

Dearly De-Parted: Bodies and the Law

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I. Bodies in the 21st Century

Body Donation Programs and Organizations [Transplant & Non-Transplant] (Institutional and Commercial) Gov't., Not-for-Profit & For-Profit donor programs and use, exhibitions of preserved whole bodies and body parts for profit. Use of new improved methods in the preparation of human tissues for teaching and research.

(sample specimens- polymer impregnated)

A. The Market for Body Parts

Institutional Medical-Dental Education courses; allied health training programs; "hands-on" surgical practice; funded research studies, continuing education seminars (accredited; non-credit), stand alone surgical and r/d training centers (commercial, for-profit), exhibitions of preserved whole bodies and body parts for profit.

B. Current Scandals

Institutional misappropriation of cadavers and body parts, Brokering in bodies and body parts. Importation of preserved bodies and body parts for commercial exhibitions. Use of donated vs. unclaimed decedent bodies. Interstate and International distribution unpreserved and untreated bodies and body parts for surgical practice at public, non-laboratory venues and sites.

C. Future Risks

Overall lack of Federal or state statutes or regulations governing the industry to meet the demand; a potential for criminal activity because of the money to be made; unintentional spread of infectious disease

II. Discomfort in the Law

A. Philosophical Concepts

1. Leibnitz-

animals are machines that may be dominated (and owned as property, people are something greater)

2. Locke-

natural law "every man has a property in his own person"

3. Hegel-

persons choose how they may yield personal bodily rights

4. Bentham-

utilitarianism- property rights exist only as a result of human labor- body not as property, but as something to be studied and used to improve human life

B. Historic Legal Use

The Initial Problem: The Good- Need for Bodies for Medical Education and Research, The Bad and Ugly- Grave Robbing for Profit, Unclaimed Bodies

1. English Law

a) Ecclesiastic Law controlled until the 19th Century

church took the body to itself for hope of resurrection

burial of the cadaver is "*nullius in bonis*" (*property of no person*)

b) Common Law

concerned with material considerations and property rights, initially restricted to protection of the monument and other tangible memorials of the departed

Blackstone- stealing of a corpse, though a matter of great indecency, is no felony (citing Hayne's Case)

Eventually in *Rex v. Lynn*, 2 T.R. 733, 100 Eng. Rep. 1389 (1788) held that body snatching was a common law offense.

c) The Solution

Use of executed criminal convicted of high crimes and misdemeanors for medical dissection, as a post-hanging penalty more punitive than being hung in chains until decomposed.

2. American Law

The practical problems remained- Originally, how to solve issues of who decides how someone may be buried, who is to pay for it, and how to provide an adequate number of cadavers for medical schools?

See, for an extensive summary of the background law, Percival Jackson, The Law of Cadavers and of Burials and Burial Places (2nd ed.;1950)

Now, how to deal with public issues about the human body and its biological parts?

a) Common Law

Yome v. Gorman, 242 N.Y. 395, 152 N.E. 126 (1926) (Cardozo, J.) The dead are to rest where they have been laid unless *reason of substance* is brought forward for disturbing their repose.

Moore v. Regents of the University of California, 51 Cal.3d 120, 793 P.2d 479 (1990) Landmark US case holding that wrongful use of cells of a leukemia patient by a research physician and university medical center did not state a cause of action for conversion, but did state one for lack of informed consent and breach of fiduciary duty. Declined to adopt a personal property analogy for body parts and instead looked to informed consent of a patient. Strong concurring and dissenting language suggesting that either enforcing a property interest in body tissue was appropriate, or, alternatively, the best path might be for a court to follow advice of Justice Brandeis and avoid the solving the dispute.

Brotherton v. Cleveland, 173 F.3d 552 (1999) allowed a 42 USC § 1983 action to survive a claim of qualified immunity against both a coroner and corneal transplant association for removal of the corneas of deceased against the express prior wishes of the decedent, according to his wife.

Washington University v. Catalona, 437 F. Supp.2d 985(2006) holds that Washington University, not a medical researcher or the patients, owns biological materials in research study. The court followed the reasoning in *Moore* and a federal 2003 Florida case in rejecting a property

interest in the donated materials. It also found that the researcher's informed consent form did not meet the standard of federal regulations and did not effectuate a transfer to him of the materials.

b) Statutory Law

National Organ Transplant Act, 42 USC §§ 273-274e(2) (1984) prohibits the acquisition or transfer of organs for transplantation if done for legal consideration, even to the donee.

2. Maryland Law

a) Case Law

Young v. College of Physicians & Surgeons of Baltimore City, 81 Md. 358, 32 A. 177 (1895) Coroner has authority to perform autopsy when manner and cause of death not certain and in order guard against the spread of infectious and contagious diseases, but post-mortem exam must not involve unnecessary wanton mutilation. However, autopsy ordinarily would disfigure the human body and give it an appearance which would shock the sensibilities of the family of the deceased.

Painter v. United States F. & G. Co., 123 Md. 301, 91 A. 158 (1914) Surviving spouse or next-of-kin have a quasi-property right in the body in the absence of testamentary disposition; the right is not a property right in the general meaning of property right, but is extending for the purpose of determining who shall have the custody of the body in preparing it for burial; exhumation is proper when justice requires it for legal purposes and the request is reasonable.

Snyder v. Holy Cross Hosp., 30 Md. App. 317, 352 A.2d 334 (1976) State has a compelling interest that overrides personal free exercise of religion interest in order to safeguard the peace, health, and good order of the community. Rights in a dead body exist ordinarily only for purposes of burial, and, except with statutory authorization, for no other purpose. When a death results from a criminal act or when the cause is such that the health and well-being of others may be adversely affected, post-mortem examinations by the State are a valid exercise of sovereign power. If an autopsy is required to ascertain the cause of death, it should be performed by the State Medical Examiner.

Venner v. State, 30 Md. App. 317, 354 A.2d 483(1976) *aff'd* 279 Md. 47, 367 A.2d 949 (1977) When a criminal defendant who swallows and then poops balloons which contain hashish oil and fails to assert a continuing right of property interest in his excretions, "the only rational inference is that he intends to abandon the material." The Court contrasted the behavior of the defendant in this case with a fictional

character in the John Barth novel, *The Floating Opera*, in which the character maintained his excrement in 129 pickle jars.

Dougherty v. Mercantile-Safe Deposit and Trust Co., 30 Md. App. 317, 354 A.2d 483(1976) When an interment takes place with the consent of the most interested party, the interment is regarded in law as a final sepulture. In this case, the wife was promised a burial slot next to her husband, but his sister was put into that slot instead. The appellate court left intact the judgment of the trial court not to disinter. It observed that there is no property in a dead body in a commercial or material sense.

Walser v. Resthaven Memorial Gardens, 98 Md. App. 371, 633 A.2d 466 (1993), cert. denied, 334 Md. 212 (1994) Opinion by J. Wilner summarizing the law of sepulture, going past prior statements to include Restatement (Second) of Torts § 868, which states "One who intentionally, recklessly, or negligently removes, withholds, mutilates or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body." The basis for the liability is essentially one of emotional distress. The appellate court in this case, involving poorly plead allegations by a mother of wrongful disinterment by a stepmother, upheld dismissal of the claims

b) Statutory Law

Md. Code Ann., Health-General Article, Title 5. Death:

Subtitle 3. Postmortem Examiner's Commission- This subtitle establishes law for when a body becomes a "medical examiner case" and the criteria for performing an autopsy.

Subtitle 4. Anatomy Board- This subtitle covers Maryland law on unclaimed bodies, distribution of body and body parts, partial prohibitions on the buying, selling and transportation of body parts, and permits a donor to provide by last will or by contract to direct disposal of last remains.

Subtitle 5 contains Miscellaneous Provisions, including a provision for the **Disposition of a Body other than by Will and Health Officer Control of a Body.**

Subtitle 6. Health Care Decisions Act includes provisions for **After Death Donation and Funeral Arrangements.**

Md. Code Ann., Estates and Trust Article, Title 4, Subtitle 5. Maryland Anatomical Gift Act allows an individual to devise their own body after death as heir chattel property and designate the use and interest to others separate from other real and personal property

Md. Code Ann., Health Occupations Article, Title 7, State Board of Morticians regulates the practice of mortuary science.

Disinternment is addressed in **Md. Code Ann., Health-General Article § 4-215 and Criminal Law §§ 10-402 to 403.**