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Torts - Unauthorized Autopsy - Non-Survival of Action

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TORTS—UNAUTHORIZED AUTOPSY—NON-SURVIVAL OF ACTION—Plaintiff's husband was struck and killed by a motorbus owned and operated by defendant municipality. The body was removed to a hospital maintained by defendant. Subsequently, at the request and direction of a physician employed by defendant, an autopsy was performed, apparently to determine whether the deceased had been drinking. During the examination certain organs were removed and destroyed. Plaintiff brought an action for damages on the ground that the mutilation was done without her consent and in violation of her legal right to the possession of the body. Plaintiff died while the action was pending, and her administrator continued the suit. Defendant's motion for a directed verdict was denied, and judgment and verdict were for plaintiff. On appeal, *held*, reversed, with direction to set aside and dismiss. While there is a cause of action in the surviving spouse for unauthorized mutilation of her husband's body, it was error to deny defendant's motion because such right did not survive the death of plaintiff. *Deeg v. City of Detroit*, 345 Mich. 371, 76 N.W. (2d) 16 (1956).

All American courts that have considered the question have recognized that a cause of action lies for the intentional and unpermitted mutilation of a corpse, and damages for mental anguish may be recovered.¹ While

¹ *Larson v. Chase*, 47 Minn. 307, 50 N.W. 238 (1891); *Simpkins v. Lumbermans Mut. Casualty Co.*, 200 S.C. 228, 20 S.E. (2d) 733 (1942); *Steagall v. Doctors Hospital, Inc.*, (D.C. Cir. 1948) 171 F. (2d) 352. See generally 52 A.L.R. 1446 (1928); Weinmann, "A Survey of the Law Concerning Dead Human Bodies," BULLETIN OF THE NATIONAL RESEARCH COUNCIL, No. 73 (1929). It is doubtful whether there may be recovery for mental anguish for a mere negligent interference. See 12 A.L.R. 342 (1921); Green, "Relational Interests," 29 ILL. L. Rev. 460 at 487 (1934).

there is accord as to the existence of the right, the basis of the liability is not clear. Most of the courts have described it as akin to a property right,² others have characterized it as a right to have the body delivered for burial without mutilation,³ while others have used combinations of both.⁴ However, it is apparent that the courts recognize that such an act reasonably and, indeed, normally causes real mental suffering and therefore are willing to award compensation.⁵ The problem of who may maintain the action has not been answered fully, though reliance on property considerations generally has led to the conclusion that the person entitled to the custody of the body for burial may maintain the action. Such a right has been recognized in the surviving spouse, mother, father, or next of kin.⁶ It is not clear whether the right is held jointly by the survivors or exclusively by a particular individual, but it would appear doubtful that the right is held severally.⁷ There is authority allowing members of the immediate family to join in the action.⁸ If the basis of the action, however, is a willful act causing mental anguish, then it would seem that any survivor sufficiently related to the deceased to suffer mental anguish should have an individual cause of action. The application of property concepts to determine who may maintain the action is inconsistent with allowing compensation for mental anguish, and can be justified only as a means of limiting the defendants' liability.⁹ The Michigan court appears to be the first to hold that the action does not survive either at common law or under the Michigan type survival statute.¹⁰ This is in accord with the theory that the action is based on the infringement of a personal right and is not related to any

² For example, *Pettigrew v. Pettigrew*, 207 Pa. 313, 56 A. 878 (1904), describes it as property subject to a trust and limited in its rights. *Mensinger v. O'Hara*, 189 Ill. App. 48 (1914), recognizes a property right authorizing the nearest relatives to take possession and control of the body for the purpose of burial.

³ *Foley v. Phelps*, 1 App. Div. 551, 37 N.Y.S. 471 (1896); *Keyes v. Konkel*, 119 Mich. 550, 78 N.W. 649 (1899) (dictum).

⁴ *Patrick v. Employers Mut. Liability Ins. Co.*, 233 Mo. App. 251, 118 S.W. (2d) 116 (1938); *Larson v. Chase*, note 1 *supra*.

⁵ See Magruder, "Mental and Emotional Disturbance in the Law of Torts," 49 HARV. L. REV. 1033 at 1064 (1936); Prosser, "Intentional Infliction of Mental Suffering: A New Tort," 37 MICH. L. REV. 874 at 885 (1939).

⁶ *Larson v. Chase*, and *Simpkins v. Lumbermans Mut. Casualty Co.*, both note 1 *supra*.

⁷ *Gostkowski v. Roman Catholic Church*, 262 N.Y. 320, 186 N.E. 798 (1933), noted in 19 CORN. L. Q. 108 (1933).

⁸ *England v. Central Pocahontas Coal Co.*, 86 W. Va. 575, 104 S.E. 46 (1920); *Phillips v. Newport*, 28 Tenn. App. 187, 187 S.W. (2d) 965 (1945). *Contra*, *Steagall v. Doctors Hospital, Inc.*, note 1 *supra*.

⁹ *Gostkowski v. Roman Catholic Church*, note 7 *supra*.

¹⁰ Mich. Comp. Laws (1948) §612.32. In *Lubin v. Sydenham Hospital, Inc.*, 42 N.Y.S. (2d) 654 (1943), however, a mother's action for damages for mental anguish due to the refusal to deliver her child's body for burial was held to survive under the New York statute, which provides that "No cause of action for injury to person or property shall be lost because of the death of the person in whose favor the cause of action existed." N.Y. Decedent Estate Law §119 as amended, Laws 1941, c. 897. On survival of tort actions generally, see Evans, "A Comparative Study of the Statutory Survival of Tort Claims for and against Executors and Administrators," 29 MICH. L. REV. 969 (1931).

property concepts.¹¹ The court compared it to actions for libel, slander, and malicious prosecution, none of which survive under the Michigan statute or at common law.¹² It is a matter of speculation whether this court's recognition of the action as personal, divorced from property concepts, is indicative of a willingness to acknowledge fully that recovery should be allowed to all members of the family whose relationship to deceased is such that they reasonably may be expected to suffer mental anguish from the tortious act. It is submitted, however, that such a course would be proper and in accord with the theory of the action.¹³

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¹¹ *Huntly v. Zurich General Accident and Liability Ins. Co.*, 100 Cal. App. 201, 280 P. 163 (1929).

¹² Principal case at 378, citing authority.

¹³ However, the impact of a recent Michigan statute requiring the consent of only one of an enumerated group of persons for the performance of an autopsy, if more than one of such group assumes custody of the body, remains to be seen. Mich. Comp. Laws (1954 Supp.) §328.151.