

# Michigan Law Review

---

Volume 41 | Issue 2

---

1942

## TORTS - RECOVERY FOR MENTAL ANGUISH IN UNAUTHORIZED AUTOPSY CASES

Brooks F. Crabtree  
*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Torts Commons](#)

---

### Recommended Citation

Brooks F. Crabtree, *TORTS - RECOVERY FOR MENTAL ANGUISH IN UNAUTHORIZED AUTOPSY CASES*, 41 MICH. L. REV. 308 (1942).

Available at: <https://repository.law.umich.edu/mlr/vol41/iss2/10>

This Comment is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

---

TORTS — RECOVERY FOR MENTAL ANGUISH IN UNAUTHORIZED AUTOPSY CASES — In the cases involving autopsies which are unauthorized, consent for their performance not having been obtained prior to their execution, the courts are fairly well committed to the proposition that a cause of action to recover for the mental anguish caused by the autopsy exists in favor of some person closely connected to the deceased.<sup>1</sup> However, the grounds upon which this recovery has been based are varied, and not altogether consistent; and it is the purpose of this comment to discuss these several grounds and to attempt an evaluation of them, in the hope of arriving at some conclusion as to the proper basis of such recovery. In order to restrict the discussion, no mention will be made herein of the difficult and, as yet, inadequately answered problem concerning the person to whom this cause of action accrues.<sup>2</sup> It will be assumed that the deceased was a male who died

<sup>1</sup> *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238 (1891). In WEINMANN, A SURVEY OF THE LAW CONCERNING DEAD BODIES (1929) (National Research Council Bull., No. 73), are discussed various statutory limitations on performing autopsies. These statutes have been passed in order to prevent autopsies by incompetent practitioners and to allow those surviving the deceased to express their consent to the performance of the autopsy.

<sup>2</sup> WEINMANN, A SURVEY OF THE LAW CONCERNING DEAD BODIES 21-22 (1929) (National Research Council Bull., No. 73); *Koerber v. Patek*, 123 Wis. 453, 102 N. W. 40 (1905); Magruder, "Mental and Emotional Disturbance in the Law of Torts," 49 HARV. L. REV. 1033 at 1065 (1936); 10 ALBANY L. J. 70 (1874); 19 CORN. L. Q. 108 (1933).

leaving a surviving spouse, and that she is the person entitled to any and all relief available under any of the several grounds of recovery to be discussed.

As a general rule a plaintiff may not recover for mental anguish, unaccompanied by physical injury, unless it results from a wilful or malicious wrong by the defendant.<sup>3</sup> It was on the basis of finding such a wilful or malicious wrong that recovery for mental anguish has been allowed in cases involving such independent torts as assault, battery, seduction, malicious prosecution, and false imprisonment. The feature of the unauthorized autopsy cases which distinguishes them from such cases is that the act of the defendant is not directed toward the plaintiff, rather is it directed toward the body of the deceased.

In England, soon after the Norman Conquest (1066) the church took over jurisdiction in regard to the place of burial and the sepulture of the dead.<sup>4</sup> So complete was its jurisdiction over dead bodies that the common-law courts of England continually refused to recognize that they had any jurisdiction whatsoever;<sup>5</sup> and as a result, there are very few early common-law cases which can be turned to for assistance in this field. However, as the judicial system of the United States developed, there was a steadfast refusal to adopt, as part of our law, the precedents of the ecclesiastical courts. Thus, for the first time, temporal courts assumed jurisdiction of dead bodies and the protection of the rights of the living in their dead.<sup>6</sup>

In reaching the conclusion that the surviving spouse has some interest in the dead body of her husband which must be protected against wilful invasion, at least three grounds have been presented as the basis for this protection: (1) that the surviving spouse has a property right, or at least a quasi-property right, in the dead body; (2) that there is a relational interest between the deceased and his surviving spouse; or (3) that the surviving spouse has a right to possession of the dead body

<sup>3</sup> Prosser, "Intentional Infliction of Mental Suffering: A New Tort," 37 MICH. L. REV. 874 at 879 (1939); *Curtin v. Western Union Tel. Co.*, 13 App. Div. 253, 42 N. Y. S. 1109 (1897).

<sup>4</sup> 33 LAW NOTES 225 (1930). Kuzenski, "Property in Dead Bodies," 9 MARQ. L. REV. 17 at 18 (1924), has given three reasons for the church taking jurisdiction here: (1) the church was best prepared to prevent sacrilege to the dead body; (2) the church owned the burial grounds; and (3) the church had original probate jurisdiction after death.

<sup>5</sup> Blackstone, the eminent English jurist and common law advocate, once said: "But, though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently, at least if not impiously, violate and disturb their remains when dead and buried." 2 BLACKSTONE, COMMENTARIES 429 (1756).

<sup>6</sup> An excellent discussion of the historical background of this field of law may be found in *Matter of the Widening of Beekman Street*, 4 Bradf. Sur. (N. Y.) 503 (1857).

in the condition in which it existed at the time of death for the purpose of burial.

I.

Ecclesiastical courts having assumed complete jurisdiction over dead bodies, the English common-law courts refused to admit that there could be any property rights in a corpse.<sup>7</sup> Moreover, it was considered impractical to talk about property rights in dead bodies when none of the incidents of ownership attached thereto.<sup>8</sup> However, when the colonial courts refused to follow the ecclesiastical precedents, some of them felt that in order to protect fully all possible interests involved it would be advisable to speak of the interests in dead bodies as "property rights";<sup>9</sup> and several jurisdictions in the United States have decided such cases on this theory. The leading case on this subject is *Larson v. Chase*,<sup>10</sup> where the court in allowing recovery by the surviving spouse for mental anguish says:

" . . . Indeed, the mere fact that a person has exclusive rights over a body for the purposes of burial leads necessarily to the conclusion that it is his property in the broadest and most general sense of that term, viz., something over which the law accords him exclusive control."<sup>11</sup>

Going even further than merely stating that the surviving spouse has a property right in the dead body, at least two courts have held that the custody of the body is a "trust" for friends and others feeling a natural interest toward the deceased.<sup>12</sup> Because of its technical connotation in the law of property, the use of the word "trust" in this connection is indeed unfortunate. One writer explains its meaning to be

<sup>7</sup> Undoubtedly the doctrine that a corpse cannot be considered property originated in the dictum of Lord Coke in 3 INSTITUTES 203 (1644), where, in asserting the authority of the church, he says: "The burial of the cadaver (that is *caro data vermibus* [flesh given to the worms]) is *nullius in bonis*, and belongs to ecclesiastical cognizance." This brief statement asserts that the burial is *nullius in bonis*, but it does not assert that an individual can have no legal interest in the body as property. As a result of this statement by Coke, in *Haynes Case*, 12 Coke 113, 77 Eng. Rep. 1389 (1614), it was declared to be larceny to take the winding sheet from a dead body; but in *Regina v. Handyside*, 2 EAST, PLEAS OF THE CROWN, 652 (1806), not larceny to steal the body itself.

<sup>8</sup> WEINMANN, A SURVEY OF THE LAW CONCERNING DEAD BODIES 21 (1929) (National Research Council Bull., No. 73).

<sup>9</sup> Kuzenski, "Property in Dead Bodies," 9 MARQ. L. REV. 17 (1924); 12 VA. L. REV. 75 (1925); 18 MINN. L. REV. 204 (1933).

<sup>10</sup> 47 Minn. 307, 50 N. W. 238 (1891).

<sup>11</sup> *Id.*, 47 Minn. at 310. Because the courts have recognized this exclusive right to possession of the body for burial for so many years, the reasoning in this quotation is not circular as it would otherwise appear to be.

<sup>12</sup> *Weld v. Walker*, 130 Mass. 422 (1881); *Pierce v. Swan Point Cemetery*, 10 R. I. 227 (1872).

that the courts will protect the repose of the dead after burial, and before burial the conflicting rights of all those interested will be subject to the rules of public health and decency and to considerations of fitness and respect.<sup>13</sup>

This ground for recovery has not gained much support in the later cases. The courts which do employ it feel that the situation calls for a recovery by the surviving spouse; but being hard put to find a suitable basis for recovery, they rely upon a "well established ground" and state that henceforth the surviving spouse shall be deemed to have a "property right" in the body of her deceased husband.

Many courts, realizing that this so-called "property right" is something evolved out of thin air, have refused to go quite this far in order to give recovery. However, they too feel that recovery should be accorded the surviving spouse, and they speak in terms of a "quasi-property right."<sup>14</sup> Such courts speak of the "most tender affections of the human heart [which] cluster about the bodies of one's loved ones,"<sup>15</sup> "a kind of property interest in the dead body,"<sup>16</sup> and "a subject which interests the feelings of mankind to a much greater degree than many matters of actual property."<sup>17</sup> It appears that the courts are merely searching for a convenient "peg" upon which to hang the "cloak" of recovery. Some courts expressly reject the theory of a property right in the dead body of the deceased.<sup>18</sup>

## 2.

In their constant search for means of accomplishing justice without doing excessive violence to the facts or to established precedents, a few courts have preferred to talk in terms of "relational interest with the deceased" in order to give the surviving spouse recovery for her mental anguish.<sup>19</sup> In *Fox v. Gordon*,<sup>20</sup> the court says:

"Questions which relate to the custody and disposal of the the remains of the dead do not depend upon the principles which

<sup>13</sup> Grinnell, "Legal Rights in the Remains of the Dead," 17 GREEN BAG 345 at 349 (1905).

<sup>14</sup> *Louisville & N. R. R. v. Wilson*, 123 Ga. 62, 51 S. E. 24 (1905); *Spiegel v. Evergreen Cemetery Co.*, 117 N. J. L. 90, 186 A. 585 (1936); *Burney v. Children's Hospital*, 169 Mass. 57, 47 N. E. 401 (1897). See also 33 LAW NOTES 225 (1930) and 28 MICH. L. REV. 353 (1930).

<sup>15</sup> *Wall v. St. Louis & S. F. R. R.*, 184 Mo. App. 127 at 132, 168 S. W. 257 (1914).

<sup>16</sup> *Louisville & N. R. R. v. Wilson*, 123 Ga. 62 at 67, 51 S. E. 24 (1905).

<sup>17</sup> *Pierce v. Swan Point Cemetery*, 10 R. I. 227 at 237-238 (1872).

<sup>18</sup> *Palenzke v. Bruning*, 98 Ill. App. 644 (1901); *Fox v. Gordon*, 16 Phila. (Pa.) 185 (1883).

<sup>19</sup> *Foley v. Phelps*, 1 App. Div. 551, 37 N. Y. S. 471 (1896); *Koerber v. Patek*, 123 Wis. 453, 102 N. W. 40 (1905); *Fox v. Gordon*, 16 Phila. (Pa.) 185 (1883).

<sup>20</sup> 16 Phila. (Pa.) 185 (1883).

regulate the possession and ownership of property, but upon considerations arising partly out of domestic relations, the duties and obligations which spring from family relationship and ties of blood . . . as growing out of the natural relations of human beings to each other and the divine and human laws which bind society together."<sup>21</sup>

In *Foley v. Phelps*,<sup>22</sup> a case of first impression in New York, the court did not put the right to recover upon the property right theory, but rather on an invasion of the clearly established legal right to perform the duty of burial—a duty which the law requires someone to perform, and which was bestowed upon the surviving spouse by reason of her relationship with the deceased. Although the *Foley* case is generally cited under the "possession of the dead body" theory of recovery, there is the reference stated above to the relational interest doctrine.

Dean Leon Green<sup>23</sup> has written a series of articles on "Relational Interests"<sup>24</sup> and devotes some little space to a consideration of their application to dead bodies.<sup>25</sup> He speaks of the relationship between the living and the dead as one "as real as between living members of the family . . . one of the dearest and most valued interests known to human beings."<sup>26</sup> Dean Green's contention is that the proper basis for recovery in these cases is not that the surviving spouse's personality or property interest has been invaded, but that the defendant in acting wrongfully toward the body of the deceased has harmed the relation between the surviving spouse and the deceased. As a result, he feels that there should be recovery for the injury to this relational interest, and in order to punish the defendant for his inconsiderate conduct.<sup>27</sup>

There has been some criticism of this "relational interest" doctrine,<sup>28</sup> and some courts have refused to admit its validity.<sup>29</sup> It is, however, an ingenious method by which the courts are able to give recovery to the surviving spouse in the unauthorized autopsy cases without having to justify a use of the property analogy.

### 3.

Perhaps the most sensible and undoubtedly the most generally accepted ground for recovery in these unauthorized autopsy cases is that

<sup>21</sup> *Id.*, 16 Phila. 185 at 185-186.

<sup>22</sup> 1 App. Div. 551, 37 N. Y. S. 471 (1896).

<sup>23</sup> Dean and Professor of Law at Northwestern University.

<sup>24</sup> 29 ILL. L. REV. 460, 1041 (1934-1935).

<sup>25</sup> *Id.* 485.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* 487.

<sup>28</sup> Magruder, "Mental and Emotional Disturbance in the Law of Torts," 49 HARV. L. REV. 1033 at 1066 (1936).

<sup>29</sup> *Buchanan v. Buchanan*, 28 Misc. 261, 59 N. Y. S. 810 (1899) (no person has a legal right to the possession of a corpse because of relationship in the abstract).

the surviving spouse has for the purpose of burial the right to possession of the dead body in the condition in which it existed at death.<sup>30</sup> Some courts have talked of this as the "duty" of burial, which authorizes and requires the surviving spouse to take possession of the body and see that it is given proper burial, thereby becoming closely allied to the "relational interest" ground of recovery.<sup>31</sup> This interest of the living in the bodies of their dead has been accepted from generation to generation, and as one judge so ably states:

" . . . The burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property. There is a duty imposed by the universal feelings of mankind to be discharged by someone toward the dead; a duty, and we may also say a right, to protect from violation; and a duty on the part of others to abstain from violation. . . ." <sup>32</sup>

In *Foley v. Phelps*,<sup>33</sup> the court held that this right of possession for the purpose of burial is "the right to what remains when the breath leaves the body, and not merely to such a hacked, hewed, and mutilated corpse as some stranger, an offender against the criminal law, may choose to turn over to an afflicted relative."

Some courts have combined this ground for recovery with that of a "property right in the dead body." *Larson v. Chase*<sup>34</sup> is an excellent example of this approach, as is *Pettigrew v. Pettigrew*.<sup>35</sup> It is difficult to determine just which of the two grounds was the basis upon which the courts decided those cases, for each is discussed fully in both opinions. It is suggested that perhaps the "right of possession" doctrine will require less mental gymnastics in the attempt to justify its conclusion, for the "right to possession for burial" doctrine has been accepted for generations and is not based upon the same amount of fiction involved in the "property right" theory.

<sup>30</sup> *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238 (1891); *Streipe v. Liberty Mut. Life Ins. Co.*, 243 Ky. 15, 47 S. W. (2d) 1004 (1932); *McPosey v. Sisters of the Sorrowful Mother*, 177 Okla. 52, 57 P. (2d) 617 (1936); *Darcy v. Presbyterian Hospital*, 202 N. Y. 259, 95 N. E. 695 (1912); *Foley v. Phelps*, 1 App. Div. 551, 37 N. Y. S. 471 (1896); *Hasselbach v. Mt. Sinai Hospital*, 173 App. Div. 89, 159 N. Y. S. 376 (1916). See also 28 MICH. L. REV. 353 (1930).

<sup>31</sup> *Foley v. Phelps*, 1 App. Div. 551, 37 N. Y. S. 471 (1896); *Fox v. Gordon*, 16 Phila. (Pa.) 185 (1883).

<sup>32</sup> *Pierce v. Swan Point Cemetery*, 10 R. I. 227 at 237-238 (1872), quoted in *Burney v. Children's Hospital*, 169 Mass. 57 at 59, 47 N. E. 401 (1897).

<sup>33</sup> 1 App. Div. 551 at 555, 37 N. Y. S. 471 (1896).

<sup>34</sup> 47 Minn. 307, 50 N. W. 238 (1891).

<sup>35</sup> 207 Pa. 313, 56 A. 878 (1904).

## 4.

Perhaps the closest analogy that can be drawn to the unauthorized autopsy cases is in that group of cases in which a telegraph company fails to deliver a death message in time to allow a near relative to attend the funeral of the deceased.<sup>36</sup> In these cases, recovery has generally been allowed for mental anguish suffered as a result of the company's failure properly to carry out its agency. This recovery has been based on tort liability, breach of contract, or the violation of a public duty owed by the telegraph company.<sup>37</sup> Dean Green feels that recovery could and logically should be based on an invasion of a relational interest.<sup>38</sup> Probably the real basis of recovery is that the company should realize the relative importance of the message both to the sender and to the receiver; and consequently the courts have seen fit to impose a higher standard of care on the telegraph company to be sure that such messages are handled properly. Messages containing news that someone dear to the receiver has passed away become of great importance to the receiver, and he may easily suffer mental anguish because he was not informed in time to attend the funeral. The courts feel that society should protect the rights of its members in paying their last respects to a beloved one who has died, and so it is that they allow compensation for mental anguish caused by the failure of the telegraph company to deliver the message in time.

Another analogy that can be drawn to the unauthorized autopsy cases is in that group of cases involving consent before a surgical operation is performed.<sup>39</sup> The courts have concluded that society will be protected more fully if the person who is to undergo the operation consents before its performance; or if he is not able to give the required consent, that someone responsible for and to him do so.<sup>40</sup> In the unauthorized autopsy cases, the deceased cannot give the consent necessary to authorize the autopsy, so the courts allow the surviving spouse to have that right. It is surely no hardship upon the one who is going

<sup>36</sup> See collection of cases in 7 N. Y. UNIV. L. Q. REV. 772 (1930). Enough cases of this type have occurred in Texas to give that state's name to the doctrine which allows recovery on such fact situations. The leading case in the United States is *SoRelle v. Western Union Tel. Co.*, 55 Tex. 308 (1881).

<sup>37</sup> *Mentzer v. Western Union Tel. Co.*, 93 Iowa 752, 62 N. W. 1 (1895); *SoRelle v. Western Union Tel. Co.*, 55 Tex. 308 (1881); *Western Union Tel. Co. v. Redding*, 100 Fla. 495, 129 So. 743 (1930).

<sup>38</sup> Green, "Relational Interests," 29 ILL. L. REV. 460 at 487 (1934).

<sup>39</sup> *Mohr v. Williams*, 95 Minn. 261, 104 N. W. 12 (1905); *Hively v. Higgs*, 120 Ore. 588, 253 P. 363 (1927); *Markart v. Zeimer*, 67 Cal. App. 363, 227 P. 683 (1924); *Rolater v. Strain*, 39 Okla. 572, 137 P. 96 (1913).

<sup>40</sup> *Moss v. Rishworth*, (Tex. Comm. App. 1920) 222 S. W. 225; *Pratt v. Davis*, 224 Ill. 300, 79 N. E. 562 (1906); *Zoski v. Gaines*, 271 Mich. 1, 260 N. W. 99 (1935).



to perform the autopsy to require that he gain consent from the surviving spouse, and once he has gained this consent he may perform the autopsy without fear of being liable to her for mental anguish caused by the act.

In conclusion, several observations may be made. First, at least two of the grounds for recovery—property right in the dead body and relational interests therein—require the courts to employ questionable concepts in order to allow recovery. Secondly, it would appear to the author that the courts could save themselves much effort and yet arrive at the same result by a very simple and direct method—by stating that the cause of action to recover for mental anguish is based upon an intentional act of the defendant which will probably cause acute and poignant emotional distress.<sup>41</sup> The act is done at a time when the emotions of the surviving spouse are strained to the breaking point, during a period when she should be protected and not presented with the thought that the body of her husband has been dissected before burial without her consent. She is in such a mental condition that anything out of the ordinary which might be done to the body may easily cause mental anguish; and when the defendant fails to obtain her consent before the autopsy, the courts should find that the defendant may be deemed to have intended the result that followed—so closely connected is it.

As the three grounds discussed above have resulted in allowing recovery to the surviving spouse, their applications cannot be condemned. Society as a whole will probably not suffer too greatly if the consent of the surviving spouse must be obtained before the autopsy may be performed. However, the real basis for recovery in these autopsy cases is that the surviving spouse has suffered mental anguish as the result of an intentional act of the defendant from which the result might have been anticipated by him; and as a result, he should be penalized for his misconduct. The main objection to the three grounds discussed is that they employ a roundabout method of arriving at an apparently correct result, and that defect could be alleviated by employing the simple method stated above.

*Brooks F. Crabtree*

<sup>41</sup> Harper and McNeeley, "A Re-examination of the Basis for Liability for Emotional Distress," 1938 WIS. L. REV. 426. The word "intentional" is used in the sense that the defendant actually intends to do the act in question—to perform the autopsy.