Legal Aspects of Death

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by

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Contents

Preface		vi
Glossary		vii
Useful webs	ites	xix
Chapter 1	Definition of death	1
Chapter 2	Certification, verification and registration of death	5
Chapter 3	Disposal of the body	15
Chapter 4	Pregnancy, stillbirths and miscarriages and disposal	27
Chapter 5	Health and safety considerations on death of patient	35
Chapter 6	Preparation for death	41
Chapter 7	Death, stress and health service professionals	49
Chapter 8	Murder, manslaughter and other criminal offences	59
Chapter 9	Euthanasia and assisted suicide	71
Chapter 10	Not for resuscitation instructions: Adults and children	79
Chapter 11	Living wills	97
Chapter 12	The coroner's jurisdiction 1: Investigation into deaths	107
Chapter 13	The coroner's jurisdiction 2: Inquests	115
Chapter 14	The coroner's jurisdiction 3:	
_	Reforms to the coroner's office	125
Chapter 15	Post mortems	145
Chapter 16	Organ transplants and dead donors	159
Chapter 17	Removal, retention and storage of organs and tissue	173
Chapter 18	Wills: Making and execution	181
Chapter 19	Property and procedures following death	187
Chapter 20	Legal action following a death	195
Chapter 21	Financial provisions following death	201
Chapter 22	Access to records of deceased	207
Further read	ling	211
Index of cas	0	213
0	tutory instruments and statutes	216
	General index	

Preface

Like the other books in this series, this monograph follows the publication of a series of articles in the *British Journal of Nursing* on the law relating to death. Those articles, revised and updated, form the basis of a concise publication covering the main concerns which arise in the law relating to deaths in the NHS and private sector.

This book, like the others in this series, is intended for all health professionals who are likely to be involved in caring for dying patients whether in hospitals or in the community. It should also be of assistance to others such as health service managers, to lecturers and clinical supervisors, patient groups and their representatives and individuals who need to understand the legal consequences of death. Each chapter uses a situation to illustrate the relevant laws so that the law can be explained in a practical jargon-free way. The basic facts of the legal system are briefly set out in the first chapter. The book does not pretend to be encyclopaedic in its coverage, rather it is intended to introduce readers to the basic principles which apply and the sources of law, so that they can, by following up the further reading and websites provided add to their knowledge. Changes in the statutory provisions and new cases will require some amendments over time. The recommendations from the Inquiry following the Shipman case are only gradually being introduced and this book covers the progress so far and the reforms that are still to be initiated. It is hoped that this book will provide a baseline upon which readers can develop their knowledge and understanding of the law relating to death.

It is the intention that the chapters will lay the foundation for an understanding of the legal implications of the many issues that can arise when a person dies. At that critical time, it is essential that health and social services professionals, managers, relatives and others have an understanding of the laws which apply and can carry out their duties with a sensitivity and awareness of the different facets of the situation. Inevitably there will be changes as the new coroner's legislation is brought into existence and implemented, as new cases set judicial precedents for the future and as new Department of Health and professional guidance is published. It is hoped that future editions of this book will be able to track such developments and that it will continue to be a resource for professionals and lay persons alike.

Glossary

Accusatorial:	a system of court proceedings where the two sides contest the issue (cf. <i>inquisitorial</i>)
Act:	of Parliament, <i>statute</i>
Action:	legal proceedings
Actionable <i>per se:</i>	a court action where the claimant does not have to
Actionable per se.	show loss, damage or harm to obtain compensation, eg. an action for <i>trespass to the person</i>
Actus reus:	the essential element of a crime which must be proved to secure a conviction, as opposed to the mental state of the accused (<i>mens rea</i>)
A 1	
Adversarial:	the approach adopted in an <i>accusatorial</i> system
Advocate:	a person who pleads for another: it could be paid
	and professional, such as a <i>barrister</i> or <i>solicitor</i> , or
	it could be a lay advocate either paid or unpaid; a
	witness is not an advocate
Affidavit	a statement given under oath
Alternative dispute:	methods to resolve a dispute without going to court such as dispute resolution
Altruistic donation:	a form of non-directed living donation, where a
	kidney is donated by a healthy person without that
	person being told who the recipient will be
Anatomical examination	:macroscopic examination by dissection for anatomical purposes
Anatomical specimen:	the body of a deceased person to be used for
-	the purpose of anatomical examination, or the body of a deceased person in the course of being used for the purpose of anatomical examination
	(including separated parts of such a body). A
	former anatomical specimen is an organ or body
	part donated for anatomical examination which is
	retained once the examination of the rest of the body
	•
Anotomist	has been completed
Anatomist:	an expert in <i>anatomy</i>
Anatomy:	the science of the structure and organisation of the
A · 1	living body and its parts
Anonymised:	a procedure to ensure that if material is removed

Appellate court:	from a body, all necessary steps are taken to avoid identifying the person from whose body the material has come a court that hears appeals from lower courts, eg.
Appropriate consent:	Court of Appeal and House of Lords defined in the Human Tissue Act by reference to the person who may give consent, with a 'nominated representative' provided for, who may make decisions about regulated activities after a person's death
Autologous use:	cells or tissue removed from and transplanted into the same person
Autopsy:	a <i>post-mortem</i> examination
Barrister: Battery: Bench: Biopsy:	a lawyer qualified to take a case in court an unlawful touching (see <i>trespass to the person</i>) the magistrates, <i>Justice of the Peace</i> a procedure where tissue is removed from a living body for examination under a microscope.
Bolam Test:	the test laid down by Judge McNair in the case of <i>Bolam v. Friern HMC</i> on the standard of care expected of a professional in cases of alleged <i>negligence</i>
Bona fide:	in good faith
Breach: Burden of proof:	breaking, usually of a legal duty the duty of a party to litigation to establish the facts, or in criminal proceedings the duty of the prosecution to establish both the <i>actus reus</i> and the <i>mens rea</i>
Case citation:	the reference to an earlier reported case made possible because of the reference system, eg. 1981 1 All ER 267 means the first volume of the All England Reports for 1981 at page 267 which is the reference for the case of Whitehouse v. Jordan, where Whitehouse is the plaintiff (claimant), Jordan the defendant and 'v' stands for versus, ie. against. Other law reports include: AC Appeals Court; QB Queens Bench Division; WLR Weekly Law Reports; EWCA England and Wales Court of Appeal
Cause of action: Cells:	the facts that entitle a person to sue individual human cells or a collection of human cells when not bound by any form of connective tissue
Certiorari:	an action taken to challenge an administrative or judicial decision (literally: to make more certain)

Civil action:	proceedings brought in the civil courts
Civil wrong:	an act or omission which can be pursued in the civil
	courts by the person who has suffered the wrong (see <i>torts</i>)
Claimant:	the person bringing a civil action (originally
Clinical:	<i>plaintiff</i>) based on, or involving, direct examination and care
Chineai.	of patients
Clinical audit:	a quality improvement process that seeks to improve
	patient care and outcomes through systematic review of care against explicit criteria. Stored tissue
	previously needed for diagnosis, for example, may
	need to be reviewed as part of this process
Clinical diagnosis:	process where a disease is identified from medical
	history taking, diagnostic tests and physical examination
CPA:	Clinical Pathology Accreditation is an organisation
	which provides a service to accredit medical
	laboratories in the UK
Committal proceedings:	hearings before the magistrates to decide if a person
Common law:	should be sent for trial in the crown court law derived from the decisions of judges, case law,
Common law.	judge-made law
Criminal courts:	courts such as magistrates and crown courts hearing
	criminal prosecutions
-	: knowledge obtained from the circumstances
Coroner:	a person appointed to hold an inquiry (inquest) into a death in unexpected unusual circumstances
Criminal wrong:	an act or omission which can be pursued in the
-	criminal courts
Cross examination:	questions asked of a witness by the lawyer for the
	opposing side: leading questions can be asked
Damage:	harm which has occurred
Damages:	a sum of money awarded by a court as compensation
	for a <i>tort</i> or breach of contract
Declaration:	a ruling by the court, setting out the legal situation
Designated individual:	the person responsible for activities carried out under the licence and for compliance with the licence.
	Under the EU Tissue and Cells Directive, Article 17,
	the Designated Individual (DI) is equivalent to the
	'responsible person'

Diagnosis:	a process where a disease is identified by signs and
Directed donation:	symptoms, a history and laboratory tests a form of donation where a healthy person donates an organ (usually a kidney) or tissue to a specific recipient following a tissue typing exercise. The recipient could be known to the donor (in the case of genetically or emotionally related donation) or unknown to the donor (in the case of paired/pooled donation)
Disclosure:	documents made available to the other party
Dissenting judgment:	a judge who disagrees with the decision of the majority of judges
Distinguished:	(of cases) the rules of precedent require judges to follow decisions of judges in previous cases, where these are binding upon them. However in some circumstances it is possible to come to a different decision because the facts of the earlier case are not comparable to the case now being heard, and therefore the earlier decision can be 'distinguished'
DNA:	(deoxyribonucleic acid) the genetic material of humans. DNA is located in the cell nucleus and controls heredity
Domino donation:	donation from a living donor, where the organ or tissue is removed for the health benefit of the donor, but is suitable for use in transplantation. The common form is from a cystic fibrosis patient, who undergoes a heart and lung transplant. The heart is unaffected by cystic fibrosis and is therefore suitable for transplantation
Donation:	donating human tissue, cells or organs intended for human applications
Donor:	every human source, whether living or deceased, of human cells or tissue
Embryo:	a fertilised egg that has the potential to develop into a fetus
Ethics:	the science of morals, moral principles and rules of conduct
Euthanasia: Examination in chief:	bringing about gentle and easy death, mercy killing the witness is asked questions in court by the lawyer of the party who has asked the witness to attend; leading questions cannot be asked

<i>Ex gratia</i> : Existing holdings: <i>Ex parte</i> : Expert witness:	as a matter of favour, eg. without admission of liability, of payment offered to a claimant relevant material being held or stored prior to the commencement of the Human Tissue Act 2004 on one side only, where the other side is not a party to the action evidence given by a person whose general opinion based on training or experience is relevant to some of the issues in dispute (contrast with <i>witness of fact</i>)
Gamete:	a cell connected with sexual reproduction, which is either a male sperm or a female egg
'Gillick' competent:	a test of competence and method of determining the ability of a young person under the age of 16 to make decisions regarding his/her own healthcare from <i>Gillick v West Norfolk and Wisbech Area Health</i> <i>Authority</i> [1985] 3 All ER 402 (HL)
Guardian ad litem:	a person with a social work and child care background who is appointed to ensure that the court is fully informed of the relevant facts that relate to a child and that the wishes and feelings of the child are clearly established. The appointment is made from a panel set up by the local authority
Guilty:	a finding in a criminal court of responsibility for a criminal offence
Hearsay: Heart-beating donors:	evidence which has been learnt from another person this refers to the circumstances where organs and tissue for transplantation are removed from donors fulfilling the nationally agreed and legally defined criteria of brainstem death. In such cases the surgeon will have obtained either the prior permission of the deceased person or, after his/her death, permission from the highest ranking person in a qualifying relationship. Such donor hearts beat up to the time of organ and tissue removal because of mechanical support mechanisms (ventilators)
Hepatic: Hierarchy:	relating to the liver the recognised status of courts which results in lower courts following the decisions of higher courts (see <i>precedent</i>). Thus decisions of the House of Lords must be followed by all lower courts unless they can

HSC: Human application:	be distinguished (see <i>distinguished</i> above) Health Service Circular issued by Department of Health the use of tissue or cells on or in a human recipient and applications outside the body
Indemnity:	security against loss or damage, compensation for loss incurred
Independent assessor:	a person who acts as a representative of the Human Tissue Authority (HTA), trained and accredited by the HTA, to consider for approval all living organ
Indictable:	donations for transplantation can be tried on an indictment (ie. before the crown court – some crimes are triable either way, ie. before the crown court and summarily before magistrates)
Indictment:	written accusation against a person, charging him with a serious crime, triable by jury
Informal:	of a patient who has entered hospital without any statutory requirements
Injunction:	an order of the court restraining a person
Inquisitorial:	a system of justice whereby the truth is revealed by an inquiry into the facts conducted by the judge, eg. coroner's court
Invitation to treat:	the early stages in negotiating a contract, eg. an advertisement, or letter expressing interest. An invitation to treat will often precede an offer which, when accepted leads to the formation of an agreement that, if there is consideration and an intention to create legal relations, will be binding
Judicial review:	an application to the High Court for a judicial or administrative decision to be reviewed and an appropriate order made, eg. <i>declaration</i>
Judiciary: Justice of the peace:	judges (JP) a lay <i>magistrate</i> , ie. not legally qualified who hears <i>summary</i> (minor) <i>offences</i> and sometimes <i>indictable</i> (serious) <i>offences</i> in the magistrates court in a group of three (bench)
Liable/liability:	responsible for the wrong doing or harm in civil proceedings
Licence holder:	the person who applies for and is granted a licence,

	who can be, but is not necessarily the <i>designated</i> <i>individual</i> . The licence holder is responsible for the payment of any fees charged by the Human Tissue Authority (HTA). The licence holder can be a corporate body. This definition is subject to change pending further consideration by the HTA
Licensed premises:	premises to which a licence applies. A licence can only be granted to a specific place, not multiple sites. This definition is subject to change pending further
Licensing:	consideration by the Human Tissue Authority a number of activities can only be carried out where the establishment is licensed under the Human Tissue Act by the Human Tissue Authority for that purpose. The activities are:
	• carrying out anatomical examinations and storing anatomical specimens
	• public display of a body or material from a deceased person
	• making of post mortem examinations
	• removing tissue or organs from a deceased person other than for transplantation, post mortem or anatomical examination
	• storing of tissue from a human body (except for diagnostic material)
Litigation:	civil proceedings
Living donor:	the person donating organs or tissue for transplantation. The most common forms are live kidney donation (where one kidney is removed), or live bone marrow donation
Magistrate:	a person (see <i>JP</i> and <i>stipendiary</i>) who hears <i>summary</i> (minor) <i>offences</i> or <i>indictable offences</i> which can be heard in the <i>magistrates</i> court
Mens rea:	the mental element in a crime (cf. <i>actus reus</i>)
Negligence:	(1) a breach by the defendant of a legal duty to take reasonable care not to injure the plaintiff or cause him loss, or (2) the attitude of mind of a person committing a civil wrong as opposed to intentionally
Next friend:	a person who brings a court action on behalf of a minor

NHS Organ Donor Register: a confidential, computerised database managed

	by UK Transplant, which holds details of people who have signed up to become organ donors in the event of their death. The register is used after a person has died to help establish whether he/she wanted to donate and if so, which organs : circumstances where donation occurs without a known recipient. Most commonly, this is deceased donation where the organ is allocated to the most suitable person on the transplant waiting list tion: donation in circumstances where the deceased donor was not ventilated at the time of death. Donation therefore occurs once death is certified following cardiorespiratory arrest (ie. the donor's heart has stopped beating)
Ombudsman: Organ:	a commissioner (eg. health, local government) appointed by the Government to hear complaints a differentiated and vital part of the human body, formed by different tissue, that maintains its structure, vascularisation and capacity to develop physiological functions with an important level of autonomy
Paired donation:	where a close relation, friend or partner is fit and able to donate an organ but is not well matched to the potential recipient, that couple can be matched to another couple in a similar situation, enabling both people in need of a transplant to receive a well- matched organ
Perfusion:	a method of treating organs following the death of the donor to preserve them before transplantation
Plaintiff:	term formerly used to describe one who brings an action in the civil courts. Now the term <i>claimant</i> is used
Pooled donation:	where a close relation, friend or partner is fit and able to donate an organ but is not well matched to the potential recipient, that couple can be matched to other couples in a similar situation, so that all people in need of a transplant receive a well- matched organ
Post mortem:	a hospital post mortem examination is carried out, with the consent of relatives/friends, to gain a fuller

Practice direction:	understanding of the deceased person's illness or the cause of death, and to enhance future medical care. Coroners' post mortem examinations are carried out under the authority of the coroner and without consent to assist coroners in carrying out their functions guidance issued by the head of the court to which
Pre-action protocol:	they relate on the procedure to be followed rules of the Supreme Court provide guidance on action
Precedent:	to be taken before legal proceedings commence a decision which may have to be followed in a subsequent court hearing (see <i>hierarchy</i>)
Preservation:	the use of chemical agents, alterations in environmental conditions or other means during processing to prevent or retard biological or physical deterioration of cells or tissue
Prima facie:	at first sight, or sufficient evidence brought by one party to require the other party to provide a defence
Privilege:	in relation to evidence, being able to refuse to disclose it to the court
Privity:	the relationship that exists between parties as the result of a legal agreement
Processing:	all operations involved in the preparation, manipulation, preservation and packaging of tissue or cells intended for human applications
Procurement:	a process by which tissue or cells are made available
Proof:	evidence which secures the establishment of a <i>claimant</i> 's, <i>prosecution</i> 's or defendant's case
Prosecution:	the pursuing of criminal offences in court
Public display:	includes organised displays and exhibitions held in museums, galleries, exhibition venues and educational establishments. This definition is subject to change pending further consideration by the Human Tissue Authority
Public health monitoring:	using population-based or epidemiological techniques to ascertain the prevalence, spread and pattern of an established disease or condition in the community and relating its occurrence to public health programmes and activities
Qualitative: Quality assurance:	relating to characteristics that are based on quality a programme for the systematic monitoring and evaluation of the various aspects of a project, service,

Glossary

	or facility to ensure that standards of quality are being met
Quantitative: Quantum:	relating to characteristics that are based on numbers
Qualituili.	the amount of compensation, or the monetary value of a claim
Quarantine:	the status of retrieved tissue or cells, or tissue isolated physically or by other effective means, while awaiting a decision on their acceptance or rejection
Queen's Counsel (QC):	
Ratio: <i>Re F</i> ruling:	the reasoning behind the decision in a court case a professional who acts in the best interests of an incompetent person who is incapable of giving consent, does not act unlawfully if he or she follows the accepted standard of care according to the <i>Bolam</i> <i>Test</i> . This common law principle applied until it was replaced by the Mental Capacity Act 2005
Relevant material:	described by the Human Tissue Act as material other than gametes, which consists of or includes human cells. In the Human Tissue Act, references to relevant material from a human body do not include: • embryos outside the human body, or • hair and nail from the body of a living person
Research ethics commit	ittee: defined under regulations made under Section
	1(9) of the Human Tissue Act to mean a local or multi-centre research ethics committee established in accordance with Department of Health guidance on the Research Governance Framework
<i>Res ipsa loquitur:</i> Residual tissue:	the thing speaks for itself material left over from a diagnostic or therapeutic intervention. This definition is subject to change pending further consideration by the Human Tissue Authority
Sanctions:	penalties, remedies following civil or criminal wrong
Scheduled purposes:	the activities relating to the removal, storage and use of human organs and other tissue, listed in Schedule 1 of the Human Tissue Act that require consent (see <i>Box 16.2</i> in <i>Chapter 16</i>)
Solicitor:	a lawyer who is qualified on the register held by the Law Society

Standard of proof: Statute law (statutory): Statutory instrument:	the level that the party who has the burden of proof must satisfy, eg. on a balance of probabilities (civil courts); beyond reasonable doubt (criminal courts) law made by <i>Acts of Parliament</i> orders and regulations having binding force. They must usually be laid before Parliament and will usually become law if they are confirmed by a simple resolution of both Houses (affirmative resolution). Some become law after they have been laid for a prescribed period unless they are annulled by resolution of either House (negative resolution)
Stem cell:	a precursor cell that can develop into more than one kind of cell. For example, early bone marrow cells can develop into red blood cells, white blood cells or platelets
Stipendiary magistrate:	a legally qualified <i>magistrate</i> who is paid (ie. has a stipend)
Storage:	maintaining the tissue under appropriate controlled conditions until distribution
Strict liability:	liability for a criminal act where the mental element does not have to be proved; in civil proceedings liability without establishing negligence
Summary judgment:	a procedure whereby the claimant can obtain judgment without the defendant being permitted to defend the action
Summary offence:	a lesser offence which can only be heard by magistrates
Tissue:	any constituent part of the human body formed by cells
Tissue establishment:	a tissue bank or a unit of a hospital or another body where activities of processing, preservation, storage or distribution of human tissue and cells are undertaken. It may also be responsible for procurement or testing of tissue and cells
Tort:	a <i>civil wrong</i> excluding <i>breach</i> of contract. It includes: <i>negligence</i> , <i>trespass</i> (to the person, goods or land), nuisance, breach of statutory duty and defamation
Transplant:	an implant of an organ, tissue or cells either from and into the same body or from one person to another
Transplant coordinator:	•

Trespass to the person:	understand the transplant process and also coordinates the transplant evaluation between the dialysis unit, transplant surgeon, and tissue typing laboratory. After a transplant, the nurse provides a communication link between the recipient and the transplant doctors for post-transplant care a wrongful direct interference with another person. Harm does not have to be proved
Trial:	a court hearing before a judge
Ultra vires:	Outside the powers given by law (eg. of a statutory body or company)
Vicarious liability:	the liability of an employer for the wrongful acts of an employee committed while in the course of
Void:	employment invalid or not legally binding
Voidable:	Can be made <i>void</i>
Volenti non fit injuria:	'to the willing there is no wrong'; ie. the voluntary assumption of risk
Ward of court:	a minor placed under the protection of the High Court, which assumes responsibility for him or her and all decisions relating to his or her care must be made in accordance with the directions of the court
Wednesbury principle:	the court will intervene to prevent or remedy abuses of power by public authorities if there is evidence of unreasonableness or perversity. Principle laid down by the Court of Appeal in the case of Associated Provincial Picture House Ltd v. Wednesbury Corporation [1948] 1 KB 233
Without prejudice:	without detracting from or without disadvantage to. The use of the phrase prevents the other party using the information to the prejudice of the one providing it
Witness of fact:	a person who gives evidence of what they saw, heard, did or foiled to do (contract with generat witness)
Writ:	did or failed to do (contrast with <i>expert witness</i>) a form of written command, eg. the document which used to commence civil proceedings. Now a claim form is served

Useful websites

Audit Commission: www.audit-commission.gov.uk Bristol Inquiry (Kennedy Report): www.bristol-inquiry.org.uk British Humanist Association: www.humanism.org.uk British National Formulary: www.bnf.org/ British Transplantation Society: www.bts.org.uk/standards.htm Civil Procedure Rules: www.open.gov.uk/lcd/civil/procrules fin/crules.htm Commission for Racial Equality: www.cre.gov.uk/ Department for Constitutional Affairs: www.dca.gov.uk Department of Health: www.dh.gov.uk Department of Trade and Industry now the Department for Business, Enterprise and Regulatory Reform: www.berr.gov.uk/ Department for Work and Pensions: www.dwp.gov.uk Domestic Violence: www.domesticviolence.gov.uk General Medical Council: www.gmc-uk.org/standards Health and Safety Commission: www.hsc.gov.uk Health and Safety Executive: www.hse.gov.uk Health Professions Council: www.hc-uk.org Help the Aged: www.helptheaged.org.uk/ Hinduism Today: www.hinduismtoday.com Human Fertilisation and Embryology Authority: www.hfea.gov.uk/ Human Rights: www.humanrights.gov.uk Islamic Law: www.al-islam.org/laws/ Judaism: www.jewfaq.org/death.htm Medicines and Healthcare Products Regulatory Agency: www.mhra.gov.uk Ministry of Justice: www.justice.gov.uk/ National Audit Office: www.nao.gov.uk National Patient Safety Agency: www.npsa.org.uk National Service Framework: www.doh.gov.uk/NSF/National Treatment Agency: www.nta.nhs.uk/ Natural Death Organisation: www.naturaldeath.org.uk NHS: www.nhs.uk NHS Direct: www.nhsdirect.nhs.uk NHS Professionals: www.nhsprofessionals.nhs.uk NICE: www.nice.org.uk Nursing and Midwifery Council: www.nmc-uk.org/ Open Government: www.open.gov.uk Pain: www.pain-talk.co.uk Pro-choice living will: www.livingwill.org.uk.

Royal College of Midwives: www.rcm.org.uk Royal College of Nursing: www.rcn.org.uk Royal Pharmaceutical Society of Great Britain: www.rpsgb.org.uk Shipman Inquiry: www.the-shipman-inquiry.org.uk/reports.asp Sikh faith: www.sikhismhomepage Stationery Office: www.hmso.gov.uk Stillbirth and Neonatal Death Society :www.uk-sands.org/ UK Government: www.direct.gov.uk UK Parliament: www.parliament.uk Victoria Climbie Inquiry: www.victoria-climbie.org.uk Voluntary Euthansia Society: www.ves.org.uk