

## CHALLENGES IN REQUESTING FOR POST MORTEM EXAMINATION – A GAP IN GHANAIAN LAW?

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### Summary

This article recounts a case where there was great difficulty in getting a post mortem examination done in a 2 month old baby. It seeks to look at the Ghanaian legal position on post mortem examinations and on issues pertaining to the legal ownership of corpses in general; what can and cannot legally be done with them

in Ghana. It also looks at laws from other jurisdictions and compares how similar incidents are handled under those laws.

It tries to highlight the deficiency in Ghanaian law on the issue of post mortem and some of the gaps that need to be filled.

### The Incident

A two month old baby was admitted to the newborn care ward of the Komfo Anokye Teaching Hospital with a large congenital tumour of the abdomen. She had been referred from a hospital in Northern Ghana. Various differential diagnoses were considered but the diagnosis was not clear. The ultrasound scan was not conclusive. A CT scan was booked but could not be done before the baby died, presumably from severe anaemia whilst awaiting her third blood transfusion in ten days. On the morning of the day she died, the parents presented a letter asking for discharge against medical advice, but this request was not granted because at the time the baby had a Haemoglobin level of 3.4g/dl and was going to be transfused. The baby died just before the transfusion and the parents were, understandably, furious. They had health insurance and there was nothing to pay. They told us that they were not interested in the body and that we should “take it” after which they packed up and left.

The next day after discussing the baby’s case at the ward meeting, it was decided to request a post mortem. We were, however, informed by the pathologist that it could not be done without the consent of the family. We explained that the family had left and there was no one available to give this consent. The pathologist stuck to the position that there was nothing that could be done without consent. I went to the courts to try and get a Coroner’s order for a post mortem. I went from office to office at the law courts. Each office had more dusty files than the one before. In each office I was met with blank stares: Was I a relative of the deceased? No

I wasn’t. Was it someone I had knocked down with a vehicle? No it wasn’t. Was it some kind of police case? No I wasn’t.

I was eventually directed to go to the District Magistrate’s Court. My trip there was as unproductive and frustrating as the one to the main courts and I finally gave up.

What does the law say on the circumstances under which post-mortems can be performed? Not a whole lot, it would appear.

### Cases establishing rights over corpses

Cases determined under Ghanaian law such as *Sam v The State [1967] GLR 283 – 290* (a case involving the stealing of a skull where one of the issues to be determined by the court was whether, from a legal point of view, a corpse or part of a corpse could be stolen) and *Neequaye v Okoe [1993] GLR 538 – 548*, (a customary law case involving a family dispute over who had what rights over a corpse), where it was held that under customary law, “...a corpse did not form part of the self-acquired property of a deceased person, and it was therefore not property capable of being inherited...” suggest that rights and the authority to decide what can and cannot be done with a corpse are vested in the family of the deceased. In neither of the cases does it clearly rule on the hierarchy of who has what rights although in *Neequaye*, the family was given precedence over the wife of the deceased, (under Ga customary law) to decide where the corpse was to be buried.

In addition to these cases, Section 3 (1) of the Anatomy Act of 1965 says that an individual can donate his body for dissection in a medical school if he puts it in writing or by word of mouth, i.e. verbally, in the presence of witnesses before he dies. This decision can be overruled under subsection (2) of Section 3 of Act 280 after his death by the surviving husband or wife, or in their absence, by a known relative of the deceased individual. The provision in subsection 2 of Section 3 rather confirms that the corpse is considered by Ghanaian law to be inheritable property.

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### **Criminality of illegally dissecting a corpse**

Section 285 of the Criminal Offences Act, 1960 (Act 29), states that: “*A person who unlawfully hinders the burial of the dead body of a person, or without lawful authority disinters, dissects or harms the dead body of a person .... commits a misdemeanour*”.

From this it can be inferred that even a pathologist who dissects a body without lawful authority can be held to be guilty of a misdemeanour under Act 29 and therefore the pathologist was right in refusing to do this post-mortem when permission under Section 2 of Act 280 had not been given for examination. Under the said Section 2 (1), the person authorised to give permission is: “*The executor or any other person who has lawful possession of the body of a deceased individual, and who is not an undertaker or a person entrusted with that body for the purpose only of interment*”.

### **The position of English Law**

Whenever one looks at the position of Ghanaian Law on a particular issue, it is always interesting to also look at the position of English law because much of Ghanaian Law (and indeed Commonwealth Law) is derived from English law. Many of the provisions of our current law including the Coroners Act 1960 (Act 18), were lifted straight and unadapted, from English Law. It is curious to see such laws still remain unchanged in our law books when the original versions we inherited have been amended beyond recognition in their country of origin.

In England, Hospital Post-mortems are governed by the Human Tissue Act of 1961. Section 2 of this Act states that “*No post mortem shall be carried out otherwise than by and in accordance with the instructions of a fully registered medical practitioner, and no post-mortem examination which is not directed or requested by the coroner or other competent legal authority shall be carried out without the authority of the person lawfully in possession of the body...*”.

Here the position of the law specifically pertaining to hospital post-mortems is clearly spelled out and there is no need, as there is in Ghana to piece different laws together to arrive at what the position might be.

### **Other law**

As the use of human parts have assumed more and more complex dimensions, often with financial and sometimes international commercial implications, there has been the need in other jurisdictions to re-look at the law on the ownership of bodies and body parts. For example, in the American case of *Moore v Regents of the University of California, 1990*, the defendant institution used cells from the plaintiff patient’s excised spleen to develop therapies which earned the defendant institution over 3 billion USD. The patient sued, claiming that his property rights in the cells had been violated. The Supreme Court of California decided in

this case that it was inappropriate to recognise property rights in a body as it would, amongst other reasons, hinder medical research.

### **The Anatomy Act**

The Ghanaian Anatomy Act, 1965 (Act 280), is sometimes quoted in connection with Autopsies. Although its long title “*An ACT to regulate the examination and dissection of the bodies of deceased individuals and to provide for matters*”, would appear to back such a position, it seems clear that the provisions of this Act refer to bodies being used for research and study in medical schools and other such academic institutions and not to post mortems in hospitals.

Section 5 of the Anatomy Act, 1965 headed: “*Unclaimed bodies of deceased individuals*” suggests this distinction by stating that “*The medical Head of a hospital may donate the body of a deceased individual to the Head of any medical school or institution ... where (a) the head of the hospital is satisfied that that the body has not been claimed by the surviving wife or husband, or (b) in the absence of such wife or husband, by any known relative of that individual falling within the prescribed class of relatives of that individual for a period, in the opinion of the head of the hospital, has been unreasonable long.*”

It may not, in practice, be easy to define exactly what the difference between a hospital post mortem and the kind of dissection referred to in the Anatomy Act. However, from a legal point of view, a look at Section 1 of the Anatomy Act, 1965 shows that the dissection referred to can be done by anyone who is so licensed by the Minister responsible for Health whether a medical practitioner or not. On the other hand, it would appear reading the Act, that even a non-medical school pathologist who does not fall under the individuals specified in the Act cannot do such dissection although he or she *can* do a post-mortem.

Another difference would be that according to section 5 of the Anatomy Act, 1965, in the case of an unclaimed body, it can be donated for dissection *only* if the cause of death is known whilst a Post Mortem will often be done to clarify the cause of death.

In practice however, the difficulty here may arise in Teaching Hospitals where both service provision and teaching are conducted in the same facility. Here, the roles of specific facilities which serve both functions may be difficult to tease out. For example the post-mortem examination may be done with both the need to clarify the cause of death and the teaching of postgraduate doctors in mind. Even here it is important to distinguish between the academic aspect of the function and the service provision aspect. Thus the fact, for example, that a mortuary in a teaching hospital happens to be the same place where medical students do their dissection does not mean that proper permission for such dissection should be overlooked.

After all, the fact that a patient has been admitted in a Teaching Hospital does *not* mean that he is bound to submit himself to being examined by medical students without his consent.

An electronic search through the Ghana Law Reports from 1959 - 2002 and including the West Africa Court of Appeal Cases (WACA) from 1934 – 1957 using search words “Autopsy” and “Postmortem” revealed no cases in which the main issue was the refusal by the family of the of the deceased to give consent to a post mortem which was required solely on medical grounds. Thus, as is the case for most medico-legal issues, there is no readily available Ghanaian Case law in existence to clarify the position of the Ghanaian courts. All the cases on record are criminal cases where the role of the coroner is not in any doubt.

### The Coroners Act, 1960

The Coroners Act, 1960 (Act 18), clearly spells out under what circumstances the coroner needs to be mandatorily notified of a death. These include when any dead body is “found,” (a term open to much interpretation!) or when a person has died a violent or other “unnatural” (another potential interpretative nightmare!) death or a death of which the cause is unknown. Any death in a prison, asylum or any such public institution (other than a hospital) must be reported to the coroner, irrespective of the cause.

Incidentally the much-touted rule that all deaths in a hospital which occur within 24 hours are automatically coroner’s cases is not part of Ghanaian law. The Coroners Act clearly states in Section 2 (3) that “*The person in charge of a hospital in which a person has died an unnatural death shall forthwith give notice of the death to the coroner for the district.*”

Section 7 of the Coroners Act deals with Post-mortem examination and when the coroner should request one. It states in subsection (1) that “*Where coroner thinks it proper, in order to discover the cause of death, to have an examination made of the dead body of any person, he may direct a registered medical practitioner to make...a post-mortem examination of the body...*”

It would appear from this that the decision to ask for a post-mortem lies entirely within the discretion of the Coroner and that in order for a doctor to get a post-mortem done in a non-criminal case, he or she will have to convince the coroner to accept that “it is proper” to have one, keeping in mind that the function of the coroner would seem to be essentially one of identifying potential criminal activity and not that of helping extend the frontiers of medicine.

### Case of Republic v Korle Gonno District Magistrate Grade 1: Ex parte Ampomah

An interesting discussion that throws some light on the issue of the courts towards post-mortems is found

in the Ghanaian case of *Republic v Korle Gonno District Magistrate Grade 1; Ex Parte Ampomah [1993-94] 2 GLR 220 – 271*. In this case a patient who was a known diabetic and hypertensive died shortly after his admission in Korle Bu Teaching Hospital in 1990. As it was the **practice of the hospital** to do post-mortems on all patients who die within 24 hours of admission (note that this is not the law but a practice adopted by a particular hospital) a post mortem was done on the patient. During the post-mortem, a colleague doctor who happened to be a relative of the deceased informed the pathologist that the patient was an old hypertensive and diabetic and almost certainly died from complications of his disease. The pathologist thus only opened the skull, confirmed that there had been a cerebro vascular accident (i.e. a stroke) and then disposed of the brain. Later however, the family, suspecting the widow of foul play (as usual!) asked for another post-mortem. Not surprisingly, as the brain was no longer available to be examined, the cause of death in the second post mortem was said to be “indeterminate” even though there was evidence of hypertensive heart disease. Based on the results of the second post-mortem, the coroner held an inquiry into the cause of death. This case travelled all the way up to the Supreme Court, with one of the issues being whether the results of the first post-mortem should be ignored, in which case the holding of an inquest was justified, or whether the second should be read in conjunction with the first, in which case the cause of death (a stroke) was known and there was no justification for an inquest.

However, in the light of the case of our baby, a statement of interest from this case would be that of Justice Hayfron-Benjamin (page 224) who said:

*“Under Act 18, the coroner is not required to find the ‘immediate cause of death.’ All that the coroner is required to do under the law is to find out not that the deceased was suffering from a disease which would naturally have terminated in his death but that there was something unnatural about the death or the cause of death was unknown. To say therefore that the ‘immediate cause of death is undetermined’ is to ignore the medical history of the dead person. In my respectful view, unless there occurs a novus actus interveniens [an intervening event], it cannot be said that a person who is likely to die of a disease from which he was suffering has died an unnatural death...”*

### Conclusion

It would appear from the above statement that since our baby clearly had a large congenital tumour, it might be difficult to convince a Coroner, in the absence of a “*novus actus interveniens*” (!) that there would be any benefit to a post mortem to determine the “immediate cause of death” of this baby.

What does a doctor do, therefore, when there is the need for a post-mortem to enable him or her to sign a death certificate but the family is not available or unwilling to give consent? It is clear that where there is suspicion of foul play, the coroner may ask for a post-mortem. The position is not so clear when there is no such suspicion and yet the need for post-mortems to improve our diagnostic accuracy and knowledge in general cannot be overlooked. In this case also, it would appear that the coroner is again the person to turn to as he or she can (in theory) still order a post-mortem. My (one!) experience with trying to get help in this matter was very unrewarding.

The absence of case law makes it difficult to know exactly what the position of the law is on several matters. Perhaps it is time that the Ghana Medical Association (GMA) began to help develop medical law in Ghana by assisting doctors to begin to challenge such cases in court. This will generate some case law which will in turn clarify the position on a large

number of issues including this one. GMA can also play a championing role in getting laws like our 50 year old Coroners Act amended to reflect current medical practice. In the meantime perhaps every hospital, (maybe every doctor) should establish good personal relationships with their local Coroner instead of filling Coroner's forms and sending them off into the blue having no idea of where they are going and then grumbling (or worse still being indifferent!) about the results when they come back.

It is also disheartening that in this day of information overload where properly written up week old cases from the House of Lords can be accessed free on the internet, Ghanaian cases are not only difficult to find and accessible only to a privileged few, but also, I might add, extremely expensive. For the medical law and indeed all law to develop, decisions of judges should be freely available to allow students and teachers of law, researchers and indeed any individual who so desires to have easy and inexpensive access.

