The Disposition of Human Remains/Tissues — A Short Guide for Hospitals

February 27, 2019

We don't mean to be morbid, but…

We frequently get asked questions by hospital clients about who has authority after the death of a patient to authorize the release of a body to a funeral home, to decide on burial or cremation and to request an autopsy. Sometimes, there are unusual requests, or disputes between family members about what should happen. There may also be wishes previously expressed by the deceased, with which the family may or may not want to comply. Patients also sometimes ask for the return of bodily tissue or implants that have been removed during care.

We attempt to address some of the more common questions below.

1. Who has the authority to release a body to a funeral home?

Surprisingly, there is no one statute in Ontario which provides a clear and obvious answer to this question, which necessitates an examination of several different statutes, the common law and judicial precedents.

Commonly, simply because of the practicality, it is the available family members who sign off on the arrangements to transfer the deceased's body to a funeral home. Typically, there is no controversy and no need to confirm specific authority.

But what if a dispute arises? The first and easiest answer is that where there is a will, the estate trustee appointed under that will (commonly referred to as the executor) is the person empowered to control the arrangements for the disposal of the body of the deceased. It would be the named estate trustee who would resolve that dispute and make the decision.

But what if there is no will? Or what if there's a will, but the estate trustee refuses to or is incapable of acting? Again, in normal circumstances, where there is no apparent dispute, it is the available family who will make the decisions. But what if the family cannot agree or there's disagreement between two co-trustees? The need to resolve any dispute is exacerbated by the need to dispose of the deceased's remains without undue delay. Any interested person can apply to the Superior Court to be appointed to

administer the deceased's estate, including regarding the disposition of the body. While the Court would endeavour to hear such an application quickly, from the perspective of a hospital, any delay will seem unreasonable.

We know from previous court decisions that any Judge asked to appoint a decision-maker for the disposition of a body, is going to be inclined to appoint a person living in a conjugal relationship with the deceased, particularly a "lawful spouse". If there is no such person, then the court is likely going to identify, to the extent possible, the closest next of kin,*i.e.*, the person with the highest entitlement to be appointed administrator of the estate, according to the hierarchy of relationships in the *Estates Act*. Knowing this, it is usually possible at the very least to arrange for the consensual transfer of a body from a hospital into the care of an agreed-upon funeral director, pending further decisions, particularly once lawyers are involved. If such agreement is not possible, then the hospital may have to keep the body until the family can reach agreement or the court decides. If this becomes prolonged or intractable, the hospital should considering involving its own lawyers.

2. Who has the authority to request an autopsy?

We know that in certain circumstances outlined in the *Coroners Act,*deaths must be reported to the coroner, who may then exercise investigative powers including issuing a warrant to take possession of the body and to have an autopsy performed. Those powers override any contrary wish on the part of the deceased, the estate trustee or family members.

Aside from this situation, there may be a desire to have some post-mortem examination conducted under the guidance of a hospital pathologist unrelated to the coroner's function to help answer non-forensic questions. Such requests can originate from the medical team, the family, or from the patient as a pre-mortem wish.

Whose consent is required for such an autopsy? Just as for transfer of a body to a funeral home, the answer to this is usually just practical — in the majority of cases, there is an "obvious" decision maker within the family who is asked to consent to the autopsy, and often that person is also the estate trustee. If there is a dispute, however, it would be the estate trustee's decision. Given that these "educational" autopsies are not mandatory, however, where there is a clear and strong dispute among close family members, the estate trustee and the pathology team might well prefer to back off from the request pending greater family consensus. The coroner could also be consulted to assist.

Neither the family members nor the estate trustee are obliged to follow the prior wishes of the patient either in favour of or against having an autopsy. Even where a patient has previously expressed a desire for no autopsy in the strongest possible terms, if there is a consensus among the family members and estate trustee that there nevertheless be one, it can proceed. They should be made aware of and consider the patient's pre-mortem wishes, but they are not absolutely bound by them.

3. Can tissues or implants removed from a patient be given to the patient or to a deceased patient's family upon request?

While rare, patients do occasionally make these sorts of requests. We have been consulted by hospitals where a patient has requested his amputated limb for the purpose of a cultural ceremonial disposition; some families will request fetal tissue following a miscarriage not meeting the definition of a stillbirth, for a religious burial; some patients have requested the release of specimens or medical devices such as implants which have been removed from them, for future legal purposes. Most medical devices removed from inside a body are infused with tissue.

Strictly speaking, any tissue or device removed from a patient is likely classified as "waste" under the *Environmental Protection Act*(EPA) and its Regulations, and is therefore subject to the EPA's strict regulatory regime with respect to waste disposal. There is a 2014 court decision in Ontario (*Piljac Estate v. Abraham*, 2014 ONSC 2893) in which the court held that human tissue that is excised either for diagnostic or medical purposes no longer "belongs" to the patient — at best, the patient is entitled to "reasonable access".

The straightforward answer to the request that tissues or implants be handed over, therefore, should usually be an empathetic and apologetic turndown.

Where the request occurs on the background of a medico-legal issue, regardless of whether or not the tissue or device falls into the class of specimens which must be archived in the pathology department pursuant to the *Public Hospitals Act* regulations, the hospital can and should provide an assurance that the specimen will be preserved so that it can be made available for lawful inspection by a suitable expert at some point in the future. Hospitals are generally accustomed to dealing with such expert-to-expert transfers from time to time, under the supervision of lawyers and/or the court.

There have been instances where the request for fetal or human tissue is so entrenched in a sincerely held religious, cultural and/or indigenous tradition that it may feel more "wrong" to refuse the request than to grant it, assuming that appropriate assurances can be sought and obtained with respect to the intention to deal with the material in a decent, dignified and appropriate manner. It would be wise to seek counsel in such situations, to assist in the mitigation of the legal risks involved.

By

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