

SARAH JANNEKE HART

THE LAW GOVERNING ORGAN DONATION IN  
NEW ZEALAND AND THE NEED FOR REFORM

LLB (HONS) RESEARCH PAPER

(7465 Words)

LAWS 489

Law Faculty  
Victoria University of Wellington

2002

LAW

AS741  
VUW  
A66  
H326  
2002

H326  
HART, S.J.  
The law governing organ donation in NZ.

# Victoria

UNIVERSITY OF WELLINGTON

*Te Whare Wānanga  
o te Ūpoko o te Ika a Māui*



LIBRARY

**CONTENTS**

I	INTRODUCTION	2
II	THE LEGISLATIVE FRAMEWORK	3
	A The Common Law: No Property Rights in a Body	4
	B The Human Tissue Act 1964 and Related Legislation	5
	1 The Human Tissue Act 1964	5
	2 The Code of Practice	6
	3 The Position of Coroners	7
	C The Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996	7
III	THE APPLICATION OF THE LAW TO THE GREEN LANE SITUATION	8
	A The Human Tissue Act 1964	9
	B The Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996	10
IV	THE AFTERMATH OF GREEN LANE	12
V	REFORM OPTIONS	13
	A Introduction	13
	B Presumed Consent: Opting Out	15
	1 An Application of Presumed Consent in New Zealand	17
	C Routine Procurement of Organs	20
	D Required Request and Routine Inquiry	21
	1 An Application of Required Request and Routine Inquiry in New Zealand	22
	2 Routine Inquiry or Required Request?	24
	E Amendments to Existing Legislation	25
VI	CONCLUSION	27
VII	BIBLIOGRAPHY	29

CONTENTS

1	I	INTRODUCTION
2	II	THE LEGAL FRAMEWORK
3	A	The Common Law No Property Rights in a Body
4	B	The Human Rights Act 1994 and Related Legislation
5	C	The Human Rights Act 1994
6	D	The Code of Ethics
7	E	The Practice of Courts
8	C	The Health and Disability Commission (Code of Health and Disability Services Consumers' Rights) Regulations 1994
9	II	THE APPLICATION OF THE LAW TO THE GREEN LANE SITUATION
10	A	The Human Rights Act 1994
11	B	The Health and Disability Commission (Code of Health and Disability Services Consumers' Rights) Regulations 1994
12	C	1994
13	IV	THE AFTERMATH OF GREEN LANE
14	V	REPORT OPTIONS
15	A	Proposals for a Report
16	B	Proposed Content of Report
17	C	An Application of Proposed Content in New Zealand
18	D	Report Framework of Options
19	E	Report Content and Report Impact
20	F	An Application of Proposed Report and Report Impact in New Zealand
21	G	Report Impact and Report Content
22	H	Report Impact in New Zealand
23	I	Report Impact in New Zealand
24	J	Report Impact in New Zealand
25	K	Report Impact in New Zealand
26	L	Report Impact in New Zealand
27	VI	CONCLUSION
28	VII	BIBLIOGRAPHY

## I INTRODUCTION

In January 2001, reports reached the New Zealand media that children's organs were being removed after post mortem without parental consent and retained in hospitals around the United Kingdom. However a subsequent audit of organs revealed around 105,000 body parts and fetuses were being retained around England at the end of 1999.<sup>1</sup> The organ collection at Alder Hey Hospital began in 1948 and for the years 1988 to 1995, nearly all organs were retained after post mortem for research purposes.<sup>2</sup> This disclosure was met with assurances from the New Zealand Ministry of Health that such practices were unlikely to happen in this country, as our current legislative scheme required informed consent for the removal of organs for donation or retention for research.<sup>3</sup>

The English experience prompted reviews of organ retention practices in Australia, and later on, in New Zealand. Australian hospitals subsequently uncovered stores of around 25,000 body parts that had been removed without consent after autopsy.<sup>4</sup> These Australian findings were again met with certainty from the New Zealand health sector that these retentions could not occur in New Zealand.<sup>5</sup>

Despite these assurances, in February 2002, it was revealed that similar practices had occurred in New Zealand. At Green Lane Hospital alone, 1300 hearts and other organs from children, babies and fetuses had been retained, often without consent, for the past fifty years.<sup>6</sup> Most of the organs were retained after post mortem from children with congenital heart disease and were used for research and teaching purposes.

---

<sup>1</sup> Department of Health *The Removal, Retention and use of Human Organs and Tissue from Post Mortem Examination – Advice from the Chief Medical Officer* (The Stationery Office, London, 2001).

<sup>2</sup> D Gareth Jones "The Use of Human Tissue: An Insiders View" (2002) 3 NZBJ 8, 8.

<sup>3</sup> "Childrens Organs Stolen, Doctor Banned"(31 January 2001) *The Evening Post*, Wellington 6.

<sup>4</sup> Cordelia Thomas "The Retention of Body Parts - Do the Best of Intentions Excuse Ethical Breaches?" (2002) 4 BFLJ 33, 34.

<sup>5</sup> "Bodies Of Evidence" (15 March 2001) *The Dominion*, Wellington 7.

On a related matter, recent media attention has focussed around the current shortage of organs for transplant in this country. New Zealanders' rate of organ donation is reportedly amongst one of the lowest in the western world.<sup>7</sup> This could partly be explained by different countries' legislative responses to organ donation but other factors may impact as well.

British politicians have questioned whether there is any connection between 'this macabre, horrible and widespread practice of organ retention'<sup>8</sup> and the current shortage of organs for transplantation, as the retained organs were kept for research and not transplant purposes. While organ retention and transplantation are distinct issues, they are both currently governed by the same statutory scheme in New Zealand, and any examination of reform for our existing legislation would have to address both issues.

This paper will firstly examine the legislative framework governing the retention and transplantation of human tissue in New Zealand and thus consider the legal implications of the events at Green Lane. The position of the minor and their family in this structure will be considered. Second, possible legislative reforms for New Zealand will be discussed with the aim of determining which option is most appropriate for the New Zealand context.

## II THE LEGISLATIVE FRAMEWORK

The law surrounding cadaveric human tissue is complicated as no one piece of legislation deals comprehensively with the retention of human tissue. Instead, the law is comprised of various statutes, the Human Tissue Act 1964, the Coroners Act 1988 and the Code of Health and Disability Services

---

<sup>6</sup> "50 Year Babies Heart Cover Up" (28 February 2002) *The Dominion*, Wellington 1.

<sup>7</sup> "Patients Die as Doctors Fail to Ask for Consent" (15 August 2002) *The Dominion Post* Wellington 1.

<sup>8</sup> Mr Tim Harvey, MP (14 December 1999) 341 GBPD col 14WH.

Consumers' Rights 1996 along with a Health Department Code of Practice<sup>9</sup> and the common law.

### A *The Common Law: No Property Rights in a Body*

By virtue of the common law, during one's lifetime, one does not own one's body.<sup>10</sup> Further, upon death, the traditional approach has been to see the corpse as owned by no one and thus it cannot be stolen.<sup>11</sup> The no property rule gained more judicial mention in earlier centuries with cases of 'body snatching' as corpses were stolen for sale to schools of anatomy.<sup>12</sup> This rule regarding dead bodies has recently been judicially considered in New Zealand and has been approved in a modern day context.<sup>13</sup> It has been suggested that presently, with advances in medicine and technology in the 20<sup>th</sup> century, the corpse again has value unparalleled since the days of grave robbing.<sup>14</sup> Modern medical practices may have called into question this rule, and its ability to sufficiently keep up with recent technological advances.

Although no property exists in a corpse, case law suggests that if a body has undergone some special procedure, it can be the subject of property in the regular sense. In *Doodeward v Spence*, a case involving a two-headed foetus, it was stated that the lawful exercise of skill upon a body part differentiates it from a corpse and thus it can become the subject of property.<sup>15</sup> Similarly, *R v Kelly* affirmed the no property rule for corpses simply awaiting burial but stated that where the corpse attains new characteristics through the use of a skill, such as embalming for teaching purposes, it is capable of becoming the subject of property.<sup>16</sup>

<sup>9</sup> Department of Health *A Code of Practice for Transplantation of Cadaveric Organs* (Wellington, 1987).

<sup>10</sup> *Williams v Williams* (1882) 20 Ch D 659 and see Peter D Skegg "The No Property Rule and Rights Relating to Dead Bodies" (1997) Tort L Rev 222, 223.

<sup>11</sup> Skegg, above, 228.

<sup>12</sup> See for example the Burke and Hare trials, stealing corpses for anatomist Robert Knox.

<sup>13</sup> *Awa v Independent News Auckland Ltd* [1995] 3 NZLR 701, 710 Hammond J.

<sup>14</sup> Law Reform Commission of Canada *Procurement and Transfer of Human Tissues and Organs* (Law Reform Commission, Ottawa, 1992).

<sup>15</sup> (1908) 6 CLR 406, 414.

<sup>16</sup> [1998] 3 All ER 741 (CA).

## **B Human Tissue Act 1964 and Related Legislation**

Although no property rights exist in the corpse, it is accepted that certain people do have rights of possession to a corpse. The common law acknowledges the executor's right to possession of the body for the purposes of burial.<sup>17</sup> In addition, coroners may have a temporary right to possession of a body, as may those in charge of hospitals, a right conferred by the Human Tissue Act 1964.<sup>18</sup>

### *1 The Human Tissue Act 1964*

The Human Tissue Act 1964 (the Act) regulates the removal of human tissue for therapeutic, medical education and research purposes.<sup>19</sup> The Act applies to dead human bodies but specifically excludes the bodies of stillborn babies.

Section 3(1) of the Act states that a person lawfully in possession of a body may authorise the removal of tissue if the deceased has requested that his or her body be used for therapeutic, educational or research purposes after death. The person lawfully in charge of the body must under section 3(2) of the Act take reasonable and practicable steps to ensure that the request was not withdrawn before the person's death. The person lawfully in possession of the body is defined in section 2(2) of the Act, as professionals in charge of any institution covered by the Hospitals Act 1957 or the Mental Health (Compulsory Assessment and Treatment Act) 1992, and also the superintendents of any penal institution.

If no request is made under section 3(1), the person lawfully in charge of the body may authorise removal if, after making such reasonable enquiries as are practicable, that person has no reason to believe the deceased or any relative objects to removal. Had the legislature's intent been to not authorise removal if

<sup>17</sup> Peter D Skegg "The No Property Rule and Rights Relating to Dead Bodies" (1997) Tort L Rev 222,224.

<sup>18</sup> Human Tissue Act 1964, s 3(1).



a relative objected, this amendment to section 3(2) could have been made.<sup>20</sup> However, as the section currently stands, the person lawfully in possession of the body may authorise removal upon having made such reasonable enquiries as are practicable that no relative of the deceased objects. In determining what amounts to a reasonable enquiry, it has been suggested that the legislature's intention in this section was not to place large burdens on the hospital when relatives cannot be found nor would the intent be to ignore the views of relatives if found.<sup>21</sup> Also applicable are the prevalent attitudes of society.<sup>22</sup> The Cartwright Report<sup>23</sup> of 1988 marked a change in societal thinking about the medical field generally, with a move away from paternalism to the idea of partnership and consultation with patients playing a larger role in decision-making. Thus, Pahl suggests a prudent doctor would do everything possible to communicate with family members to determine the views of the deceased as well as the family's own views towards organ donation.<sup>24</sup>

## 2 The Code of Practice

A Code of Practice supplements the Act to guide health professionals in this area.<sup>25</sup> It states that although it is desirable to approach relatives to ascertain their views, it is not legally obliged to.<sup>26</sup> The Code of Practice also provides guidance as to what constitutes 'such reasonable inquiry as may be practicable'. It suggests a relatively low standard of enquiry, in that the person lawfully in possession of the body need only consult with any one relative who has been in close contact with the deceased.

<sup>19</sup> Also governs post mortem examinations and the practice of anatomy.

<sup>20</sup> Peter D Skegg "The Interpretation of the Human Tissue Act 1961" (1976) 16 Med Sci Law 193, 197.

<sup>21</sup> Susan Pahl "Removal of Body Parts: the Legal Position" [1993] NZLJ 144, 145.

<sup>22</sup> Pahl, above, 145.

<sup>23</sup> Silvia Cartwright "*The Report of the Committee of Inquiry into Allegations Concerning the Treatment of Cervical Cancer at National Women's Hospital and into Other Related Matters*" (Government Printing Office, Auckland, 1988).

<sup>24</sup> Pahl, above, 145.

<sup>25</sup> Department Of Health *A Code of Practice for Transplantation of Cadaveric Organs* (Wellington, 1987).

<sup>26</sup> Department Of Health *A Code of Practice for Transplantation of Cadaveric Organs* (Wellington, 1987), 2.

### 3 *The Position of Coroners*

The coroner's purpose is to enquire into the cause of death where the death appears to be violent, unnatural, while in the custody of the state, suicide, without known cause or following medical procedures.<sup>27</sup> In these situations the coroner is the person lawfully entitled to possession of the body.<sup>28</sup> The coroner is able to authorise a post-mortem under section 7 of the Coroners Act 1988, and familial consent to this procedure is not required.<sup>29</sup> The coroner has the right to remove organs and tissues for the purpose of determining the cause of death, but apart from this, bodies in the possession of the coroner are subject to the same limits as bodies in the possession of the hospital.<sup>30</sup> Thus the coroner must comply with the Human Tissue Act 1964, such as the reasonable and practicable inquiries detailed in section 3 of the Act.<sup>31</sup>

#### ***C Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996***

The Health and Disability Commissioners Act 1994 (the HDC Act) was inspired by the recommendations of the Cartwright Report that a commissioner be established to define and protect patient rights.<sup>32</sup> The HDC Act implements a code of Health and Disability Services Consumers' Rights (the Code), which is included in the regulations to the Act.<sup>33</sup> The Code details the obligations of all health providers to observe the Code, make consumers aware of the Code and allow consumers to exercise their rights in accordance with the Code.<sup>34</sup> Rights included in the Code include the right to be treated with respect, the right to effective communication and the right to be fully informed.<sup>35</sup> Right 7 contains

<sup>27</sup> Coroners Act 1988, s 4.

<sup>28</sup> Human Tissue Act 1964, s 3(5).

<sup>29</sup> Jane Bawden "Body Parts Controversies" [2002] NZLJ 153, 153.

<sup>30</sup> Susan Pahl "Removal of Body Parts: the Legal Position" [1993] NZLJ 144, 146.

<sup>31</sup> Pahl, above, 146.

<sup>32</sup> Health and Disability Commissioner's Website <<http://www.hdc.org.nz>> (last accessed 12 July 2002).

<sup>33</sup> Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996.

<sup>34</sup> Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, cl 1.

the right to informed choice and informed consent and specifically refers to the retention of body tissue. If a body part is to be removed, the consumer has the right to be informed of this and under right 7(9) has the right to make a decision about the return or disposal of a body part removed during a healthcare procedure. Further, under right 7(10) any organs removed in the course of healthcare procedure may be stored, utilised or preserved only with the informed consent of the consumer.

### **III APPLICATION OF THE LAW TO THE GREEN LANE SITUATION**

The law governing the area of human tissue retention in New Zealand is complex, but a further complicating factor in the Green Lane situation is the involvement of young children, and their legal incapacity to give consent.

The Health and Disability Commissioner Ron Paterson alleges the Human Tissue Act has been breached.<sup>36</sup> However, medical law specialist Professor Peter Skegg, who is advising Green Lane Hospital, has adopted a different view, apparent in comments made in the media.<sup>37</sup> These conflicting interpretations of the Act will be considered with an application of the relevant law to the events at Green Lane.

#### **A The Human Tissue Act 1964**

The Human Tissue Act 1964 contains no specific guidelines as to age, so it appears that a person of any age could potentially donate tissue after death. The Guardianship Act 1968 states that children sixteen or over are able to consent to any medical, surgical or dental procedure.<sup>38</sup> For children under sixteen years of age, whether or not a child can give effective consent turns on

<sup>35</sup> Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 Rights 1, 5 and 6 respectively.

<sup>36</sup> Cordelia Thomas "The Retention of Body Parts - Do the Best of Intentions Excuse Ethical Breaches?" (2002) 4 BFLJ 33, 36.

<sup>37</sup> "Heartbreak Hospital" (June 2002) *North and South New Zealand*, 29,39; "Hospitals legally entitled to keep Hearts, says Expert" (28 February 2002) *The New Zealand Herald* Auckland.

<sup>38</sup> Guardianship Act 1968, ss 25(1) and (2).

that child's individual ability to make an informed decision about the proposed procedure.<sup>39</sup> If a child were competent to understand the situation sufficiently to make a request under section 3(1), then that request would be valid for the purposes of that section. However, section 3(1) does not appear to be applicable to most children especially the babies involved in this particular situation.

Section 3(2) potentially has more application in the case of children, and any authorisation for retention would have to be made under this section. By virtue of section 25 of the Guardianship Act 1968, it is presumed that for children younger than sixteen years of age, parental consent is necessary for medical, surgical or dental procedures.<sup>40</sup> Thus, where young children are involved, organ and tissue removal is a matter for parental consent. Section 25 is subject to section 23 which requires parents to make decisions according to the welfare of the child. While living, it is possible for a child to donate an organ such as a kidney or regenerative tissue such as skin or bone marrow. Organ donation may help others but is it in the child's welfare to do so? Many issues surround whether parental consent can be given for non-therapeutic medical procedures in general, however, for organ donation the test appears to be one of the best interests of the child where best interests are wide enough to include the psychological benefit accrued to the donor from their altruism.<sup>41</sup>

Section 3(2) often involves a weighing up of the deceased's and the family's views on organ donation. As the child has died the difficulties of the 'best interests' test for live child donors are avoided. In situations involving child donors the deceased is unlikely to have expressed any opinion on the matter, which should make the opinions of the family even more crucial. However, section 3(2) does not require the person lawfully in possession of the body to obtain consent from relatives for removal of organs. What is necessary is an absence of objection, and only 'reasonable enquiries as are practicable' are required to ascertain whether this objection exists before organ removal can be

<sup>39</sup> *Gillick v West Norfolk and Wisbech Area Health Authority and DHSS* [1986] AC 112; [1986] 3 All ER 402.

<sup>40</sup> Guardianship Act 1968, ss 25(1) and (2).

<sup>41</sup> Ian Kennedy & Andrew Grubb *Medical Law: Text and Materials* (Butterworths, Sevenoaks, 1989) 983.

authorised. What is not clear is the degree to which the absence of objection needs to be an informed lack of objection. It appears that in the Green Lane situation, parents did not object, as they were not aware that organ retention was potentially part of the post mortem process. It could be argued that it is not possible to object to something unless one is aware of the suggestion to do so.<sup>42</sup> However, it may also be argued that one can have such established attitudes towards certain behaviours that result in an objection to them, without even being aware of the specific suggestion proposed.<sup>43</sup> It is questionable how any inquiry that does not raise the possibility of tissue retention could be called 'reasonable'. How can the person lawfully in possession of the body conclude that no objections exist without raising the possibility of retention with the family? As the law stands presently, a positive act of consent is not required from parents. It is this lack of objection that is important under the current law.

It is not an offence to fail comply with the requirements of Section 3 of the Act. The only offences contained in the Act are those relating to the performance of a post-mortem or anatomical examination without a medical licence.<sup>44</sup> Thus, any liability under this Act would have to be found in the Crimes Act 1961<sup>45</sup> or as a form of civil liability.<sup>46</sup>

#### ***B Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996***

The Code, unlike the Guardianship Act 1968, makes no presumption of competence based on age and presumes every consumer competent to make an informed decision and give informed consent unless there are reasonable

<sup>42</sup> Peter D Skegg "The Interpretation of the Human Tissue Act 1961" (1976) 16 Med Sci Law 193, 197.

<sup>43</sup> Skegg, above, 197.

<sup>44</sup> Human Tissue Act 1964, s 12.

<sup>45</sup> Crimes Act 1961, s 150 creates an offence with regard to misconduct in respect of human remains and s 107 creates an offence to contravene any statute.

<sup>46</sup> For example, a claim in tort for negligently causing nervous shock. See generally P D G Skegg "Liability for Unauthorised Removal of Cadaveric Transplant Material" (1974) 14 Med Sci Law 53.

grounds for believing otherwise.<sup>47</sup> Therefore a child may be able to give informed consent but presumably there would be grounds for believing a very young, pre-verbal child would not be competent. In this situation, the child's parents may act on the child's behalf as the definition of "consumer" in the Health and Disability Commissioner Act includes someone entitled to consent on behalf of the consumer.<sup>48</sup> The parents would then be able to receive information, and give or withhold consent on the child's behalf.

Right 7 contains the right to make decisions about return and disposal of body parts obtained in the course of a healthcare procedure and states that no body parts removed will be kept without the informed consent of the consumer.<sup>49</sup> However, Right 7 only applies to body parts removed during a healthcare procedure, and although healthcare procedures are defined extensively in the main Act, it does not include body parts retained after autopsy.<sup>50</sup> Additionally, even if the retention of body parts could be viewed as part of a healthcare procedure<sup>51</sup>, the Code is not able to override other legislation, and thus the provisions of the Human Tissue Act would prevail.<sup>52</sup>

It appears that as far as the strict interpretation of the law is concerned, the events at Green Lane hospital were not in breach of any law. The Human Tissue Act 1964 does not specifically require consent for retention and thus absence of consent does not constitute a breach of the Act. Nonetheless, the

<sup>47</sup> Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 Right 7(2).

<sup>48</sup> Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 Definition of consumer.

<sup>49</sup> Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 Rights 7(9) and 7(10) respectively.

<sup>50</sup> The Health and Disability Commissioners Act 1994 Definition of healthcare procedure: [a]ny health treatment, health examination, health teaching or health research administered to or carried out on or in respect of any person by any health care provider; and includes any provision of health services to any person by any health care provider.

<sup>51</sup> Many of the hearts stored at Green Lane came from aborted foetuses, and if these abortions were performed as part of a health care procedure as defined in the HDC Act, informed consent for their storage, return or disposal would be required under the Code. However, no aborted foetuses were kept without consent after 1996 when the Code came into effect.

<sup>52</sup> Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, cl 5.

reasonableness of the hospitals inquiries does appear questionable. Additionally, the Code of Health and Disability Services Consumers' Rights 1996 appears to apply only to the living. Despite this, the public outcry surrounding the practice of retaining organs without parental consent suggests that perhaps in this case, medical practice was inconsistent with acceptable practices as far as the public was concerned.

#### IV THE AFTERMATH OF GREEN LANE

In the United Kingdom, public and professional debate ensued after the events at Alder Hey and Bristol Royal Infirmary. This resulted in the review of this area of medical practice and advice from the Chief Medical Officer suggesting that amendments to the existing Human Tissue Act 1961 (UK) are necessary. Firstly, a clarification was necessary to confirm that parental consent for the retention of children's organs beyond autopsy was required.<sup>53</sup> In addition, it was suggested that penalties for non-compliance with the Human Tissue Act 1961 (UK) should be implemented.<sup>54</sup> Finally, a broader revision of the law surrounding the removal of human tissue was seen as essential, with a shift from the idea of retention to one of donation required by practitioners.<sup>55</sup> Several Australian States have responded to the situation with new guidelines created concerning the use of human tissue and further legislation has been suggested to prevent any removal of human tissue from corpses without familial consent.<sup>56</sup>

<sup>53</sup> Department of Health *The Removal, Retention and use of Human Organs and Tissue from Post Mortem Examination – Advice from the Chief Medical Officer* (The Stationery Office, London, 2001) Recommendation 1.

<sup>54</sup> Department of Health *The Removal, Retention and use of Human Organs and Tissue from Post Mortem Examination – Advice from the Chief Medical Officer* (The Stationery Office, London, 2001) Recommendation 1.

<sup>55</sup> Department of Health *The Removal, Retention and use of Human Organs and Tissue from Post Mortem Examination – Advice from the Chief Medical Officer* (The Stationery Office, London, 2001) Recommendation 6.

<sup>56</sup> Cordelia Thomas "The Retention of Body Parts - Do the Best of Intentions Excuse Ethical Breaches?" (2002) 4 BFLJ 33, 34.

In New Zealand, Green Lane hospital has established a group to review the position of the heart library that includes hospital, family and iwi representatives. New Zealand hospitals are addressing issues surrounding the provision of information and requirements of consent when retaining tissue from corpses in the future.<sup>57</sup> With regard to the present storage of tissue in the library the position is less clear. However, it is doubtful that existing legislation will require hospitals to now obtain consent for the storage of this tissue.<sup>58</sup> The development of the no property rule in *Doodeward v Spence*<sup>59</sup> and subsequent cases may mean that the retained organs are now the property of the hospital that stored them.

Health and Disability Commissioner Ron Paterson considers the Human Tissue Act 1964 outdated and in need of review in the light of modern medical practices.<sup>60</sup> Skegg argues that this review need not be rushed<sup>61</sup>, and indeed it may be that practitioners and hospitals now alter their behaviours to concur more readily with public expectations. However, when one considers that the Cartwright Report of 1988 sought to assert the place of informed consent in New Zealand, and that many years later practitioners are still not translating this into reality, it is perhaps time for a reassessment of our current laws and practices concerning the removal and retention of human tissue.

## V REFORM OPTIONS

### A Introduction

Donated organs can be utilised for therapeutic, research and educational purposes. The Human Tissue Act 1964 does not require donors or their families to specify for which purpose the organs are being donated. Thus, as long as the intended use for the organs is not illegal by virtue of the common

<sup>57</sup> Jane Bawden "Body Parts Controversies" [2002] NZLJ 153, 154.

<sup>58</sup> Thomas, above, 38.

<sup>59</sup> (1908) 6 CLR 406.

<sup>60</sup> Hon R Dyson (28 Feb 2002) 598 NZPD 14745.

<sup>61</sup> "Hospitals legally entitled to keep Hearts, says Expert" (28 February 2002) *The New Zealand Herald* Auckland.



law, the alternative purpose does not have to be specifically authorised by the Act.<sup>62</sup> Effective legislation governing human tissue would increase the amount of organs available for all three of these purposes while ensuring a situation similar to Green Lane does not arise in this country again.

Approaches to organ donation in all jurisdictions have many competing goals to attempt to satisfy. First, an organ shortage exists worldwide and thus organ donation legislation aims to maximize the amount of organs obtained from corpses to help remedy this shortage. Currently in New Zealand, 300 people are waiting for donor kidneys, fifteen for livers, nine for hearts, and three for lungs.<sup>63</sup> However, in 2001 only 37 people donated organs after death.<sup>64</sup> New Zealand has one of the lowest rates of cadaveric organ donation in the world, with a donor rate of 10.6 donors per million population compared to 39.6 in Spain, 22.3 in the United States, 13.4 in the United Kingdom and 10.2 in Australia.<sup>65</sup> Second, there are competing tensions to balance between the role of the state, medical professionals, individuals, their families and society generally towards organ donation as illustrated in the Green Lane heart scandal.

The responses of other countries to organ and tissue removal vary significantly. They range from the model of opting in and express consent as seen in New Zealand and Britain, where the role of the individual and the family is emphasized, to presumed consent and opting out as seen in many European jurisdictions, which places much more weight on the needs of society as a whole. Other, more hybrid approaches have also been developed such as the routine request and inquiry procedure implemented in many states of the USA.

<sup>62</sup> Human Tissue Act, section 3(7). Also see Cordelia Thomas "The Retention of Body Parts – Do the Best of Intentions Excuse Ethical Breaches?" (2002) 4 BFLJ 33, 40.

<sup>63</sup> "Organ Shortage Costs \$15 Million a Year" (19 August 2002) *The Dominion* Wellington 3.

<sup>64</sup> 41 donated in 2000; 39 in 1999; 46 in 1998. The New Zealand Donor Website <[http://www.donor.co.nz/facts\\_figures\\_f\\_b.html](http://www.donor.co.nz/facts_figures_f_b.html)> last accessed 22 August 2002.

<sup>65</sup> For the year 2000. The New Zealand Donor Website <[http://www.donor.co.nz/facts\\_figures\\_f\\_b.html](http://www.donor.co.nz/facts_figures_f_b.html)> last accessed 22 August 2002.

The specific legislative responses to organ and tissue removal examined in this part of the paper will include presumed consent, routine salvage of organs and routine inquiry as options for reform to the existing New Zealand system. The current legislation will also be examined and amendments suggested for the improvement of this legislation.

### ***B Presumed Consent: Opting Out.***

The presumed consent approach to organ and tissue removal allows doctors or coroners to remove organs or tissue without the prior expressed consent of the deceased.<sup>66</sup> In a strong presumed consent system, organs could be removed contrary to the actual wishes of the deceased and the deceased's family.<sup>67</sup> In a weak presumed consent system, organ or tissue removal will be performed in the absence of some objection expressed by the deceased or family members.

Austria, Denmark, Poland, Switzerland and France have adopted an approach of strong presumed consent to organ donation.<sup>68</sup> Other European countries such as Finland, Greece, Italy, Spain and Sweden employ a weak form of presumed consent where family members are still consulted to make sure they have no objection.<sup>69</sup>

This method of organ removal is premised on the idea that as the population has available to them a great quantity of information about organ donation, if a person had any objections to removal, then they would have made that objection apparent. Thus, an effective system of presumed consent needs to be accompanied by a large amount of publicity providing information about the law to the public. However, even with wide scale publicity surrounding the scheme, it is still possible for people to not be informed about the law. This may

<sup>66</sup> David Lamb *Organ Transplantation and Ethics* (Routledge, London, 1990) 140.

<sup>67</sup> Ian Kennedy & Andrew Grubb *Medical Law: Text and Materials* (Butterworths, Sevenoaks, 1989) 1039.

<sup>68</sup> Kennedy & Grubb, above, 1040.

<sup>69</sup> Department of Health *Donating Organs in New Zealand: a Review of the National Register* (Wellington, 1991) 14.

mean that their absence of objection is not a true absence of objection, as they did not have the information available to them to make an informed decision.<sup>70</sup> The minimal involvement of family members is based on respecting the wishes of the dead, as absence of objection is seen as evidence of a person's wish to donate.

France implemented an informed consent approach in 1976. Under this system, organs can be retained for therapeutic and scientific purposes unless one objects to such use.<sup>71</sup> Hospitals have a register of objections and under the French legislation the role of the family is limited to providing evidence of the deceased's wishes. However in practice, it seems French doctors are reluctant or even unwilling to remove organs from the deceased without the consent of relatives, and thus the legislatively prescribed system of strong presumed consent exists only on paper and this system of strong presumed consent has been transformed into one of weak presumed consent by the practices of the medical profession. A consequence of this practical difficulty to the French approach is that an increase in the amount of organs obtained has not occurred. Belgium instituted a policy of presumed consent in 1986, but contrary to the French experience has encountered a significant increase in the level of organs obtained.<sup>72</sup> Thus, with a strict application of the approach it may be possible to increase the rate of organ donation, and this is one of the main justifications for adopting this type of organ recovery law.<sup>73</sup> However it is not possible to entirely rule out other explanations for the differential experience of the approach by the two countries.<sup>74</sup>

<sup>70</sup> Ian Kennedy & Andrew Grubb *Medical Law: Text and Materials* (Butterworths, Sevenoaks, 1989) 1047.

<sup>71</sup> Law Reform Commission of Canada *Procurement and Transfer of Human Tissues and Organs* (Law Reform Commission, Ottawa, 1992) 147. Loi no 76-1181 du 18 décembre 1989.

<sup>72</sup> Law Reform Commission of Canada *Procurement and Transfer of Human Tissues and Organs* (Law Reform Commission, Ottawa, 1992) 151.

<sup>73</sup> United Network for Organ Sharing Ethics Committee *An Evaluation of the Ethics of Presumed Consent and a Proposal based on Required Response: a Report of United Network for Organ sharing Ethics Committee* (1993) accessible at <<http://www.unos.org>> (last accessed 29 August 2002).

<sup>74</sup> Suggestions that Belgium has a much higher rate of car accident deaths than England, car accident victims are the source of a large amount of transplantable organs. Minister of State, Department of Health, Mr John Hutton (14 December 1999) 341 GBPD col 22WH.

The place of minors in a presumed consent regime varies between jurisdictions. Under a strict presumed consent system, if no objection to removal is registered, then organs will be removed. A small child once again is unlikely to be aware of the practice and have formed an opinion on the issue or have registered an objection with the relevant bodies if an objection to removal was their desire. Thus, on a strict legalistic application of a strong presumed consent approach, a child, having not registered an objection, would be presumed to have consented. In the French system, the views of family are not directly relevant. However a 1990 case involving a child subject to unauthorised post-mortem procedures resulted in express parental consent being required for organ removal.<sup>75</sup> The Belgian system of presumed consent does appear to apply to minors, in that if a family member does not object, removal of organs may take place.<sup>76</sup> Thus, in the French scheme, active consent is required of parents, whereas under the Belgian system, all that is necessary to authorise removal is absence of objection.

### 1 *An application of presumed consent in New Zealand*

Thus, the traditional criticisms directed at a presumed consent approach, include the approach not yielding an increase in organs obtained, practical difficulties in application and reluctance of clinicians to apply the law. In addition, there are several other reasons for this not appearing to be an appropriate policy alternative for New Zealand. England has a similar statutory scheme regarding organ donation to that in New Zealand, with either express consent or absence of objection from relatives required before removal can take place. Several attempts to enact presumed consent legislation in England have failed.<sup>77</sup> Public opinion surveys in both England and the United States suggest

<sup>75</sup> Law Reform Commission of Canada *Procurement and Transfer of Human Tissues and Organs* (Law Reform Commission, Ottawa, 1992) 150. *Epoux Camara* JCP 1990 II 21421.

<sup>76</sup> Law Reform Commission of Canada *Procurement and Transfer of Human Tissues and Organs* (Law Reform Commission, Ottawa, 1992) 151. Also see *Law of 13 June 1986 on the removal and transplantation of organs* (Belgium).

<sup>77</sup> British MP Tim Dalyell has unsuccessfully proposed contracting out legislation since the 1970s. See for example Organ Transplantation Bill 1993.

presumed consent is not a popular approach with the public.<sup>78</sup> Presumed consent is seen as 'not quite the American way'<sup>79</sup> and 'too authoritarian' for the British.<sup>80</sup> The reaction of New Zealanders to the lack of consultation with family members over organ retention at Green Lane would suggest that similar sentiments would be expressed in this country.

The practice of doctors in presumed consent jurisdictions such as France to consult with relatives despite no legal obligation to do so suggests that the medical profession is also uncomfortable with the idea of removing organs without familial consent. This is evident in New Zealand already, with transplant teams respecting the wishes of the family over the wishes of the deceased and not retrieving organs if the family objects.<sup>81</sup> Additionally, recent articles in the New Zealand media have suggested the reluctance of doctors to approach grieving families with regard to organ donation is the primary reason for the organ shortage in this country.<sup>82</sup>

The presumed consent approach is also incompatible with the current New Zealand legislative scheme. The notion of informed consent is a salient feature of the New Zealand medico-legal arena. It is a right guaranteed under the Code of Health and Disability Consumer Rights, available to all consumers of healthcare procedures. As discussed earlier, the Code has no direct bearing in this case, as organ donation is not a healthcare procedure. However, the Code does provide evidence of societal attitudes towards consent and healthcare in

<sup>78</sup> 1991 survey in USA had support at approx. 37% United Network for Organ Sharing Ethics Committee *An Evaluation of the Ethics of Presumed Consent and a Proposal based on Required Response: a Report of United Network for Organ sharing Ethics Committee* (1993) accessible at <[www.unos.org](http://www.unos.org)> last accessed 29 August 2002. Health Department Survey in England found only 28% support (50% in favour of current system) Minister of State, Department of Health, Mr John Hutton (14 December 1999) 341 GBPD col 22WH.

<sup>79</sup> United Network for Organ Sharing Ethics Committee *An Evaluation of the Ethics of Presumed Consent and a Proposal based on Required Response: a Report of United Network for Organ sharing Ethics Committee* (1993) accessible at <[www.unos.org](http://www.unos.org)> last accessed 29 August 2002.

<sup>80</sup> Department of Health *Donating Organs in New Zealand: a Review of the National Register* (Wellington, 1991) 15.

<sup>81</sup> New Zealand Donor Website <<http://www.donor.co.nz/questions.html>> last accessed 22 August 2002.

<sup>82</sup> "Patients Die as Doctors Fail to Ask for Consent" (15 August 2002) *The Dominion Post* Wellington 1.

general and accepted practices in this area. Presuming a person's consent in absence of objection is not synonymous with an act of consent. Furthermore, there is no way of ensuring that a person's lack of objection is an informed lack of objection. Under a presumed consent approach, a person may upon their death have organs removed because they failed to register an objection. Failure to register this objection may be because of lack of information, or lack of understanding of the law. One can contract out, but it may be that under a presumed consent approach only the more privileged groups in society actually exercise this right.<sup>83</sup> This false-positive result is unacceptable in the current New Zealand legislative scheme. The presumed consent approach places more decision-making ability with the medical profession and away from individuals and their families, which is also incompatible with the consumer focussed health environment affirmed by the Code of Health and Disability Services Consumer Rights.

The cultural composition of New Zealand society further questions the appropriateness of a presumed consent policy. One of the strongest moral arguments against a presumed consent approach is that it does not sufficiently safeguard the rights of groups that are morally opposed to donation.<sup>84</sup> With regard to religion, Buddhists and Hindus view organ donation favourably.<sup>85</sup> Christians and Jews have no religious objections and neither do Muslims except that Islamic law demands the corpse be buried soon after death.<sup>86</sup> Presumably, many of these religions still see the human body as sacred and thus the proviso may exist on donation that the body be treated with dignity and respect.

Culture potentially impacts on organ donation to a greater degree. Maori believe the body is instilled with an ancestral life spirit and the role of the living is to preserve this spirit and protect the dignity of the deceased.<sup>87</sup> In

<sup>83</sup> David Lamb *Organ Transplantation and Ethics* (Routledge, London, 1990) 142.

<sup>84</sup> Arthur L Caplan "Beg, Borrow, or Steal: The Ethics of Solid Organ Procurement" in Deborah Mathieu (ed) *Organ Substitution Technology* (Westview Press, Colorado, 1988) 52, 67.

<sup>85</sup> Department of Health *Donating Organs in New Zealand: a Review of the National Register* (Wellington, 1991) 24.

<sup>86</sup> Department of Health *Donating Organs in New Zealand: a Review of the National Register* (Wellington, 1991) 24.

performance of this role, Maori require the tupapuku (corpse) to be returned to whanau promptly after death.<sup>88</sup> Organ donation, and post mortem procedures generally, potentially prolong this return. Maori raised concerns in the early 1990s over families not being notified of the practice of retaining brains after autopsy.<sup>89</sup> This practice violated Maori cultural beliefs and broke tapu. In response, the first Maori coroner was appointed and Te Puni Kokiri consequently developed guidelines for healthcare providers in 1999, and these guidelines for retention and return of human tissue to Maori were heralded as a helpful guide for all New Zealanders.<sup>90</sup>

A presumed consent approach, which would remove organs in the absence of objection from the deceased, could potentially result in the cultural views of Maori being violated. This result would be unacceptable under the Code, which affirms the right to be treated with respect and more specifically to have one's cultural and religious beliefs taken into account.<sup>91</sup> More generally, in honouring the Treaty of Waitangi, the Crown needs to ensure the beliefs and cultural practices of Maori are reflected and respected in the laws of this country.<sup>92</sup>

### **C Routine procurement of organs**

Routine salvage of organs is an extension of the presumed consent approach with an elimination of consent altogether, and thus organs can be removed without the consent of the donor or the donor's family.<sup>93</sup> This

<sup>87</sup> Sharron Cole "The Green Lane Heart Library : Ethical and Cultural Implications" (2002) 3 New Zealand Bioethics Journal 4, 5.

<sup>88</sup> Department of Health *Donating Organs in New Zealand: a Review of the National Register* (Wellington, 1991) 24.

<sup>89</sup> Peter D Skegg "The No Property Rule and Rights Relating to Dead Bodies" (1997) Tort L Rev 222, 226.

<sup>90</sup> Ministry of Maori Development *Hauora o Te Tinana Me Ona Tikanga: a Guide for Removal, Retention, Return and Disposal of Maori Body Parts and Organ Donation* (Wellington, 1999).

<sup>91</sup> Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 Right 1(3).

<sup>92</sup> Sharron Cole "The Green Lane Heart Library : Ethical and Cultural Implications" (2002) 3 New Zealand Bioethics Journal 4, 5.

approach is based on emphasising the interests of the public and aiding the organ shortage, over individual autonomy.<sup>94</sup> It is compared to autopsy, for which familial consent is not required on grounds of public safety, and thus consent should not be required for organ donation on grounds of public need for organs.<sup>95</sup>

Similarly to presumed consent, this approach appears to be inconsistent with the existing legislative framework in New Zealand. It has the potential to violate the important principles of individual autonomy and informed consent as well as ignoring rights of the family and cultural beliefs. At the present time, it is unlikely that New Zealand society would emphasise the organ shortage over individual and family rights and adopt such a coercive policy of organ procurement.

#### **D Required Request and Routine Inquiry**

This is an alternative approach to presumed consent and has been implemented primarily in the United States of America since 1986.<sup>96</sup> Australian states also have a system of required inquiry followed by presumed consent, where hospital staff must consult with the relatives but if no relatives can reasonably be found, consent is presumed.<sup>97</sup> Required request legally imposes an obligation on doctors to request organs from the deceased's family after death.<sup>98</sup> Routine inquiry is a more permissive approach that requires hospitals to develop procedures to approach family members of the deceased who have expressed no preference as to donation and provide them with information and

<sup>93</sup> United Network for Organ Sharing Ethics Committee *An Evaluation of the Ethics of Presumed Consent and a Proposal based on Required Response: a Report of United Network for Organ sharing Ethics Committee* (1993) accessible at <www.unos.org> last accessed 29 August 2002.

Ian Kennedy & Andrew Grubb *Medical Law: Text and Materials* (Butterworths, Sevenoaks, 1989) 1058.

<sup>95</sup> Kennedy & Grubb, above, 1058.

<sup>96</sup> David Lamb *Organ Transplantation and Ethics* (Routledge, London, 1990) 148.

<sup>97</sup> Law Reform Commission of Canada *Procurement and Transfer of Human Tissues and Organs* (Law Reform Commission, Ottawa, 1992) 158.

<sup>98</sup> Department of Health *Donating Organs in New Zealand: a Review of the National Register* (Wellington, 1991) 17.



an opportunity to consent to donation.<sup>99</sup> A request is not required if the hospital knows of the donor or family's wishes, or if there were reason to believe the removal would be contrary to the deceased religious or cultural beliefs.<sup>100</sup>

This approach to procuring organ donation aims to increase the supply of organs by giving everyone the opportunity to donate, and indeed in some American states levels of donation have improved under this scheme.<sup>101</sup> However, this approach has been met with negativity from the medical profession who feel the required request impinges on medical discretion and familial privacy.<sup>102</sup> This resistance from doctors could potentially result in an application of the policy in a way that will not obtain participation from donor families, and the possible worsening of the organ shortage.

#### 1 *An application of routine inquiry and required request in New Zealand*

The required request and routine inquiry approach appears to be a promising policy alternative in New Zealand despite the previously mentioned criticisms from the medical field. First, it would likely lead to an increase in the amount of organs available for transplant. The problem in New Zealand does not generally appear to be one of disinclination towards organ donation. Comments from the parents of children whose hearts were kept at Green Lane suggest that they were not against the idea of donation all together, they just wanted to be asked.<sup>103</sup> A national study of brain dead patients in intensive care units found that doctors failed to approach the families of around a third of all suitable donors.<sup>104</sup> No one would argue approaching the members of a deceased's family about organ donation is a pleasant experience for doctors,

<sup>99</sup> Law Reform Commission of Canada *Procurement and Transfer of Human Tissues and Organs* (Law Reform Commission, Ottawa, 1992) 153

<sup>100</sup> David Lamb *Organ Transplantation and Ethics* (Routledge, London, 1990) 148.

<sup>101</sup> Department of Health *Donating Organs in New Zealand: a Review of the National Register* (Wellington, 1991) 15.

<sup>102</sup> Department of Health *Donating Organs in New Zealand: a Review of the National Register* (Wellington, 1991) 15.

<sup>103</sup> Sharron Cole "The Green Lane Heart Library : Ethical and Cultural Implications" (2002) 3 *New Zealand Bioethics Journal* 4, 6.

<sup>104</sup> "Patients Die as Doctors Fail to Ask for Consent" (15 August 2002) *The Dominion Post* Wellington 1.

and the elimination of this difficult process is one of the virtues of the presumed consent approach. A reduction in doctors' distress should not however come at the expense of the distress of families finding out their recently deceased family member had their organs removed without their permission because of a presumed consent approach. Neither should doctors' distress be given primacy over the needs of patients missing out on life saving organs, just because it was too hard for the doctor to ask. Increasing education for the medical profession is required to make this difficult inquiry as less distressing as possible for all parties involved. It has been suggested that a high rate of consent amongst family members approached is a result of treating relatives with respect and engendering and acknowledging the benefits the gift of organ donation will provide.<sup>105</sup> This respect and notion of giving rather than taking is potentially lost in a presumed consent approach.

This approach also seems less likely to violate cultural beliefs, as a presumption against providing the opportunity for donation exists in this situation. In addition the family makes the final decision about donation, and their wishes whether based on culture, religion or personal conviction will be respected.

Required request and Routine Inquiry are more easily reconcilable with the current law and practices surrounding organ donation in New Zealand than the previously discussed policy options. On one view, the approach does not differ much from the reasonable and practicable inquiries that are presently required under the Human Tissue Act 1964. However, the approach does go further than the current provisions by firstly requiring active consent, rather than an absence of objection. Second, the family will have been given information on which to base their decision and thus their consent is more likely to be informed. This is consistent with rights provided for in the Code and expectations of the medical profession generally. The approach is also consistent with the practice of transplant teams to consult with families and not to remove organs if the deceased's family object.

---

<sup>105</sup> David Lamb *Organ Transplantation and Ethics* (Routledge, London, 1990) 143.

With regard to undeclared donors, especially children, this approach seems much more appropriate as it puts the family, rather than doctors in charge of the decision making process. It involves the family in a way not provided for by the other organ donation schemes. By raising the possibility of donation it gives the family the opportunity to consent, but also gives them the ability to decline and this refusal will be respected.

The position with regard to already declared donors is much more difficult. It is current practice not to remove organs if family object even if one has expressed a wish during one's lifetime that organ donation should take place after death. Why should individual autonomy be overridden by familial objection? There is no easy answer but it appears that our legal system treats the dead very differently from the living. The non-application of the individual rights guaranteed by the Bill of Rights Act 1990 and the Code of Health and Disability Services Consumers' Rights 1996 to the deceased suggest that as far as the law is concerned a person has no rights upon death and thus the views of the family take ultimate importance. Suggestions have been made that the driver licence donor system should become legally binding. However, medical professionals are opposed to this move as it would potentially destroy the trust and respect that is so vital in the organ donation programme.<sup>106</sup> The National Transplant Donor Co-ordination Office suggests people should make their views concerning organ donation aware to their family so that in the event of death, respect for the deceased's individual autonomy will rest with families rather than medical professionals.<sup>107</sup>

## 2 *Routine inquiry or required request?*

Required request/routine inquiry approaches can be classified into three different groups on the basis of what action is required from medical

<sup>106</sup> "Patients Die as Doctors Fail to Ask for Consent" (15 August 2002) *The Dominion Post* Wellington 1.

<sup>107</sup> New Zealand Donor Website <<http://www.donor.co.nz/questions.html>> (last accessed 22 August 2002).

practitioners.<sup>108</sup> These approaches vary from those that require the hospital to ask for consent for donation from the deceased's family, those that require the hospital to inform the family about the option of donation and finally those that allow discussion about donation but do not demand it.<sup>109</sup> Comments by medical professionals in this country have highlighted the difficulties doctors perceive in approaching bereaved family members about donation. Despite these difficulties, many health professionals may already see it as part of their duty as a doctor to raise the possibility of donation with the deceased's family. Thus, it seems imposing any duty on doctors to actively ask for organs may result in an application of the law in a way that does nothing to secure consent from the families involved. A better option appears to be the more permissive option obligating hospitals to provide the donor families with information and discuss the possibility of donation with them. This version of routine inquiry leaves room for the application of medical discretion and the delegation of this hard task to professionals within the hospital who have the relevant experience and expertise to approach family members with respect and sensitivity.

### *E Amendments to existing legislation*

The existing Human Tissue Act 1964 could be amended to make the application of the law in this area less difficult. Firstly, 'reasonable inquiries as may be practicable' in section 3(2) of the Act could be clarified. The Act was drafted at the time kidney transplantations were first becoming possible and doctors were under urgent time constraints to transplant organs into the recipient patient while the organs were still viable. Without the benefit of modern technology, for example ventilation systems, the inquiries that would have been reasonable and practicable then, are probably not reasonable and practicable now. What exactly amounts to an inquiry that is 'reasonable as may be practicable' is not clear and future amendments to the Act would need to address this.

---

<sup>108</sup> Ian Kennedy & Andrew Grubb *Medical Law: Text and Materials* (Butterworths, Sevenoaks, 1989) 1049.

<sup>109</sup> Kennedy & Grubb, above, 1049-1050.

In addition, the issue of which relatives can validly object to removal is not clear. Currently, it appears that any relative's objection would suffice to prohibit removal under section 3(2). The consent of a spouse or parents could be made irrelevant by the objection of any relative however distant. Future amendments to the Act could address this issue by perhaps introducing a hierarchy of family members whose objections are relevant and whose objections or consent should be given primacy. Although this amendment may make the application of section 3 more expedient and effective, it may impact negatively on Maori. With the wider notion of whanau that Maori recognise, there is the potential for members outside of the nuclear family group to have valid objections to donation and a familial hierarchy such as the one proposed may ignore relevant Maori social arrangements and practices.

Currently, consent does not need to be sought for changes of purpose for which the donated organs are used. Thus, if the intended recipient for donation dies before transplantation takes place, the donated organs can be used for another purpose, such as research or education. The Act could be amended to allow the deceased and their relatives to stipulate the use to which the donated organs may be put. This amendment would avoid the additional grief and distress some family members may experience on finding the organ they donated was used for another purpose. This amendment would be consistent with the Code of Health and Disability Services Consumers Rights 1996 which requires consent for any utilisation or storage of human tissue. Amending the Act in this way might however result in less organs becoming available for research and educational purposes. Donating an organ for research does not appear to have the same notions of altruism attached to it that donating an organ for therapeutic purposes does. Research is however vitally important and does save lives, as the advances made in paediatric cardiac surgery at Green Lane have shown. Any move to require consent for alternative uses would need to be accompanied by publicity of the invaluable help donated organs provide surgeons and researchers alike.

A recent Law Commission report has recommended changes to procedures regulating the retention of human tissue after autopsy.<sup>110</sup> One of those recommendations was that the Coroners Act 1988 should be amended to require coroners to advise the family of the deceased of any retention of tissue and the reasons why this is required.<sup>111</sup>

In the light of public opinion expressed since Green Lane, New Zealand should at the very least follow the lead of the English and amend our Human Tissue Act 1964 to require a guardian's consent for any retention of minor's tissue beyond that required to determine the cause of death.<sup>112</sup>

## VI CONCLUSION

The events at Green Lane shocked the nation and brought the Human Tissue Act 1964 and related legislation into the glare of public and political scrutiny. It is questionable whether the removal of adult organs without consent would have initiated as much public debate as the events at Green Lane. The current legislative scheme does not distinguish between minors and adults. Nevertheless, in the public's opinion the legal issues that arose at Green Lane were complicated by the legal vulnerability of children and struck to the core of the protective nature of the parent-child relationship. Although it now appears that on a strictly legalistic interpretation, nothing illegal occurred at Green Lane, the public outcry towards the retention of human tissue without consent needs to be addressed.

Subsequent media attention has concentrated on the shortage of organs for transplant purposes in New Zealand. This has also illustrated the inadequacies of the current Act and its inability to cope with modern advances and medical needs.

<sup>110</sup> New Zealand Law Commission *Coroners Report 62* (NZLC R62, Wellington, 2000).

<sup>111</sup> New Zealand Law Commission *Coroners Report 62* (NZLC R62, Wellington, 2000) 78-80.

<sup>112</sup> Department of Health *The Removal, Retention and use of Human Organs and Tissue from Post Mortem Examination – Advice from the Chief Medical Officer* (The Stationery Office, London, 2001) Recommendation 1.

## BIBLIOGRAPHY

Reform is needed for this area of New Zealand law. On reviewing the policy options available, the presumed consent appears inappropriate in the New Zealand context due to its relegation of familial views, the hesitancy of the medical profession to apply it and its disregard of cultural factors. Although the efficacy of the routine inquiry and required request approach is yet to be fully demonstrated due its novelty, this appears to be a preferable alternative over the presumed consent approach. Its consistency with notions of consent and family involvement in the donation process already expressed in current organ transplantation law and practice make it a promising legislative option for this country.

It is unclear whether the Government will initiate a large-scale review of the law governing human tissue despite the events at Green Lane and pressure resulting from the current organ shortage. However, it appears that this is what the public and health professionals both want. In this difficult area that is always inevitably tainted by grief the Government needs to lead the way with legislation and practices that encourage ethical conduct by the medical profession and stimulates donation and trust within the public.

Cordelia Tamara "The Retention of Body Parts - Do the Best of Intention Excuse Ethical Breaches?" (2012) 4 NZLJ 23.

D. Geran Jones "The Use of Human Tissue: An Insider's View" (2012) 3 New Zealand Bioethics Journal 5.

Jane Bowden "Body Part Controversies" (2002) NZLJ 151.

P. D. G. Slagg "Liability for Unauthorised Removal of Cadaveric Transplant Material" (1974) 14 Med Sci Law 33.

Peter D Slagg "The Interpretation of the Human Tissue Act 1961" (1976) 16 Med Sci Law 193.

Peter D Slagg "The No Property Rule and Rights Relating to Dead Bodies" (1997) *Tax L Rev* 722.

Sharon Cole "The Green Lane Illness Litigation: Ethical and Cultural Implications" (2012) 3 New Zealand Bioethics Journal 4.

## VII BIBLIOGRAPHY

### A Cases

*Awa v Independent News Auckland Ltd* [1995] 3 NZLR 701 Hammond J.

*Doodeward v Spence* (1908) 6 CLR 406.

*Gillick v West Norfolk and Wisbech Area Health Authority and DHSS* [1986] AC 112; [1986] 3 All ER 402.

*R v Kelly* [1998] 3 All ER 741 (CA).

*Williams v Williams* (1882) 20 Ch D 659.

### B Legislation

Coroners Act 1988.

Crimes Act 1961.

Guardianship Act 1968.

Human Tissue Act 1964.

Health and Disability Commissioner (Code of Health and Disability Consumer Rights) Regulations 1996.

### C Journals

Cordelia Thomas "The Retention of Body Parts - Do the Best of Intentions Excuse Ethical Breaches?" (2002) 4 BFLJ 33.

D Gareth Jones "The Use of Human Tissue: An Insiders View" (2002) 3 New Zealand Bioethics Journal 8.

Jane Bawden "Body Parts Controversies" [2002] NZLJ 153.

P D G Skegg "Liability for Unauthorised Removal of Cadaveric Transplant Material" (1974) 14 Med Sci Law 53.

Peter D Skegg "The Interpretation of the Human Tissue Act 1961" (1976) 16 Med Sci Law 193.

Peter D Skegg "The No Property Rule and Rights Relating to Dead Bodies" (1997) Tort L Rev 222.

Sharron Cole "The Green Lane Heart Library: Ethical and Cultural Implications" (2002) 3 New Zealand Bioethics Journal 4.



Susan Pahl "Removal of Body Parts: the Legal Position" [1993] NZLJ 144.

**D**     ***Non-academic Journals***

"Heartbreak Hospital" (June 2002) *North and South* New Zealand.

**E**     ***Electronic Materials***

Health and Disability Commissioners Website <<http://www.hdc.org.nz>> (last accessed 12 July 2002).

New Zealand Donor Website <<http://www.donor.co.nz>> (last accessed 22 August 2002).

United Network for Organ Sharing Ethics Committee *An Evaluation of the Ethics of Presumed Consent and a Proposal based on Required Response: a Report of United Network for Organ sharing Ethics Committee* (1993) accessible at <<http://www.unos.org>> (last accessed 29 August 2002).

**F**     ***Newspaper Articles***

"50 Year Babies Heart Cover Up" (28 February 2002) *The Dominion* Wellington 1.

"Bodies Of Evidence" (15 March 2001) *The Dominion* Wellington 7.

"Children's Organs Stolen, Doctor Banned"(31 January 2001) *The Evening Post* Wellington 6.

"Hospitals legally entitled to keep Hearts, says Expert" (28 February 2002) *The New Zealand Herald* Auckland 3.

"Organ Shortage Costs \$15 Million a Year" (19 August 2002) *The Dominion Post* Wellington 3.

"Patients Die as Doctors Fail to Ask for Consent" (15 August 2002) *The Dominion Post* Wellington 1.

**G**     ***Government Publications***

Department Of Health *A Code of Practice for Transplantation of Cadaveric Organs* (Wellington, 1987).

Department of Health *Donating Organs in New Zealand: a Review of the National Register* (Wellington, 1991).

Department of Health *The Removal, Retention and use of Human Organs and Tissue from Post Mortem Examination – Advice from the Chief Medical Officer* (The Stationery Office, London, 2001).

Hon R Dyson (28 Feb 2002) 598 NZPD 14745.

Law Reform Commission of Canada *Procurement and Transfer of Human Tissues and Organs* (Law Reform Commission, Ottawa, 1992).

Ministry of Maori Development *Hauora o Te Tinana Me Ona Tikanga: a Guide for Removal, Retention, Return and Disposal of Maori Body Parts and Organ Donation* (Wellington, 1999).

New Zealand Law Commission *Coroners Report 62* ( NZLC R62, Wellington, 2000).

Silvia Cartwright “*The Report of the Committee of Inquiry into Allegations Concerning the Treatment of Cervical Cancer at National Women’s Hospital and into Other Related Matters*” (Government Printing Office, Auckland, 1988).

#### **H     Texts**

Arthur L Caplan “Beg, Borrow, or Steal: The Ethics of Solid Organ Procurement” in Deborah Mathieu (ed) *Organ Substitution Technology* (Westview Press, Colorado, 1988) 52.

David Lamb *Organ Transplantation and Ethics* (Routledge, London, 1990)

Ian Kennedy & Andrew Grubb *Medical Law: Text and Materials* (Butterworths, Sevenoaks, 1989)

AS741  
VUW  
A66  
H326  
2002

**LAW LIBRARY**

A Fine According to Library  
Regulations is charged on  
Overdue Books

VICTORIA  
UNIVERSITY  
OF  
WELLINGTON

**LIBRARY**

VICTORIA UNIVERSITY OF WELLINGTON LIBRARY



3 7212 00692994 5