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## Torts - Emotional Distress

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TORTS—EMOTIONAL DISTRESS—The Pennsylvania Supreme Court has held that a cause of action exists for mental distress resulting from the wanton and wilful conduct of causing indignities to a corpse.

*Papieves v. Kelly*, 437 Pa. 373, 263 A.2d 118 (1970).

The defendant, a minor, while operating a motor vehicle, struck plaintiff's minor son, either seriously injuring or killing him. Without any attempt to obtain medical aid, defendant hid the body in his automobile and put the automobile in a garage. About three days later, defendant acquired the assistance of the co-defendant, also a minor, and together they transported the body to a nearby open field where they buried it. Over two months later, the body was discovered and the remains were returned to the parents, the plaintiffs.

The plaintiffs argued that these acts constituted an unlawful retention of the body from them, and that such indignities to the corpse of their son caused them great mental anguish and humiliation. Defendants filed preliminary objections in the nature of a demurrer, and the complaints as to both defendants were dismissed. On appeal, the Pennsylvania Supreme Court reversed and remanded.

There can be little argument with the fairness of the court's conclusion. It is only reasonable that the activity of hiding and burying somebody's son without authorization will cause severe emotional distress.<sup>1</sup> The difficulty, however, is the reasoning the court used in reaching its conclusion. The court relied on the Restatement of Torts, section 868.<sup>2</sup> Due to a lack of Pennsylvania cases concerning the mishandling of corpses, the court also cited a number of extra-jurisdictional decisions.<sup>3</sup> Having mentioned these, the court phrased the issue in terms of "the right of a decedent's nearest relatives to protection against intentional, outrageous, or wanton conduct which is peculiarly calculated to cause mental or emotional distress."<sup>4</sup> The court then stated that a cause of action did exist.<sup>5</sup>

Utilization of section 868 was unfortunate. Under this section, any mistreatment of a corpse, whether intentional or mistaken, causing

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1. See *State Rubbish Collectors Assn. v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952); see also *Curnett v. Wolf*, 244 Iowa 683, 57 N.W.2d 915 (1953).

2. RESTATEMENT OF TORTS, § 868 (1939):

A person who wantonly mistreats the body of a dead person, or who without privilege intentionally removes, withholds, or operates on the dead body is liable to the member of the family of such person who is entitled to the disposition of the body.

3. *Papieves v. Kelly*, 437 Pa. 373, 377-78, 263 A.2d 118, 120 (1970).

4. *Id.* at 378, 263 A.2d at 121.

5. *Id.* at 379, 263 A.2d at 121.

mental distress, results in liability.<sup>6</sup> Section 868, therefore, removes the consideration of mistake from the tort. In order to commit an intentional tort, one must act with sufficient legal intent. He must desire the consequences of his act or have substantial mental certainty that the expected result will follow.<sup>7</sup>

For the tort in question, one must desire to cause mental anguish or realize that it is substantially certain to result from the conduct. Yet section 868 will punish one who acts with no desire or suspicion of the consequences. It would, for example, impose total liability on a surgeon who mistakenly performs an autopsy, even though his act be both routine and innocent.<sup>8</sup> The only apparent justification for such a policy decision is that generally mistake is not recognized as a defense in torts.<sup>9</sup> In numerous situations, however, the defense is afforded.<sup>10</sup> Therefore, whether to allow it or not becomes an *ad hoc* determination. For this particular tort, it should be allowed. Only by doing so can the law avoid the contradictory position of punishing one for intentionally inflicting mental anguish when he had no legal intent.

Secondly, section 868 is narrow in its scope of application, and consequently, deprives the instant case from contributing significantly to Pennsylvania precedent in the widening area of recovery for mental distress. *Papieves* can be relied on only in the infrequent situations where the mishandling of a corpse causes the mental suffering.<sup>11</sup>

Finally, the section allows recovery "to the member of the family of such person who is entitled to disposition of the body."<sup>12</sup> In Pennsylvania, a widow has the primary right to disposition,<sup>13</sup> but in the absence of a widow, the question arises again. The court will be asked to choose the possessor of the legal right of disposition, and consequently, the

6. RESTATEMENT OF TORTS, § 868 (1939). Comment *a* to this section states in part: The right to maintain an action for intentional interference with the body exists although there was no intent to do a tortious act, as where the body was misdelivered by the railroad, or where a surgeon performs an autopsy mistakenly believing that he is privileged to do so.

7. RESTATEMENT (SECOND) OF TORTS, § 8A (1965).

8. RESTATEMENT OF TORTS, § 868, comment *a* (1939).

9. W. PROSSER, LAW OF TORTS § 99 (4th ed. 1971).

10. *Smith v. Lauritzen*, 356 F.2d 171 (3d Cir. 1966) (defense to assault); *Rogers v. Huber*, 239 So. 2d 333 (Miss. 1970) (defense of others); *Hughes v. Babcock*, 349 Pa. 475, 37 A.2d 551 (1944) (defense of property); *Shaw v. May Dept. Stores Co.*, 268 A.2d 607 (D.C. Cir. 1970) (false imprisonment).

11. Liability for the mistreatment of corpses has arisen apparently only twice before in Pennsylvania. Both cases granted relief at the lower court level. 437 Pa. at 376-377, 263 A.2d at 120 *citing* *Block v. Har Nebo Cemetery Co.*, 14 Pa. D. & C. 237 (C.P. Phila. Co. 1930), and *Reick v. Maple Hill Cemetery Assn.*, 31 Luz. L. Reg. Rep. 213 (C.P. Luzerne Co. 1936).

12. RESTATEMENT OF TORTS, § 868 (1939).

13. *Pettigrew v. Pettigrew*, 207 Pa. 313, 56 A. 878 (1904).

owner of the right to recover for mental distress. Balancing the rights of parents, children, siblings, cousins and so on will certainly cause unnecessary problems.

It is submitted that, in substitution for section 868, the court should have relied on Restatement (Second) of Torts, section 46(1).<sup>14</sup> Use of this section would have compelled the court to closely analyze the facts of *Papieves*, and to discuss the essential elements of intent and recklessness. The court could have first considered whether the defendants' acts were "extreme and outrageous" as mandated by this section. The court would probably have concluded that the conduct fit within this description, as it was beyond the "bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."<sup>15</sup>

The court might then have questioned whether the defendants' acts were intentional or reckless, as recovery under this section is limited to these situations. The Restatement provides that for an act to be intentional, the actor must know that severe emotional distress is "certain, or substantially certain" to result from that conduct.<sup>16</sup> Sufficient certainty has been recognized in the instance where a man committed suicide in a friend's kitchen.<sup>17</sup> It was ruled that the inevitable discovery of the corpse by the friend was almost certain to cause mental anguish, and liability was incurred by the decedent's estate. When the defendant in another case falsely told a young girl that her mother was sleeping with another man and would be punished by God, the court decided that, as the intent to injure was present, the foreseeable mental distress should be compensated.<sup>18</sup>

In the noted case, substantial certainty also presents an issue. One might argue that mental distress was inevitable due to the boy's disappearance alone. It might be argued, however, that the distress was caused not simply by the boy's absence, but rather by the specific knowledge that the corpse was mishandled. If so, as the body was buried with the hope that it would never be found, the damage could not be termed "substantially certain" to result. In short, if the body was not discovered, there would be no damage.

Had the court reached the plausible conclusion that the defendants'

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14. RESTATEMENT (SECOND) OF TORTS, § 46(1) (1965):

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

15. *Id.* comment *d.*

16. *Id.* comment *i.*

17. *Blakely v. Shortal's Estate*, 236 Iowa 787, 20 N.W.2d 28 (1945).

18. *Korbin v. Berlin*, 177 So. 2d 551 (Fla. 1965).

acts were not intentional, it could have considered the question of recklessness. Guidelines differentiating between intentional and reckless behavior are provided by Restatement (Second) of Torts section 500. The comment to that section indicates that for an act to be reckless, the actor, although intending the act, need not intend the result. It is sufficient that the actor knows, or should know, the probability of such harm.<sup>19</sup> This section cautions that the probability of such harm is "different" from the substantial certainty of harm which is characteristic of intentional behavior.<sup>20</sup> More than a few Pennsylvania cases have cited this section, giving credence to its acceptability in this jurisdiction.<sup>21</sup>

The behavior in *Papieves* would be within this concept of recklessness. In burying the corpse, there was lacking the substantial certainty necessary for the acts to be intentional, yet there certainly existed a strong possibility of such resultant harm. Therefore, had the court employed section 46(1), it would have by its analysis of the facts justifiably reached the same conclusion as by the chosen reasoning.

It should be noted that section 46 recognizes the affirmative defense of mistake. By imposing liability only when the actor has subjective intent, it necessarily accords to a defendant an opportunity to prove any erroneous belief that vitiated the intent.

Secondly, section 46(1) allows any party injured within its scope to recover. It is specifically stated by the American Law Institute that as the limits of the tort are not yet realized, section 46 in no way acts as a limitation to further development of the law or impositions of liability.<sup>22</sup> This section, therefore, avoids the shortcoming of section 868, which permits recovery only by the member of the family entitled to disposition of the corpse. It is submitted that one's right to recovery should be based on his actual injury rather than on relationship to the decedent.

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19. RESTATEMENT (SECOND) OF TORTS, § 500, comment *f*, (1965):

Reckless misconduct differs from intentional wrongdoing in a very important particular. While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm that results from it. It is enough that he realize, or from the facts he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless. However, a strong probability is a different thing from the substantial certainty without which he cannot be said to intend the harm in which the act results.

20. *Id.*

21. *Slother v. Jaffe*, 356 Pa. 238, 51 A.2d 747 (1947); *Reilly v. City of Philadelphia*, 328 Pa. 563, 195 A. 897 (1938); *LaMarra v. Adam*, 164 Pa. Super. 268, 63 A.2d 497 (1949); *Schu v. Pittsburgh*, 143 Pa. Super. 101, 16 A.2d 752 (1940).

22. RESTATEMENT (SECOND) OF TORTS, § 46, comment *c* (1965).

A third argument for the use of this section is that, unlike section 868, it would have enabled the noted case to contribute to the development of Pennsylvania law in the area of mental distress. Whereas section 868 concerns mental distress caused by the mishandling of corpses, the proposed section encompasses the mainstream of mental distress law.

Finally, the Pennsylvania Supreme Court has implicitly approved the provisions of section 46(1) on two previous occasions. In *Cucinotti v. Ortman*,<sup>23</sup> the cause of action was for assault, and the consequential mental distress occurring when the plaintiffs were ordered to leave their residence. The cause of action for assault was deemed insufficient, but dicta in the case indicated that the principles of section 46(1) would apply were the infliction intentional.<sup>24</sup>

A more persuasive reference to section 46(1) may be found in *Forster v. Manchester*.<sup>25</sup> That case dealt with the attempts of a private investigator to follow the plaintiff and record her movements for the purpose of filing an "activity report" to assist counsel in forthcoming litigation. During the course of the surveillance, the plaintiff on several occasions noticed her pursuers, and as a result, became very upset and distressed. In concluding that the facts of the case did not support a cause of action under section 46(1), the court quoted the section and indicated that "the clear-cut intent required by the restatement was not established," as the defendant was only conducting a legitimate and routine surveillance.<sup>26</sup> The court further stated that defendants' conduct could not be labeled "outrageous" as the activity had some "social value."<sup>27</sup>

The noted case provided an opportunity for the court to expand upon the tenets of section 46(1). Failure to utilize this section was an unfortunate oversight on the part of the court and deprived *Papieves* of acquiring significance in Pennsylvania tort law.

*Eric Pearson*

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23. 399 Pa. 26, 159 A.2d 216 (1960).

24. *Id.* at 29, 159 A.2d at 218. The reference is to Restatement of Torts, section 46 (1948 Supp.) which is the basis for the later Restatement of Torts, section 46 (1) (1965).

25. 410 Pa. 192, 189 A.2d 147 (1963).

26. *Id.* at 200, 189 A.2d at 151.

27. *Id.* at 200, 189 A.2d at 151-52.