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Note from Hank Greely – this was originally made as a comment to the first post on this topic, “When Is Bone Marrow Not an Organ Under the National Organ Transplant Act.” The comment was substantive, useful, and long. It prompted me to write a response and to seek, and obtain, Professor Capron’s permission to move his comment to a full-blown post.

This, as one expects from you Hank, a clear description and analysis of the case. But I was puzzled by your approval for the decision. The focus of NOTA was not only the form that an organ takes or the manner in which it is obtained for transplantation. Rather, NOTA was written to prevent the development of a market in organs for transplantation based on three propositions: that having a market will not increase and in fact may decrease the availability of organs for transplantation, that paying people to part with their organs for money (or other “valuable consideration”) will result in the poorest and most vulnerable people becoming the organ bank for those who can afford transplants, and that payments for body parts amounts to turning human beings into market commodities. The manner in which an organ exists in the body (whether all in one place or distributed) and the manner in which it is removed from the body were certainly not central to NOTA’s rationale or objectives.
Therefore, the development of apheresis as a means of harvesting peripheral blood stem cells as an alternative to aspiration is simply another means of obtaining a portion of the bone marrow which is a change no more relevant than the many other developments in organ transplantation in the past 27 years.

What is relevant is that bone marrow transplantation is a form of treatment where the risks of financially motivated “vendors” are actually greater than with other organs because the preparation of the recipient (through irradiation of the bone marrow) occurs much longer before the harvesting and transplantation of the bone marrow than is true with transplants of solid organs. The risk of a “hold up”–which always exists but is certainly much greater with a donor who motivation is money rather than concern about the life and well-being of the recipient–ought to give anyone pause.

At several points in your commentary you make reference to what might have led Congress “to criminalize bone marrow donation by aspiration.” The plaintiffs would like to create the sense that NOTA has to be struck down (at least–or for the moment–as to PBSC aspiration) in order for live-saving transplants to go forward. But that’s not the case, because Congress never did any such thing as to any transplant procedure. What it did was to criminalize payment for the organ, for the reasons I have already mentioned, and thousands of transplants occur every year despite NOTA. We certainly need more efforts to increase donation of all organs (especially from deceased donors, as to heart, liver and even kidney, but also from living donors, especially as to bone marrow). The HHS “Collaborative” produced a large up-tick in the rate of donation beginning a decade ago, and it needs to be reinvigorated, with new “best practices.” But all the existing arguments against developing a market in organs continue to exist and apply to bone marrow as much as any other organ for transplants. Some supporters of the plaintiffs in Flynn v. Holder are rejoicing precisely because they see it as the death knell for the NOTA payment-prohibition, which they will achieve by turning their present arguments on their head: if we can pay for something as innocuous as donating bone marrow through apheresis, then how can we leave donors of kidneys and liver lobes, who bear a much greater burden, with no compensation? And if the payment system does not have the effect of reducing the supply of bone marrow (or only has the effect of greatly increasing the cost of bone marrow for transplants while somewhat increasing the available supply), they will argue that NOTA is without a policy rationale–though the harm to the supply was only one, and probably the least important, of the rationales for the statute.

The 9th Circuit panel arrived at an unwise decision based on its fascination with a change in technology. I’m sorry to see you agree with the judges.

Alex
2 Responses to “Bone Marrow and Organ Donation – a Comment from Professor Alex Capron”

1. Iain Mars says:
January 7, 2012 at 2:01 pm
I registered for the British Bone Marrow Register about 10 years ago. I never heard anything from them until a few months ago when I received a letter telling me I was a potential match for someone. I have no idea about who this person is or why they need my bone marrow but I decided to go ahead with the tests and hopefully I will be able to make a difference to this persons life.

Reply

2. Greg Traver says:
January 11, 2012 at 7:43 pm
It is a very sad testament to our society when the technology exists to save lives (and money) and it is stymied by a legal and bureaucratic system that claims that it is doing everything possible to advance healthcare. The old axiom, “follow the money trail” certainly is in effect in this case. There is simply too much money to be made from pharmaceuticals and that money lobbies very hard to bury an other legitimate procedures via the legal system. The only hope that we have to ever effect change is to keep beating the drum to raise public awareness.

Reply

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