



PM101 Part 2

Legal News You Can Use

“The Autopsy- Legal Considerations”

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Disclosure

- I have no financial interests, relationships or non-FDA approved uses to disclose.
- The opinions expressed are my own personal views and are not meant to reflect the position of the autopsy committee or CAP

Lecture Objectives

- At the end of this lecture, the participant should:
- Be familiar with the benefits of the autopsy and reasons for its decline.
- Know the legal issues regarding autopsy performance.
- Be familiar with recent decisions regarding organ retention, medical versus forensic autopsy.



Benefits

- **Confirmation, clarification, and correction of antemortem diagnoses**
- **Discovery and definition of new diseases**
- **Evaluation of new diagnostic tests**
- **Evaluation of new surgical techniques**
- **Evaluation of new devices**
- **Evaluation of new drugs**

Benefits

- Investigation of environmental hazards
- Investigation of occupational diseases
- Reassurance of family members
- Supplying organs for transplantation
- Contributions to medical and epidemiological research
- Establishing valid mortality statistics

McPhee SJ, Maximizing the Benefits of Autopsy for Clinicians and Families. What Needs to be Done. Arch Pathol Lab Med 1996; 120:743.

Benefits

- **Comfort from knowing the cause of death**
- **Reassurance that medical care was adequate**
- **Alleviation of guilt**
- **Discovery of contagious infections**
- **Discovery of heritable disease**
- **Detection of environmental hazards**
- **Facilitation of insurance benefits**
- **Organ and tissue donation**
- **Extension of medical knowledge**

Reason for Decline Among Clinicians

- Lack of training in how to seek autopsy permission
- Perception that technologic advances have rendered the autopsy obsolete
- Delay in receipt of autopsy results
- Fear of malpractice litigation
- Fear of unexpected findings, professional discreditation
- Defective training of autopsy pathologists
- Frustrations at poorly performed autopsies
- Inadequate compensation for pathologists
- Cost-cutting pressures

Reason for Decline Among Families

- Stress around time of death
- Lack of rapport with physicians
- Inadequate information about value of autopsy
- Concerns about disfigurement
- Concerns regarding delay of funeral
- Concerns about cost
- Religious objections

Legal Considerations

- **For Pathologists**
 - Authorization
 - Performance
 - Disfigurement
 - Organ retention
 - Failure to diagnose
 - Unauthorized release of report
- **For Clinicians**
 - Fear of medical negligence lawsuit
- **For Institution**

TORT

- DUTY
 - BREACH OF DUTY
 - PROXIMATE CAUSATION
 - DAMAGES
-
- LEGAL THEORY: Negligent infliction of emotional distress

SETTING THE STANDARD OF CARE

- THE MEASUREMENT OF DUTY OWED THE PATIENT BY THE PROVIDER OF CARE, THE BREACH OF WHICH WILL RESULT IN LIABILITY FOR ANY INJURIES WHICH MAY BE CAUSED.

SETTING THE STANDARD OF CARE

- **TANGIBLE FACTORS**

- **WRITTEN POLICIES AND GUIDANCE**

- **STATUTES**

- **REGULATIONS**

- **CODES OF CONDUCT**

- **PROFESSIONAL POLICY POSITIONS**

- **OPERATING INSTRUCTIONS**

- **CLINICAL PRACTICE GUIDELINES**

- **INTANGIBLE FACTORS**

- **CUSTOMARY AND ACCEPTED PRACTICE**

Authorization

Medical Autopsy

- **Common Law-right to bury was given to NOK**
(Feegel, The Private Autopsy: Problems of Consent,
41 Denv. L.J. 239, 240 (1964))
- **Currently specified by statute in US**
- **Authorization by written agreement:**
 - Decedent (authorize or refuse NOK authorized autopsy)
 - Health care surrogate
 - NOK (hierarchy)
 - Will/ Insurance policy
- **Adherence to statutory constraints is imperative for the pathologist and hospital to avoid liability.**
- **Defendant was liable for an unauthorized autopsy, even though oral permission had been obtained, when the statute required written authorization.**
(Bambrick v. Booth Memorial Medical Ctr., 593 N.Y.S.2d 252 (N.Y. App. Div. 1993))

Authorization

Medical Autopsy

- 872.04 Autopsies; consent required, exception.--
- (1) "Autopsy" means a postmortem dissection of a dead human body in order to determine the cause, seat, or nature of disease or injury and includes the retention of tissues customarily removed during the course of autopsy for evidentiary, identification, diagnostic, scientific, or therapeutic purposes.
- (2) Unless otherwise authorized by statute, no autopsy shall be performed without the **written consent** by the health care surrogate, as provided in s. 765.202, if one has been designated. If a **health care surrogate** has not been designated, then written consent may be provided by the **spouse**, nearest relative, or, if no such next of kin can be found, the person who has assumed custody of the body for purposes of burial. When two or more persons assume custody of the body for such purposes, then the consent of any one of them shall be sufficient to authorize the autopsy.
- (3) Any such written consent may be given by telegram, and any telegram purporting to have been sent by a person authorized to give such consent will be presumed to have been sent by such person. A duly witnessed telephone permission is acceptable in lieu of written permission in those circumstances where obtaining written permission would result in undue delay.

Informed Consent

- Informed consent is an aspect of the due care a physician owes a patient. Patient-driven informed consent requires telling the patient what a reasonable patient would need to know to make a decision, and physician-driven informed consent involves telling the patient what a physician in that community would be required to tell the patient.
- In Truman v. Thomas 611 P.2d 902 (Cal. 1980), the court held “the scope of a physician’s duty to disclose is measured by the amount of knowledge a patient needs in order to make an informed choice. All information material to the patient’s decision should be given.”

Informed Consent

- **Some states have codified informed consent. In OR, the statute requires a physician to explain the nature of the procedure, alternative treatments and the risks associated with the procedure. In PA, MCARE additionally requires physicians to provide info about experience, training, and credentials.**
- **For autopsy, who seeks consent? Is it informed consent?**
- **Do pathologist's credentials and experience need to be provided?**

Informed Consent

- Retention of hearts at Alder Hey Children's Hospital in 1999 without consent led to public outcry.
- Proposed guidelines for informed consent
 - NOK given sufficient information to insure their understanding of procedure matches the actual procedure performed, especially regarding organ retention.
 - Specific written consent for retention of whole organs
 - Specific written consent for use of organs for teaching or research
 - NOK given the opportunity to direct ultimate disposal of any organs or tissues retained as part of autopsy

Authorization

Forensic Autopsy

- Authorized by statute
- Ordered by the medical examiner/coroner without family permission
- A physician who performs an autopsy upon a dead body under legal sanction, with ordinary care and skill, is not liable in action to the family of the deceased for the mutilation of the body without their consent. In re Johnson, 612 P.2d 1302 (N.M. 1980)
- In some states, the decedent is treated as “quasi-property” which creates a due process requirement that the next of kin be notified that an autopsy is being performed.

Authorization

Forensic Autopsy

- Some states have religious objection provisions
- In NY, in the absence of a compelling public necessity, no autopsy shall be performed over the objection of a surviving relative or friend of the deceased that is contrary to the religious belief of the decedent
- Compelling public necessity equals
 - in the conduct of a criminal investigation of a homicide
 - discovery of the cause of death is necessary to meet an immediate and substantial threat to the public health
- Otherwise, a special proceeding must be instituted in court to obtain authorization

Performance

- Follow standard of care
- In Lashbrook v. Barnes, 437 S.W.2d 502, 504 (Ky. Ct. App. 1969), pathologist was charged with mutilating the body by retaining the heart and placing the brain in the abdominal cavity after completion of his dissection.
- The court held that when an autopsy is performed within the “customary and usual manner,” the pathologist is not liable for mutilating the body.
- The problem was the plaintiff did not understand what an autopsy entailed. The court said an “autopsy per se means the inspection and partial dissection of the dead body to learn the cause of death.”

Body Disfigurement

- In Lashbrook v. Barnes 437 S.W.2d 502 (Ky. Ct. App. 1969), the court held that when an autopsy is performed within the “customary and usual manner,” the pathologist is not liable for mutilating the body.
- Liability occurs when pathologist deviates from standard of care or exceeds consent given by NOK.
- Diener sold corneas and eyeballs removed at autopsy without NOK consent. Court held in Whaley v. County of Tuscola, 58 F.3d 1111 (1995), that NOK had property right and that the mutilation of the bodies was actionable.

Organ Retention

Medical Autopsy

- Historically, the standard autopsy practice was to remove the organs and retain them for a period of time for various reasons.
- In several states, the courts have held that the unauthorized retention of internal organs by the pathologist performing the autopsy presents a basis for damages for mental anguish.
- The court in interpreting state statute has stated it will strictly construe the wording of the statute.
- If the permission form states, however, that organs are retained for further pathologic study, there is no basis for a claim.

Organ Retention

Medical Autopsy

- In Hendriksen v. Roosevelt Hosp., 297 F.Supp. 1142, 1144 (S.D.N.Y. 1969), the family authorized an autopsy to determine the cause of death. The organs were not returned to the body. The court held the pathologist is bound by the consent granted him to prevent mental suffering by NOK.
- In Hendriksen, the court held “authority to perform an autopsy derives solely from statute.” “Nothing in the statute grants so broad an authority to authorize [complete retention of organs at autopsy].”
- In Lashbrook v. Barnes, 437 S.W.2d 502 (Ky. Ct. App. 1969), the court held that the heart retained by the pathologist for further pathologic examination was consistent with the authorization and pathologist was not liable for “mutilation” of body.

Organ Retention

Medical Autopsy

- **Some states by statute require that the autopsy consent include a phrase regarding the retention of tissues to be used for “scientific investigation, including research, teaching, and therapeutic purposes.”** Haw. Rev. Stat. § 453-15
- **In other jurisdictions, retention of organs for research or medical education requires permission of the legal next of kin and must be specifically identified in the autopsy authorization.**
- **Key is to insure informed consent**
- **Specify disposition of tissue in consent form**
 - e.g., retain brain for fixation prior to sectioning
 - organs may be retained for further diagnostic procedures

Organ Retention

Forensic Autopsy

- Authorization by statute, no consent by NOK
- In Kohn v. U.S., 591 F.Supp. 568 (E.D.N.Y. 1984), an autopsy authorized by the Army without family permission, was performed on a soldier killed by a fellow soldier. During the autopsy, some organs were retained and subsequently cremated by the hospital. The family sued for damages for pain and suffering on behalf of the deceased for negligent acts that violated the principles of their Jewish faith.
- The court held the government had the right to perform the autopsy without obligation but had the moral and legal obligation to return all organs to the body prior to burial in keeping with the decedent's faith.
- Glass slides and paraffin blocks had to be returned to the family.

Organ Retention

Forensic Autopsy

- In Hainey v Parrott, (2005 U.S. Dist. LEXIS 44837), medical examiner as part of SOP fixed brains for 2 weeks prior to sectioning. The other organs had been returned to body and the body released. Brain tissue was cremated after sectioning.
- Lawsuit brought claiming that decedent's NOK had a due process right to be notified that the brain was retained and right to control final disposition.
- Court agreed that NOK had property right in decedent's brain and should have been given notice and ability to control disposition.
- Check statutes for jurisdiction, OH notify NOK
- Tissue not needed for diagnosis or evidentiary purposes should be returned to body.

Followup

- Hainey v. Parrott
- Class Action Lawsuit challenging constitutionality of certain practices
- Summary judgment for Plaintiff in 2005
 - Constitutionally protected interest in organs and entitled to notice and opportunity to reclaim organs prior to disposal
 - Not entitled to sovereign immunity since state law silent
- Appeal to 6th circuit (constitutionality and immunity questions)
- June 2007 notice of proposed settlement to 835 class members
- Fund of \$6,000,000 established (attorney fee 33%)

Failure to Diagnose

- **Pathologist liable for failure to diagnose ovarian cancer.** Ayala v. Murad, 367 Ill. App. 3d 591 (2006)
- **ME conducted autopsy on 7 year old in Ontario, Canada. His diagnosis was multiple stab wounds. Second autopsy confirmed injuries were due to pit bull dog.**
- **Suit pending on whether victims can hold ME and other scientific experts accountable for negligence.** The Standard 12/19/2006
- **Immunity vs. liability**

Followup

- Ontario Pediatric forensic pathologist
- 1991-2002 errors in 20 of 45 cases
 - 12 persons wrongly convicted
- Law suit for \$ 7 million dollars against Ontario's Coroner Office and second suit against provincial government by woman falsely imprisoned for death of her daughter
- Law that prevented her from suing pathologist directly because of protection granted to witnesses at trial struck down
- Pathologist had to pay \$44,000 in legal bills

Failure to Diagnose

- **Parents filed negligence suit against hospital for non performance of autopsy on stillborn infant where physician and parent agreed to autopsy. Infant was disposed of by mortuary in common grave. Parents claimed damages based on:**
 - Never knowing the cause of death of their baby with resulting worry concerning future pregnancies.
 - Never knowing where their baby was buried and therefore unable to do traditional memorializations such as placing flowers on a grave or visiting a grave site.
 - Loss of the opportunity to conduct a funeral and experience that normal and usual time of grief necessary to the continuation of life as usual following a death.
- **Court found basis for negligent infliction of emotional distress on part of hospital and attending physician.**

Unauthorized Release of Report

- **Medical Autopsy**

- Medical record
- Comply with hospital policy regarding medical record privacy
- Hospital policy specifies who may receive a copy (medical records, decedent's physician, hospital committees)
- Statutes may require state agencies to receive copies
- In NH, the hospital is required to provide report to the Bureau of Maternal and Child Health, Division of Public Health Services, and Department of Health and Human Services where the autopsy diagnosis is SIDS. N.H. Rev. Stat. Ann. §611:11

- **Forensic Autopsy**

- Statute/regulations govern
- Disclosure under FOIA for public documents

Medical Negligence

- **Autopsies do not increase malpractice claims but provide grounds for a proper defense if a suit is filed.**

Brooks JP Jack Dempsey, J. How Can Hospital Autopsy Rates be Increased?, 115 Arch Pathol Lab Med 1991; 115:1107

- **In situations where the physician and or hospital are negligent, the factual information obtained from the autopsy allows the hospital to:**
 - (1) eliminate suspicion,
 - (2) provide reassurance to families,
 - (3) substitute facts for conjecture,
 - (4) construct a better defense,
 - (5) reduce the number of claims, and
 - (6) improve the quality of care.”

Valaske MJ. Lost Control/Risk Management: A Survey of the Contribution of Autopsy Examination. Arch Pathol Lab Med 1984; 108:462 (1984) 32

Medical Negligence

- **Autopsy does not increase physician's risk of medical malpractice. Negligence based on deviation from standard of care.**

Bove KE, Kery IC The role of the autopsy in medical malpractice cases, a review of 99 appeals court decisions. Arch Pathol Lab Med 2002;126:1023

- **Autopsies performed on perioperative deaths with suspicion of medical negligence identified unexpected information/ complications helping to explain the cause of death and resolve conflict between surgeon and family. Findings may also provide defense in lawsuit.**

Juvin PJ et al. Postoperative death and malpractice suits: Is autopsy useful? Anesth Analg 2000; 91:344

Institutional Liability

- Standard of care for hospitals are the standards purported by the JCAHO and incorporated into the hospital's bylaws. Pedroza v. Bryant, 677 P.2d 166 (Wash. 1984)
- Hospitals have a fiduciary obligation to comply with their bylaws.
- JACHO standards regarding End-of-Life Treatment
- Corporate theory of liability
- Court found basis for negligent infliction of emotional distress on part of hospital for not performing autopsy. St. Elizabeth Hosp. v. Garrard, 730 SW2d 649 (Tex. 1987)

Summary

- Despite the decline in the autopsy rate nationwide, the autopsy does provide benefits to society and families.
- Pathologists must be aware of the legal issues regarding autopsy performance to avoid liability.
- Informed consent, including whether organs are retained, must be sought from the NOK in medical autopsies.
- For forensic autopsies, care must be given to the jurisdiction's statute or administrative regulations.
- Courts have found a property right for the NOK. NOK should be notified regarding autopsy performance and the disposition of organs at the completion of a forensic case.

Questions?

Break Time!

Sue you later!
I mean, See
you later!

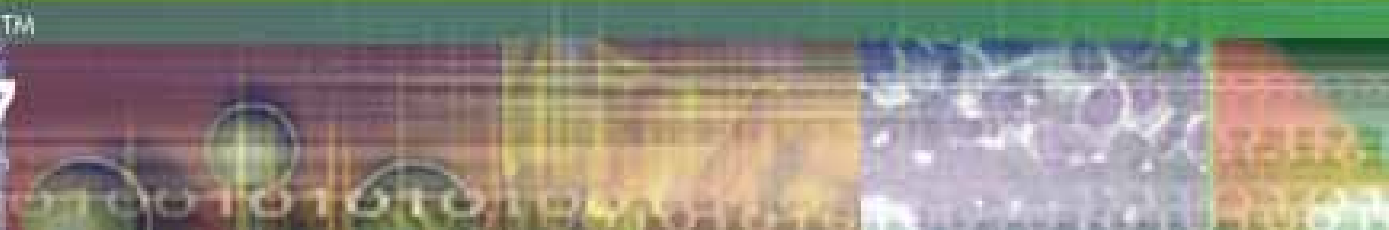


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Thank you for
participating!

Please complete the course
evaluation before you leave.

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