

OVER MY DEAD BODY

The Elusive Tort of Interference with Human Remains

by S. Karen Bamberger and Emily Ann Albrecht

Despite modern society's unabashed fascination with the macabre ("Walking Dead," anyone?), the morbid reality of dead bodies is nevertheless an uncomfortable topic for many people.

Human remains also occupy an uneasy position in the eyes of the law. When someone dies, the corpse left behind falls into somewhat of a legal purgatory (pun most definitely intended) between the status of "person" and "property."

Not surprisingly — given the delicate subject matter and often abhorrent fact patterns being litigated—the law of dead bodies is also a rarely discussed (and often misunderstood) niche within the legal profession. After all, dead body cases are probably not your "go-to" topic for cocktail party conversations.

Under English common law, there existed a right to a "decent [i.e. Christian] burial"— the denial of which was a misdemeanor.¹ Under modern common law in the United States, the concept of "decent burial" has been secularized to simply mean the right to an orderly interment in a suitable place, also known as the right of sepulture. The obvious difficulty in exercising one's own right of sepulture ultimately evolved into a right of recovery by the living arising from tortious interference with the corpse of a deceased.

Washington law recognizes a cause of action for the tortious interference with human remains.² "The tort of

interference with a dead body allows recovery for mental suffering derived from the willful misuse of a body."³ "The action is not based on a property interest in the body itself, but rather an interest in the proper treatment of the body."⁴ The tort action is available for relatives of the deceased and those who control the right to disposition of the remains.⁵ The surviving spouse is generally the person who

is deemed to be entitled to the disposition of the deceased person's body, but if the deceased was unmarried, the next of kin has standing.⁶

To recover emotional damages for interference with human remains, the mental suffering must directly result from a willful wrong — mere mistake is not enough.⁷ In other words, to establish liability, the plaintiff must show that the misuse of the body was intentional, rather than negligent.⁸ In

addition, the misuse must be "in such a manner as to cause the relatives or persons charged with its decent sepulture to naturally suffer mental anguish."⁹ For example, intentionally withholding or delaying the proper burial of a body constitutes willful misuse of a dead body.¹⁰ Performing an unauthorized autopsy, burial in the wrong cemetery, or unlawful disinterment may also constitute willful misuse.¹¹

Washington courts first recognized an actionable claim for the tort of improper burial in 1907 when an undertaker was sued for breach of contract by the parents of a deceased child whose corpse had been buried only eight



CLAIMS FOR TORTIOUS INTERFERENCE WITH A DEAD BODY
HAVE BEEN FEW, AND NOT MUCH HAS CHANGED IN THE CASE
LAW IN WASHINGTON OVER THE PAST CENTURY.

inches below the earth in the same grave with another corpse.¹² The Supreme Court denied liability under a breach of contract theory for failing to bury the child according to the agreement because the plaintiffs based their claim for damages on mental suffering.¹³ Nevertheless, the court went on to conclude that “it would shock the sensibilities to hold that there was no remedy for such a wrong,” noting that although the tort of wrongful interference had traditionally been related to the mutilation of a corpse, an improper burial equated to a mutilation for purposes of raising an actionable claim.¹⁴

Interest in the tort of interference with a dead body was resurrected in 1925 when the Supreme Court upheld a mother’s claim against an undertaker for withholding her son’s corpse as collateral for payment of funeral expenses.¹⁵ While the court noted that a party cannot recover for mental suffering based solely on a claim for negligence, intentionally withholding the body from proper burial constituted a willful misuse of the body.¹⁶ The court reasoned that willful delay in providing a burial was equivalent to improper burial for purposes of the tort of interference—once again focusing on the emotional effect of the mistreatment on others rather than the extent of the misuse itself.¹⁷

Claims for tortious interference with a dead body have been few, and not much has changed in the case law in Washington over the past century as compared with other states.¹⁸ This is, in part, because the Washington Supreme Court has expressly refused to adopt the *Restatement (Second) of Torts* §868, which permits recovery of emotional distress damages for *negligent* interference with a dead body.¹⁹ Therefore, as a matter of law in Washington, a claim for emotional distress cannot be pursued in an action alleging negligent mishandling of human remains.²⁰

Ultimately, the parameters of misuse that may give rise to a cause of action for tortious interference with human remains are not well defined. As a practical matter, the easiest way to understand what constitutes tortious interference with human remains is by staying apprised as to current case law clarifying what does not. **NWL**



S. KAREN BAMBERGER is a shareholder and chair of the defense litigation practice group at Betts, Patterson & Mines, P.S. where she focuses her practice primarily in the areas of product liability and complex litigation. She can be reached at kbamberger@bpmlaw.com.



EMILY ANN ALBRECHT is an associate at Betts, Patterson & Mines, P.S. where she focuses her practice on insurance defense, product liability, and asbestos litigation. She can be reached at ealbrecht@bpmlaw.com.

NOTES

1. P. Jackson, *The Law of Cadavers* at 31. Granted, the burial had to be in a churchyard or other consecrated area (ecclesiastical rules permitting) and a church service performed – it was not possible to choose burial but reject the service (or vice versa) – which naturally resulted in great tension between the Established Church and other denominations, ultimately leading to the secularization of cemeteries.
2. *Adams v. King County*, 164 Wn.2d 640, 658, 192 P.3d 891 (2008); *Reid v. Pierce County*, 136 Wn.2d 195, 961 P.2d 333 (1998).
3. *Adams*, 164 Wn.2d at 658.
4. *Id.* (citing *Herzl Congregation v. Robinson*, 142 Wash. 469, 471, 253 P. 654 (1927) (recognizing generally that “there is a right of custody over, and interest in, a dead body, and the disposal of a body”)); *Wright v. Beardsley*, 46 Wash. 16, 19, 89 P. 172 (1907) (“the action is for a wrong against the feelings of the plaintiffs inflicted by a wrongful and improper burial of their dead; in other words, a tort or injury against the person.”).
5. *Adams*, 164 Wn.2d at 658.
6. RCW 68.50.160(3) (determining right to control disposition).
7. *Adams*, 164 Wn.2d at 658 (quoting *Gadbury v. Bleitz*, 133 Wash. 134, 233 P.299 (1925)). See, e.g., *Whitney v. Cervantes*, 182 Wn. App. 64, 328 P.3d 957 (2014).
8. *Id.*
9. *Wright*, 46 Wash. at 20.
10. *Adams*, 164 Wn.2d at 659.
11. *Wright*, 46 Wash. at 20.
12. *Id.* at 17.
13. *Id.*
14. *Id.* (recognizing that a cause of action for wrongful mutilation “applies as well to a case such as the one at bar where the wrong consists of the manner of burial”).
15. See e.g. *Gadbury*, 133 Wash. 134.
16. *Id.* at 137.
17. *Id.* at 137-38 (“The misuse in one case may be greater in degree, but nevertheless is a misuse.”)
18. See Ryan Seidemann, “How Do We Deal With All The Bodies? A Review of Recent Cemetery and Human Remains Legal Issues,” U. BALT. 3 J. LAND DEV. 1 (2013).
19. See *Whitney v. Cervantes*, 182 Wn. App. 64; *Adams*, 164 Wn.2d at 656-57; *Restatement (Second) of Torts* §868 (1979).
20. *Id.*