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# Torts--A Comparison of Unauthorized Embalming and Unauthorized Autopsy

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guardians, at least if their wards are nonresidents as well. Some statutes have been patched together similar to West Virginia's resulting in the admittance of guardians and the turning away of other representatives such as committees for incompetents. The principal case followed the trend of decisions, and as such, it espouses the more liberal view. In continental Europe the courts have no problems in admitting foreign guardians into their courts, basing this practice on a theory of comity. The American courts seem headed in that direction. *Clarke v. Clarke*, 178 U.S. 186 (1900).

Larry Lynn Skeen

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### Torts—A Comparison of Unauthorized Embalming and Unauthorized Autopsy

*P*'s husband died and the body was delivered to *D*'s funeral home. *D*'s employees immediately embalmed the body and prepared it for burial without the knowledge or permission of *P*. Upon learning that *D* had possession of her husband's body, *P* had the body removed to another funeral home. *P* brought an action against *D* for mental anguish caused by the unauthorized embalming of her husband's body. The lower court sustained a demurrer to the complaint. *P* appealed. *Held*, affirmed. The unauthorized embalming of a dead body did not in itself constitute such mishandling or mutilation of a body as would support a cause of action by the surviving spouse for mental anguish. *Parker v. Quinn-McGowen Co.*, 138 S.E.2d 214 (N.C. 1964).

A sharp distinction can be drawn between unauthorized embalming and unauthorized autopsy. Embalming is the treatment of a dead body with specific preparations, such as aromatic oils or arsenic in order to preserve it from decay. *Commonwealth v. Markmann*, 114 Pa. Super. 29, 174 Atl. 6 (1934). Autopsy is the inspection and partial dissection of a dead body which has been opened to expose important organs either to ascertain the cause of death, the exact nature of the disease or any other abnormalities present. *In re Disinterment of Body of Jarvis*, 244 Iowa 720, 58 N.W.2d 24 (1953). The court in the principal case stated that recovery has generally been allowed for mental anguish as a result of an unauthorized autopsy because of the extreme aversion by many people to an autopsy; but an unauthorized embalming has

not been a sufficient basis for recovery as an embalming is a standardized popular burial practice which does not create the extreme antipathy that autopsy does.

Few cases have arisen which are based on unauthorized embalming. In *Sworski v. Simon*, 208 Minn. 201, 293 N.W. 309 (1940), *P*'s son committed suicide by hanging himself in a jail cell. An undertaker was summoned and he was directed to embalm the body. *P* demanded his son's body but the undertaker first requested payment for his services. After some delay *P* was allowed to see his son's body. The court held that *P* could recover damages for mental anguish because the embalming of the dead body without authority and the withholding of the body constituted an actionable wrong. In this case there was not only an unauthorized embalming but a wilful holding and refusal to turn over the body.

In *Kirksey v. Jernigan*, 45 So.2d 188 (Fla. 1950), *D* took the body to his funeral home and two hours later *P* made a demand for the body but *D* refused to surrender the body and then embalmed it. *D* refused to deliver the body until *P* made a payment. *P* was allowed to recover punitive damage as well as damages for mental anguish. Here there was a wilful refusal to turn the body over to *P*, followed by an unauthorized embalming and a deliberate holding of the body until *P* paid a certain sum. When recovery has been allowed for mental anguish as a result of an unauthorized embalming, there have been other factors such as wrongful holding of the body, negligence or wilful behavior on which recovery has been based.

No case has arisen in West Virginia concerning unauthorized embalming. The licensing and regulations of funeral directors and embalmers are controlled by the Board of Embalmers and Funeral Directors, appointed by the governor. (W. VA. CODE ch. 30, art. 6 § § 1-12 (Michie 1961). W. VA. CODE ch. 30, art. 6 § 8 (Michie 1961), states that no public officer, employee, physician, or surgeon, or any other person having a professional relationship with the deceased shall send the body of the deceased to an undertaker without first making inquiry as to the desires of the next of kin or any other person who might have to pay funeral expenses. Though this section was probably written to assure the undertaker of payment for his services, it could also afford protection to the undertaker if the West Virginia court would allow recovery for unauthorized embalming in the future. The undertaker could plead

that he acted in good faith and believed that the person who delivered the body was abiding by the wishes of the deceased family. This could shift the blame for the unauthorized embalming to the doctor or party who delivered the body.

Recovery has generally been allowed for mental anguish due to an unauthorized autopsy. In *Phillips v. Newport*, 128 Tenn. App. 787, 187 S.W. 2d 965 (1945), P's infant son died as a result of taking forty-five aspirin tablets. The body was removed to the D's funeral home and P's instructed D to embalm the body and prepare it for burial, but no permission was given for a post mortem examination. P's noticed incisions on the body and ordered it examined. The doctors who made this examination were of the opinion that an autopsy had been performed. P's sued for mental anguish caused by the alleged unauthorized autopsy and the jury returned a verdict for P's based on the post mortem examination. The court sustained the verdict, holding that it was a jury question as to whether the operations performed on the body were for the purposes of a post mortem examination or for the purposes of embalming.

In *Beller v. City of New York*, 58 N.Y.S.2d 112, 269 App. Div. 642 (1945), the court noted that a cause of action would lie for an unauthorized autopsy and that a person mutilating the remains of a body without the consent of the persons entitled to possession thereof is liable for damages for mental anguish though no pecuniary damages are proved.

Thus, recovery will be allowed for mental anguish as a result of this unauthorized autopsy but exceptions have arisen in order to protect the public interest. In cases of violent, accidental or unusual deaths, various state statutes give a coroner or other public official the right to investigate the death and order an autopsy when he deems it necessary without the consent of the deceased's next of kin. In *Kingsley v. Forsyth*, 92 Minn. 468, 257 N.W. 95 (1934), P's husband was found dead in his car in a garage. The coroner ordered an autopsy of the body pursuant to a statute giving the coroner authority to investigate. The cause of death was found to be monoxide gas poisoning. P was not told of the autopsy and brought an action for wounded feelings. The statute was construed to permit the coroner to investigate certain kinds of deaths and order an autopsy without the consent of the next of kin when he deemed it necessary.

In *Frick v. McClelland*, 384 Pa. 597, 122 A.2d 43 (1956), P's

husband died as a result of an injury suffered at work. The coroner performed an autopsy on the body without the permission of *P*. The court ruled for the coroner, noting that the coroner had a duty to investigate sudden deaths and did not have to obtain permission of the family of the deceased in such cases.

Although no case concerning unauthorized autopsy has been reported in West Virginia, statutory provisions cover the use of autopsy. W. VA. CODE ch. 61, art. 12 § § 1-15 (Michie, 1964 Supp.). These sections provide that in case of death by violence, or suddenly when the deceased was in apparent good health, when unattended by a physician or in any other suspicious, unusual or unnatural manner, the county medical examiner should be notified. In deaths caused in the above manner, the county medical examiner is given the power to order an autopsy whenever (1) he deems it advisable and in the public interest or (2) if requested by the county prosecuting attorney or the judge of the circuit court or any other court with criminal jurisdiction. However, an attending physician can perform an autopsy only when he has the permission of the deceased's relatives. W. VA. CODE ch. 16, art. 4B § 1 (Michie, 1964 Supp.). These statutes give the medical examiner broad powers in ordering an autopsy in the public interest and greatly protect him from being accused of an unauthorized autopsy.

An unauthorized autopsy alone should support an action for mental anguish because of the great aversion of the public toward an autopsy unless the autopsy is authorized by statute. The rules are far from settled in regard to an unauthorized embalming. The court in the principal case takes the position that an unauthorized embalming alone is not sufficient to allow recovery. There must be other factors present such as a wilful withholding of the body, a negligent embalming or wilful and wanton conduct on the part of the defendant in order to allow recovery. Certainly there must be some safeguards to prevent undertakers from wilfully taking bodies and embalming them without the permission of the deceased's next of kin. A mere innocent good faith act of embalming by the undertaker, not knowing that the deceased next of kin were opposed to the act, would not present as strong a case for recovery. The court appears to have reached a desirable result in holding that before liability is imposed, there must be more than an unauthorized embalming.

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