# Organ retention and the Law of Tort

By Dr Cameron Stewart

Over the past five years, a number of public scandals have arisen in the UK, New Zealand and Australia about the practice of organ retention.

In the UK, organ retention practices were uncovered in the inquiry into the deaths of the 'Bristol Babies',[1] and further investigation led to the discovery of the longstanding practice of retaining children's hearts after postmortem at Alder Hey Hospital.[2] The later inquiry into the death of Cyril Isaacs showed that hundreds of dead Britons had had their brains removed without the consent of their relatives.[3] Similar practices were revealed at Green Lane Hospital in Auckland[4] (once again involving children's hearts) and, in NSW, Brett Walker's inquiry into practices at the Institute of Forensic Medicine at the Glebe Morgue described non-consensual forensic experimentation, surgery for 'practise', and the retention of brains, bones and other tissues.[5]

Generally speaking, organ retention occurs in the context of corpse examination, when there is some need to examine the corpse to determine the cause of death or to examine it in the interests of public health. Organs, and other human tissue, are taken at postmortem for analysis and, where possible, they are returned to the corpse before the corpse is buried. These removals of tissue uniformly occur in the context of coronial and postmortem powers which vary across jurisdictions, but which almost uniformly allow for removal of tissue only when it is necessary for the determination of death, or for reporting for public health purposes. Public scandals have arisen in this context because these powers to remove human tissue have been exercised without the knowledge of the relatives of the deceased, often in circumstances where the organs have not been used to determine death but rather for scientific purposes or collection, to which the relatives would not have consented.

## AB V LEEDS TEACHING HOSPITAL NHS TRUST [2004] EWHC 644

The public outcry over these practices and subsequent emotional and financial impact of discovering that part of an already buried or cremated relative had yet to be buried, led to two major class actions in the UK; the first dealing with claims relating to practices at the Alder Hey Hospital, and the second covering all other hospitals. The first class action was eventually settled, but in the second, entitled the Nationwide Organ Group Litigation (NOGL), 2,140 claims were made. It was agreed between the parties that three 'lead' claims would be heard to decide whether there was a tort for the wrongful interference with a corpse that would make recoverable damages for psychiatric injury, or whether a negligence claim might produce a similar result.

## THE THREE CLAIMS

All three claims concerned organs that had been removed from dead children in accordance with the terms of the *Human Tissue Act* 1961 (UK).

The first claimants, Karen and David Harris, had a child, Rosina, who suffered from a rare condition known as arthgryposis. Rosina died in 1995 after a few months of life. Her parents consented to an autopsy but on the grounds that all organs must be returned for burial. After autopsy, Rosina's brain, heart, lungs and spinal cord were removed and she

was cremated without them. The organs were later disposed of by the hospital.

The second claimant, Susan Carpenter, had a son, Daniel, who died in 1987 of a brain tumour at age two. Mrs Carpenter was against a postmortem but was told that the examination would only be of the operation site. However, Daniel's brain was removed without her knowledge. It was stored for a time and then cremated, but a number of wax blocks and slides of the brain were kept until 2001, when they were given back to Mrs Carpenter for burial with Daniel's other remains.

Denise Shorter was the third claimant. She gave birth to Laura in 1992, but Laura was stillborn. Mrs Shorter said she consented to a postmortem on the condition that any organs would be returned prior to burial, although this was not accepted by the court. The court found that she had consented to the examination, but that she had not been informed that organs would have been taken and retained. Laura's heart and brain were removed and not returned.

All the claimants became aware of what had happened in 2001 when letters were sent from the authorities to inform them that tissue from their children had been retained after postmortem examination. All the claimants sought damages for psychiatric injury arising out of the retention. It was not alleged that the organs had been removed without consent. Rather it was argued that the organs should have been >>

returned in accordance with the consents given and that the nature of the advice given to the parents at the time they gave consent had been negligent.

The claims were brought before Justice Gage whose decision was delivered on 26 March 2004. Only Mrs Shorter's claim was successful.

### A tort of wrongful interference with a corpse

All parties claimed that they had a claim for wrongful interference with the corpses of their children. Justice Gage examined the elements of the claimed tort of wrongful interference. It was argued by the claimants that the parents' duty to bury their children gave rise to a right of possession of the corpse. That right did not amount to a full-blown property interest. Rather there was no property in a corpse or its constituent parts unless some process of skill of labour had transformed the body part.[6] Nevertheless, it was claimed by the parents that their possessory rights also covered tissue removed during postmortem examinations. To deny the parents' right to bury the child with all its tissue was claimed be a wrongful interference with the claimed possessory rights.

It was argued by the defendants that organs had been lawfully removed under the *Human Tissue Act* 1961 (UK) and were, therefore, not subject to any right of burial by the parents. Moreover, they argued that the possessory rights of the parents had been extinguished by the superior property rights of the hospitals. That right was created in the process of removal and preservation, which was effectively a process of labour and skill which transformed the human tissue from a *res nullius* (a thing belonging to no one) into something capable of being classed as property.

Justice Gage agreed with the defendants and found that 'the principle that part of a body may acquire the character of property which can be the subject of rights of possession and ownership is now part of our law'.[7] His Honour found that the parents did not have possessory or property rights over the organs. Indeed, following the defendant's submission, he found that the hospitals' rights to the organs were superior to those of the parents.

Having found that the removal of the organs was lawful under the Act, his Honour found that there could be no action for wrongful interference. His Honour queried whether such an action would arise for unauthorised postmortems and recognised that such actions had been recognised in Scotland[8] and Canada,[9] but he made no final comment on the issue.

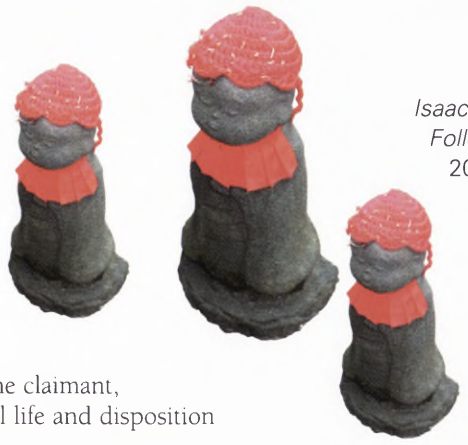
To the extent that the claimants were arguing that the parental consents had not been complied with, Justice Gage stated that there might be an action on that basis but it was better for such issues to be dealt with under a negligence claim rather than to create a new cause of action that might come without the in-built limitations of negligence.[10]

### Negligent infliction of psychiatric injury through organ retention

Justice Gage found that there was a general duty on the part of doctors seeking consent to postmortem examination to properly discuss such issues with the parents of the dead children. He rejected claims that the *Bolam* test alleviated the doctors from discussing such issues with parents. He found that the practice of the medical profession not to discuss such issues, while universally adopted, was not reasonable as 'a significant number, if not all, bereaved mothers of recently deceased children would want to know if organs from their deceased child were to be retained following a postmortem examination'.[11] The duty to discuss extended to doctors who had treated the child (and not the parents) as well as those doctors already in a relationship of doctor and patient with the claimant.

While the *Human Tissue Act* only required that the doctor look for evidence of non-objection to postmortem, the parents were entitled to a proper explanation of why a postmortem was needed and what would happen so that they could properly exercise their power to consent or object.[12] In that context it was reasonable for the doctors to be required to discuss issues of organ retention with the parents.

A general duty of care had therefore been established, but the claims had more hoops to jump before such duties were actionable. The claims could succeed only as claims for nervous shock. That, in turn, required the claimants to be categorised as either primary or secondary victims. Justice Gage found that the claimants were primary victims. Justice Gage then applied the rule in *McLoughlin v Jones*,[13] that damages can be recovered by primary victims only if:



- the illness which results is a foreseeable result of the specific act or omission upon which the claimant relies;
- there is a sufficient degree of likelihood that the type of loss in question, namely psychiatric illness, will occur;
- it is foreseeable that psychiatric illness would have been suffered by the claimant, given all those features of her personal life and disposition of which the defendants were aware;
- the standard by which the defendants are to be judged is the standard of the ordinary reasonable man in the circumstances of the defendant.

On an examination of the facts of the claims, Justice Gage found that only Mrs Shorter's subsequent illness would have been a foreseeable result of not being told about organ retention. Mrs Harris' illness was not foreseeable because she was said to be a robust person, 'unlikely to collapse under strain'.[14] Similarly, Mrs Carpenter was a 'well-adjusted, practical and sensible woman' and while it was foreseeable that she would be angry by what happened, it was not foreseeable that she would suffer a psychiatric illness.

Mrs Shorter's damages were assessed at £2,750 ($7,000) general damages and an amount as agreed for special damages and interest. Aggravated and exemplary damages were deemed to be unavailable because the doctors had not acted arbitrarily, unlawfully or outrageously.

## CONCLUSIONS

The case highlights the incongruent treatment of claims for the negligent infliction of psychiatric injury in the UK in that, despite the court's accepting that the defendants had acted in a manner universally
condemned and which resulted in considerable pain and suffering, damages were not recoverable where the parents appeared robust enough to cope with the knowledge that their deceased children's organs had been retained against their wishes.

The decision is disturbing in its effective silencing of the traditional rights of families, giving an iron-clad protection to medical interests. While the use of children's organs in this case was not commercial, it potentially endorses the commercial use of organs by transmogrifying them into property.

More useful for the Australian plaintiff is the recognition that even when a statutory duty to look for objection to postmortem examination has been satisfied, an actionable duty to seek consent may nevertheless arise. This small victory might be salvageable for the hundreds of Australian plaintiffs currently considering claims. ■

**Notes:** **1** Bristol Royal Infirmary Inquiry, *Learning from Bristol: the report of the public inquiry into children's heart surgery at the Bristol Royal Infirmary 1984-1995* (2001). **2** The Royal Liverpool Children's Inquiry, *The Royal Liverpool Children's Inquiry Report* (2001). **3** J S Metters CB, *The Isaacs Report – The Investigation of Events that Followed the Death of Cyril Mark Isaacs* (May 2003). **4** See, generally, New Zealand Ministry for Health, *Review of the Regulation of Human Tissue and Tissue-based Therapies discussion document* (April 2004) and DG Jones and KA Galvin, *Retention of Body Parts: Reflections from Anatomy* at *http://anatomy.otago.ac.nz/publications/Retention_of_body_parts.pdf* (1 July 2004). **5** B Walker SC, Inquiry into the Matters Arising from the Postmortem and Anatomical Examination Practices of the Institute of Forensic Medicine (2001). **6** *Doodeward v Spence* (1908) 6 CLR 40; *Dobson v North Tyneside Health Authority* [1997] 1WLR 596; *R v Kelly* [1999] QB 621. **7** At [148]. **8** *Pollok v Workman* [1900] 2F 354 and *Hughes v Robertson* [1930] SC 394. **9** *Edmunds v Armstrong Funeral Home Ltd* (1931) DLR 676. **10** At [161]. **11** At [230]. **12** At [206]. **13** [2002] 2 WLR 1279. **14** At [253].

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