Moore v. Regents of University of California

51 Cal.3d 120
Supreme Court of California
July 9, 1990

JOHN MOORE, Plaintiff and Appellant, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA et al., Defendants and Repondents No. S006987. Gage, Mazursky, Schwartz, Angelo & Kussman, Sanford M. Gage, Christopher E. Angelo and Jonathan T. Zackey for Plaintiff and Appellant. Lori Andrews and Marjorie M. Schultz as Amici Curiae on behalf of Plaintiff and Appellant. James E. Holst, Allen B. Wagner, John F. Lundberg, George L. Marchand, Ball, Hunt, Hart, Brown & Baerwitz, Anthony Murray, Donn Dimichele, Horvitz. Levy & Amerian, Horvitz & Levy, Ellis J. Horvitz, Peter Abrahams, Coleman & Marcus, Richard M. Coleman, Michael D. Marcus, Hale & Dorr, John G. Fabiano, Ian Crawford, Covington & Crowe, Robert E. Dougherty and Robert H. Reeder for Defendants and Respondents. Cooley, Godward, Castro, Huddleson & Tatum, Michael Traynor, Brian C. Cunningham, Lloyd R. Day, Louis M. Lupin and Gary H. Ritchey as Amici Curiae on behalf of Defendants and Respondents.

PANELLI, J.

I. Introduction

We granted review in this case to determine whether plaintiff has stated a cause of action against his physician and other defendants for using his cells in potentially lucrative medical research without his permission. Plaintiff alleges that his physician failed to disclose preexisting research and economic interests in the cells before obtaining consent to the medical procedures by which they were extracted. The superior court sustained all defendants' demurrers to the third amended complaint, and the Court of Appeal reversed. We hold that the complaint states a cause of action for breach of the physician's disclosure obligations, but not for conversion.

II. Facts

~The plaintiff is John Moore, who underwent treatment for hairy-cell leukemia at the Medical Center of the University of California at Los Angeles (UCLA Medical Center). The five defendants are: (1) Dr. David W. Golde, a physician who attended Moore at UCLA Medical Center; (2) the Regents of the University of California (Regents), who own and operate the university; (3) Shirley G. Quan, a researcher employed by the Regents; (4) Genetics Institute, Inc.; and (5) Sandoz Pharmaceuticals Corporation and related entities (collectively Sandoz).

Moore first visited UCLA Medical Center on October 5, 1976, shortly after he learned that he had hairy-cell leukemia. After hospitalizing Moore and "withdr [awing] extensive amounts of blood, bone marrow aspirate, and other bodily substances," Golde~ confirmed that diagnosis. At this time all defendants, including Golde, were aware that "certain blood products and blood components were of great value in a number of commercial and scientific efforts" and that access to a patient whose blood contained these substances would provide "competitive, commercial, and scientific advantages."

On October 8, 1976, Golde recommended that Moore's spleen be removed. Golde informed Moore "that he had reason to fear for his life, and that the proposed splenectomy operation ... was necessary to slow down the progress of his disease." Based upon Golde's representations, Moore signed a written consent form authorizing the splenectomy.

Before the operation, Golde and Quan "formed the intent and made arrangements to obtain portions of [Moore's] spleen following its removal" and to take them to a separate research unit. Golde gave written instructions to this effect on October 18 and 19, 1976. These research activities "were not intended to have ... any relation to [Moore's] medical ... care." However, neither Golde nor Quan informed Moore of their plans to conduct this research or requested his permission. Surgeons at UCLA Medical Center, whom the complaint does not name as defendants, removed Moore's spleen on October 20, 1976.

Moore returned to the UCLA Medical Center several times between November 1976 and September 1983. He did so at Golde's direction and based upon representations "that such visits were necessary and required for his health and well-being, and based upon the trust inherent in and by virtue of the physician-patient relationship ...." On each of these visits Golde withdrew additional samples of "blood, blood serum, skin, bone marrow aspirate, and sperm." On each occasion Moore travelled to the UCLA Medical Center from his home in Seattle because he had been told that the procedures were to be performed only there and only under Golde's direction.

"In fact, [however,]throughout the period of time that [Moore] was under [Golde's] care and treatment, ... the defendants were actively involved in a number of activities which they concealed from [Moore] ...." Specifically, defendants were conducting research on Moore's cells and planned to "benefit financially and competitively ... [by exploiting the cells] and [their] exclusive access to [the cells] by virtue of [Golde's] ongoing physician-patient relationship ...."

Sometime before August 1979, Golde established a cell line from Moore's T-lymphocytes.

A T-lymphocyte is a type of white blood cell. T-lymphocytes produce lymphokines, or proteins that regulate the immune system. Some lymphokines have potential therapeutic value. If the genetic material responsible for producing a particular lymphokine can be identified, it can sometimes be used to manufacture large quantities of the lymphokine through the techniques of recombinant DNA. (See generally U.S. Congress, Office of Technology Assessment, New Developments in Biotechnology: Ownership of Human Tissues and Cells (1987) at pp. 31-46)

While the genetic code for lymphokines does not vary from individual to individual, it can nevertheless be quite difficult to locate the gene responsible for a particular lymphokine. Because T-lymphocytes produce many different lymphokines, the relevant gene is often like a needle in a haystack.^ Moore's T-lymphocytes were interesting to the defendants because they overproduced certain lymphokines, thus making the corresponding genetic material easier to identify.~

Cells taken directly from the body (primary cells) are not very useful for these purposes. Primary cells typically reproduce a few times and then die. One can, however, sometimes continue to use cells for an extended period of time by developing them into a "cell line," a culture capable of reproducing indefinitely. This is not, however, always an easy task. "Longterm growth of human cells and tissues is difficult, often an art," and the probability of succeeding with any given cell sample is low, except for a few types of cells not involved in this case.^

On January 30, 1981, the Regents applied for a patent on the cell line, listing Golde and Quan as inventors. "[B]y virtue of an established policy ..., [the] Regents, Golde, and Quan would share in any royalties or profits ... arising out of [the] patent." The patent issued on March 20, 1984, naming Golde and Quan as the inventors of the

cell line and the Regents as the assignee of the patent. (U.S. Patent No. 4,438,032 (Mar. 20, 1984) .)

The Regent's patent also covers various methods for using the cell line to produce lymphokines.~ Moore admits in his complaint that "the true clinical potential of each of the lymphokines ... [is] difficult to predict, [but] ... competing commercial firms in these relevant fields have published reports in biotechnology industry periodicals predicting a potential market of approximately $3.01 Billion Dollars by the year 1990 for a whole range of [such lymphokines] ...."

With the Regents' assistance, Golde negotiated agreements for commercial development of the cell line and products to be derived from it. Under an agreement with Genetics Institute, Golde "became a paid consultant" and "acquired the rights to 75,000 shares of common stock." Genetics Institute also agreed to pay Golde and the Regents "at least $330,000 over three years, including a pro-rata share of [Golde's] salary and fringe benefits, in exchange for ... exclusive access to the materials and research performed" on the cell line and products derived from it. On June 4, 1982, Sandoz "was added to the agreement," and compensation payable to Golde and the Regents was increased by $110,000. "[T]hroughout this period, ... Quan spent as much as 70 [percent] of her time working for [the] Regents on research" related to the cell line.

Based upon these allegations, Moore attempted to state 13 causes of action: (1) "Conversion"; (2) "lack of informed consent"; (3) "breach of fiduciary duty"; (4) "fraud and deceit"; (5) "unjust enrichment"; (6) "quasi-contract"; (7) "bad faith breach of the implied covenant of good faith and fair dealing"; (8) "intentional infliction of emotional distress"; (9) "negligent misrepresentation"; (10) "intentional interference with prospective advantageous economic relationships"; (11) "slander of title"; (12) "accounting"; and (13) "declaratory relief."

Each defendant demurred to each purported cause of action. The superior court, however, expressly considered the validity of only. the first cause of action, conversion.~ Reasoning that the remaining causes of action incorporated the earlier, defective allegations, the superior court sustained a general demurrer to the entire complaint with leave to amend. In a subsequent proceeding, the superior court sustained Genetics Institute's and Sandoz's demurrers without leave to amend on the grounds that Moore had not stated a cause of action for conversion and that the complaint's allegations about the entities' secondary liability were too conclusory. In accordance with its earlier ruling that the defective allegations about conversion rendered the entire complaint insufficient, the superior court took the remaining demurrers off its calendar.

With one justice dissenting, the Court of Appeal reversed, holding that the complaint did state a cause of action for conversion. The Court of Appeal agreed with the superior court that the allegations against Genetics Institute and Sandoz were insufficient, but directed the superior court to give Moore leave to amend. The Court of Appeal also directed the superior court to decide "the remaining causes of action, which [had] never been expressly ruled upon."

III. Discussion

A. *Breach of Fiduciary Duty and Lack of Informed Consent*

[The court discussed Moore's claims for breach of fiduciary duty and lack of informed consent. The court remanded to the Court of Appeal, ordering it to: direct the

trial court to: overrule the physician's demurrers to the causes of action for breach of fiduciary duty and lack of informed consent; and sustain, with leave to amend, the demurrers of the four other defendants to the purported causes of action for breach of fiduciary duty and lack of informed consent. The court held that a physician who is seeking a patient's consent for a medical procedure must, in order to satisfy his fiduciary duty and to obtain the patient's informed consent, disclose personal interests unrelated to the patient's health, whether research or economic, that may affect his medical judgment. The court held the allegations of the patient's third amended complaint against the physician were adequate to state such a cause of action based on the physician's nondisclosures prior to the medical procedure and the postoperative taking of blood and other samples. The court held the patient was not required to allege that defendants knew his cells had potential commercial value at the time blood tests were first performed and had at that time already formed the intent to exploit the cells, and further held the patient was not required to allege that the operation lacked a therapeutic purpose or that the procedure was totally unrelated to therapeutic purposes. – Ed. (compiled from clerk's case summary)]

B. *Conversion*

Moore also attempts to characterize the invasion of his rights as a conversion - a tort that protects against interference with possessory and ownership interests in personal property. He theorizes that he continued to own his cells following their removal from his body, at least for the purpose of directing their use, and that he never consented to their use in potentially lucrative medical research. Thus, to complete Moore's argument, defendants' unauthorized use of his cells constitutes a conversion. As a result of the alleged conversion, Moore claims a proprietary interest in each of the products that any of the defendants might ever create from his cells or the patented cell line.

No court, however, has ever in a reported decision imposed conversion liability for the use of human cells in medical research. While that fact does not end our inquiry, it raises a flag of caution. In effect, what Moore is asking us to do is to impose a tort duty on scientists to investigate the consensual pedigree of each human cell sample used in research. To impose such a duty, which would affect medical research of importance to all of society, implicates policy concerns far removed from the traditional, two-party ownership disputes in which the law of conversion arose.

Conversion arose out of the common law action of trover. "We probably do not have the earliest examples of its use, but they were almost certainly cases in which the finder of lost goods did not return them, but used them himself, or disposed of them to someone else. ... By the allegations of the complaint had become more or less standardized: that the plaintiff was possessed of certain goods, that he casually lost them, that the defendant found them, and that the defendant did not return them, but instead 'converted them to his own use.' From that phrase in the pleading came the name of the tort." (Prosser & Keeton, Torts (5th ed. 1984) § 15, p. 89.)

Invoking a tort theory originally used to determine whether the loser or the finder of a horse had the better title, Moore claims ownership of the results of socially important medical research, including the genetic code for chemicals that regulate the functions of every human being's immune system. Moore alleges, for example, that "genetic sequences ... are his tangible personal property ...." We are not, however, bound

by that conclusion of law. Moreover, as already mentioned, the genetic code for lymphokines does not vary from individual to individual.^

We have recognized that, when the proposed application of a very general theory of liability in a new context raises important policy concerns, it is especially important to face those concerns and address them openly. Moreover, we should be hesitant to "impose [new tort duties] when to do so would involve complex policy decisions"^, especially when such decisions are more appropriately the subject of legislative deliberation and resolution. This certainly is not to say that the applicability of common law torts is limited to the historical or factual contexts of existing cases. But on occasions when we have opened or sanctioned new areas of tort liability, we "have noted that the 'wrongs and injuries involved were both comprehensible and assessable within the existing judicial framework."^

Accordingly, we first consider whether the tort of conversion clearly gives Moore a cause of action under existing law. We do not believe it does. Because of the novelty of Moore's claim to own the biological materials at issue, to apply the theory of conversion in this context would frankly have to be recognized as an extension of the theory. Therefore, we consider next whether it is advisable to extend the tort to this context.

1. *Moore's Claim Under Existing Law*

"To establish a conversion, plaintiff must establish an actual interference with his *ownership* or *right of possession* . ... Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion."^Since Moore clearly did not expect to retain possession of his cells following their removal, to sue for their conversion he must have retained an ownership interest in them. But there are several reasons to doubt that he did retain any such interest. First, no reported judicial decision supports Moore's claim, either directly or by close analogy. Second, California statutory law drastically limits any continuing interest of a patient in excised cells. Third, the subject matters of the Regents' patent-the patented cell line and the products derived from it - cannot be Moore's property.

Neither the Court of Appeal's opinion, the parties' briefs, nor our research discloses a case holding that a person retains a sufficient interest in excised cells to support a cause of action for conversion. We do not find this surprising, since the laws governing such things as human tissues, transplantable organs,[1] blood,[2] fetuses,[3]

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[1] See the Uniform Anatomical Gift Act, Health and Safety Code section 7150 et seq. The act permits a competent adult to "give all or part of [his] body" for certain designated purposes, including "transplantation, therapy, medical or dental education, research, or advancement of medical or dental science." (Health & Saf. Code, §§ 7151 , 7153.) The act does not, however, permit the donor to receive "valuable consideration" for the transfer. (Health & Saf. Code, § 7155.)

[2] See Health and Safety Code section 1601 et seq., which regulates the procurement, processing, and distribution of human blood. Health and Safety Code section 1606 declares that "[t]he procurement, processing, distribution, or use of whole blood, plasma, blood products, and blood derivatives for the purpose of injecting or transfusing the same ... is declared to be, for all purposes whatsoever, the rendition of a service ... and shall not be construed to be, and is declared not to be, a sale ... for any purpose or purposes whatsoever."

pituitary glands,[4] corneal tissue,[5] and dead bodies[6] deal with human biological materials as objects sui generis, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property. It is these specialized statutes, not the law of conversion, to which courts ordinarily should and do look for guidance on the disposition of human biological materials.

Lacking direct authority for importing the law of conversion into this context, Moore relies, as did the Court of Appeal, primarily on decisions addressing privacy rights. FN28One line of cases involves unwanted publicity. (*Lugosi v. Universal Pictures* (1979) 25 Cal.3d 813; *Motschenbacher v. R. J. Reynolds Tobacco Company* (9th Cir. 1974) 498 F.2d 821.) These opinions hold that every person has a proprietary interest in his own likeness and that unauthorized, business use of a likeness is redressible as a tort. But in neither opinion did the authoring court expressly base its holding on property law. (*Lugosi v. Universal Pictures, supra* , 25 Cal.3d at pp. 819, 823-826; *Motschenbacher v. R. J. Reynolds Tobacco Company, supra* , 498 F.2d at pp. 825-826.) Each court stated, following Prosser, that it was "pointless" to debate the proper characterization of the proprietary interest in a likeness. (*Motschenbacher v. R.J. Reynolds Tobacco Company, supra* , 498 F.2d at p. 825, quoting Prosser, Law of Torts (4th ed. 1971) at p. *Lugosi v. Universal Pictures, supra* , 25 Cal.3d at pp. 819, 824 .) For purposes of determining whether the tort of conversion lies, however, the characterization of the right in question is far from pointless. Only property can be converted.

No party has cited a decision supporting Moore's argument that excised cells are "a species of tangible personal property capable of being converted." On this point the Court of Appeal cited only *Venner v. State* (1976) 30 Md.App. 599^, which dealt with the seizure of a criminal defendant's feces from a hospital bedpan by police officers searching for narcotics. The court held that the defendant had abandoned his excrement for purposes of the Fourth Amendment.^

In dictum, the *Venner* court observed that "[i]t is not unknown for a person to assert a continuing right of ownership, dominion, or control, for good reason or for no reason, over such things as excrement, fluid waste, secretions, hair, fingernails, toenails,

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[3] See Health and Safety Code section 7054.3 : "Notwithstanding any other provision of law, a recognizable dead human fetus of less than 20 weeks uterogestation not disposed of by interment shall be disposed of by incineration."

[4] See Government Code section 27491.46 : "The coroner [following an autopsy] shall have the right to retain pituitary glands solely for transmission to a university, for use in research or the advancement of medical science" (id. , subd. (a)) or "for use in manufacturing a hormone necessary for the physical growth of persons who are, or may become, hypopituitary dwarfs ..." (id. , subd. (b)).

[5] See Government Code section 27491.47 : "The coroner may, in the course of an autopsy [and subject to specified conditions], remove ... corneal eye tissue from a body ..." (id. , subd. (a)) for "transplant, therapeutic, or scientific purposes" (id. , subd. (a)(5)).

[6] See Health and Safety Code section 7000 et seq. While the code does not purport to grant property rights in dead bodies, it does give the surviving spouse, or other relatives, "[t]he right to control the disposition of the remains of a deceased person, unless other directions have been given by the decedent ...." (Health & Saf. Code, § 7100.)

blood, and organs or other parts of the body ...."^ This slender reed, alone, supported the Court of Appeal's conclusion in the case before us that "it cannot be said that a person has no property right in materials which were once part of his body." However, because *Venner* involved a criminal-procedure dispute over the suppression of evidence, and not a civil dispute over who was entitled to the economic benefit of property, the opinion is grounded in markedly different polices and has little relevance to the case before us.

Not only are the wrongful-publicity cases irrelevant to the issue of conversion, but the analogy to them seriously misconceives the nature of the genetic materials and research involved in this case. Moore, adopting the analogy originally advanced by the Court of Appeal, argues that "[i]f the courts have found a sufficient proprietary interest in one's persona, how could one not have a right in one's own genetic material, something far more profoundly the essence of one's human uniqueness than a name or a face?" However, as the defendants' patent makes clear - and the complaint, too, if read with an understanding of the scientific terms which it has borrowed from the patent - the goal and result of defendants' efforts has been to manufacture lymphokines.

Inside the cell, a gene produces a lymphokine (see fn. 2, *ante*) by attracting protein molecules, which bond to form a strand of "messenger RNA" (mRNA) in the mirror image of the gene. The mRNA strand then detaches from the gene and attracts other protein molecules, which bond to form the lymphokine that the original gene encoded. (OTA Rep., *supra* , at pp. 38-44.)

In the laboratory, scientists sometimes use genes to manufacture lymphokines by cutting a gene from the chromosome and grafting it onto the chromosome of a bacterium. The resulting chromosome is an example of "recombinant DNA," or DNA composed of genetic material from more than one individual or species. As the bacterium lives and reproduces, the engrafted gene continues to produce the lymphokine that the gene encodes.^

It can be extremely difficult to identify the gene that carries the code for a particular lymphokine. "Since the amount of DNA in a human cell is enormous compared to the amount present in an individual gene, the search for any single gene within a cell is like searching for needle in a haystack."^ As the Regents' patent application explains, the significance of a cell that overproduces mRNA is to make the difficult search for a particular gene unnecessary. (U.S. Patent No. 4,438,032 (Mar. 20, 1984) at col. 2.) If one has an adequate source of mRNA - the gene's mirror image - it can be used to make a copy, or clone, of the original gene. The cloned gene can then be used in recombinant DNA, as already described, for large-scale production of lymphokines.^

Lymphokines, unlike a name or a face, have the same molecular structure in every human being and the same, important functions in every human being's immune system. Moreover, the particular genetic material which is responsible for the natural production of lymphokines, and which defendants use to manufacture lymphokines in the laboratory, is also the same in every person; it is no more unique to Moore than the number of vertebrae in the spine or the chemical formula of hemoglobin.

By definition, a gene responsible for producing a protein found in more than one individual will be the same in each. It is precisely because everyone needs the same basic proteins that proteins produced by one person's cells may have therapeutic value for another person.~ Thus, the proteins that defendants hope to manufacture - lymphokines such as interferon - are in no way a "likeness" of Moore.~

The next consideration that makes Moore's claim of ownership problematic is California statutory law, which drastically limits a patient's control over excised cells.

Pursuant to Health and Safety Code section 7054.4 , "[n]otwithstanding any other provision of law, recognizable anatomical parts, human tissues, anatomical human remains, or infectious waste following conclusion of scientific use shall be disposed of by interment, incineration, or any other method determined by the state department [of health services] to protect the public health and safety." Clearly the Legislature did not specifically intend this statute to resolve the question of whether a patient is entitled to compensation for the nonconsensual use of excised cells. A primary object of the statute is to ensure the safe handling of potentially hazardous biological waste materials. Yet one cannot escape the conclusion that the statute's practical effect is to limit, drastically, a patient's control over excised cells. By restricting how excised cells may be used and requiring their eventual destruction, the statute eliminates so many of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to "property" or "ownership" for purposes of conversion law.

It may be that some limited right to control the use of excised cells does survive the operation of this statute. There is, for example, no need to read the statute to permit "scientific use" contrary to the patient's expressed wish. A fully informed patient may always withhold consent to treatment by a physician whose research plans the patient does not approve. That right, however, as already discussed, is protected by the fiduciary-duty and informed-consent theories.

Finally, the subject matter of the Regents' patent - the patented cell line and the products derived from it - cannot be Moore's property. This is because the patented cell line is both factually and legally distinct from the cells taken from Moore's body. Federal law permits the patenting of organisms that represent the product of "human ingenuity," but not naturally occurring organisms.^ Human cell lines are patentable because "[l]ong-term adaptation and growth of human tissues and cells in culture is difficult - often considered an art ... ," and the probability of success is low. (OTA Rep., *supra* , at p. 33; see fn. 2, *ante* .)It is this *inventive effort* that patent law rewards, not the discovery of naturally occurring raw materials. Thus, Moore's allegations that he owns the cell line and the products derived from it are inconsistent with the patent, which constitutes an authoritative determination that the cell line is the product of invention.^

The distinction between primary cells (cells taken directly from the body) and patented cell lines is not purely a legal one. Cells change while being developed into a cell line and continue to change over time.^ "[I]t is clear that most established cell lines ... are not completely normal. Besides [an] enhanced growth potential relative to primary cells, they frequently have highly abnormal chromosome numbers ...." (2 Watson et al., Molecular Biology of the Gene (4th ed. 1987) p. 967^.)

The cell line in this case, for example, after many replications began to generate defective and rearranged forms of the HTLV-II virus. A published research paper to which defendants contributed suggests that "the defective forms of virus were probably generated during the passage [or replication] of the cells rather than being present in the original tumour cells of the patient." Possibly because of these changes in the virus, the cell line has developed new abilities to grow in different media. (Chen, McLaughlin, Gasson, Clark & Golde, *Molecular Characterization of Genome of a Novel Human T-cell Leukaemia Virus* , Nature (Oct. 6, 1983) vol. 305, p. 505.)

We find it interesting that Justice Mosk, in his dissent, would object to our "summar[y] of the salient conclusions" (*People v. Guerra* (1984) 37 Cal.3d 385, 412 [opn. by Mosk, J.]) of relevant scientific literature in setting forth the technological background of this case. (Dis. opn. of Mosk, J., post , at p. 182.) This court has previously cited

scientific literature to show, for example, that reports of hypnotic recall "form[ed] a scientifically inadequate basis for drawing conclusions about the memory processes of the large majority of the population" (*People v. Shirley* (1982) 31 Cal.3d 18, 59 [opn. by Mosk, J.]), and that eyewitness testimony can be unreliable (*People v. McDonald* (1984) 37 Cal.3d 351, 365-367 [opn. by Mosk, J.]).^

2. *Should Conversion Liability Be Extended?*

As we have discussed, Moore's novel claim to own the biological materials at issue in this case is problematic, at best. Accordingly, his attempt to apply the theory of conversion within this context must frankly be recognized as a request to extend that theory. While we do not purport to hold that excised cells can never be property for any purpose whatsoever, the novelty of Moore's claim demands express consideration of the policies to be served by extending liability^ rather than blind deference to a complaint alleging as a legal conclusion the existence of a cause of action.

There are three reasons why it is inappropriate to impose liability for conversion based upon the allegations of Moore's complaint. First, a fair balancing of the relevant policy considerations counsels against extending the tort. Second, problems in this area are better suited to legislative resolution. Third, the tort of conversion is not necessary to protect patients' rights. For these reasons, we conclude that the use of excised human cells in medical research does not amount to a conversion.

Of the relevant policy considerations, two are of overriding importance. The first is protection of a competent patient's right to make autonomous medical decisions. That right, as already discussed, is grounded in well-recognized and long-standing principles of fiduciary duty and informed consent.^ This policy weighs in favor of providing a remedy to patients when physicians act with undisclosed motives that may affect their professional judgment. The second important policy consideration is that we not threaten with disabling civil liability innocent parties who are engaged in socially useful activities, such as researchers who have no reason to believe that their use of a particular cell sample is, or may be, against a donor's wishes.

To reach an appropriate balance of these policy considerations is extremely important. In its report to Congress, the Office of Technology Assessment emphasized that "[u]ncertainty about how courts will resolve disputes between specimen sources and specimen users could be detrimental to both academic researchers and the infant biotechnology industry, particularly when the rights are asserted long after the specimen was obtained. The assertion of rights by sources would affect not only. the researcher who obtained the original specimen, but perhaps other researchers as well.

"Biological materials are routinely distributed to other researchers for experimental purposes, and scientists who obtain cell lines or other specimen-derived products, such as gene clones, from the original researcher could also be sued under certain legal theories [such as conversion]. Furthermore, the uncertainty could affect product developments as well as research. Since inventions containing human tissues and cells may be patented and licensed for commercial use, companies are unlikely to invest heavily in developing, manufacturing, or marketing a product when uncertainty about clear title exists."^

Indeed, so significant is the potential obstacle to research stemming from uncertainty about legal title to biological materials that the Office of Technology Assessment reached this striking conclusion: "[R]egardless of the merit of claims by the

different interested parties, resolving the current uncertainty may be more important to the future of biotechnology than resolving it in any particular way." (OTA Rep., *supra* , at p. 27 .)

We need not, however, make an arbitrary choice between liability and nonliability. Instead, an examination of the relevant policy considerations suggests an appropriate balance: Liability based upon existing disclosure obligations, rather than an unprecedented extension of the conversion theory, protects patients' rights of privacy and autonomy without unnecessarily hindering research.

To be sure, the threat of liability for conversion might help to enforce patients' rights indirectly. This is because physicians might be able to avoid liability by obtaining patients' consent, in the broadest possible terms, to any conceivable subsequent research use of excised cells. Unfortunately, to extend the conversion theory would utterly sacrifice the other goal of protecting innocent parties. Since conversion is a strict liability tort, it would impose liability on all those into whose hands the cells come, whether or not the particular defendant participated in, or knew of, the inadequate disclosures that violated the patient's right to make an informed decision.

"'The foundation for the action for conversion rests neither in the knowledge nor the intent of the defendant. ... [Instead,] "the tort consists in the breach of what may be called an absolute duty; the act itself ... is unlawful and redressible as a tort."'^ "Conversion is a species of strict liability in which questions of good faith, lack of knowledge and motive are ordinarily immaterial."

In contrast to the conversion theory, the fiduciary-duty and informed-consent theories protect the patient directly, without punishing innocent parties or creating disincentives to the conduct of socially beneficial research.

Research on human cells plays a critical role in medical research. This is so because researchers are increasingly able to isolate naturally occurring, medically useful biological substances and to produce useful quantities of such substances through genetic engineering. These efforts are beginning to bear fruit. Products developed through biotechnology that have already been approved for marketing in this country include treatments and tests for leukemia, cancer, diabetes, dwarfism, hepatitis-B, kidney transplant rejection, emphysema, osteoporosis, ulcers, anemia, infertility, and gynecological tumors, to name but a few. (Note, *Source Compensation for Tissues and Cells Used in Biotechnical Research: Why a Source Shouldn't Share in the Profits* (1989) 64 Notre Dame L. Rev. 628~.

The extension of conversion law into this area will hinder research by restricting access to the necessary raw materials. Thousands of human cell lines already exist in tissue repositories, such as the American Type Culture Collection and those operated by the National Institutes of Health and the American Cancer Society. These repositories respond to tens of thousands of requests for samples annually. Since the patent office requires the holders of patents on cell lines to make samples available to anyone, many patent holders place their cell lines in repositories to avoid the administrative burden of responding to requests.^ At present, human cell lines are routinely copied and distributed to other researchers for experimental purposes, usually free of charge. This exchange of scientific materials, which still is relatively free and efficient, will surely be compromised if each cell sample becomes the potential subject matter of a lawsuit.~

IV. Disposition

The decision of the Court of Appeal is affirmed in part and reversed in part. The case is remanded to the Court of Appeal, which shall direct the superior court to: (1) overrule Golde's demurrers to the causes of action for breach of fiduciary duty and lack of informed consent; (2) sustain, with leave to amend, the demurrers of the Regents, Quan, Sandoz, and Genetics Institute to the purported causes of action for breach of fiduciary duty and lack of informed consent; (3) sustain, without leave to amend, all defendants' demurrers to the purported cause of action for conversion; and (4) hear and determine all defendants' remaining demurrers.

BROUSSARD, J., Concurring and Dissenting.

~When it turns to the conversion cause of action,~ the majority opinion fails to maintain its focus on the specific allegations before us. Concerned that the imposition of liability for conversion will impede medical research by innocent scientists who use the resources of existing cell repositories - a factual setting not presented here - the majority opinion rests its holding, that a conversion action cannot be maintained, largely on the proposition that a patient generally possesses no right in a body part that has already been removed from his body. Here, however, plaintiff has alleged that defendants interfered with his legal rights before his body part was removed. Although a patient may not retain any legal interest in a body part after its removal when he has properly consented to its removal and use for scientific purposes, it is clear under California law that before a body part is removed it is the patient, rather than his doctor or hospital, who possesses the right to determine the use to which the body part will be put after removal. If, as alleged in this case, plaintiff's doctor improperly interfered with plaintiff's right to control the use of a body part by wrongfully withholding material information from him before its removal, under traditional common law principles plaintiff may maintain a conversion action to recover the economic value of the right to control the use of his body part. Accordingly, I dissent from the majority opinion insofar as it rejects plaintiff's conversion cause of action.~

MOSK, J. Dissenting.

I dissent.

~The majority next cite several statutes regulating aspects of the commerce in or disposition of certain parts of the human body, and conclude in effect that in the present case we should also "look for guidance" to the Legislature rather than to the law of conversion. (*Id.* at p. 137.)Surely this argument is out of place in an opinion of the highest court of this state. As the majority acknowledge, the law of conversion is a creature of the common law. "'The inherent capacity of the common law for growth and change is its most significant feature. Its development has been determined by the social needs of the community which it serves. It is constantly expanding and developing in keeping with advancing civilization and the new conditions and progress of society, and adapting itself to the gradual change of trade, commerce, arts, inventions, and the needs of the country.' [Citation.] [¶] In short, as the United States Supreme Court has aptly said, 'This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law.' [Citation.] ... Although the Legislature may of course speak to the subject, in the common law system the primary instruments of this evolution are the courts, adjudicating on a regular basis the rich variety of individual

cases brought before them." (*Rodriguez* v. *Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 394 [115 Cal.Rptr. 765, 525 P.2d 669].)

Especially is this true in the field of torts. I need not review the many instances in which this court has broken fresh ground by announcing new rules of tort law: time and again when a new rule was needed we did not stay our hand merely because the matter was one of first impression.^ For example, in *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588, we adopted a "market share" theory of liability for injury resulting from administration of a prescription drug and suffered by a plaintiff who without fault cannot trace the particular manufacturer of the drug that caused the harm. Like the opinion in the case at bar, the dissent in *Sindell* objected that market share liability was "a wholly new theory" and an "unprecedented extension of liability"^, and urged that in view of the economic, social, and medical effects of this new rule the decision to adopt it should rest with the Legislature^. We nevertheless declared the new rule for sound policy reasons~.

Even if we assume that section 7054.4 limited the use and disposition of his excised tissue in the manner claimed by the majority, Moore nevertheless retained valuable rights in that tissue. Above all, at the time of its excision he at least had *the right to do with his own tissue whatever the defendants did with it*: i.e., he could have contracted with researchers and pharmaceutical companies to develop and exploit the vast commercial potential of his tissue and its products. Defendants certainly believe that *their* right to do the foregoing is not barred by section 7054.4 and is a significant property right, as they have demonstrated by their deliberate concealment from Moore of the true value of his tissue, their efforts to obtain a patent on the Mo cell line, their contractual agreements to exploit this material, their exclusion of Moore from any participation in the profits, and their vigorous defense of this lawsuit. The Court of Appeal summed up the point by observing that "Defendants' position that plaintiff cannot own his tissue, but that they can, is fraught with irony." It is also legally untenable.

~My respect for this court as an institution compels me to make one last point: I dissociate myself completely from the amateur biology lecture that the majority impose on us throughout their opinion.^ For several reasons, the inclusion of most of that material in an opinion of this court is improper.

First, with the exception of defendants' patent none of the material in question is part of the record on appeal as defined by the California Rules of Court. Because this appeal is taken from a judgment of dismissal entered after the sustaining of general and special demurrers, there is virtually no record other than the pleadings. The case has never been tried, and hence there is no evidence whatever on the obscure medical topics on which the majority presume to instruct us. Instead, all the documents that the majority rely on for their medical explanations appear in an appendix to defendant Golde's opening brief on the merits. Such an appendix, however, is no more a part of the *record* than the brief itself, because the record comprises only. the materials before the trial court when it made its ruling.^ Nor could Golde have moved to augment the record to include any of these documents, because none was "part of the original superior court file," a prerequisite to such augmentation.^ "As a general rule, documents not before the trial court cannot be included as a part of the record on appeal."^

Second, most of these documents bear solely or primarily on the majority's discussion of whether Moore's "genetic material" was or was not "unique", but that entire discussion is legally irrelevant to the present appeal. As Justice Broussard correctly observes in his separate opinion, "the question of uniqueness has no proper

bearing on plaintiff's basic right to maintain a conversion action; ordinary property, as well as unique property, is, of course, protected against conversion."^

Third, this nonissue is also a noncontention. The majority claim that "Moore relies ... primarily" on an analogy to certain right-of-privacy decisions, but this is not accurate. Under our rules, as in appellate practice generally, the parties to an appeal are confined to the contentions raised in their briefs (see Cal. Rules of Court, rule 29.3). In his brief on the merits in this court Moore does not even cite, less still "rely primarily," on the right-of-privacy decisions discussed by the majority, nor does he draw any analogy to the rule of those decisions. It is true that in the course of oral argument before this court, counsel for Moore briefly paraphrased the analogy argument that the majority now attribute to him; but a party may not, of course, raise a new contention for the first time in oral argument.~

I would affirm the decision of the Court of Appeal to direct the trial court to overrule the demurrers to the cause of action for conversion.