# Judicial Avenues in Organ Retention Cases

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The controversy surrounding organ retention raises questions about the law's capacity to deal effectively with revelations of former practices hidden from public view.

## IRELAND

The failure of the Dunne Inquiry, the restricted terms of the Madden Inquiry, and the lack of any legislation governing this area has left affected families with little option but to seek answers and redress in the judicial arena.

There are thousands of organ retention cases being taken to the High Court by members of the group "Parents for Justice". This group claims that unauthorised Hospital Post-Mortems (HPMs), unauthorised removal and retention of organs following HPMs and Coroner's Post-Mortems (CPMs), and the unauthorised supply of pituitary and thyroid glands to pharmaceutical companies for nominal payment was standard practice in hospitals around the country. Families also claim that in some cases they were led to believe the post-mortem being carried out was a CPM, which does not require consent from the deceased's next-of-kin, when it was in fact a HPM. These cases have put forward various legal arguments including negligence and conversion.

Two of these cases have been heard, *Bridget and Terence Devlin v The National Maternity Hospital*, unreported, High Court, July 1, 2004 and *O'Connor and Tormey v Lenihan*, unreported, High Court, June 9, 2005. Both cases were struck out. There is also a case currently being heard by the High Court, *Tierney Quirke v Prendergast*. This article will consider these cases as well as the British case of *AB v Leeds Teaching Hospital* [2004] EWHC 644 (QB) and examine the strengths and limitations of several possible heads of claim.

*Devlin* concerned a claim of unauthorised organ retention, following an unauthorised HPM. The latter claim was statute barred. There was uncontradicted evidence from two doctors that in the 1980s it was accepted practice that, where there was consent to the carrying out of a post-mortem, it was implicit that the pathologist had permission to remove and retain organs. The evidence was clear however, that consent from the next-of-kin was required before a HPM could be carried out. Based on this evidence the court held that as there was no consent to the HPM there was no entitlement to carry it out. The defendants therefore "owed a duty not to interfere with the remains of the deceased [and] it [was] reasonably foreseeable that had they done so, as they did, it was probable that the plaintiff would suffer distress on that account". The court did not elaborate any further as to whether there might to be a duty of care to advise patients as to the possibility of organ retention when seeking their consent to a post-mortem.

Although a duty of care was established, the plaintiffs were unsuccessful in their claim for nervous shock. The court had regard to the criteria laid down by Hamilton CJ in *Kelly v Hennessey* [1995] 3 IR 253 as approved by the Supreme Court in *Fletcher v Commissioner of Public Works* [2003] 2 ILRM 94, and held that the plaintiff had established all but the fourth element of their claim: that the nervous shock sustained must be by reason of an actual or apprehended physical injury to the plaintiff or a person other than the plaintiff.

The *O'Connor* case concerned the unauthorised retention of organs of the plaintiffs' two children following authorised HPMs. The court dismissed the case, holding that the plaintiffs had failed to establish that they were suffering from a psychiatric illness recognised by law as attracting damages. The court also stated that in any case the plaintiffs had failed to discharge their onus of satisfying the court, by adducing expert evidence, that there was a duty of care on the hospital to avoid the allegations in the particulars of negligence.

The current case of *Tierney Quirke v Prendergast* concerns a plaintiff mother who discovered her deceased son's body parts in Tralee General Hospital where she was working as a cleaner. A CPM was carried out and her son's brain and lung tissue were allegedly retained without her knowledge or permission. The plaintiff is claiming negligence and breach of

duty, and that the defendants' alleged conduct caused her extreme stress, anguish, panic, and sleeplessness resulting in the loss of her job.

## ENGLAND

In England, the Alder Hey and Bristol inquiries, and the public outcry that followed led to a number of legal claims made against different hospitals in England and Wales. As there were many common features, they were grouped together in two class actions, one relating to Alder Hey (RLCL), and one relating to all other hospitals (NOGL — Nationwide Organ Group Litigation). The RLCL group settled in 2003 with an out-of-court settlement of £5 million (£5,000 per child). The NOGL claim was not settled, however, with an offer of £2 million (approximately £1,000 per child) being turned down.

The 2,140 claims on the NOGL register were represented by three lead claims in the *AB* case in March 2004. All three claims were taken by parents and concerned damages for psychiatric injury caused by the alleged unauthorised removal, retention, and disposal of organs without the knowledge or consent of the claimants. Unlike the Irish cases, there was no question of lack of consent to the post-mortems. The court held that the UK Human Tissue Act 1961, which has no equivalent in this jurisdiction, provided no basis for a claim. The court based its decision on common law which makes it particularly influential from an Irish perspective. The two categories of claim worthy of substantive consideration were negligence and wrongful interference (conversion).

### Negligence

This was only pleaded in the case of HPMs. Based on expert testimony, Gage J found that clinicians who counselled bereaved relatives about a post-mortem owed them a freestanding duty of care, which extended to "an explanation of the purpose of the post-mortem and what it involved including alerting them to the fact that organs might be retained".

The court stated that, with reference to Lord Browne-Wilkinson in *Bolitho v City and Hackney Health Authority* [1998] AC 233, at 241 it was "unable to accept" the universal practice, as put forward by the experts' testimonies, of not explaining to parents when seeking consent to post-mortems, that it may involve the removal and retention of organs, so as not to further distress the parents involved. The court considered that the practice was a blanket one carried out by virtually all clinicians and there was no evidence that clinicians considered the matter individually with each parent or family. In the court's opinion there was very little risk of parents being caused greater distress by being given the additional information. The standard of care was breached in all of the cases; (though only one claim succeeded, as the other cases were defeated by issues of causation and foreseeability).

### Wrongful Interference (Conversion)

To satisfy this claim, the claimants had to establish an entitlement or duty to possess the body of their deceased child and the interference by the defendant with that entitlement or duty by retaining or disposing of body parts without lawful authority.

The claimants submitted that, after the post-mortems, when the bodies were returned for burial, the organs should have been returned to the parents. This was argued on the basis that parents have a duty to bury their deceased children, as articulated in *R v Vann* (1851) 2 Den 325 and a consequent right to possess the body and all its parts.

Gage J approved *R v Kelly*, [1989] QB 621 , which applied the principle that there is no property in a corpse, and further accepted the *Doodeward v Spence* (1908) 6 CLR 406 exception to this, which states that a human body or part thereof which has acquired some attributes differencing it from a mere corpse as a result of the application of skill may be subject to possessory rights by the person who carried out such transformation "at least as against any person not entitled to have it delivered to him for the purpose of burial". The Court held that the parental duty to bury was not absolute, and its historical purpose was to prevent a nuisance caused by unburied bodies.

The claimants, in support of their claim for wrongful interference, cited a number of cases in other jurisdictions where the tort was recognised. These included two Scottish cases: *Pollock v Workman*[1900] 2 F 354 and *Hughes v Robertson*, 1930 SC 394, and a Canadian case, *Edmonds v Armstrong Funeral Home Ltd* [1931] DLR 676. The court held, however, that unlike those cases, which all involved unauthorised post-mortems, the post-mortems in the lead cases had all been consented to, and the bodies were therefore in the lawful possession of the pathologists at the time the organs were removed. The crucial question was therefore whether parents had any possessory rights in the organs once a post-mortem and attendant examinations were completed.

The court considered that the skill required to dissect and fix a child's organ, and subsequently produce blocks and slides, brought it within the *Doodeward* exception. Once the post-mortems were completed, the pathologists became entitled to possess the organs/blocks and slides at least until a better right was asserted. In relation to the statement in *Doodeward* that such a right to possession might be trumped by a person entitled to have it delivered to him for the purpose of burial, Gage J pointed out that in *Doodeward*, the body had never been buried, but in the instant proceedings the bodies had been buried before the process of examination of the organs was completed. The argument that parents were entitled to possess the bodies in a state as anatomically complete as was reasonably practicable in the circumstances was dismissed on the grounds that it was impracticable, given that some tests take up to eight weeks, and certain blocks and slides were extremely small. The court therefore concluded that in the three lead claims there could be no action for wrongful interference.

## FUTURE CASES

### Negligence

With regard to HPMs, there are a number of barriers to a successful negligence action in organ retention. These include the evidential difficulties surrounding causation in untangling the effect of the non-disclosure from the underlying grief process, foreseeability, and statute of limitations issues. These hurdles however, are factual and can be overcome depending on the circumstances of the case.

Legal obstacles include extending the duty of care to situations where HPMs were consented to, but organ retention was not. Since *AB* was not decided on the basis of the Human Tissue Act 1961, it is possible that, if similar evidence regarding a continuing duty of care had been adduced in *O'Connor & Tormey*, a similar result would have been achieved. In fact, Peart J referred to *AB* where he stated that there "was expert evidence of the kind which I have found lacking in the present case, however any detailed consideration of that case should I feel await another occasion when perhaps a case will come before the court with the necessary evidence called". Once the HPM is complete, a strong argument can be made that there is a duty of care on the pathologists to seek further consent for use of organs for research projects or for supplying the organs to pharmaceutical companies, especially where there is a commercial element to the transaction. This situation is more akin to transplantation where consent must always be obtained. Since *Devlin* already recognised a duty of care to obtain consent for HPMs, extending this duty of care to obtaining informed consent would appear consistent with the incremental approach adopted in this jurisdiction in *Glencar Exploration plc v Mayo County Council* [2002] 1 ILRM 481.

The limitations imposed by the law in relation to nervous shock, in particular *Kelly v Hennessey* [1995] 3 IR 253, may prove to be an insurmountable obstacle. Deirdre Madden has observed that *Devlin* "illustrates the courts' reluctance to extend nervous shock beyond existing criteria" (2004) MLJI 76, at 82. The plaintiffs must suffer a recognised psychiatric injury which arises from actual or apprehended physical injury to the plaintiff or some other recognised person. However in no case was there a question of anyone actually being physically injured, or in fear of being injured. All successful Irish cases so far would seem to have fulfilled this requirement, e.g. *Byrne v The Great Southern & Western Railway Company* unreported, cited at 26 LR Ir 428; *Bell v The Great Northern Railway Company of Ireland* (1895) 26 LR Ir 428; *Mulally v Bus Eireann* [1992] ILRM 722; and *Kelly v Hennessey,* [1995] 3 IR 253. Even in *Curran v Cadbury Ireland* [2000] 2 ILRM 343, which involves the most liberal approach to the subject, the plaintiff apprehended that another person had been injured or killed.

*Devlin* is currently being appealed to the Supreme Court, so it remains to be seen whether, despite approving *Kelly* in *Fletcher*, the court might adopt a more liberal stance on the issue. The plaintiff in *Quirke v Prendergast* has pleaded the English case of *Walker v Northumberland County Council* which established the precedent that an employer can be held liable for mental injury to a plaintiff from work-related stress. It is noteworthy that *Walker* has found support in Irish decisions dealing with work-related stress: *McGrath v Trintech Technologies Ltd* [2005] ELR 49; *Quigley v Complex Tooling and Moulding*, unreported, High Court, Lavan J, March 9, 2005. However, moving from the narrow confines of the employment relationship to the context of organ retention may well be a step too far, in view of the incrementalist philosophy favoured by *Glencar* and the clear adoption of policy in the area of psychiatric injury in *Fletcher*.

With regards CPMs, if the duty exists at all, it is at the end of the coronial process to return any body parts to the person with the duty to dispose of them. Given that consent is not required for a CPM, it is doubtful whether an antecedent duty exists to explain the nature of the CPM so as to allow the person with such an obligation to decide whether to dispose of the body prior to the exhaustion of that process or afterwards. If the *Glencar* test applies to this question, there is no apparent proximity at that earlier stage to construct a duty of care, as there would be no communication between the plaintiff and the pathologist who carried out the post-mortem. It is also unlikely that a court would consider it "fair just and reasonable" to impose such a duty on a coroner. It may therefore be suggested that the plaintiffs would fail to establish that the coroner owed them a duty of care to explain the likelihood of organ retention during the CPM.

### Conversion

McMahon & Binchy, *Law of Torts* (3rd ed, 2000), observe that "[t]he wrongful interference with a dead body or its parts may possibly be actionable in conversion in spite of the old statements to the effect that there is no property in a corpse". Conversion is actionable *per se* and is therefore not subject to the same nervous shock limitations as an action in negligence. The two possible acts of conversion are the unauthorised HPM or the unauthorised organ retention. To succeed under this claim, a plaintiff must establish an immediate right to possession of the body of a deceased child. In resolving the right to possession, it seems that a hospital has a right to possession, until the coroner exercises his authority or the parents exercise their right pursuant to their duty to dispose. The coroner's right to possession ends when the CPM if complete and a coroner's certificate is issued, at which stage the parents right to possession arises. If the parents consent to a HPM, the hospital is in lawful possession of the body until the post-mortem is complete, at which stage it reverts to the parent.

On the basis of *AB*, it would seem that where the child has already been buried, there is no right to possession of organs for the purposes of burial after a post-mortem to which consent has been given, even if such consent was not "informed".

It could be argued that Gage J was incorrect in assuming that the fact that the removal was lawful because the post-mortem was authorised was crucial to denying the parents' right to possess. In an action for conversion, even if possession was lawfully acquired, subsequent abuse of it may constitute conversion: McMahon & Binchy, *op cit*, para at 784. It is no defence for a defendant to claim that he/she had a right to deal with the "goods". With regard to CPMs, it is not only permissible, but also obligatory, for the pathologist to retain tissue that may assist in the further investigation of a death or in determining the cause of death. However, the coroner cannot grant permission for the retention of tissue or organs for purposes other than the investigation of death, such as transferring organs to pharmaceutical companies. He or she can only express the lack of objection to such tissue being retained, and positive permission must be obtained from the next-of-kin under the authority of a separate consent form: see Farrell, *Coroner's Practice and Procedure* (2000), pp193, 394–395.

What is the position where a post-mortem has been carried out to which consent was not given? In *Devlin*, evidence from two doctors was discussed to the effect that it was accepted practice in the 1980s that consent was required from parents before a HPM could be carried out. It would seem that the possession is unlawful if no consent is obtained to the post-mortem. This is supported by the conclusions of Gage J in *AB*.

The measure of damages in conversion is generally the value of the article converted at the date of the conversion: *Allibert SA v O'Connor* [1982] ILRM 40, at 43 (HC). This is obviously an inappropriate test to apply to the sensitive context which we are considering. It may be suggested that the court should award damages for the distress caused by the conversion, as was the case in Canada in *Edmunds v Armstrong Funeral Home Ltd* [1931] DLR 676.

### Other Heads of Claim

Other arguments that may be put forward include negligent misrepresentation, breach of contract, deceit, breach of constitutional rights, and breach of Art 8 of the European Convention on Human Rights. It must be acknowledged that, if the court is not disposed to recognise a claim for negligence or conversion, it is unlikely to respond positively to claims based on these grounds.

## CONCLUSION

Although many cases will be unsuccessful for statute of limitations, foreseeability of injury, or causation reasons, it remains to be seen how the courts will deal with the remainder of cases which overcome these hurdles and whether they will expand the law relating to nervous shock and conversion to provide some form of redress.

The issue of organ retention highlights the urgent need for reform in the law regarding human tissue in this jurisdiction. This should be done by the introduction of a Human Tissue Act along the lines of Britain's Human Tissue Act 2004. This legislation makes consent the fundamental principle underpinning the lawful retention and use of body parts, organs and tissue from the living or the deceased for specified health-related purposes and public display. It is only when such legislation is enacted that the competing rights of all parties in the complex, sensitive, and emotive area of the procurement of human material can be reconciled in a way that would safeguard and ensure clinicians and other research workers continued access to human organs/material for the advancement of their indispensable work while simultaneously enshrining the rights of next of kin to information and informed consent. To ask the courts to embark on such a project through the medium of tort law is to impose an inappropriate burden upon them.