

Rights in the Human Body: Wrongful Interference and Psychiatric Injury

KENNETH WARNER*

In the year 1999 a janitor employed by the Royal College of Surgeons in London was dismissed from his position when it was discovered that he was in the practice of taking away parts of human bodies which had been kept at his work place and using them as ornaments for his flat. He was also charged with theft and prosecuted in the Crown Court, where he was convicted. On appeal the Court of Appeal upheld the conviction.¹ The conviction seemed, *prima facie*, to be unsound, because nobody had provided any authority for the proposition that anyone could have property in a corpse. The College has a personal right to possession of corpses brought onto the premises for certain reasons by virtue of ancient Charter, but of course this is not legally the same thing. However the incident was newsworthy only to the extent of its very unusual nature. It was a circumstance unlikely to repeat itself and nothing more was made of it.² It did not seem necessary from a practical point of view to generalise from it to consider the property issue any more broadly. From an academic point of view however the incident did appear to raise an immediate conundrum. Apparently the police did return the exhibits which they had found to the College. However what would be the position had the College been so placed that it was necessary to turn to the civil law in order to pursue the return of the objects? How would the College frame the action? What would the cause of action be? Of course the same applies, absent any statutory provisions, to anyone else making a claim to body parts. Unless a party can establish a right to property in the corpse how can he assert a right to any part or parts of it, and what kind of right can that be? Academic, then, and interesting to the common lawyer perhaps. Little was it known at the time that events were already at work in Britain that just a few years later would raise these very issues on the public stage in a most significant and poignant form.

* Senior Lecturer, School of Law, La Trobe University

¹ *R v Kelly* [1999] QB 621. Leave to appeal on a point of law as to whether a corpse could constitute 'property' for the purposes of the law of theft was declined by the appeals committee of the House of Lords.

² A sentence of two years jail did appear excessive and was reduced on appeal to two months with a further period suspended.

In re Organ Retention Group Litigation ³

At an inquiry into the management of care of children receiving complex heart surgery held at Bristol Royal Infirmary in September 1999 it was revealed publicly that over a long period 'tissue' removed from the bodies of deceased children in the course of a post mortem operation had been retained at various hospitals around the country.⁴ The parents' consent had not been sought for this, and they had no knowledge at the time that it had been done.⁵ The bodies were returned to them for burial but, unbeknown to them, without one or more of the organs. In 2001 letters were sent out by hospitals to parents of these children informing them of this circumstance. This led to in excess of two thousand claims against the hospitals brought by parents so affected. Many sought the return of the deceased child's organ.⁶

Sometimes the organ was available and could be released to them. In other cases the organ had since been destroyed, so return was not possible. In the latter case the parents sought damages for an interference with their civil right in relation to the child's organ. Generally parents sought damages for psychological injury occasioned by them because of this practice and their belated discovery of it. All their claims were founded in tort. In the event, not only did they need to address the property issue apparently raised by the London janitor's case, but many other difficult issues of tort law more generally. Three 'lead claims' came before the English High Court of Justice.

The Harris claim⁷

Mrs. Harris, who had always desired a large family, became pregnant in 1995. Ten weeks into the pregnancy she was diagnosed as diabetic. At 20 weeks she and her husband were informed that it was likely that the baby would suffer from a rare and serious affliction and they were strongly advised by

³ [2005] 2 WLR 431, before Gage J.

⁴ In medical usage the term 'tissue' is taken to include body organs but this was not understood by some parents, which confused the issue of consent.

⁵ Under the Coroners Act 1988 (UK) and regulations made under that Act, in certain circumstances when a person dies in hospital the coroner must be informed. In the *Carpenter* claim, *infra*, the child had died shortly following surgery. This constituted a sudden death within the provisions of the Act. The coroner is empowered to direct that a post mortem operation be performed to ascertain the cause of death and appoint a pathologist for this purpose. In this case no further consent is necessary and the coroner has lawful possession of the body for as long as is necessary to achieve this purpose. This is known as the coroner's post mortem. In other cases the Human Tissue Act 1961 (UK) makes 'non-objection' of relatives a pre-condition of the post mortem, and in fact consent is sought. This is known as the Hospital post mortem.

⁶ Some parents wished to have the organs interred with the remains.

⁷ [2005] 2 WLR 358 @ 361-362.

their doctors to have the pregnancy terminated. They declined to do so. At 28 weeks Mrs. Harris was admitted to West Dorset General Hospital where by caesarian section her baby daughter was delivered prematurely. The baby was born with severe multiple abnormalities and died two days later in hospital. A post mortem operation was carried out in which the child's brain, heart, lungs and spinal cord were removed and retained in the Southampton University Hospital. Subsequently these organs were disposed of.

Mr. and Mrs. Harris averred that not only had they not given consent for the retention of any organs from the child's body but they had specifically stated that all organs removed must be returned so that they could attend to the child's burial.⁸ Apart from Mr. and Mrs. Harris' claims against the two hospitals for wrongful withholding of the body parts Mrs. v Harris brought a further claim for the psychiatric damage which she had personally suffered immediately following her appreciation of the events upon her reading the letter from the hospital in May 2001.⁹

The Carpenter claim¹⁰

Mrs. v Carpenter gave birth to her first child, a boy, in 1985. The pregnancy was normal and it was not until some twelve months of age that the child manifested any signs of illness, but in February 1987 he was diagnosed with a brain tumour. An operation to remove the tumour, which was found to be around the brain stem, was carried out at Southampton General Hospital. After some initial improvement the child's health rapidly deteriorated and he died in hospital a few days later. A post mortem was performed at the hospital and some days later the body was returned to Mr. and Mrs. Carpenter for burial. It was not until 2001 that by letter they were informed that the brain had been removed during the procedure and retained at the hospital. By that time the brain had been cremated. As with the *Harris* claim both parents sought damages for wrongful interference with the organ and in addition Mrs. Carpenter claimed damages for her depressive illness brought about by organ retention knowledge following her appreciation of the information in the letter.

⁸ Several years had elapsed since the events occurred and there was often a conflict of evidence over the discussions between the doctors and the parents. The judge preferred the evidence of the parents on these matters since he inclined to the view that given the drama of the situation to them it was more likely that the details would more clearly remain in their memory.

⁹ Referred to in the case and hereinafter as 'organ retention knowledge'.

¹⁰ [2005] 2 WLR 358 @ 362.

The Shorter claim¹¹

Early in 1992 Mrs. Shorter became pregnant with her first baby. At 40 weeks of pregnancy she went into spontaneous labour but the midwife who attended her at her home was unable to detect a foetal heartbeat, so she was admitted to the John Radcliffe Hospital in Oxford. An ultra-sound scan indicated no heartbeat and Mrs. Shorter was informed that the baby was dead. The following day Mrs. Shorter gave birth to a baby girl stillborn. A post mortem was carried out at the hospital and the body was returned and buried approximately one week later. It was not until November 2001 that the hospital informed Mrs. Shorter by letter that the brain and heart had been removed and retained by the hospital. Again the parents alleged a wrongful interference with the body parts sounding in damages in tort. Again Mrs. Shorter sought damages for her psychological injury brought about by the organ retention knowledge.

The organs: a tort of wrongful interference

All plaintiffs contended that the removal and retention of the body parts by the defendants constituted a tort actionable in itself,¹² although the stronger argument is that the retention and alteration and ultimately destruction of the organs is so actionable, since this avoids difficulties over the issue of consent. In some cases consent to perform the post mortem was not lawfully required. In others there was no dispute that consent was given, but there was doubt as to what the parents understood the post mortem procedure to involve. It was common ground, however, that the plaintiffs had not consented to the retention and usage of the parts. At common law an action in conversion may lie for a direct and intentional interference with the plaintiff's goods. It is established that conversion is a tort against possession, and there is authority that a plaintiff's constructive possession, i.e. a legal right to possess, is sufficient to found the action.¹³ Moreover as a form of trespass the tort is actionable *per se*.¹⁴ The problem facing all of the plaintiffs was whether they had any such right to possession of the deceased child's organs.

¹¹ [2005] 2 WLR 358 @ 383.

¹² A claim in deceit was abandoned; [2005] 2 WLR 358 @ 363. For a general history of conversion see S.F.C. Milsom, *Historical Foundations of the Common Law*, p.365.

¹³ *Bailiffs of Dunwich v Sterry* (1831) 1 B. & Ad. 831

¹⁴ The tort of detainee was abolished in the UK by the Torts (Interference with Goods) Act 1977. The action in conversion remains. D. Nicol, 'Property in Human Tissue and the Right of Commercialisation', (2004) 30 *Mon L.R.* 139 @ 150-152 discusses the possibilities in bailment and its attendant remedies. L. Skene, (2002) 2 *MacQuarie L.R.* 165 @ 170 argues that existing criminal laws appear to provide adequate protection against interference generally.

The few available authorities included the High Court of Australia decision in *Doodeward v Spence*.¹⁵ In 1870 a stillborn foetus had been removed by the doctor who preserved it in a jar with spirits. When the doctor died two years later his effects, including the jar, went to auction, where the jar was purchased by a stranger. On the death of the purchaser the jar passed with the rest of the estate to his son. So it was that after some 40 years, the jar, together with contents, was on display as part of an exhibition, and it was seized by police. An action for its recovery was allowed by the majority. The action was framed in detinue. Reviewing the earlier authorities, Griffith CJ. in the High Court found that there existed from very early times a right in family members to possession of, and delivery up of, a corpse for burial purposes, but this was a specific right derived from a duty to bury the deceased.¹⁶ More generally there could exist no property in a corpse.¹⁷ However where a person has lawful possession of a human body, and lawfully exercises some work and skill upon part of it, so that the part acquires attributes which distinguish it from an ordinary corpse awaiting burial, that person acquires some possessory right in the item capable of vindication under the law of trespass. He added, however, that the party has this right 'at least as against any person not entitled to have it delivered to him for the purpose of burial'¹⁸

The right to have the body delivered up for burial has been confirmed by the English courts in *R v Gwynedd County Council, Ex p B*,¹⁹ involving a local authority's decision to pass the body of a young child who had died in foster care to the natural parents for burial against the wishes of the foster parents.

In *Dobson v North Tyneside Health Authority*²⁰ a woman had suddenly collapsed while at work and was admitted the defendant hospital from which she was discharged after five days. Soon afterwards she became extremely ill and was admitted to the Royal Victoria Hospital in Newcastle. There she was diagnosed as suffering from two brain tumours, but she died before she could

¹⁵ (1908) 6 CLR 406

¹⁶ See, for example, *R v Vann* 2 Den 325; *Foster v Dodd* L.R.3.Q.B.67. The policy behind the rule, however, was about obviating a public nuisance.

¹⁷ The few early authorities are clear on this general rule; for example, Willes CJ., in relation to the action in trover, asserted that no person has any property in a corpse, 2 Easts Pleas of the Crown 652. There is a general discussion N.E. Palmer and E. McKendrick, eds. *Interests in Goods*, at pp. 25-34

¹⁸ (1908) 6 CLR 406 @ 414. In *Roche v Douglas* (2000) 22 WAR 331 in an application for DNA testing of tissue specimen of deceased to establish paternity the question of property arose, but this was for the purposes of the Supreme Court Rules. In a different context a general overview appears in Report of the Australian Law Commission, No.96, March 2003; 'Essentially Yours: The Protection of Human Genetic Information in Australia', Part E, s.20, 11-15, "Ownership of samples and Human Tissue Acts".

¹⁹ [1992] 3 All E.R. 317

²⁰ [1997] 1 WLR 596

be operated on. On the instructions of the coroner a post mortem operation was performed in the course of which her brain was removed and fixed. The cause of death was certified but no other report was made. The brain was returned to the Newcastle hospital where it was stored for some time and then disposed of. The patient's grandmother as executrix of her estate, and as next friend in respect of her son, commenced an action in negligence against the defendant (first) hospital. They contended that a routine CT scan would have revealed the presence of the tumours. Had they been benign the patient could have been treated and would have recovered. Had they proved to be malignant she probably would have died. It was important for their case, then, that they could ascertain the condition of the brain. However when their solicitors wrote to the second hospital in relation to this matter they were informed that neither any report nor the brain itself existed. In an action against the second hospital it was held that the defendants were not liable in conversion since the plaintiffs had no actual possession or immediate right to possession of the brain.

In relation to the organ retention situation, these authorities would suggest that given the hospital has lawful possession of the body, once an organ has been removed and 'processed' a right to possession of that part accrues to the hospital. However this leaves open the situation where the organ has simply been removed and retained. Even in the former circumstance the question is not clearly resolved, since it remains to be answered whether the parents right to possession of the body for burial means a right to the 'whole' body. It would appear that there are competing rights of possession.²¹

Negligence: the duty of care

The *Organ Litigation* plaintiffs alleged that the defendant hospitals, through their doctors, owed them a duty of care when pursuing their consent to a post mortem, which consisted of counselling them appropriately with respect to the nature of the medical procedure necessarily involved, and which included disclosure of the fact that organs would be removed and some might be retained, and, further, to comply with the plaintiffs' wishes with respect to the child's body. In relation to the *Harris* claim and the *Shorter* claim there was no difficulty over this issue, since the requisite duty arose simply by virtue of the doctor-patient relationship. In relation to the *Harris* claim, where a child is born alive and dies soon afterwards, the doctor must be under a duty to

²¹ There is isolated Canadian authority for the proposition that an *unauthorised* interference with constructive possession of a corpse is actionable; *Edmonds v Armstrong Funeral Home Ltd* [1931] 1 DLR 676; plaintiff claiming damages for mental suffering caused to him by unlawful autopsy performed upon deceased wife. See also R. Atherton, 'Who owns Your Body', (2003) 77 *ALJ* 178, @ 180-184. The author concludes @ 193: "The body/corpse lies in ambiguous zone."

advise the mother on the prospect for future pregnancies. This is supported by the fact that the stated purpose of the post mortem itself was to assist the doctors in ascertaining whether or not the child's abnormalities were genetic for the benefit of so advising Mrs. Harris. Much the same considerations were true of the *Shorter* claim. The *Carpenter* claim differed in that the patient was the child, and the defendants contended in effect that their professional duty stopped there. In their own evidence, however, the doctors agreed that their ethical sense dictated that they should to some extent proffer their assistance to the grieving mother in the direct aftermath of the tragic event. The judge found that a duty of care arose in all three situations.

Breach of duty

Much more difficult was the issue as to whether the defendants were in breach of their duty by failing to exercise proper professional care in the course of their discussions with the plaintiffs concerning the post mortem procedures.²² This involved both a question of law and a question of fact. On the former, generally speaking, not any and every risk of injury to a plaintiff will fall within the scope of the defendant's duty of care. As a matter of law the breach question is essentially one of risk management.²³ The duty is to take care to avoid foreseeable risks in the sense that the doctor should take care to address risks which should reasonably have been foreseen. On the factual issue the essence of the matter went to the proper scope of the aftermath counselling process, and that question involved, in so far as is relevant, what was appropriate to discuss with the mother in the context of medical and general knowledge pertaining to the time of the events rather than to the date of trial. Accepting that it was a delicate matter to decide in what sort of detail in explaining what would be involved in the post mortem operation to be performed on the deceased child of a newly bereaved mother, the judge reached the factual conclusion that given the importance of the crucial information, and given that the mother's level of distress in the course of these events was already such that divulging it was unlikely significantly to worsen it, the defendants were in breach of their duty of care by failing to do so.

The question remained whether the psychiatric illness suffered by the plaintiffs fell within the notion of 'reasonable foresight' for the purposes of determining the breach issue. Here the judge differed between the claimants

²² The court was referred to the so-called *Bolam* principle, from *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, according to which the court should be guided what is the practice of a responsible body of medical opinion. The judge concluded, however, that at the pertinent time there was actually no established practice relating to the post death discussions with relatives, [2005] 2 WLR 358, 409-413.

²³ See, for example, *Bolton v Stone* [1951] AC 850; dicta of Lord Porter @ 858 and Lord Reid @ 867; dicta of Mason J. in *Wyong Shire Council v Shirt* (1979-80) 29 ALR 217 @ 221.

in his conclusion since it was necessary to take into account all the factors of her personal life and disposition of which the doctor was aware at the time of the events.²⁴

Mrs. Harris was found to be a robust person who would not be expected by the ordinary treating doctor to collapse under the strain of organ retention knowledge.²⁵ The risk of psychiatric injury to Mrs. Harris as a result of failing to disclose the information was not sufficiently probable to bring it into the circle of the 'reasonably foreseeable'. For this reason the *Harris* claim failed. Similarly Mrs. Carpenter was found to be a 'well adjusted, practical and sensible woman' to the knowledge of her treating doctor.²⁶

Mrs. Shorter, however, at the time of the relevant consultation was obviously in an extremely distressed condition and emotionally fragile following the stillbirth. When asked in evidence whether he could have foreseen psychiatric harm resulting to Mrs. Shorter in the circumstances, a member of the obstetric team which had been treating her answered in the affirmative. In relation to the *Shorter* claim alone, then, the defendants were found to be in breach of their duty of care.²⁷

Psychiatric injury

Each of the lead claimants in the *Organ litigation* was found to be suffering from a psychiatric condition capable of sounding in damages in tort.²⁸ An analytical difficulty with the case arises, inasmuch as, in the tort of negligence, in modern law the question as to whether a defendant is liable for the infliction of a purely psychological injury is normally initially addressed in terms of whether any duty is owed by the defendant in respect of that type of harm. However in the instant case a duty of a general kind was found to have been assumed by the doctors in the course of dealing with the parents at the time of the death or stillbirth of the children.²⁹ Nevertheless there was argument as to whether the claimants, in the context of this type of damage, constituted 'primary' or 'secondary' victims. This is the dichotomy between the situation where the plaintiff is directly so affected by the defendant's negligent conduct and the situation in which the plaintiff suffers the psychiatric injury through

²⁴ See [2005] 2 WLR 358 @ 406

²⁵ [2005] 2 WLR 358 @ 416-417.

²⁶ [2005] 2 WLR 358 @ 421.

²⁷ [2005] 2 WLR 358 @ 407.

²⁸ Windeyer J. explains the distinction between grief and psychological injury in *Mount Isa Mines v Pusey* (1970) 125 CLR 383 @ 394.

²⁹ I would suggest that a way to deal with this, conceptually, where a general duty of care arises by virtue of an existing relationship between the parties, would be to treat the question of liability for psychological injury as an issue of remoteness.

an emotional reaction to the injuries inflicted upon another person.³⁰ The practical importance of the distinction lies in the fact that the law will more readily impose liability in the case of the former than the latter, largely due to the policy concern over the multiplicity of claims.³¹

Historically the prototype situation of the secondary victim is the case where the mother is afflicted with psychological illness as a result of the death or injury which the defendant causes to her child.³²

In relation to the 'secondary' victim, the various 'control' factors,³³ often collectively articulated in terms of 'proximity', are important in establishing a duty of care and therefore liability.³⁴ But there is scant authority for the proposition that a corpse is capable of constituting a primary victim for these purposes,³⁵ and one must have a primary victim before there can arise any issue as to a secondary victim. The court found the mothers to fall into the category of primary victims.³⁶ As such they were not affected by the 'control' factors;³⁷ the question was whether the defendants owed the duty of care for this damage through their direct dealings with them, not via any prior treatment of the children.

³⁰ An example of the former is *Page v Smith* [1995] 2 WLR 644; motorist in collision physically unscathed but suffering psychiatric injury. This situation is as old as *Dulieu v White* [1901] 2 KB 669. An example of the latter is *Jaensch v Coffey* (1984) 54 ALR 417; wife developing psychiatric illness as a result of injuries sustained by husband in motor collision. In Victoria, Australia, the Wrongs Act 1958 s.72 speaks of the second situation as 'pure mental harm' and codifies the common law.

³¹ See, notably, *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310; the famous Hillsborough football stadium tragedy.

³² The earliest successful case is *Hambrook v Stokes Brothers* [1925] 1 KB 141. Fathers were formally included under the rule in *Boardman v Sanderson* [1964] 1 WLR 1317. A historical survey appears in Kenneth A. Warner, 'Judicial Reasoning and Precedent: Negligently Inflicted Psychological Injuries', 1990, 10 *Legal Studies*, 63, 66-74.

³³ See generally N.J. Mullany and P.R. Handford *Tort Liability for Psychiatric Damage*, Ch.s 4, 5, 6, 7.

³⁴ See *Alcock*, n.19, supra; [2005] 2 WLR 358 @ 401-402.

³⁵ *Owens v Liverpool Corporation* [1939] 1 KB 394 stands alone in this regard and, although a decision of the Court of Appeal, is invariably ignored, and surely wrongly decided; defendants found liable to mourners travelling behind in cortege who suffered shock when tramcar collided with hearse causing coffin to spill onto the road.

³⁶ [2005] 2 WLR 358 @ 404-405.

³⁷ The House of Lords and the High Court of Australia have been proceeding in opposite directions in relation to controlling liability for psychiatric injury, with the former rewriting legal history in *Frost v Chief Constable of South Yorkshire Police* [1998] 3 WLR 1509, and the latter possibly commencing an unravelling of the law in *Gifford v Strang Patrick Stevedoring Ltd* (2003) 198 ALR 100.

Causation and damage

One of the most problematic aspects of the *Organ Litigation* case, both in terms of fact and law, is the issue of causation. I shall turn first to the findings of fact.

The Harris claim

The evidence was that the period of a year following the death of her baby was a particularly bad time for Mrs.Harris, but for a further period of three to four years after the death, she and her husband blamed each other. She had just begun to cope with the death and the fact that she could have no further children when she received the letter from the hospital. She underwent emotional collapse. Since that time she had nightmares and once again blamed her husband. She stated that there was no aspect of their lives that had not been affected by the organ retention knowledge.

However, in addition to the emotional trauma following the death of her child, Mrs.Harris had been afflicted by other problems, including her inability to conceive, behavioural problems of her stepson, who since 1997 had been living in the marital home, and her husband's general breakdown of health which left him unable to work.

By the date of trial she had been undergoing counselling and was taking an anti-depressant. Allowing for some divergence in expert opinion on the matter the judge found that Mrs.Harris was already suffering from some kind of recognised psychological disorder prior to her receiving the hospital's letter in May 2001. The judge found further that the letter and the connected organ retention knowledge exacerbated this disorder, making some contribution to her present condition.

However the judge accepted the expert evidence that that additional contribution would be negated once the effect upon her of the litigation itself was brought to an end. In factual terms, the damage, then, consisted of the aggravation of the plaintiff's condition for the period between the receipt of the letter and the cessation of the legal proceedings. The judge rejected the defence argument this was so minimal a contribution to Mrs.Harris' existing harm as to be insufficiently material to warrant compensation, describing it as 'small...but...material and quantifiable'.³⁸

³⁸ [2005] 2 WLR 358 @ 375.

The Carpenter claim

The situation following the tragic death of Mrs.Carpenter's young son was thankfully a happier one, and it was agreed that the event did not cause her to succumb to any psychological illness. However during the years which elapsed between the death and the time at which Mrs.Carpenter acquired the organ retention knowledge she experienced a number of other significant personal setbacks. In 1987 she had to terminate another pregnancy on medical advice. In 1990 she miscarried with a further pregnancy and was involved in a motor accident. In 1991 she had another miscarriage. In 1992 she and her husband were confronted with financial problems. In 1997 the sudden death of her aunt through illness caused Mrs. Carpenter to have a depressive episode. In March 2001 she received the hospital's letter. In September 2001 she was subject to an inquiry at work which resulted in her being suspended for 28 days. Following the organ retention knowledge Mrs.Carpenter had difficulty sleeping and experienced mood swings, irritability, poor concentration, breathlessness and panic attacks.

Again allowing for some differences in the expert testimony, the judge found that at some stage in 2001 Mrs.Carpenter suffered a recognised psychological disorder either due to the organ retention knowledge itself or because that very knowledge had rendered her susceptible to a psychological illness, although it did not occur until her problems over her employment eventuated in the following September. It was found that she had recovered from the psychological disorder at the date of trial but remained susceptible to it in the future. In factual terms, Mrs.Carpenter's damage consisted of her illness which subsisted between March and September 2001, and her future continuing vulnerability to psychological disorder.

The Shorter claim

Following the stillbirth of her child in 1992 Mrs.Shorter continued to grieve for a number of years. In 1994 she gave birth to a healthy daughter but there were some mixed feelings of guilt in this. After acquiring the organ retention knowledge she lost her confidence and went onto a course of anti-depressants. She was able to function adequately in the home. The evidence was that Mrs. Shorter had suffered a pathological grief reaction as a result of the stillbirth, and this was exacerbated by the organ retention knowledge for a period of approximately one year. Mrs.Shorter's damage, therefore, consisted of the degree of exacerbation of her initial psychological injury projected over one year.

Causation as a matter of law³⁹

It would appear from the above that each plaintiff's 'overall' psychological illness was brought about not solely because of the organ retention knowledge but by other events as well, stemming initially from the death of the child itself. In a number of relatively recent decisions the English House of Lords has appeared to return to a more traditional stance on the issue of causation, holding that it is incumbent upon the plaintiff to establish that the defendant's negligence was the predominant cause of the damage complained of.⁴⁰ In the event of other 'competing' factors this can be a serious problem for the plaintiff. A different view is that that the defendant may be liable if the defendant's negligence made a material contribution to the damage suffered.⁴¹ In the *Organ Retention* case, possibly one can conceptually view the exacerbation of the plaintiff's original condition due to the organ retention knowledge as distinct damage in itself. In that case on the evidence the causal link is clearly made out, but it must be admitted that this is not a comfortable distinction to make. Otherwise it is apparent that we do have competing factors in causation

³⁹ See generally H.L.A. Hart and A. Honore, *Causation in the Law*; H. Luntz, *Assessment of Damages for Personal Injury and Death*, p.135. J. Wright, 'Causation in Tort law', (1985) 73 *Cal. L. Rev.* 1735.

⁴⁰ In *Hoson v East Berkshire Area Health Authority* [1987] 3 WLR 232 a boy injured his hip when he fell several feet from a tree. He was admitted to hospital but his condition was not diagnosed until five days afterwards. He developed 'avascular necrosis' as a result of a failure of blood supply to the hip. On the evidence there was a 75% chance that this condition would have occurred regardless of the delay in diagnosis and treatment. The defendant hospital admitted liability for five days pain and suffering but was found not liable for the ongoing condition. In *Wilsher v Essex Area Health Authority* [1988] AC 1074 a baby born prematurely was administered excessive oxygen and found to be blind. A one-in-six chance that the error brought about the blindness was not sufficient to satisfy the requirement of causation.

⁴¹ In *Bonnington Castings v Wardlaw* [1956] 1 All E.R. 615 the House of Lords preferred an approach based on 'material contribution', Lord Reid opining that material contribution is a question of degree (@ p. 618). *McGhee v National Coal Board* [1972] seemed to endorse this approach. In *March v Stramare* (1991) 99 ALR 423 @ 429 Mason CJ. advocated an approach of applying common sense to the facts of each particular case, but this raises difficulties over predictability. In *Chappel v Hart* (1998) 195 CLR 232 the majority of the High Court of Australia appeared to follow the 'material contribution' approach. In civil systems where an Aquilian action is available the position appears to be the same, see, for example, *Minister of Police v Skosana* 1977 (1) SA 31 (A) 33 @ 34-35, 43-44. A comparison of the two approaches appears in A.I. Ogus, *The Law of Damages*, p.64. See also H. McGregor, 'Successive Causes of Personal Injury', (1970) 33 *MLR* 386. For an American view, see Robert J. Peaslea, 'Multiple Causation and Damage', (1934) *Harv. L.R.* 1127.

and the defendants' liability would have to be justified on the basis of the 'material contribution' version of the causation requirement.⁴²

Summary of outcomes

A tort of wrongful interference

The plaintiffs' argument that they were entitled to damages based upon some form of trespass could not be sustained. On the authorities their possessory right to a family member's body was qualified at common law and, in some cases, by statute. The common law recognises a right to possess a corpse for burial, though the prior removal of organs and its effect is undecided. The right derives from antiquity and does not rely on notions of ownership or property. Generally, the law does not recognise property in a corpse or its body parts, so that any action based on possession must fail. The major exception is where lawful work or skill has been exercised on the corpse, or its parts, which distinguishes it from a corpse awaiting burial. In such cases a property right may be recognised.

Negligence

On the basis of the decision most claimants, like *Harris* and *Carpenter*, would fail on the breach issue, since the finding was that psychiatric illness as a result of non disclosure of organ retention was not such a significant risk as to bring it within the range of the 'foreseeable'. The *Shorter* (and other like) claim(s) succeeded because the plaintiff's vulnerable condition, which was known to the defendant at the time, was such as to render that risk appreciable.⁴³ In all such cases the aggravation of pathological grief disorder brought about by the

⁴² With respect to the learned judge, whilst on one view fair as between the parties, this approach does not appear consonant with mainstream principle, and may be seen to invite confusion. A duty of care arose in these cases because of the professional relationship between defendant and plaintiff. The judge found as a matter of fact that there had been a breach of duty. In relation to the breach issue foresight is relevant only inasmuch as it bears upon the apprehension of risk; see, for example, *Roe v Minister of Health* [1954] 2 Q.B. 66. Risk of injury is one consideration involved in making that decision on the facts; If the organ retention knowledge was the operative cause of the plaintiffs' psychiatric harm (and there is considerable doubt over this on the facts), then the defendant should be liable for the whole of that claim.

⁴³ Exemplary damages were refused; [2005] 2 WLR 358 @ 419.

death of the infant itself into a psychological illness due to the organ retention knowledge constituted compensable damage.⁴⁴

As a conclusion, it would seem then, that the common law imposes some sort of duty to inform close relatives who are entitled to possession of the deceased's body for burial that organs have been removed in those situations where the law allows for a right to remove them. However such is the conflict of possessory rights that it does not follow that there will arise liability in damages in tort for a failure to do so.

In relation to the negligence claims, and the requirement that the plaintiffs must be demonstrably susceptible to psychiatric injury, it might be observed that the law has not imposed such strict requirements on mothers or fathers witnessing or apprehending the aftermath of the death of their children.⁴⁵

More generally we are left with a dilemma. In the view of the law psychiatric injury resulting in these circumstances falls outside of the range of foreseeable events. The experience of the litigation over these tragic circumstances would suggest that, in reality, it does not.

⁴⁴ The position in Australia would appear to conform with this, e.g. the Wrongs Act 1958 (Vic) s.74(1)(b) provides 'A person is not entitled to recover damages...for consequential mental harm unless...the defendant knew, or ought to have known, that the plaintiff is a person of less than normal fortitude and foresaw or ought to have foreseen that the plaintiff might, in the circumstances of the case, suffer a recognised psychiatric illness'. The position appears to be the same under legislation existing in the other states and territories; (s.34 Civil Law (Wrongs) Act (ACT); sw.32 Civil Liability Act 2002 (NSW); s.33 Civil Liability Act 1936 (SA); s.34 Civil Liability Act 2002 (Tas); s.5S Civil Liability Amendment Act 2003 (WA). However these provisions relate to the issue as to whether a duty of care arises. The position seems to be that provided psychiatric injury ought to be a foreseeable consequence of the defendant's negligence, a duty of care may arise, in which cases the vulnerability of this particular plaintiff to that consequence will not matter. Neither will any unforeseeable severity of harm under the rule in *Smith v Leech, Brain*. [1962] 2 Q.B. 405. If the plaintiff is unforeseeable in this sense, the claim should fail, either for want of duty, or for remoteness. See, for example, *Tame v N.S.W.* (2002) 211 CLR 317.

⁴⁵ See, for example, *Hambrook v Stokes Bros* [1925] 1 KB 141, *Boardman v Sanderson* [1964] 1 WLR 1317, *Hinz v Berry*, [1970] 1 All ER 1074, *Benson v Lee* [1972] VR 879.