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Delay in Delivery of Cadaver to Next of Kin

Lawrence S. Grean* and Paul Hesse**

MENTAL SUFFERING CASES are of great concern to today's practicing attorney. The reason, logically, is that many cases and situations arise in which mental suffering is a prominent factor, and therefore deserving of consideration. Whether or not recovery is granted for mental anguish depends upon questions of intent, negligence, and presence or absence of physical injuries.

The general rule is that mental suffering alone, caused by mere negligence, is non-compensable.¹ While a majority of courts seem to hold that damages may be awarded when physical injuries result from mental anguish, even though no "impact" (contact) is involved, in most states the requirement of physical injury appears steadfast.² One notable exception to this rule, however, can sometimes be found in the law relating to cadavers. Briefly stated, it holds that mental anguish suffered by the next of kin, resulting from interference with the body of the deceased, is sufficient basis for compensation, irrespective of contemporaneous physical injury.

Our purpose then is to discuss interference with possession of a cadaver, delay in delivery, and the accompanying mental distress of the next of kin.

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¹ *Kimberly v. Howland*, 143 N. C. 398, 55 S. E. 778 (1906); *Green v. T. A. Shoemaker & Co.*, 111 Md. 69, 73 A. 688 (1909); *Mahnke v. Moore*, 197 Md. 61, 77 A. 2d 923 (1951); *Alabama Fuel & Iron Co. v. Baladoni*, 15 Ala. App. 316, 73 S. 205 (1916); *O'Meara v. Russel*, 90 Wash. 557, 156 P. 550 (1916); *Penick v. Mirro*, 189 F. Supp. 947 (E. D. Va. 1960); *Robb v. Pennsylvania R.R. Co.*, 210 A. 2d 709 (Del. 1965); *Falzone v. Busch*, 45 N. J. 559, 214 A. 2d 12 (1965).

² *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134, 50 N. W. 1034 (1892); *Sloane v. Southern California Ry. Co.*, 111 Cal. 668, 44 P. 320 (1896); *Mack v. South Bound R. Co.*, 52 S. C. 323, 29 S. E. 905 (1898); *Kimberly v. Howland*, *supra* n. 1; *Green v. T. A. Shoemaker & Co.*, *supra* n. 1; *Alabama Fuel & Iron Co. v. Baladoni*, *supra* n. 1; *O'Meara v. Russell*, *supra* n. 1; *Laird v. Natchitoches Oil Mill, Inc.*, 10 La. App. 191, 120 S. 692 (1929); *Cashin v. Northern Pac. Ry. Co.*, 96 Mont. 92, 28 P. 2d 862 (1934); *Orlo v. Connecticut Co.*, 128 Conn. 231, 21 A. 2d 402 (1941); *Battalla v. State*, 10 N. Y. 2d 237, 219 N. Y. S. 2d 34, 176 N. E. 2d 729 (1961); *Kaufman v. Western Union Tel. Co.*, 224 F. 2d 723 (5th Cir. 1955), cert. den. 350 U. S. 947 (1956); *Colla v. Mandella*, 1 Wis. 2d 594, 85 N. W. 2d 345 (1957); *Penick v. Mirro*, *supra* n. 1; *Robb v. Pennsylvania R. Co.*, *supra* n. 1, *Falzone v. Busch*, *supra* n. 1.

Possession

The courts generally recognize that the next of kin have the right to possession of the deceased—sometimes referred to as a quasi-property right.³ The line of succession that this possessory right follows is to husband or wife, surviving children, followed by parents, brothers and sisters, and then distant relatives.⁴ However, in conjunction with this right there is a corresponding duty. This duty is to dispose of the body without undue delay.⁵

A dead body however is a tangible object, potentially dangerous, which must be disposed of. The party charged with its disposal has a duty to perform, and in the performance of that duty must be granted certain rights and privileges.⁶

Jackson suggests five elements of duty as to those responsible for the disposal of a cadaver.⁷

(1) The person who has possession of the body holds it in trust for those who are charged with the duty of burial or who are privileged to exercise the right to see to burial.

(2) The person charged with the duty of burial or the person who has the prior privilege thereof, is entitled to the possession of the body for the purpose of interment.

(3) Such person is entitled to possession in such manner as not to delay, impede, or prevent interment.

(4) Such person is likewise entitled to possession of the body in the same condition as it was in when death occurred.

³ *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238 (1891) (willful mutilation of corpse); *Wilson v. St. Louis & S. F. R. Co.*, 160 Mo. App. 649, 142 S. W. 775 (1912) (willful mishandling of corpse; cadaver involves a quasi-property right); *Nichols v. Central Vermont R. Co.*, 94 Vt. 14, 109 A. 905 (1919) (negligent damage to a cadaver); *Southern Life & Health Ins. Co. v. Morgan*, 21 Ala. App. 5, 105 So. 161 (1925) (intentional withholding of death certificate); *Aetna Life Insurance Co. v. Burton*, 104 Ind. App. 576, 12 N. E. 2d 360 (1938) (intentional unauthorized autopsy); *Dunahoo v. Bess*, 146 Fla. 182, 200 So. 541 (1941) (negligent embalming); *Sanford v. Ware*, 191 Va. 43, 60 S. E. 2d 10 (1950) (intentional misburial; cadaver involves a quasi-property right); *Lott v. State*, 32 Misc. 2d 296, 225 N. Y. S. 2d 434 (1962), (Jewish body to Catholic survivors and Catholic body to Jewish survivors); *Terril v. Harbin*, 376 S. W. 2d 945 (Tex. Civ. App. 1964) (unauthorized autopsy); *Parker v. Quinn-McGowan Co.*, 262 N. C. 560, 38 S. E. 2d 214 (1964) (quasi-property right); also see, *Stueve*, *Mortuary Law* 13 (3rd rev. ed. 1963).

⁴ Comment, *Property in Corpses*, 5 St. Louis U. L. J. 280, at 291 (1958).

⁵ See Comment, *The Law of Dead Bodies: Impeding Medical Progress*, 19 Ohio St. L. J. 455, at 458 (1958) "This is a right to receive possession of the body immediately and in the same condition it was in at the time of death." Also see, *Lott v. State*, *supra* n. 3, at 436. The court says: "The law is well settled that the surviving next of kin have a right to the immediate possession of a decedent's body for preservation and burial. . . ."

⁶ *Stueve*, *op. cit. supra* n. 3, at 11 and 12.

⁷ *Jackson*, *Law of Cadavers* 134, 135 (1937).

(5) After interment, next of kin are entitled to have the body remain undisturbed except for proper and authorized reason.

Although violations of this right of possession may occur in a variety of ways,⁸ the common denominator is that they all cause a delay in interment. This delay, in turn, causes grief and mental anguish to those charged with the duty of disposal.

Excessive grief may result because the next of kin are already grieved about the loss of the deceased. In other areas of law, damages for mental suffering ordinarily are not allowed because of the difficulty in determining the degree and genuineness of the distress. When dealing with the deceased's next of kin, however, honest mental suffering has been experienced in an undeniable majority of the cases, subject to only rare exceptions.

What all these cases appear to have in common is an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serve as a guarantee that the claim is not spurious.⁹

Remedies

As mentioned above, virtually all the courts agree that the next of kin have the right to possession of the body of the deceased.¹⁰ There is, however, much disagreement as to when a remedy will be granted for an interference with this right. The major points of disagreement revolve around the following concepts:

a. Negligence Not Requiring Physical Injury

When there is ordinary negligence that amounts to interference with possession of a cadaver, a few jurisdictions allow recovery for mental suffering alone.¹¹ The state of New York

⁸ *Supra* n. 3.

⁹ Prosser, Torts 349 (3rd ed. 1964).

¹⁰ *Op. cit. supra* n. 4.

¹¹ *Louisville & N. R.R. v. Hull*, 113 Ky. 561, 68 S. W. 433 (1902) (negligent delay in shipment of a corpse, from afternoon to the next morning); *Hale v. Bonner*, 82 Tex. 33, 17 S. W. 605 (1891) (negligent delay in shipment of body); *Parker v. Quinn-McGowan Co.*, *supra* n. 3 (the court stated that recovery could be had for intentional or negligent mutilation of corpse); note the line of New York cases that allow recovery in a variety of situations. *Lott v. State*, *supra* n. 3 (hospital negligently mixed up bodies); *Torres v. State*, 34 Misc. 2d 488, 228 N. Y. S. 2d 1005 (1962) (hospital was negligent in allowing unauthorized autopsy and unauthorized burial); *Gratton v. Baldwinville Academy & Central School*, 49 Misc. 2d 329, 267 N. Y. S. 2d 552 (1966) (defendant deprived plaintiff of the right to view deceased child when she arrived at the scene of death); *Schmidt v. Schmidt*, 49 Misc. 2d 498, 267 N. Y. S. 2d 645 (1966) (defendant wrongfully retained ashes of the deceased's wife).

has a line of recent decisions covering several types of interference where recovery has been granted.¹² In *Lott v. State*,¹³ and *Torres v. State*,¹⁴ state hospitals were negligent in handling of cadavers. In the *Torres* case, the negligence resulted in an unauthorized autopsy and unauthorized burial. The court said, "the state's endeavors herein were insufficient, inadequate, and ineffective,"¹⁵ referring to the hospital's attempt to locate the next of kin.

In the *Lott* case, the hospital was negligent in tagging two cadavers. The result of this mistake was the sending of a Jewish body to Catholic survivors and a Catholic body to Jewish survivors. The court made several points relating to interference.¹⁶

(1) The law is well settled that the surviving next of kin have a right to the immediate possession of a decedent's body for preservation and burial, and that damages will be awarded against any person who unlawfully interferes with that right or improperly deals with decedent's body.

(2) This rule of law has been applied to both physical mutilation of the bodies . . . as well as in cases where there was no physical injury to the body, but only unlawful interference with surviving kins' right to the body. . .

(3) In decisions affecting this type of action, the courts are not primarily concerned with the extent of the physical mishandling or injury to the body per se, but rather how such improper handling or injury affects feelings and emotions of the surviving kin.

b. Negligence Requiring Physical Injury

Some jurisdictions still require the presence of physical injuries, not only in ordinary negligence cases, but also in cases involving interference with cadavers.¹⁷ The philosophy in or-

¹² *Lott v. State*, *supra* n. 3; *Torres v. State*, *supra* n. 11; *Gratton v. Bald.*, *supra* n. 11; *Schmidt v. Schmidt*, *supra* n. 11.

¹³ *Supra* n. 3.

¹⁴ *Supra* n. 11.

¹⁵ *Id.* at 1008. See pp. 1006-1008 for the state's efforts to locate the relatives.

¹⁶ *Supra* n. 13 at 436.

¹⁷ *Nichols v. Central Vermont R. Co.*, *supra* n. 3 (negligent injury to body of a boy; the court held that no recovery should be allowed for mental suffering without resulting physical injury); *Kneass v. Cremation Society of Washington*, 103 Wash. 521, 175 P. 172 (1918) (cremation society negligently lost infant child's ashes; court denied recovery for mental anguish alone unless physical injury results to complainant); *Dunahoo v. Bess*, *supra* n. 3 (negligent embalming—no recovery for mental anguish not accompanied by physical injury); *Nail v. McCullough & Lee*, 88 Okla. 243, 212 P. 981 (1923) (negligence, causing an accident on the way to a burial, resulting in mutilation of the body; no recovery for mental pain and anguish).

dinary negligence cases, as noted earlier,¹⁸ of requiring contemporaneous physical injury, is carried over to the law of cadavers. It can only be concluded here, that even in the case of the deceased's next of kin, the courts believe that their claim of mental suffering can still be falsified. This reasoning, however, has been subjected to the criticism noted above.¹⁹

c. Intentional Interference, Physical Injury Not Required

In situations where there has been intentional, willful, wanton, or malicious interference with possession of a cadaver, the courts have allowed recovery more readily for mental suffering alone.²⁰

As shown before, New York allows recovery for any interference with possession of a cadaver, negligent or otherwise. In a 1966 decision, *Gratton v. The Baldwinsville Academy and Central School*,²¹ the plaintiff's daughter drowned in the swimming pool of the defendant school. The plaintiff was notified and came to the school, "and requested permission to see and take possession of her daughter's body."²² She was denied the right to view her child for only three or four minutes. The court stated the following:

Even assuming for purposes of this motion only that the plaintiff mother was deprived of the right to view her child for some three or four minutes, brief though the period of deprivation may have been, while the power to do so was in the hands of the school board authorities, in this Court's opinion, this still would be sufficient for a court to grant damages for such denial. The cause for emotional upsetness and disturbance certainly does exist in this state.²³

¹⁸ *Supra* n. 2.

¹⁹ Prosser, *op. cit. supra* n. 9.

²⁰ *Aetna Life Ins. Co. v. Burton*, *supra* n. 3 (intentional unauthorized autopsy; no physical injuries needed where the act is intentional; recovery for mental suffering alone); *Wilson v. St. Louis & S. F. R. Co.*, *supra* n. 3 (intentional mishandling of body while in transportation; when the act is willful, wanton, or intentional, no physical injury is needed; mental suffering is enough to allow recovery); *Kirksey v. Jernigan*, 45 So. 2d 188 (Fla., 1950) (undertaker kept the body as security for exorbitant fee despite the request of parents; court said that malice was needed for recovery for mental suffering; recovery allowed in this case); *Gadbury v. Bleitz*, 133 Wash. 134, 233 P. 299 (1925) (defendant willfully detained body for cremation in order to collect a debt); but, *cf.*, *Gatzow v. Buening*, 106 Wis. 1, 81 N. W. 1003 (1900) (intentional interference with funeral; no physical injury from the mental suffering, so no recovery).

²¹ *Supra* n. 11.

²² *Id.* at 553.

²³ *Id.*

d. Contract Theory

There are some jurisdictions that allow recovery for mental anguish caused by interference with possession of a cadaver, when based on breach of contract. Funeral arrangements and transportation are two of the more common situations where a contract may be involved. Recovery for mental suffering is granted on the theory that it is within the contemplation of the parties when the contract is entered into.²⁴ There are certain jurisdictions, however, that deny recovery on this theory because they feel that such mental anguish is not contemplated in the minds of the contracting parties.²⁵

Ohio

a. When Recovery Is Allowed

Ohio has not taken a progressive approach to situations involving mental suffering. When dealing with negligence, the general rule in that state is that there is no recovery even for physical injuries resulting from mental anguish in the absence of impact or contact.²⁶ If no physical injury has occurred, then only intentional, malicious, willful, or wanton acts will suffice.

Regarding interference with cadavers, a recovery will be granted in an action in tort only when the delay is intentional.²⁷ Recovery on a breach of contract theory will not be awarded in Ohio.²⁸

b. Procedure Upon Death

What is the procedure followed as to disposal of the body when someone dies? For a better understanding of this important area of the subject, perhaps a summary of the approach taken by one state will be worthwhile. Ohio, like many other states, breaks the subject of procedure into two general classifications. First, the procedure when a person dies under the care of a physician. Second, when a person not under a physician's care dies, whether by suicide, by accident, by violent or crimi-

²⁴ *Carey v. Lima, Salmon & Tully Mortuary*, 168 Cal. App. 2d 42, 335 P. 2d 181 (1959); *So. Relle v. Western Union Tele. Co.*, 55 Tex. 308 (1881); *Taylor v. Bearden*, 6 Tenn. App. 33 (1915); *Louisville & N. R.R. v. Hull*, *supra* n. 11; *Sanford v. Ware*, *supra* n. 3; *Brown v. Funeral Home & Ins. Co. v. Baughn*, 226 Ala. 661, 148 So. 154 (1933); *Lamm v. Shingleton*, 231 N. C. 10, 55 S. E. 2d 810 (1949).

²⁵ *Dunahoo v. Bess*, *supra* n. 3; *Plummer v. Hollis*, 213 Ind. 43, 11 N. E. 2d 140 (1937); *Grille v. Abele Funeral Home, Inc.*, 69 Ohio App. 51, 42 N. E. 2d 788 (1940); *Beaulieu v. Great Northern R. Co.*, 103 Minn. 47, 114 N. W. 353 (1907).

²⁶ *Miller v. Baltimore & O. S. W. R. Co.*, 78 Ohio St. 309, 85 N. E. 499 (1908).

²⁷ *Brownlee v. Pratt*, 77 Ohio App. 533, 68 N. E. 2d 798 (1946).

²⁸ *Grille v. Abele Funeral*, *supra* n. 25.

nal means, by casualty, or in any unusual or suspicious manner.²⁹

In the latter situation, Ohio law requires the immediate notification of the coroner.³⁰ The coroner or deputy coroner then has not only the right, but also the duty to take possession of the deceased's body for purposes of determining the probable cause of death.³¹ Once he acquires this possession, the coroner is obliged to notify the deceased's next of kin.³² This notification may be verbal or written, unless the relatives are not known.³³ Then, notice and cause of death advertised in a newspaper of general circulation in the county will suffice.³⁴

The significant factor to be noted here is that, after notification, the relatives may not demand immediate possession of the body for burial purposes.³⁵ The coroner has the right to detain the corpse of the deceased for as long as he deems necessary in determining the probable cause of death.³⁶ If he believes that an autopsy should be performed, he has the authority, in Ohio, to proceed without requesting permission from the next of kin of the deceased.³⁷ In Cuyahoga County (Cleveland) in Ohio, approximately eighty percent of all coroner cases are autopsied.³⁸

As a result of this statutory power given to the coroner, the relatives of the deceased have a cause of action limited to cases where the coroner has deliberately and intentionally withheld the body, not in pursuance of determining the cause of death. No such cases have been reported.

The second and more active area regarding liability for delay in delivery concerns the person who passes away with a physician in attendance. Since the cause of death is known and certified to by the physician, the deceased's next of kin have the immediate right to possession.³⁹ An autopsy is authorized only in cases where death occurred in an unlawful or suspicious manner.⁴⁰

Ohio, however, has diluted the strength of this possessory right. While the Code announces liability for refusal to deliver

²⁹ Ohio Rev. Code, Sec. 313.11.

³⁰ *Ibid.*, 313.12; 313.11.

³¹ *Id.*, 313.21; 313.13.

³² *Id.*, 313.14.

³³ *Id.*, 313.14.

³⁴ *Id.*, 313.14.

³⁵ *Id.*, 313.15.

³⁶ *Id.*, 313.15.

³⁷ *Id.*, 313.13.

³⁸ Cuyahoga County Coroner's Office.

³⁹ Ohio Rev. Code, Secs. 1713.34; 1713.35; 1713.39; 1713.41. Liability when death occurs at charitable institution, city hospital, etc. See, Ohio Rev. Code, Sec. 1713.39 and *supra* n. 3 (liability when death occurs at home).

⁴⁰ 1939 Op. Atty. Gen. (Ohio) 727.

a corpse or for any unlawful possession,⁴¹ it then grants an immunity from liability for 24 hours to charitable institutions, city hospitals, and other similar institutions.⁴² That is, any of the above institutions can rightfully refuse delivery for 24 hours after death.⁴³ The result of this statute is that there may be an actual delay in delivery of the body to the next of kin, but it may not constitute an actionable delay.

Interviews with several funeral homes disclosed the fact that while very rarely do any delays fall into the unlawful possession classification (more than 24 hours), it is not uncommon for hospitals and other institutions of similar nature to take advantage of the full time allotment under the statute.⁴⁴ The common reason for this delay seems to be the attempt to obtain autopsy permission from the next of kin.⁴⁵

Thus, Ohio announces its belief in the right of possession in the next of kin, but goes on to provide safeguards which make recovery under this right most difficult.

Conclusion

While a few jurisdictions now allow recovery for interference with possession of cadavers, for mental suffering unaccompanied by physical injury, the majority do not. The majority appears to base this conclusion on the possibility of feigning of mental anguish. This line of reasoning seems not only unreasonable, but absurd in most cases.

Since genuine mental distress is suffered by most relatives because of the death of the deceased alone, in all but a minute percentage of cases it is certainly reasonable to assume that any delay in delivering the body to the next of kin will result in further suffering. Jurisdictions requiring contemporaneous physical injury protect the defendant against the minuscule minority of abuses, and also bar the majority who have valid claims deserving a remedy. We believe that the inequity is obvious.

⁴¹ Ohio Rev. Code, Secs. 1713.39; 1713.41.

⁴² *Id.*, 1713.41.

⁴³ *Id.*, 1713.41.

⁴⁴ Names withheld upon request.

⁴⁵ *Ibid.*