

Chapter 8

Legal matters : uses of tissue

Summary

Statute law provides the framework within which the use of tissue from the living for the purposes of transplantation or infertility treatment is permitted. There is also comprehensive legislation covering the use of tissue from the dead for therapeutic purposes and for the purposes of medical education and research. The lawfulness of all other uses of tissue would depend on a common law justification that it was in the public interest and did not offend public decency.

Introduction

- 8.1 It is clear that there is a close relationship between the lawfulness of the removal of tissue and the lawfulness of any subsequent use of the tissue: the propriety of the use largely determines the legality of the removal.

Use of tissue removed from the living

- 8.2 As has been seen, the Human Organ Transplants Act 1989 makes removal of an organ lawful if it is to be used for the purpose of transplantation (paragraph 7.3). This is the only use contemplated by the Act. Removal for other uses is outside the Act. The Human Fertilisation and Embryology Act 1990 makes the use of gametes or embryos for infertility treatment or research lawful provided that the necessary consents, under schedule 3 of the Act, have been given, all other uses being outside the Act.
- 8.3 So, the legality of all other uses of tissue becomes a matter of common law. Our concern in this report is with the use of tissue for five general purposes: treatment, archiving, banking, study/research and teaching. Each of these uses is one which in general terms can be described as being in the public interest. This is the criterion which a court would be most likely to employ if the legality of any particular use of tissue were challenged. It reflects the ethical analysis which we offered earlier (paragraphs 6.13 – 6.16). Put another way, the test would be whether any proposed use offended public decency or order as understood and previously determined by the courts. If treatment, archiving, banking, study/research and teaching are in the public interest, the question then becomes how far these general terms extend and

what are their proper limits? The common law at present is silent on these specific questions. Notions of public decency would guide the court if a case arose. Although not directly related on its facts, the case of *R v Gibson*¹ supports this view of the principle which would be applied. Freeze-dried aborted fetuses were put on display as earrings attached to a sculpted head. Strictly speaking, it was the public nature of the display rather than the use (if these can be separated) which was the basis of the prosecution. The conviction of the artist and the gallery owner of the crime of outraging public decency demonstrates the residual power of the common law to condemn that which “goes too far”. Of course, the vagueness of the terms also leaves the person who intends to use the tissue in a novel way which could offend others in some difficulty as to whether the (indeterminate) line has been crossed.

Use of tissue removed from the dead

- 8.4 We have already seen that the statutes regulating removal of tissue from the dead also stipulate the use to which this tissue may be put. The Human Tissue Act 1961 refers to “*medical education and research*” in addition to “*therapeutic purposes*”, and the Anatomy Act 1984 refers to “*teaching or studying or researching*”. With the exception of archiving and banking, these statutes clearly embrace all the intended uses which are our concern (as well as allowing, under the Coroners Act 1988, for the proper investigation of cause of death). We have already suggested the way in which archiving, if indeed it is a separate purpose, can be dealt with (paragraph 7.14). As regards the banking of tissue, since the purpose of such banking is to facilitate treatment, research or teaching in the future, it may also be brought within the general scheme of permitted uses.
- 8.5 What if it is intended to use the tissue in such a way as to exploit it commercially or to develop ways of doing so? It could be objected that commercial exploitation is not mentioned and thus falls outside the permitted range of uses. The response may be that commercial development and exploitation are not themselves uses but ways of organising uses that appeal to standard commercial motivation. Since research is a use authorised by statute, it could be argued that the motive for such research, which might be commercial exploitation, is irrelevant. Where, however, tissue is removed without any intention of using it for research but merely so as to be used immediately in some process of commercial development or manufacture, then such a use would appear to be outwith the terms of the Acts referred to. It must find its legality in the kind of common law justification referred to earlier, reflecting as it must our prior view of what is ethically acceptable (paragraphs 6.13 – 6.16).

¹ *R v Gibson* [1991] 1 All ER 439