

A Guide to *Moore v. Regents of the University of California*
Prof. Mary O'Connell

I have chosen to begin this course with a ferociously hard case. One way to look at this is, it's all down hill from here! My excuse for giving you such a complex case, for what it's worth, is that *Moore* is such a wonderful window into the question "so what is property"? We will proceed carefully through the case, using it to begin to unpack the underlying structure of the judicial opinions that will entertain (haunt?) you this entire year.

This brief guide is intended to help you get started, both with *Moore* and with the structural issues.

(1) Procedural posture: Unless you understand the *procedural posture* of a case, you cannot understand what the case is about. In your first year of law school (indeed, throughout most of law school), virtually every case you read will be a decision by an *appellate court*. This means that the case was already heard and decided by another, lower, court before it reached the court whose opinion you are reading. It is crucial in reading any case to identify: (1) the court that made the decision and wrote the opinion you are reading; (2) where the case was *before* it got to the present court – how many prior courts have heard and decided it? (there will often be 2 prior decisions, and sometimes more); (3) what did each prior court decide? (as we will learn, higher courts are sometimes – but not always – required to give deference to lower court decisions) and (4) exactly what issue or issues are before the court that wrote the opinion you are reading? As the lay people you still are (but not for long), you might have thought that when a case is appealed "the case" comes before the appellate court. Not so. Usually, specific issues or questions are before the appellate court, and the appellate court can, in general, rule only on those issues.

Figuring out the procedural posture of a case is one of the major challenges in acquiring the skill of case reading.

What court is deciding the *Moore* case in the opinion assigned for today? The introductory paragraph mentions the prior courts. Which courts were they? What did they do?

(2) What is before the court whose opinion you are reading? The first aspect of *procedural posture* is procedural background, i.e., where was this case before it got here? But the second key aspect is determining what, exactly, is before the court that is writing the opinion you are reading. Usually, what is before an appellate court is a challenge to some action taken in the lower court. The propriety of that action – and *only* the propriety of that action – is being reviewed by the higher court.

The procedural issue in *Moore* revolves around a *demurrer*. The superior court, the case tells us, "sustained all defendants' demurrers to the third amended complaint". (See first paragraph of the case). The Court of Appeal then reversed this superior court decision. The California Supreme Court therefore faced the question: *Was the Court of Appeal correct in reversing the trial court's order sustaining the demurrers?* Does all

this feel like gibberish? Obviously, one of the things you need to get a handle on is, what is a demurrer, and what does it mean to sustain one?

(3) Legal terminology: Another challenge in early case reading is legal vocabulary. A legal dictionary is as essential to law school (and the practice of law) as your casebooks are. The Cadillac of law dictionaries is *Black's*. The library owns the hard cover edition, and there is an abridged paperback edition available from Amazon (and elsewhere, I'm sure) for about \$30, and there may be a lot of old copies/editions floating around (check CISP). You also have access to a number of legal dictionaries on line through the Law Library's first year page: <http://www.slw.neu.edu/library/onehome.htm>. Whatever method you choose, a law dictionary is a good friend, especially during the first few months of law school, but in fact throughout your career.

(4) Stating a cause of action: This is a civil procedure concept, and your civ pro teachers will work with you on it. For now, what you need to know is that before a court can hear a case, the plaintiff must show that he or she is making a claim that the law recognizes. For example, if I come into class and one of you makes a face at me, that might hurt my feelings. However, if I filed a lawsuit against the face-maker, I could expect to find myself thrown out of court pretty quickly. This is because having hurt feelings because someone made a face at you is not a problem the law recognizes. There is no *legal cause of action* that I could show a court in connection with the face-making problem.

In *Moore*, how many causes of action did the plaintiff raise and what were they? What happened to each cause of action in the courts below? And what did the Supreme Court of California decide about each cause of action?

(5) Homing in while getting the context: One of the skills you will develop during this first year is the skill of homing in on the portion of a case that is relevant to an issue, problem or other case you are working with. However, as you do this, it is essential that you also understand the whole case, and the context in which your issue is being decided. (Every year, one of my second year students writes a paper that includes a wonderful sounding quotation from a case her/his research has turned up. Except that when I go to look at the case myself, it turns out that it actually rules *against* the client I have given the student – a fact the student somehow overlooked in extracting the quotation (oops!))

There are two major issues in *Moore*. One is a property issue, the other is not. Can you tell which is which? Mr. Moore lost on the property issue, but won on the non-property issue. If there had been no non-property issue for Mr. Moore to win on, I wonder if the case might have come out differently. That is, while our focus will be on the property issue, the presence of and analysis of the non-property issue almost certainly affected the Court's analysis and resolution of the property issue.

(6) The *Moore* case specifically: This case, decided by the California Supreme Court, produced four different opinions. The *majority* opinion, which stands as the *opinion of the court*, appears first. (This will always be the case. Majority opinions appear first, followed by concurrences, if any. Dissents appear last). The majority opinion was written by Justice Panelli, and was joined by Justices Lucas, Eagleson and Kennard (see

the beginning of the case). That adds up to 4 of the 7 justices who heard the case, i.e., a majority. Justice Arabian wrote a concurring opinion. This means that he agreed with the result the majority reached (he concurred), but he had different reasons for reaching that result. Another way to say this is that Justice Arabian agreed with the court's *decision* but not with its *opinion*. The *decision* is the court's ruling on the legal issue presented. It is this decision that determines what happens to the parties in the case. If you look at the end of the majority opinion, at IV, you will see the court's order, implementing its decision. That decision is then embedded in its *opinion* – which is the explanation and justification for its decision.

The next opinion, by Justice Broussard, is a “concurring and dissenting” opinion. That is, Justice Broussard agreed with the majority on a portion of its decision, but not all. Finally, there is a dissent by Justice Mosk. As a dissenter, he is saying that the case should have come out the other way.

Not all cases produce four opinions. While it is typical for the U.S. Supreme Court to produce that many or more, it is rarer for state courts. The four opinions here are evidence of the perceived importance and complexity of this case.

(a) Justice Broussard's opinion has some of the clearest discussion of the property issue in this case. This will not be the last time you find a concurrence or dissent more cogent than the majority. As I noted above, Justice Broussard both concurred and dissented. As to what did he concur, and as to what did he dissent?

(b) In part, this is a case about “conversion”. What is “conversion”, and what would Mr. Moore have to show in order to prove “conversion”? According to Justice Broussard, what does the tort of conversion protect against?

(c) The majority discusses conversion in its Section B. It says that if it were to impose conversion liability in this case, any scientist using human cell samples in his/her work would have to “investigate the consensual pedigree of each human cell sample”. First, what would it mean to “impose conversion liability” in this case? Second, what is the majority suggesting the result would be if conversion liability were imposed?

(d) According to the majority, does a person have a property interest in his or her own likeness? And what is the difference (at least according to the majority) between one's likeness and the cell line at issue here?

(e) What, exactly, is the “property” that the parties to this case are fighting about? The researchers and the University have obtained a patent. Is a patent property? What is it that they have patented?

(f) A plaintiff always brings a court action because he or she wants something. What did the plaintiff in *Moore* want?

(g) In Justice Mosk's dissent (in section 2), he refers to the “bundle of rights” metaphor that I mentioned in the brief intro memo (also posted) for this class). This metaphor is, at least at the present time, quite dominant in discussions of property. We will bump into it many times in the course.

(h) This is a tort case. Why are you reading a tort case to begin your study of property?

Please don't worry if there are parts of the case that you don't understand. I'm sure you've all heard the old saw that law is like a foreign language. At the beginning, you

only pick up bits and pieces, but as you keep trying, it gets better. There's more than a little truth to that, in my opinion.

I look forward to meeting all of you and embarking on the adventure that is property. If I promise you it will be fun, you probably won't believe me – but I will promise you anyway!