Case Commentary

Case

You are approached by a neonatal intensive care nurse who is visibly distressed. He is concerned about the treatment of a neonate under his care. The infant died after serious complications due to the infant's prematurity. After the infant's death a new registrar, under guidance of the senior consultant, attempted to intubate it (intubation involves carefully placing a tube into the lungs in the event of respiratory failure). The infant's parents were not present at the time.

When the nurse asked the senior consultant what was happening, the response was that it was essential for the junior registrar to know how to intubate before it was necessary in a medical emergency. When the nurse asked the consultant if the infant's parents had been asked, she replied that they had not. The reason given was that it was an extremely stressful time for parents. To ask them to consent to this would only add to their grief. Furthermore, practising intubation is quick and harmless to an infant who is already dead. What do you say to the NICU nurse? Do you suggest to the NICU that the consultant is right?

Commentary One

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For the consultant to be right in this situation, there would need to be an acceptance that people lose their rights once they have died and that it is acceptable for health professionals to make decisions about children instead of the parents if the child is dead.

There is no evidence that there would be public support for such views. There is more likely to be an expectation that deceased people are treated with respect and dignity and that those acting on their behalf are included in discussions and decisions about what will happen to the dead person. Equally likely is the expectation that principles of consent will still apply, even though a patient has died. Even though this case involves a baby, acknowledgement that the rights of a deceased person are important is reflected in wills.

In addition the health professionals involved with this case are morally, ethically, professionally and legally bound to apply informed consent provisions to all health care procedures. The importance of this was emphasised by Judge Cartwright in the Report of the Cervical Cancer Inquiry 1988. The Code of Rights that was subsequently developed applies to teaching and research situations and no exception to this is stated in the Code in relation to patients who have died. The consent process is not just relinquished upon death.

The Code of Rights emphasises the right of the parents (in this case) to be informed, to be provided with a satisfactory explanation and for communication that is open, honest and effective. The parents have the right to legal, ethical, professional and other relevant standards in relation to the way their baby is dealt with. They also have the right to agree to their child being involved in a teaching situation and to say no. Even though the loss of the baby will be distressing, parents should still be presumed to be competent to make decisions about what happens to their baby. They will have to make difficult decisions about a number of things including a post-mortem and funeral arrangements.

It is not reasonable to assume that the loss of the baby means consent issues are too much to deal with. The parents still have the right to be asked if they are willing to provide consent, just as they would be asked for a live child to be involved in a teaching situation.

It is also reasonable for parents to trust that they will be consulted about matters relating to their baby. The failure to consult with the parents and seek their consent to the teaching situation is a breech of trust as well as a breech of their rights as the parents of the baby. Parents who agree to the teaching situation might want to be present for the procedure and may want to hold the baby whilst the intubation is carried out. There may also be cultural and spiritual aspects relating to the care of the dead baby that don't appear to have even been considered.

The notion of implied consent because a patient is in the hospital or because they have died and the procedure therefore cannot harm them is not acceptable. The baby is also not the property of the hospital, with unrestricted access by staff, and shouldn't be treated as such.

The suggestion that the junior registrar won't know enough to be able to act in an emergency situation unless dead babies can be used for teaching purposes is also untenable. Other options for teaching that complement hands-on learning, such as audio-visual and simulated aids, are available.

There is an arrogance in this situation, where teaching requirements are placed ahead of patient rights because the baby has died. The assumption of the consultant also undermines the level of public goodwill towards teaching and the training of health professionals. Some parents in this situation might feel it is very important for their child to participate in teaching situations that may help other babies and therefore give some purpose to their death – others might be appalled at the thought.

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Commentary Two

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The New Zealand Law

The legal status of newly deceased bodies

In law, newly deceased bodies are not the subject of property; they are not owned by anyone. It has long been accepted that this is so, and in consequence of recent judicial decisions this aspect of the law is better established than it has ever been.

The Human Tissue Act 1964

The Human Tissue Act 1964 provides for the authorisation of the removal and use 'for therapeutic purposes or for purposes of medical education or research' of *parts* of the bodies of people who have died. It does not make specific provision for the use of *whole* bodies for these purposes – except insofar as this involves a post-mortem examination of the body or an anatomical examination.

However, it does not follow that it is necessarily unlawful to use whole corpses 'for therapeutic purposes or for the purposes of medical education or research'. The relevant provision of the Human Tissue Act specifically provides that:

> Nothing in this section shall be construed as rendering unlawful any dealing with, or with any part of, the body of a deceased person which is lawful apart from this Act.

There is reason to believe that such activities can be 'lawful apart from this Act'.

Criminal liability–

Section 150 of the Crimes Act 1961 provides that:

> Every one is liable to imprisonment for a term not exceeding 2 years who – . . .
>
> (b) Improperly or indecently interferes with or offers any indignity to any dead body or human remains, whether buried or not.

Over the years, a great many things have been done to corpses, without legal authorisation but 'for therapeutic purposes or for the purposes of medical education or research'. Criminal prosecution, much less conviction, does not seem to have ensued. There would be a reluctance to hold that there was an improper interference with a corpse when ventilation was continued (as it often is) to prevent vital organs from deteriorating while authorisation was being sought for the removal of organs for transplantation, or while arrangements were being made for the removal to take place. The intubation of newly deceased neonates, so doctors can be better trained to deal with the intubation of still-living neonates, has some things in common with such practices. However, a distinction could be drawn.

It is not possible to be entirely confident that intubation for the purpose of medical education would not be regarded as an improper interference with a corpse: much would depend on the judge's, or the jury's, assessment of the case for the practice. If parental consent had been given, a prosecution would be extremely unlikely. However, there is very little indication of what (if any) medical uses of a corpse will be regarded as improper, and to what extent the consent of a relative is a relevant consideration in making that assessment.

Civil liability

Although no one owns the body of a recently deceased person, certain people do have a right to possession of it for particular purposes. If the coroner is involved, the coroner has the prior right to possession of the body. The person who is charged with the duty of disposing of the body usually has the next right to possession of it, for the purpose of disposal.

In the absence of an executor, it is frequently unclear who has the duty to dispose of the body and hence the right to possession of it for that purpose. However, it seems reasonable to assume that the parents of a newly-deceased child do have such a duty, and hence right.

If, after a reasonable time, the hospital authorities failed to comply with a request from the person who was entitled to possession that the body be made available, there would be a possibility of recovering damages for an interference with this right. If parts of the body were withheld without legal authorisation following a post-mortem examination, damages might also be recoverable. However, it is very difficult to see how the brief intubation of a dead neonate would interfere with any legal right to possession of the body for a legally recognised purpose.

If a parent learnt that intubation had taken place, and could establish that this news (rather than that of the death of the child) was the reason why a recognised psychiatric disorder resulted, there would be the possibility of recovering damages for nervous shock.

The Code of Health and Disability Consumers' Rights does not create any criminal offences, but breach of the Code can give rise to civil liability. The Code may therefore be thought to merit attention in this context. The specific provisions of the Code which appear to have a bearing on what is done with body parts after death do not purport to apply to ventilation or intubation, and the more general provisions do not have any bearing on what is done to a body after the person has died.

Conclusion

The intubation of a newly deceased neonate, for the purpose of medical education, is unlikely to result in civil or criminal proceedings, whether or not parental consent is obtained. However, there is some uncertainty about the interpretation of section 150 of the Crimes Act 1961.

Commentary Three

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An Australian Perspective

Anglo-Australasian law is still deeply ambivalent about the legal status and meaning of the human corpse. As yet, it has failed to formulate a precise legal definition of this entity, and indeed legal pronouncements about what can be done lawfully with the dead are usually made with conspicuous uncertainty and unease. Part of the problem seems to stem from the limited conceptual vocabulary of law. There are only two major legal categories into which the corpse might be fitted, that of legal person and property, a fundamental division of legal matter which goes back to Roman law and which remains within the modern common law. However, neither concept seems quite to suit the corpse.

The implications of something being designated either person or property are considerable. If something is a legal person, then it not only has legal standing but it also tends to have moral status, which is why animal-rights activists have striven to have the higher primates included in the category of legal person. When something is a legal person, it demands treatment with dignity. (This is clearly not so in relation to artificial entities such as the corporation, but it is certainly true of biological beings.) The offences against the person, such as assault, homicide and rape, can only have persons as their victims. Thus an animal cannot be murdered, only destroyed, though it can be bought and sold – precisely because it is a form of property. Nor can an animal bring an action in law or assert any legal rights.

Legal death is usually said to coincide with biological death, which would seem to indicate that the corpse is not a person; and certainly it is the case that a corpse cannot be the victim of an offence against the person and so it cannot be assaulted or raped. Does it follow therefore that a corpse is a form of proprietary interest? Is the human corpse akin to a live animal in this respect? Consistently, the English and Australian courts have said that it is not, even though they have tended to draw on the language of property to describe the body of the deceased. Thus the courts have insisted that the corpse is not to be treated as any sort of commercial interest – that it cannot be converted, bought or sold (which is why the early body-snatchers were safe from charges of the capital offence of larceny). And yet the courts have also recognised a right to possess the corpse, before it is interred or cremated, which strongly suggests some sort of quasi-property interest. Nevertheless the person who possesses the body is not in most senses of the word its owner and so cannot claim damage to, or interference with, her property. The principal reason why the courts have objected to the idea of the dead body as property is that it seems to strip it of all humanitarian considerations.

Despite this legal uncertainty about what the corpse actually is, there exist various legal forms of protection for the dead (though perhaps it would be more realistic to say that the following laws are concerned about the sensibilities of the living, not the dead). In most states of Australia, there are statutory offences of misconduct with regard to corpses or human remains. Such offences usually entail the improper or indecent interference with a dead human body or the treatment of a body with indignity. The New Zealand Crimes Act 1961 also includes the offence of 'misconduct in respect of human remains' framed in similar terms. In the case before us, it could therefore be argued that the neonate has been treated with indignity and that the registrar could be charged with misconduct in respect of human remains and that perhaps the consultant could even be said to have aided and abetted this offence. However the registrar could reply that the procedure was performed with care, that the corpse was therefore not treated with indignity and that none was intended. To my knowledge, there is no case law offering an interpretation of these provisions, so here we are on uncertain ground.

A more straightforward legal objection to the intubation of the neonate is that it has failed to conform to the requirements of the New Zealand Human Tissue Act 1964. Under that Act, the performance of an anatomical examination other than in accordance with the Act constitutes an offence. In order to comply with the Act, the person who is lawfully in possession of the body (who in this case would be the Medical Superintendent of the hospital), would have to authorise the body to be used for the purposes of anatomical examination (that is, for the purpose of the study of anatomy) and then only after she had assured herself, having made reasonable inquiry, that the surviving relative did not object to such an examination. Clearly this was not done here and so arguably an offence has been committed. In addition, the Act demands that the examination be conducted 'in an orderly, quiet and decent manner'. From the facts before us, it is not entirely clear whether these requirements were satisfied, though the reaction of the nurse may suggest that they were not.

In reply, it might be said that the procedure performed on the neonate did not fall within the Act because it was not for the purpose of the study of anatomy. The Human Tissue Act refers to the removal of the body to a school of anatomy for examination, which would strengthen the argument that the Act does not, strictly-speaking, cover intubation immediately after death within a hospital. And yet such a literal reading of the Act undermines its spiritual purpose, which is surely to ensure that procedures are not performed on deceased persons without the relevant consent. And although academic legal opinion on the subject is divided, a strong case has been made for the performance of procedures on the dead only with the knowledge and consent of relatives. It is felt that this best conforms with the principles of autonomy and privacy embedded in our liberal law.

We might also consider whether the relatives could recover damages for emotional distress should they learn of the procedure. While certain American states have been willing to offer a remedy in similar circumstances, it is unlikely that the courts in Australia and New Zealand would look favourably on such a claim. And of course the relatives could not sue for damage to, or conversion of, their property because the corpse is not a proprietary interest.

My advice to the NICU nurse would be that the consultant was not right. Although the governing law lacks the clarity we might seek, it is more consistent with the proposition that procedures should not be performed on the newly-dead for the purposes of medical education without the consent of the surviving relatives.