



FAST POLICY FACTS: HUMAN BODIES AND BIOLOGICAL MATERIALS

Rights and Interests in Human Bodies and Biological Materials

BACKGROUND

There are many reasons why someone may wish to access, use or control a dead body. Organs and tissues, for example, may be useful for transplantation purposes. Scientific researchers may also want to gain access to bodies or biological materials from a deceased body to use in their research projects. Coroners may also seek access to a dead body for the purpose of an investigation and families often want to control what happens to the bodies of their loved ones for the purposes of burial or cremation.

The circumstances in which a dead body can be claimed and the extent of one's rights over a dead body are legal questions that have developed over a long period of time. Although there is a traditional legal rule that human bodies and body parts are not considered property and therefore cannot be "owned" by another, there is increasing legal recognition that more limited rights to possess, use and control a dead body may exist in some circumstances.¹

WHAT RIGHTS EXIST IN RELATION TO DEAD BODIES?

USE OF BODIES AND BODY PARTS FOR TRANSPLANTATION, MEDICAL EDUCATION AND SCIENTIFIC RESEARCH

Individuals who want their own bodies to be used for organ/tissue transplantation, medical education or scientific research have the ability to consent to these uses prior to their death. The age at which one can consent and the manner in which consent must be given are specified in provincial and territorial legislation.² While this decision is generally considered to be legally binding (i.e., must be followed as a matter of law), in practice a deceased person's wishes will often not be followed if his or her family objects. For example, many university body donation programs have policies that bodies will be refused if there is disagreement within the deceased's next of kin over the use of the body for medical education and research.³ Additionally, authorization from next of kin is routinely sought prior to procuring a deceased person's organs for transplantation even if that individual was registered as an organ donor. It is therefore important for individuals desiring to donate their bodies or body parts for these purposes to discuss this matter with their next of kin to increase the likelihood that their wishes will be carried out.

If a deceased individual has not given consent to use her or his body for transplantation, education or research prior to death, certain members of the individual's next of kin may provide consent on the individual's behalf so long as they have no reason to believe that the deceased individual would have opposed using the body for these purposes. If there is no need for the donated body or body parts or if they cannot be used for the specified purpose for any reason then the body is to be treated as if no consent had been provided (i.e., returned to the next of kin for the purpose of burial or cremation).⁴



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When it comes to using human biological materials from a deceased person in research, prior approval must be obtained by a Research Ethics Board which is responsible for reviewing the proposed research protocol to determine if the project adheres to relevant ethical principles and guidelines.⁵ Ordinarily, researchers will be required to obtain consent to use biological materials in these circumstances either from the deceased person prior to death or from his or her authorized representative after death.⁶ An authorized representative who provides consent is usually able to change his or her mind and withdraw consent at any time. Any limits on the ability to withdraw consent in this regard (such as when the biological samples have been completely anonymized and can no longer be used to identify the individuals from whom they came) should be made clear as part of the process for obtaining consent.⁷

In addition, as part of obtaining consent, researchers must provide information such as:

- The type and amount of biological materials to be taken;
- The intended uses of the biological materials, including any commercial use;
- The measures employed to protect the privacy of the participants;
- The length of time the biological materials will be kept; and
- Any anticipated linkage between the biological materials and information about the participant.⁸

However, there are some circumstances in which researchers may access these kinds of biological materials without consent. For example, in some circumstances, provincial anatomy legislation allows bodies that have not been claimed by any family or friends to be used for anatomical research or instruction.⁹ Additionally, researchers wanting to do research using biological materials may not need to obtain consent if they use biological materials that were originally collected for an alternative purpose (e.g., materials left over from an autopsy) and that cannot be used to identify the individual from whom they were taken.¹⁰

In situations where the biological materials sought by researchers can be used to identify the individual from whom they came, a Research Ethics Board may allow researchers to use the materials without consent provided it is satisfied that, among other things:

- Adequate privacy protection measures are in place;
- Use of the materials is not contrary to the known wishes of the participant;
- Consent would be impossible or impractical to obtain; and
- Use of the materials without consent would be unlikely to negatively impact the participant's welfare.¹¹

In Quebec, however, there may be less discretion in this regard, as the Civil Code requires consent for the use of discarded material from a surgical procedure in research by the individual from whom it came or the individual's substitute decision-maker if the individual has died.¹²



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POSSESSION FOR THE PURPOSE OF BURIAL

Although families do not “own” the body of a deceased loved one, they do have a right to custody, possession and control of a dead body for the purpose of burial.¹³ In determining who has the right to possess the body and make decisions regarding burial, the precise order of priority is set out in provincial legislation and typically starts with the personal representative appointed in the deceased’s will followed by the deceased’s spouse/adult interdependent partner, adult children, parents/guardians, adult grandchildren and adult siblings, followed by various others.¹⁴ When these rights are violated they can give rise to certain criminal and civil sanctions (see Text Box on the right).

POSSESSION FOR INVESTIGATION

Coroners also have certain rights of possession over dead bodies. They may order the examination of a body during an investigation as well as the disinterment of a body for the purpose of an inquest. This can be done over the objections of a deceased person’s next of kin without incurring liability so long as the coroner has exercised her or his authority appropriately.¹⁵

WHAT LEGAL REMEDIES EXIST WHEN THESE RIGHTS ARE VIOLATED?

CRIMINAL LAW REMEDIES

- Canada’s Criminal Code makes it an offence to fail to dispose of a dead body where an obligation exists to do so and to indecently interfere with or offer an indignity to a human body or remains.¹⁶
- This can encompass a wide range of activities including interfering with the burial of a body, copulating with a dead body, intentionally damaging a coffin while backfilling the grave, and interfering with gravestones (eg. by taking photographs featuring Nazi symbols next to graves in a Jewish cemetery).¹⁷

CIVIL CLAIMS AND REMEDIES

Civil claims have been brought on a number of grounds, including:

- trespass to land where the interference with a dead body occurs in the plaintiff’s residence or at a burial plot owned by the plaintiff;¹⁸
- contract law, for example, where a funeral home mishandles a deceased’s ashes or fails to honour a request to provide a viewing of the body prior to cremation;¹⁹ and
- bailment, in cases where a cemetery loses an urn of ashes.²⁰

However, plaintiffs often face difficulties in these cases establishing the amount and type of damages they are entitled to, and are often left only with claims to damages for mental distress which are difficult to establish and not always readily awarded by the courts.

REFERENCES

1. M. (J.C.) v. A. (A.N.), 2012 BCSC 584 (B.C. S.C.).
2. See Canadian National Transplant Research Program, (2013), Fast Facts: Consent. Available at <http://www.cntrp.ca/#!fast-policy-facts/c17al>.
3. See Dalhousie University, Faculty of Medicine (2013). Information and Procedures: How to Arrange the Donation of Your Body. Available at <http://medical-neuroscience.medicine.dal.ca/donation/procedures2.htm>; The University of Calgary (n.d.). Body Donation Program. Available at <http://www.fp.ucalgary.ca/bodydonation/faq.htm#5>; University of Toronto, Faculty of Medicine, Department of Surgery (2011). Body Donation Program. Available at <http://anatomy.utoronto.ca/body.htm>.
4. See Human Tissue Act, S.N.L. 1999, c. H□15, s. 10; Human Tissue Donation Act, R.S.P.E.I. 1988, c. H□12.1, s. 10; Human Tissue Gift Act, R.S.N.S. 1989, c. 215, s. 9; Human Tissue Gift Act, R.S.S. 1978, c. H□15, s. 9; The Human Tissue and Organ Donation Act, SA 2006, H-14.5, s. 8; The Human Tissue Gift Act, CCSM c. H180, 2005, s. 5; The Human Tissue Gift Act, RSBC 1996, c. 211, s. 8; Trillium Gift of Life Network Act, RSO 1990, c. H.20, s. 8.
5. CIHR, NSERC, SSHRC (2014), Tri-Council Policy Statement, Art. 2.1.
6. Ibid., Art. 12.1.
7. Ibid., Arts. 3.1 & 3.11.
8. Ibid., Art. 12.2.
9. Anatomy Act, RSBC 1996, c. 13; Anatomy Act, RSO 1990, c. A.21; The Anatomy Act, CCSM 2006, c. A80.
10. CIHR, NSERC, SSHRC (2014), Tri-Council Policy Statement, Art. 12.3B.
11. Ibid., Art. 12.3A.
12. Civil Code of Québec, RLRQ c. C-1991, at s. 22.
13. Miner v. Canadian Pacific Railway (1910), 15 W.L.R. 161 (Alta. Trial), overturned in part (1911), 3 Alta. L.R. 408 (ABCA); Hunter v. Hunter, [1930] 4 D.L.R. 255 (Ont. HCJ). See also, for example, the General Regulation, Alta. Reg. 249/1998 to Alberta's Cemeteries Act, R.S.A. 2000, c. C-3.
14. General Regulation, Alta. Reg. 249/1998, s. 11; Cremation, Interment and Funeral Services Act, SBC 2004, c. 35, s. 5; The Funeral and Cremation Services Act, SS 1999, c. F23.3, s. 91.
15. See Coroners Act, R.S.O. 1990, c. C.37; Coroners Act, 1999, S.S. 1999, c. C-38.01; Coroners Act, S.B.C. 2007, c. 15; Fatality Inquiries Act, R.S.A. 2000, c. F-9; Fatality Inquiries Act, C.C.S.M. 1990, c. F52; Sheng v. Ontario (Ministry of the Solicitor General and Correctional Services), [1997] O.J. No. 3535 (ONCA).
16. Criminal Code, RSC 1985, c. C-46, s. 182.
17. Nwabueze RN. Biotechnology and the Challenge of Property: Property Rights in Dead Bodies, Body Part, and Genetic Information. (2007). Ashgate Publishing Limited: Burlington, VT; Regina v. Ladue (1965), 51 W.W.R. 175 (YKCA); R. v. Mills, [1993] SCJ No. 120; R. v. Moyer, [1994] 2 SCR 899.
18. Davidson v. Garrett (1899), 30 OR 653 (Ont. HCJ); O'Connor v. Victoria (City) (1913), 4 W.W.R. 4.
19. McLoughlin v. Arbor memorial Services Inc. (2004), 33 CCLT (3d) 158 (Ont. SCJ); McNeil et al. v. Forest Lawn Memorial Services Ltd. (1976), 72 D.L.R. (3d) 556 (B.C. Sup. Ct.).
20. Mason v. Westside Cemeteries Ltd. (1996), 29 C.C.L.T. (2d) 125 (Ont. Gen. Div.).

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