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Printed By **Chloe Kent**

Henrietta Lacks' Harvested Cells: Is The Clock Ticking On Unjust Enrichment Claim?

Cells Were Harvested From Henrietta Lacks Without Her Knowledge Or Consent In 1951

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Executive Summary

The descendants of Henrietta Lacks, a Black woman whose non-consensually harvested cervical cancer cells became the famous HeLa cell line, are suing Thermo Fisher Scientific. The family argue that Thermo Fisher's ongoing profits from the various HeLa cell lines it commercializes and sells constitute unjust enrichment.



FRONT ROW FROM LEFT TO RIGHT: HENRIETTA LACKS' GRANDSON RON LACKS, SON LAWRENCE LACKS AND GRANDSON ALFRED CARTER, PICTURED WITH THEIR LEGAL TEAM AND SOUTHERN UNIVERSITY REPRESENTATIVES

Source: *Deleso Alford*

After a two-year legal battle, a district court will soon decide whether the descendants of Henrietta Lacks, a Black woman whose cervical cancer cells formed the basis for the famous HeLa cell line, can proceed with their lawsuit against Thermo Fisher Scientific. The plaintiffs contend that the company unjustly profited from the use of Lacks' cells, but the defendants are arguing that the claim is outside that statute of limitations.

The outcome of the case may ultimately hang on what constitutes unjust enrichment from the use of living cells and how soon after a legal wrong that a civil claim of this nature can be made.

In October 2021, the estate of Henrietta Lacks filed a lawsuit against Thermo Fisher Scientific, alleging that the company's ongoing profits from continuing to reproduce and sell HeLa cells without consent from or compensation to the family constitutes unjust enrichment.

Among the Lacks' legal team is prominent civil rights lawyer Ben Crump, who has represented the families of several Black men murdered by the US police, people affected by the Flint water crisis and the plaintiffs behind the 2019 Johnson & Johnson baby powder lawsuit. (Also see "J&J Cosmetic Talc Lawsuits Halted, \$2Bn Trust Created, As Subsidiary Takes Liabilities Into Bankruptcy" - HBW Insight, 17 Oct, 2021.)

"Unjust enrichment law is fairly simple in terms of what it's trying to do," explained Caprice Roberts, law professor at Louisiana State University Herbert Law Center. "The law itself just says that a person who is unjustly enriched at the expense of another is subject to liability and restitution. They're basically saying that the defendant has benefitted unjustly by profiting from the HeLa cell line at Mrs. Lacks' expense, and the idea that they can continue to profit without having to pay something to the plaintiffs is unjust."

The Lacks estate is currently waiting to hear a judge's decision on a motion to dismiss the case, having amended their complaint twice following pushback from Thermo Fisher. They have requested that the court order Thermo Fisher to disgorge the full amount of its net profits obtained by the commercialization of the HeLa cell line for the preceding three years and to permanently forbid the company from using the cells without the permission of the Lacks family.

It has also been requested that the court impose a constructive trust in favor of the estate of Henrietta Lacks on all HeLa cells possessed by Thermo Fisher, all related intellectual property and all proceeds related to their use.

The Legacy Of The HeLa Cell Line

The HeLa cell line is the most widely used human cell line in biological research and has played a substantial role in the passing of several medical milestones. Henrietta Lacks, the woman from whom the cells were originally taken, died of cervical cancer aged 31 on 4 October 1951, six months after her remarkable cells were taken from her on 8 February 1951 at Johns Hopkins Hospital.

Johns Hopkins was the only hospital in the Baltimore area at the time where Black patients like Henrietta could receive free care. "Many scientists," writes Rebecca Skloot in her book *The Immortal Life of Henrietta Lacks*, "believed that since patients were treated for free in the public wards, it was fair to use them as research subjects as a form of payment."

Samples were being regularly collected from patients on the public ward of Johns Hopkins by its chairman of gynecology, Richard TeLinde, as part of research attempting to prove that cervical carcinoma *in situ* would eventually progress to invasive carcinoma. While Henrietta was unconscious on the operating table undergoing radium treatment for her tumor, attending physician Lawrence Wharton Jr. cut two samples from her cervix – one of healthy tissue and one from her cancerous tumor – which were then delivered to George Gey, a cell biologist based at the hospital's medical school.

What Do HeLa Cells Mean For Modern Medicine?

HeLa cells have helped researchers discover the 24th chromosome, contributed extensively to scientists' understanding of HIV and were the first pieces of human tissue to ever be sent into space. They were also instrumental in the development of vaccines for polio and human papillomavirus (HPV), several cancer treatments and even in vitro fertilization, among many other discoveries.

"Many scientists believed that since patients were treated for free in the public wards, it was fair to use them as research subjects as a form of payment."

The harvesting of the samples was not medically necessary and was done without her knowledge or consent. Months later, when she learned that the radium treatment had left her infertile, Henrietta expressed that she would not have agreed to undergo it at all if she had been informed of this risk.

Gey and his team found that the cultured cells cut from Henrietta's uniquely aggressive tumor doubled in volume every 20 to 24 hours where most other cultures would normally die out. If sustained correctly in laboratory conditions and fed the correct nutrients to allow them to grow, Henrietta's biopsy was effectively immortal.

While Gey made short work of sending Henrietta's cells to any scientist who might use them in their research, the Lacks family did not learn about the origin of the HeLa cell line until the 1970s. A multibillion-dollar biotech ecosystem has formed around the cells, as companies either patented and sold various HeLa cell line products or used them to support research which would eventually culminate in a profitable product; meanwhile, the Lacks family have not seen a penny of the profits derived from this work.

Thermo Fisher Mounts Its Defense

In its defense, Thermo Fisher is arguing that proceeds earned through an act of unjust enrichment cannot be subject to an unjust enrichment case themselves. The company maintains that an "accrual of an unjust enrichment claim occurs when the benefit is first conferred, not when the benefit is monetized or profits are realized later." In other words, just because Thermo Fisher is now profiting from the non-consensual harvesting of Henrietta Lacks' cells in 1951, this does not make its profits an ongoing unjust enrichment against the surviving members of the Lacks family.

Thermo Fisher has also argued that that the claim of unjust enrichment is time-barred, since Maryland law requires that an unjust enrichment claim must be brought within three years of its accrual. Thermo Fisher's HeLa cell line products existed more than three years before the lawsuit was brought against it in 2021.

"The law of unjust enrichment is clear," Thermo Fisher summarized in its latest motion to dismiss. "A claim accrues when a plaintiff confers a benefit on a defendant, the claim must be brought within three years of its accrual and follow-on proceeds do not create new claims or restart the clock."

However, it is the immortal nature of HeLa cells, the Lacks estate is arguing, which validate its claim.

Southern University Law Center professor Deleso A. Alford explained: "The defendant is arguing that plaintiffs' claim is time-barred, that they have waited too long, but in this instance it is not too late, because the plaintiffs are arguing that her unique cells continue to grow and continue to provide profit to the defendants without consent or compensation."

She continued: "An integral part of the argument that the plaintiffs made was that our history in the US of enslavement dealt with the legal dehumanization of people as chattel property. What co-lead counsel attorney Ben Crump stated in court was that Henrietta Lacks lives. She lives today with each new cell that Thermo Fisher Scientific duplicates and sells for unsanctioned profit. Thermo Fisher utilizes Henrietta Lacks' cells as chattel property, as if she wasn't a human being due dignity and respect, staking a claim to Mrs. Lacks as if she can be disassociated from her very own cells."

A Bona Fide Purchaser For Value

Thermo Fisher also argues that the plaintiffs' claim fails because they do not plead an actionable underlying tort, while the Lacks estate says that Maryland courts have permitted cases to go forward with a sole claim for unjust enrichment and therefore no underlying tort needs to be pleaded. Roberts said: "One of the key myths around the law of unjust enrichment is there has to be a tort that's proven, and that's just not accurate. You can have unjust enrichment as what's called a freestanding claim, its own breach in substantive law, plus the remedies that come with it, of which there are a variety."

The Lacks estate further asserts that it has indeed alleged tortious conduct in the form of the Johns Hopkins physicians' treatment of Henrietta Lacks, which it says constitutes both battery and a breach of the confidential doctor-patient relationship. However, as the defendant raises in its response, this "still pleads no tort as a count in the complaint," since these acts were committed by doctors at Johns Hopkins rather than by Thermo Fisher Scientific.

The case also hinges upon whether Thermo Fisher can be considered a bona fide purchaser for value of HeLa cells when it first acquired them.

"No one in the chain of sale between Johns Hopkins and Thermo Fisher Scientific has ever had good title to HeLa cells."

Under Maryland law, a bona fide purchaser or "innocent purchaser" exists when a party acquires a property for valuable consideration in good faith and without notice of another's prior claim to the property. Thermo Fisher maintains that the Lacks estate must demonstrate that the company already had notice of a competing equitable claim – i.e., knowledge of the origin of the cells and the Lacks' potential claim over them – when it initially acquired HeLa cells.

Meanwhile, the Lacks' maintain that the medical experiments on Black patients conducted at Johns Hopkins and the origin of HeLa cells were such common knowledge in the scientific community that Thermo Fisher "knew or should have known" that it could not purchase HeLa cells in good faith. The Lacks estate also maintains that Thermo Fisher cannot be a bona fide purchaser of Henrietta Lacks' stolen cells in the first place, since they were taken from her without her knowledge or consent and "no one in the chain of sale between Johns Hopkins and Thermo Fisher Scientific has ever had good title to HeLa cells."

Roberts said: "Thermo Fisher might be able to prove their knowledge was very late, it was when the public found out, and that could affect the ultimate merits of the case. But the plaintiffs have asserted the basic facts that are sufficient to get over a motion to dismiss, so they ought to have their day in court."

Thermo Fisher was offered the opportunity by *In Vivo* to provide a statement outlining its position on the case but has opted not to do so.

Thermo Fisher May Be The First Of Many Defendants

Should the plaintiffs win this case, the consequences could extend far beyond Thermo Fisher to impact other pharmaceutical and biotechnology companies.

Crump stated in 2021 that the family's legal team was investigating lawsuits against as many as 100 defendants, mostly pharmaceutical firms, meaning other businesses that profit from the sale and use of HeLa cells may find themselves facing similar allegations if this first case proves to be a success. Thermo Fisher, which states in its latest motion to dismiss the case that it has been chosen "seemingly at random" as the subject of the Lacks estate lawsuit, may simply be the first of many.

Roberts also suggested that the case could change the conversation when it comes to compensation for people whose bodily samples are used in medical research.

“I do think if this case were successful, that’s where it leads,” she said. “What will be the legality going forward? Should there be some level of not just giving people informed consent but also giving them the opportunity to have some compensation at the front end for what they’re giving to the project.”

However, the HeLa cell line is a particularly unique case and it is unlikely that an individual’s cells will lead to a blockbuster scientific breakthrough of this magnitude.

“What happened to the Lacks family is unlike any other set of facts that we’ve seen in our lifetime,” said Alford. “So to say that this case would open the floodgates would not be a fair assessment to the uniqueness of Henrietta Lacks’ case. We must put her cells back into her body to humanize her existence and pursuit for justice, rather than consider her cells as the gift that keeps giving. Really, HeLa cells amount to an inequitable benefit to the defendants that the law provides a remedy for through unjust enrichment. What I do believe is going to happen, based on the handling of this case, is that its historical grounding in medical advancement, medical racism and doctor-patient relationships of trust are going to impact the future generation.”

In short, a win for the Lacks estate could also extend beyond the pharmaceutical sector and into everyday healthcare and medical settings.

“The plaintiffs’ argument is essentially that you cannot separate her from her cells, they are one, and when you dehumanize her you go back to this legal fiction of chattel property and manipulate it to say that this is the way we treat Black bodies, this is the way we continue the dehumanization of Black bodies in the US,” said Alford. “This impacts more than pharmaceutical companies. It has the promise of directly impacting medical professionals and the way they frame their doctor-patient encounters. If they take human tissue without the informed consent of the patient it [could] result in tortious conduct.”

Editor's note: this article was updated on 19 April 2023 to make the following correction: Caprice Roberts is a law professor at Louisiana State University Herbert Law Center, not the George Washington University Law School as was stated in the previous version.