the wrongdoer liable for the harm caused to the tibia unless a ground of justification is present; or if policy grounds exist that militate against such liability. The standard of negligence that will be applied in most instances would be the reasonable medical practitioner. In respect of harm, the harm may result in patrimonial as well as non-patrimonial harm.

Three approaches

With regard to the example of the tibia later to be reintegrated in the body of source, taking into consideration the narrow Anglo-American and wider German approach, there are three approaches that could be used in South African law. Firstly, we could use the approach that the separated body part is a unique type of property as applied in Anglo-American law. Secondly, we could use the approach followed in German law, where the separated body part is considered as part of the body using the idea of functional unity where the right to bodily integrity has been infringed. Thirdly, we could use the approach that other personality rights such as the right to one's dignity, privacy or identity have been breached.

First approach

With regard to the Anglo-American approach and the tibia being considered as property, Shevelev and Shevelev, submit that ownership or proprietary interests are useful in providing protection for separated body parts. A person's abstract ownership of their own body is the basis for their ownership in a separated body part thus granting 'full and real pecuniary protection against any encroachment upon the body'. Possessory remedies, an interdict or other suitable remedies may be applicable as the body part is an object of property but for moral reasons considered *res extra commercium*. In a simplified sense the body part is either deemed the property of the person from whom it came if there is a future intended use for it, or it is deemed the property of another, such as a hospital or institution.

If separated body parts are regarded as property, then in principle the owner of the property is entitled to compensation for the damage caused to his or her property as well as any consequential loss. Damages may in principle be claimed for damage to property, theft, destruction, alienation or loss of use of property. This is the same approach followed in German tort law with regard to property. Thus, *the actio legis Aquiliae* may depending on the circumstances be an appropriate remedy for the damage to the deemed property.

Second approach

With regard to the German approach, the tibia being regarded as part of the body. As Brown suggests, the development of the law of personality could be an acceptable approach in explaining the 'nature of wrongs effected to human tissue while at the same time avoiding the pitfalls of a "piecemeal" or *sui generis* approach'. Thus, the basis of the relationship between the person and its separated tibia would be personal and not proprietary. In order to see if this approach could be easily applied in South African law a brief look at German tort law principles is useful.

With regard to German law, the three general paragraphs of the German Civil Code that cover tort fault liability is paragraphs 823 I, 823 II and 826. The following requirements must be met in order to ground liability: that is, human conduct either in the form of an omission or a commission; a violation of one of the protected rights to life, bodily integrity, health, freedom of movement, property, or any other right, or the intentional infliction of harm *contra bonos mores*, or the violation of a legislative provision; unlawfulness; fault in the form of intention or negligence; causation and damage.

Property, whether moveable or immoveable, with ownership being its fundamental right, is one of the protected rights or interests under paragraph 823 I of the German Civil Code against culpable interference. It should also be noted that Section 25 of the South African Constitution specifically protects one's right to property in South African law. In German law, the interference may consist of damaging property, the use and enjoyment of it, taking the property away, detaining it, vilifying the quality of it, or using it without consent. Generally, there must be some sort of interference with the property, although actual physical interference is not a requirement and it may cover a legal interference with the plaintiffs right of ownership, providing all the other requirements for liability are met.

The general right to one's personality in German law, as an absolute subjective right of one's personality falls under 'any other right' as a protected right. The rights to human dignity and the free development of one's personality are also fundamental rights protected under Articles 1 and 2 of the German Constitution. These constitutional provisions are considered supreme law in Germany; therefore, they enjoy both tort and constitutional protection.

In determining unlawfulness according to the traditional view in German tort law, unlawfulness is generally present when one of the protected interests or rights under paragraph 823 I of the German Civil Code has been violated. The question of fault either in form of intention or negligence then arises. However, recently a new approach has emerged. According to this approach, the violation of the protected interest or right on its own where the conduct is intentional, is not sufficient and what must also be determined is if the defendant's conduct failed to comply with a standard of conduct 'imposed by a particular imperative rule' or that the defendant's conduct 'violated a general duty imposed on all human beings to take care not to inflict injury on others'. This approach has been favoured in cases of indirect infringement of interests or rights, such as in cases of omissions and the infringement of the newly recognised rights such as the general right to personality which falls under the ambit of 'other rights'. The outcome of both approaches is however the same.

Culpability refers to fault and in German tort law there are five forms of fault, which in essence relate to degrees of fault in the form of intention or negligence. Negligence like in South African law is determined according to the standard of the reasonable person or adjusted standard in cases of professionals such as medical practitioners.

Due to the numerous medical liability cases that the courts have had to deal with in Germany, the legislator intervened introducing in 2013 eight new paragraphs as part of the German Civil Code, paragraphs 630a-630h which transformed medical liability into a

special branch of contract law. The contractual obligations include duties by the medical practitioners to take reasonable care and do one's best in providing the medical treatment. In order to claim damages for non-patrimonial loss, the plaintiff may need to prove a breach of the contract and in instances of delictual liability, as an infringement on one's health and body in terms of paragraph 823 I of the German Civil Code. According to case law, a medical procedure may result in an interference with a person's bodily integrity, but informed consent could negate unlawfulness. In German law, a concurrence of claims as in South African law (in tort and contract) is allowed but due to reforms of the German Civil Code in 2002 and 2013, contractual law has been shaping medical malpractice claims recently.

Paragraphs 842 to 846 of the German Civil Code deal with damages stemming from personal injury while paragraphs 848 to 851 deal with damage to property. Paragraph 249 I of the German Civil Code states that 'a person who is obliged to make compensation must restore the situation which would have existed if the circumstances, which render him liable to make amends, had not occurred'. In addition, paragraph 249 II of the German Civil Code allows the claimant in instances of physical injury or damage to property to claim not only restoration in kind but the cost of restoration. With regard to personal injury, one may claim patrimonial or non-patrimonial loss which includes *inter alia* pain and mental suffering. Non-patrimonial loss can also be claimed in cases of medical negligence. General injunctive relief can be used in cases of infringement or threatened future infringement of interests or rights under paragraph 823 I of the German Civil Code in order to remove the source of interference or prevent the imminent commission of an unlawful act.

Thus, even though German tort law stems from a civil code, the underlying general requirements of liability such as conduct, wrongfulness, fault, causation and harm are similar to the required elements of liability in the South African law of delict. Furthermore, the protection of personality interests and rights including the recognition and protection of them under constitutional provisions in German law is similar to the position in South

Africa law. In my opinion, it is submitted that the guidance of the German Federal Supreme Court provided in instances where a separated body part is to be used or reintegrated into the body of source, is sound and can easily be applied in the South African law of delict.

In South African law, harm to one's bodily integrity may include, pain and suffering, psychological or psychiatric harm, disfigurement, shortened life expectancy and loss of amenities of life. There are several remedies that are available in instances where the plaintiff's right to bodily integrity has been infringed or is associated with the plaintiff's right to bodily integrity. In general, the infringement of the body as such infringes the right to bodily integrity and on the face of it is *contra bonos mores* or wrongful. However, exceptions apply in cases of omissions, where the infringement is not deemed *contra bonos mores*, or where a ground of justification is applicable, such as necessity or consent.

Third approach

In the South African law of delict, besides the infringement of the right to bodily integrity, one's right to privacy, dignity and self-determination or autonomy may be infringed and the *actio iniuriarum* may depending on the circumstances be the appropriate remedy. With regard to the third approach mentioned above dealing with the infringement of other personality rights such as the rights to dignity, privacy and identity. The *actio iniuriarum* for an *iniuria* is a suitable remedy. However, the fault on the part of the wrongdoer must be intentional, so this remedy would not be applicable where the infringement of the rights to dignity, privacy or identity occurred negligently. This constitutes an important limitation because negligent infringements would in all probability be more frequent than intentional infringements. However, if the infringement is intentional, say where medical experiments are conducted deliberately and without consent on a person's separated body part, this approach may be a feasible one.

An *iniuria* can also cause patrimonial damage and in principle, in such instances, the plaintiff must institute the *actio iniuriarum* for satisfaction or *solatium* and the *actio legis Aquiliae* for the patrimonial damage. Therefore, Brown's recommendation with regard to the negligent harm of a separated body part which could be based on the *lex Aquilia* is conceivable.

Compensation for pain and suffering, emotional shock, loss of amenities of life, bodily disfigurement, and loss of life expectancy can be recovered with the action for pain and suffering. This action may be used as a remedy where there is intentional conduct but is more frequently applied where there is negligent conduct on the part of the defendant. Therefore, with regard to the separated body part, whether it is deemed as property or part of the body, in the instance where the plaintiff sustained emotional or psychological harm, the action for pain and suffering may be used.

The *actio legis Aquiliae* may be used where the plaintiff suffers patrimonial loss as a result of or associated with the infringement of the body (such as medical costs, loss of earnings or earning capacity). Fault in the form of negligence is sufficient.

Looking holistically at all the approaches as well as the different remedies that may be used in the South African law of delict, a question arises, is there better legal protection if the separated body part is deemed property as compared to the separated body part being regarded as part of the body? It seems that from a practical point of view, in both scenarios, adequate protection may be provided. However, looking at the example of the tibia, one may argue that from a sensible, philosophical and ethical view, it would be more appropriate to regard the separated tibia as part of the body. Furthermore, when we deal with the value that is attached to different rights, the right to body, bodily integrity even from an Anglo-American approach trumps the right to property. Looking also at the generalising approach to determining a delict in South African law, the German tort law approach is easier to apply as it also follows a generalising approach. In respect of the

Anglo-American approach and its specific torts divided between the tort of negligence and the numerous intentional torts, one is confined to ensuring that the elements of the specific torts of negligence, conversion or battery are present. As we have seen under the discussion of Anglo-American law, the courts struggle with meeting the requirements for conversion and as of yet have not succeeded with the tort of negligence or battery.

Conclusion

In conclusion, it is recommended that the wider approach taken in German law with regard to separated body parts be followed in the South African law of delict. In instances where the body part is to be separated permanently from the body then at the moment of separation, the body part loses the link to the body as well as its functional unity and becomes an object in the legal sense. Where a body part is separated from the body but expected to be used or reintegrated at a later stage, then it would be logical and sensible to treat it as harm to the person and not categorising it as interference with property. As mentioned, the South African legislation that deals with separated body parts seems to deal with instances of permanently separated body parts with a focus on the use and control of it in terms of implantation in another person, research and import and exportation of it. Mahomed, Nöthling-Slabbert and Pepper have stressed the importance of the need for amending the legislation in order to provide clarity on any proprietary interests as well as the practical implications of possession, custodianship and ownership of the separated body parts in this context. That being said, there is no reason why the South African law of delict could not be developed in line with the German approach especially when dealing with the infringement of personality rights and separated body parts that are not regulated by any legislation.