Physician Update

An update for MDA National PHYSICIAN MEMBERS

Overview

***Physician Update* is written specifically for you – our Physician Members.**

The publication aims to:

- keep you informed of the emerging and perennial medico-legal issues specific to Physicians
- equip you with practical medico-legal advice
- support your delivery of quality medical care.

This edition covers:

- human tissue and transplant Acts – challenges and issues with the current legislation
- case studies on a life-preserving blood transfusion and a wife's capacity to consent to the collection of sperm from her husband.

Our Medico-legal Advisers are here to support you with answers to any questions on **1800 011 255** or **advice@mdanational.com.au**.

If there are specific issues you would like covered in future editions or if you have feedback, we'd love to hear from you at **specialtyupdates@ mdanational.com.au**.

MDA National
Support Protect Promote

Human Tissue and Transplant Acts: An unnecessary barrier to live donor kidney transplantation

By Prof Paolo Ferrari AO
Physician & MDA National Member

Hundreds of health professionals across the country are involved in transplant operations that improve wellbeing and save lives. Yet, in several Australian states, legislation refers to them as "brokers" with a commercial interest. What is the current legislation and how can it be updated to help rather than hinder surgical practice?

Kidney transplants

Some patients are eligible for a kidney transplant and have a living donor who is willing but unfortunately unable to donate because of an incompatible blood type or tissue type. The Australian Paired Kidney Exchange (AKX) Program is increasing live donor kidney transplantations by identifying matches for these patients.

This option is known as kidney paired donation (KPD). To date, the AKX Program has helped more than 150 Australians with kidney failure get a new lease on life, and now contributes to nearly 20% of the live donor kidney transplants in Australia.

Legal requirements in Australia

For KPD to be legal in New South Wales, South Australia, Western Australia, the Northern Territory, Tasmania and the Australian Capital Territory, the Minister for Health is required to approve participation in the AKX Program. This is because each Australian state has its own legislation,[1] and these Acts contain a section that prohibits trading in human tissues (including organs), and specifically prohibit selling or buying of tissues.

The prohibition against trading in tissue provisions in most states and territories prohibits "a contract or arrangement under which a person agrees, for valuable consideration, whether given or to be given to himself or to another person… to the sale or supply of tissue from his body…".[1]

There is no valuable consideration clause in the Queensland and Victorian legislation, and the prohibition only applies clearly to the buying/selling of tissue. KPD is not interpreted as trade in these two states and therefore Ministerial approval is not required.

In other states and territories, the jurisdictional legislation includes the option of the Minister granting an exemption to this prohibition which can be used for the purpose of KPD.

Depending on the state or territory, organising a KPD without Ministerial approval is punishable with up to two years imprisonment for the donor, the recipient or personnel facilitating the live donor organ exchange. I argue that the rationale of obtaining Ministerial approval for KPD is outdated and the

process of obtaining Ministerial approval for each individual pair participating in the AKX Program is time consuming and unnecessary.

Legal requirements in the United States

The problem of valuable consideration and its implications for KPD has already been extensively addressed in the United States. The *US National Organ Transplant Act* (NOTA) of 1984 prohibited "any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation".[2]

Questions arose about the legal status of KPD, and of the possible future ability of United Network for Organ Sharing (UNOS) and other organisations created in part by the NOTA to organise it. UNOS published a legal opinion in 2003 that KPD was legal under the NOTA as written. In late March 2007, the US Department of Justice finally issued a memo saying that in fact KPD was legal under the NOTA.[3]

The legislation to amend the NOTA to make this explicit was introduced in the House and Senate in January and February of 2007, and became the *Charlie W Norwood Living Organ Donation Act* in December 2007.[4] The Norwood Act makes it clear that "human organ paired donation" includes not just two-way exchanges, but larger ones as well. The "paired" in "paired donation" here is interpreted as referring to the patient-donor pairs, and avoids the need to use the word "exchange". Today in the US incompatible pairs can freely join a KPD program, and patients with kidney failure and an immunologically unsuitable donor can have a life-saving kidney transplant without any legal barrier.

Is there valuable consideration?

In the situation of KPD there is no intention to create legal relations and no contract between the parties. Therefore it can be argued that each donor is altruistically donating a kidney to an unknown recipient. A better description of the activity is that it is an arrangement through which kidneys are supplied and received.

However, KPD is considered by legislation to be an arrangement akin to a bilateral contract. In a KPD including two donors (A1 and B1) and two recipients (A2 and B2), although donors A1 and B1 would freely donate to their own partner if they were compatible, they are not willing to donate to anyone else *unless* that person has the means to offer an appropriate kidney in return. Each pair has joined the program in order to *gain* a kidney.

None of the existing legislation defines the term "valuable consideration", nor has the section been considered by a court in Australia. The donation of an organ is properly considered to be a legal gift, rather than a contractual undertaking. Therefore it would be fair to assume that there is no valuable consideration at all in a gift transaction – thus in my view there is no valuable consideration in live donor kidney transplants achieved with KPD.

Next steps

It is time for the legislation to be reviewed and to take into consideration recent progress in organ transplantation. Attempting to request an amendment of the legislation in each individual state and territory, where the *valuable consideration* clause exists, is an almost impossible task that would take many years.

I would welcome it if the Federal Court would look into ruling that those states or territories amend their legislation, which currently requires Ministerial approval to enter into a KPD agreement. A subsection could be added to the relevant section of the Act stating, "The preceding sentence (i.e. valuable consideration) does not apply with respect to human organ paired donation."

Hundreds of health professionals (physicians, surgeons, nurses) across Australia have embraced the AKX program and work hard and enthusiastically with the ultimate goal of saving lives. They are not brokers with commercial interests, and should not be regarded as organ traders. Patients and their donors are not criminals trading organs for a financial gain. It is time to remove this legal barrier.

References

1. *Human Tissue Act 1983* NSW; *Human Tissue Act 1982* VIC; *Transplantation and Anatomy Act 1979* QLD: *Human Tissue and Transplant Act 1982* WA; *Transplantation and Anatomy Act 1983* SA; *Transplantation and Anatomy Act 2014* NT; *Transplantation and Anatomy Act 1978* ACT; *Human Tissues Act 1985* TAS.
2. Williams Mullen. Intended Recipient Exchanges, Paired Exchanges and NOTA S 301. Richmond, VA, 7 March 2003.
3. Marshall, Kevin. Memorandum for Daniel Meron, General Counsel, Department of Health and Human Services, 28 March 2007. [Washington, DC]: US Department of Justice, 2007.
4. *Charlie W Norwood Living Organ Donation Act.* Available at: govtrack.us/congress/bills/110/hr710

Hundreds of health professionals (physicians, surgeons, nurses) across Australia have embraced the AKX program and work hard and enthusiastically with the ultimate goal of saving lives.

Transplant Cases – Complexity and capacity to consent

The difficulties encountered when hospitals are presented with patients who lack capacity to consent to medical treatment were highlighted in two cases:

- one involving a young boy of the Jehovah's Witness faith who was to undergo a planned liver transplant, with an expectation of blood product support[1]
- the other case concerning a woman who sought to collect the sperm of her moribund unconscious husband for use in a future pregnancy.[2]

Both cases demonstrate how recourse to the courts can be used to safeguard proposed treatment plans.

Life preserving blood transfusion

In the case concerning the young boy requiring liver transplant surgery, the hospital sought a declaration from the Supreme Court of Queensland authorising the administering of blood and/or blood products that were deemed clinically necessary during a planned liver transplant procedure and/or during a post-operative period from that procedure. The patient's parents, also Jehovah's Witnesses, agreed to a liver transplant. However, they resisted the order sought and, instead, asked the court to make an order reflecting their wish that every appropriate and reasonable blood conservation measure would be used before the doctors resorted to the administration of a blood transfusion.

In considering the application, his Honour Douglas J had regard to section 20 of the *Transplantation and Anatomy Act 1979* (Qld)[3] which authorises a medical practitioner to administer a blood transfusion to a child without parental consent if, in the opinion of the medical practitioner, a blood transfusion was necessary to preserve the child's life and consent was obtained from either a second medical practitioner (after examining the child) or the medical superintendent of a base hospital (if a second medical practitioner is unavailable). However, his Honour noted that the application of this provision in the present case was premature, given that a situation where the blood transfusion was necessary to preserve the young boy's life had not yet arisen. Instead, the hospital was taking the preparatory step of asking the court to resolve the issue of consent to a blood transfusion before the commencement of the transplant procedure.

Exercising the court's *parens patriae* jurisdiction,[4] Douglas J found it appropriate to make the orders sought by the hospital, without confining the manner in which any blood product was to be administered.

A wife's capacity to consent to the collection of sperm from her husband

An urgent application was brought by the wife of a man who was lying unconscious in a critical condition at Royal Prince Alfred Hospital, Sydney. Earlier, the man had presented to the hospital complaining of severe chest pain. He was diagnosed with a rupture of a major blood vessel and was admitted for emergency surgery. He remained conscious until a general anaesthetic was administered. During that time, the man was able to sign consent for the procedure. His wife later informed her solicitor that "just before he lost consciousness, he said [to her] he wanted to have one more child [with her]". Following the surgery, the patient did not regain consciousness and his condition deteriorated. At the time the matter was brought before the court, the patient had only hours to live.

Acting on her husband's wish, the plaintiff approached a fertility specialist and requested that the doctor extract sperm from her unconscious husband and store it for insemination at a later date. The fertility specialist indicated that he was willing to perform the extraction subject to being satisfied that he would have lawful and effective consent.

Given the unlikelihood that the patient would regain consciousness and be able to give consent, the plaintiff brought an urgent application before Fagan J.

His Honour considered the application by having regard to legislation on the issue. However, neither the *Assisted Reproductive Technology Act 2007* (NSW) nor the *Human Tissue Act 1983* (NSW) were relevant. Fagan J ultimately held that the extraction of the patient's sperm was a procedure that fell within the meaning of "medical treatment" for the purposes of section 40 of the *Guardianship Act 1987* (NSW). As such, he authorised the medical practitioners to act upon the consent given by the plaintiff as the person responsible for the patient. The extraction procedure was undertaken shortly after the court's declaration had been communicated to the hospital. The patient died 45 minutes after the procedure.

In his written judgment, Fagan J reflected on his earlier order communicated to the hospital. Drawing on observations from a reported case (that he was not aware of prior to determining the plaintiff's urgent application), his Honour acknowledged that his interpretation of the term "medical treatment" was inconsistent with parliament's intent. Based on observations in the reported case, Fagan J noted that it was parliament's intention to confine spousal consent to medical treatment to cases where the treatment was curative in nature and directed to remedying or alleviating a "condition" suffered by the incapable patient. His Honour therefore ordered that the plaintiff not seek to use or to deal with the sperm of her late husband until a further order was made.

Discussion

Profoundly personal cases such as these can elicit strong emotional reactions from the doctors involved, other medical practitioners and the wider community. From a medico-legal perspective, the cases underscore the importance of following proper process to ensure that valid and effective consent is obtained before embarking on treatment. Doctors should not be expected to make these decisions and should refrain from letting their personal beliefs or morals take over. Doing so could expose you to litigation and possible disciplinary action.

When presented with medico-legal issues that are complex and time-critical, proceed carefully and contact MDA National in the first instance. In some cases, the correct course of action may be to seek urgent judicial intervention.

References

1. *The Hospital v T and Anor* [2015] QSC 185.
2. *Ping Yuan v Da Yong Chen* [2015] NSWSC 932.
3. Legislation in each state and territory provides for blood transfusions and other medical treatment to children without parental consent in emergency situations.
4. The inherent jurisdiction of the Supreme Court in each state and territory to make orders to protect the welfare of children.

Education Resources for Physicians

MDA National delivers high quality education as part of our longstanding commitment to supporting and protecting our Members. Much of our education is accredited with multiple colleges, and all of it is complimentary for Members:

- Face to face education events such as
  - Practical Solutions to Patient Boundaries
  - The Challenging Emotions of Difficult News
  - Enhancing Patient Understanding – Health Literacy and Communication
- Distance education options allowing you to learn anytime, anywhere:
  - *Defence Update* education activities – log in to our Member Online Services via our website, then click on Online Education Activities. Alternatively, the activity can be found in each hard copy edition of *Defence Update*
  - *Identifying the Risks in Medical Practice* handbook – an education activity designed for medical practitioners with consulting rooms. To order your copy email **peaceofmind@mdanational.com.au**
- Booklets and information sheets on prescribing Schedule 8 drugs, medical records, retirement from medical practice and other topics.

Interested in hosting a face to face education session?

All you need is a group of participants and a suitable room. If we can fill your request, we will provide the session facilitator and all education collateral to support the activity.

For more information, contact Sandra Reed, MDA National Business Development Manager, on **0419 269 733** or email **sreed@mdanational.com.au**.

Want more information?

For more information on face to face events, visit our **What's On** page at **mdanational.com.au**.

Contributors

Thank you to the following editorial contributors:

Alice Cran
Claims Manager (Solicitor)
MDA National

Specialty Reviewer

A/Prof David O Watson
MDA National Member

Medico-legal Blog Coming Soon!

We're launching a Medico-legal Blog in 2016 to help keep our Members informed of Court judgments and legislative changes relevant to medical practice and the profession. Watch this space – you will soon receive an invitation to subscribe.

Congratulations

Our specialty reviewer and Past President A/Prof David Watson was recognised on the Australia Day Honours List 2016 and has been awarded the Order of Australia in the Member (AM) General Division.

Freecall: 1800 011 255
Member Services fax: 1300 011 244
Email: peaceofmind@mdanational.com.au
Web: mdanational.com.au

The information in *Physician Update* is intended as a guide only. We recommend you always contact your indemnity provider when you require specific advice in relation to your insurance policy. The case histories used have been prepared by the Claims and Advisory Services team. They are based on actual medical negligence claims or medico-legal referrals; however certain facts have been omitted or changed by the author to ensure the anonymity of the parties involved.

We include a number of articles to stimulate thought and discussion. These articles may contain opinions which are not necessarily those of MDA National.

The MDA National Group is made up of MDA National Limited ABN 67 055 801 771 and MDA National Insurance Pty Ltd ABN 56 058 271 417 AFS Licence No. 238073. Insurance products are underwritten by MDA National Insurance. Before making a decision to buy or hold any products issued by MDA National Insurance, please consider your personal circumstances, and read the Product Disclosure Statement and Policy Wording and the Supplementary Product Disclosure Statement and Endorsement to the Policy Wording available at mdanational.com.au. 390.1