



BOOK REVIEW

Heather Conway, *The Law and the Dead*, Routledge, 2016, Hardback, 298 pp., £90, ISBN 9780415706940.

In *The Law and the Dead*, Heather Conway provides an in-depth exploration of crucial laws relating to the dead. As one of the UK's leading authorities in this area, Conway's monograph makes a significant contribution to scholarship in the sphere of death by providing the first book-length treatment of the fate of the recently dead in a way that integrates analysis of the law with broader contextual analysis of the fate of the dead in the UK. Her focus is 'solely on the fate of the recently dead – looking primarily at disposal, but also the related areas of exhumation and commemoration, as well as the posthumous use of donated bodily material' (p 6). Conway walks a line between legal and sociological study, with the weight coming down most heavily on the legalistic side. This is to be expected, given that she is a legal scholar who has already made notable contributions to the field, particularly in 'Burial Instructions and the Governance of Death' where she highlighted certain latent legal problems underlying aspects of UK law's approach to the process of burial.¹ In this monograph, Conway's jurisdictional focus rests on the UK, predominantly England and Wales, but a comparative dimension is also employed to good effect. Allusion is frequently drawn to other common law jurisdictions in order to see what can be learned from their similar yet (sometimes) divergent legal heritage. These jurisdictions include Australia, the USA, Canada, and New Zealand.

The book is clearly arranged across nine chapters, preceded by an Introduction, and Conway begins by examining the legal regime that applies in the immediate wake of one's death, the form that the disposal of the body might take in the context of the UK's postmortem legal framework, and significant regulatory aspects of that framework.² She then addresses rights relating to the possession of a corpse and the associated duty to bury it, and considers the sorts of problems that can arise in relation to

1 H Conway, 'Burial Instructions and the Governance of Death' (2012) 12 Oxford University Commonwealth Law Journal 60. Developing H Conway, 'Dead, but not Buried: Bodies, Burial and Family Conflicts' (2003) 23 Legal Studies 423.

2 'Death and Its Immediate Aftermath', ch 1; 'Bodily Disposal Laws', ch 2.

the form and nature of burials, including disputes that may arise between bereaved family members and others.³ Matters are then carried forward into consideration of the law's relationship to posthumous organ transplantation and reproduction.⁴ In the final chapters, disinterment of the dead is addressed, and some considerations are also given to memorials.⁵

Viewed in a general sense, *The Law and the Dead* is largely rich and illuminating throughout. Taking aspects of its subject dimensions more narrowly, it is also notable that within the broader field of the work's overall concerns (as summarised above), there are certain discrete moments of particular interest. Chapter 1 includes a notable section entitled "Mistreatment" of the dead: Criminal offences pending bodily disposal' (pp 22–25). Mistreatment of the pre-buried corpse is neither a simplistic nor commonly considered legal area, in spite of the fact that bodily disposal itself is something that by its very nature has some degree of pertinence for all human beings.⁶ As such, this section raises some interesting points. It highlights that common law offences pertaining to the mistreatment of the corpse have developed 'on a seemingly *ad hoc* basis over the centuries' and have been to a significant extent 'sustained by antiquated case law', which has led to what Conway characterises as 'all sorts of interpretive problems' (p 23). Issues raised in this chapter usefully connect with other parts of the book, such as the section in Chapter 2 entitled 'Specific body disposal offences', where Conway discusses issues including the concealment of the dead body in a way that prevents burial (pp 56–57).

Chapter 2 itself is also notable for the manner in which it focuses not merely on laws pertaining to the two most common forms of disposal (burial and cremation), but for the manner in which Conway endeavours to think beyond this. Thus, interesting reflection is incorporated on what are described as 'new and emerging methods' of disposal—resomation and promession (pp 47–50). The meaning and nature of these new and emerging methods are outlined. Resomation involves liquefaction of the corpse and crushing of remaining skeletal materials, whereas promession employs freezing, super-cooling, and ultrasonic vibration techniques to reduce human remains to organic residue, and ultimately to a dry powder. Conway writes of resomation in the UK that 'the process is being driven by Glasgow-based company Resomation Ltd, with plans to make the technology widely available over the next few years' (p 49). She suggests that the methods are probably not illegal (p 50), and so, in theory, a roll-out of these forms of disposal should not face significant legal hurdles, although regulatory frameworks and safeguards would likely require development if the methods were to become mainstream. Unlike resomation, promession is in an earlier developmental stage and is not publicly available. Conway also discusses exposure and natural

3 'Disposal of the Dead: Legal Rights and Responsibilities', ch 3; 'Resolving Funeral Disputes', ch 4; 'Funeral Instructions: The Case for Ante-Mortem Planning', ch 5.

4 'Utilising Parts of the Dead: Organ Donation and Posthumous Reproduction', ch 6.

5 'Exhuming the Dead', ch 7; 'Memorialising the Dead', ch 8.

6 The limited scholarship in this area includes J Herring, 'Crimes against the Dead' in B Brooks-Gordon and others (eds), *Death Rites and Rights* (Hart 2007); S White, 'The Law Relating to Dead Bodies' (2000) 4 *Medical Law International* 145.

decomposition as a way of dispatching the dead (pp 50–51), and reflects on means of ‘preservation’, including plastination and cryonics⁷ (pp 51–55).

Chapter 3, which largely sets out legal rights and responsibilities relating to the disposal of the dead, helps to set the scene for Chapters 4 and 5, which are the richest chapters in the book. In these chapters, the text moves most effectively beyond a description of law and legal procedure, and leans into the subject of the book most critically. Here, Conway explores the subject matter in a more actively critical way, and develops and crystallises her thesis that the deceased’s burial instructions should be accorded more significant legal force than the law presently provides, where those wishes are reliably known (discussed particularly in Chapter 5). Burial instruction has never been legally binding in the UK, even where the instructions are included in a valid will, and so, at present, this aspect of the fate of the dead chiefly relies on the idea that the living will respect the wishes of the dead and endeavour to carry their wishes out. Thus, a ‘specific form of burial may be requested . . . but the force of such a request is moral and not legal’.⁸ Conway convincingly argues that the case should be otherwise, highlighting that change in this area would not only improve the process of ante-mortem planning, but would also benefit the courts insofar as judges could more easily look onto the wishes of the deceased as the crucial reference point in instances where conflicting claims to the burial of the dead were being made by the living.

Some parts of Chapters 4 and 5 reiterate elements of Conway’s previously published work⁹; however, it is notable that they also display some movement in her own thinking. For example, in taking the view that the deceased’s burial wishes should be accorded greater legal weight, Conway had previously concluded that the deceased’s appropriate *written* directions should be taken into account, but that ‘oral statements . . . [f]or the most part . . . should not be taken into account’.¹⁰ This prohibition on oral recognition, she suggested, ‘should be subject to one exception – namely, where the deceased’s oral statements contradict a previous written directive about burial.’¹¹ Convinced by the positive case she made for lending greater weight to the deceased’s burial instructions, I examined this issue, and associated matters in ‘The Law of the Dead’, and concluded that ‘[a]ppropriately witnessed oral direction should also be admitted’ as a source of burial stipulation,¹² positing a structured field of ‘Valid Oral Directions’ in addition to a field of ‘Valid Written Directions’ posited elsewhere in

7 A case concerning cryonics has recently been heard in the Family Division of the High Court. A 14-year-old girl with terminal cancer wanted her body to be cryonically preserved after her death. The court made an order permitting the girl’s mother, who was sympathetic to her wishes, to make arrangements for preservation of her body. Her father, who was less inclined towards his daughter’s wishes, was issued with an injunction to prevent him from interfering with disposal of her remains: *Re JS (Disposal of Body)* [2016] EWHC 2859 (Fam).

8 L Doyal and T Muinzer, ‘Should the Skeleton of “the Irish Giant” Be Buried at Sea?’ (2011) 343 *British Medical Journal* 1290, 1291.

9 Parts of ch 4 draw on H Conway and J Stannard, ‘The Honours of Hades: Death, Emotion and the Law of Burial Disputes’ (2011) 34 *University of New South Wales Law Journal* 860, and ch 5 also reiterates much of Conway, ‘Burial Instructions’ (n 1).

10 Conway, ‘Burial Instructions’, *ibid* 89.

11 *ibid*.

12 T Muinzer, ‘The Law of the Dead: A Critical Review of Burial Law, With a View to its Development’ (2014) 34 *Oxford Journal of Legal Studies* 791, 816.

that paper.¹³ In *The Law and the Dead*, Conway now takes a broader, roughly equivalent view (p 152), but does not elucidate her change of mind.

Chapter 6 is a particularly noteworthy chapter as here Conway engages with organ and tissue donation, and posthumous reproduction. The chapter serves to make a significant contribution to the overall work by broadening the treatment of the dead beyond issues attaching to the immediate disposal of the remains. As such, it provides insight into the legal status of the deceased's wishes and controlling interests of other pertinent parties in the area of organ and tissue donation, and posthumous reproduction, and it elucidates the broader rights and interests extending to the excised human material at issue. However, in taking on such large issues in a relatively short space (organ donation in its own right is a substantial, complex matter), this chapter tends to feel a little rushed. Conway then, in Chapter 7, considers postburial disinterment and in the penultimate chapter she moves away from the central object of the book (the dead body) somewhat, by presenting a novel and insightful discussion of memorials to the deceased. This chapter includes a brief but thought provoking description of 'Virtual memorials', which Conway characterises as the practice of 'commemorating the dead "online"' (p 222).

The final chapter, Chapter 9, is comprised of four pages of reflection, where Conway points out that the area of law extending to how we deal with the dead body is somewhat overcomplicated and tends to be scattered inconveniently across a range of disparate legal sources.¹⁴ She also highlights that this is an area of law that can struggle to accommodate shifting sociocultural norms, as where a sense of family, religious values, environmental debates around bodily disposal, and rights-based approaches to the dead can be seen to alter over time. Furthermore, she re-emphasises her convincing argument that greater legal weight ought to be accorded to the burial wishes of the deceased, which would serve not only to more adequately respect the posthumous wishes of the dead, but would also provide a reference point that could be utilised by the courts in order to more easily determine disputes among the living over the fate of the deceased's remains.

Moving beyond this monograph's clearly valuable features, it is worth considering whether this substantial work in what is a relatively obscure legal area, serves to raise or engage with any additional or particularly important hard legal problems. In this respect, it is notable that Chapter 1 contains a subsection entitled 'The legal definition of death' (pp 9–11). How precisely one might most appropriately 'define' death in an exacting legal sense might constitute a current legal problem, insofar as there is no statutory or otherwise concise definition of death for lawyers to rely on.¹⁵ In this section of the book, Conway does not drill into the significance of this circumstance, dwelling, instead, on the way in which the courts look to the medical profession's criteria in order to gauge a sense of death (pp 10–11).

More importantly, in my opinion, aspects of Conway's monograph express an increasing and arguably problematic tendency to construe the human body, or parts

13 *ibid* 811–17.

14 'The Law and the Dead: Time for a Re-Evaluation?'

15 See, further, the discussion of death in *Re A (A Child)* [2015] EWHC 443 (Fam). The leading cases on death are *Re A* [1992] 3 Medical Law Review 303; *Airedale NHS Trust v Bland* [1993] AC 789.

of it, as property. This is most explicit where she asserts that a ‘possessory entitlement [to a corpse for the purposes of burial] is an exception to the general rule that there is no property in a corpse’ (p 60). In UK law, the human body has conventionally been placed outside of the realm of property. It is something other than property and is subject to what is often generalised as a ‘no property in the body’ rule.¹⁶ As such, and to employ an appropriate metaphor, the law has drawn a no property shroud over the dead body: ‘[o]ur law recognises no property in a corpse’ (Erle J in *R v Sharpe* (1857)¹⁷); ‘[a] dead body by law belongs to no one’ (Byles J in *Foster v Dodd* (1867)¹⁸); ‘a dead body is not the subject of property’ (Stephen J in *R v Price* (1884)¹⁹).

However, from the position that human beings are not property and are, therefore, not capable of being owned legally by other people, the shroud of no property drawn over the dead has been qualified by certain exceptions. The most significant instance of this shroud being cast aside is the courts’ determination that where a person has applied particular ‘work or skill’ to a dead body or its parts, such that it has ‘acquired some attributes differentiating it from a mere corpse’,²⁰ then that dead body and/or its parts may achieve a proprietary status that can permit proprietary ownership interests to crystallise.²¹ In other cases, some of which have concerned living rather than dead bodies, the no property shroud has been merely eroded or worn through slightly in places, as, for example, where larceny has been construed regarding hair,²² theft for blood²³ and urine,²⁴ and bailment for semen.²⁵

Conway contributes to the further erosion of the no property shroud by, as noted above, asserting that the possessory entitlement to a corpse for the purposes of burial is ‘one of two exceptions to the “no property” rule’ (p 60). As to the ‘work or skill’ exception set out above, she notes that ‘[this] originated in Griffith CJ’s judgment in the Australian case of *Doodeward v Spence* (1908)’ (p 60).²⁶ I suggest that it is highly unlikely that the possessory right to the corpse for the purposes of burial can be said to amount to a second exception in the law of England and Wales to the no property rule. At the least, Conway would need to point to convincing authority for this

16 On the dead body, see *Haynes’ Case* (1614) 12 Co Rep 113, 77 ER 1389; *Dr Handyside’s case* (1749) 2 East PC 652; *R v Lynn* (1788) 2 TR 733, 100 ER 1389; *R v Sharpe* (1857) Dears and Bell 160; *Williams v Williams* (1882) 20 Ch D 659; *R v Price* (1884) 12 QBD 247. While the rule is now well-embedded in contemporary law, Matthews has highlighted certain problematic features underlying the rule’s origins: see P Matthews, ‘Whose Body? People as Property’ (1983) 36 Current Legal Problems 193. See also R Hardcastle, *Law and the Human Body* (Hart 2007) 25–28.

17 *R v Sharpe*, *ibid* 160, 163.

18 *Foster v Dodd* (1867–68) LR 3 QB 67, 77.

19 *R v Price* (n 16) 247, 252. See further the discussion of the dead body in Matthews (n 16).

20 *Doodeward v Spence* (1908) 6 CLR 406, para 414 (Griffith CJ).

21 *ibid*. See also *Dobson v North Tyneside Health Authority* [1997] WLR 596; *R v Kelly and Lindsay* [1998] 2 All EER 741.

22 See *R v Herbert*, *The Times* (December 22, 1960).

23 *R v Rothery* [1976] RTR 550.

24 *R v Welsh* [1974] RTR 478.

25 *Jonathan Yearworth and others v North Bristol NHS Trust (Yearworth)* [2009] EWCA 37. Similar issues involving sperm have recently been addressed in Scotland: *Holdich v Lothian Health Board* [2013] CSOH 197.

26 See n 21.

proposition. Given her comparative perspective and although this is not explicitly stated, this analysis may have been influenced by *Adams on Criminal Law*,²⁷ or some equivalent text. However, this is not clear as Conway does not support her contention, but merely states that the possessory proprietary exception exists. Nevertheless, outlining the law of New Zealand, Robertson states that ‘the exceptions based in common law . . . are limited to (i) rights of the personal representatives of the deceased to the custody of the body for burial; (ii) regenerative tissue exceptions where property vests in hair, urine and blood; and (iii) the *Doodeward* work and skill exception’.²⁸ However, it is not clear how proposition (i), if it is interpreted in some fulsome proprietary sense, can legitimately be extrapolated onto the law of England and Wales, given that the UK applies a no property rule to corpses. It would take more than some New Zealand references (found by me) to override this ‘no property’ rule to corpses in England and Wales, and Conway herself needs to ground her position in law, if she seeks to carry it. To my knowledge, there is no satisfactory authority in the law of England and Wales permitting her to do so. At any rate, a disjunction seems to arise in relation to the New Zealand position as stated here, which posits three no property exceptions, and Conway’s proposal of two categories in the context of her discussion of England and Wales.

As I have argued elsewhere, ‘it is established that . . . personal representatives have a right to guardianship or possession over the [dead] body as a necessary and logical element of the carrying out of their duty to bury’.²⁹ The possessor’s entitlement to the corpse is an entirely necessary and logical practice given the nature and requirements of societal burial needs. It would be illogical to assert that a person accorded the responsibility of burial under law should not take possession of the deceased in the interest of discharging that obligation. But that necessary and logical obligation alone *cannot* amount to something that expressly converts a corpse to property. Thus, for instance, in *Williams v Williams* (1882) the court affirmed both that there is no property in the dead human body and that the executors involved in the case were ‘entitled to the possession and are responsible for the burial of a dead body’.³⁰ The reason that there is no contradiction here between the no property rule and the possession framing of the situation, is that the court understood that the possessory right for the purposes of burial does not cause the no property rule to be swept aside. For recent significant jurisprudence engaging body–property tensions in the UK, one may look to the Scottish case of *Holdich v Lothian Health Board* [2013], where Lord Stewart commented that ‘[p]ossessory remedies . . . are available for corpses . . . but that fact of itself does not make the objects of the remedies property’.³¹ At any rate, by maintaining a body–property division in relatively sharp terms in relation to the corpse, unnecessary legal complexity can be avoided. The distinction appears to make the correct legal position clear to the lawyer, namely that conventional proprietary phenomena such as criminal damage or theft offences, or a facility to sell a corpse in

27 B Robertson (ed), *Adams on Criminal Law* (loose-leaf edn, Brookers).

28 *ibid*, para 218.03.

29 T Muinzer, ‘A Grave Situation: An Examination of the Legal Issues Raised by the Life and Death of Charles Byrne, the “Irish Giant”’ (2013) 20 *International Journal of Cultural Property* 23, 29.

30 20 Ch D 659, 664.

31 (n 25) [49].

the manner that one might sell other conventional property that one owns, are not applicable in the burial setting.

There is no question that Conway's monograph will be of interest and value to medical lawyers and others whose work engages with the relationship between law and the fate of the dead. It makes a valuable contribution to the field by providing the first book-length treatment of the fate of the recently dead from a detailed legal perspective. It is hoped that Conway, and others, will continue to write on this frequently neglected topic, in particular given some of the issues raised in this review.

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