

SLSS1003 LAW & CONTEMPORARY SOCIETY



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W4 - LAW AND THE END OF LIFE

Overview

- Look how law manages death/the dead
- Understand death as a **process** vs. death as an **experience**
- Examine how law deals with dying (include euthanasia)
- How law understands the dead body (as concept)
- Discussion of death, suicide, medical procedures and nudity (w/ case studies around law's regulations of death issues)
- "The only thing certain in life is that we will die" (not be confused with death & taxes)
- Form of deaths: Intended deaths / Unintended deaths / Expected deaths / Unexpected deaths / Avoidable deaths / Natural deaths / Unnatural deaths
- Thomas Lynch: the rituals we devise to conduct the living and beloved and the dead from one status to another have less to do with performance than with meaning.

Death and the Law

- Death and the law (Lord Killbrandon 1968): "never get an answer to what's death in legislation, because that is a technical professional medical matter - entrusted to medical men to say when a man is dead and nobody but doctor can decide that."
- Death's relationship to other issues
 - 1977 ALRC recommendation for uniform state and territory legislation, re: organ donation & tissue transplantation
 - Transplantation programme developed - desire for legal definition of death that was relevant to obtain kidney from cadavers (**socio-legal & medical issue: definition of death**)
- Legal Definitions: **R v Malcherek [1981] 1 WLR 690** at 694
 - Modern techniques have undoubtedly resulted in the blurring of many of the conventional and traditional concepts of death...**there is, it seems, a body of opinion in the medical profession that there is only one true test of death and that is the irreversible death of the brain stem, which controls the basic functions of the body such as breathing.**
When that occurs it is said that the body has died, even though by mechanical means the lungs are being caused to operate and some circulation of the blood is taking place.

Statutory Definitions

- **Human Tissue Act 1983 (NSW)**
 - s.33 - when death occurs (for the purpose of the law of NSW, a person has died when there has occurred):
 - a) **irreversible cessation of all function of the persons brain, or**
 - b) **irreversible cessation of circulation of blood in the persons body.**
- Human Tissue Transplant Act 1979 (NT) / Transplantation and Anatomy Act 1978 (ACT) / Death (Definition) Act 1983 (SA) / Human Tissue Act 1985 (TAS) / Human Tissue Act 1982 (VIC) / Transplantation and Anatomy Act 1979 (QLD) / S. 24(2) Human Tissue and Transplant Act 1982 (WA)

Legal Definitions

- Medical technology has effectively created a twilight zone of suspended animation where death commences while life, in some form, continues (**Rasmussen v Fleming 154 Ariz 207 (1987)**)
- Could the legal guardian of a dying patient refuse artificial tube feeding?
- Morris J determined - **artificial feeding was medical treatment and not palliative care** under **Medical Treatment Act 1988 (VIC)** and could be refused
- Accepted it is lawful to withdraw futile treatment
- **Gardner; re NWV [2003] VSC 173**: tended to see these situations differently because of the values and symbolism attached to the provision of food and drink for those in our care, especially babies and young children
- Death: Moria Korp - body in the boot case (**Airedale National Health Service Trust v Bland [1993] AC 789**)

Key Socio-legal issues around death: EUTHANASIA

- "Euthanasia" divided into four categories (Australian law relating in an international context)
 1. Passive voluntary euthanasia: when medical treatment is withdrawn or withheld from a patient, at the patient's request, in order to end the patient's life.
 2. Active voluntary euthanasia: when medical intervention takes place, at the patient's request, in order to end the patient's life.
 3. Passive involuntary euthanasia: when medical treatment is withdrawn or withheld from a patient, not at the request of the patient, in order to end the patient's life.
 4. Active involuntary euthanasia: when medical intervention takes place, not at the patient's request, in order to end the patient's life.
- Euthanasia is illegal in Australia (except in VIC)
 - Unlawful to provide a lethal dose of a drug to a patient, to assist someone in committing suicide
 - If a doctor administers a lethal dose of a drug w/ the intention that the patient will die, they're committing a criminal offence and may be charged with murder or manslaughter
- Lethal dose & active voluntary euthanasia: R v Cox (unreported 18/9/1992 Winchester CC, UK)
 - Dr. Cox gave patient Mrs Boyes aged 70 - lethal injection of potassium chloride
 - She has been his patient for 13 years, suffering enormous pain from arthritis
 - Dr. Cox: only way to relieve her pain was to respond to her request and end her life
 - Dr Cox was convicted of attempted murder and given a suspended sentence
 - However, if lethal dose of drug is administered, not with the intention that patient should die, but intention of relieving patient's pain - act is NOT unlawful even if the doctor knows the drug will hasten/cause death
 - Principle stated in English Case: R v Adams 1957 : over-sedation to relieve pain is not unlawful
 - Principles constitute → "doctrine of double effect" that relate to a number of issues (i.e. intent, that death is an underlying condition and that over-sedation is in the patient's best interest)
 - There has been some dispute but primary intention : relieve pain
 - The doctrine has appear to have statutory support in Australia: the Consent to Medical Treatment and Palliative Care Act 1995 (SA) s.17(1) states: "a doctor incurs no civil or criminal liability if the treatment is administered with the intention of relieving pain and distress even though an incidental effect is to hasten the death of the patient."
- In general, its unlawful for a doctor to act/omit to do an act that hastens a patient's death, but there are circumstances that this act/omission may be lawful (Skene, Law and Medical Practice, 2004):
 - Where a competent adult has refused medical treatment
 - Where an agent on the patients behalf has refused treatment
 - Where the treatment is futile
 - Where the treatment imposes and unjustifiable burden or is not in the patients interests.
 - Assisting suicide is a criminal offence
 - Passive euthanasia (withdraw treatment lawful in some circumstances)
- Approximately 34 bills in diff state parliaments on euthanasia have failed to pass this century
- 2017: Victoria passed the Voluntary Assisted Dying Bill
- Bill in the federal senate to allow Australian territories to legislate for euthanasia failed 15/8/2018)

Law and death:

- Society (govt) rely on law to: achieve goals and restrict activities
- How do we balance these aims?
- Social values and norms? values? ethics?
- How and under what condition are they subject to change?

Key Questions:

- Can the law regulate all areas of society - such as: event of death effectively?
- What are some of the most significant issues we still grapple with and why?
- What is the place of autonomy? Collectivity? (consent?)
- Who makes the decisions about end of life issues?
- Think about in relation to issues throughout the course (i.e. liberalism, autonomy, torture, morality, the family)

Assisting Suicide

- **Crimes Act 1900 (NSW) s.31C** Aiding etc. suicide
 - (1) A person who aids or abets the suicide or attempted suicide of another person shall be liable to imprisonment for 10 years.
 - (2) Where:
 - a person incites or counsels another person to commit suicide, and
 - that other person commits, or attempts to commit, suicide as a consequence of that incitement or counsel, the first mentioned person shall be liable to imprisonment for 5 years.
- **Criminal Code (QLD) s.311** Aiding suicide:
 - Any person who:
 - a) procures another to kill himself or herself; or
 - b) counsels another to kill himself or herself and thereby induces the other person to do so; or
 - c) aids another in killing himself or herself; is guilty of a crime, and is liable to imprisonment for life.
- Criminal Code (WA) s288 / Criminal Law Consolidation Act 1935 (SA) s.13A / Crimes Act 1958 (VIC) s.6B / Crimes Act 1900 (ACT) s.17 / Criminal Code (NT) s.168 / Criminal Code (TAS) s.163

Legislation

- **Criminal Code Amendment (Suicide Related Material Offences) Act 2005 (Cth):**
 - Makes it an offence to use a carriage service to transmit, make available, publish, otherwise distribute material that directly or indirectly counsels or incites committing or attempting to commit suicide and the person intends to use the material to counsel or incite committing or attempting to commit suicide; or intends that the material be used by another person to counsel or incite committing or attempting to commit suicide.
 - Makes it an offence to use a carriage service to transmit, make available, publish, otherwise distribute material that the material directly or indirectly: promotes a particular method of committing suicide; or provides instruction on a particular method of committing suicide; and the person intends to use the material to promote that method of committing suicide or provide instruction on that method of committing suicide; or intends that the material be used by another person to promote that method of committing suicide or provide instruction on that method of committing suicide; or intends the material to be used by another person to commit suicide.
 - And to possess, control, produce, supply or obtain suicide related material for use through a carriage service
- Legislation around end of life
- Natural Death Act 1988 (NT) / Consent to Medical Treatment and Palliative Care Act 1995 (SA) / Medical Treatment Act 1994 (ACT) / Medical Treatment Act 1988 (VIC)
- **Various concern directions (of persons suffering terminal illness), refusal and withdrawal of treatment.**

Morality and Euthanasia Laws

- Pro euthanasia debate: Individual rights & autonomy / Choice /Dying with dignity
 - **Legalising in reality - what is already a common practices**
 - **No moral diff between voluntary euthanasia and other medical end-of-life decisions**
 - **Rights of the Terminally III Bill (NT) 1995**
 - “The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others
 - ... over himself, over his own body and mind, the individual is sovereign’
 - “The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it’, (Mill, in Perron, 1995, 8-9)
- Opponents of Euthanasia:
 - Sanity of human life
 - Religious beliefs
 - The slippery slope (thin edge of the wedge)
 - Erosion of medical ethics and deterioration of doctor/patient relations
- Palliative care
- **Euthanasia Laws Bill 1996** (Andrews’ Private Members bill) Fed, to override the legislation pass in the NT
- On the issue of individual rights & autonomy, Professor Baume stated: “Voluntary euthanasia is justified because it is a self-regarding victimless action arising from an individual decision in a matter which affects individuals alone” (inquiry on euthanasia bill 1996, 58) → individuals have a right to make decisions for themselves

PRO-EUTHANASIA ARGUMENTS	ANTI-EUTHANASIA ARGUMENTS
• Moral point of view within a pluralist and liberal society	• Dying is not only a personal affair but affects the life of others
• Intentions and motives are fundamental to legal analysis	• The deterioration social mores and the erosion of medical ethics
• Intention is also determinative of the moral character of medical intervention	• Risk to the ill and vulnerable
• Human ethics and human rights issue	• Dying natural - all have the right to refuse treatment
• Ethical feelings about killing someone else	• Futile treatment v lethal injection

Burke and Hare

- Criminal law and indecent/improper interference with/offend indignity to a dead body (s.81(c) [Crimes Act 1900 \(NSW\)](#))
- Post-mortems and Human Tissue Acts / Anatomy Acts / Transplantation Acts
- Colonial law
- Ashes/bodies of the deceased (legal property in a dead body?)
 - Haynes (1614) 12 Co Rep 113; 77 ER, 1389
 - Doodeward v Spence (1908)

Key Socio-legal issues around death: DEAD BODY AS “PROPERTY”

Case study: [Anthony Noel-Kelly](#) / (also) [Doodeward v Spence \(1908\) 6 CLR 406](#)

- English artist, stole around 40 body parts (heads, legs, feet, torsos etc)
- Cast body parts and exhibited casts
- Member of the public thought she recognised her grandmother
- The head of the anatomy school thought they could only be cast from specimens and reported to police
- Police investigated.

Property comes to mind

- Western society is highly individualistic
- Importance of individual as property owner
- “my body” - possessory individualism over our lives and rights (thinking extends to death)
- Dead body as property (legitimately)
 - Sacred religious/ cultural nature of human dead bodies
- Problems with concepts of ‘property’ in a dead body: emotional, familial, pragmatic, economic, social
- Arguments for concept of ‘property’ in a dead body: self dominion / protection against tampering / inconsistent for third party to own but not donor / encourage research

Key Socio-legal issues around death: POST-MORTEM REGULATION OF BODIES

- Case study (1): autopsies
- Case study (2): posthumous reproduction

Clinical v Coronial

- Distinction between clinical and coronial post mortem examinations
- Clinical: governed by Part 5 Human Tissue Act 1983 (NSW)
- Coronial: governed by Part 8.1 Coroners Act 2009
- Types of deaths (investigated by the coroner): [NSW Coroners Act 2009](#), defines “reportable deaths” at s.6)
- [Coroners Act 2009 \(NSW\)](#) Part 8.1 Investigation directions, exhumations and related matters; s88 Dignity of deceased person to be respected
 - (1) When a post mortem examination or other examination or test is conducted on the remains of a deceased person under this Part, **regard is to be had to the dignity of the deceased person.**
 - (2) If more than one procedure is available to a person conducting a post mortem examination to **establish the cause and manner of a deceased person's death**, the person conducting the examination is to endeavour to use the least invasive procedures that are appropriate in the circumstances.

Autopsies

- Superior courts ordering autopsy over objection
- Superior court decisions refusing an autopsy
- Post-mortems and 'property'
 - Cultural construct to treat a dead body as not a thing
 - Law recognises that the dead person isn't legal personality anymore, we need an executor to administer their estate

Harvesting sperm and posthumous reproduction

- Using a dead man's sperm, a number of cases in recent years
- Concerned with issues of 'consent', 'decency', 'interference' and jurisdiction - argument for broader concerns (i.e. wishes and values? Future life of child? Needs and motivations of mother?)
- Re Edwards (2011) 4 ASTLR 392 - application release sperm from storage (to transport and use in IVF) granted (possession recognised)
- Re Gray [2001] 2 QdR 35 - application to obtain sperm sample refused
- Baker v State of Queensland [2003] QSC 002 - application to remove sperm refused
- AB v Attorney-General [2005] VSC 180 - sought declaration that section 43 of Vic Infertility Treatment Act did not prohibit the carrying out of procedure of ART. Decision - couldn't be carried out in Victoria but application could be made for transport out of Victoria
- YZ v Infertility Treatment Authority [2005] VCAT 2655 - AB sought to transport sperm. Granted.
- In the matter of an application by Elizabeth Ann Denman (Denmans case) (unreported, Supreme Court of Queensland 12 February 2004) - application to store and remove granted

Standards of Decency

- s16A Anatomy Act 1977(NSW): In the conduct of an anatomical examination of a body under an authority conferred by this Act, regard is to be had to the dignity of the deceased person
- s88(1) Coroners Act 2009 (NSW): When a postmortem examination or other examination or test is conducted on the remains of a deceased person under this Part, regard is to be had to the dignity of the deceased person.
- s31D Human Tissue Act 1983 (NSW): In the conduct of a post-mortem examination under an authority conferred by this Act, regard is to be had to the dignity of the deceased person.

READINGS (Tutorial Questions).

A. Post-mortem sperm harvesting, conception and the law: Rationality or Religiosity

(Q: Does the law recognise property in a dead body? Considering the legal issues on organ donation.)

- Judges personal point of view can change the decisions
- ☺: closure to the deceased - wanting to have family genes and family line to carry on (grandparents)
- ☺: cool down period / leaving to the family decision rather than state's interferences
- ☹: how do the judge find out the availability of the deceased's consent
- ☹: that father is a deceased or dead body (affecting child's life growth)

B. EUTHANASIA

(Q: Do you agree with the current legislative position on euthanasia? Should the law be changed? If so/if not, why?)

- ☺: dignity / die painlessly
- ☺: human rights to life (live it in the way we want)
- ☺: protection for doctors (as long as they have no intention to kill)
- ☹: religion (god decide the progress of death)