

# **LATVIAN CASE**

## **REMOVAL OF TISSUE FROM 400 DECEASED PERSONS**

Author: Solvita Olsena, MD, JD  
Director of Medical Law Institute Ltd.  
Lecturer at Riga Stradins University  
Address: Jaunpils iela 2 – 3, Riga, LV – 1002, Latvia  
Email: solvitaolsena@apollo.lv

### **Introduction**

In March 2003 police discovered, that in Rezekne, one of the regional centres of Latvia, in the department of State Centre for Forensic Medicine during autopsy, tissue was removed from deceased persons without prior permission by those concerned or their relatives. Different materials, like pieces of wood and fabrics, were put into the bodies to make deceased appear untouched. Police found collection of tissues in the Center. The case was reported in the main Latvian media<sup>1</sup>, and it rose some public debate. Police initiated criminal investigation. In December 2005, however, media first<sup>2</sup> and families of donors later<sup>3</sup>, received the verdict of Security Police which concluded: criminal investigation is dismissed on two charges: unlawful removal of tissues, and unlawful commercial deal with tissues, and are to be pursued on tax evasion. The decision of the Security Police again raised a debate in the Latvian media<sup>4</sup>.

### **I. Facts of the case<sup>5</sup>**

In January 1994 an Agreement on Scientific Research Cooperation (hereinafter referred to as – the agreement) was concluded between the Forensic Pathology Center of the Health Department of the Ministry of Welfare (hereinafter referred to as – the Center) and a private German company (hereinafter referred to as - the Company). The agreement provided for the research and practical cooperation, i.e. the Center would remove different tissue from bodies of the deceased making selection in accordance with the international quality standard requirements and sent them to the Company. In Germany the tissue was to be processed and sent back to Latvia in the form of finished bioimplants ready for use in transplant surgery.

The Ministry of Welfare subsequently confirmed the agreement being in accordance with the rules of laws of the Republic of Latvia. The Prosecutor General Office concluded compliance of the agreement, in general, with the Latvian law. Financial aspects were considered too, as under the agreement compensation was owed to the Center for the removed tissue.

In the beginning, an extra-budgetary funds account for the Center was opened whereto payments were transferred from the Company. Later payments by Company were transferred on the private account of the Head of the Department of Thanatology of the Center, a physician. The Head of the Department who controlled the work on tissue removal and paid the Center medical experts for their work, testified that in the very beginning payments by the Company occasionally were received via a transport company which remained unknown in the police investigations and which was liquidated in 1997.

Medical expert of the Center worked and removed the tissue on a voluntary basis. No separate employment agreement was concluded by experts with the Company. The Head of Thanatological Department organized the experts' work, and was liable for sending the tissue to Germany. Hospital attendants and laboratory assistants, who similarly performed this function on voluntary basis, assisted experts in the tissue removal. In the beginning, Ventspils, Saldus, Kuldiga, Daugavpils and Rezekne medical centers cooperated in the tissue removal, however since 1996 only Rezekne forensic pathology department and the Center in Riga participated.

The experts removed tissue from the corpses delivered at the Center for post-mortem examination or the forensic pathology examination. Before removal of tissue, experts should make sure that there were no objections against it. In particular, experts were to examine the deceased's passport on whether there was a seal imprinted prohibiting to remove tissue and organs in case of death. Also, if relatives of the deceased objected to the tissue removal such a decision was assumed and tissue from this person's body were not removed. However, the experts themselves did not take the initiative to search for relatives and did not ask for their permission, if the relatives themselves did not object thereto.

The following tissue was removed from about 400 corpses – dural cerebral membrane, temporal bone fascia, ear anvil bone, parts of costal cartilage, upper thigh bone nearest and farther part, lower thigh bone joint part, plate fascia (upper shin) etc.

Removed tissue were cleaned and put in into separate bottles with a special solution. A internal formular of the Center was filled out specifying information regarding the donor, the tissue removed and the name of the expert who had removed the tissue. A lot of samples were taken from the corpse for medical analysis, also including forensic serology examinations, on possible diseases. Tissue was removed irrespective of the results of the medical analysis. If the results were not satisfactory the tissue was not sent to Germany.

Usually twice per year bottles with removed tissue were put into metal containers and delivered to Germany through the Latvian customs, where the tissue was examined once more as to quality compliance with the generally accepted international standards and the value of compensation was calculated for each parcel of tissue.

A share of 50% of the calculated compensation was intended for different medicals, bio-implants, surgical materials etc. of the Ministry of Welfare which were delivered to different medical centers and hospitals in Latvia, as well as medical equipment for the work of the Center such as, cutting blade, computer-aided tomography, etc.

The other share of 50% of the total compensation was intended for employees, who were engaged in tissue removal, payable for the work performed. This share of compensation was calculated by the Head of Thanatological Department jointly with other personnel of the Center. Payment for additional services was separately envisaged in the claim report, for serology, histology, drawing up a donor's protocol, etc. This amount was not included in the calculated compensation and was paid by the Head of Thanatological Department to the personnel rendering the particular additional services.

All the amounts specified above were transferred from the Company to the private bank account of Head of Thanatological Department.

## II. Legal regulation in Latvia in respect to tissue removal in the period of 1994 – 2003

On 15 December 1992 the Supreme Council of the Republic of Latvia adopted a law “On the Protection of the Deceased’ Body and the Use of Tissues and Organs in Medicine”<sup>6</sup> (hereinafter referred to as – the Law), which is aimed at the protection of the deceased’ body against degrading and illegal acts. The law defines the procedure making it possible to use tissues and organs of the alive or the deceased for the scientific research and training purposes, for transplantation, for producing the healthcare products and for biological prostheses. The Law was amended in 1995 and 2001.

The Law stipulates priority rights of a person to its own body: “*Each capable person shall have the right to prohibit or permit to use his/ her body after death stating the same in documents*” (Section 2). Until 2002, execution of prohibition or permission should be registered as an entry in passport; thereafter in the Residents’ Register. Section 4 of the Law stipulates the Rights of Next of Kin: “*Body, tissue and organs of the deceased may not be used against his/her will expressed within a period of his/ her life; in cases where it has not been expressed it is possible to utilize body, tissue and organs of the deceased unless anyone of children, parents, brothers, sisters or a spouse (hereinafter referred to as – next of kin) object thereto*”.

The Law regulates removal of tissue and organs for transplantation during the post-mortem and Forensic Medical Examination (Section 9 and 11) as follows: “*Within a period of the post-mortem and forensic medical examination it is possible to take samples of tissue and organs for diagnostic examination in the laboratory conditions without adhering to the will of the deceased and the next of kin. It is possible to take organs, samples of organs and tissue for scientific research and training, if the decease, while alive, has given permission thereto, if the deceased’s next of kin have given written consent, if the deceased’s will is not known, as well as if the will of the deceased is not known and he/ she has no the next of kin. ... It is possible to remove the deceased’s tissue and organs for transplantation in case of a donor’s death, if the deceased when alive has not prohibited taking tissue and organs from his body and unless the next of kin have not prohibited to do so.*”

Law regulate emphasizes the role of the state and declares: “*Protection of the deceased’s body and the use of tissue and organs in medicine shall be state function implemented by the Ministry of Welfare. Without permission by the Ministry of Welfare, any institution or organization is prohibited to be engaged in the post-mortem examination of the deceased at the anatomy studio, in the removal of tissue and organs of the alive or the deceased and in further disposal*” (Section 17).

The Law explicitly prohibits commercial transaction (Section 18): “*Removal of tissue and organs either from persons alive or from the deceased’s body and their use shall serve the purpose of development in medicine and is of non-profit nature. Removal of tissue and organs from persons alive or the deceased’s body takes place adhering strictly to the consent or disagreement and it shall be prohibited to select, send and use these tissue and organs as a commercial transaction.*”

The Law gives priority to the rules of international law (Section 22): “*If any international or inter-governmental treaty, as well as conventions, to which the Republic of*

*Latvia is a member-state, envisage other regulations than this law the rules of the international law shall apply.”*

According to Latvian Criminal Law<sup>7</sup> there are the following criminal offences and sanctions foreseen:

Unlawful Removal of Tissue and Organs from a Human Being (Section 139):

*“For a person who commits as a medical practitioner unlawful removal of tissue or organs from a living or dead human being in order to utilise such for medical purposes, the applicable sentence is deprivation of liberty for a term not exceeding five years, with or without deprivation of the right to engage in the practice of medical treatment for a period not exceeding five years.*

Desecration of Graves and Corpses (Section 228):

(1) *For a person who commits desecration of graves, funerary urns or interred or uninterred corpses, the applicable sentence is deprivation of liberty for a term not exceeding six years or a fine not exceeding one hundred times the minimum monthly wage.*

(2) *For a person who commits such acts repeatedly or in a group of persons acting pursuant to prior agreement, the applicable sentence is deprivation of liberty for a term not exceeding eight years, or by a fine not exceeding one hundred and fifty times the minimum monthly wage.*

### **III. Verdict by the Security Police on initiating criminal procedures on November 30, 2005**

The findings of the Security Police, by which the charges of unlawful removal of tissue in this case were dropped, are summarized as follows:

1. The legal basis for donor’s organs removal could either be “expressed consent” or “presumed consent”. The law “On Protection of the Deceased’ Body and the Use of Tissue and Organs in Medicine” contains disputable rules, which cause difficulties in the interpretation of the legal basis. Section 2 of the Law lays down that “each capable person is entitled to prohibit or permit, executing the same in documents, to utilize his/ her body after death”, wherefrom it is possible to conclude that Latvian legislation applies to the “expressed consent”-rule, as it stipulates that a person would state his/her “permission” or “prohibition” in documents. However, the wording “must not be removed against the will (..) expressed within a period of his/ her life; in the cases, when it has not been expressed it is possible to dispose of the deceased’s tissue and organs, if any next of kin does not object thereto”, should be interpreted – “is prohibited, if there exists the prohibition” or “is permitted, if any permission has been received from the deceased or the next of kin”. Consequently, it is possible to remove any person’s tissue, where it has not been prohibited and not only in the event, where it has been permitted.

2. Personnel of the Center - the Head of the Center, as well as the Head of Thanatological Department, at the same time personnel of the Ministry of Welfare - considered that the “assumed consent” - rule was operating in Latvia – “where it is not prohibited, there it is permitted”. Section 19 of the Criminal procedure law<sup>8</sup> regulates one of the key principles of criminal procedure, in particular, the presumption of innocence – “any reasonable doubts in the guilt, which is impossible to avert should be evaluated in favor of the person, who enjoys the right of defense”. In this case under the reasonable doubt there should be understood not duly specified rules of the law “On Protection of the Deceased’ Body and the Use of Tissue and Organs in Medicine”, which has not clearly defined how exactly the experts should act in order to establish the deceased’s will relating to tissue removal after his death, the law does not impose liability to inform directly next of kin of the deceased.
3. On June 30, 2004, the law<sup>9</sup> above was amended once more. Section 11 was set forth in the following wording – “it is possible to remove the deceased’s tissue (..) for transplantation in case of a donor’s death, if there is no information of the Residents’ Register regarding prohibition to utilize the deceased’s tissue after death (..)”. It is obvious from this rule that the “presumed consent”- rule is operating in Latvia legal system<sup>10</sup>. The Professor of the Chair of criminal law of the faculty of law at the University of Latvia was questioned as a specialist and expressed the opinion that the “issue regarding the right of relatives to dispose of the deceased’s body in the civil law theory is the most discussed and resolved different. (..) In my opinion, the presumed permission is strictly fixed in the current wording of the law, in particular, if within a period of any person’s life such actions of disposal of own’s body have not been prohibited, then he/ she has permitted to do so.”

In view of the foregoing it is possible to conclude that Sections 2, 3, 4 and 11 of the rules of law “On Protection of the Deceased’ Body and the Use of Tissues and Organs in Medicine” have not been infringed.

4. It appears from the evidence that the German Company calculated the value for tissue on how much time and work was required for removing each particular type of tissue. One share of the total amount calculated was envisaged in the form of different types of healthcare products for Latvian medical centers, as well as in the form of the finished bio-implants or transplants in return. The other share was intended for the personnel directly or indirectly involved in the tissue removal. They received money for their work.
5. In order to clarify, whether in this case the rules of Section 18 of the law “On Protection of the Deceased’ Body and the Use of Tissue and Organs in Medicine” were infringed, in that payment for tissue removal qualifies as a commercial deal and whether this payment can be deemed profit yielding; a specialist of the draft Commercial Law was invited and explained that the “Commercial Law”<sup>11</sup>, wherein the lawmaker explains the concept of commercial activities came into effect on January 1, 2002. The concept of a ‘commercial transaction’ differs prior to and after the law took effect”. Commercial activities have been described as follows in the Commercial Law: “Commercial activities are open economic activities, which are performed by merchants in their name for the purposes of gaining a profit.

Commercial activities represent one of the forms of business activities. Economic activities are any systematic, independent activities for remuneration”. Furthermore: “A merchant is a natural person (individual merchant) or a commercial company (partnership and capital company) registered with the Commercial Register”. In this sense the State Forensic Examination Center shall not be deemed a merchant but a state budget agency, which carries out economic activities, and must not carry out commercial activities.

6. Prior to the Commercial Law entering into force, the concept of commercial activities has not been specially stipulated by any legislation. However on a legal basis the commercial activities were divided into business activities and economic activities, as defined already herein above. The business activities are defined by the law “On Entrepreneurship”<sup>12</sup>. Business activities are also defined in the law “On the Value Added Tax”<sup>13</sup>, wherein Section 1 has the following wording: “(..) economic activities – any systematic activities for remuneration, which is not payment for employment by an employer, or other remuneration to an employee, whereon mandatory State social security payments and personal income tax is calculated (..)”. In this case payment for the work is neither the source of income nor profit. It would have been the source of income only if experts had sold tissues for the Center, but in this case the tissue removal served for the development of medicine and the experts were paid only for the work performed.
7. The “source of income” in interpretation of the law “On the Value Added Tax” itself does not include working relations. The German Company has not concluded employment agreements separately with each expert, as the agreement on research and practical cooperation between the Center and the Company had been concluded already. In this case separate employment agreements were not necessary, as de facto the experts were directly employed by the Center and as the latter entered into the cooperation agreement with permission of the Health Department of the Ministry of Welfare – one legal person with another legal person. The fact that the Latvian part received remuneration in medical products and in finished bio-implants may not be interpreted as commercial activities, as this return did not come directly to the Center, but served the general development of Latvian medicine, since in those times the situation in medical centers was catastrophic in terms of lack of different healthcare products (for example, surgical material, alloplast, etc.). Therefore, the aim of the law “On Protection of the Deceased’ Body and the Use of Tissues and Organs in Medicine” has not been infringed, as tissue removal served directly the medical development and not personal profit..

In view of the foregoing it is possible to conclude that the experts receiving payment for the work have not infringed the rules of Section 18 of the law “On Protection of the Deceased’ Body and the Use of Tissue and Organs in Medicine”.

8. In the course of pretrial investigation it was clarified that within the limits of cooperation from January 1994 till March 2003 taxes had not been paid from payments for the work of experts in tissue removal. By Section 218, part 2 of the Criminal Law these actions are qualified as evasion of paying taxes. Since this caused enormous losses to the state, it is necessary to separate criminal proceedings from the proceedings concerning Section 139 of the Criminal Law.

#### IV. Conclusions to be drawn

The case is giving an overview on the poor situation in Latvia in respect to organ donation and tissue removal. Latvia is one of the Eastern European countries which became an independent democratic state only in 1990. Such important values like human dignity, autonomy, and integrity were not respected and protected under the soviet regime. Because of international legal obligations, Latvia has ratified the main part of international conventions, in respect to human rights, and adopted national legislation in different areas of medical law. The most difficult area in Latvia, in respect to human rights protection, is interpretation and application of the laws. The tissue case is showing several difficulties in respect to implementation of the laws. The main questions in respect to this case are still open. 1. Was the removal of tissues lawful? 2. Was it a commercial deal with tissues? 3. Was/is the removal a criminal offence? 4. How should such case to be judged according to international regulations?

My conclusions are:

- The interpretation of the Law of the period 1994 to 2003 by the Security Police disregards the overriding constitutional principle of human dignity as enshrined in Section 95 of the Latvian constitution<sup>14</sup>: "The State shall protect human honour and dignity. ..."
- For the same reasons the wording of the 2004 amendment of the Law is unconstitutional.
- The Police Security findings concerning "commercial transactions" and evasion of taxes are contradictory.
- The current Latvian legislation on tissue removal as well as its application and enforcement in the past does not meet international standards.

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<sup>1</sup> In daily newspapers: „Diena”, articles at 21.03.03., 22.03.03., 25.03.03., 27.03.03., 28.03.03., 29.03.03., 02.04.03., 28.11.03., „Neatkarīga Rita Avīze” articles at 24.03.03., 26.03.03., 28.03.03., „Vakara Zinas” article at 24.03.03., „Rīgas Balss” article at 26.03.03.

<sup>2</sup> Latvian Television, news program „Panorama” in December 2005.

<sup>3</sup> Families of donors received letter from Security police and copy of the Verdict of Security Police from 30 November 2005 in the end of December 2005.

<sup>4</sup> In daily newspapers „Diena” 10.02.06, „Neatkarīga rita avīze” at 31.01.06., 01.02.06., 03.02.06., 10.02.06.

<sup>5</sup> All facts are taken from the Verdict of Security Police from 30 November 2005.

<sup>6</sup> Law “On Protection of the Deceased’ Body and the Use of Tissues and Organs in Medicine” adopted by the Supreme Council of the Republic of Latvia, 1992, with amendments in 1995 and 2001.

<sup>7</sup> Criminal Law of Latvia, adopted by the Saeima (the Parliament of Latvia) in 1998, with amendments until 2006.

<sup>8</sup> Criminal Procedure Law of Latvia, adopted by the Saeima in 2005.

<sup>9</sup> Law “On Protection of the Deceased’ Body and the Use of Tissues and Organs in Medicine” adopted by the Supreme Council of the Republic of Latvia, 1992, with amendments in 1995, 2001 and 2004.

<sup>10</sup> The same opinion about legal situation in Latvia in respect to tissue removal is expressed at quarterly report (2004) of the Latvian National Human Rights Office.

<sup>11</sup> The Commercial Law, adopted by the Saeima in 2000.

<sup>12</sup> Law “On Entrepreneurship”, adopted by the Supreme Council of the Republic of Latvia, 1990, in force until 01.09.2005.

<sup>13</sup> The law “On the Value Added Tax”, adopted by the Saeima 1995.

<sup>14</sup> Satversme, the Constitution of the Republic of Latvia, adopted by the Constitutional Assembly of Latvia on 1922, with amendments until 2006.