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Practicing on the newly dead: Is a corpse considered property?

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There is an increasing demand for procedural training opportunities and a decreasing availability of some traditional clinical training opportunities. Intubation is just one such procedure that must be taught. The number of individuals requiring training is increasing. Emergency medicine residencies now graduate nearly 1000 residents per year. In addition, there is an increasing number of paramedics being trained each year with accredited programs required to provide intubation training on actual patients. At the same time, fewer patients who are brought to the emergency department require intubation in the department, because they've already been intubated by paramedics. The "perfect" patient for a resident or student to practice on — the patient who arrives at the emergency department in cardiac arrest after a significant duration of resuscitation in the field — no longer exists. The patient is not yet "dead," but surely cannot be harmed (medically) by a resident's attempt to intubate. The alternative of intubation training in the operating room on anesthetized patients is not always available.

We can analyze whether it is appropriate to practice minimally invasive techniques,[1] *on newly dead patients without express consent from the patient (by advance directive) or the patient's family from multiple perspectives: moral, ethical, and legal. Much of what has been written on this subject focuses on the moral and ethical issues because the courts have not taken an active role.*

Courts generally have held that either: 1) There can be no property rights in a dead body and, by implication, consent of the family would not be required; or 2) The next of kin does not have a property right in a relative's dead body, but does hold some limited right to possess the body for purposes of burial (a "quasi-property" right). It might seem that, if no one can have a property right in a dead body, no one's rights could be violated by practicing minimally invasive techniques on a corpse.

While it might be morally or ethically wrong to practice on corpses

without the family's consent, it seemed that there was nothing legally wrong with the practice — at least from a property law perspective. As discussed below, this is now much less clear, with at least one U.S. Court of Appeals holding that a family has a constitutionally protected property right in the body of their deceased relative.

Introduction

The ethics, morality, and legality of allowing house staff and students to practice minimally invasive techniques on newly dead patients have been debated for many years. I doubt that any of us practicing in the emergency department have not allowed such practice on at least some occasions. The most common technique involved is intubation. A common scenario follows:

A patient arrests in the emergency department or is brought to the department in cardiac arrest, but has not yet been intubated. You intubate the patient, but you find the procedure a bit more difficult than usual. For example, perhaps the patient's anatomy was somewhat unusual ("bull neck," edema from previous intubation attempts, etc.). After pronouncing the patient dead, you take a moment to reintubate the patient. Perhaps you allow the resident to intubate the patient because you consider the variant anatomy to be a good teaching opportunity. You reason that this practice will be a substantial benefit to the community: You, or the resident, will better be able to accomplish the next difficult intubation that arrives. What's the harm? After all, the "patient" is dead.

The moral issues raised by this practice were outlined by J.P. Orlowski, MD, in a 1988 *New England Journal of Medicine* article.[2] While the focus of my article is a legal analysis, not a moral or ethical analysis, Orlowski's moral/ethical framework provides useful background. In his article, Orlowski identifies four "moral claimants" potentially affected by the use of newly dead patients for the teaching and practicing of intubation techniques:

• The first moral claimant is the recently deceased patient who may have, through an advance directive, indicated his or her wishes as to the use of his body following death (e.g., donation to a medical school). Such wishes clearly should be respected. However, in many cases they are not.

• The second claimant is the surviving family, whose wishes might differ from the patient's.

• The third claimant is the health care staff. They have an obligation to protect patients. They may also have an "obligation to teach safe and effective medical procedures."[3] We must consider whether, in this context, these two obligations are morally at odds.

• The fourth claimant is society. Society has an interest in activities that are of societal benefit, e.g., having well-trained health care professionals available. On the other hand, society also has an obligation to protect its members' individual rights. Consider the various interests of these "moral claimants" as you read the cases below.

Why Don't Physicians Ask Permission?

It is a given that many, if not most, physicians who practice minimally invasive techniques on the newly dead or allow others to do so (residents, nurses, paramedics, etc.), do not obtain consent before doing so. Consent for such activities would, in most cases, come from the family, but could, theoretically, come from the patient prior to death through an advance directive.

There are a variety of reasons why physicians so rarely request the consent of family members before they practice techniques on the newly dead. First,

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some physicians may not believe it is necessary. There is certainly legitimate disagreement on this point, from ethicists and lawyers, in addition to physicians. Physicians are uncomfortable with requesting consent for this purpose, particularly in the case of emergency physicians who rarely have an opportunity to develop any significant rapport with the family of a patient who has died. It is one thing to ask a family about organ or tissue donation; perhaps quite another to ask to "practice" on the recently deceased family member. While many families refuse permission for organ or tissue donation, it is difficult to imagine someone who cannot at least appreciate the tangible benefits of such a donation. On the other hand, the benefit of allowing people to "practice" on their recently deceased loved one may seem much less concrete. Physicians know that and are, therefore, uncomfortable asking.

Physicians may then find themselves faced with a situation in which they believe in the benefit of allowing residents or others to practice minimally invasive procedures on a newly dead patient, but also are: 1) uncomfortable asking for permission; 2) uncomfortable with their ability to convey the benefits of such practice; and 3) fear their request will be denied. As a result, some physicians allow their students to practice on newly dead patients without the consent of the family. The fundamental questions raised by this practice are:

— Is consent for such "practice" on the newly dead required?

— Does the family of the deceased have the right to consent (and therefore the right to refuse to consent)?

— May consent be presumed?

— How necessary is it to practice such techniques on the newly dead?

What is the Harm in Practicing Without Consent?

Some commentators argue there can be no harm in practicing minimally invasive techniques on the newly dead, so long as the family is not aware that it occurred. That may be true as to some types of harm that might be suffered. For example, there can be no emotional distress due to, for example, knowing that three medical students were allowed to attempt to intubate a recently deceased child, if the relatives are unaware that it occurred. If, however, the distraught parents burst into the room while this was taking place, or even if they learned that the reason they were kept from coming in to hold their baby was because the medical students were "practicing," it seems clear that some parents would claim to have suffered emotional distress. We live in a time of mistrust and conspiracy theories, and what might seem justifiable to most will seem sinister and conspiratorial to some, if for no other reason than it was clandestine.

Arguably, family members might actually suffer harm, but be unaware of it — perhaps more of an ethical issue than a legal one. For example, consider the example above, the newly dead baby being used by the medical students to practice intubation. Do the parents not suffer by being made to wait in suspense, not knowing the result of the resuscitative effort, while someone is "practicing" on their child, even if they are unaware of the cause of the delay? The degree of this harm is, of course, proportional to the amount of time they are kept in suspense. Damages for a one- or two-minute delay might be nominal. The degree of harm is really a different issue than whether there was any harm suffered.

Lacy v. Cooper Hospital/University Medical Center

There have been very few reported cases dealing with the issue of practicing minimally invasive procedures on the newly dead. In 1990, the U.S. District Court for the District of New Jersey decided a case in which this issue was raised: *Lacy v. Cooper Hospital/University Medical Center*.[4] The court, however, never made a finding as to whether the accused physician had, as was alleged, performed an invasive medical procedure (pericardiocentesis) after the patient was dead (i.e., for "practice"). As a result, the court never reached the issue of the appropriateness of doing so.

The lawsuit began as a typical medical malpractice action brought against the hospital, various physicians, and a nurse following the death of a patient. It was during the course of discovery that the case took a turn, making it relevant to the subject of this article. While gathering documents and information during discovery, the plaintiffs' attorney obtained a letter written by a nurse stating that "an intern, defendant Mordecai Dunst, MD, had performed a procedure on plaintiffs' decedent, Todd Lacy ("Todd") after he had been pronounced dead."[5]

It is not clear from the case whether this letter had been sent by the nurse to the plaintiffs' attorney or whether it was simply contained in a file turned over

to the attorney in the course of discovery. In any case, the attorney advised the plaintiffs of the contents of the letter.

Todd had been admitted to Cooper Medical Center on Dec. 14, 1985, with an admitting diagnosis of bowel obstruction. He was treated surgically and seemed to be recovering satisfactorily. On Dec. 30, at approximately 9:30 p.m., "Todd" complained of chest pain. At approximately 5:15 a.m. he was found unresponsive in cardiopulmonary arrest. A code was called, and Dr. Dunst, an intern, responded, as did other physicians and nurses. At issue was what occurred as the resuscitative effort was ending.

It was undisputed that three pericardiocenteses were performed on the patient. The plaintiffs claimed that the third pericardiocentesis was performed after the patient was dead and was not therapeutic; it was "for practice." Furthermore, it was performed without the consent of the family, which they argued, was required. Dr. Dunst, on the other hand, claimed that all three of the pericardiocenteses were diagnostic or therapeutic and were done before the patient was "dead." He claimed that his first pericardiocentesis yielded a "white, milky fluid that is not expected to be found in the pericardial space."[6] He then performed a second pericardiocentesis because "he thought he had entered the stomach the first time."[7] This pericardiocentesis yielded no fluid. At this point, Dr. Dunst concluded there was no pericardial fluid, and Todd was pronounced dead by a "consensus."[8]

Dr. Dunst says he looked around, and "noticed a bottle containing fluid that had the same appearance as the fluid" he had obtained during the first pericardiocentesis.[9] He, therefore, concluded that the fluid he had obtained on the first pericardiocentesis had, in fact, come from the pericardial sac. It was at this time that, according to Dr. Dunst, he decided to do a third pericardiocentesis in the hopes of relieving a possible pericardial tamponade. The patient had already, as mentioned above, been pronounced dead. The third pericardiocentesis yielded "a small amount of fluid, similar in appearance" to that which had been obtained on the first procedure.[10] There was no positive response on the part of the patient, and Todd was pronounced dead a second time.

Dr. Dunst admitted that "a nurse present in Todd's room during the code told [him], when he started the third pericardiocentesis, that he should not 'practice' on the body."[11] In response, he told her he was not practicing but, because of the emergency situation, did not stop to explain the situation to her. The court noted that Dr. Dunst "did not write anything down regarding any of the three pericardiocenteses, and there is no mention of the procedures in the chart summary."[12]

Editor's note: *The fact that a procedure is not documented in the medical record might suggest that it was done for practice and not as part of the patient's treatment. In this case, however, none of the pericardiocenteses were documented. While this certainly represents poor documentation, it also undermines the argument that the failure to document the third pericardiocentesis was evidence that it had been done for practice. The first pericardiocentesis appears clearly to have been diagnostic/therapeutic, and it was not documented, either.*

At autopsy, the major finding was "necrosis of the right ventricular apex with a pericardial effusion of white, turbid fluid, grossly not unlike the hyperalimentation fluid. There was a cellular reaction to this, indicating that puncture occurred prior to actual demise and that the catheter tip was most likely delivering fluid directly into the pericardial cavity."[13]

Plaintiffs' version of the events that transpired is quite different from Dr. Dunst's account. The basic difference was that Dr. Dunst contended that all three of the pericardiocenteses occurred during the code. That is, they were all diagnostic/therapeutic procedures performed in an effort to resuscitate the patient. Plaintiffs, on the other hand, claimed that, while the first two procedures were performed as part of the resuscitation, the third "invasive medical procedure" was performed after Todd was dead and was for the sole purpose of "practice."[14] Furthermore, plaintiffs claimed that this "practice" procedure was performed without consent which, plaintiffs' argued, was required. Plaintiffs' claim was based principally on a letter written by one of the nurses present during the code. In her letter, the nurse wrote: "After the man [Todd] was pronounced [dead], Dr. Dunst proceeded to perform a thoracentesis even after I told him that it was unacceptable to practice on patients. He told me he was not practicing and was going to do it anyway!!"[15]

The first issue addressed by the court was what tort was at issue in the case, a point of disagreement among the parties. It was the defense's position that plaintiffs' claim was for intentional or negligent infliction of emotional distress. Plaintiffs, however, contended that they were attempting to recover based upon an independent tort of mishandling a corpse. The

court ruled that, under New Jersey law, "a plaintiff can recover for intentional or negligent infliction of emotional distress based upon the mishandling of a corpse, but mishandling a corpse is not a distinct tort."[16] This was based upon the New Jersey Supreme Court's decision in *Strachan v. John F. Kennedy Memorial Hospital* that "an action based on the mishandling of a corpse is in essence an action for recovery for emotional distress."[17] That is, in New Jersey, a plaintiff could not recover based on mishandling a corpse; rather, recovery must be based on the emotional distress, if any, that the mishandling had on the plaintiff.

Having ruled that the torts at issue were intentional or negligent infliction of emotional distress (in this case, as a result of mishandling a corpse), the court proceeded to consider the necessary elements of those torts and whether plaintiffs had sufficient evidence to prove each of them.[18]

In the case of intentional infliction of emotional distress, plaintiff must prove that 1) the defendant's conduct was intentional (or reckless) *and outrageous*; and 2) that this conduct was the proximate cause of severe emotional distress. The resultant emotional distress must be "so severe that no reasonable [person] could be expected to endure it."[19] In the case of negligent infliction of emotional distress, the plaintiff must prove that 1) defendant had a duty; 2) the duty was owed to plaintiff; 3) defendant breached that duty; 4) plaintiffs were injured; and 5) the breach caused the injury. "Outrageousness" is not an element of negligent infliction of emotional distress.

The court then applied the facts of the case to the required elements, and concluded that "plaintiffs [did] not suffer emotional distress so severe that no reasonable person could be expected to endure it."[20] As a result, plaintiff failed to meet the elements of either an intentional or negligent infliction of emotional distress claim. The court then granted summary judgment for defendant and dismissed all claims.

The court never addressed the issue as to whether Dr. Dunst had performed the third pericardiocentesis after Todd was dead (i.e., "for practice") since, even if this were the case, plaintiffs had failed to establish the degree of emotional distress required to recover for such an act. The court concludes, however, that the mental distress suffered by the Lacys, as a matter of law, cannot support a finding that it was so severe that no reasonable person could be expected to endure it."[21]

Property Rights in Corpses

We must now look to the more general issue: Do property rights exist in a dead body? That is, is a corpse "owned" by the decedent's relatives?[22]

This question has been addressed in the context of cornea removal statutes. If such property rights exist, then it would follow that consent would be required, and someone (relative or guardian) would have the right to give or withhold consent to requests to practice techniques on a dead body. After all, we cannot simply appropriate for our use, no matter the merit of our purpose, any other item of a person's personal property. On the other hand, if no such property right exists, no one would have a legal right to give or withhold consent for practicing techniques on a dead body. Many states have taken a somewhat intermediate position, finding that relatives have a "quasi-property" right in the dead body of their relative.

This issue has been considered by courts for many years, most recently in the context of the removal of cadaveric tissue for transplantation without the express consent of the deceased individual's family. Until recently, the answer seemed clearly to be that families did not have a property right in the body of their deceased relative. However, in *Brotherton v. Cleveland, et al.*, the Sixth Circuit Court of Appeals, breaking from the long tradition in American law that there can be no property rights in a dead body, held that a constitutionally protected property right exists in a dead body, that right being held by the surviving family.[23]

There has (perhaps "had" is now more appropriate) been a long-established rule in American law, dating back to its English origins, that there can be no property right in the body of a deceased person.[24] That being said, there have been certain limited exceptions carved out of this general rule over the years, for example, the right to the custody and possession of a relative's body until it is properly buried. Importantly, while this was considered a right, it was generally not considered to be a "property right," a right which would potentially allow the holder to treat the corpse like any other item of personal property.

American courts, relying on English precedent, found themselves having to balance two competing legal rules in dealing with the issue of a family's rights with respect to the body of a deceased family member:

1) there can be no property rights in dead bodies; and 2) corpses must be properly disposed of, traditionally a responsibility of the decedent's family. The result was the creation of "quasi-property" rights, together with certain duties as to the corpse, which are held by the decedent's family. Those "quasi-property" rights consist primarily of a right of the deceased individual's family to claim the body for burial; not, however, to exercise any other rights with respect to the body.

The distinction between property rights and "quasi-property" rights was, according to the courts, much more than semantics, at least prior to *Brotherton*. Recovery for violation of a property right is based upon damage to, or some other action that directly affects the property itself. The concern of "quasi-property" rights, however, is not direct injury to the corpse itself, but rather whether the improper action caused physical or emotional pain or suffering to the decedent's surviving family members, the holders of the "quasi-property" right.[25]

It follows the, that, for those courts that found that family members could have only "quasi-property" rights in dead bodies, actual damage to the body is not the issue; rather, the determinative issue is the impact of that damage on the family members.

In this next section, I have selected cases from the Sixth Circuit tracing the question of whether there can be property rights in a dead body. As you read these case summaries, remember that there has been a several-hundred-year legal tradition in English and American law that there could not be a property right in a dead body.

Tillman v. Detroit Receiving et al.[26]

Plaintiff's daughter, Mary Catherine Tillman, was admitted to Detroit Receiving Hospital and University Health Center on Dec. 25, 1982. She died that evening. After an autopsy was performed at the Wayne County Morgue the following day, the cause of death was listed as an accidental gunshot wound to the back. Plaintiff later filed a complaint in circuit court against the hospital and multiple other defendants alleging that her daughter's corneas or eyes had been removed without her consent in violation of state law.

The trial court considered and rejected plaintiff's claim that Michigan's cornea removal statute was unconstitutional. The statute provided that:

• In any case in which an autopsy is to be done by a county medical examiner or a county medical examiner causes an autopsy to be done, the cornea of the deceased person may be removed by a person authorized by the county medical examiner.

• Removal under subsection (1) may be made only under the following circumstances:

— An autopsy has already been authorized by the county medical examiner.

— The county medical examiner does not have knowledge of an objection by the next of kin of the decedent to the removal of the cornea.

— The removal of the cornea will not interfere with the course of any subsequent investigation or autopsy or alter post-mortem facial appearance.[27]

The Michigan cornea removal statute, as in other states, provided for "presumed consent" to the removal of corneas in medical examiner cases. That is, the medical examiner could authorize the removal of the corneas, provided he or she had no knowledge of an objection to removal by the next of kin of the decedent. The burden was on the family to inform the medical examiner of their objection.

The court rejected plaintiff's claim of a privacy right violation and held that such a right is personal and ends with the death of the person to whom it is of value. Certainly, the decedent had a right to her corneas, but that right was extinguished upon her death, and such a right does not transfer to the surviving family members.

The court first held that "there is no property right in the next of kin to a dead body."[28] The court then reaffirmed that Michigan courts recognize "a common law cause of action on behalf of the person or persons entitled to the possession, control, or burial of a dead body for the tort of interference with the right of burial of a deceased person without mutilation."[29]

However, the court held that this common law right was *not protected by the constitution*. That is, it could be abrogated by statute, in this case the Michigan cornea removal statute, M.C.L. § 333.10203.

The court's holdings, therefore, were: 1) The family has no privacy right in a decedent's body; 2) the family has no property right in a dead body; and 3) the family merely has a common law cause of action for the tort of interference with the right of burial of a deceased person without mutilation (a "quasi-property" right), a right which is not constitutional in nature.

Brotherton v. Cleveland, et al.[30]

This Sixth Circuit Court of Appeals case was decided Jan. 18, 1991. On Feb. 15, 1988, Steven

Brotherton was found in cardiac arrest in an automobile. He was taken to Bethesda North Hospital in Cincinnati, where he was pronounced "dead on arrival." The hospital asked his wife, Deborah Brotherton, to consider making an anatomical gift. She declined, apparently based on her husband's aversion to such a gift. Her refusal to consent to donation was documented in the hospital's "Report of Death."

Because Mr. Brotherton's death was considered a possible suicide, his body was taken to the Hamilton County coroner's office and an autopsy was performed on Feb. 16. After the autopsy, the coroner permitted Steven Brotherton's corneas to be removed and used as anatomical gifts. The hospital had made no attempt to inform the coroner's office of Mrs. Brotherton's objection to tissue donation, and the coroner's office had not inquired into whether there was an objection. Mrs. Brotherton did not become aware that her husband's corneas had been removed until she later read the autopsy report.

As in Michigan, an Ohio statute permitted a "coroner to remove the corneas of autopsy subjects without consent, provided that the coroner had no knowledge of an objection by the decedent, the decedent's spouse, or, if there is no spouse, the next of kin, the guardian, or the person authorized to dispose of the body."[31] It was the custom of the coroner's office not to obtain the next of kin's consent or to inspect the medical records or hospital documents before allowing the removal of corneas.

Mrs. Brotherton brought suit against the coroner and multiple other defendants alleging, among other claims, a violation of due process in the removal of her husband's corneas. She asserted that she had been deprived of her right to due process of law under the 14th Amendment, which provides, in pertinent part: "nor shall any state deprive any person of life, liberty, or *property* without due process of law. . . ."[32] In this case, she was alleging a deprivation of her property interest in her husband's body, specifically his corneas. The District Court dismissed her complaint and found that Ohio does not give a surviving custodian a property interest in the body of a decedent.

To determine if Mrs. Brotherton had a property interest in her husband's body sufficient to be protected by the due process clause, the court examined the laws of Ohio. The court first made a general observation that "[a] majority of the courts confronted with the issue of whether a property interest can exist in a dead body have found that a property right of some kind does exist and often refer to it as a 'quasi-property right.'"[33]

The court then cited two Ohio Appeals Court cases[34] as a basis for its conclusion that Ohio recognized a right to possess a dead body for burial, a right which the court said "resides at the very core of a property interest."[35] The court, however, conveniently ignored the Ohio Appeals Court's clear statement in *Everman v. Davis*, the case the Sixth Circuit ultimately relied upon, that "[t]his is not to say that a person has a property right in the body of another, living or dead. . . ."[36]

The court then went into a brief discussion of the definition of "property," a definition that is broad, somewhat abstract, and has been likened to a "bundle of rights." (*Picture a bundle of sticks, each stick being a "right."*) The point of the analogy is that there are many rights that are associated with ownership of property (the right to possess, to use, to exclude, to profit, to dispose of, etc.). The key point is that it is not necessary to have the entire "bundle of rights" to hold a property interest in something. For example, in the case of a lease, a tenant has a recognized property interest in his leasehold interest, even though his interest is limited in time and may be otherwise limited (e.g., sale or assignment of the leasehold might be prohibited).

The court then reasoned that, because Mrs. Brotherton had what it considered to be one of the key rights in the "bundle of rights" that constituted a property interest in her husband's body — the right to possession, at least for the purpose of burial — she had a property right that should be accorded due process clause protection. Whether the Ohio Supreme Court would label the right a "property" right, a "quasi-property" right, or not a property interest at all was, to the Sixth Circuit, immaterial; it was, no matter the name attached to it, a "legitimate claim of entitlement" protected by the due process clause. While the categorization of the interest (i.e., the name attached to it) was a matter of state law, whether that interest was sufficient to be considered a "legitimate claim of entitlement" protected by the due process clause was a matter of federal law. According to the Sixth Circuit, in this case it was.

Because Mrs. Brotherton had a property right in her husband's body, the court held that a state could only deprive her of that right through due process that must include a "predeprivation hearing."[37] The court curiously minimized the benefits of cornea

transplantation: the "*only* government interest enhanced by the removal of the corneas is the interest in implementing the organ/tissue donation program; *this interest is not substantial enough* to allow the state to consciously disregard those property rights which it has granted."[38]

The court also found that "predeprivation process undertaken by the state would be a minimal burden."[39] The fact of the matter is, however, that any "predeprivation process," especially a hearing, would likely discourage cornea removal. In fact, any "predeprivation process" that substantially delayed the cornea harvest could make the issue moot. The court did not indicate exactly the type or extent of "predeprivation process" that would be required to pass constitutional muster: "We merely hold that the policy and custom of the Hamilton County coroner's office is an established state procedure necessitating predeprivation process."[40]

In his dissent, Judge Joiner made it clear that, in his opinion, "Ohio law has made it very clear that there is no property right in a dead person's body."[41] His authority was the same case, *Everman*, that the majority cited for its opposite conclusion. He then cited a long string of cases standing for the proposition that there can be no property right in a corpse and upholding presumed consent cornea removal statutes.

What then was the state of the law in Michigan after *Tillman* and *Brotherton?* In *Tillman* (1984), the Michigan Court of Appeals held that there could be no property right in a dead body (Michigan law). In *Brotherton* (1991), the Sixth Circuit held that the family held at least one of the rights in the "bundle of rights" that defines property and, therefore, had a constitutionally protected property interest in their relative's dead body (Ohio law). Whether *Brotherton* was precedent in Michigan depended on how similar Michigan and Ohio law was in their treatment of property interests in dead bodies. The Michigan Court of Appeals' holding in *Tillman* seemed pretty clear on this issue; but then, the Ohio Court of Appeals' holding in *Everman* seemed equally clear to Judge Joiner and many others. We got our answer in 1995 when the Sixth Circuit heard a case similar to *Brotherton*, except that Michigan law applied.

Whaley v. County of Tuscola[42]

In *Whaley,* the Sixth Circuit decided a case similar to *Brotherton*, except that the case arose in Michigan and the court, therefore, analyzed Michigan law (instead of Ohio law) to determine if a family had a property interest in a relative's dead body. In this case, the autopsy was performed by Dr. Ronald G. Hines, a pathologist employed by the Saginaw and Tuscola County Medical Examiners to perform autopsies. Hines' assistant, Armando Herrera, coincidentally owned and operated the Central Michigan Eye Bank and Tissue Center and had a business agreement with the counties in which he would pay all the counties' expenses in performing the autopsies whenever corneas were removed, and half those expenses when they were not.

There were a number of cases consolidated in *Whaley*, and it was alleged that all the cornea and eye harvests were performed without the next of kin's permission. According to the trial court, "in some cases the next of kin were never asked, [and] in other cases the next of kin specifically refused to give their consent."[43]

After consolidation of the claims, the sole remaining issue was whether the plaintiffs' 14th Amendment right to procedural due process had been denied when the defendants removed the decedents' corneas or eyes. The U.S. District Court for the Eastern District of Michigan dismissed the claim holding that "Michigan law did not create an interest in a dead body sufficient to qualify as a 'property interest' under the 14th Amendment's Due Process Clause."[44] The plaintiffs appealed.

The Sixth Circuit started by stating, as it did in *Brotherton*, that it was appropriate for the federal court to look to state law to decide whether the relevant state's law provided an interest in the dead body, but "whether a substantive interest created by the state rises to the level of a constitutionally protected property interest is a question of federal constitutional law."[45] That is, if the court found that state law gave the family *any* interest in the relative's dead body, the court would then be free to decide that that interest, however small it might be, was sufficient to be constitutionally protected. Knowing the result in *Brotherton*, and the holding in *Tillman* that the family had a common law right of possession of the body for purposes of burial, the court's holding in *Whaley* should come as no surprise.

The court then restated its holding in *Brotherton* that, if the state law provided a "legitimate claim of entitlement" as to the dead body, and Ohio's law did, there would, therefore, be a property interest in the

body. The court then revisited the "bundle of rights" concept which was the basis for its determination that a property right existed. The court then examined Michigan law and held that it was quite similar to Ohio's in this regard, although even more explicit in providing a family the rights to possess a relative's body for burial and to prevent its mutilation. The court cited a Michigan Supreme Court case (1899) in support of its holding: The next of kin "[are] entitled to possession of the body as it is when death comes, and that it is an actionable wrong for another to interfere with that right by withholding the body or mutilating it in any way."[46]

Based largely on this authority (which was, arguably, *dicta* (i.e., not binding authority)), the court held that: "Michigan provides the next of kin with a constitutionally protected property interest in the dead body of a relative."[47]

After this long digression on the constitutionality of state-presumed consent cornea removal statutes in Michigan and Ohio, you may wonder about the relevance. Our topic was not cornea removal statutes, or even anatomical gifts in general. There are plenty of facts that might distinguish these cases from the topic at hand: practicing minimally invasive techniques on the newly dead without the consent of the patient or the family. The important point of these cases, particularly *Brotherton* and *Whaley*, is that a U.S. Court of Appeals has held, contrary to what seemed to have been clear precedent for literally centuries, that the family of a decedent has a property right in the decedent's body.

If the family "owns" the dead body, it would seem to follow that another person, not the owner, could not lawfully use the body without the permission of its owners. If a physician wanted to use the body for "practice," he or she would logically have to ask its owners for permission. After all, we cannot take any other piece of someone's property without permission in order use it for "practice." The law is obviously now not well settled in this area, but a major shift has occurred, at least in the Sixth Circuit. These cases should signal caution to those who might practice procedures on the newly dead without receiving permission from the next of kin.

Is It Necessary to Practice on the Newly Dead?

Those who advocate the practicing of minimally invasive techniques on the newly dead without explicit consent begin by arguing that it is essential that health care personnel practice on the newly dead: "Emergency physicians and other health care personnel expected to provide lifesaving medical interventions must continue to learn and practice these procedures on recently dead cadavers."[48] It is this perceived absolute necessity that provides their primary justification for acting without the families' consent.

To avoid the appearance of practicing on the newly dead, resuscitations are sometimes prolonged to allow individuals to practice certain resuscitative techniques.[49] We all know that attempting another pericardiocentesis on a patient who has been in pulseless electrical activity (PEA) for an hour is useless. Yet, how often is it that the medical student gets to attempt a pericardiocentesis or needle thoracostomy in such a situation? While both of these techniques are reasonable in the face of PEA, performing them again after one hour of resuscitation — just before terminating the resuscitation — is not. To draw a distinction between this practice and allowing the procedures to be done after the resuscitation is terminated, is intellectually and ethically dishonest.

If there were a perfect option for practicing emergency techniques, there would be no controversy. Unfortunately, there is no such option. Animals can be used to practice certain techniques. Many of us, however, find the use of animals for such purposes distasteful. Intubation heads may be anatomically correct in terms of size and shape, but are seldom realistic in terms of compliance. Truly lifelike models may be prohibitively expensive. Some studies have, however, suggested that it is possible to provide adequate intubation training for paramedics using only mannequins.[50]

In advocating for practicing on the newly dead pursuant to presumed consent, Iserson severely criticizes the teaching of techniques such as intubation on "unsuspecting anesthetized patients in the operating room."[51] While it is true that injuries might occur as a result of teaching intubation skills in the operating room, they are extremely rare. Furthermore, the patients are not (at least *should not* be) "unsuspecting."

Teaching hospitals routinely include in their informed consent process a discussion of the fact that medical students, interns, residents, and others will be involved in the care of patients. Any hospital allowing the use of surgery, or any other patients, for teaching purposes must inform the patients and give them an opportunity to refuse to participate.

Endnotes

1. "Minimally invasive procedures" has been defined as including only those procedures that will not disrupt the appearance of a person in an open casket. Iserson KV. Law vs. life; the ethical imperative to practice and teach using the newly dead emergency department patient. *Ann Emerg Med* 1995; 25:91. This, of course, somewhat overstates the procedures we are considering (intubation, central line placement, etc.), as even a full autopsy does not disrupt a person's open casket appearance.
2. Orlowski JP, et al. The ethics of using newly dead patients for teaching and practicing intubation techniques. *N Engl J Med* 1988; 319:439.
3. Id.
4. 745 F.Supp 1029 (E.D.N.J. 1990).
5. Id.
6. Id. at 1031.
7. Id.
8. Id.
9. Id.
10. Id.
11. Id.
12. Id.
13. Id.
14. Id. at 1032.
15. Id. The actual procedure performed was a pericardiocentesis. In her deposition, the nurse corrected her misdesignation of the procedures.
16. Id. at 1033.
17. 109 N.J. 523, 531, 538 A.2d 346, 350 (1988).
18. In order to prevail on a tort claim, a plaintiff must prove all the elements of the case. For example, in the case of a malpractice claim, the necessary elements are: duty, breach of the standard of care, proximate causation, and damages.
19. 745 F. Supp at 1035, quoting, *Buckley v. Trenton Saving Fund Society*, 111 N.J. 355, 366, 544 A.2d 857, 863 (1988).
20. Id.
21. Id. at 1036.
22. An individual's rights as to his or her body are extinguished upon death.
23. 923 F.2d 477 (6th Cir. 1991).
24. *Williams v. Williams*, 20 Ch.D 659 (1882).
25. *Culpepper v. Pearl St. Building*, 877 P.2d 877, 880 (Colo. 1994).
26. 138 Mich.App. 683, 360 N.W.2d 275 (1984).
27. M.C.L. § 333.10203.
28. 138 Mich.App. at 686.
29. Id. at 687.
30. 923 F.2d 477 (6th Cir. 1991).
31. Id. at 478 (citing Ohio Rev. Code § 2108.60).
32. Id. at 479 (emphasis added).
33. Id. at 480.
34. *Carney v. Knollwood Cemetery Ass'n*, 33 Ohio App. 3d 31, 514 N.E.2d 430 (1986); *Everman v. Davis*, 54 Ohio App. 3d 119, 561 N.#.2d 547, appeal dismissed, 43 Ohio St. 3d 702, 539 N.#.2d 163 (1989).
35. 923 F.2d at 481.
36. 54 Ohio App. 3d at 122.
37. 923 F.2d at 482.
38. Id. (emphasis added).
39. Id.
40. Id.
41. Id. at 483.
42. 58 F.3d 1111 (6th Cir. 1995).
43. Id. at 1113.
44. Id. at 1112.
45. Id. 15 1114 (citing, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978)).
46. *Doxtator v. Chicago & West Michigan Railway Co.*, 120 Mich. 596 (1899).
47. 58 F.3d 1116.
48. Iserson, supra note 1.
49. Id. at 92.
50. Stratton SJ et al. Prospective study of mannequin-only versus mannequin and human subject endotracheal intubation training of paramedics. *Ann Emerg Med* 1991; 20:1,314.
51. Iserson, supra note 1 at 92.

Physician CME Questions

13. In ruling as to whether the next of kin has a property right in the corpse of their deceased relative, courts have ruled:
    a. There can be no property right in a dead body.
    b. There can be a "quasi-property" right in a dead body.
    c. There can be a property right in a dead body.
    d. All of the above.

14. What procedure may always be practiced on a recently deceased patient without consent of the next of kin?
    a. Central line insertion
    b. Intubation
    c. Pericardiocentesis
    d. None of the above

15. Prolonging resuscitations so medical students and housestaff can practice invasive techniques is the perfect solution to the dilemma of practicing on the newly dead and eliminates the attendant ethical and moral concerns.
    a. True
    b. False

16. In New Jersey, the elements for the tort of intentional infliction of emotional distress are:
    a. Conduct by the defendant that intentional and outrageous.
    b. Defendant's conduct was a proximate cause of severe emotional distress.
    c. Both a and b.
    d. Neither a nor b.

In Future Issues:

When patients leave against medical advice