



Use of Human Organs after Death

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Use of Human Organs After Death

1. Introduction

In February 1999, it was revealed that the United Bristol Health Care NHS Trust had kept the hearts of babies, removed during post-mortem examinations. The Trust stated that these hearts had been used for research purposes. The consent of the families had not obtained. It appears that the retention of human tissue and organs after post-mortems, without express consent, is standard practice in hospitals. Some commentators have even proposed that organ retention become compulsory¹. Such practices have ethical and religious implications and can cause emotional distress to the families of the deceased.

Consent to treatment and to how the body is disposed of is an important principle in English law. Any NHS Trust or health authority that actively disregards this requirement not only undermines the social objectives for an open and accountable NHS but acts unlawfully.

2. No Property in a Corpse

While alive, mentally competent adults may donate non-essential or replaceable fluids, tissue or organs for altruistic purposes. After death, the law concerning the use or ownership of a body or parts of that body is more complex. Medical advances have facilitated the use of organs after death to prolong the lives of the seriously ill. This and other areas of research has resulted in increased use of human tissue and organs for research and education purposes.

An individual may authorise use of his or her organs after death through the donor card scheme. In the absence of express authority, the use and retention of body parts after death is legally fraught as well as being a highly charged emotional issue.

It has been held that there is no property in a corpse (nobody can own it)². However, that does not stop families or hospitals being in lawful possession of a body. If the body or part of it has been altered for the purpose of medical or scientific examination it can thereby acquire a value and become property.³

3. Coroners' Post-mortems

A Coroner must investigate any death in violent, suspicious or unknown circumstances. He is under no duty to seek consent to a post-mortem from the family of the deceased, although it is good practice to do so. Rule 9 of the Coroners Court Rules 1984 provides that '*A person making a post-mortem examination shall make provision, so far as possible, for the preservation of material which in his opinion bears upon the cause of death for such period as the coroner thinks fit*'. The jurisdiction of the Coroner is restricted to establishing or confirming the cause of death, therefore, the retention of human tissue or organs required for diagnostic testing, ceases to be authorised under these Rules when the cause of death is known.

4. Clinical Interest Post-mortems

Not all post-mortems are carried out on the instructions of a Coroner. Where the cause of death is already known, such a post-mortem will not be ordered. A hospital, doctor, or family of the deceased may request a clinical interest post-mortem. The Human Tissue Act 1961 introduced a statutory consent requirement

¹ Prof. John Harris-The Daily Telegraph 18/02/99

² Williams v Williams (1880)

³ Doodeward v Spence (1908) Australian Case, R v Kelly (1998)

into clinical interest post-mortems. Section 1(2) states that:

The person lawfully in possession of the body ...may authorise the removal of any part of the body... having made such reasonable enquiries as may be practicable, he has no reason to believe –

a) that the deceased had expressed an objection to his body being so dealt with after his death... or

b) that the surviving spouse or any surviving relative of the deceased objects to the body being so dealt with.'

What constitutes 'reasonable enquiries' will vary with the circumstances of each case. In most instances, a post-mortem would be unlawful without having first consulted the dead person's spouse or other close family members. There is no legal requirement to consult if the deceased left express authority, through a donor scheme or in the presence of two witnesses⁴. It is however good practice to be sympathetic to the family's wishes.

5. Department of Health Guidance

Guidelines, issued in March 1998 called 'Cadaveric Organs for Transplantation - A Code of Practice, Including the Diagnosis of Brain Death', details the Department of Health's interpretation of section 1(2) of the Human Tissue Act. Although these guidelines deal specifically with the harvest of organs for transplantation, as the Act makes no differentiation, it is clear that the same criteria and practices must apply to the retention of organs for research.

Under the heading 'Guidelines for the Management of Potential Organ and Tissue Donors' it repeats the provisions of the Human Tissue Act but advocates a strict interpretation of the 'reasonable enquires' criteria. It details the requirement to

⁴ Human Tissues Act 1961 section 1(1)

establish lack of objection from surviving relatives including, parents and cohabitants and clarifies the need to consider the religious beliefs of the deceased.

The Department of Health has also issued guidance in which it is stated:

'post-mortem tissue and organs when examined in the laboratory are subject to dissection and processing as pathological specimens and do not retain a recognisable form as in the human body. Their subsequent disposal is arranged as for pathological specimens.'

However, this does not negate the requirement that consent be sought prior to a clinical post-mortem (carried out other than on the direction of a Coroner). Nor, in the case of a Coroner's post-mortem, does it sanction the removal of body organs other than for establishing the cause of death.

6. Transplantation of Organs

Removal and retention of organs can be used to facilitate research, or for education or therapeutic purposes. The Human Tissue Act 1961 is effective in all these situations. Therefore, the consent necessary under the Act is applicable where organs are removed for transplantation. The requirement for 'reasonable enquiry' under section 1(2) is particularly important where transplantation is proposed. Prompt organ removal improves the success of transplant operations and health authorities may be unwilling to delay where authorisation is not immediately available. Practitioners who proceed in these circumstances without consent would contravene both the Human Tissue Act 1961 and NHS guidelines.

7. Death of Children

In certain strict circumstances, a minor is able to consent to medical treatment⁵. This consent extends to the donation of blood and organs⁶. In such a case,

⁵ Family Law Reform Act 1969 section 8(1)

consent is dependent on the child being of '*sufficient maturity to understand what is involved*'⁷. The Department of Health advises that '*even where a child has made such a request, enquiry should be made to the parents as a matter of good practice*'⁸. If no such request has been made or the child lacks competence consent must be gained from the parents as the surviving relative under section 1(2)(b) of the Human Tissue Act 1961.

8. Conclusion

The retention of organs for research, education or therapeutic purposes without consent is unlawful. In the absence of advance authority from the deceased individual, reasonable enquiries must be made to ascertain both the relatives' and deceased's lack of objection to organ donation. Unfortunately, the very nature of bereavement, makes enquiries and investigation distressing. Relatives or indeed patients, may find that that they have signed consent forms without fully comprehending what they are consenting to.

Marion Chester and Antonia Ford
March 1999

⁶ *Re W (a minor) (medical treatment: Court's jurisdiction)* [1992] 3 WLR 758, 4 All ER 627

⁷ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112

⁸ DOH guidelines '*Cadaveric Organs for Transplantation a code of practice including the diagnosis of brain death*' para 8.10

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