

This response was submitted to the consultation held by the Nuffield Council on Bioethics on Give and take? Human bodies in medicine and research between April 2010 and July 2010. The views expressed are solely those of the respondent(s) and not those of the Council.

Thomas Dillon

Nuffield Council on Bioethics
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11th June 2010

Dear Sirs,

Response to Consultation: Human Bodies in Medicine and Research

I submit the following in response to the above consultation. I welcome this effort to think about the issues raised by the use of human tissue.

Dr. David W. Evans of Queens' College, Cambridge, has shared with me his detailed submission to you. In particular in relation to question 3, I should like to express my support for the argument he presents. An understanding of the concept of death is clearly an absolute pre-condition to the correct answering of your question.

I should like in addition to comment in relation to (i) questions 9, 10 and 24; and (ii) question 26.

The underlying importance of the doctor-patient relationship in upholding respect for human life in society

9. Are there any other values you think should be taken into consideration?

The need to uphold the conventional doctor-patient relationship, in which the physician's duty and liberty to act is wholly defined by the interests of the patient as the patient defines them.

10. How should these values be prioritised, or balanced against each other?

Values protecting the individual and the sanctity of his relation with his physician should not be balanced with societal, collective values. This is a moral choice about which some will take another view. Until it is clear that society has abandoned the conventional understanding of the doctor's duty, purported values profiting the collective interest of society should be subordinate to the moral principles that govern the relations between individuals.

24. Is there a difference between making a decision on behalf of yourself and making a decision on behalf of somebody else: for example for your child, or for an adult who lacks the capacity to make the decision for themselves?

Clearly: but especially for an agent, such as doctor, whose entire freedom of action depends on the authority consciously accorded to him by his client, the patient.

Discussion

The conditions under which the use of human tissue in medicine is to be permitted inevitably implicate the values implicit in the doctor-patient relationship, since the securing of tissue currently takes place through the institutions of medicine, professional and institutional. In my opinion, a fundamental value which requires greater prominence in the scheme implied by your Consultation is that of the integrity of the medical profession in the performance of its duties to individual patients.

As Lord Mustill observed, in *Airedale Hospital Trustees v Bland* [1992] UKHL 5: "A doctor who kills his patient even with the consent of the patient is guilty of murder". Similarly, a doctor who operates on his patient, even non-fatally, without consent, is guilty of a criminal assault. This is not mere technicality, but concerns a fundamental value, a duty of care, which is imperiled by bending the law and the facts to increase the supply of organs for transplant.

The physician's interventions are legalised only by the subsistence of the doctor-patient relationship and the continuing presence of consent on the part of the patient. Hence it is only when that relationship is terminated by death that the legality and propriety of interfering with the patient's body cease to be defined by the limits of that relationship.

The very appreciable and sustained drive on behalf of sections of the medical and academic community to increase the supply of "donor" organs, using utilitarian, collectivist arguments are consistent with an increasingly aggressive secularist climate in British society.

It is perfectly rational to argue that the interest of the greater good and the absence of any higher moral authority justify changing the definition of death to permit the removal of organs before the end of life. However, it is important that these values be clearly exposed, so that we can judge whether we wish to live by them or not.

Organ removal before "real" death is clearly not permitted by the conventional relation of doctor and patient, since it proximately results in the killing of the patient. Leaving aside the question whether the doctor-patient relationship can ever

permit an act to be carried out that is not in the sole interests of the patient, under present conditions it is certainly the case that consenting organ donors are not giving an informed consent. It must also be considered whether, given that in practice the patient is no longer in a position to express a consent immediately prior to the removal of organs, any prior consent remains valid.

This chipping away at the doctor-patient relationship widens the door to advocates of euthanasia. Less repugnant forms of patient coercion in the name of societal interests are also an inevitable consequence of shallow thinking on the use of donor tissue.

All this having been said, I think it would be valuable to re-examine the (apparently accidental) abolition of the power of the High Court to exercise a relevant consent on behalf of a patient who is unable to consent. This is at least to pose one relevant question in the right way: is there consent? Currently the idea seems to be that an interested medical third party's estimation of the absence of "benefit" to a patient in a given treatment can substitute for a consent. Inevitably we then assume that the patient as a good member of society would not wish to see others suffer who could be helped, or medical resources which are expensive and in short supply be used inefficiently – and we have substituted a utilitarian calculus for that individual freedom of will which is fundamental to a liberal society governed by law.

Property in organs

26. To whom, if anyone, should a dead body or its parts belong?

The traditional approach of the common law has much to recommend it. The issue with regard to organs removed from dead patients, as in the Alder Hey case, is about the professionalism and caring approach of medical professionals and institutions to all persons affected by a death - not issues of property or control. Excessive deference to the wishes of relatives (an ill-defined class in any case) risks sentimentalising medical practice to an excessive degree. I would oppose any change in the current law.

I hope that the foregoing thoughts will contribute to your deliberations.

Yours faithfully,

A handwritten signature in black ink, appearing to read "Thomas Dillon". The signature is written in a cursive, slightly slanted style.

THOMAS DILLON