GEOFFREY L. MELVIN

TILL DEATH US DO PART: CORONERS RETAINING BODY PARTS

LLB(HONS) RESEARCH PAPER
LAW AND MEDICINE (LAWS 546)

LAW FACULTY
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CONTENTS

		Page
I	INTRODUCTION	1
II	CONFLICTING INTERESTS	3
III	IS RETENTION PERMISSIBLE UNDER THE CORONERS ACT 1988?	6
	i) Bodies	6
	ii) Body Parts	7
IV	PREVENTION AND REDRESS UNDER CURRENT LAW	12
	i) Judicial Review	13
	ii) Tort Law Remedies	16
	a) Interference with the right to possession of the corpse for burial	17
	b) Negligently causing nervous shock or emotional harm	20
	c) Economic loss	22
	d) Breach of statutory duty	24
	e) Summary	26
	iii) The Treaty of Waitangi Act 1975	27
V	OPTIONS FOR REFORM	31
	i) Some Preliminary Considerations	31
	ii) Control Over Post-mortem Examinations	35

a) Statutory definition of post-mortem examination 35

b) Code of practice for pathologists 39

c) Employment contracts 40

d) Summary 41

iii) Amending the "No-property" Rule 41

VI CONCLUSION 47

APPENDIX 49

BIBLIOGRAPHY 53

ABSTRACT

The initial prompt for this paper came early in 1992 when the media brought to the public's attention the dilemma of a Maori family which had to delay for nearly three weeks the tangihanga of a deceased family member while they waited for the dead man's brain to be released by the Auckland coroner. Against this background, the paper examines what right coroners have to retain body parts, concluding that it is a breach of the Coroners Act 1988 for incomplete bodies to be returned to families. The paper then explores the legal options which families have when the wrongful or unnecessary retention of body parts occurs. These include subjecting the coroner's decision to retain body parts to judicial review, invoking various civil law sanctions and submitting a claim to the Waitangi Tribunal on the ground that retention may be in breach of the principles of the Treaty of Waitangi. Finally, the paper canvasses possible ways of reforming coronial law and practice in order to prevent body parts from being wrongfully or unnecessarily retained and to strengthen the position of families as they confront the coronial system.

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 11,800 words.

I INTRODUCTION

Until recently New Zealand's coronial legislation failed to address the diverging cultural and spiritual values of New Zealand's multicultural society, thereby reaping decades of "real anguish"[1] for Maori, as well as for other ethnic and religious groups. By enacting the Coroners Act 1988[2] the legislature sought to bring the nation's coronial law up to date in terms of cultural awareness.

Of particular concern was the increasingly vexatious problem of what was considered to be unreasonable delay in the release of bodies for burial.[3] Parliament's response to this matter was threefold. Firstly, it directed that coroners deciding whether or not to authorise a post-mortem examination must consider:[4]

> [t]he desirability of minimising the causing of distress to persons who, by reason of their ethnic origins, social attitudes or customs, or spiritual beliefs, customarily require bodies to be available to family members as soon as is possible after death.

Secondly, if a coroner decides to authorise an examination even though these ethnic, social or spiritual factors apply, then a new and controversial provision requires the coroner to expedite the examination by directing a doctor to "perform it forthwith".[5] Thirdly, as soon as a coroner is satisfied that it

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[1] Hon. Peter Tapsell, New Zealand Parliamentary Debates Vol 482, 1987: 10433.

[2] Parts I and III of the Act are reproduced in the Appendix.

[3] See the *Final Report of the Working Party on Delays in the Release of Bodies for Burial* (Department of Justice, Wellington, 1984).

[4] Section 8(e), Coroners Act 1988.

[5] Section 9, Coroners Act 1988. The controversy centred on coroners being given the power to order a post-mortem "forthwith" and what that meant exactly.

is no longer necessary to withhold a body from family members, the coroner is now directed to authorise its disposal "forthwith".[6]

Parliament was also aware that a communication breakdown between coroners and grieving families had been silently fuelling "ignorance and frustration".[7] To overcome this the Act now requires a coroner, as soon as is practicable, to take all reasonable steps to ensure that a member of the immediate family is notified that a post-mortem examination has been authorised and of the reasons for authorising it.[8]

The new Act was hailed by parliamentarians as significant legislation that finally gave "substance" to "the cries of the Maori people",[9] while its degree of cultural sensitivity was said to offer a lesson for other countries.[10] After a fledgling life of three and a half years, assessment of its success is mixed. Officials within the coronial system maintain that by and large the Act is working well and give the impression that problems that exist are minor and incidental.[11] There are others, dealing with the system from the outside, who are not so convinced. They allege that delays are still occurring and the

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[6] Section 14, Coroners Act 1988. However, the section is subject to s 13(3) so that a coroner who decides not to authorise a post-mortem shall not authorise disposal of a body "earlier than 24 hours after notifying a member of the Police of the decision, unless a member of the Police of the rank of Senior Sergeant or above agrees".

[7] Above n 3, 21.

[8] Section 11, Coroners Act 1988.

[9] Dr Gregory, New Zealand Parliamentary Debates Vol 490, 1988: 5162.

[10] Above n 9, 5162.

[11] For example, during the recent furore over the Auckland coroner who retained the brain of a dead Maori man, Darci Eketone, the Minister of Justice, Doug Graham, was keen not to get the issue "out of proportion". "There are a great number of [autopsies] each year and there seems to be relatively few complaints." See transcript of National Radio's "Morning Report" programme, 2YA, 7:14 a.m., 9 March 1992, 4.

recent controversy[12] in Auckland over the removal and retention of body parts is evidence that gaps in communication are still a source of anguish and distress. Moreover, the acrimony of that debate highlighted a long-simmering dissatisfaction with aspects of coronial practice and law that the 1988 reforms apparently did not address. This paper details that dissatisfaction and examines what rights coroners[13] have to retain body parts in light of the Coroners Act 1988. The discussion then surveys remedies that might be available if the retention of body parts does occur contrary to the Act. Finally, various reform options that might solve the problems associated with the retention of body parts are considered.

II CONFLICTING INTERESTS

The state takes a vital interest in ascertaining, as precisely as possible, the cause of all deaths so that suspicions of foul play, homicide or neglect of human life can be fully investigated, and dangerous or negligent practices that have cost human life can be modified or eliminated.[14] This interest provides the foundations of twentieth century coronership[15] and is given statutory recognition in the Births and Deaths Registration Act 1951. Section 25(4) of that Act requires doctors to report forthwith to a coroner all deaths occurring "under any

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[12] Above n 11.

[13] For the purposes of this paper a coroner is treated as retaining the body parts even though it is the pathologist performing the autopsy who makes the clinical decision to do so and who has physical possession of them.

[14] Ontario Law Reform Commission *Report on the Coroner System in Ontario* (Department of Justice, Toronto, 1971) 29.

[15] The coroner's role was originally almost purely fiscal, ie to safeguard certain financial interests of the Crown that arose from sudden deaths. For the historical development of the office of the coroner see SM Roberts "Who Habeas The Corpus? A Review of Coroners and Coronial Law in New Zealand" (LLM Research Paper, Victoria University of Wellington, 1985) and G Thurston *Coronership* (Barry Rose Publishers, UK, 1976).

circumstances of suspicion", while section 4 of the Coroners Act 1988 further reinforces this by listing certain deaths that must be reported to the Police and thence to a coroner. These include deaths without a known cause, unnatural or violent deaths, suicides, deaths occurring while the person concerned was undergoing a medical, surgical or dental operation or procedure, and deaths in prisons or mental hospitals.

While most deaths do not fall within the scope of these sections and therefore do not come within the coroner's jurisdiction, those that do very commonly result in a post-mortem examination in order to establish the cause of death. Typically this involves "a gross examination of the exterior of the body for any abnormality or trauma and a careful inspection of the interior of the body and its organs".[16] It may also include "the recovery of ... foreign objects, the collection of vaginal washings, the taking of hair samples, ... and the laboratory study of trace evidence such as fingernail scrapings or stains on clothing".[17]

Small samples of tissue[18] are invariably taken from each important organ for microscopy and analysis. Blood and urine samples may also be taken,[19] particularly if drugs or alcohol are suspected elements of the death. Only rarely is there reason to retain an organ. However, a pathologist may wish to keep the heart of a deceased for further examination if there is evidence of congenital heart disease. Similarly, a pathologist may wish to retain a brain if, in a homicide inquiry, the deceased has a

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[16] Above n 3, 8.

[17] FA Jaffe "Some Limitations of the Medico-Legal Post-mortem Examination" (1974-1975) 17 The Criminal Law Quarterly 178, 178-179.

[18] In most cases this is a slice of tissue two millimetres thick and 15 millimetres square. Normally, the largest sample of tissue required is 100 grams of liver.

[19] The average sample of blood is ten millimetres, while 15 to 20 millimetres of urine is generally taken.

history of previous head injury and the cause of death cannot be determined conclusively from the current injury or if there is a suspicion of contributing factors.[20]

Critics of the present regime have no quarrel with the state's interest in ensuring that the cause of all deaths is accurately determined and recorded.[21] They do question, however, those occasions when pathologists retain an organ for further examination, to be returned at some future time.[22] In such circumstances the family of the deceased is left to bury an incomplete body or is obliged to delay burial until the body part is returned.

For Maori, "the most sacred part of a person's body is [the] brain",[23] hence the visceral objection when it is retained. Likewise, "Maori people believe that after death the spirit does not depart immediately, but is available for a time to be spoken to".[24] Custom holds "that relatives should embrace the body as soon as possible after death".[25] These cultural dictates, realised and observed during the tangihanga, are abused when a burial is deferred pending the return of body parts. There are also economic consequences when a tangihanga is delayed, with the large numbers of mourners arriving for it having to be fed and

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[20] Information provided by Dr Ken Thomson, the pathologist employed by the Wellington coroner.

[21] See, for example, statements by Moana Jackson in "Body parts dispute sparks concern" *The Evening Post*, Wellington, New Zealand, 11 March 1992, 30.

[22] Allegations have been made that "[i]n one case body parts were not returned for two years and in another case they were not returned at all". Above n 21.

[23] "Body parts dispute sparks concern" *The Evening Post*, Wellington, New Zealand, 11 March 1992, 30.

[24] Above n 1, 10433.

[25] Above n 1, 10433.

housed.[26]

Recently, a spokesperson from the Samoan community also publicly criticised the retention of body parts as being "insensitive" to, and "inconsiderate" of, their cultural values.[27] Orthodox Jews have voiced their abhorrence, too.[28]

III IS RETENTION PERMISSIBLE UNDER THE CORONERS ACT 1988?

i) Bodies

In common with its predecessors the present Coroners Act has no explicit provision giving coroners the right to retain a body. It has been said, however, that "in appropriate cases", the right is a "sine qua non [of the coroner's] duty to inquire into the death".[29] At Common Law, therefore, the right "arises as soon as the report reaches the coroner that a person has been killed or has died violently, and remains until the conclusion of the inquest".[30]

Section 14 of New Zealand's Coroners Act now qualifies this by requiring a coroner to authorise forthwith the disposal of a body if she or he is satisfied that it is no longer necessary to withhold it from family members.[31] Thus, once a coroner's post-mortem has been completed the family will normally be entitled to have the body returned to it. Exceptions may occur where the

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[26] Hon. Mrs TWM Tirikatene-Sullivan, New Zealand Parliamentary Debates Vol 482, 1987: 10434.

[27] Above n 23.

[28] Above n 23.

[29] KM Walker *Coronial Law and Practice in New South Wales* (2 ed, The Law Book Company Ltd, Sydney, 1982) 178.

[30] *R* v *Bristol Coroner, ex parte Kerr* [1974] 2 All ER 719, 722.

[31] Subject to s 13(3), see above n 6.

deceased is the subject of a homicide inquiry. In such cases a coroner would have to take account of defence counsel's wishes to exercise the right to call for its own pathological examination before releasing the body for burial.[32]

Unnecessary retention of a body by a coroner is therefore in contravention of the Act, although Parliament has provided no sanction to be imposed on an errant coroner in this specific respect.[33]

ii) Body parts

Section 2 of the Coroners Act 1988 defines "body" to mean "a dead person, and includes- (a) Any part of a person without which no person can live ...". For the reasons that follow, it is submitted that this statutory definition should be interpreted to mean that when a coroner orders the release of a body, either under section 13 or section 14 of the Coroners Act, all essential organs must be returned with the body since they are, by definition, an integral part of it.

Firstly, in defining "body" Parliament has used clear words that are unambiguous. Although in our ordinary use of language we might refer to a corpse as a "body" even if essential organs have been removed, the fact that Parliament has chosen to give its own meaning to the word suggests that ordinary usage is not applicable here.

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[32] In *R* v *Bristol Coroner, ex parte Kerr*, above n 30, the right was recognised but no authority was given for it. Text writers are similarly vague with respect to the authoritative basis of the right. See, eg, G Thurston *Coronership*, above n 15, 131.

[33] But a person who fails or refuses to comply with a coroner's direction to dispose of the body would arguably commit an offence as outlined in s 43(2) of the Coroners Act. For this conclusion to hold, however, s 14 must be read in conjunction with s 13.

Secondly, this interpretation is consonant with the reformist spirit of the Act that endeavours to accommodate the diverse cultural and religious values of society's members. Although the specific issue of coroners retaining body parts was not mentioned during the parliamentary debates of the Coroners Bill, it clearly comes within the mischief that Parliament sought to reduce or eliminate when it enacted the new legislation.

Thirdly, acceptance of this interpretation would not impede the coroner's duty to ascertain the cause of death. In practice it is only when further examination of a brain is desired that substantial delays should be expected to occur.[34] Although in neuropathology the classic fixation period for a brain is three weeks, according to Dr Ken Thomson[35] procedures can be adapted in order to reduce this period to four or five days by using extra-strength formalin. Once set, representative slices can be taken for analysis and the bulk of the brain can be returned for burial with the rest of the body. Although rapid fixation is not as good as when the longer time is taken, Dr Thomson describes this as "not really a problem" - acceptable standards of accuracy can still be achieved.

Fourthly, any contention that this interpretation would lead to the absurd result that less important body parts could be retained by a coroner, but not those "without which no person can live" lacks practical substance. It is only major organs that are the focus of autopsies, and only ever the heart or brain that is needed for further examination. Moreover, it is possible to read into the Act a requirement that coroners permit no more "interference" with a body than is necessary for the performance of their duties. A coroner who retained a minor body part would

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[34] The heart, the other organ likely to be retained for further examination, sets in formalin within two to three days.

[35] Above n 20.

be in breach of this unwritten rule.[36]

If this view is accepted there is no legal basis for coroners returning an incomplete body, at least not one lacking a major organ such as the heart or the brain and upon which human life depends.[37] Failure to do so will mean a breach of the Act, though again no penalty has been provided for such violations.

It could be contended, however, that the introductory words of section 2 - "unless the context otherwise requires" - are intended to allow for a different approach in those situations where a pathologist deems it desirable to retain an organ for further examination but has no further need for the rest of the corpse. To hold otherwise would mean pathologists having to retain the complete corpse until the examination of all body parts is completed. This might create inconvenience for families which do not wish to leave the body unattended prior to the burial and where mortuary facilities lack adequate viewing or waiting facilities for relatives. For these families, however, this inconvenience will arise regardless of which interpretation is chosen. In practice it should occur only rarely but, where it does, it demands the modernisation and humanisation of sub-standard facilities rather than betraying the spirit of sensitivity that the Act seeks to engender.[38]

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[36] This rule does find clear expression in the Human Tissue Act 1964, however; s 11 prohibits "unnecessary mutilation" of a body during a post-mortem carried out under that Act. It is also an offence under s 150 of the Crimes Act 1961 to "improperly or indecently interfere with ... any dead human body". Doctors carrying out coronial post-mortems do not escape the effect of this provision.

[37] But, for the reasons given, retention of any other body part would not be permissible either.

[38] Most of New Zealand's major mortuary facilities provide viewing and waiting rooms for relatives. If necessary, it would be within a coroner's powers under s 13(1) of the Coroners Act to have a body moved to a mortuary that is suitably equipped for relatives.

Other families - those which require the burial of the corpse as soon as possible after death[39] - may be inconvenienced in a different way if body parts are not to be seen as separable from the rest of the corpse. Instead of immediately proceeding with the burial of the corpse and burying any body parts that have been retained when they are subsequently returned by the coroner, these families will be forced to delay burial until the complete "body" is returned. Although these counter-arguments have a measure of force and generate some sympathy, each raises the question of the status that the retained body parts would have under the Coroners Act since, for the purposes of the Act, the "body" would have been returned to the family for disposal under section 13(2) or section 14.[40] It is submitted that in these situations the retained body parts would no longer be under the cover of the Act, having fallen into a jurisdictional void. If that is the case then the coroner's right to possession and examination of the parts would be in doubt, as might be the family's right to seek the return of the parts since they have already been returned the "body". An answer to this conundrum might be that here the Act envisages the retained body part to be regarded as the, or another, "body". It is suggested that an interpretation that has the absurd result of either allowing retained body parts to escape the ambit of the Act, or of making two bodies out of one, is worthy of rejection.

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[39] This is required by Orthodox Jews, for example; above n 23.

[40] If body parts can be separated from the rest of the corpse then s 13(1) might offer a partial solution to the first inconvenience. It reads: "For the purposes of any examination under this Act, a coroner may give any directions the coroner thinks fit relating to the removal of a body." Thus a coroner could give an order to remove the corpse to a funeral parlour, for example, so that family members could be with it, while a body part was retained by the coroner for further examination. However, there could be some doubt as to whether such a removal would be "for the purpose of an examination" as the section requires. Nor would this section alleviate the more troublesome situation where a corpse is required to be buried as soon as possible after death, since it does not authorise the disposal of the body, only its removal.

Rather, the words "unless the context otherwise requires" more appropriately cater for those situations where incomplete human remains have been discovered and an autopsy has been authorised. For the purposes of the Coroners Act such remains are thereby deemed to be a "body". In other cases, however, the "body" includes, meaning that it is inseparable from, "any part without which no person can live".

This interpretation is supported by the New Zealand Bill of Rights Act 1990, which, by virtue of section 3(b), applies to the work of coroners and doctors performing post-mortems. Section 20 of the New Zealand Bill of Rights Act states that:

> a person who belongs to an ethnic, [or] religious ... minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, [or] to profess and practise the religion, ... of that minority.

Section 5 of the Act contains an important proviso, permitting such, but only such, "reasonable limits [to the Bill of Rights] prescribed by law as can be demonstrably justified in a free and democratic society". The state's right to perform a post-mortem examination on the body of a dead person in order to precisely ascertain the cause of death has already been seen to be a justifiable limitation on the rights of mourning families to proceed immediately with the burial. However, it is submitted that if the Coroners Act can be interpreted so as to accommodate the ethnic or religious beliefs and practices of minority groups without unduly restricting or compromising the legitimate role of coroners, then the effect of the New Zealand Bill of Rights Act is that that interpretation "shall be preferred"[41]. The suggested interpretation of "body" in section 2 of the Coroners Act satisfies both conditions; that is, it goes furthest in meeting the beliefs and practices of minority groups without unduly hampering coronial practice.

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[41] Section 6, New Zealand Bill of Rights Act 1990.

IV PREVENTION AND REDRESS UNDER CURRENT LAW

It is submitted that the Coroners Act 1988 does not allow coroners to return incomplete bodies, a conclusion that turns on a particular interpretation of the statutory definition of "body". Even if this interpretation is rejected, most people would accept that the unnecessary retention of body parts is highly objectionable and would agree that mechanisms should be available to prevent this from occurring and, furthermore, that means of redress should exist if it does occur. This part of the paper considers potential options for prevention and redress[42] that could be argued within the confines of present law and precedent when the retention of body parts occurs wrongfully[43] or unnecessarily. The discussion relies upon some elasticity in these confines, however.

For the sake of analysis (where it matters), it is to be presumed that the statutory interpretation argued for in Part III of this paper is correct and that the Coroners Act is contravened when incomplete bodies are returned. (Nevertheless, some mention is made of the consequences if the contrary interpretation is preferred.) It is not the intention of this discussion to uncover and address all the intricacies of law and circumstance that have the potential to arise, but to survey, in broad outline rather than in detail, the possible remedies that currently exist when coroners retain body parts.

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[42] As in other areas of law these two issues are not easily separated - the fact that a legally cognisable and enforceable remedy is available upon the commission or omission of a certain act is generally perceived as one means of preventing the commission or omission of that act in the first place.

[43] Wrongfully, that is, in the sense that body parts have been retained and an incomplete corpse has been returned to the family.

i) Judicial Review

Judicial review proceedings can be brought against a coroner who has exceeded his or her jurisdiction or has acted without jurisdiction.[44] [45] The statutory procedure for review is an application under section 4 of the Judicature Amendment Act 1972. First, however, the initial hurdle of standing would have to be overcome. No difficulty would arise for the executors of the deceased since they have a duty to dispose of the body.[46] If the deceased died intestate standing could be achieved by one or more persons with an interest in the deceased applying for letters of administration under section 6 of the Administration Act 1969.

Such an application was made in *Re Tupuna Maori*.[47] The applicant was constituted a personal representative of the deceased so that legal proceedings could be commenced "for the limited purpose of ... according the deceased a proper burial according to Maori law and custom and to prevent, as far as possible, further indignity being visited upon him".[48] Despite the unusual facts of that case, including the absence of any testamentary dispositions and there being no other persons who could have had a right to a grant of administration, it would provide some support for an application made for the same narrow

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[44] See s 35 of the Coroners Act 1988 and s 193(1) of the Summary Proceedings Act 1957.

[45] It should be noted that although there may be some conceptual difficulty or artificiality in doing so, the courts generally follow the wide meaning of "jurisdiction". Thus, all errors in the decision-making process tend to be treated as *ultra vires* rather than as errors made within jurisdiction. See HWR Wade *Administrative Law* (6 ed, OUP, New York, 1988) 39-44.

[46] *R* v *Fox* (1841) 2 QB 246; *Williams* v *Williams* [1882] 20 Ch D 659, 664; *Murdoch* v *Rhind* [1945] NZLR 425. See also *Halsbury's Laws of England* (4 ed, Butterworths, London, 1980) vol 10, Cremation and Burial, para 1017, p 486.

[47] Unreported, 19 May 1988, High Court Wellington Registry P 580/88.

[48] Above n 47, 4.

purpose, namely to secure a proper burial. Even if the deceased did not die intestate it might be possible for a family member to seek letters of administration if solely for that purpose.

Where body parts have been retained the following decisions could be usefully attacked in judicial review proceedings: the initial decision whether or not to authorise a post-mortem examination under section 8 of the Coroners Act, and the decision to release the body under section 14 of the Act.

Section 8 lists various criteria which must be considered when the decision to authorise a post-mortem examination is made. It could be argued that relevant considerations were not taken into account that should have been, that irrelevant considerations were taken into account that should not have been, or that the decision was unreasonable.[49] The relief sought could be an order of certiorari with a declaration that the decision to authorise a post-mortem was defective, presumably with the result that the body be returned to the family, or an order of mandamus, similarly requiring the return of the body.

There would be considerable difficulty in supporting such contentions with sufficient evidence. This difficulty would be compounded by a predictable unwillingness of the court to substitute its judgment for that of the coroner's, particularly given the specialised nature of the coroner's work, the undesirability of what might be perceived to be the fettering of

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[49] Traditionally "unreasonableness" in Administrative Law has had a high threshold as expounded by Lord Greene in *Associated Provincial Picture Houses* v *Wednesbury Corporation* [1948] 1 KB 223, 229: "[the] decision on a competent matter [must be] so unreasonable that no reasonable authority could ever have come to it". Indications of a lower threshold have recently appeared, however; in *Webster* v *Auckland Harbour Board* [1987] 2 NZLR 129 Cooke P stated (at p 131) that "[a]n unreasonable decision, in an ordinary sense, is one outside the limits of reason. Or, in other words, one which no reasonable person could reach." Nevertheless, the higher threshold remains in ascendancy in New Zealand, having been affirmed by the Privy Council in *Petrocorp Exploration Ltd* v *Minister of Energy* [1991] 1 NZLR 641.

coronial practice, and the fact that the statute is silent as to what weight should be given to the individual criteria that are listed in section 8.

The family could also question whether a coroner's decision to return the body complied with section 14 of the Coroners Act. The section requires a coroner to authorise the disposal of the body as soon as she is satisfied that it is no longer necessary to withhold it from family members, subject to the requirements of section 13(3).[50] Two scenarios are possible here. The first is where a coroner retains body parts (the heart or brain, for example) but returns the rest of the body to the family (thereby breaching the Act); the second where the body parts are retained for further examination, thus causing the rest of the body to be retained as well.

In the first scenario the decision to return an incomplete body is open to attack on the ground that the meaning of "body" in the Coroners Act precludes the physical separation of a "dead person" and "any part of a dead person without which no person can live". If a court were to uphold that interpretation then there would be no difficulty in finding that a coroner acted in excess of the powers granted under the Act by returning an incomplete body.

In the second scenario judicial review would concentrate on whether retention of the body parts (causing the withholding of the body) is "necessary". Again there would be considerable difficulty in amassing sufficient evidence to convincingly support such a claim. The Act's failure to provide guidance as to what "necessary" entails makes the task even harder.

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[50] See above n 6. Section 13(2) also concerns the coroner's powers to authorise disposal of the body but its permissive language oddly contradicts the mandatory statement of section 14.

ii) Tort Law Remedies

Although section 35 of the Coroners Act awards coroners "the powers, privileges, authorities, and immunities of a District Court Judge exercising jurisdiction under the Summary Proceedings Act 1957", coroners who unnecessarily retain body parts could still be vulnerable to actions in tort. Judicial immunity only extends to the execution of judicial acts,[51] whereas coroners engage in both judicial and administrative functions. It is submitted that a coroner's decision to retain body parts falls within the latter category with no such immunity attaching to it. In any event, coroners who act outside their jurisdiction or without jurisdiction are not immune from civil actions - like judges of the inferior courts, they are "liable in damages for any injury so caused".[52] Although, here, "jurisdiction" is said to be used "in a wider sense than for the purposes of the ultra vires doctrine ... requir[ing] something like 'some gross and obvious irregularity of procedure'",[53] an act in clear contravention of the Coroners Act (such as the unnecessary retention of body parts) could well be said to come within that wider meaning.[54] In light of this, the following tort law

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[51] *Nakhla* v *McCarthy* [1978] 1 NZLR 291, 299.

[52] Wade, above n 45, 784. See also H Street *Street on Torts* (7 ed, Butterworths, London, 1983) 87. However, coroners are indemnified by the Crown for any damages or costs entered against them; see s 196A of the Summary Proceedings Act 1957.

[53] Above n 45, 784.

[54] In the United States, at least, a coroner has been sued in negligence, albeit unsuccessfully. See *Gray* v *Southern Pac. Co et al* 68 P (2 ed) 1011 (1937), discussed briefly below Part IV (ii)(a). In England, pathologists who performed a post-mortem at the request of the police were amongst the defendants sued, inter alia, for negligently conducting the post-mortem and preparing the subsequent report; *Evans* v *London Hospital Medical College and others* [1981] 1 All ER 715. In this case, however, the defendants were covered by the absolute immunity from any form of civil action conferred on witnesses in criminal proceedings in respect of their evidence. This immunity, it is submitted, would not attach to a coroner in New Zealand who wrongfully or unnecessarily retained body parts.

remedies offer possible redress.

a) Interference with the right to possession of the corpse for burial[55]

The law does not recognise property in a corpse[56] but it does recognise "as incident to the duty to dispose of the body rights to the possession of the body until it is disposed of [footnote omitted]".[57] The right is not absolute[58] and it may be obliged to yield, perhaps temporarily, to the rights of others who have a legitimate interest in the body for which possession is necessary or desirable. Thus, when a coronial post-mortem examination is authorised the coroner's right to possession[59] temporarily subordinates the executor's right to possession. Arguably, however, a coroner's right only exists in so far as he or she acts intra vires; a coroner who acts ultra vires whilst in possession of the body (or a part thereof) would thereby

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[55] For a discussion of this tort in the context of the removal of cadaveric transplant material contrary to the provisions of the Human Tissue Act 1961 (UK) see PDG Skegg "Liability for the Unauthorised Removal of Cadaveric Transplant Material" (1974) 14 Medicine, Science and the Law 53, 54; PDG Skegg "Liability for the Unauthorised Removal of Cadaveric Transplant Material: Some Further Comments" (1977) 17 Medicine, Science and the Law 123, 123-124; and I Kennedy *Treat Me Right* (OUP, New York, 1988) 226-227.

[56] *Dr Handyside's* case 2 East PC 652; *R* v *Lynn* (1788) 2 TR 733; *R* v *Sharpe* (1856-1857) Dears & Bell 160; *Foster* v *Dodd* (1866) LR 1 QB 475; *Williams* v *Williams* above n 46; *R* v *Price* [1884] 12 WBD 247. See also *Halsbury's Laws of England* above n 46, para 1019, p 487-488. The point is discussed in more detail below Part V (iii).

[57] *Halsbury's Laws of England*, above n 46, para 1019, pp 487-488. See also *Williams* v *Williams*, above n 46.

[58] *Edmonds* v *Armstrong Funeral Home Ltd* [1931] 1 DLR 676, 680.

[59] As has been noted the Coroners Act does not explicitly give coroners the right to retain a body but it can be said to be, in "appropriate cases" a "sine qua non [of the coroner's] duty to inquire into the death". Above n 29.

invalidate the right to possession. In this latter situation the person under the duty to dispose of the body could argue that the coroner has interfered with his or her right to possession of the body for the purpose of burial.

Interference with this right was successfully argued in *Edmonds* v *Armstrong Funeral Home Ltd*[60] before the Alberta Supreme Court. The plaintiff sued for general damages on the basis of an (apparently non-coronial) unauthorised post-mortem that was performed upon his deceased wife's body. Portions of the body were removed during the post-mortem. According to Harvey CJA the claim succeeded because the defendants' acts "constituted a violation of the plaintiff's right of custody and control".[61] The plaintiff was not required to prove actual damage or to show that he had actually been unable to dispose of the body because of the defendants' acts - the mere interference with the right to possession for the purpose of burial was an injury giving rise to a cause of action.[62] In *Gray* v *Southern Pac. Co et al*[63] the Californian District Court of Appeal also recognised that interference with the right to possession of a corpse for burial can form the basis of legal action. In that case the interference was the unnecessary retention of body parts following a coronial post-mortem. The action failed, however, partly on account of erroneous pleadings[64] and partly because "such violation could give rise to no more than nominal damages ... and the court would not be justified in reversing the judgment for the purpose of

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[60] Above n 58.

[61] Above n 58, 681.

[62] Above n 58, 680-681.

[63] Above n 54.

[64] Apparently the plaintiff had claimed a right to possession of "her deceased husband's body for the purpose of decent burial free of mutilation by an autopsy thereon" (above n 54, 1015) whereas the Court had found the autopsy to have been a lawful one.

procuring such an award".[65]

Thus, where a coroner has retained body parts ultra vires it would be open to the person with the right to possession for the purpose of burial to allege interference with that right. Such an action would be novel in New Zealand but the decisions in *Edmonds*[66] and *Gray*[67] would lend it valuable support. It should be noted, however, that the judgment in *Edmonds*[68] appears to give more weight to the right of possession than to the purpose for which that right exists.[69] Another court might construe the right more strictly, requiring a plaintiff to show that the interference actually impeded the plaintiff from burying the deceased. On the other hand, this may not be a difficult task to do, particularly for those families whose beliefs prohibit the burial of an incomplete body or for whom immediate burial is important.

If, contrary to the submission of this paper, it were deemed permissible for a coroner to retain body parts and return the rest of the corpse, a court might also question whether the duty to bury extends to the duty to bury with no parts missing.[70] It is submitted that this should be seen not as a question of law but as a question of fact to be answered by the cultural or religious values of the deceased and the deceased's family. Maori, for instance, would assuredly consider it their duty to bury a complete body (or, at least, all the parts of a body that are known to still exist).

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[65] Above n 54, 1015.

[66] Above n 58.

[67] Above n 54.

[68] Above n 58.

[69] See Skegg (1977), above n 55, 124.

[70] See Kennedy, above n 55, 227.

b) Negligently causing nervous shock or emotional harm[71]

It is highly unlikely that the tort of intentionally inflicting emotional harm would apply where a coroner wrongfully or unnecessarily retains body parts, but there is some scope for an action based in negligence.[72] Kennedy's consideration of an action arising out of the tort of "negligently causing nervous shock by the removal of tissue without authority"[73] offers a parallel to the situation where a coroner exceeds his or her jurisdiction by retaining body parts, thus causing nervous shock or emotional harm to a plaintiff. For an action to succeed it would have to be established that the coroner owed a duty to the plaintiff, that the duty was breached by the coroner and that damage arose from that breach.

In establishing a duty of care New Zealand's courts undertake "two broad fields of inquiry".[74] The first considers "the degree of proximity or relationship between the alleged wrongdoer and the person who has suffered damage".[75] It is submitted that members of the deceased's family, but perhaps close friends of the deceased as well, would satisfy this inquiry, these being persons so closely and directly affected by the coroner's actions that the coroner should reasonably have had

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[71] For a discussion of this tort in the context of the removal of cadaveric transplant material contrary to the Human Tissue Act 1961 (UK) see Skegg (1977) above n 55, 124; and Kennedy above n 55, 227-228.

[72] The definition of "accident" in s 3 of the new Accident Rehabilitation and Compensation Insurance Act 1992 (requiring "[a] specific event or series of events that involves the application of force or resistance external to the human body and that results in personal injury") means that such claims are no longer barred in New Zealand.

[73] Kennedy above n 55, 227-228.

[74] *South Pacific Manufacturing Co Ltd* v *New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282, 294.

[75] Above n 74, 294.

them in her contemplation when directing her mind to the retention of the body parts.[76] This is particularly so given the strong emotional ties that such people would have with the deceased, particularly surrounding the time of death and burial. Furthermore, it is generally family members who are under the duty to bury the deceased and whose right to possession of the corpse has yielded only temporarily to that of the coroner.

The second inquiry in establishing a duty of care asks "whether there are other policy considerations tending to negative or restrict the duty in that class of case".[77] Although the courts would be reluctant to fetter coronial discretion, it is submitted that they should not defer uncritically to one side's point of view. Nor could there be any realistic fear of a flood of litigation by allowing such a cause of action - few meritorious cases would probably arise but where they do they should not be precluded from proceeding.

On this basis therefore, a duty of care could arguably be established. Breach of the duty must also be proven by the plaintiff by showing that retention of the body parts was indeed wrongful or unnecessary. Proving the latter, however, could be difficult - some of the problems confronting a plaintiff in doing this have already been alluded to. [78]

Difficulties could also arise in persuading a court to accept a claim solely for emotional harm. However, while "the great majority of courts"[79] have denied recovery of damages where only mental disturbance occurs, unaccompanied by adverse physical consequences, a number of cases involving the negligent mishandling of corpses have emerged in the United States as an

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[76] *Donoghue* v *Stevenson* [1932] AC 562.

[77] Above n 74, 294.

[78] Above Part IV (i).

[79] WP Keeton (ed) *Prosser and Keeton on the Law of Torts* (5 ed, West Pub. Co, St Paul, Minn., 1984) 361.

exception to the traditional rule.[80] It has been said that the common element in these cases "is an especial likelihood of genuine and serious mental distress arising from the special circumstances, which serves as a guarantee that the claim is not spurious".[81]

There is also now high New Zealand authority[82] for awarding damages where a breach of a duty of care leads solely to inconvenience, worry and stress which were reasonably foreseeable at the time of the breach. On the other hand, it remains to be seen whether this approach will be adopted unreservedly. In any particular case the courts may still opt for a more conservative approach and seek a "recognizable, psychiatric illness [footnote omitted]"[83] in the plaintiff as a minimum indication of injury, although such an illness could be in the form of anxiety or depression.[84] Proving causation would also be problematic since it is probable that a plaintiff would already be suffering considerable emotional strain from the fact of the death. It would be difficult to say with the desired certainty that it was the coroner's action that caused the emotional harm, and not the death itself, and a court would be likely to retreat from having to make such a conclusion.

c) Economic loss

Situations can occur where the retention of body parts results in economic loss to the family of the deceased. For example, in a Maori family the elder brother of a deceased is required by custom to remain constantly by the corpse to keep it

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[80] Above n 79, 362.

[81] Above n 79, 362.

[82] *Mouat* v *Clark Boyce* [1992] 2 NZLR 559 (CA).

[83] Kennedy above n 55, 228.

[84] Kennedy above n 55, 228.

"warm". Such a vigil may result in time having to be taken off work, resulting in a loss of earnings for that family member. Furthermore, large numbers of mourners may have to be accommodated and fed, at considerable financial cost to the deceased's family, if the tangihanga is delayed. If retention of the body parts is wrongful or unnecessary then the coroner may be liable in negligence for the resulting economic loss.

It has already been seen that family members ought to reasonably come within a coroner's contemplation when considering whether to retain body parts, although certain factors make it difficult to establish a breach of that duty to take care.[85] In an action based on negligently causing economic loss a further impediment to success might be the charge that the loss is too remote - that it was not a reasonably foreseeable consequence of the coroner's decision. However, if it were considered reasonable to expect a coroner to be familiar with Maori custom, it follows that it would be reasonable for a coroner to foresee the possibility of a family member having to remain with the corpse until its burial. Therefore, if delay of the burial is prolonged, it is foreseeable that the family member's obligation to remain with the body is likely to have financial consequences. Similarly, if the burial is delayed it may be possible to contend that a coroner should have reasonably foreseen the likelihood of the deceased's family having to accommodate and feed large numbers of mourners, or at least the closer family members, until the tangihanga could proceed.

Although the action would be based on pure economic loss, (or economic loss in conjunction with emotional harm), without accompanying physical harm, the New Zealand Court of Appeal has indicated a willingness to uphold such actions in deserving cases.[86]

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[85] These are referred to above Part IV (i).

[86] See, eg, *Gartside* v *Sheffield, Young & Ellis* [1983] NZLR 37, 47: "[t]he duty of care extends to liability for foreseeable economic loss regardless of the absence of some

d) Breach of statutory duty[87]

Section 14 of the Coroners Act imposes a duty on coroners to "forthwith authorise" the disposal of a body "as soon as [he or she] is satisfied that it is no longer necessary to withhold [it] from family members".[88] A failure to comply with this duty (by unnecessarily retaining body parts, for example,) may give rise to an action based on the tort of breach of statutory duty. This cause of action might also arise where a coroner has retained a body part but returned the rest of the corpse, in contravention of the implicit duty (which is argued for in this paper) not to return incomplete bodies. Only the person to whom the duty is owed may bring such an action[89] - from a consideration of the Act as a whole, and the wording of appropriate provisions such as section 14, this duty is clearly owed to members of the deceased's family.

The threshold issue would be whether the Act intended to give an individual a right of action in tort.[90] In deciding this existing tort law remedies are sometimes considered in order to determine whether they already cover the circumstances also addressed by the statute.[91] Although various tort remedies have

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identifiable physical damage or injury or any identifiable danger or threat thereof".

[87] For a discussion of this tort in the context of the removal of cadaveric transplant material contrary to the provisions of the Human Tissue Act 1961 (UK) see Skegg (1977) above n 55, 124; and Kennedy above n 55, 228-230.

[88] The duty is subject to s 13(3), however; see above n 6.

[89] Kennedy, above n 55, 229.

[90] Street, above n 52, 282. See also S Todd (ed) *The Law of Torts in New Zealand* (The Law Book Company, Sydney, 1991) 327. Todd notes (at pp 328 and 329) that "in the majority of cases the parliamentary intent must be inferred [footnote omitted]" and that this test of construction "must involve a substantial creative input by the court itself".

[91] Street, above n 52, 282.

been discussed above, none has an established basis in New Zealand; moreover, each faces substantial difficulties that would likely prove fatal if considered by a conservative judge. An action for breach of statutory duty should not be disqualified, therefore, on the uncertain ground that other tort remedies are available to the plaintiff.

Another relevant factor in deciding the threshold question is whether the statute itself expressly provides a sanction for the breach of the duty since "[i]t is not to be presumed that Parliament would have intended to lay down a duty which is unenforceable: it would then be only a pious aspiration [footnote omitted]".[92] The provision of an alternative remedy often works against the applicability of this tort, though not invariably, particularly if the alternative is, in the circumstances, inadequate.[93] While section 43(2) of the Coroners Act does make it an offence to fail or refuse to comply with, or to hinder or prevent compliance with, directions for the removal and disposal of bodies given under section 13 of the Act, there is no express sanction for a breach of section 14 providing for the mandatory early release of bodies (subject to section 13(3)). This omission is some evidence that an action for breach of statutory duty should be permitted to lie.[94]

The plaintiff must also show that the harm suffered comes within the scope of the general class of risks at which the statute is directed.[95] There would be little difficulty in

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[92] Todd, above n 90, 330.

[93] Street, above n 52, 284.

[94] Indirectly, however, there is the remedy of judicial review to test the legality of a coroner's actions (see above Part IV (i)) and perhaps also recourse to s 34 of the Coroners Act: the removal of a coroner from office for inability or misbehaviour. Whether this latter would actually be seen as an applicable remedy in these circumstances must be open to considerable doubt, however.

[95] Street, above n 52, 285.

demonstrating this - for instance, a breach of section 14 by unnecessarily delaying the release of a body will often conflict with the cultural and religious values of families, heightening their anxiety and emotional stress. This is in clear conflict with a major tenet of the current Act, namely to make the coronial system more sensitive to the "ethnic origins, social attitudes or customs, or spiritual beliefs"[96] of people making up the New Zealand community.

Given the significant effect that non-compliance with the duty would have on family members of the deceased, including financial as well as emotional consequences, and that the duty embodies much of the reformist spirit of the Act, it is submitted that a court might well deem it appropriate to allow an action for breach of statutory duty to lie.

e) Summary

None of these tort-based remedies enjoys ready application to a situation where a coroner has wrongfully or unnecessarily retained body parts. Nevertheless, each has some potential for success and, given the right conditions, may yield positive results for particular plaintiffs. Perhaps the most important pre-conditions are counsel who are willing to run the arguments and a judge both willing to listen to them and prepared to extend the boundaries of the Common Law, if necessary, where the facts of a case merit it.

It is also hoped that, where applicable, the courts would not adopt an unduly restrictive meaning of "family" for the purpose of bringing these actions.[97] Given that the 1988

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[96] Section 8(e), Coroners Act 1988. See also ss 8(f), 9 and 14.

[97] It should be noted that the Coroners Act itself refers to both "family members" and "immediate family" at different times; compare ss 9(1) and 14, for example. Only the latter

Coroners Act is an attempt to sensitise coronial law and practice by accommodating, as far as it is reasonable to do so, the needs of society's divergent ethnic and religious communities, the "family" should be used in its extended sense as including all who are related to the deceased by blood or marriage, as well as those people living within the immediate social household of the deceased even if not so related. A wider definition of "family" might lead to more litigation than if a narrower one were adopted, but this should not be used as an argument for denying redress to meritorious claims. In any event, beyond the question of standing there are numerous other obstacles to be overcome and which would have the effect of limiting spurious allegations.

iii) The Treaty of Waitangi Act 1975

Coroners who return incomplete bodies to Maori families may be breaching the principles of the Treaty of Waitangi, thereby opening the possibility of a claim under section 6 of the Treaty of Waitangi Act 1975.[98] The relevant parts of that section state that Maori who are (or are likely to be) prejudicially affected by any Act or any policy or practice adopted by or on behalf of the Crown, which was or is inconsistent with the principles of the Treaty of Waitangi, may submit that claim to the Waitangi Tribunal.

Although debate over the ramifications of the Treaty has focused primarily on land and other material resources, both Maori culture and social policy are "central and major theme[s]"[99] of the Treaty. While this predominant focus is also

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phrase is statutorily defined but it is given a reasonably expansive meaning; see s 2.

[98] As amended by s 3(1) of the Treaty of Waitangi Amendment Act 1985.

[99] MH Durie "The Treaty of Waitangi: Perspectives on Social Policy" in IH Kawharu *Waitangi* (OUP, Auckland, 1989) 280, 280.

evident in the claims brought to the Waitangi Tribunal for consideration, the Te Reo Maori claim provides a prominent exception and one that is highly pertinent to the present issue.

In its report on that claim the Tribunal accepted that the phrase "O ratou taonga katoa", found in Article II of the Maori text of the Treaty, is broader than the English equivalent "other properties", and includes both tangible and intangible things.[100] Having regard, as it must,[101] to the two texts, the Tribunal opted for the "broader perspective"[102] since "the right to use the Maori language would have been one of the rights expected to be covered by the Royal guarantee by those chiefs who signed the Treaty".[103] Thus, the Tribunal had little difficulty in finding that "[i]t is plain that the [Maori] language is an essential part of the culture and must be regarded as 'a valued possession'".[104] As a taonga, therefore, it enjoys the Treaty's protection.

The tangihanga can equally be seen as a taonga coming within the Treaty's protective ambit. It, more than anything else, symbolises the "nature of the Maori world view",[105] emphasises group solidarity and affirms central values, while offering a cathartic outlet for the grief, and reducing the supernatural fears, associated with death.[106] Described variously as "the

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[100] Waitangi Tribunal *Report of the Waitangi Tribunal on the Te Reo Maori Claim (Wai 11)* (2 ed, Department of Justice, Wellington, 1989) 20.

[101] Section 5(2), Treaty of Waitangi Act 1975.

[102] Above n 100, 21.

[103] Above n 100, 22.

[104] Above n 100, 20.

[105] RS Oppenheim *Maori Death Customs* (AH & AW Reed, New Zealand, 1973) 19.

[106] Above n 105, 20.

most 'Maori' gathering of all"[107] and "the major Maori ceremonial occasion",[108] the tangihanga survives, albeit "with many adaptions and changes in form ... with the same purpose and spirit as in the past".[109] That is has so survived and developed "after the shock and disruption of more than 140 years of European contact, is indicative of its importance to Maori society both in the past and in the present".[110] Like te reo Maori, the right to observe the customary tangihanga would have been "one of the rights expected to be covered by the Royal guarantee by those chiefs who signed the Treaty".[111]

Although the Treaty of Waitangi Act refers to inconsistencies with the "principles of the Treaty" and not to breaches of its express provisions, one of those principles is that the Crown will keep the promises that it undertook when it signed the covenant. This principle is implicit in the Waitangi Tribunal's support of the Te Reo Maori claim and has found more explicit expression in the Court of Appeal's characterisation of the Treaty as a partnership creating "responsibilities analogous to fiduciary duties"[112] and requiring "each party to act reasonably and in good faith".[113] Such onerous requirements do not easily allow the breaking of promises.

It remains to be shown that coronial law and practice prejudicially affects Maori. It is submitted that this occurs

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[107] A Salmond *Hui: A Study of Maori Ceremonial Gatherings* (AH & AW Reed, New Zealand, 1975) 180.

[108] H Dansey "A View of Death" in M King (ed) *Te Ao Hurihuri The World Moves On* (Hick Smith & Sons Ltd, New Zealand, 1975) 173, 180.

[109] Above n 108, 180.

[110] Above n 105, 123.

[111] Above n 100, 20.

[112] Per Cooke P in *New Zealand Maori Council* v *Attorney-General* [1987] 1 NZLR 641, 664.

[113] Per Richardson J, above n 112, 673.

when coroners retain body parts causing "unnecessary" disruption to, or interference with, the tangihanga ceremony, since the "recognition and protection"[114] guaranteed to the ceremony as a taonga is denied.

It is important here to clarify what is meant by "unnecessary". It has already been established that when the state's interest to ascertain the precise cause of all deaths collides with the Maori interest to observe their cultural dictates, some compromise must be made. Such compromise is inherent in the Treaty of Waitangi - "[t]he parties owe each other co-operation".[115] Thus, Maori accept the legitimacy of coronial post-mortems to determine the cause of death when it is otherwise unexplained but do so on the understanding that the state undertakes its inquiries with reasonable speed and with as little interference to the deceased as possible. Since, in those situations where examination of a deceased's brain tissue is required, it is possible to adopt procedures so that retention of the brain is confined to no more than five days, any longer delay would be an unnecessary disruption of the tangihanga and therefore would be in breach of the principles of the Treaty of Waitangi.

In summary, a coroner who retains a body part of a Maori deceased, thereby unnecessarily delaying that person's tangihanga, is prejudicially affecting the family of the deceased and acting inconsistently with the principles of the Treaty of Waitangi. This is so unless the part retained is the brain or the heart, in which case post-mortem procedures should be adapted in order to keep delay to a minimum. Failure to adopt those procedures, where possible, is also a breach of the Treaty's

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[114] Above n 100, 23.

[115] Per Cooke P, above n 112, 666.

principles.[116]

It would be imprudent to dismiss any finding of the Waitangi Tribunal on the basis that the Tribunal's powers are recommendatory only. Its decisions may be bereft of direct legal consequences[117] but they are charged, at the very least, with a symbolic significance that cannot comfortably be ignored or overridden. As a Treaty partner the Crown's role is "not merely passive but extends to active protection ... to the fullest extent practicable".[118] The Court of Appeal has opined that:[119]

> if the Waitangi Tribunal finds merit in a claim and recommends redress, the Crown should grant some form of redress, unless there are grounds justifying a reasonable Treaty partner in withholding it - which would only be in very special circumstances, if ever.

V OPTIONS FOR REFORM

i) Some Preliminary Considerations

It has been widely acknowledged that much of the anxiety and distress over the retention of body parts have their source in unsatisfactory communication between the parties working within,

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[116] A similar claim could be made on the basis of the dead body as a taonga which should not be interfered with by the performance of unnecessary post-mortems or the unnecessary retention of body parts.

[117] Except in the limited circumstances as provided for by the Treaty of Waitangi (State Services) Act 1988.

[118] Per Cooke P, above n 112, 664.

[119] Per Cooke P, above n 112, 664-665.

and affected by, the coronial system.[120] For example, the Act does not require coroners to tell the family of a deceased if parts are to be retained. Indeed, media reports have indicated that it is often left to the whim of funeral directors to disclose that information.[121]

In response to this specific problem the Minister of Justice has proposed the introduction of regulations which would require "pathologists performing post-mortem examinations to advise coroners why body parts need to be retained, and for how long".[122] The coroner would then be required to relay that information directly to the family within 48 hours.[123]

The Minister has also reiterated a call for the appointment of Maori coroners in the hope that that would assist in sensitising the coronial system to the needs of Maori.[124] While the fact of being Maori could not enable a coroner to work outside the strictures of the statute, it would bring the practical and important benefit of greater liaison and communication with Maori families struck by a bereavement. In turn, Maori are likely to feel less alienated by, and feel less

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[120] See, eg, transcript of National Radio's "Morning Report" programme 2YA, 7:08 a.m., 6 March 1992, 6.

[121] See, eg, "Maori push claim for own coroner" *The Evening Post* Wellington, New Zealand, 3 March, 1992.

[122] Above n 23. However, the regulation-making power conferred by s 45 of the Coroners Act does not cover the Minister's proposed regulations. Nevertheless, administrative forms have been prepared and the Minister has "suggested" that they be used nationwide. Form 3 provides notice to the deceased's immediate family that a body organ has been retained for further examination. Significantly, the Minister's direction is that "[t]his notification is to be used only when a body organ is retained and the body is available for release but not otherwise" (original emphasis); see Memorandum To All Coroners (undated, on file).

[123] Above n 23.

[124] See, eg, "Graham wants Maori coroner" *The New Zealand Herald* Auckland, New Zealand, 6 March 1992.

hostility towards, a system in which they have some measure of input and control. It is essential, however, that everyone participating in the coronial system, including the pathologists performing the autopsies and the police, be aware of, and actively respect to the extent that it is reasonable to do so, the cultural and religious needs of all bereaving families. Problems will recur so long as one weak link along the coronial chain remains.

If implemented, these recommendations would go a considerable way in eliminating deficiencies within the present system. However, they do not directly address the issue of unnecessary retention; more is needed, it is submitted, than simply improving the flow of information and facilitating communication.

When coroners retain body parts the crux of the issue will be: is the retention of the parts (causing the withholding of the body) "necessary"? To answer this question the exercise of the coroner's discretion to withhold the body must be reviewed. Amidst the shock and grief of a death this is a daunting and distressing task for a family to undertake. It is made all the more difficult in that section 14 of the Coroners Act provides no guidance as to what "necessary" entails. A family is thereby placed in something of an informational vacuum while the position of the coroner - in the event of questions being asked about decisions that have been made - is effectively bolstered.

Admittedly, section 10(3) of the Coroners Act enables a family to be represented by a doctor at a post-mortem examination but this provision is insufficient to overcome the imbalance that exists between the coroner's office and the public. Firstly, the Act makes such representation dependent upon the coroner's authorisation. Secondly, there is no obligation on the coroner to inform the family of the right to apply for representation, only an obligation to inform it of the decision to authorise a post-mortem and the reasons for that decision. Thirdly, even if

aware of the right, the family remains at an institutional disadvantage, unable to seek answers to questions that it may have without total reliance on the advice of medical professionals, the coroner and probably lawyers as well. In short, the Act succeeds, albeit passively, in disempowering the family rather than actively enabling family members to partake meaningfully in, and perhaps exercise some control over, any review procedure.

It is submitted that it is desirable and important for the Coroners Act to provide this element of family input and control. If the Act is truly to overcome the "unnecessary hurt, bitterness, and sadness"[125] that families have suffered in the past then they should be able, and encouraged, to act upon more than mere suspicion or intuition. This is not to suggest that a family would ever be able to conduct a review of a coroner's decisions on its own, without resort to those involved in the coronial process. Nor is it to exalt the position of bereaving families so that their needs override the state's legitimate interests to determine the cause of death where uncertainty exists. It is to recognise, however, the unavoidable social, cultural and spiritual ramifications of the coroner's work and, in light of that, to advocate a more balanced relationship between the family of a deceased and the coroner's office. To promote the review of the decision-making process when there is delay is consistent with one of the broad aims of the Coroners Act - to ensure the prompt release of bodies. To promote the role of families in this review procedure is also consistent with a legal system purportedly built on the ideals of natural justice.

To the extent that the provision of information is an effective way of empowering people, this could be achieved by undertaking an educational and informational programme that explained to the public at large the theory and practice of coroners' work. Once more, however, it is submitted that this

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[125] Hon. Peter Tapsell, New Zealand Parliamentary Debates Vol 490, 1988: 5160.

would not be enough and that further measures would be needed.

Various options are sketched below to redress the issue of the unnecessary retention of body parts. The extent to which they redress the imbalance that exists between the family of a deceased and the coroner, and his or her agents, is also considered in the discussion. Firstly, however, it is worth noting that if the interpretation of "body" that is argued for in this paper is not accepted the need for reform of the Coroners Act is perhaps even greater. If, for example, a coroner is entitled to retain body parts after the return of the rest of the body, the Act provides scant, if any, opportunity for a family to question that decision. The point is that in this scenario section 14 governing the early release of bodies would appear not to apply since the "body" has already been returned, leaving little else upon which to hang a challenge of the coroner's actions. The options for reform that follow are therefore relevant regardless of one's position in the preceding interpretation debate.

ii) Control Over Post-mortem Examinations

a) Statutory definition of post-mortem examination

A definition of a post-mortem examination could be inserted into the Coroners Act setting out what a standard examination entails. Anything occurring beyond those statutory limits would only be permitted with the consent of the deceased's family.[126] A possible definition would be:

> (a) For the purposes of this Act a post-mortem examination means an external and internal examination of the body and the taking of such small samples of tissue and fluids as are necessary for microscopy and analysis in order to

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[126] This suggestion was made by Dr Ken Thomson, above n 20.

> determine the cause or likely cause of death, or in order to exclude a cause, or causes, or a possible cause or possible causes, of death.
>
> (b) The retention of any tissue or fluid beyond that allowed by part (a) of this definition may only take place with the consent of the family of the deceased person.

Such a definition is no more than the statutory expression of standard contemporary coronial practice, incorporating what is necessary in all, or virtually all, cases where a post-mortem examination is required for the cause of death to be precisely determined. It is difficult to conceive of a post-mortem that would require the taking of more tissue or fluids than that which this definition permits. It is submitted that the benefits that the definition brings should not be lost in order to rigorously but impractically accommodate logically possible but otherwise highly remote situations.

The definition has the advantage of excluding the possibility of body parts being retained permanently (apart from the taking of small samples that the definition permits or unless consent has been given to do so). Permanent retention evidently has occurred on rare occasions[127] but in no case can this be said to be necessary for the performance of a post-mortem examination. The definition also clearly indicates to a family that only small body samples may be retained permanently and, therefore, that the non-return of a body organ is impermissible. If an incomplete body were returned this definition would provide a ready foundation upon which a family could begin to question a coroner's acts.

On the other hand it would not, on its own, prevent the more likely scenario of prolonged, but not permanent, retention of a body part (so long as it was being retained for the taking of

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[127] Above n 23.

samples allowed by the definition). To that end the Act could be further amended so that similar "sensitivity" considerations that already apply when a coroner decides whether or not to authorise a post-mortem examination, or whether or not to hold an inquest, also apply to the post-mortem examination itself. This could read as:

> Without limiting the above definition of a post-mortem examination and so far as it is reasonable to ascertain them, a doctor performing a post-mortem examination shall, throughout the course of the examination and to the extent that it is reasonable to do so, respect the ethnic origins, social attitudes or customs, or spiritual beliefs of the dead person being examined and his or her immediate family.

Although this provision raises the spectre of reasonableness and what that is to mean, in most cases its inclusion would have little additional practical effect. Doctors generally, after all, have a respect for deceased persons that is shared by all people and which they endeavour to incorporate in the performance of their work. Society's ethnic and religious groups, themselves, concede that the state has a legitimate interest in undertaking coronial post-mortems. However, lapses in sensitivity do occur, causing considerable emotional, cultural and religious dislocation. The legal system could play a role in preventing such lapses from recurring by requiring doctors, in those situations where it is known, or where it is reasonable to expect the doctor to know, that a family has specific needs arising from particular beliefs, to accommodate these needs if it can be done without unduly fettering, or interfering with, their work.[128]

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[128] The recently enacted Mental Health (Compulsory Assessment and Treatment) Act 1992 provides a useful statutory precedent for the application of similar considerations. See s 5 requiring all court or tribunal proceedings, and all powers, to be conducted or exercised under that Act with "proper respect for the patient's cultural and ethnic identity, language, and religious or ethical beliefs".

Such a provision would require doctors performing post-mortems to have a "working knowledge" of the relevant cultural and spiritual values held by the various groups that make up the New Zealand community. Moreover, it would require a commitment to respect these values in their professional work. It would also require a doctor to consider making initial inquiries amongst the deceased's family in order to determine whether any special needs do exist. In practice, it may be convenient - and "reasonable" in terms of the amendment - for such inquiries to be made by the coroner who would pass on the information to the doctor;[129] it would be for the doctor, however, to exercise the discretion whether or not to adapt procedures on the basis of the information supplied.

It should be noted that this "sensitivity" provision is phrased so as not to place limits on the preceding statutory definition of a post-mortem examination. Hence, the fact of taking tissue and fluids that come within the ambit of the "standard" post-mortem would be safe from attack for want of respect or sensitivity, although the manner in which they were taken could be so questioned, as could "non-standard" procedures.

To provide an example, in a situation where the brain of a deceased Maori is required for further examination, this provision would imply that the pathologist should undertake the examination with appropriate speed so that the body can be returned as soon as possible to the family in accordance with Maori custom. More specifically, it would imply that in the absence of special pathological circumstances demanding the contrary, the brain should be set in extra-strength formalin in order to achieve rapid fixation within four or five days. Thereupon the necessary representative slices of tissue should

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[129] The Coroners Act already envisages coroners making certain inquiries regarding a deceased's cause of death before deciding whether or not to authorise a post-mortem examination; see s 8(a). It may be practical for the coroner to inquire into any special needs of the deceased's family regarding post-mortem examinations at the same time.

be taken and the body (including the brain) returned to the family. Where the ethnicity or religious values of the deceased are uncertain or unknown, however, the amendment's "reasonable inquiries" provision would suggest that the deceased's immediate family should be telephoned and asked if there are any relevant considerations to be taken into account in respect of the intended post-mortem examination. Where there is difficulty contacting the immediate family then the risk of delay impairing the accuracy of post-mortem results would begin to counter the reasonableness of consulting with the family. It would be for the pathologist to make a professional judgment of when the competing factors tip the balance and make further inquiries unreasonable.

Together these suggested amendments to the Coroners Act would not have onerous effects upon coronial practice, yet they would improve the position of families with particular cultural or religious needs. Such families could not only expect more understanding treatment than perhaps they might have experienced in the past, they would also have a clearer picture of their rights, and therefore a better chance of enforcing them, than they do under the current regime.

b) Code of practice for pathologists

Rather than regulating the conduct of post-mortem examinations via statute, the definition of a standard examination and the sensitivity considerations that have been discussed above could be included in a code of practice governing pathologists. At present no written code exists.

For a variety of reasons this would be a less desirable option to take but, in particular, families seeking to question aspects of a post-mortem examination could find the task more difficult if pathologists operated under a code of practice rather than the suggested statutory amendments. Most importantly, it would be unlikely for a code to have universal coverage since,

although most doctors who perform coronial post-mortems are pathologists, the Coroners Act requires only that the examination be performed by a doctor, that is, "a registered medical practitioner".[130] A pathologist, on the other hand, is a registered medical practitioner who specialises in pathological medicine. Therefore, not all doctors who perform post-mortems, or who are legally able to perform them, would be covered by the code. As a result families would be confronted with uncertainties and inconsistencies. Injustice would rightfully be felt if unnecessary delay of the return of a body part could not be questioned merely because the doctor who performed the post-mortem was not a pathologist and therefore not subject to the code. Were the code voluntary rather than compulsory, its coverage would be potentially even less extensive, creating further disadvantage for families.

It is probable that a code of practice would be a less visible and accessible document than the statute, causing difficulty for the public in acquainting themselves of their rights. Furthermore, from the family's point of view, a code's utility would depend considerably upon the remedies it contained for breaches of its rules, and their ease of enforceability. Issues such as standing and the appropriate forum for hearing allegations of breaches would have to be resolved. An advantage of adopting the statutory approach is that a ready-made procedure to appraise the exercise of a doctor's discretion already exists under judicial review proceedings.

c) Employment contracts

The employment contract between the coroner and the pathologist employed to perform coronial post-mortems could also be a vehicle for introducing the limits and controls that have been discussed. This approach could be favoured as an interim

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[130] Section 2, Coroners Act 1988.

measure but unless identical contractual arrangements were adopted by all coroners and pathologists throughout the country inconsistency and uncertainty would again arise. Moreover, such contracts would not be available for public scrutiny and, even if there were general knowledge of their existence and contents, the doctrine of privity of contract would cause significant difficulties for anyone but the coroner to enforce what rights the contract bestowed.

d) Summary

Although not an exhaustive analysis of all the merits and ramifications of each proposal, the above discussion suggests that an amendment to the Coroners Act would be the most effective way of placing reasonable controls on coronial post-mortems in order to prevent the unnecessary retention of body parts. Not only would the statutory approach cover all doctors performing post-mortems, it is the option which does the most to serve the legitimate interests of families who have questions to ask.

iii) Amending the "No-Property" Rule

Just as English Common Law recognises no property in whole living human bodies,[131] it has "permitted ... this rule to survive the death of the person in question";[132] it is consequently said that there can be no larceny or theft of a corpse.[133] The bald simplicity of the "no-property" rule is

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[131] 1 *Hawkins* PC 148.

[132] ATH Smith "Stealing the Body and its Parts" [1976] Criminal Law Review 622, 623.

[133] But note an inadvertent inroad into this rule in two road-traffic cases concerning body parts or bodily products from living people; see *R* v *Welsh* [1974] RTR 478 and *R* v *Rothery* [1976] RTR 550 in which the defendants were respectively convicted of the theft of urine and blood samples

"misleading",[134] however. It has already been shown, for example, that English civil law recognises and protects certain possessory rights over dead bodies so that, as one commentator has put it:[135]

> [t]he executor (or other person having possession of the corpse) has "property" in it for the purpose of proprietary remedies, at least to the extent that the law recognises, as incidental to the duty to dispose of the body, rights to the possession of the body until it is disposed of.

Other jurisdictions have been less willing to follow a strict "no-property" rule. In Missouri the right to the possession of the body for burial has been judicially described as a "quasi-property right",[136] meaning that "'possession for commercial purposes was still denied'".[137] In Canada a trust analogy has been applied:[138]

> [I]nasmuch as there is a legally recognised right of custody, control, and disposition, the essential attribute of ownership, ... it would be more accurate

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which they had provided for the police.

[134] P Mathews "Whose Body? People As Property" (1983) 36 Current Legal Problems 193. Mathews also describes it as an "embarrassment", and possibly "quite misconceived" (at p 193).

[135] Above n 132, 624.

[136] *Patrick* v *Employers Mutual Liability Ins. Co et al* 118 SW 2d 116 (1938), 122.

[137] TH Murray "On the Human Body as Property: The Meaning of Embodiment, Markets, and the Meaning of Strangers" (1987) 20 University of Michigan Journal of Law Reform 1055, 1070. See also *Larson* v *Chase* 50 NW 238 (1891), 239 (Minnesota).

[138] *Miner* v *Canadian Pacific R.W. Co* 15 WLR 161 (1910), 167 (Alberta). A trust analogy was also used in *Pierce* v *Proprietors of Swan Point Cemetery* 10 RI 227 (1872), cited in Mathews above n 134, 201. However, there the court's reference was to a "sacred trust", indicating, perhaps, that the court was merely drawing a useful, but loose, analogy with trust law. If property in a corpse is really subject to a trust then actions for breach of fiduciary duty may lie.

> to say that the law recognises property in a corpse, but property subject to a trust, and limited in its rights to such exercise as shall be in conformity with the duty out of which the rights arise.

A further inroad into the "no-property" rule in relation to dead bodies is to be found in the Australian case of *Doodeward v Spence*.[139] There the corpse in question was that of a stillborn child with two heads which had been kept, preserved in a bottle of spirits, by the doctor of the dead child's mother. Regardless of any legal rule to the contrary, the background to the litigation indicates that the corpse was treated as if it were at least de facto property, it having been sold by auction to the plaintiff's father, from whom it passed to the plaintiff. The majority of the High Court of Australia, however, were willing to treat the corpse in this instance as the subject of property not just in fact but in law. According to Griffiths CJ there was no doubt that:[140]

> when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial ... .

Furthermore, his Honour stated:[141]

> I do not know of any definition of property which is not wide enough to include such a right of permanent possession. By whatever name the right is called, I think it exists, and that, so far as it constitutes property, a human body, or a portion of a human body, is capable by law of becoming the subject of property.

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[139] (1908) 6 CLR 406.

[140] Above n 139, 414.

[141] Above n 139, 414.

Scots law also provides an alternative to the strict "no-property" rule. In *Dewar* v *HM Advocate*[142] Lord Moncrieff clearly stated, albeit in obiter dicta, that:[143]

> a body that has been consigned for burial cases ceases to be subject to theft only when interment is complete; and if the doctrine is now to be applied in the case of a body consigned for cremation, I think that the proper parallel would be that theft should be regarded as having ceased to be practicable once the body has been enclosed in the furnace. It is when a step has conclusively been taken to set agoing the process of dissolution of the bodies of the dead that the law ceases to protect the body from acts of theft.

The responses of the varying jurisdictions outlined above show that the "no-property" rule in respect of dead bodies is not unassailable. Not having already decided the point, there is no necessity for the New Zealand courts to assiduously follow the strictness of the English approach, at least in respect of unburied bodies.[144] Notions of property could be extended to dead bodies and body parts by recognising a property interest in a dead body which vests "in the executors, or whoever else is now under the duty to dispose of [the corpse] and has a right to possession for that purpose".[145] Legal limits could be consciously applied to the property interest to prevent what might be considered to be far-reaching and undesirable

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[142] 1945 Scots Law Times 114.

[143] Above n 142, 116.

[144] Arguably buried corpses, or corpses dispersed following cremation, are adequately protected by existing statutory rules. For example, s 51 of the Burial and Cremation Act 1964 renders it unlawful to remove any body or the remains of a body from its burial place without a licence. Section 150(b) of the Crimes Act 1961 makes it a criminal offence to improperly or indecently interfere with, or offer any indignity to, any dead human body or human remains, whether buried or not.

[145] PDG Skegg "Human Corpses, Medical Specimens and the Law of Property" (1975) 4 Anglo-American Law Review 412, 417.

consequences - the possibility of commercial transactions involving the human body, for example, or the possibility of testamentary dispositions of bodies. This could be achieved simply by treating the property interest in the corpse "as one which could not be divested".[146]

In terms of policy considerations there are several reasons that would justify New Zealand's courts treating corpses and body parts as the subject of property so that actions for theft could lie in respect of them. From a purely legal viewpoint it is anomalous for the civil law to recognise property in a corpse - albeit a limited recognition - but for the criminal law to refuse to do so.[147] From a practical viewpoint, it would have the advantage of affording considerable protection to bodies and body parts used in medical research and teaching and increasingly in transplantation operations. While these areas may well be the more important beneficiaries of any amendment to the "no-property" rule in New Zealand, it is submitted that to recognise property in dead bodies and body parts would also, if only incidentally and on rare occasions, provide a further means of preventing coroners from wrongfully retaining body parts and provide some redress where they do. In particular, this development of the law would be of use in situations where body parts (excluding those tissue and fluid samples which may be legitimately kept by the pathologist for analysis) are retained permanently. In such a case, the law of theft may operate so as to enable the return of the missing part either before or after the burial of the corpse and to punish the offender.

That New Zealand's courts should not feel constrained from developing their own response to the question of property in dead bodies is strengthened by the fact that the English "no-property" rule is based on scant authority and largely unexplained or

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[146] Above n 145, 417.

[147] Above n 132, 625.

erroneous rationale.[148] The rule appears to originate, for example, from the writings of Coke who stated that "'[t]he burial of the *Cadaver* (that is, *caro data vermibus*) is *nullius in bonus*, and belongs to Ecclesiastical cognizance'".[149] Coke did not say, however, that corpses could never be the subject of property; rather, his comments were directed at corpses buried in consecrated ground.[150] Moreover, "the fact that corpses buried in consecrated ground were the subject of ecclesiastical cognizance, was hardly a good reason for regarding them as *nullius in bonus* at common law"[151] since other objects which are also the subject of ecclesiastical law do fall within the Common Law's protection.[152] From these uncertain origins the "no-property" rule has thus "assumed the proportions of an unalterable truth"[153] in English law, despite making up the *ratio decidendi* of only two English cases,[154] both of which have been criticised, perhaps with fatal effect.[155]

Amending the "no-property" rule as suggested above could also be achieved by legislative action. For several reasons such

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[148] Above n 134, 198.

[149] Cited in Mathews, above n 134, 198. See also Skegg above n 145, 412.

[150] Above n 145, 412. According to Coke's reasoning, corpses buried in unconsecrated ground, and therefore not protected by ecclesiastical law, would not be covered by the "no-property" rule. See also above n 134, 198.

[151] Above n 145, 412.

[152] For example, monuments and church fabric. Above n 145, 412 and above n 134, 198.

[153] Above n 132, 624.

[154] *Dr Handyside's* case, above n 56; and *Williams* v *Williams*, above n 46.

[155] See Mathews above n 134, 209-210, for a commentary on *Dr Handyside's* case. In fact, after considerable historical research, Mathews claims that (at p 210): "it is not a decision on the point [ie, the "no-property" rule], let alone one binding the courts to follow it". For a commentary on *Williams* v *Williams* see Skegg, above n 145, 416.

a course may well be preferable. Firstly, unless the issue is brought before the court for determination judicial development of the law cannot occur. Secondly, even if a case is brought before the court the particular facts may not allow for a full and authoritative explication of principle. If the law is to develop in this area then it is submitted that it ought to do so comprehensively and with the necessary safeguards (preventing commercial transactions, for instance) in place from the beginning. Thirdly, the judiciary may be inhibited by conservatism or inertia and choose not to amend the "no-property" rule. Fourthly, given the moral and emotional significance of the subject-matter, there may be merit in promoting wider public debate about, and seeking the public's input into, the suggested reforms. In particular, such development of the law may have ramifications for ethnic or religious minorities, as well as for the medical profession, that should be considered.[156]

VI CONCLUSION

The funeral and burial customs of all people are not just a ritualised means of disposal but are effectively "a commemoration of a life" and "an occasion to reassure and re-establish the social group".[157] Against this heady background of intense emotion, and perhaps sudden cultural and religious polarisation, the coroner cuts a potentially abrasive wound when he or she authorises a post-mortem examination. The enactment of the 1988 Coroners Act was in many ways a commendable and

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[156] For example, enabling prosecutions for the theft of a corpse may impact negatively upon Maori custom which not uncommonly gives rise to disputes over the place of burial of a deceased. Such disputes are in fact a manifestation of aroha for the deceased (above n 105, 22) and reflect the dead person's mana. Although in theory the law already favours one party's position in such disputes by upholding rights to the possession of a corpse for the purpose of burial, any further intervention of the law may be seen as unwelcome.

[157] C Nathan "Ethical and Legal Aspects to Death: The Burial" (1989) 8 Medicine and Law 455.

satisfactory palliative but it appeared to overlook the even deeper wound inflicted when the decision to retain body parts is made.

A central issue in this paper has been an interpretational debate as to whether the Coroners Act actually allows coroners to return incomplete bodies to families, whilst retaining body organs. The answer that has been proffered is that they may not, but irrespective of the ultimate determination of this point, there is a need to tackle the unnecessary retention of body parts however it may occur. In considering the issues it has been an underlying premise of this paper that the competing rights of the state and families must give way to compromise. Evidence suggests, however, that in practice families are sometimes the ones forced to yield the most, placed as they are in an institutional, and often cultural, imbalance with the coroner's office. Possible ways of addressing that imbalance have been canvassed herein; to categorise them broadly they either modify coronial law and practice, or they attempt to empower families by providing them with a means of challenging decisions when they feel that have been wrongly aggrieved. Some do both, directly or indirectly.

Society ignores its untreated maladies at its peril. Given that the retention of body parts is causing members of the community considerable anguish and concern, it is hoped that the problem will not be ignored by those with the ability to tackle it. It has been an aim of this paper to show that at least some of the power to do this resides with the families themselves, but this requires sufficient will and resources to engage the aid of the legal system. Furthermore, there are many potential barriers to success. Unless and until the coronial system also concedes some of its power an unequal balance is likely to remain and the anguish shall continue.

APPENDIX: Parts I and III of the Coroners Act 1988

PART I

PRELIMINARY

1. Short Title and commencement—(1) This Act may be cited as the Coroners Act 1988.

(2) This Act shall come into force on the 1st day of January 1989.

2. Interpretation—In this Act, unless the context otherwise requires,—

"Body" means a dead person, and includes—

(a) Any part of a person without which no person can live; and

(b) Any part of a person discovered in such circumstances or such a state that it is probable that the person is dead,—

whether or not the identity of the person concerned is known when the part is discovered or is later determined; but does not include a foetus or a still-born child:

"Death", in relation to reporting to a member of the Police, a Justice, or a coroner, includes the finding of a body:

"Disposal", in relation to a body, means burial or cremation; and includes all other lawful modes of disposing of a body; and "to dispose of" has a corresponding meaning:

"Doctor" means a registered medical practitioner:

"Immediate family", in relation to any person, includes persons whose relationship to the person is, or is through one or more relationships that are, that of de-facto spouse, step-child, step-parent, step-brother, or step-sister:

"Irrecoverable" means impossible or impracticable to recover:

"New Zealand" includes the Ross Dependency:

"Secretary" means the Secretary for Justice.

Cf. 1951, No. 73, s. 2

3. Act binds the Crown—This Act binds the Crown.

PART III

POST-MORTEM EXAMINATIONS

7. Coroner may authorise examination—With the authority of a coroner, a doctor (not being a doctor who, to the coroner's knowledge, attended the person concerned immediately before death) may—

(a) For the purpose of enabling the coroner to decide whether or not to hold an inquest into the death concerned; or

(b) Where the coroner—

(i) Is to hold an inquest into the death; or

(ii) Has opened and not completed an inquest into the death,—

perform a post-mortem examination of the body concerned; and in that case, the doctor shall give the coroner a written report on the results of the examination.

Cf. 1951, No. 73, ss. 6 (1), 10 (1)

8. Decision whether or not to authorise examination—In deciding whether or not to authorise a doctor to perform a post-mortem examination, a coroner shall have regard to the following matters:

(a) The extent to which the matters required by this Act to be established at inquests—

(i) Are not already disclosed in respect of the death concerned by information available directly to the coroner or from information arising from inquiries or examinations the coroner has made or caused to be made; but

(ii) Are likely to be disclosed by a post-mortem examination; and

(b) Whether or not the death appears to have been unnatural; and

(c) If the death appears to have been unnatural or violent, whether or not it appears to have been due to the actions or inaction of other persons; and

(d) The existence and extent of any allegations, rumours, suspicions, or public concern about the cause of the death; and

(e) The desirability of minimising the causing of distress to persons who, by reason of their ethnic origins, social attitudes or customs, or spiritual beliefs, customarily require bodies to be available to family members as soon as is possible after death; and

(f) The desirability of minimising the causing of offence to persons who, by reason of their ethnic origins, social attitudes or customs, or spiritual beliefs, find the post-mortem examination of bodies offensive; and

(g) The desire of any member of the immediate family of the person concerned that a post-mortem examination should be performed; and

(h) Any other matters the coroner thinks relevant.

Cf. 1951, No. 73, ss. 6 (1), 10 (1)

9. Early performance of examination—(1) A coroner who—

(a) Has authorised a doctor to perform a post-mortem examination of a person's body; and

(b) Is satisfied that subsection (2) of this section applies to the person or to a member of the person's immediate family,—

shall direct the doctor to perform it forthwith; and in that case the doctor shall do so.

(2) This subsection applies to a person if persons having the ethnic origins, social attitudes or customs, or spiritual beliefs of the person customarily require bodies to be available to family members as soon as is possible after death.

10. Observers at examinations—(1) A doctor who attended a person before death may be present at any post-mortem examination of the person's body authorised under this Act.

(2) A coroner may, by notice in writing to a doctor who attended a person before death, require the doctor to do either or both of the following:

(a) Be present at a post-mortem examination of the person's body authorised by the coroner under this Act:

(b) Give the coroner a report (containing information specified in the notice) relating to the person.

(3) Any doctor may, with the authority of a coroner granted on the application of any person, be present as the person's representative at a post-mortem examination authorised by the coroner under this Act.

(4) Any doctor may, with the authority of a coroner, be present as the coroner's observer at a post-mortem examination authorised by the coroner under this Act.

(5) Any member of the Police may be present at a post-mortem examination authorised under this Act.

Cf. 1951, No. 73, ss. 6 (1), 9, 10 (1)

11. Family to be notified—(1) A coroner who has authorised a doctor to perform a post-mortem examination shall, as soon as is practicable after doing so, take all reasonable steps to ensure that there is given to a member of the immediate family of the person concerned notice—

(a) That the performance of an examination has been authorised; and

(b) Of the coroner's reasons for authorising it; and

(c) That a copy of the doctor's report can be obtained under subsection (2) of this section.

(2) Where a coroner—

(a) Has authorised a doctor to perform a post-mortem examination of a person's body; and

(b) Has possession of the doctor's report,—

any member of the person's family may (without charge), after the expiration of 7 days after the completion of the examination, obtain a copy of the report from the coroner.

(3) A failure to comply with subsection (1) of this section does not affect the validity of any action.

12. Other inquiries and examinations—A coroner may cause to be made any inquiries or examinations, or commission any reports, (medical or otherwise), the coroner thinks proper—

(a) For the purpose of deciding whether or not to hold an inquest; or

(b) Where the coroner is to hold an inquest or has opened and not completed one.

Cf. 1951, No. 73, s. 10 (4)

13. Removal and disposal of bodies—(1) For the purposes of any examination under this Act, a coroner may give any directions the coroner thinks fit relating to the removal of a body.

(2) Subject to subsection (3) of this section, a coroner to whom a death has been reported may at any time, by written notice in the prescribed form signed by the coroner, authorise the disposal of the body concerned; and the body may be disposed of accordingly.

(3) A coroner who decides not to authorise a doctor to perform a post-mortem examination of a body shall not authorise its disposal earlier than 24 hours after notifying a member of the Police of the decision, unless a member of the Police of the rank of Senior Sergeant or above agrees.

Cf. 1951, No. 73, ss. 10 (5), 11

14. Early release of bodies—Subject to section 13 (3) of this Act, as soon as a coroner is satisfied that it is no longer necessary to withhold a body from family members, the coroner shall forthwith authorise its disposal.

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