
12-1933

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Recommended Citation

(1933) "Blackmail-Nature of the Rights in a Dead Body," *Indiana Law Journal*: Vol. 9 : Iss. 3 , Article 4.
Available at: <https://www.repository.law.indiana.edu/ilj/vol9/iss3/4>

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RECENT CASE NOTES

BLACKMAIL—NATURE OF THE RIGHTS IN A DEAD BODY—Appellant wrote a widow threatening to disinter and sell the body of her deceased husband unless a certain sum of money was paid. Held, the injury threatened in such letter rendered the writer guilty of blackmail as constituting a threat to do "injury to person or property." That the threat of "injury to person or property" within the statute denouncing blackmail includes any threat to invade any right for invasion of which an action in damages would lie for "injury to person or property," and that damage resulting to a widow for disinterment, removal or destruction of the body of her deceased husband is, to the extent of the physical and mental pain, anguish and suffering, an "injury to the person" and actionable as such.¹

The appellant contended that the affidavit did not state a cause of action under the property clause of the statute for the reason that there can be no property right in a dead body and that the affidavit, therefore, does not allege facts sufficient to show threatened injury to property.

The doctrine that a corpse is not property seems to have its origin in the dictum of Lord Coke;² and while most courts still refuse to recognize a corpse as property in the broad sense,³ all courts now concur in holding that the right to possession of the body for purposes of burial belongs to the surviving wife, husband, or next of kin.⁴ The different courts obtain this result on a variety of theories, probably the most popular being that there is a quasi-property interest in the body which the courts will protect.⁵ Other courts prefer the view that it is property subject to a trust,⁶ while Indiana went so far in an early case as to announce that bodies of

¹ Meek v. State (1933), 185 N. E. 399 (Ind.).

² 3 Coke Institute 203.

³ George H. Weinmann, *The Law of Dead Human Bodies* (1929), Bulletin of National Research Council; Enos v. Snyder (1900), 131 Cal. 68, 63 Pac. 170; Finley v. Atlantic Transport Co. (1917), 220 N. Y. 249, 115 N. E. 715; Guthrie v. Weaver (1876), 1 Mo. App. 136; Griffith v. Charlotte C. & A. R. R. Co. (1834), 23 S. C. 25.

⁴ Buchanan v. Buchanan (1899), 59 N. Y. S. 810; Guthrie v. Weaver (1876), 1 Mo. App. 136; Bogert v. City of Indianapolis (1859), 13 Ind. 134; People v. Harvey (1919), 286 Ill. 593, 122 N. E. 138; Renihan v. Wright (1890), 125 Ind. 536, 25 N. E. 322.

⁵ Wm. G. Pierce and Wife v. Proprietors of Swan Point Cemetery and Almira Metcalf (1872), 10 R. I. 227; Wall v. St. Louis & S. F. R. R. Co. (1918), 184 Mo. App. 127, 168 S. W. 257; Litteral v. Litteral (1908), 131 Mo. App. 306, 111 S. W. 872; Gray v. State (1908), 55 Texas Cr. R. 90, 114 S. W. 635; Wilson v. St. Louis & S. F. R. Co. (1912), 160 Mo. App. 649, 142 S. W. 775; Floyd v. Atlantic Coast Line Ry. Co. (1914), 167 N. C. 55, 83 S. E. 12; Keyes v. Konkel (1899), 119 Mich. 550, 78 N. W. 649; England v. Pocahontas Coal Co. (1920), 86 W. Va. 575, 104 S. E. 46.

⁶ Pettigrew v. Pettigrew (1904), 207 Pa. St. 313, 56 Atl. 378.

the dead belong to the surviving relatives as property.⁷ In a later decision, however, the same court, without mentioning that case, held that while the right was one which the law would recognize it was not property.⁸ This would now seem to be the settled law of this state—at least unless changed by the court's decision in the principal case that "if there is any right of control over or interest in an inanimate material thing, it would seem to be property." The adoption of this rule would solve a great many of the problems that arise in litigation involving dead bodies, particularly since most courts seem to think it necessary to find either the violation of a property right or injury to person in order to give a remedy in this type of case. The objection to it in the past, or at least the one advanced by the courts, seems to have been largely the sentimental reason that owning a corpse as property is somewhat shocking.¹⁰

The court in the principal case then, without expressly stating that there was such a threat to injure property as would sustain an action of blackmail, made the positive statement that the disinterment of the body would be such an injury to person by reason of the mental pain, anguish, and suffering of the widow that it would sustain an action for damages and thus fall within the statute denouncing blackmail. There is authority both for¹¹ and against¹² the proposition that mental suffering is a proper element of damages in an action for the mutilation or disinterment of a corpse where no actual pecuniary loss is alleged or proved. Those courts holding that damages are recoverable, undoubtedly reach a more just result, although the great weight of authority is that mental suffering in order to be an element of damage must be connected with physical injury,¹³ breach of contract,¹⁴ trespass,¹⁵ or accompany some other independent cause of action.¹⁶ For instance, failure to transport a dead body,¹⁷ to pre-

⁷ *Bogert v. City of Indianapolis* (1859), 13 Ind. 134; (1896-97), 10 Harv. L. Rev. 51. For other cases holding that a dead body is property see *Miner v. Canadian Pac. R. Co.* (1920), 15 West L. Rep. 161; *Larson v. Chase* (1891), 47 Minn. 238, 50 N. W. 238.

⁸ *Orr v. Dayton and Muncie Traction Company* (1912), 178 Ind. 40, 96 N. E. 462.

⁹ *Orr v. Dayton and Muncie Traction Company* (1912), 178 Ind. 40, 96 N. E. 462; *Renihan v. Wright* (1890), 125 Ind. 536, 25 N. E. 822.

¹⁰ (1896-97), 10 Harv. L. Rev. 51; (1910-11), 24 Harv. L. Rev. 316.

¹¹ *Hassard v. Lehane* (1912), 128 N. Y. S. 161; *Larson v. Chase* (1891), 47 Minn. 238, 50 N. W. 238; *Medical College of Georgia v. Rushing* (1907), 1 Ga. App. 468, 57 S. E. 1083; *Koerber v. Patek* (1905), 125 Wis. 453, 102 N. W. 40.

¹² *Nail v. McCullough and Lee* (1923), 88 Okla. 243, 212 Pac. 981; *Kelan v. Terre Haute & Indianapolis R. R. Co.* (1897), 18 Ind. App. 202, 47 N. E. 694.

¹³ *Morse v. Duncan* (1882), 14 Fed. 396; *Kalen v. Terre Haute & I. R. Co.* (1897), 18 Ind. App. 202, 47 N. E. 694; *Gatzow v. Buening* (1900), 106 Wis. 1, 81 N. W. 1003; *Beaulieu v. Great Northern Ry. Co.* (1907), 103 Minn. 47, 114 N. W. 353; *Wall v. St. Louis & S. F. R. Co.* (1914), 184 Mo. App. 127, 168 S. W. 257.

¹⁴ *Hall v. Jackson* (1913), 24 Colo. App. 225, 134 Pac. 151; *Loy v. Reid* (1914), 11 Ala. App. 231; *Reese v. Western Union Telegraph Co.* (1890), 123 Ind. 294, 24 N. E. 163; *Renihan v. Wright* (1890), 125 Ind. 536, 25 N. E. 822.

¹⁵ *Thomas F. Meagher v. Driscoll* (1868), 99 Mass. 281; *Bessemer Land and Implement Company v. Jenkins* (1895), 111 Ala. 125, 18 So. 565; *Jacobus v. Congregation of Children of Israel* (1899), 107 Ga. 518, 33 S. E. 853.

¹⁶ *Foley v. Phelps* (1896), 37 N. Y. S. 471; *Wright v. Hollywood Cemetery Corporation* (1901), 112 Ga. 884, 38 S. E. 94.

¹⁷ *Wells, Fargo and Company Express v. Fuller* (1893), 4 Tex. Civil App. 213, 23 S. W. 412; *Birmingham Transfer and Traffic Company v. Still* (1913), 7 Ala. App. 556, 61 So. 611.

pare it properly for burial,¹⁸ to bury,¹⁹ or to keep until ready for burial,²⁰ have all been held to be actionable wrongs for which mental suffering of the one entitled to the body was a proper element of damages. But even the more liberal courts do not go so far as to hold that mental suffering alone may be an injury to person. Rather, they base their decisions on the ground that this situation falls within that class of cases involving wilful assault without physical contact, obstruction of the right to vote, malicious prosecution and alienation of affections,²¹ where the courts have no difficulty in entertaining an action and awarding compensation although the interests involved are neither property rights or injury to person. The interests involved in these cases have been designated as the interest in freedom from apprehension of harmful or offensive contact, the interest in political relations and activities, freedom from unjustifiable and unreasonable litigation, and the interest in the marital relation,²² respectively. It is submitted that the interest in a dead body is an entirely separate and distinct interest; namely, interest in disposing of the body and maintaining it inviolate. The whole controversy, and the problem of the court in this case, as in many others where the remedy is dependent upon a statute, arises out of the erroneous concept that all actionable injuries are either injury to "person" or to "property" interests. That this assumption is untrue is too obvious to need exposition. However, the statute in question is drawn in these terms, and it is thus necessary for the court to classify the wrong in one category or the other in order to reach a just result.

A. A. C.

EVIDENCE—THE RULE AGAINST HEARSAY—This action was brought by the personal representative of a decedent to recover for his wrongful death. It was alleged that the defendant had caused the death by negligently striking and running over the decedent with an automobile. During the course of the trial, evidence of conversations between unidentified persons shortly after the accident was admitted over the defendant's objection. The witness testified that the declarants had said the defendant was drunk and had driven upon the wrong side of the road "to kill a man". Held, the evidence was admissible.¹

The only objections made to the admission of this evidence at the trial were that it was "unfair", "not proper", and others equally general. There court held that there was no error in admitting the evidence over such objections, since they were so general that they did not point out the error the defendant wishes to present. An examination of the cases cited in the opinion demonstrates that the court was entirely correct in so holding.

The court, however, failed to stop at this point but went on to say that it was necessary for it to find some ground upon which the evidence was

¹⁸ Hall v. Jackson (1913), 24 Colo. App. 225, 134 Pac. 151.

¹⁹ Wright et al. v. Hollywood Cemetery Corporation (1901), 112 Ga. 334, 38 S. E. 94.

²⁰ Renihan v. Wright (1890), 125 Ind. 536, 25 N. E. 822.

²¹ Koerber v. Patek (1905), 123 Wis. 453, 102 N. W. 40; Larson v. Chase (1891), 47 Minn. 238, 50 N. W. 238.

²² Harper, A Treatise on the Law of Torts (1933), pp. 43, 605, 583, 557.

¹ Garner v. Morgan, Appellate Court of Indiana, Jan. 26, 1933, 183 N. E. 916.