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Civil Liability and Dead Bodies

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"No, great king; I come to thee for charitable license
That we may wander o'er this bloody field,
To book our dead, and then to bury them;"

-King Henry V, Act IV scene 7 by William Shakespeare.

***** Introduction

A popular saying asserts that nothing is inevitable but death and taxes. Inevitably for those involved in law enforcement, there are encounters in which officers encounter dead bodies—whether of offenders, murder or accident victims, or those who die of illness, old age, or other natural causes. Law enforcement personnel and other public safety employees are necessarily involved in securing, safeguarding, identifying, transporting, and handling human cadavers in the course of criminal investigation and community caretaking.

Historically, as long ago as the ancient Egyptians, and perhaps before, corpses resting unmolested and undisturbed has been a concern. A 1920 book by William Henry Francis Basevi entitled *The Burial of the Dead* surveyed this history and found that many cultures with no other rituals held in common all tried to treat the dead with reverence. This respect even extends to the bodies of enemies in wartime, with the 1949 Geneva Conventions containing specific provisions that mandate that contending armies have a duty to search for their enemy's dead "and prevent their being despoiled."

The families of the dead are understandably concerned. They want their loved ones' remains correctly identified, and they want to receive timely notice of the death and access

to the remains for proper burial. Many have religious beliefs mandating certain rituals for the cleaning and preparation of the body for burial, some frown on cutting or disfiguring of the body, even for autopsies, and some religions require prompt burial. Families are also concerned that human remains be treated with dignity and respect, and that privacy be respected.

Unfortunately, in a small number of instances, these concerns have been arguably violated, and this has led to lawsuits. This brief article examines court ruling in cases involving the identification of bodies, the handling of bodies, and privacy issues, such as the dissemination of photos or videos of dead bodies and autopsies, and highlights some lawsuits that led to substantial damage awards. It then makes some suggestions to consider. Finally, a number of useful and relevant resources and references are presented.

❖ Identification and Notification

A number of lawsuits involving dead bodies have focused on claims arising from the failure to properly or timely identify them, or a failure to notify the decedent's family of the death and the location of the corpse for purposes of burial.

In <u>Chaudhry v. City of Los Angeles</u>, #11-55820, 2014 U.S. App. Lexis 9208 (9th Cir.), and 2014 U.S. App. Lexis 9226 (Unpub. 9th Cir.), an autistic Muslim man was shot and killed by a police officer after allegedly lunging at him with a knife. In a lawsuit by his family, his estate, and three organizations, it was also claimed that the coroner took custody of his body but did not notify his family until twenty-one days later and the delay prevented his family from burying him in accordance with the religions customs of Islam.

A federal appeals court ruled that a negligence claim against the coroner for failure to provide timely notice of the death should be reinstated, as there was a mandatory duty under state law to make a reasonable effort to locate the decedent's family. The coroner did not, however, violate equal protection, as he did not act with intent to discriminate on the basis of religion, and he did not deprive the parents of a property right. The existence of any such property right is very much a matter of state law.

However, another court ruled that a police officer and medical examiner had no duty under existing Tennessee state law to notify man's family of his death or the location of his dead body, and there was no liability for an alleged failure to do so. *Tinsley v. Dudley*, #03A01-9502, 915 S.W.2d 806 (Tenn. App. 1995).

Similarly, in <u>Morton v. Maricopa County</u>, #2 CA-CV 92-0185, 865 P.2d 808 (Ariz. App. 1993), the court held that the county had no duty to crime victim's family to identify victim's remains. However, the parents of a murder victim had a cause of action against

the medical examiner for incineration of the remains due to space needs, as they had a statutory right to receive the body for interment or cremation. The siblings could not recover damages for emotional distress and had no right of their own to receive remains. A \$950,000 award was reversed and a new trial was ordered, limited to the claims of the parents against the medical examiner's office.

See also <u>Jordan v. Brantley</u>, #1900617, 589 So.2d 680 (Ala. 1991), in which the court overturned a \$200,000 jury award against state troopers for removing identification from the bodies of two youths killed in a traffic accident and later misidentified. The jury's use of a dictionary for the definition of "reasonable" was prejudicial misconduct requiring a new trial.

Care and Handling of Bodies

The question of how dead bodies are cared for and handled has also been an issue in a number of lawsuits. This is also largely an issue of state law or general negligence principles rather than federal law. In *Perryman v. County of Los Angeles*, #B194373, 153 Cal. App. 4th 1189, 63 Cal.Rptr.3d 732 (Unpub. Cal. App. 2007), the court held that a county coroner had no mandatory statutory duty to embalm or refrigerate the body of a murder victim or otherwise ensure that the remains continued to be intact. The family of the victim could not recover damages under either state law or federal civil rights law for the grief and anguish they allegedly suffered after observing the victim's decomposed and "unrecognizable" body after the coroner had retained it for approximately a week. The court also noted that, under federal civil rights law, the family had no constitutionally protected property right in the body. (This case is no longer citable, as it was ordered de-published when the California Supreme Court granted review. That review was later dismissed, and the principle stated in the above decision appears to still be valid. *Perryman v. County of Los Angeles*, #S156334, 208 P.3d 622 94 Cal. Rptr. 3d 684; 2009 Cal. Lexis 5350).

What about the removal or disposal of body parts? In <u>Albrecht v. Treon</u>, #09-3703, 617 F.3d 890 (6th Cir. 2010), cert. denied, #10-867, 131 S. Ct. 1047 (2011), a couple sued the county coroner and other defendants, claiming that their due process rights were violated when their son's brain was removed during an autopsy, and subsequently destroyed rather than returned. Noting that state law controls the issue of whether there are property rights in dead bodies and their parts, a federal appeals court found that there are no property rights, under Ohio law, in body parts removed by a coroner during an autopsy conducted for purposes of a criminal investigation. Judgment on the pleadings for the defendants was therefore upheld.

Similarly, in <u>Waeschle v. Dragovic</u>, #08-2228, 2009 U.S. App. Lexis 16083, 2009 Fed App. 0258P (Unpub. 6th Cir.). The daughter of a decedent claimed that a county medical examiner violated her Fourteenth Amendment due process right by a failure to return her mother's brain following an autopsy. The mother had fallen at a nursing home where she lived, and died of her injuries. The autopsy was conducted at police request as part of an investigation of the daughter's suspicion that the fall was caused by neglect or abuse. After the daughter disposed of her mother's body, she found out that the brain had been incinerated as medical waste.

The medical examiner was entitled to qualified immunity because any supposed constitutional right to dispose of the decedent's body was not clearly established. Any state-created property right under Michigan law to post-autopsy possession of specimens taken for purposes of a criminal investigation was not "unequivocal." State law also failed to unambiguously direct medical examiners as to how individual body parts taken for forensic examination were to be disposed of. In a subsequent proceeding, summary judgment for all defendants was upheld. *Waeschle v. Dragovic*, #11-1878, 687 F.3d 292 (6th Cir. 2012).

In a lawsuit by the family of a motorist shot and killed by police following a pursuit, the estate and family attempted to assert a claim against the medical examiner's office for negligent abuse of the corpse by failing to properly preserve it, preventing them from having an open casket at the funeral. Applying Pennsylvania state law, a federal trial court ruled that no such cause of action is possible, based on a Pennsylvania Supreme Court decision. *Whitson v. Philadelphia*, #07-2832, 2008 U.S. Dist. Lexis 87443 (E.D. Pa.).

In <u>Helmer v. Middaugh</u>, #04-2824, 159 Fed. Appx. 300, 2005 U.S. App. Lexis 27940 (Unpub. 2nd Cir.), the family of a deceased former police sergeant had no claim for violation of the constitutional right to privacy or due process based on police lieutenant's ordering of autopsy and photographs of the decedent's body. His actions did not constitute a taking of property, and the surviving family was not deprived of their father's body, or prevented from disposing of it as they saw fit.

Additionally, the body was not disturbed from a resting place. Even if a constitutionally protected privacy right had been shown, the impracticality of providing pre-seizure hearing on the performance of autopsies and the availability of a meaningful post-seizure state remedy barred any federal claim.

Privacy Issues

A very emotional issue is that of privacy surrounding the viewing of dead bodies and the possible dissemination of photographs or videos of them to the public or unauthorized persons generally. In one case, after a motorist was decapitated in a car crash, two highway patrolmen allegedly e-mailed nine "gruesome" death pictures of the body to family members and friends on Halloween for their "shock value." The pictures later were posted on the Internet. The decedent's family sued for invasion of privacy and intentional infliction of emotional distress.

A California appeals court found that the trial court improperly rejected the privacy claim, since the dissemination of the photos in this manner served no legitimate law enforcement purpose or public interest, appearing to be for the purpose of "pure morbidity and sensationalism." The plaintiffs also had a valid cause of action for negligent infliction of emotional distress, the court ruled, since it was foreseeable that the display of the pictures would cause them "devastating trauma." *Catsouras v. Calif. Highway Patrol*, #G039916, 181 Cal. App. 4th 856, 104 Cal. Rptr. 3d 352, 2010 Cal. App. Lexis 113 (4th Dist.), opinion modified, no change in judgment, 2010 Cal. App. Lexis 316.

In <u>Williams v. City of Minneola</u>, #92-624, 619 So.2d 983 (Fla. App. 1993), the court ruled that viewing by non-officers of a videotape and photos of the autopsy of a fourteen year old boy did not constitute invasion of privacy, but initially ruled that the boy's family could sue the officers and city for infliction of emotional distress, later upholding summary judgment for the city and police department on the basis of sovereign immunity.

❖ Damage Awards

The issue of the identification and handling of dead bodies, and privacy issues surrounding them is one that stirs up powerful emotions and can result in substantial damage awards. This is illustrated in *Culberson v. Doan*, #C-1-965, U.S. Dist. Ct. (S.D. Ohio), reported in The National Law Journal p. A14 (March 19, 2001), in which a federal jury awarded \$3.75 million against a village for a police chief's failure to recover the bodily remains of murder victim after dogs alerted officers to the presence of human remains at the edge of a pond in a junkyard. Subsequently, there was a \$2 million settlement in the case by the village. *Culberson v. Doan*, #C-1-97-965 (S.D. Ohio), reported in The National Law Journal, p. A4 (July 30, 2001).

In another case, a California jury awarded \$75,000 for emotional distress to the family of a deceased woman whose body was autopsied, without authorization, during a "Scared Stiff" program for youthful drunk drivers, with the autopsy displayed to them. *Garza v. County*

of Fresno, #644182-8, (Fresno Co., Calif., Super. Ct.), reported in The National Law Journal, p. B3 (August 13, 2001).

Some Suggestions

Plainly, a failure to rigorously follow proper procedures in the identification and handling of dead bodies, or disseminating photographs or videos for non-legitimate purposes can lead to lawsuits and potential civil liability. Additionally, it can result in public relations disasters for a department or agency and damage the prestige and good will of law enforcement in the community.

Each dead human body is someone's mother, father, son, daughter, or sibling. Regardless of whether they were a crime or accident victim, an ill or old person, an offender, or a fellow officer, their dead body should be treated with dignity and respect. Accordingly, there are a number of suggestions to consider:

- 1. Each department or agency should review applicable law in its jurisdiction to understand thoroughly its duties with regard to the identification and handling of human cadavers, notification of family members, and privacy issues.
- 2. Written policy and procedures on the subject should be developed and periodically reviewed.
- 3. Personnel should receive training on the developed policy and procedures. Such training should include information designed to make personnel aware of and sensitive to diverse religious, ethnic, and cultural concerns that community members may have concerning issues involving dead bodies.
- 4. Policy should strictly prohibit the dissemination of photos and videos of injured persons and dead bodies by department or agency personnel for non-legitimate purposes, including explicitly barring the release of such material to the media. Any infractions should be taken seriously and be subject to investigation and discipline, up to and including termination.

* Resources

The following are some useful resources related to the subject of this article.

- <u>Body Transport and Handling</u>. Spokane County Medical Examiner's Office. (2013).
- <u>Cadaver</u>. Wikipedia article.

- Community Caretaking Function, AELE Training Alert (2002).
- Death Investigation. Anaheim, California, Police Department Policy. 360 (2013).
- <u>Death Investigation</u>. Peoria, Arizona Police Department Policy. 360 (2013).
- <u>Disposal of human corpses</u>. Wikipedia article.
- Frequently Asked Questions. NYC Office of Chief Medical Examiner. (2014).
- <u>Negligence: Dead Body Identification/Handling</u>. AELE Case Summaries.
- The Use of Personally-Owned Mobile Phone Cameras and Pocket Video Cameras by Public Safety Personnel, 2012 (2) AELE Mo. L. J. 501.

*** References:** (*Chronological*)

- 1. Death Notification, IACP Model Policy, v. 3 n. 11 (12/1995).
- 2. Stress Among Police Body Handlers, 163 Brit. J. of Psychiatry 806-808 (1993).
- 3. Anderson, A Treatise on the Law of Sheriffs, Coroners and Constables with Forms.

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