WHOSE RIGHT IS IT ANYWAY? THE DUTIES OWED TO A DECEASED AND TO SURVIVING FAMILY MEMBERS WHEN DEALING WITH A CORPSE.

BRENNAN V CITY OF BRADFORD METROPOLITAN DISTRICT COUNCIL AND LEEDS TEACHING HOSPITALS NHS TRUST [2021] 1 WLUK 429

SUMMARY

This commentary considers the case of *Brennan*, in which surviving family members successfully brought a Human Rights Act claim against a hospital and a council for the way in which they both treated a body post-mortem. Their failure to freeze it led to such a state of decomposition that it was unfit for viewing. The family argued this constituted an unjustified interference with their rights to family and private life. After a review of Strasbourg case law, the Leeds County Court found for them and awarded them damages under s.8 of the HRA. This commentary evaluates both the Strasbourg law and the way it was utilised and interpreted domestically. While agreeing with the outcome, the authors conclude that the Strasbourg law does not line up four square – and instead they suggest that a different approach, accepting the legitimacy of a claim based on 'memory-securing', is warranted on the facts. The commentary also questions whether the court was correct in seeing the rights reposed in the surviving family, and offers the view that greater coherence to the law might be achieved if we conceive of the survivors as the vehicle for the exercise of rights by the deceased.

KEYWORDS

Article 8 – death – dignity – harm – post-mortem – private and family life – rights

INTRODUCTION

Occasionally, in the pages of the law reports we come across troubling stories of human tragedy that make us stop short. *Brennan v City of Bradford Metropolitan District Council and Leeds Teaching Hospitals NHS Trust* is one such, a decision of His Honour Judge Saffan in the Leeds County Court handed down on 29th January 2021.[1] The claim was brought by five members of the family of Emily Whelan, who died aged 26 in November 2016, against the council (who operated the city mortuary) and the hospital on the basis of their treatment of her body post-mortem. The family argued that in failing to freeze her body, and allowing it to decompose to such an extent that it was unfit for viewing, the hospital and council had failed to treat her body with dignity and respect. This in turn constituted a breach of the family's rights under Article 8 of the European Convention of Human Rights (ECHR). The County Court found for the family.

This commentary considers the judgment against the hospital (the council having accepted liability) and the various issues it raises as to the scope of Article 8 in relation to the dead and surviving family members. Specifically, we will consider whether HHJ Saffan was right to consider the family members themselves had suffered harms, either sufficient to engage Article 8 as a matter of Strasbourg case law or more normatively. It is difficult to criticise a case when its outcome is one to which any person would be entirely sympathetic. We therefore support the decision in favour of the surviving family members, but our view is that the route by which the judge reached that outcome is open to criticism. Our conclusion is that while there are a good number of European Court of Human Rights (ECtHR) decisions that appear to support

[1] The judgment is here: https://www-lexisnexis-com.uea.idm.oclc.org/uk/legal/results/docview/attachRetrieve.do?csi=316762&A=0.46021248853172114&ersKey=23_T258522599&urlEnc=ISO-8859-1&inline=y&smi=48383&componentseq=1&key=61YW-BJ63-GXFD-84KF-00000-00&type=pdf

his conclusion, none in fact does, or if they do, then not for the reasons HHJ Saffan assumed. They all concern the provision of information to surviving relatives or matters relating to their autonomy over their deceased loved ones. His decision, we argue, might be in keeping with the spirit of Strasbourg case-law but is not four-square aligned with it. While HHJ Saffan might not have been wrong to conclude that the surviving members had their own interests in play, we do suggest that their interests are ones relating to what we term 'memory-securing' not to decision-making. Furthermore, we suggest that the better view is that it is time for the law to consider allowing them to be the vehicle – or depositary – of a third party's rights, here the deceased. While normally it would not matter whose rights they are, provided they are enforced, we suggest there may be scenarios where it is critical that this is thought through a little more coherently.

This commentary is in four parts: an outline of the judgment; a discussion of the case law relied upon; an analysis of the question "whose rights are in play, and why?"; and lastly, a short reflection on why this might matter.

II. THE JUDGMENT

Emily Whelan died of terminal hypoxic brain injury in November 2016 in Leeds General Infirmary. Her body was placed in refrigeration at the hospital for six weeks until it was transferred to Bradford public mortuary where for a year, broadly, it remained, under refrigeration, until it was moved to a deep-freeze storage under the direction of HM Coroner of West Yorkshire. Emily was ultimately buried in May 2018. Refrigeration does not arrest the progress of decomposition of a body, merely slowing it down. Freezing a body however does

bring decomposition to a near standstill. Emily's body was not frozen either by the hospital or by the mortuary for almost 12 months. By the time it was, and indeed for a significant prior period, her body had decomposed to such an extent that it would have been very distressing for her family to see her. The claim was brought by five members of her family including her mother, cousins, aunt, and half-siblings. They contended that both the hospital and the mortuary, in failing to freeze Emily's body thereby causing or permitting her body to become very badly decomposed, failed to treat their loved one's body with dignity and respect. This, they argued, was an unlawful act (or omission) which was incompatible with their own rights to a private and/or family life under Article 8 of the ECHR, given domestic effect by virtue of section 6 of the Human Rights Act 1998 (HRA).

There were various legal issues for resolution, and one of fact relating to the condition of the body when it was transferred. The critical question, and the focus of this commentary, was this: did the way in which Emily's body was treated after death fall within the scope of Article 8? Thereafter, it became a matter of 'standard' ECHR analysis: was there an interference?; was it justified?; were the claimants victims within s.7 of the HRA?; and were they entitled to a declaration and/or an award of damages to afford just satisfaction, and if so in what sums?

HHJ Saffan found for the claimants on all points. Having reviewed the Strasburg case law, he found that the way in which the body of a deceased family member is treated after death was within the scope of an individual's Article 8 right. Here the decision not to freeze constituted treatment that interfered with that right. A public authority which has undertaken to store a deceased's body, and which has the means and the facilities to store it in a way which will prevent it from decomposing, and which is subject to national guidance from the Human Tissue

Authority (HTA) as to how to preserve a body and prevent it from decomposing too badly,[2] does not treat that body with dignity and respect if it then either causes or permits the body to decompose to the state it reached.[3] The hospital was unable to provide a justification. The hospital argued that it did not freeze the body on ground of economic well-being: there were not the funds or if there were, they were better directed at using equipment to save lives. The court did not feel it needed to resolve this, finding instead that there was simply no evidence that the body was not frozen because there were no facilities to do so. There had thus been a violation. The claimants should properly be considered 'victims' within s.7(5) of the HRA and so were entitled to both a declaration and an award, under s.8, for pecuniary and for non-pecuniary loss. Each was able to show an exacerbation of existing mental health conditions, some connected to Emily's death (bereavement reaction) while others were longer-standing depressive conditions.

The focus of this commentary is on that primary question, namely whether or not the (non-) treatment of Emily's body fell within the scope of the right protected by Article 8. There is a second aspect, implicit in the court's resolution of the claimants' victim status but which was not fully explored in the judgment, one which speaks perhaps to the unspoken conceptual difficulty at its heart: whose rights really are being harmed, why and in what way? We will come back to this once we have considered a little more fully the case-law.

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[2] The HTA was created by the Human Tissue Act 2004 to regulate organisations that remove, store and use human tissue for research, medical treatment, post-mortem examination, education and training: https://www.hta.gov.uk/. It seeks to ensure that human tissue and organs are used safely and ethically, and with proper consent. Under s.26 of the Act, it has the power to issue codes of practice and promulgate standards. Code B and its accompanying standards govern post-mortem examinations including storage of bodies of the deceased: https://content.hta.gov.uk/sites/default/files/2020-11/Code%20B.pdf and https://content.hta.gov.uk/sites/default/files/2020-11/Code%20B%20standards.pdf.

[3] *Brennan* [106], accepting counsel for the claimant's submission. Both current and then operative national standards were that "bodies should be moved into frozen storage after 30 days in refrigerated storage": Code B standard PFE2(c).

III. DID THE CASE FALL WITHIN THE SCOPE OF ARTICLE 8?

There is, perhaps surprisingly, a good deal of ECHR case law that governs how states should deal with and treat the dead.[4] Much of this is traversed in the judgment by HHJ Saffan.[5] On this, he was clear: it was not a right of the deceased. As a general rule, a dead body itself has no Article 8 rights.[6] Instead, it was reposed in the surviving family members, and not indirectly.[7] They had suffered a direct interference, not based on the failure to freeze; their claim is in effect a parasitic one, stemming from the fact that the way in which

> Emily's body was treated did not accord the body the dignity that it deserved, and that Emily's loved ones have their own right to expect their loved one's body to be treated with respect.[8]

None of the authorities is directly on point – which, again, comes as little surprise as we would need to wonder why the case was being litigated at all – but some come very close. HHJ Saffan found that all '... involved issues as to the dignity to be accorded to a deceased person,' thus making Brennan 'no different'.[9] He saw this in the many cases he considered. We are not

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[4] We undertook a search of the Council of Europe's HUDOC database using the terms "right of the dead" "right of the deceased". This revealed very few matches: *Jaggi v Switzerland* app.no. 58757/00, judgment 13th July 2006, *Elberte v Latvia* app.no. 61243, judgment 13th January 2015, and *Kresten Filtenborg Mortensen v Denmark* app. no.1338/03, inadmissibility decision 15th May 2006. A search using "corpse" limited to Article 8 brought up 96 hits, including a few cases communicated. Each of these was read to see if they had any bearing on the issues in *Brennan*; this list comprised 22 cases, many but not all of which were covered in the judgment by HHJ Saffan.

[5] It is hard to tell from the judgment which of the various cases was operative. The judgment refers to: *Solska and Rybicka v Poland* app. nos. 30491/17 and 31083/17, judgment 20th September 2018; *Pannullo and Forte v France* app. no. 37794/97, judgment 30th October 2010; *Ploski v Poland* app. no. 26761/95, judgment 12th November 2002; *Dodsbo v Sweden* app. no. 61564/00, judgment 17th January 2006; *Hadri-Vionnet v Switzerland* app. no. 55525/00, judgment 14th February 2008; *Sabanchiyeva v Russia* app. no. 38450/05, judgment 6th June 2013; *Petrova v Latvia* app. no. 4605/05, judgment 24th June 2014; *Lozovyye v Russia* app. no. 4587/09, judgment 24th April 2018; *Jovanovic v Serbia* app. no. 21794/08, judgment 26th June 2013; *Znamenskaya v Russia* app. no. 77785/01, judgment 2nd June 2005; *Girard v France* app. no. 22590/04, judgment 30th November 2011; *Draskovic v Montenegro* app. no. 40597/17, judgment 9th June 2020; *Mortensen v Denmark* (above n.4); and *Maric v Croatia* app. no. 50132/12, judgment 12th June 2014.

[6] *Brennan* [80].

[7] *Brennan* [102].

[8] *Brennan* [103].

[9] *Brennan* [99].

convinced he is correct in his summation or in his conceptualisation of that European case law. We think there is a sounder, more defensible analysis of many of those cases but we leave our critique of the judgment until the next part. In this section, we simply traverse that case law. In outline, our concern is that those Strasbourg case are not at heart "about" dignity being accorded to the deceased. Instead they are "about" relatives being deprived of decision-making capacity in respect of their loved ones, and perhaps in fact being deprived of the chance to create or maintain proper memories of them. Furthermore, we do not think the case law wholeheartedly and uniformly supports HHJ Saffan's simple and straightforward conclusion that survivors have their own independent rights that are capable of being violated.

Many cases were about states refusing to return bodies to families at all, so they were unable to bury their loved ones,[10] or promptly so as to allow them to do so, to grieve, bring peace and move on.[11] In contradistinction to *Brennan*, the harm here is palpable and more obviously direct. In others, a hospital's refusal to disclose to parents where they had disposed of the body of a stillborn baby constituted a violation.[12] Some were about exhumations without the consent of surviving family members,[13] although by contrast one involved a state refusing consent to exhume and re-bury in a family plot.[14] *Dennis v UK,* declared inadmissible by the Strasbourg

[10] *Sabanchiyeva v Russia* above n.5 in which national law forbade the return of the bodies of terrorist suspects for burial; *Maskhadova v Russia* app. no. 18071/05, judgment 6th June 2013; *Zalov and Khakulova v Russia* app. no. 7988/09, judgment 16th January 2014; *Arkhestov v Russia* app. no. 22089/07, judgment 16th January 2014; and *Abdulayeva v Russia* app. no. 38552/05, judgment 16th January 2014.

[11] *Panullo* above n.5: a delay of over six months in returning the body of their deceased daughter, after an autopsy, constituted an unlawful violation of Article 8.

[12] *Maric v Croatia* above n.5. It was a violation of Article 8 for the state to dispose of the body of a stillborn child improperly (taken along with other clinical waste such as human tissue and amputated body parts by the hospital's contractor for cremation), which had consequently prevented him from obtaining information about where the child was buried.

[13] *Solska and Rybicka v Poland* above n.5: exhumation of husband's remains without consent was a violation Article 8.

[14] *Draskovic v Montenego* app. no. 40597/17, judgment 9th June 2020. The state violated the positive element of Article 8 where it did not entertain a surviving wife's request for exhumation and relocation of her husband's remains that had been buried during the war in a grave not near their shared home.

Court as it was out of time, was an Article 8 case founded on the removal of body parts by the coroner for identification following the BowBelle/Marchioness disaster on the River Thames in August 1989.[15]

The cases show what in *Lozovye v Russia* was described as 'various aspects of funeral rites', falling within the scope of both "private life" and "family life" under Article 8.[16] It is this overarching spirit that HHJ Saffan sought to capture in finding for the family but, as we suggest below, he did not fully appreciate the limitations of the case or, perhaps, the ramifications of so doing. There is growing appreciation at Strasbourg of the importance of offering support to those surviving family members as they seek to come to terms with death, an approach that is disjoined from any religious connotations about burial (albeit that that latter infuses some of the thinking on some cases and in some outcomes).[17] We can see this most obviously in those cases where the basis is the need for information about the death. The violation in *Jovanovic v Serbia* arose because of the state's continuing failure to provide credible information as to the fate of her son or ever to release the body to her.[18] She had been told her son had died in hospital a few days after birth, having been taken to a separate ward as was usual practice awaiting discharge next day, but suspected he might still be alive, having been unlawfully given up for adoption. The cause of death was never determined nor was his mother ever provided with an autopsy report or informed of when and where her son had allegedly been buried, and his death was never officially recorded. *Hadri vionnet v Switzerland* is a case decided on the basis that there was no legal basis for the interference, the burial having been conducted by the registrar

[15] App. no 76573/01, judgment 2nd July 2002.
[16] App. no. 4587/09, judgment 24th April 2018. There was a violation of the positive element of Article 8 by the Russian authorities who failed to act with reasonable diligence to trace the parents of a murder victim so as to allow them to bury him (and participate in criminal proceedings against his murderer).
[17] See e.g. *Janowiec v Russia* app. nos. 55508/7 and 29520/09 admissibility decision 5th July 2011.
[18] App. no. 21794/08, judgment 26th March 2013.

without having consulted the relatives, contrary to municipal regulations governing cemeteries and funerals.[19] To that extent it is of limited help in evaluating the instant *Brennan* decision but it illuminates that wider overarching rationale: there was a violation of Art 8 for the body of someone's stillborn child to be taken and buried without their knowledge in a communal grave in the cemetery, without being able to attend (as she was herself at the time in asylum accommodation). Perhaps as important is that the applicant had a second line of attack: her son's body had been transported from the hospital to the cemetery in an inappropriate vehicle, an ordinary delivery van. Again, this was unlawful, contrary to another part of those regulations but it speaks to the need, evident in *Brennan*, of certain minimum social expectations, mutual and prospective expectations we all share: we hope that if we treat a deceased in a certain way, then we will be. This is what, in another context – privacy against media intrusions – one of us has termed the "effecting assurances" rationale for why I have an interest in your privacy.[20]

This in fact is the approach taken in one case, *Dodsbo v Sweden* typified by the Strasbourg Court thus:

> what was at stake was the right of the living to be assured that, after death, their remains would be treated with respect. Thus, in the present case, the interference also served to protect the rights of others.[21]

We develop this aspect further below. To some extent then, the rationale underpinning the Strasbourg cases, and *Brennan*, is not an individualised conception of the rights at stake: they are owed to the dead, so that they can in turn be owed to me and to you. HHJ Saffan is not alone in failing to develop the underpinnings of the right. The Court's own guide on Article 8

[19] App. no. 55525/00, judgment 14th February 2008.
[20] D Mead, 'A Socialised Conceptualisation of Individual Privacy: A Theoretical and Empirical Study of the Notion of the 'Public' in UK MoPI Cases' (2017) 9 Journal of Media Law 100, 106.
[21] App. no. 61564/00, judgment 17th January 2006 [20].

rights (and which he relied on) states 'The court has found that the way in which the body of a deceased relative is treated...comes within the scope of the right to respect for family and private life.'[22] That takes us only so far but does not address why a surviving family member might need their own independent protection, not vicariously on behalf of the deceased. What function is served by bestowing on surviving family members their own right for their loved one's body to be treated with respect? If we accept the wider importance of facilitating the transition, we can start to sketch out some component parts, which we do below.

The judgment does not really engage with what we suggest are the two critical issues that lie at its heart, and in all those that have proceeded it: whose rights and to what – in Article 8 terms – are we, and should we be, protecting? It is to that we now turn.

IV. WAS HHJ SAFFAN RIGHT TO CONCLUDE AS HE DID?

Here we offer a short critique of the judicial reasoning adopted. Let us iterate once more our two main concerns with HHJ Saffan's conclusion that "the right to treat a dead body with dignity [was] a right belonging to family members".[23] First, he did not explain how the case law supported his view that it was the treatment of the dead body that was the critical element.[24]

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[22] Updated 30th December 2020 https://www.echr.coe.int/documents/guide_art_8_eng.pdf, accessed 25th June 2021

[23] *Brennan* [80] and [98]-[99]. Relatedly, if all that is needed is mistreatment of a deceased body to found a claim by a surviving family member, it is not the greatest leap (if we substitute 'body' with 'person') to consider that this may have (unintentionally?) created a post-mortem privacy claim, in the name of a relative: we now all have a right for our deceased relative to be treated with dignity then when an invasion of their privacy occurs which does not do so, we can bring a claim. On this, see Tina Davey 'Until Death Do Us Part: Post-mortem Privacy Rights for the Ante-mortem Person.' *https://ueaeprints.uea.ac.uk/id/eprint/79742* (Thesis submitted to the University of East Anglia April 2020).

[24] HHJ Saffan does get one of the Strasbourg cases slightly wrong. His discussion of *Sabanchiyeva* (at [84e]) is premised on the Article 3 infringement having been suffered by the deceased. This is not the case. *Sabanchiyeva* (above n.4) is a case where the family was claiming it had been subjected to mental suffering as to constitute inhuman treatment: see [108]. There was no breach on the facts – whatever suffering they endured, it was not enough to surmount that hurdle. While, of course, that does not preclude a finding of a violation of Article 8, that would need greater explication than occurred here.

Secondly, he did not consider a sounder and more defensible conceptualisation: that the family was the repository of Emily's *in vivo* right – for her dead body to be treated appropriately – that crystallised and accrued on death.

In what way was Emily Whelan's dead body not "treated with dignity"?

HHJ Saffan broadly followed Strasbourg case-law which, too, had very little exploration of the underpinning rationale. In his view, the weight of it suggested the Strasbourg "message"[25] was that according dignity and treating a body with respect was a duty owed to the surviving relatives. As the Court asserted in *Genner v Austria*, 'dealing appropriately with the dead out of respect for the feelings of the deceased's relative's falls within the scope of Article 8.'[26] We should not forget that it is a County Court decision where the issue needed a simple disposal. We suggest though that grounding the family's claim much more firmly, expounding on why and in what way mistreatment causes an identifiable harm to the family's interest would have been enormously beneficial for future development of the law. If it is the post-mortem treatment that is the fount of the state's wrongdoing, then – as here – it would not matter that none of the family saw the body. Neither would it matter if they did not know – though of course in such an abstract, no case would probably be brought. Here, they did know – they were told about the state of the body and (probably) assumed much worse. But if treatment of the body is the trigger, the fact that, as here, the family has suffered – in common law terms, admittedly, rather than ECHR – psychological harm is irrelevant. If they never discovered it, the harm – the undignified mistreatment of the body has already occurred – and there has already been a violation. Even if they discovered it but were unmoved, again the harm and the

[25] *Brennan* [98].
[26] *Genner v Austria* app. no. 55495/08, judgment 6th June 2016.

violation has already occurred through the treatment of the once-alive but now-deceased body. Yet, this needs to be reconciled to the fact that the dead can suffer no Convention-infringing harm itself, at least under Article 8, as (and this was accepted by the claimants' counsel) "a dead body itself has no Article 8 rights".[27] This tension can be unpacked a little if we address how and why a family might benefit from being bestowed with protection against mistreatment, which we now explore.

Alternatively, and bearing in mind the Strasbourg case-law traversed by HHJ Saffan, we might read *Brennan* requiring not only 'treatment' of the deceased's body but a consequent harm to a surviving relative's interest. That would obviate there being a violation where family members were unaware of the treatment to the body – whatever form that 'treatment' took (though of course absent a knowing family member, it is hard to see how there could be a victim to bring the claim!) While that might appear attractive, it is not entirely congruent with the case-law. Several cases feature what can at very best only loosely be described as a failure to treat the deceased's body with dignity and respect. They are much more easily explained as cases where the treatment of the body is neither undignified nor disrespectful; it is the treatment of the relatives that is not. Failing to allow someone to attend a funeral – *Ploski v Poland* and *Hadri Vionnet v Switzerland* – cannot really be seen as treating the body in an adverse way, and certainly not in a way as to engage the protection of the ECHR. Without more, we cannot conclude that the body was not cared for, presented properly and subject to a dignified internment. The claims here are really about how the grieving family were 'treated', yet the way HHJ Saffan approached it is very clear: twice he explains that it is the treatment of the dead body that should be the focus of the legal attention and analysis.

[27] *Brennan* [80].

The problem, then, is that European case law is not a one-size fits all. Removal of a child's organs without consent, as in *Petrova v Latvia,* is very clearly an affront to both child and parent: the undignified treatment through desecration of the child's corpse and the failure to accord any value to the parent's wishes.[28] We can therefore see very clearly, using HHJ Saffan's words, treatment of the dead body. This, and *Solska and Rybicka v Poland*, seem aligned. There, the exhumation of a body against the wishes of the family fell within the scope of Article 8: treatment of the body and consequential harm to a survivor's interests.

This, we suggest, is also what is at play in *Brennan* yet it is not how it is reasoned or decided. There is the mistreatment of Emily Whelan's body and consequent harm to the interests of the surviving Brennan family. The principled development of the law requires greater granular dissection of the case law. There are cases where there is both treatment of a body and resultant harm – of what sort, we discuss shortly; cases where there is 'simply' mistreatment of a body; and cases where we cannot properly say the body has suffered any treatment at all yet some interest of the family has been harmed. We believe a better way of explaining the case law is to conceive that in the first and last the essence is not in fact what has happened to the body. This is simply the catalyst for effecting the 'real' harm to the surviving family's interests. All those cases can arguably be better explained as situations where there has been a harm to one of the following three interests: autonomous decision-making (such as where the body is to be buried), provision of information (how did someone die?) and finally, here in Brennan, what

[28] App. no. 4605/05, judgment 24th June 2014.

we term 'memory-securing' – part of the grieving process, coming to terms with the death, and setting out a path for the future.

Whose rights and interests are at play when a dead body is mistreated?

Here, our primary concern is who is the beneficiary of Article 8 protection. The law proceeds on the basis that the dead are no longer in existence and thus do not have any Convention rights.[29] However, this is not to deny that their physical body may remain and so too their memory in the surviving, but they themselves, as a legal entity, do not exist. A case cannot be brought in the name of a deceased person,[30] because she is not considered to be a 'person' for the purposes of Article 34 of the ECHR.[31] The Court has also emphasised that Article 8 rights are eminently personal and non-transferable.[32] It follows, therefore, that not only do the dead have no legal 'right' to dignity or respect under Article 8, but there can be no action brought – as we saw above – unless there has been mistreatment of their body together with a surviving relative whose interests have been directly affected, as was the case in *Brennan*. Of course, the corollary of protecting the surviving relative's right under Article 8 in such a situation is that the Court is vicariously protecting (or seeking to protect) the dignity of the deceased. In many cases, we could properly say that they are the real subject matter of the claim and/or that the 'real' harm is done to them, or their bodies.

[29] *Jaggi v. Switzerland,* App no. 58757/00 (2006) 47 EHRR 30 and *Brennan* [80].
[30] Except in certain circumstances when proceedings were commenced in her own name before death.
[31] See *Dvořáček and Dvořáčková v. Slovakia*, app. no. 30754/04 [41] judgment 28th July 2009, and *Aizpurua Ortiz and Others v. Spain*, app. no. 42430/05 [30], judgment 2nd February 2010.
[32] *Sanles v. Spain* (dec.), app. no. 48335/99, judgment 26th October 2000.

Brennan is properly a case where the family's harm is parasitic on the harm to the dead body – it was the fact that it was allowed to decay that caused the harm to the family's "memory-securing" interest. In others, there is no obvious bodily harm or mistreatment – the harm is simply to one of the family's three interests, as we saw above. How though should we approach cases where there has simply been harm to the dead body? Alternatively, what if Emily Whelan had no surviving relatives to be affected by the unfortunate decomposition of her body. On the face of it the law does not protect her dignity or respect her body; she has no such right under Article 8. This begs the question: is it only the dead with surviving family members that are affected who deserve the law to respect their dignity? To raise the question is partly to resolve it. If, as will be discussed below, society shows a strong commitment to treating the dead with respect and dignity, often displaying a belief that the dead retain some kind of sentience, then surely that should include protecting them in law, as of right, a right that is not theoretical and illusory, and is not dependent on a third party being affected?

These questions were partly considered in the concurring judgment of Judge Wojtyczek in the case of *Petrova v Latvia.*[33] There it was found that the removal of the deceased son's organs for transplantation without his or his mother's consent violated her own Article 8 rights because it was not prescribed by law. Her claim was founded on the fact that she had been deprived of the right, granted by domestic law, to object to her son's organ removal since she was not informed of his death or of possible removal before that occurred and so could not exercise the right to object. It was found that the 'rights of the deceased', Mr Petrova, and his mother, the applicant, were closely related and thus there was no need to examine the issue of transferability

[33] App. no. 4605/05, judgment 4th June 2014 and see too *Elberte v Latvi* app. no 61243/08, judgment 13th January 2015.

of rights. The applicant was complaining of a violation of her own rights in connection with the removal of her son's organs after his death, just as the family in *Brennan* were complaining of a breach of their own rights, not Emily's. Judge Wojtyczek considered that it was arguable that the close relatives of the deceased are 'depositaries of a right which belonged to the deceased person'.[34] He felt that the majority judgment had not 'sufficiently stressed' this 'important aspect of the right under consideration'. He went on to say that the case raised '...the question of the necessity of ensuring protection of human rights after the death of the right-holder' and that 'this entire question deserves deeper consideration'. In his view '... the different rights at stake and their nature were not properly identified in the judgment.' We suggest that conceptualising the factual matrix as a harm to the once-alive person's prospective interests (having their body treated respectfully on their death) that happens to eventuate at death and accrue to the survivors yields a more plausible account of what is at stake and is lost.

V. CONCLUSION: WHY DOES IT ALL MATTER?

To contort George Berkeley, if a dead body is mistreated but no one sees it, has it really been mistreated?[35] It surely matters to us if the body of another human, now deceased, is allowed to decompose in the manner that Emily's did, despite none of us being a close relative of hers? It is probably why the case attracted media attention and comment at the time. People find it shocking because it is considered wrong to show such a lack of respect to the dead and for her

[34] Although this was being said in relation to organ donation it is equally applicable to the facts of the *Brennan* case.

[35] G Berkeley, *A Treatise Concerning the Principles of Human Knowledge* (1710) "The objects of sense exist only when they are perceived; the trees therefore are in the garden…no longer than while there is somebody by to perceive them" (section 45).

body not to be treated with dignity. Here, it was fortunate that there were surviving family members and they could be said to be harmed as well, but if there were none, or they did not….?

If a living surviving relative cannot establish that they have suffered a 'direct and unjustified interference' with their Article 8 right by the undignified manner, for example, in which their loved one has been treated, why does it matter that the deceased was so treated? They are after all dead and if no harm has come to a living person should we really care too much? The Code of Practice issued by the Human Tissue Authority Guidance makes it clear that the "dignity of the deceased should be maintained at all times"[36] and the "storage of bodies in mortuaries must preserve the dignity of the deceased….Storage facilities must be fit for purpose and that practices relating to body storage must show respect for the deceased."[37] Ms Alexandra Sunderland, the Chief Anatomical Pathology Technologist at the Leeds General Infirmary, gave evidence in the *Brennan* case, that treating bodies with dignity and respect was the 'lynchpin' of the guidance and that allowing the body to become badly decomposed was 'wholly inconsistent' with that.[38] But why do we place such importance on treating a dead body with dignity and respect? Why does it matter?

It may be explained, in part, by the notion of the 'popular death culture' which Ruth Richardson, in her research of the dead and burial, found in the traditional attitude towards death and the corpse.[39] There were recurring death customs whereby society treated the dead

[36] Code B above n.2, para 7.
[37] Ibid para 124.
[38] *Brennan* [69].
[39] For a full exposition of this term see R Richardson, 'The Corpse and Popular Culture' in *Death, Dissection and the Destitute* (Penguin Books 1988) 3.

body with care and respect even though it was no longer an 'actual person'. Ritual reverence continued to be given for the person that the cadaver represented. Cantor sees this as attributing a 'quasi human status, a sort of quasi-personhood, to the cadavers.' There is an 'intimate association' which 'accounts for the common expectation of dignified and respectful treatment' and that '…dignity and respect that a cadaver's quasi-personhood entails are suffused with human values…' albeit not at the same 'level of dignity accorded to the living.'[40]

These 'ingrained notions of human dignity and respect for the dead'[41] can partly be explained by the oft held belief, or perhaps intuition, that the dead may have some kind of sentience and thus can be harmed, often in evidence when decisions need to be made about a deceased's organ donation by family members. The respectful treatment of the dead could also be explained by the 'effecting assurances' approach that underlines a more social conception of Article 8 – that we each have an interest in another's continued well-being: the living treat the dead as they wish to be treated themselves when they die lest a different fate befall them.[42] Historically, many of the legal protections that can be said to apply to the dead, such as testamentary wishes and bodily integrity, were premised upon the living having such an interest.

Judge Wojtyczek in *Petrova* thought questions of who was the rights-bearer, whose interests were at stake (and why) were of the 'utmost relevance in ascertaining the correct judicial

[40] N Cantor, *After We Die: The Life and Times of the Human Cadaver* (Georgetown University Press 2010) 29.
[41] H Conway, *The Law and the* Dead (Routledge 2016) 57.
[42] Mead above n.20. The idea of "effecting assurances" lies behind the argument one of us has made that protection of privacy (against media intrusion) should extend past death and is best envisaged not as a right of the deceased but as a right of the living (albeit now dead) to protect their privacy prospectively: see Davey above n.23.

answer'.[43] It would have probably been too much to expect a county court judge to delve into such complexities of his own volition, but it is a very interesting point that may have future traction and calls for a more nuanced approach. For whilst the dead cannot presently be legal rights-holders it does not necessarily mean that the dead cannot be given legal protection or that there should not be consideration of, in the words of Judge Wojtyczek, surviving family members being 'depositaries of a right which belonged to the deceased person.'

In *Petrova* the removal of an organ from a deceased person was seen by Judge Wojtyczek as not only a violation of that person's right but also the mother's right 'to respect for the dignity of her deceased son. Her right was violated not because she could not assert a personal entitlement to decide on transplantation of her son's organs, but because she was denied the possibility to express her son's wishes.'[44] So, it could also be argued that the Brennan family rights were violated not because they saw Emily's decomposed body or imagined it from the details they had been given, but because they were denied the possibility of protecting the dignity of their family member. This of course, would allow surviving relatives to bring claims on behalf of their loved ones who had not been treated with respect and dignity – absent any direct effect on the family and thus where they themselves cannot establish a 'victim' status under Article 34 and they do not have an Article 8 claim themselves.

Ultimately, the correct outcome was achieved in *Brennan*, one with which we assume all right-thinking people would agree. The idea that, as a matter of human rights law, a state could treat

[43] [3] above n. 5.
[44] [5] above n.5.

a body so awfully without comeback is anathema to all we hold dear. That said, as this commentary has sought to explain, there is much to commend in having a better understanding of why the law should align more clearly with that intuitive path. As Lord Hoffman put it in *Bland:*

> At least a part of the reason why we honour the wishes of the dead about the distribution of their property is that we think it would wrong them not to do so, despite the fact that we believe that they will never know that their will has been ignored. Most people would like an honourable and dignified death and we think it wrong to dishonour their deaths, even when they are unconscious that this is happening. We pay respect to their dead bodies and to their memory because we think it an offence against the dead themselves if we do not. Once again, I am not concerned to analyse the rationality of these feelings. It is enough that they are deeply rooted in our ways of thinking and that the law cannot possibly ignore them.[45]

To conclude, we offer up three slightly different notions of the harm that is suffered. One is to us all, the communal harm we suffer. The dead are not just memories but are in the biological category of 'dead people' implying some sort of continuity. No matter what the law indicates, while someone may now be a 'dead person', they nevertheless live on in the hearts and minds of those that knew them, and remain part of that ongoing perpetual community.[46] So, just as we would have treated the 'living person' with dignity and respect so too we should treat them when they are a 'dead person.' Alternatively, we might conceive of the harm to those of us

[45] Lord Hoffman in *Airedale NHS Trust v Bland* [1993] AC 789, 829C; this was contained within his judgment in the Court of Appeal, affirmed in the House of Lords.
[46] B Brecher, 'Our Obligation to the Dead' (2002) 19 Journal of Applied Philosophy 109, 113.

living now – as we cast our minds forward to a time after death – and who seek to foster that continuing bond and their surviving identity in the minds of those who live on. According to Scarre, albeit in the context of post-mortem privacy, '…we feel strong distaste while alive for the prospect of our loss of privacy when dead.'[47] Lastly, as Jessica Berg puts it: '[t]he dead live on in the memories of the living. Harms to the memory of the deceased may entail very real harms to people now living who have an interest in preserving the original memory, such as relatives or close friends of the deceased.'[48]

[47] G Scarre, 'Privacy and the Dead' (2012) 19 Philosophy in the Contemporary World 1, 10.
[48] J Berg, 'Grave Secrets: Legal and Ethical Analysis of Post-mortem Confidentiality' (2001) 34 Conn L Rev 81, 99.