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interpretations would work to defeat the apparent intent of the Virginia legislature to place the burden of liability upon the party actually responsible for the loss.

Virginia courts might justifiably be persuaded to follow the guidelines set out in the California statute since the apparent purpose of both statutes is essentially the same. It is certainly conceivable, however, that Virginia courts may apply the statute strictly as it was written on the theory that if the Virginia legislature had meant to adopt the California rule, it would have adopted all of the language of the California statute. Regardless of what course of action the Virginia courts choose to follow, however, it is clear that the General Assembly has taken a step in the direction of endorsing the principle that the liability arising out of the negligent operation of a motor vehicle should follow the driver rather than the vehicle.⁴⁵

DAVID L. ROSS

PROVIDING HUMAN ORGANS FOR MEDICAL TRANSPLANT

The recent success experienced by surgeons in homotransplantations, especially in cardiac transplantations, raises an issue of the compatibility of law and science in this rapidly expanding area of medical endeavor.¹ The immediate problem presented by this scientific advancement is the creation of a legally acceptable procedure whereby usable organs can be made available to surgeons for use in homotransplantations.² Existing case law and statutory provisions concerning dead bodies are inadequate to meet the needs of transplanting sur-

⁴⁵It has been suggested that the entire concept of automobile liability insurance should be revised; and, that by requiring the driver rather than the vehicle to be insured, many of the controversial problems relating to such items as "double coverage" and conflicting "other insurance" clauses could be eliminated. See, Logan, *Insure the Driver*, 457 INS. L.J. 682 (1968).

¹See e.g., N.Y. Times, May 8, 1968, § A at 23, col. 1. The Deputy District Attorney for the City of Los Angeles maintains that murder is technically committed in many transplant situations because of the uncertainty of the legal definition of death.

²Physicians have made and are making great progress in protecting human lives by the use of "spare parts." Vestal, Taber & Shoemaker, *Medico-Legal Aspects of Tissue Homotransplantation*, 18 U. DET. L.J. 271 (1955). Organ transplantations, from a simple blood transfusion to the more complex therapeutics such as skin grafts and kidney transplants have been performed for many years. Couch, Curran & Moore, *The Use of Cadaver Tissues in Transplantations*, 271 NEW ENG. J. MEDICINE 691 (1964).

geons and the complexity of this problem points to the fact that a re-evaluation of legal concepts is necessary in order to keep pace with medical science.

In order to supply surgeons with suitable organs Virginia recently enacted the first homotransplantation statute.³ The statute provides that when there is a patient "in immediate need" of "an internal organ as a transplant," "the Chief Medical Examiner or his deputies" may "in their discretion" and upon "request of the transplanting surgeon," supply such an organ from any "decedent who comes under their jurisdiction" if "there is insufficient time" during which the viability of the organ may be maintained to obtain consent from the next of kin, and "no known objection by the next of kin is foreseen," and the taking of the organ will not interfere with any subsequent investigation or autopsy.

The objective of this statute and its significance become apparent when it is read in light of the prior case and statutory law dealing with dead bodies. At common law it was early recognized that a living person had a legal right to a decent burial. This right, accorded to him after death,⁴ has been construed to mean that an individual has the right to be buried as soon as possible after death and to remain interred.⁵ The right to a decent burial, however, has not always meant that the deceased's wishes about the disposition of his body are to be followed. Although great weight is given to the deceased's wishes,⁶ the courts have sometimes acceded to the wishes of the relatives in

³In any case where a patient is in immediate need for an internal organ as a transplant, the Chief Medical Examiner or his deputies where a decedent comes under their jurisdiction; who may provide a suitable organ for transplant and there is insufficient time to contact the next of kin of the decedent in order to maintain the viability of the organ to be transplanted, and no known objection by the next of kin is foreseen by the Chief Medical Examiner or his deputies; the Chief Medical Examiner or his deputies may in their discretion where providing the organ for transplant will not interfere with subsequent course of the investigation or autopsy provide such organ on the request of the transplanting surgeon.

VA. CODE ANN. § 19.1-46.1 (Supp. 1968). This bill was approved on April 2, 1968 as Chapter 305 of the Virginia Acts of Assembly 1968 and became effective on July 1, 1968.

⁴*Finley v. Atlantic Transp. Co.*, 220 N.Y. 249, 115 N.E. 715 (1917); *Persinger v. Persinger*, 39 Ohio Op. 315, 86 N.E.2d 335 (1949); *Kitchen v. Wilkinson*, 26 Pa. Super. 75 (1904).

⁵*King v. Frame*, 204 Iowa 1074, 216 N.W. 630 (1927); *Pettigrew v. Pettigrew*, 207 Pa. 313, 56 A. 878 (1904). See *Hoeberle v. Weber*, 56 N.J. Super. 428, 153 A.2d 390 (1959).

⁶*Thompson v. Deeds*, 93 Iowa 228, 61 N.W. 842 (1895); *Fidelity Union Trust Co. v. Heller*, 16 N.J. Super. 285, 84 A.2d 485 (1951); *Gostkowski v. Roman Catholic Church*, 262 N.Y. 320, 186 N.E. 798 (1933); *Goldman v. Mollen*, 168 Va. 345, 191 S.E. 627 (1937).

an attempt to balance the interests involved.⁷ In order to effectuate the right to a decent burial the law has imposed a duty upon the surviving spouse, then the next of kin and, in the absence of kin, upon the public to provide a decent burial.⁸

The courts, in order to facilitate the performance of this duty of burial, have resorted to the concept⁹ that there is a "quasi-property" right in the dead body that is coextensive with the duty of decent burial.¹⁰ If this right to possession of the body is interfered with, the courts have recognized a cause of action in favor of the person entitled to possession.¹¹ Other courts have realized that the concept of a "quasi-property" right in a dead body is a fiction.¹² These courts recognize that there is a right to possession of the body and that relief can be given without any reference to the law of property because what are really being protected are the sensibilities of the next of kin. This same judicial policy in favor of protecting the sensibilities of the next of kin has had several other consequences. The courts have held that the person entitled to the body has an immediate right to possession of the body¹³ and a right to receive the body in the same condition (including all of its parts) that it was in at the time of death.¹⁴ Thus, delay in delivery of the body to the next of kin¹⁵ or any mutilation of the body¹⁶ will give rise to a cause of action.

⁷E.g., *Holland v. Metalious*, 105 N.H. 290, 198 A.2d 654 (1964).

⁸*McClellan v. Filson*, 44 Ohio St. 184, 5 N.E. 861 (1886); *Love v. Aetna Cas. & Sur. Co.*, 99 S.W.2d 646 (Tex. Civ. App. 1936).

⁹It seems reasonably obvious that such [a concept as quasi-property] . . . is something evolved out of thin air to meet the occasion, and that it is . . . a fiction likely to deceive no one but a lawyer.

W. PROSSER, *TORTS* § 11, at 51 (3d ed. 1964).

¹⁰*Anderson v. Acheson*, 132 Iowa 744, 110 N.W. 335 (1907); *Seaton v. Commonwealth*, 149 Ky. 498, 149 S.W. 871 (1912); *Barela v. Frank A. Hubbell Co.*, 67 N.M. 319, 355 P.2d 133 (1960); *Finley v. Atlantic Transp. Co.*, 220 N.Y. 249, 115 N.E. 715 (1917); *Pettigrew v. Pettigrew*, 207 Pa. 313, 56 A. 878 (1904); *Simpkins v. Lumbermens Mut. Cas. Co.*, 200 S.C. 228, 20 S.E.2d 733 (1942); *England v. Central Pocahontas Coal Co.*, 86 W. Va. 575, 104 S.E. 46 (1920); *Koerber v. Patek*, 123 Wis. 435, 102 N.W. 40 (1905).

¹¹*Southern Life & Health Ins. Co. v. Morgan*, 21 Ala. App. 5, 105 So. 161 (1925); *Larson v. Chase*, 47 Minn. 307, 50 N.W. 238 (1891); *Hassard v. Lehane*, 143 App. Div. 424, 128 N.Y.S. 161 (1911); *Love v. Aetna Cas. & Sur. Co.*, 99 S.W.2d 646 (Tex. Civ. App. 1936).

¹²*Stephens v. Waits*, 53 Ga. App. 44, 184 S.E. 781 (1936); *Gadbury v. Bleitz*, 133 Wash. 134, 233 P. 299 (1925).

¹³*Larson v. Chase*, 47 Minn. 307, 50 N.W. 238 (1891); *Lott v. State*, 32 Misc. 2d 296, 225 N.Y.S.2d 434 (Ct. Cl. 1962); *Gatzow v. Buening*, 106 Wis. 1, 81 N.W. 1003 (1900).

¹⁴*In re Disinterment of Jarvis*, 244 Iowa 1025, 58 N.W.2d 24 (1953); *Hassard v. Lehane*, 143 App. Div. 424, 128 N.Y.S. 161 (1911); *Koerber v. Patek*, 123 Wis. 435, 102 N.W. 40 (1905).

¹⁵*Louisville & N.R.R. v. Hull*, 113 Ky. 561, 68 S.W. 433 (1902); *Schmidt v.*

In addition to the common law, the statutes of every state contain numerous provisions dealing with dead bodies. These statutes can be conveniently grouped into three generic types: the anatomy statutes; the autopsy statutes; and the donation statutes.

The first legislation that dealt with dead bodies was the anatomy laws. These laws,¹⁷ in thirty-five jurisdictions, were a reflection of medical and legislative concern with the acquisition of cadavers to be used for medical training¹⁸ and they provide that unclaimed bodies otherwise required to be buried at public expense could be delivered to medical schools or State Anatomical Boards for scientific purposes.¹⁹ While these statutes change the common law to the extent that the deceased's right to a decent burial is postponed until the body is through being used for pedagogical purposes,²⁰ the deceased's right to an eventual decent burial has been maintained.²¹

Several writers have suggested that the anatomy laws could be construed to allow the taking of organs for the purpose of homotransplantations.²² As a practical matter, however, such a construction would accomplish little because the time period for which a body must be held under these statutes²³ renders the body and its parts useless

Schmidt, 49 Misc. 2d 498, 267 N.Y.S.2d 645 (Sup. Ct. 1966); *Parker v. Quinn-McGowen Co.*, 262 N.C. 560, 138 S.E.2d 214 (1964); *Hole v. Bonner*, 82 Tex. 33, 17 S.W. 605 (1891).

¹⁷*Dunahoo v. Bess*, 146 Fla. 182, 200 So. 541 (1941) (negligent embalming); *Nail v. McCullough & Lee*, 88 Okla. 243, 212 P. 981 (1923) (mutilation of the body as a result of a negligent accident on the way to the burial); *Nichols v. Central Vermont Ry.*, 94 Vt. 14, 109 A. 905 (1919) (negligent damage to corpse); *Kncass v. Cremation Soc'y*, 103 Wash. 521, 175 P. 172 (1918) (negligent loss of deceased's ashes).

¹⁸For a collection of these statutes, see Appendix I.

¹⁹Note, *Legal Problems in Donations of Human Tissues to Medical Science*, 21 VAND. L. REV. 352, 353 (1968).

²⁰Comment, *The Law of Dead Bodies: Impeding Medical Progress*, 19 OHIO ST. L.J. 455, 459 (1958).

²¹See Note, *Legal Problems in Donations of Human Tissues to Medical Science*, 21 VAND. L. REV. 352, 354 (1968).

²²See, e.g., *Burke v. New York University*, 196 App. Div. 491, 188 N.Y.S. 123 (1921) (N.Y. Pen. Law of 1909) § 2215 provided that a body should be buried after it was used; defendant cremated the body instead and it was held liable to the plaintiff for damages. This provision was later repealed by Law of April 15, 1955, c. 355, § 2 N.Y. Laws (1955)).

²³Packel, *Spare Parts for the Human Engine*, 37 PA. BAR ASS'N Q. 71, 75 (1965); Note, *Legal Problems in Donations of Human Tissues to Medical Science*, 21 VAND. L. REV. 352, 355 (1968); Note, *Donation of Dead Bodies and Parts Thereof for Medical Use*, 21 U. PITT. L. REV. 523, 534 (1960).

²⁴E.g., CAL. HEALTH & SAFETY CODE § 7202 (West 1955) (30 day wait); MASS. ANN. LAWS ch. 113 § 1 (1957) (14 day wait).

for anything but pedagogical purposes.²⁴ It is for this very reason that the transplantation statute allows the medical examiner to act within a time period measured by the viability of the organ to be transplanted.²⁵ Furthermore, even if medical science could develop a technique that would preserve cadavers indefinitely, cadavers would provide little transplant material either because of the cause of death or because of the age and physical condition of the deceased.²⁶ In contrast, under the transplantation statute, the number of potential donors is much greater. Anyone falling within the statutory jurisdiction of the medical examiner is a potential donor, even though the body may subsequently be claimed. This jurisdiction includes any decedent who died by "violence, or suddenly when in apparent health, or when unattended by a physician, or in prison, or in any suspicious, unusual or unnatural manner. . . ."²⁷

The second type of legislation concerning dead bodies is the autopsy laws. An autopsy is the "inspection, and usually partial dissection, of a dead body which has been opened so as to expose important organs either to ascertain the cause of death or . . . any other abnormalities present. . . ."²⁸ The basis of these laws is that in certain circumstances the public has an interest in ascertaining the cause of death²⁹ and, to that extent, the common law rights of the next of kin to immediate possession of the body are modified.³⁰ Thus far, however, the public interest has not been judicially construed to allow organs obtained by autopsy to be used for transplantation purposes. In fact, it was early recognized that the unauthorized retention of any internal part, other than those needed for microscopic study, gives rise to a cause of action against the coroner.³¹ Furthermore, even if the autopsy statutes were revised to allow permanent retention of body parts, they would still not be an important source of trans-

²⁴Couch, Curran & Moore, *The Use of Cadaver Tissues in Transplantation*, 271 NEW ENG. J. MEDICINE 691 (1964).

²⁵VA. CODE ANN. § 19.1-46.1 (Supp. 1968).

²⁶Interview with Dr. Geoffrey Mann, Chief Medical Examiner of the Commonwealth of Virginia, in Richmond, Virginia, November 14, 1968.

²⁷VA. CODE ANN. § 19.1-41 (Repl. Vol. 1960).

²⁸*In re* Disinterment of Jarvis, 244 Iowa 1025, 58 N.W.2d 24, 28 (1953), citing, M. WEBSTER, NEW INT'L DICTIONARY 188 (2d ed. 1952).

²⁹Palenzke v. Bruning, 98 Ill. App. 644 (1900); Young v. College of Physicians, 81 Md. 358, 32 A. 177 (1895); Sturgeon v. Crosby Mortuary, 140 Neb. 82, 299 N.W. 378 (1941); Stason, *The Role of Law in Medical Progress*, 32 LAW & CONTEMP. PROB. 563, 569 (1967).

³⁰See, e.g. VA. CODE ANN. § 19.1-43 (Repl. Vol. 1960).

³¹Palenzke v. Bruning, 98 Ill. App. 644 (1900); *In re* Disinterment of Jarvis, 244 Iowa 1025, 58 N.W.2d 24 (1953); Hassard v. Lehane, 143 App. Div. 424, 128 N.Y.S. 161 (1911).

plant material since the autopsy is normally not performed until too long after death to maintain the viability of the organ.³²

The only legislation that has been directly addressed to the need for providing transplant material is the so-called "donation statutes."³³ Although they vary in substance,³⁴ their purpose is to allow the individual or, under some statutes, his survivors, to donate the deceased's body or parts thereof to science.³⁵ Under the common law there was no property right in a dead body that would permit a gift of it;³⁶ therefore, to accomplish a gift these statutes give a general grant of authority to a person either to dispose of³⁷ or to make a gift of his body.³⁸ At the present time a Uniform Anatomical Gift Act is in the process of being completed.³⁹ While this act will modernize and make uniform the basic purposes of the donation statutes, its effects will still be limited by the small number of people who specifically bequeath organs.⁴⁰ Both the donation statutes and the Uniform Act are of limited value in supplying emergency transplant material because unless prearrangements have been made, vital organs such as the heart, liver, or kidney will lose their viability before the donation can be ascertained and completed.⁴¹

Thus, prior to the passage of the transplantation statute, no law existed which could supply transplant material to surgeons within the narrow time limits imposed by the present state of medical technology.⁴² The Virginia transplantation statute is an important step

³²Couch, Curran & Moore, *The Use of Cadaver Tissues in Transplantations*, 271 NEW ENG. J. MEDICINE 691, 692 (1964).

³³For a collection of these statutes, see Appendix II.

³⁴Compare CAL. HEALTH & SAFETY CODE § 7100 (West Supp. 1968) (the entire body or any part of it) with W. VA. CODE ANN. § 16-19-1 (1966) (eyes only).

³⁵Stason, *The Role of Law in Medical Progress*, 32 LAW & CONTEMP. PROB. 563, 570 (1967).

³⁶See *Larson v. Chase*, 47 Minn. 307, 50 N.W. 238 (1891); Note, *Legal Problems in Donations of Human Tissues to Medical Science*, 21 VAND. L. REV. 352, 356 (1968).

³⁷E.g., ARK. STAT. ANN. § 82-408 (Repl. Vol. 1960); VA. CODE ANN. § 32-364.1 (Supp. 1968).

³⁸E.g., MICH. STAT. ANN. § 14.523(1) (Supp. 1968).

³⁹UNIFORM ANATOMICAL GIFT ACT (Final Draft, July 26, 1968).

⁴⁰Stason, *The Uniform Anatomical Gift Act*, 23 BUSINESS LAWYER 919 (1968).

⁴¹Couch, Curran & Moore, *The Use of Cadaver Tissues in Transplantations*, 271 NEW ENG. J. MEDICINE 691 (1964).

⁴²Stason, *The Role of Law in Medical Progress*, 31 LAW & CONTEMP. PROB. 563, 568 (1967).

Cadaver tissues for transplantation are divided into two groups according to the urgency with which they must be salvaged.

Critical tissues are those whose usefulness depends upon their viability, but whose viability is lost so rapidly at normal temperatures that

forward because it provides transplant material to patients in immediate need of an internal organ in situations where previous legislation was ineffectual. Under the statute the time period during which an organ's viability can be maintained is the crucial factor and permission to use the organ is unnecessary where there is insufficient time to obtain it.⁴³

One problem of immediate importance is the possible conflict between the transplantation statute and the Virginia donation statute. In Virginia, any person who has attained the age of twenty-one and who is of sound mind, can by will or instrument executed in the same manner as a will, prescribe the disposition of his body or parts thereof.⁴⁴ It should be noted that the transplantation statute allows the Medical Examiner to obtain organs within the relatively short period of time in which they must be used. In order to accomplish this, the statute allows the Medical Examiner to take the organ without consent where "there is insufficient time to contact the next of kin of the decedent in order to maintain the viability of the organ to be transplanted." This same crucially short period of time would generally not allow the Medical Examiner to determine if the decedent had willed or donated his body or parts thereof.⁴⁵ In the event that such a conflict should occur it is probable that the transplantation statute would be controlling. Where a subsequent enactment is in conflict with a prior enactment, it is often held that the subsequent enactment effects a pro tanto repeal by implication of the prior enactment.⁴⁶

This possible conflict between the two statutes is inexorably involved with the rights of potential donees under the transplantation

post-mortem legal procedures, tissue procurement and transplantation must be completed in a matter of minutes. . . .

Couch, Curran & Moore, *The Use of Cadaver Tissues in Transplantations*, 271 NEW ENG. J. MEDICINE 691 (1964).

⁴³VA. CODE ANN. § 19.1-46.1 (Supp. 1968).

⁴⁴VA. CODE ANN. § 32-364.1 (Supp. 1968).

Under the proposed Uniform Anatomical Gift Act, any individual who is eighteen years of age and of sound mind may make a gift of his body or any parts thereof by a will or by any document that is signed by the donor and witnessed by two people. UNIFORM ANATOMICAL GIFT ACT §§ 2(a), 4(a), (b) (Final Draft, 1968).

⁴⁵There are critical organs such as the kidney, liver or heart that must be removed from the deceased within forty-five minutes after death to maintain their viability. Couch, Curran & Moore, *The Use of Cadaver Tissues in Transplantation*, 271 NEW ENG. J. MEDICINE 691 (1964).

⁴⁶Berry v. Gordon, 237 Ark. 547, 376 S.W.2d 279 (1964); *People v. Kuhn*, 216 Cal. App. 2d 695, 31 Cal. Rptr. 253 (Dist. Ct. App. 1963) (alternative holding); *Ferch v. People*, 101 Colo. 471, 74 P.2d 712 (1937).

and donation statutes. Potential donees may include individuals,⁴⁷ medical schools⁴⁸ and organ banks.⁴⁹ The conflict would almost certainly arise where the Medical Examiner had given an organ to a transplanting surgeon without knowledge that the organ or the entire body had been previously donated to a particular individual or organization. The question that arises then is whether the potential donee has a cause of action. The existence of a cause of action for the taking of a body organ that was the subject of a valid will or gift has never been judicially determined.⁵⁰ However, by analogy to either the law of wills or to the law of gifts it would seem probable that the potential donee has a legally protected right. Under the wills analogy, the gift of the organ or of the entire body⁵¹ would vest at the time of death⁵² and create an enforceable right to the bequest in the donee.⁵³ An interference with that right, even an innocent one, might impose liability on the interfering person.⁵⁴ Under the gift analogy, the execution of the instrument of gift should supply both donative intent and constructive delivery.⁵⁵ The right to the gift would become enforceable at the death of the donor and a cause of action might lie for wrongfully taking the property of the donee. However, since the donee's right was created by a statute, there is no fundamental objection to the abridgement of that right by a subsequent statute.

A necessary consequence of making time the controlling factor under the transplantation statute is that the legal rights of the next of kin must be modified. As stated above, the "quasi-property" right

⁴⁷E.g., CAL. HEALTH & SAFETY CODE § 7100 (West Supp. 1968).

⁴⁸E.g., CONN. GEN. STAT. ANN. § 19-139a (Supp. 1968).

⁴⁹E.g., ARIZ. REV. STAT. ANN. § 36-841 (1956).

⁵⁰The only statute to deal with a problem that is even remotely related to this problem is CONN. GEN. STAT. ANN. § 19-139b (Supp. 1968) which provides that a valid gift of the donor's entire body shall take precedence over a gift of any portion thereof when there are conflicting gifts.

⁵¹The question of whether a person can bequeath an organ does not arise because the donation statutes specifically confer that right. E.g., VA. CODE ANN. § 32-364.1 (Supp. 1968).

⁵²See generally *Irving Trust Co. v. Day*, 314 U.S. 556 (1942); *Kellar v. Kasper*, 138 F. Supp. 738 (D. S.D. 1956); *Rogoski v. McLaughlin*, 228 Ark. 1157, 312 S.W.2d 912 (1958).

⁵³*In re Estate of Bixby*, 295 P.2d 68, 140 Cal. App. 2d 326 (Dist. Ct. App. 1956); *In re Estate of Giberson*, 21 Misc. 2d 299, 194 N.Y.S.2d 686 (Sur. Ct. 1959); *In re Schwartz*, 2 Misc. 2d 542, 149 N.Y.S.2d 638 (Sur. Ct. 1956).

⁵⁴See generally *McGregor v. McGregor*, 101 F. Supp. 848 (D. Colo. 1951) (defendant represented earlier will as later will); *Morton v. Pettitt*, 124 Ohio St. 241, 177 N.E. 591 (1931) (defendant destroyed real will and substituted forgery).

⁵⁵*DeMouy v. Jepson*, 255 Ala. 337, 51 So. 2d 506 (1951) (dictum); *Berl v. Rosenberg*, 336 P.2d 975, 169 Cal. App. 2d 125 (Dist. Ct. App. 1959); *In re Kaufman's Estate*, 201 Misc. 905, 107 N.Y.S.2d 681 (Sur. Ct. 1951).

in the next of kin for the purpose of giving the body a decent burial has been interpreted to mean that the person entitled to the body has an immediate right to possession of the body⁵⁶ and a right to receive the body in the same condition (including all of its parts) that it was in at the time of death.⁵⁷ While it is clear that the statute changes the common law to the extent that the state may alter the body before returning it to the next of kin, the statute makes no mention of the condition the body must be in when returned. Delay in delivery of the body to the next of kin has long been recognized as giving a cause of action for mental distress to those entitled to the body.⁵⁸ Similarly, mutilation of the body, including retention of internal body parts,⁵⁹ also gives rise to a cause of action for mental distress.⁶⁰ While a reasonableness requirement might be read into the statute which would cover both delay and unnecessary retention and mutilation, until such time as this could be judicially settled, the deceased's survivors would have no clearly defined statement with respect to their rights.

The liability of the Medical Examiner with regard to mutilation of a body also inheres in the wording of the statute. The statute provides that the Chief Medical Examiner or his deputies may provide an organ from a decedent "who *may* provide a *suitable organ* for transplant . . ."⁶¹ If it subsequently appears that an organ was taken from the deceased's body and that the organ was not suitable, the Medical Examiner might incur liability for an unnecessary mutilation of the body. It is obvious that the Medical Examiner cannot know with certainty that the organ will be suitable until the body is opened and the organ extracted.⁶² The resolution of this problem depends upon the standard that the word "may" imposes on the Medical Examiner. If the general rule of statutory construction is applied then "may" will be held to give the Medical Examiner a wide latitude of discretion⁶³ and he will be held liable only for a clear abuse of that discretion.⁶⁴ If a court were to hold otherwise,

⁵⁶Cases cited note 13 *supra*.

⁵⁷Cases cited note 14 *supra*.

⁵⁸Cases cited note 15 *supra*.

⁵⁹*E.g.*, *Hassard v. Lehane*, 143 App. Div. 424, 128 N.Y.S. 161 (1911) (physician retained heart and spleen after autopsy); *accord*, *Gray v. Southern Pac. Co.*, 68 P.2d 1011, 21 Cal. App. 2d 240 (Dist. Ct. App. 1937); *Palenzke v. Bruning*, 98 Ill. App. 644 (1900).

⁶⁰Cases cited note 16 *supra*.

⁶¹VA. CODE ANN. § 19.1-46.1 (Supp. 1968) (emphasis added).

⁶²Interview cited note 26 *supra*.

⁶³*See generally* *U.S. v. Bowden*, 182 F.2d 251 (10th Cir. 1950); (the word "may" vests discretion); *State v. Machovec*, 236 Iowa 377, 17 N.W.2d 843 (1945); (word

the fear of liability would, as a practical matter, render the statute useless.⁶⁵

The transplantation statute requires several other factual determinations in which the Medical Examiner must exercise a substantial degree of discretion. In order for the statute to operate there must be a patient "who is in immediate need for an internal organ as a transplant." It is not clear from the statute whether this determination is to be made by the transplanting surgeon or by the Medical Examiner.⁶⁶ Similarly, the statute is silent on the criteria to be used in arriving at this determination. If it should later be determined that the organ was taken in a situation in which the need was not immediate, the question would arise as to the liability of the Medical Examiner. It would seem that the Medical Examiner could be held to either of two standards of conduct, a good faith standard or a reasonable man standard. In Virginia, as elsewhere, a doctor is held to the reasonable professional standard of his colleagues⁶⁷ and it would seem probable that since the Medical Examiner would be performing the function of a doctor when he makes the determination of immediate need, he would be held to the doctor's standard. On the other hand, if the statute requires the Medical Examiner to determine from the transplanting surgeon that there is a case of immediate need, then it would seem probable that only a good faith requirement exists. Good faith means only an honest effort to ascertain the facts upon which his exercise of discretion rests.⁶⁸

"may" generally operates to confer discretion); *Ocean Accident and Guarantee Co. v. Milford Bank*, 236 Ky. 457, 33 S.W.2d 312 (1930). (word "may" imports permission or liberty to act).

⁶⁵See *United States Nat'l Bank & Trust Co. v. Sullivan*, 69 F.2d 412 (7th Cir. 1934); *Paper Stylists v. Fitchburg Paper Co.*, 9 F.R.D. 4 (N.D.N.Y. 1949); *Murphy v. Grand County*, 1 Utah 2d 412, 268 P.2d 677 (1954).

⁶⁶This is the view taken by Dr. Geoffrey Mann, the Chief Medical Examiner of Virginia. Interview cited note 26 *supra*.

⁶⁷Although the statute has not yet been used, Dr. Geoffrey Mann is of the opinion that this determination is for the transplanting surgeon. Interview cited note 26 *supra*.

This view is consonant with the one taken by the National Academy of Sciences: "Rigid safeguards should be developed with respect to the selection of prospective donors.... An independent group of expert, mature physicians, none of whom is directly engaged in the transplantation effort... should agree... as to the donor's acceptability...." BOARD OF MEDICINE, NATIONAL ACADEMY OF SCIENCES, *CARDIAC TRANSPLANTATION IN MAN*, February 28, 1968. (A copy of this statement can be obtained from the National Academy of Sciences, Washington, D. C.)

⁶⁸*Harris v. Fall*, 177 F. 79 (7th Cir. 1910); *Beach v. Chollet*, 31 Ohio App. 8, 166 N.E. 145 (1928); *Alexander v. Hill*, 174 Va. 248, 6 S.E.2d 661 (1940).

⁶⁹*Colket v. St. Louis Union Trust Co.*, 52 F.2d 390 (8th Cir. 1931); *In re Pine Grove Canning Co.*, 226 F. Supp. 872 (W.D. La. 1963); *People v. Bowman*, 320 P.2d 70, 156 Cal. App. 2d 784 (Dist. Ct. App. 1958).

After it has been determined that there is a recipient in immediate need of an organ, the Medical Examiner must determine if there is a decedent under his jurisdiction who might supply such an organ. This determination is really the key to the statute because until it is made, the Medical Examiner may not act. The statute makes no attempt to define death or to cope with such difficult problems as whether a donor who has provided a viable heart is really dead. This is probably wise because such problems are not amenable to a legislative approach.⁶⁹ Although the statute has not been used as yet, the procedure that will be followed is that the family physician or the attending physician at the hospital will make the determination of death before the Medical Examiner enters the picture.⁷⁰ This will insure that the donor receives every benefit of medical science while he still lives.

Once the determination has been made that there is a genuine and immediate need for an organ and that there is a decedent who falls under the jurisdiction of the Medical Examiner, the organ may be provided where "no known objection by the next of kin is foreseen by the Chief Medical Examiner." The standard of conduct to which the Medical Examiner will be held in deciding if such an objection exists is not clear from the statute. If emphasis is placed on the words "no known objection" then it would seem that the standard is good faith.⁷¹ If, however, emphasis is placed on the words "is foreseen," then it would seem that the standard is the reasonable man.⁷² While a means of resolving this ambiguity is not at hand, as a practical matter the good faith standard is preferable. The spirit of the statute is to facilitate transplants and save lives and in order to do this the Medical Examiner should be encouraged to function under the statute without fear of unnecessary liability.

A final problem is that the statute refers only to "the transplanting surgeon" without stating any qualifications as to the experience or ability that such a surgeon should possess. The American Medical Association has promulgated requirements for surgeons and facilities

⁶⁹Doctors are in agreement that death cannot readily be defined and that each case must be decided on its own circumstances. Interview with Dr. D. E. Andrews, Medical College of Virginia, in Richmond, Virginia, November 14, 1968.

⁷⁰Interview cited note 26 *supra*.

⁷¹"No known objection" is a phrase that denotes a test of good faith. *C.f.* *Appel v. Morford*, 62 Cal. App. 2d 36 144 P.2d 95, (Dist. Ct. App. 1943).

⁷²The word "foreseeable" is a word that suggests the reasonable man test of "foreseeability." *RESTATEMENT (SECOND) OF TORTS* § 283, comment *b* (1965).

necessary in order to perform homotransplantation.⁷³ As the prevailing medical opinion is an important factor in setting the legal standard of care,⁷⁴ the medical examiner may be charged with ascertaining that these medical standards are met before he provides an organ for homotransplantation. While the probability of an inexperienced surgeon seeking to perform a transplantation is slight, the possibility of abuse should not be ignored.⁷⁵

The Virginia transplantation statute attempts to provide a procedure whereby a constant and viable source of organs can be made available to transplanting surgeons.⁷⁶ In so doing, the effect of the statute is to cast doubt on many of the old concepts concerning dead bodies. While it is true that the transplantation statute raises several legal problems, this must also be true of any attempt to legislate in a new area. The significance of the statute is that the rights of the deceased, his next of kin and the community as a whole have been balanced, and the balance has been struck in favor of the community. It is legislation of this type that will provide an atmosphere in which law and medicine can better serve humanity.

JEFFREY R. REIDER

⁷³Transplant procedures of body organs should be undertaken (a) only by physicians who possess special medical knowledge and technical competence developed through special training, study, and laboratory experience and practice, and (b) in medical institutions with facilities adequate to protect the health and well-being of the parties to the procedure.

REPORT OF THE JUDICIAL COUNCIL OF THE AMERICAN MEDICAL ASSOCIATION (Adopted by the American Medical Association House of Delegates on June 19, 1968). BOARD ON MEDICINE, NATIONAL ACADEMY OF SCIENCES, CARDIAC TRANSPLANTATION IN MAN, February 28, 1968 (A copy of this statement can be obtained from the National Academy of Sciences, Washington, D. C.).

⁷⁴See *Ayers v. Parry*, 192 F.2d 181 (3d Cir. 1951), *cert. denied*, 343 U.S. 980 (1952); *Adkins v. Ropp*, 105 Ind. App. 331, 14 N.E.2d 727 (1938); *Johnson v. Colp*, 211 Minn. 245, 300 N.W. 791 (1941); *Harris v. Graham*, 124 Okla. 196, 255 P. 710 (1926).

⁷⁵Washington Post, Dec. 7, 1968 § A, at 1, Col. 3.

⁷⁶The Chief Medical Examiner, Dr. Geoffrey Mann, while agreeing that the statute is an important step forward, believes that the statute is still so restrictive that its potential use is limited. Dr. Mann would prefer a statute that allowed the Medical Examiner to take organs from a decedent falling under his jurisdiction without any qualifications as to time or foreseeability of known objections from the next of kin. Interview cited note 26 *supra*.

APPENDIX I

The following table shows the anatomy statutes of thirty-five jurisdictions.

ALA. CODE tit. 22, § 174, *et seq.* (1958); ARIZ. REV. STAT. ANN. § 36-801, *et seq.* 1956); ARK. STAT. ANN. § 82-404, *et seq.* (Repl. Vol. 1960); CAL. HEALTH & SAFETY CODE § 7200 (West 1955); COLO. REV. STAT. ANN. § 91-3-1 (1963); D.C. CODE § 2-203 (1967); GA. CODE ANN. § 88-2701, *et seq.* (Supp. 1967); ILL. REV. STAT. ch. 91, § 19 (Smith-Hurd 1966); IND. ANN. STAT. § 63-601, *et seq.* (1962); IOWA CODE ANN. § 142.1 (Supp. 1968); KY. REV. STAT. ANN. § 311.300 (1963); LA. REV. STAT. ANN. § 17:2271, *et seq.* (1963); ME. REV. STAT. ANN. tit. 22, § 2881 (1964); MD. ANN. CODE art. 43, § 158 (1957); MASS. ANN. LAWS, ch. 113, § 1, *et seq.* (1965); MICH. STAT. ANN. § 14-513(1), *et seq.* (Supp. 1968); MINN. STAT. ANN. § 145.14 (1946); MISS. CODE ANN. § 6709 (1953); MO. ANN. STAT. § 194.20 (1962); NEB. REV. STAT. § 71-1001, *et seq.* (1966); N.J. STAT. ANN. § 45:9-49 (1963); N.M. STAT. ANN. § 12-7-4 (1954); N.Y. PUB. HEALTH LAW § 43211, *et seq.* (McKinney 1954); N.C. GEN. STAT. § 90-214 (1965); N.D. CENT. CODE § 23-06-14 (1960); OKLA. STAT. ANN. tit. 63, § 91, *et seq.* (1964); ORE. REV. STAT. § 97-170 (1967); PA. STAT. ANN. tit. 35, § 1091, *et seq.* (1964); S.C. CODE ANN. § 9-501, *et seq.* (1962); TENN. CODE ANN. § 53-504, *et seq.* (1966); TEX. REV. CIV. STAT. ANN. art. 4583, *et seq.* (1960); VA. CODE ANN. § 32-357 (Repl. Vol. 1964); WASH. REV. CODE ANN. § 63.08.060 (1967); W. VA. CODE ANN. § 18-11-12 (1966); WIS. STAT. ANN. § 155.02 (1957).

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APPENDIX II

The following table shows the donation statutes of forty-three jurisdictions.

ALA. CODE tit. 22, § 184 (1958); ALASKA STAT. § 13.05.035 (1962) (eyes only); ARIZ. REV. STAT. ANN. § 36-841, *et seq.* (1956); ARK. STAT. ANN. § 82-406, *et seq.* (1960); CAL. HEALTH & SAFETY CODE § 7100, *et seq.* (West Supp. 1968); COLO. REV. STAT. ANN. § 91-3-5, *et seq.* (1963); CONN. GEN. STAT. ANN. § 19-139 (Supp. 1968); D.C. CODE § 2-251, *et seq.* (Supp. 1967); FLA. STAT. ANN. § 736-08, *et seq.* (1963); GA. CODE ANN. § 88-2001, *et seq.* (Supp. 1968) (eyes only); HAWAII REV. LAWS § 64-14 (Act of April 1, 1967, ch. 50F); ILL. ANN. STAT. ch. 3, § 42(a) (Smith-Hurd 1961); IND. ANN. STAT. § 6-510, *et seq.* (1967); IOWA CODE ANN. § 142.12 (Supp. 1968); KY. REV. STAT. ANN. § 311.352-56 (1963); LA. REV. STAT. ANN. § 17:2351-5 (1963); ME. REV. STAT. ANN. tit. 22, § 2881, *et seq.* (1964) (eyes only); MD. ANN. CODE art. 43, § 149 (1965); MASS. ANN. LAWS ch. 113, § 7-10 (Supp. 1967); MICH. STAT. ANN. § 14-523 (Supp. 1968); MINN. STAT. ANN. § 525.18 (Supp. 1968); MISS. ACTS (1966), H.B. No. 1070; MO. ANN. STAT. § 194.190 (Supp. 1968); MONT. REV. CODES ANN. § 69-2311, *et seq.* (Supp. 1968); NEB. REV. STAT. § 71-1339, *et seq.* (Supp. 1968); NEV. REV. STAT. § 451.440, *et seq.* (1963); N.J. REV. STAT. § 26:6-51 (1964) (eyes only); N.M. STAT. ANN. § 12-11-1, *et seq.* (Supp. 1968); N.Y. PUB. HEALTH LAW § 4201 (McKinney Supp. 1968); N.C. GEN. STAT. § 90-216.1, *et seq.* (1965); N.D. CENT. CODE § 23-06-01 (Supp. 1968); OKLA. STAT. tit. 63, § 105, *et seq.* (1964); ORE. REV. STAT. § 97.132, *et seq.* (1961); PA. STAT. ANN. tit. 35, § 5001 (1964); R.I. GEN. LAWS ANN. § 23-42-1 (Supp. 1966); S.C. CODE ANN. § 32-701 (1962) (eyes only); S.D. CODE § 27.1302 (1939); TENN. CODE ANN. § 32-601, *et seq.* (Supp. 1968); TEX. REV. CIV. STAT. ANN. art. 4590-1 (1960); VA. CODE ANN. § 32-364.1 (Supp. 1968); WASH. REV. CODE ANN. § 68.08.250, *et seq.* (1962); W. VA. CODE ANN. § 16-19-1 (1966) (eyes only); WIS. STAT. ANN. § 155-06 (Supp. 1968).