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Physicians and Surgeons— Transplantation of Body Parts*

Transplantation of healthy parts of a human body as replacements for defective parts is a concept in modern medicine which finds application under circumstances of widely differing complexity and criticality with respect to the patient's health. Transplants which might be spoken of as almost commonplace are skin grafts, bone grafts and corneal transplants. One explanation for the broad use of these techniques is the fact that the material to be transplanted is obtainable without unreasonable risks or difficulties.¹ Bone and skin graft material can be taken from the patient himself. The eyes can be removed from the body of a deceased for several hours after death and stored for substantial periods of time without impairing their quality.² During recent years, however, the probability of successful transplants of vital body organs has increased and attempts at them have been made.³

It is convenient for analysis to distinguish between body organs which may be removed from a donor who continues to live,⁴ and those where removal is incompatible with continued life of the donor.⁵ A donation of the former "non-essential" category may come from either a living or a deceased donor, but the latter "essential type" can only be obtained from the body of a deceased. One critical problem, then, in donations of essential organs is to determine when death has occurred.⁶ To remove the organ before that

* N.M. Stat. Ann. § 12-11-1 to -5 (Repl. 1968.)

1. Wasmuth & Stewart, *Medical & legal Aspects of Human Organ Transplantation*, 14 Clev.-Mar. L. Rev. 442 (1965).

2. *Id.* at 443.

3. Kidney transplantation was first successfully applied in 1954. 160 J.A.M.A. 277 (1956). Within the last year heart transplants have been successfully completed throughout the world; many of the recipients are still living. A lung transplant was performed in Edinburg, Scotland, on May 15, 1968. *Albuquerque Journal*, May 17, 1968, at E-12, col. 2.

4. A kidney, for example, or possibly a lung.

5. A heart or liver, for example.

6. The problem of developing an adequate clinical definition of "death" which must be satisfied before removal of essential organs is extremely difficult. No single factor has been postulated as being invariably determinative of when a patient is beyond hope.

A physician may rely on various tests or signs to determine whether or not death has occurred. Such tests are undertaken to prove that the heart has stopped beating, that respiration has ceased, and that circulation and responses of the vascular system to certain stimuli have been irreversibly altered. . . .

It is common knowledge in medical centers that such definitions of death are obsolete. It is not possible to define death only as the cessation of respiration or of the heartbeat. These two functions may be carried on now by artificial means. For instance, the heartbeat may be stimulated by an electric pacemaker

time presumably deprives the donor of life, yet to delay until all possible indicia of life have vanished can substantially reduce the probability of making a successful transplant.⁷

Assuming a solution to the problem of establishing the point at which death occurs, and that willing donors are available,⁸ there is need for an adequate legal procedure to effectuate such a donation. It is the purpose of this Comment to discuss the problems of such donations within the context of New Mexico law.

In 1961, the New Mexico legislature passed "an act relating to the donation or consent to certain disposition of human bodies or parts thereof."⁹ The act allows disposition of organs or members of the body by the person himself¹⁰ or by the person having the right

(an instrument that is in common use in the large medical centers), or the circulation may be maintained by forceful massage of the heart. Likewise, a patient need not die because he is unable to breathe. There are many instruments now available in most hospitals to ventilate the patient artificially. As an illustration, the patient who suffers a massive brain hemorrhage frequently becomes apneic (unable to breathe). Should this patient be ventilated by an automatic respirator, life will continue for a considerable length of time. . . . However, the destruction of the brain by the hemorrhage may not be consistent with prolonged or productive life. . . . [T]his patient, if abandoned, will not survive. . . . He has no hope of ever regaining consciousness. His existence depends wholly upon artificial means, and it is questionable how long such artificial means will be effective.

By contrast, consider the patient suffering from a paralytic poliomyelitis. . . . During the great poliomyelitis epidemics of the not-too-distant past, many patients were supported by artificial respirators and many of them continue to live today by this means. . . . Therefore, the fact that life can only be maintained by mechanical instruments is not sufficient to establish death. . . . Death is determined by several factors but primarily by the state of unconsciousness. When the chances of recovery of consciousness have been totally eliminated, brain death has occurred. . . .

But the lack of function of the mind alone is insufficient as evidence of death. It is generally conceded that some unconscious persons live on while breathing with mechanical assistance. The question then, is, "When is the brain so damaged that consciousness cannot be regained?" Wasmuth & Stewart, *supra* note 1, at 464-66.

7. It has been found that if the kidneys can be removed and perfused in less than one hour after cessation of circulation in the donor, the chances for survival are good. As further time elapses the chances diminish, so that beyond two hours it is very unlikely that transplantation will be successful. Wasmuth & Stewart, *supra* note 1, at 445. "Within minutes, certainly no more than an hour, of the clinical death of the donor, the heart must be removed from the body, quickly cooled, and then transplanted within a few hours if the operation is to work." National Observer, Jan. 22, 1968, at 22, col. 3. But there is some hope that by equipment being experimentally developed at Baylor University the subsequent implantation may be delayed as much as 17 hours. Albuquerque Journal, April 5, 1968, at B-5, col. 1.

8. A recent Gallup Poll indicated that seven in every ten U.S. adults would be willing to have their heart or other vital organs donated to medical science upon their deaths. Albuquerque Journal, Jan. 19, 1968, at A-12, col. 1.

9. N.M. Laws 1961, ch. 167.

10. N.M. Stat. Ann. § 12-11-1 (Repl. 1968).

to burial of the body.¹¹ The only restrictions are that the deceased be an "inhabitant" and die within the state, and that the donation be "for the purpose of advancing medical science or for the replacement or rehabilitation of diseased or worn out organs, members or parts of the bodies of living humans."¹² In addition, the act specifies that the donation shall be by written instrument signed by the donor and witnessed by two persons of legal age,¹³ but that no particular form or words are necessary so long as "the instrument conveys the clear intention of the person making the same."¹⁴ It is permissible to specifically name the donee, but if none is named, the hospital or the attending physician is considered to be the donee with discretion over the use to be made of the part of the body concerned.¹⁵ Lastly, there is specifically reserved to the person making such a donation the right to revoke it by a written instrument of the same formality as that of the original donative transfer.¹⁶

Such a statute represents a departure from the common law. Under the early common law of England a dead body was under the jurisdiction of the ecclesiastical courts and the body was not considered to be property.¹⁷ In this country, in the absence of ecclesiastical courts, the law developed somewhat differently. The deceased had no absolute right to dispose of his body, even by testamentary instrument, but his wishes were entitled to respectful consideration.¹⁸ Eventually, rights that were similar to property rights came to be recognized and protected:

[N]otwithstanding there can be no property right in a dead body in the commercial sense, there is a quasi-property right in a dead body vesting in the nearest relatives of the deceased and arising out of their duty to bury their dead.¹⁹

Although the common law has come to recognize some rights in dead bodies, the right of a deceased to dispose of his own body is still a new concept in the law.²⁰ The continuing importance of the common law as developed is shown, for instance, by the reliance of

11. N.M. Stat. Ann. § 12-11-2. (Repl. 1968).

12. N.M. Stat. Ann. §§ 12-11-1,-2 (Repl. 1968).

13. N.M. Stat. Ann. § 12-11-3 (Repl. 1968).

14. N.M. Stat. Ann. § 12-11-4 (Repl. 1968). Suggested forms presently being used in some Ohio hospitals are included in Wasmuth & Stewart, *supra* note 1, at 469-71.

15. N.M. Stat. Ann. § 12-11-3 (Repl. 1968).

16. N.M. Stat. Ann. § 12-11-5 (Repl. 1968).

17. *Infield v. Cope*, 58 N.M. 308, 311, 270 P.2d 716, 718 (1954).

18. *Id.*; *In re Henderson*, 13 Cal. App. 2d 449, 57 P.2d 212 (1936); *Guerin v. Cassidy*, 38 N.J. Super. 454, 119 A.2d 780 (1955).

19. *Infield v. Cope*, 58 N.M. 308, 312, 270 P.2d 716, 719 (1954), citing 15 Am. Jur. *Dead Bodies* § 6, at 831.

A study of the texts and decisions seems to establish in the survivors the

the New Mexico statutes upon the common law definition of "person having right to burial of the body."²¹

In the case of a married person, the primary right to possession of the body and control of the burial is in the spouse.²² But the application of this rule is restricted to married persons who at the time of death were living together as man and wife.²³ If the spouses were separated, then the right belongs to the next of kin, in order, according to the closeness of relationship between them and the deceased.²⁴

Children, if not married, may be buried by their parents, but if in a divorce proceeding custody of the child was awarded to one of the parents, then that parent alone has the right to control the burial of the body.²⁵ These examples suffice to indicate that substantial uncertainty attends prediction of the person entitled to bury any deceased until after a thorough analysis has been made of the decedent's family and his relationship to it.²⁶ This uncertainty carries over into the application of the New Mexico statute as to one who performs a transplant without first ascertaining and obtaining the consent of all possible claimants to the right of burial of the body. The possibility of legal complications arising from a situation of this nature may seem remote²⁷ and the cases are not numerous, but

following rights in relation to the bodies of their dead, to-wit:

1. The right to the custody of the body.
2. The right to have the body in the condition in which it was left by death, without mutilation.
3. The right to have the body treated with decent respect, without outrage or indignity thereto.
4. The right to bury the body without (sic) interference.

Id. at 312, 270 P.2d 719.

20. A current analysis of the validity and effect of testamentary directions to dispose of the testator's body appears in Annot., 7 A.L.R.3d 747 (1966).

21. N.M. Stat. Ann. § 12-11-2 (Repl. 1968).

22. *Fischer's Estate v. Fischer*, 1 Ill. App. 2d 528, 117 N.E. 2d 855 (1954).

23. *Feller v. Universal Funeral Chapel, Inc.* 124 N.Y.S.2d 546 (1953).

24. *McEntee v. Bonacum*, 66 Neb. 651, 92 N.W. 633 (1902).

25. *Phillips v. Home Undertakers*, 192 Okla. 597, 138 P.2d 550 (1943).

26. That such uncertainty exists is illustrated by a recent newspaper story. Permission to use the heart and kidneys of a 26 year old truckdriver was denied by his mother. The story explained that the man had been shot in the brain during an altercation in a bar while celebrating because his wife had just given birth to a son. Under such conditions it would be strange if the mother, instead of the wife, was the person with real authority. *Albuquerque Journal*, January 18, 1968, at C-4, col. 1.

27. One possible problem is suggested by a recent transplant performed in Houston. The donor was severely beaten by two men and an autopsy shows he suffered massive brain damage. The autopsy report shows that death occurred at 11:30 A.M. but a hospital pathologist contends that the heart was still beating faintly with the aid of a mechanical respirator at 1:00 p.m. The heart was subsequently transplanted. The two men who administered the beating were charged with murder, but it is their conten-

their frequency is likely to increase. In addition, the facts underlying the New Mexico cases concerned with dead bodies share an almost irrational concern of the living for the treatment of the body of a deceased.²⁸

The possibility of obtaining the permission of the donor, himself, is also a likely area for legal complications. With respect to transplants of vital body organs, the person often sought as a donor is the victim of an accident or a homicide who previously was in good health and is relatively young. These, however, are the persons least likely to have made *prior* arrangements to donate their organs because they would not have been contemplating death. Once the accident has occurred there would be substantial doubt of their competency to execute a valid donative instrument,²⁹ and if sufficient lucidity has been retained, as one observer has commented,

It would be a most shocking experience to a desperately ill patient to

tion that if the victim's heart was still beating when removed then their acts did not kill him. Albuquerque Journal, May 14, 1968, at A-12, col. 1. *See*: State v. Scates, 50 N.C. 420, 423-24 (1858), R. v. Jordan, 40 Crim. App. 152 (1956); *Compare*: R. v. Smith, 43 Crim. App. 121 (1959), Payne v. Commonwealth, 255 Ky. 533, 75 S.W.2d 14 (1934), People v. Lewis, 124 Cal. 551, 57 P. 470 (1899).

Concerning the question of the doctor's possible guilt for failing to continue prolonging life, *see*: Fletcher, *Prolonging Life*, 42 Wash. L. Rev. 999 (1967).

28. In *Theodore v. Theodore*, 57 N.M. 434, 259 P.2d 795 (1953), the decedent's widow, who had agreed upon and assisted in making the funeral arrangements, decided that she wished to disinter the body after learning that her deceased husband had by will left all his property to a brother and sister. In *Infield v. Cope*, 58 N.M. 308, 270 P.2d 716 (1954), the decedent's widow sought damages from an undertaker for alleged mental suffering and impairment of bodily health because the undertaker, in possession of the body prior to burial, refused to allow the widow to view it. The husband had been killed in an explosion and fire while his wife was out of state. Either his employers or the public authorities requested the undertaker to prepare the the body for burial. His reason for refusing the widow the right to view the body was that it was burned beyond recognition. But he promptly granted her request to take possession of the body. The body was subsequently buried without the widow viewing the remains anyway.

In *Barela v. Frank A. Hubbell Co.*, 67 N.M. 319, 355 P.2d 133 (1960), the parents were seeking damages for alleged mutilation of the body of their son and for their own shock. Their son, a sheep herder, died from an undetermined cause and was found by a fellow employee. He wrapped the body in a tarpaulin and tied it on a burro to transport it down across hilly country covered with 16 inches to 3 feet of snow to a jeep. The body, still wrapped in the tarpaulin was laid on a bedroll in the jeep and then transported to the employer's ranch, all of which took one day. The parents were notified and asked if the body should be taken to a mortuary, but they requested it be brought to their home. The following day the body was placed in the trunk of an automobile and taken to the parents' home. The alleged mutilation of the body consisted of a scratch (about one inch long) on the forehead and the fact that, due to the passage of time, the body had turned blue.

29. The requirement of competency to execute an instrument as allowed by N.M. Stat. Ann. § 12-11-1 (Repl. 1968) would probably be the same as for execution of a will. On that subject *see* Weihofen, *Mental Incompetency to Make a Will*, 7 Natural Resources J. 89 (1967). *See also* 71 Dick. L. Rev. 675 (1967).

be consulted relative to the donation of any of his vital organs at a time when he is desperately trying to remain alive.³⁰

The alternative then under New Mexico law would be to obtain the prior permission of the "person having the right to burial of the body" if the patient should die. Determining who that person is would require, as stated above, a thorough analysis of the decedent's family and his relationship to it.

Another way to handle the problem, which would simplify it, would be to give the coroner the authority to make the donation as soon as any official examination was complete. Granting such authority would require the imposition of some checks and balances which would likely require revision of the law concerning coroners as it presently exists.³¹ Some guidelines would have to be developed to decide when donations should be made and to whom. It seems doubtful whether present public opinion would endorse such a grant of authority which could operate despite the adverse wishes of a decedent's family.

Further problems could arise if the donations were induced by paying the donor. The possibility of commercialization or "black-marketing" is present,³² and one state's statute which allows donations specifically prohibits any compensation for them.³³ New Mexico's law makes no such restriction,³⁴ but such a contract could raise serious problems of enforcement.

Finally, the doctor who removes the organ could be subject to liability for the mutilation of a dead body under the common law, if the removal was not authorized.³⁵ The New Mexico statutes which authorize donations presume that a valid gift has been made. If the instrument was subsequently held invalid, would the doctor's immunity remain? The Massachusetts law provides that one who relies on such an instrument in good faith shall not be liable or accountable for his act.³⁶ The measure of damages in the event liability

30. Wasmuth & Stewart, *supra* note 1, at 448.

31. N.M. Stat. Ann. §§ 15-43-43 to -50 (Repl. 1968).

32. Dr. William W. L. Glenn of the Yale University School of Medicine estimates about 500,000 Americans per year could benefit from heart transplants, "far more than could possibly be supported with any transplant program." National Observer, Jan. 22, 1968, at 22, col. 4.

33. Mass. Gen. Laws Ann. ch. 113, § 7 (Supp. 1967).

34. See N.M. Stat. Ann. §§ 12-11-1, -2 (Repl. 1968).

35. Palmquist v. Standard Accident Ins. Co., 3 F. Supp. 358 (S.D. Cal. 1933); Hill v. Travelers' Ins. Co., 154 Tenn. 295, 294 S.W. 1097 (1927); Annot., 83 A.L.R. 2d 955, 964 (1962).

36. Mass. Gen. Laws Ann. ch. 113, § 9 (Supp. 1967). The New Mexico law makes a similar release from liability for persons rendering emergency medical care, but says nothing about it in the laws concerning donations of body parts. N.M. Stat. Ann. § 12-12-3 (Repl. 1968).

was imposed is similarly uncertain.³⁷ There could also be a question, depending upon the facts, as to whether such liability, if imposed, would come within the coverage of the typical medical malpractice insurance policy.

Within our judicial system, the law may be developed under a case by case application of principles and purposes. Or it may be developed by legislation which attempts to provide answers in advance to many of the questions certain to arise. The demand for transplantation of human body parts is so great that the operations undoubtedly will be performed as medical science continues to develop the appropriate techniques. It is unfair to ask doctors³⁸ to assume the risks of proceeding under laws which provide an inadequate guide for their conduct. The public interest in such operations is substantial enough to justify legislative attention.

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37. In general, only nominal damages are allowed for the "injury" to the body, but punitive damages may be added if the act was willful. 22 Am. Jur. 2d *Dead Bodies* §§ 31, 42, 43 (1965). It is also possible that damages could be awarded for mental anguish of the person with the right to bury the body. Such damages were claimed in *Barela v. Frank A. Hubbell Co.*, 67 N.M. 319, 355 P.2d 133 (1960), but the court did not pass on the question since liability was not found.

38. And, incidentally, their medical malpractice insurers.

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