

## EMOTIONAL DISTRESS RECOVERY FOR MISHANDLING OF HUMAN REMAINS: A FIFTY STATE SURVEY

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### ABSTRACT

*Death is unique in the human race in the sense that once someone dies, unlike in many other species, humans still have attachment and respect for the dead. This attachment and respect should be reflected in the law of the dead. This Article surveys cases of emotional distress recovery for negligent mishandling of human remains among the fifty states. Three things come out clearly. First, jurisdictions that allow pure emotional distress recovery have coalesced around a small range of options. Second, jurisdictions that do not allow stand-alone emotional distress recovery for mishandling of human remains rely on the familiar arguments supporting the distinction between physical and emotional injury and treating the latter as less legitimate. Third, even among the jurisdictions that allow pure emotional distress recovery, standing is a further limitation to plaintiffs' recovery. This Article suggests abandoning Restatement (Second) of Torts section 46, in favor of Restatement (Third) of Torts section 47; incorporating the principles of evidence-based law in negligent mishandling of human remains; and the application of moral law as a way to respect the dead.*

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## INTRODUCTION

For many of us, the death of a loved one is the most painful moment of our lives.<sup>1</sup> Oftentimes, such deaths may even be accompanied by or caused by a person's tortious acts. For

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1. The author can attest to this assertion having experienced the deaths of his grandparents, parents, and two siblings.

example, on February 26, 2020, a hearse loaded with two corpses was stolen outside of a church in Pasadena, California, where it was parked to drop off one of the caskets.<sup>2</sup> When the driver came out of the church, the hearse was gone—with the other corpse.<sup>3</sup> In a criminal context, the suspect could be charged with theft of the hearse,<sup>4</sup> body snatching,<sup>5</sup> desecration of a corpse,<sup>6</sup> vandalism,<sup>7</sup> obstruction of justice (assuming evidence is taken away from a crime scene),<sup>8</sup> conversion,<sup>9</sup> and possibly theft of the corpse.<sup>10</sup> Here, the crimes are likely to cause

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2. *Id.*

3. *Id.*

4. See, e.g., Dan Alexander, *Hearse Stolen from Straford Funeral Home by Owner's Daughter*, N.J. 101.5 (July 3, 2013), <https://nj1015.com/hearse-stolen-from-strafor-funeral-home/> (noting that a woman was charged with vehicle theft after stealing a hearse from a funeral home).

5. See *People v. Reid*, 201 Cal. Rptr. 3d 295, 299 (Cal. Ct. App. 2016) (discussing the common law crime of body snatching).

6. Mary Catherine Joiner & Ryan M. Seidemann, *Rising from the Dead: A Jurisprudential Review of Recent Cemetery and Human Remains Cases*, 45 OHIO N.U. L. REV 1, 2 (2019) (“Among the types of various issues that arise with regard to death that may, and sometimes do, lead to litigation in the United States include desecration, mishandling or losing human remains, control of remains, property disputes, regulatory issues, and the mismanagement of cemetery trust funds.”); see, e.g., S.C. CODE ANN. § 16-17-600(A)(3) (2010) (“It is unlawful for a person willfully and knowingly, and without proper legal authority to . . . desecrate human remains.”).

7. See, e.g., S.C. CODE ANN. § 16-17-600(B)(1) (2010) (“It is unlawful for a person willfully and knowingly, and without proper legal authority to . . . obliterate, vandalize, or desecrate a burial ground where human skeletal remains are buried, a grave, graveyard, tomb, mausoleum, Native American burial ground or burial mound, or other repository of human remains.”).

8. See *Pickett v. State*, No. 18A-CR-2791, 2019 Ind. App. Unpub. LEXIS 1120, at \*11 (Ind. Ct. App. Aug. 28, 2019).

9. Although conversion is the civil equivalent of larceny, some states recognize the criminal offense of theft by conversion. E.g., GA CODE ANN. § 16-8-4 (West 2021). Other states do not recognize the criminal offense of theft by conversion. See, e.g., *Boorman v. Nevada Mem'l Cremation Soc'y*, 236 P.3d 4, 9 (Nev. 2010) (“A claim for conversion of a deceased human body or its parts does not exist under Nevada law.”).

10. See, e.g., *State v. Harelson*, 938 P.2d 763, 765 (1997) (discussing a man's conviction for theft of a corpse). In an eerily similar case, a man in Riverside, California stole a van parked outside of a mortuary after finding the keys in the ignition. See Josh Hafner, *Man Returns Stolen Van after Finding Dead Body Inside, Police Say*, USA TODAY (Feb. 15, 2017, 11:35 AM), <https://www.usatoday.com/story/news/nation-now/2017/02/15/man-returns-stolen-van-after-finding-dead-body-inside-police-say/97942014/>. Upon realizing that there was a dead body inside the van, the man went back to the mortuary, returned the original van, and stole another van that did not contain a dead body. *Id.* An employee who had tried to stop the man from stealing the second van called the police, after which the man led the police on a ten-minute chase before being arrested. *Id.* After being apprehended, the man “was charged with two counts of vehicle theft, one count of assault with a deadly weapon and one count of evading

emotional distress to the family members of the deceased if the human remains are destroyed or vandalized. Now consider a scenario where the suspect takes the police on a high-speed car chase, takes a sharp turn, the casket slides out of the hearse, tips open, and the corpse rolls out into the street, landing in a ditch nearby. The pain felt by the family of the deceased would be incalculable. Would they be able to recover for their emotional distress were they to sue the hearse's driver for leaving the keys in the ignition or causing the corpse to roll out into the street? Would they recover under vicarious liability?

Consider the millions of deaths caused by the coronavirus pandemic<sup>11</sup>—which have overwhelmed mortuaries and funeral homes.<sup>12</sup> As a result, many hospital morgues, funeral homes, and mortuaries ran out of space and started storing dead bodies in mobile trailers and warehouses.<sup>13</sup> One funeral home in New York City was unable to handle the massive number of bodies and resorted to storing them on ice in rented, unrefrigerated U-Haul trucks, resulting in overwhelming stench that overtook neighborhood.<sup>14</sup> Can the next of kin sue this funeral home for negligent mishandling of the corpses, despite the pandemic? The answers to these questions vary depending on the

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police." *Id.* Notably, the man was not charged with the theft of the corpse. *Id.*; see also *Reid*, 201 Cal. Rptr. 3d at 300 ("[C]rimes against remains of the dead have attendant public health and moral concerns not presented by crimes of larceny.").

11. *NYC Coronavirus World Map: Tracking the Global Outbreak*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/world/covid-cases.html> (Oct. 11, 2021) (noting that, as of October 11, 2021, there had been 4,851,764 reported global deaths as a result of the COVID-19 pandemic).

12. See, e.g., Christopher J. Brooks, *Funeral Home Staff Overwhelmed by Waves of Covid-19 Deaths*, CBS NEWS (Jan. 15, 2021, 4:31 PM), <https://www.cbsnews.com/news/covid-deaths-funeral-homes-overwhelmed/>; Rong-Gong Lin II & Luke Money, 'A Mass Fatality Event': California Struggles with Backlog of Bodies of COVID-19 Victims, L.A. TIMES (Jan. 9, 2021, 8:40 PM), <https://www.latimes.com/california/story/2021-01-09/with-hospital-morgues-overwhelmed-by-bodies-coroner-begins-storing-bodies-as-covid-deaths-surge>.

13. *Id.*

14. *NYC Funeral Home Stored Dozens of Bodies in U-Haul Trucks, Producing "Overwhelming" Stench*, CBS NEWS (Apr. 30, 2020, 12:23 PM), <https://www.cbsnews.com/news/bodies-u-haul-trucks-new-york-funeral-home-covid-19/>.

jurisdictions where such acts occur. Evidently, death and the law of the dead present some unique problems.<sup>15</sup>

There is an emerging body of literature on negligent mishandling of human remains. Such literature addresses the failure of certain states to allow a cause of action for emotional distress caused by the negligent mishandling of a corpse,<sup>16</sup> hospital liability for negligent mishandling, transport, and disposition of a corpse,<sup>17</sup> and the interrelationship of human remains and burial ground cases.<sup>18</sup> Additionally, the shortcomings of the so-called “impact rule” and its effects on non-economic losses like mental anguish are widely discussed in cases and legal journals.<sup>19</sup>

What’s missing in the legal literature is an evidence-based approach, including studies that explain the relationship

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15. See *Deavors v. S. Express Co.*, 76 So. 288, 289 (Ala. 1917) (“The law as to the rights and remedies of the living as to the bodies of their dead, is not as certain as death itself.”).

16. See Kevin E. Bry, *Genuinely Distressing: Illinois’ Failure to Allow a Cause of Action for Emotional Injuries Caused by Negligent Mishandling of a Corpse*, 23 J. MARSHALL L. REV. 353, 354–56 (1990); Gary J. Simson, *An Essay on Illusion and Reality in the Conflicts of Laws*, 70 MERCER L. REV. 819, 828 n.31 (2019) (criticizing the Georgia Supreme Court’s decision in *Coon v. Medical Center, Inc.* in which the court denied the plaintiff’s request for recovery for emotional distress for negligent mishandling of human remains because the defendant’s actions did not include physical injury to plaintiff).

17. Constance Frisby Fain, Annotation, *Civil Liability of Hospital for Negligent Handling, Transportation, and Disposition of Corpse*, 86 A.L.R.5th 693 (2001) (annotating state and federal cases in which the courts have considered whether a hospital or medical center should be held liable for damages to a decedent’s surviving family members for negligent handling or treatment of a corpse or dead body).

18. See Joiner & Seidemann, *supra* note 6, at 68 (discussing various issues that arise regarding death that may lead to litigation and concluding that “[t]he law of the dead continues to defy classification under any broad legal regime and, with the rise in the number of problems related to the dead . . . such cases will only continue to proliferate”). See generally Ryan M. Seidemann, *How Do We Deal With All the Bodies? A Review of Recent Cemetery and Human Remains Legal Issues*, 3 U. BALT. J. LAND & DEV. 1 (2013) (discussing issues surrounding cemetery and human remains with regards to land, such as issues created by weather conditions, land use concerns, and desecration of graves).

19. See, e.g., WILLIAM L. PROSSER, *LAW OF TORTS* 350–51 (3d ed. 1964) (discussing the various interpretations of the impact rule and criticizing jurisdictions that “have found ‘impact’ in minor contacts with the person which play no part in causing the real harm, and in themselves . . . have no importance whatever”); VICTOR SCHWARTZ, KATHRYN KELLY & DAVID PARTLETT, PROSSER, WADE, SCHWARTZ, KELLEY, AND PARTLETT’S *TORTS* 509 (14th ed. 2020) (“[M]ost jurisdictions do not apply ‘the impact rule’ although some continue to champion it.”); Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 *Ariz. St. L.J.* 805, 816 (2004) (describing both the over and underinclusive nature of the impact rule).

between physical and emotional pain and how this distinction is likely to be blurred in cases of mishandling of human remains. This Article fills this gap by reviewing both the medical and social science literature showing that the physical-psychological injury distinction is simply a distinction without a difference. This Article surveys the law in the fifty states and the District of Columbia regarding negligent mishandling of human remains and does so for three principal reasons. First, this Article tries to identify best practices among the states, including which states provide a remedy, either by statute or common law, without the necessity of showing physical impacts. To this end, this Article supports the jurisdictions that follow the *Restatement (Second) of Torts* section 868<sup>20</sup> and disapproves of *Restatement (Second) Torts* section 46.<sup>21</sup> Second, this Article aims to serve as a valuable resource to practitioners by providing an in-depth description of the key facts and rulings of the principal cases in each state. In so doing, the Article draws some common themes and approaches among the states. Finally, this Article provides some recommendations for courts, litigants, academics, legislators, and other legal practitioners to consider when dealing with emotional distress recovery for the mishandling of human remains.

This Article proceeds in seven parts. Part I unpacks the distinction between physical and emotional pain, arguing that it is a distinction without a difference mainly because of studies showing high correlation between physical and emotional pain. Part II defines emotional distress in the context of tort law and notes that in law, emotional distress is often treated as the poor stepchild of physical pain. Part III addresses the uniqueness of

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20. The *Restatement (Second) of Torts* states that “[o]ne who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body.” RESTATEMENT (SECOND) OF TORTS § 868 (AM. L. INST. 1979) (emphasis added).

21. The *Restatement (Second) of Torts* states that “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.” RESTATEMENT (SECOND) OF TORTS § 46 (AM. L. INST. 1965).

the human corpse under the law and avers that the traditional approach concerning dead bodies represents an inadequacy—some might even say an absurdity—in the law of emotional distress recovery. Part IV then delves into the laws of the fifty-one jurisdictions regarding negligent mishandling of a corpse. First, Part IV specifically discusses the states that require physical injury versus those that do not, and concludes that jurisdictions that allow for pure emotional distress recovery have coalesced around a small range of options, including: adopting the *Restatement (Second) of Torts* section 868; making a distinction between intentionally inflicted emotional distress and negligently inflicted emotional distress; and allowing recovery where there is a special relationship or where mental distress is a highly foreseeable result of mishandling human remains. Meanwhile, the jurisdictions that do not allow for stand-alone emotional distress recovery rely on the familiar arguments supporting the distinction between physical and emotional injury and treat the latter as being less legitimate. Part V goes on to explain that even in the states where physical injury is not required, proper standing still serves to further limit a plaintiff's recovery.

Part VI calls for the abolition of the *Restatement (Second) of Torts* section 46 and highlights how its requirement that emotional distress be so severe that no reasonable person could be expected to endure it is absurd in light of empirical research showing that the effects of emotional distress are as detrimental as the effects of physical injury. Finally, Part VII proposes three approaches: adoption of the *Restatement (Third) of Torts* section 47 on negligent mishandling of corpses, reliance on evidence-based law, and application of moral law. The Article concludes by noting that death is unique to the human race in the sense that once someone dies, unlike in many other species, humans still have an emotional attachment and respect for the dead. This attachment and respect should be reflected in the law of the dead.



### I. PHYSICAL AND EMOTIONAL PAIN: A DISTINCTION WITHOUT A DIFFERENCE?

Society in general, and some courts in particular, have categorized physical and emotional pain as fire and ice; that is, so dissimilar that a distinction needs to be made.<sup>22</sup> But this is a distinction without a difference, for several reasons. First, pain and suffering can be difficult to define and quantify regardless of whether it is physical or emotional.<sup>23</sup> That is because “[p]ain is a complex sensory and emotional experience that can vary widely between people and even within an individual depending on the context and meaning of the pain and the psychological state of the person.”<sup>24</sup> According to the International Association for the Study of Pain, pain is defined as “an unpleasant sensory and emotional experience associated with actual or potential damage, or described in terms of such damage.”<sup>25</sup> One’s emotional state has an enormous influence on pain; “a negative emotional state increases pain, whereas a positive state lowers pain.”<sup>26</sup> Indeed, “[i]t is hard to imagine pain without emotion.”<sup>27</sup>

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22. See, e.g., Christopher Ogolla, *Death Be Not Strange. The Montreal Convention’s Mislabeling of Human Remains as Cargo and Its Near Unbreakable Liability Limits*, 124 DICK. L. REV. 53, 57 (2019) (discussing the Montreal Convention’s liability limits on recovery for emotional injury unaccompanied by physical injury); see also *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 6, 8 (Tex. 2008) (holding that a cause of action for emotional distress made against church members for their involvement in an effort to cast out “demons” is barred by the First Amendment, but also observing that the plaintiff’s case “was not about her physical injuries” as the evidence presented by the plaintiff at trial “related solely to her subsequent emotional or psychological injuries”).

23. See M. Catherine Bushnell, Marta Čeko & Lucie A. Low, *Cognitive and Emotional Control of Pain and Its Disruption in Chronic Pain*, 14 NATURE REV. NEUROSCIENCE 502, 502 (2013) (showing that both emotional and physical factors can have significant and very real impacts on how a person experiences pain).

24. *Id.*

25. Mark A. Lumley, Jay L. Cohen, George S. Borszcz, Annmarie Cano, Alison M. Radcliffe, Laura S. Porter, Howard Schubiner & Francis J. Keefe, *Pain and Emotion: A Biopsychosocial Review of Recent Research*, 67 J. CLINICAL PSYCH. 942, 942 (2011) (citation omitted).

26. Bushnell et al., *supra* note 23, at 502.

27. Steven J. Linton, *A Transdiagnostic Approach to and Emotion*, 18 J. APPLIED BIOBEHAVIORAL RSCH. 82, 82 (2013).

Second, the physical-psychological injury distinction presumes that physical injuries are more legitimate than psychological injuries.<sup>28</sup> Put differently, this school of thought posits that emotional distress “may be real and serious in some situations, while trivial, feigned, or imagined in others.”<sup>29</sup> But this belief presumes that physical injury can never be trivial, feigned, or imagined. That is, of course, an untenable position.

Third, the physical manifestations of emotional distress are both causally linked and rooted in reverse causality and simultaneity.<sup>30</sup> For example, an Idaho court once acknowledged the multiple physical manifestations of emotional distress, including “sleep disorders, headaches, stomach pains, suicidal thoughts, fatigue, loss of appetite, irritability, anxiety, reduced libido and being ‘shaky-voiced.’”<sup>31</sup> Each of these conditions can be *caused by* emotional distress alone. Concomitantly, each can also *lead to* emotional distress, thus indicating reverse causation and/or simultaneity.

Fourth, and even more absurd, is the attempt to distinguish pain associated with bodily injury from pain associated with the negligent mishandling of human remains—a distinction that even the common law has refused to recognize as a barrier

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28. See, e.g., *Guth v. Freeland*, 28 P.3d 982, 987 (Haw. 2001) (“[T]he primary concerns that prompt courts to limit recovery for emotional distress in general are: 1) emotional distress is temporary and often trivial; 2) the distress may be imagined and is easily feigned; and 3) it may seem unfair to hold defendants, whose actions were merely negligent, financially responsible for harm that appears remote from the actual conduct.”); Brian H. Bornstein, *Physical v. Mental Pain: A Legal Double Standard?*, 40 MONITOR ON PSYCH. 18, 18 (2009).

29. *Muchow v. Lindblad*, 435 N.W.2d 918, 921 (N.D. 1989) (“Historically, the recognition and identification of the requirements of an independent claim for infliction of emotional distress have troubled courts because emotional distress may be real and serious in some situations, while trivial, feigned, or imagined in others.”).

30. See Jeffrey B. Vancouver & Michael A. Warren, *This Is How We Do Research Around Here: Socializing Methodological and Measurement Issues*, in THE OXFORD HANDBOOK OF ORGANIZATIONAL SOCIALIZATION 196 (Connie R. Wanberg ed., 2012) (“Simultaneity is similar to reverse causality, except that it is the idea that causality goes both ways. That is, reverse causality is the notion that the association between X and Y is really because Y causes X. Simultaneity is the idea that X causes Y and Y causes X.”). Here is a simple example of reverse causality: while depression may lead to obesity, obesity may in turn lead to depression.

31. *Carrillo v. Boise Tire Co.*, 274 P.3d 1256, 1265 (Idaho 2012).

to recovery.<sup>32</sup> In fact, there are two sources of pain here: first, the loss of one's relative and second, a defendant's negligence in handling the human remains. To condition recovery on the showing of a link between emotional pain stemming from the death of a relative and physical pain strains credulity.<sup>33</sup> That is to say that the line between physical and emotional distress regarding the loss of one's loved ones is clearer on paper than in practice. As an example, exposure to traumatic events may be short-lived or long lasting.<sup>34</sup> Where death is involved, particularly of a loved one, the emotional pain is likely to last longer than many forms of physical pain.<sup>35</sup>

Fifth, various studies have shown that both physical and emotional pain "may rely on some of the same behavioral and neural mechanisms that register pain-related affect."<sup>36</sup> For example, in 2001, Francis Keefe and others published a review

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32. Professor Rabin cites two scenarios where common law made an exception to the absolute barrier to recovery for standalone negligent infliction of emotional distress cases: "mishandling of a corpse and erroneous announcement by telegraphic communication of a death in the family." See Robert L. Rabin, *Emotional Distress in Tort Law: Themes of Constraint*, 44 WAKE FOREST L. REV. 1197, 1199 (2009).

33. See *Allen v. Jones*, 163 Cal. Rptr. 445, 449–50 (Cal. Ct. App. 1980) (Gardner, J., concurring) (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 328 (4th ed. 1978)).

34. Gaurav Patki, Ankita Salvi, Hesong Liu & Samina Salim, *Witnessing Traumatic Events and Post-Traumatic Stress Disorder: Insights from an Animal Model*, 600 NEUROSCIENCE LETTERS 28, 28 (2015).

35. See Bornstein, *supra* note 28 ("[S]tudies show psychological injuries can take as long to heal, can be as resistant to treatment and can impair normal functioning as much as or more than physical injuries."); See Chris Irvine, *Emotional Pain Hurts More Than Physical Pain, Researchers Say*, TELEGRAPH (Aug. 28, 2008, 6:47 PM), <https://www.telegraph.co.uk/news/newstopics/howaboutthat/2639959/Emotional-pain-hurts-more-than-physical-pain-researchers-say.html> (explaining that certain types of emotional pain can be felt for a longer period of time than physical pain); Lumley et al., *supra* note 25, at 942.

36. C. Nathan DeWall, Geoff MacDonald, Gregory D. Webster, Carrie L. Masten, Roy F. Baumeister, Caitlin Powell, David Combs, David R. Schurtz, Tyler F. Stillman, Dianne M. Tice & Naomi I. Eisenberger, *Acetaminophen Reduces Social Pain: Behavioral and Neural Evidence*, 21 PSYCH. SCI. 931, 931 (2010); see also Naomi I. Eisenberger, *Social Pain and the Brain: Controversies, Questions, and Where to Go from Here*, 66 ANN. REV. PSYCH. 601, 601 (2015) (noting that evidence shows that, regardless of whether an individual is experiencing physical, social, or emotional pain, the pain receptors involved are all located within the same neural region). *But cf.* Tor D. Wager, Lauren Y. Atlas, Martin A. Lindquist, Mathieu Roy, Choong-Wan Woo & Ethan Kross, *An fMRI-Based Neurologic Signature of Physical Pain*, 368 NEW ENG. J. MED. 1388, 1394–95 (2013) (suggesting that the neurologic signature response is substantially stronger for physical pain than for social pain).

of the available literature on pain and emotion.<sup>37</sup> They found that “emotional distress has a strong influence on the treatment-seeking behaviors of persons with pain symptoms.”<sup>38</sup> They further conclude that “[e]motional distress may lead people to interpret sensations as symptoms of pain, or it may simply prompt treatment seeking.”<sup>39</sup> In a separate study of pain in times of stress, researchers reviewed several studies on stress and how it affects human behavior.<sup>40</sup> They found that “[t]he stress system does not function alone; the genetic and psychological makeup of a person, experience and environmental factors all contribute to the response to pain. The interactions among these factors subsequently result in the sequelae of survival, disease or even death.”<sup>41</sup> A correlational study of emotional abuse within intimate partnerships reported that “[t]he effects of emotional abuse are just as detrimental as the effects of physical abuse” while also noting that “the law recognizes physical and sexual violence as crimes against the individual but not emotional abuse although it is a pervasive form of relationship abuse.”<sup>42</sup>

Sixth, numerous studies have also lent credence to the link between physical and emotional distress, particularly with regard to post traumatic stress disorder (PTSD).<sup>43</sup> These studies

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37. Francis J. Keefe, Mark Lumley, Timothy Anderson, Thomas Lynch & Kimi L. Carson, *Pain and Emotion: New Research Directions*, 57 J. CLINICAL PSYCH. 587, 587 (2001).

38. *Id.* at 599.

39. *Id.*

40. Asma Hayati Ahmad & Rahimah Zakaria, *Pain in Times of Stress*, 22 MALAYSIAN J. MED. SCIS. (SPECIAL ISSUE) 52, 57 (2015) (“Stress modulates pain perception, resulting in either stress-induced analgesia [the inability to feel pain] or stress-induced hyperalgesia [an increased sensitivity to feeling pain and extreme response to pain], as reported in both animal and human studies.”).

41. *Id.*

42. Günnur Karakurt & Kristin E. Silver, *Emotional Abuse in Intimate Relationships: The Role of Gender and Age*, 28 VIOLENCE & VICTIMS 804, 818 (2013) (citation omitted).

43. See, e.g., Bonnie L. Green & Rachel Kimerling, *Trauma, Posttraumatic Stress Disorder, and Health Status*, in *TRAUMA & HEALTH: PHYSICAL HEALTH CONSEQUENCES OF EXPOSURE TO EXTREME STRESS* 13, 21–22 (Paula P. Schnurr & Bonnie L. Green eds., 2004) (citing the CDC Vietnam Experience study and noting that a PTSD diagnosis was associated with an increased risk of “chronic disorders including circulatory, digestive, musculoskeletal, endocrine, respiratory, and non-sexually transmitted infectious disease”).

suggest that PTSD is directly related to the risk of developing hypertension.<sup>44</sup> One scholar, Alexander McFarlane, “explore[d] the evidence . . . [regarding] the delayed effects of traumatic stress and its cumulative burden on psychological and physical health.”<sup>45</sup> He had a surfeit of findings. Specifically, MacFarlane found that “among psychiatric disorders, PTSD is the one with the strongest relationship with somatization,” and particularly as it relates to “medically unexplained pain.”<sup>46</sup> Additionally, “[t]he association between PTSD and a number of other physical conditions emphasizes that the effects of traumatic stress are far reaching.”<sup>47</sup> These findings stand for the proposition that psychological and physical health are intimately intertwined. Similarly, another researcher studying the effects of traumatic stress on the brain noted that “[t]raumatic stressors such as early trauma can lead to . . . [PTSD], which affects about 8% of Americans at some time in their lives, as well as depression, substance abuse, dissociation, personality disorders, and health problems.”<sup>48</sup>

Finally, in 2011, the influential Institute of Medicine convened a committee to address the state of pain research, care, and education.<sup>49</sup> In its findings, the committee noted that “[p]ain is a uniquely individual and subjective experience that depends on a variety of biological, psychological, and social factors, and different population groups experience pain differentially.”<sup>50</sup> Moreover, pain:

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44. See *id.* at 22 (“In the CDC Vietnam study sample, chronic PTSD was associated with electrocardiogram (ECG) abnormalities, atrioventricular defects, and infarctions.”).

45. Alexander McFarlane, *The Long-Term Costs of Traumatic Stress: Intertwined Physical and Psychological Consequences*, 9 *WORLD PSYCHIATRY* 3, 3 (2010).

46. *Id.* at 6. Somatization means “the existence of physical bodily complaints in the absence of a known medical condition.” *Somatization*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/somatization> (last visited Jan. 21, 2022).

47. McFarlane, *supra* note 45, at 7.

48. See J. Douglas Bremner, *Traumatic Stress: Effects on the Brain*, 8 *DIALOGUES CLINICAL NEUROSCIENCE* 445, 445 (2006).

49. See generally INST. OF MED., *RELIEVING PAIN IN AMERICA: A BLUEPRINT FOR TRANSFORMING PREVENTION, CARE, EDUCATION, AND RESEARCH* 1 (2011).

50. *Id.*

cannot be seen, like bleeding; it cannot be felt, like a lump; it cannot be heard, like a heart arrhythmia; it has no taste or odor; and it often is not confirmed by x-ray or more sophisticated imaging procedures. No current clinical tests for pain are analogous to temperature, blood pressure, or cholesterol measurements. Clinical findings that can be seen—a broken bone on an x-ray, for example—do not necessarily correlate well with the severity of pain the patient perceives.<sup>51</sup>

The preceding discussion emphasizes the close relationship between stress and physical health in the medical and social science literature. Stress, of course, encompasses mental pain and anguish, which is synonymous with emotional distress.<sup>52</sup> This interrelationship then prompts a definitional question: what is emotional distress?

## II. WHAT IS EMOTIONAL DISTRESS?

Black's Law Dictionary defines emotional distress as "[a] highly unpleasant mental reaction (such as anguish, grief, fright, humiliation or fury) that results from another person's conduct; emotional pain and suffering . . ."<sup>53</sup> The *Restatement (Second) of Torts* notes that emotional distress has been described as "mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises."<sup>54</sup> California civil jury instructions state that "emotional distress includes suffering, anguish, fright, horror,

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51. *Id.* at 25.

52. In Black's Law Dictionary, the section on mental anguish cross-references emotional distress. *Mental Anguish*, BLACK'S LAW DICTIONARY (11th ed. 2019).

53. *Emotional Distress*, BLACK'S LAW DICTIONARY (11th ed. 2019).

54. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. L. INST. 1965).

nervousness, grief, anxiety, worry, shock, humiliation and shame.”<sup>55</sup>

Distress involving the emotions described above can make life miserable for the sufferer and can even cause serious bodily harm.<sup>56</sup> For example, “[e]merging evidence has shown that social pain—the painful feelings that follow from social rejection, exclusion, or loss—relies on some of the same neural regions that process physical pain, highlighting a possible physical-social pain overlap.”<sup>57</sup> Yet physical pain seems to engender more sympathy from the jury than emotional pain,<sup>58</sup> even though both can be equally devastating. Perhaps this could be because “pain is often treated as a purely sensory experience reflecting underlying tissue damage.”<sup>59</sup> But studies show psychological injuries can take as long to heal, can be as resistant to treatment and can impair normal functioning as much as or more than physical injuries.”<sup>60</sup> Judge Richard Posner captured the essence of pain and suffering in *Kwasny v. U.S.* by noting:

[w]e disagree with those students of tort law who believe that pain and suffering are not real costs and should not be allowable items of damages in a tort suit. No one likes pain and suffering and most people would pay a good deal of money to be free from them. If they were not recoverable in damages, the cost of negligence would be less to the tortfeasor and there would be more

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55. JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS No. 1620 (2014).

56. Lawrence Vold, *Tort Recovery for Intentional Infliction of Emotional Distress*, 18 NEB. L. BULL. 222, 222 (1939).

57. Eisenberger, *supra* note 36, at 601.

58. See, e.g., RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. L. INST. 1965) (noting that, for claims of emotional distress, the law seldom interferes because “emotional distress is a part of the price of living among people”).

59. Lumley et al., *supra* note 25, at 942.

60. Bornstein, *supra* note 28, at 18.

negligence, more accidents, more pain and suffering, and hence higher social costs.<sup>61</sup>

In sum, the dichotomy between physical and emotional pain in tort law seems to be a distinction without a difference. Whether the reaction is fright, horror, grief, shame, humiliation, anger, worry, nausea, depression, obesity, fainting, or heart attack, the body still suffers. Yet, in law, emotional distress is the poor stepchild of physical pain. And even though courts have changed their views of emotional distress with time, the ground is still “littered with fossilized rules.”<sup>62</sup> The application of these fossilized rules in cases of negligent mishandling of human remains has led to some confusion,<sup>63</sup> in part, due to the uniqueness of the human corpse under the law.<sup>64</sup>

### III. UNIQUENESS OF THE HUMAN CORPSE UNDER THE LAW

Death has always been unique; some might even say it is strange.<sup>65</sup> More than a century ago, Justice Lumpkin of the Georgia Supreme Court wrote

Death is unique. It is unlike aught else in its certainty and its incidents. A corpse in some respects is the strangest thing on earth. A man who but yesterday breathed, and thought, and walked among us has passed away. Something has gone. The body is left still and cold, and is all that is visible to mortal eye of the man we knew. Around it cling love and memory. Beyond it may reach hope. It must be laid away. And the law—

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61. *Kwasny v. United States*, 823 F.2d 194, 197 (7th Cir. 1987).

62. Dan B. Dobbs, *Undertakings and Special Relationships in Claims for Negligent Infliction of Emotional Distress*, 50 ARIZ. L. REV. 49, 51 (2008) (“Courts have slowly, but more or less constantly, changed their answers over the last one hundred years or so as they have struggled to deal with negligently inflicted stand-alone emotional harm. In so doing, they have left the ground littered with fossilized rules and have created many paths to confusion.”).

63. *See id.*

64. Ogolla, *supra* note 22, at 72 (citing *Louisville & Nashville R.R. v. Wilson*, 51 S.E. 24, 25 (Ga. 1905)).

65. *Id.* (citing *Louisville & Nashville R.R.*, 51 S.E. at 25).



that rule of action which touches all human things—must touch also this thing of death[.] It is not surprising that the law relating to this mystery of what death leaves behind cannot be precisely brought within the letter of all the rules regarding corn, lumber, and pig-iron. And yet the body must be buried or disposed of. If buried, it must be carried to the place of burial. And the law, in its all-sufficiency, must furnish some rule, by legislative enactment, or analogy, or based on some sound legal principle, by which to determine between the living questions of the disposition of the dead, and rights surrounding their bodies. In doing this, the courts will not close their eyes to the customs and necessities of civilization in dealing with the dead, and those sentiments connected with decently disposing of the remains of the departed which furnish one ground of difference between men and brutes.<sup>66</sup>

Judge Lumpkin captures how unique death is under the law; that it encompasses both the law of the living and the dead. Within many cultures of the world, there is respect for the dead.<sup>67</sup> Even here in the United States, we revere the dead, partly as evidenced by our tradition of burying our deceased in caskets, some more elaborate than others. This established respect for the dead is common among a variety of cultures,<sup>68</sup> which makes it all the more distressing when the deceased are disturbed. Sir William Blackstone, in his commentaries of the laws of England, once wrote,

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66. *Louisville & Nashville R.R.*, 51 S.E. at 25.

67. See generally DEATH ACROSS CULTURES: DEATH AND DYING IN NON-WESTERN CULTURES (Helaine Selin & Robert M. Rakoff eds., 2019) (discussing death, funerals, rituals, and the afterlife among cultures in Europe, the Middle East, Asia, Africa, and North and South America).

68. See *id.*

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. The parson, indeed, who has the freehold of the soil, may bring an action of trespass against such as dig and disturb it; and if [anyone] in taking up a dead body, steals the shroud or other apparel, it will be felony, for the property thereof remains in the executor, or whoever was at the charge of the funeral.<sup>69</sup>

Succinctly put, Blackstone teaches “that a dead body is not the subject of property right and becomes, after burial, a part of the ground to which it has been committed,” and whoever owns the burial ground can bring a cause of action against anyone who “digs and disturbs the grave.”<sup>70</sup>

But Blackstone’s position fails to answer numerous questions. If a corpse is not property, then what is it? Or, is it in fact property?<sup>71</sup> What happens to those who interfere with the dead or the wishes of the next of kin? As early as 1960, one student Note called for the total abandonment of the traditional approach concerning dead bodies, observing that

[the] traditional approach concerning dead bodies represents a definite inadequacy in the law for the recovery of damages for mental disturbance. This inadequacy would best be remedied by a frank

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69. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 429 (George Sharswood ed., Phila: J.B. Lippincott Co. 1893) (1765).

70. *Bessemer Land & Improvement Co. v. Jenkins*, 18 So. 565, 567 (Ala. 1895).

71. See Mary Lowth, *Charles Byrne, Last Victim of the Bodysnatchers: The Legal Case for Burial*, 29 MED. L. REV. 252, 273 (2021); see also Shyamkrishna Balganes, *Quasi-Property: Like, but Not Quite Property*, 160 UNIV. PA. L. REV. 1889, 1895–96 (2012) (discussing quasi-property interests). Professor Balganes writes that the rule developed “from the rather strict division between the courts of common law and the ecclesiastic courts . . . [as] the former were allowed to develop any rules necessary to ensure the proper burial of corpses in accordance with any required religious practices.” *Id.*

admission that negligent mutilation or indignity to human remains is *sui generis*, and damages for mental disturbance should be awarded without proof of aggravated misconduct.<sup>72</sup>

Although it is true that some courts have now totally abandoned the anachronistic traditional approach of treating dead bodies as quasi-property,<sup>73</sup> in other states, the quasi-property interest endures.<sup>74</sup> This shows that some jurisdictions are still stuck in the origins of American common law where courts were reluctant to adopt the maxim that corpses were no one's property. However, at the same time, these courts rationalized that "corpses seemed deserving of some protection against mutilation in order to protect the emotional interests of the family and the next of kin."<sup>75</sup> To be sure, one cannot generally receive emotional distress compensation for damage to property,<sup>76</sup> although a few cases allow recovery if one actually witnesses the property's destruction and is in the zone

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72. *Damages for Mental Suffering Resulting from Mistreatment of a Cadaver*, 1960 DUKE L.J. 135, 138–39 (1960) (emphasis added).

73. See *Boorman v. Nevada Mem'l Cremation Soc'y, Inc.*, 236 P.3d 4, 10 (Nev. 2010) ("Consistent with the majority of jurisdictions that have addressed this issue, we cannot conclude that there is a property right in a deceased human body or its remains."); *Culpepper v. Pearl St. Bldg., Inc.*, 877 P.2d 877, 880, 882 (Colo. 1994) (finding no property right in a body that would support a conversion claim); *Wilson v. Wilson*, 138 So. 3d 1176, 1178 (Fla. Dist. Ct. App. 2014) ("Common law, our supreme court, and this Court have always held that a decedent's remains are not property.").

74. Some courts still treat dead bodies as quasi-property. See Michael H. Scarmon, Note, *Brotherton v. Cleveland: Property Rights in the Human Body—Are the Goods Oft Interred with Their Bones?*, 37 S.D. L. REV. 429, 429–30 (1992) ("American courts have been split between upholding the traditional rule that no property rights exist in cadavers, and a rule recognizing some form of property interest in a relative's remains."); *Arnaud v. Odom*, 870 F.2d 304, 308 (5th Cir. 1989) ("Louisiana has indeed established a 'quasi-property' right of survivors in the remains of their deceased relatives.").

75. Balganes, *supra* note 71, at 1896.

76. See e.g., *City of Tyler v. Likes*, 962 S.W.2d 489, 493 (Tex. 1997) (holding that plaintiff cannot recover damages for mental anguish arising out of harm to her property); *Dobbins v. Washington Suburban Sanitary Comm'n*, 658 A.2d 675, 677 (Md. App. 1995) ("We have held that a plaintiff ordinarily cannot recover for emotional injury caused by witnessing or learning of negligently inflicted injury to the plaintiff's property."); *Whaley v. Perkins*, 197 S.W.3d 665, 670 (Tenn. 2006) ("Subject to some exceptions, generally, under ordinary circumstances, there can be no recovery for mental anguish suffered by plaintiff in connection with an injury to his or her property.").

of danger,<sup>77</sup> or the act leading to the property damage is motivated by fraud, malice, or like motives.<sup>78</sup> This Article, therefore, does not discuss the property status of a corpse but rather it focuses on emotional distress compensation brought about as a result of the negligent mishandling of a corpse.

#### IV. EMOTIONAL DISTRESS RECOVERY FOR NEGLIGENT MISHANDLING OF A CORPSE

Tort law has been liberal in awarding damages for physical pain caused by a defendant's negligence—while putting stringent limits on recovery for the emotional distress caused by the same negligence, if unaccompanied by physical pain.<sup>79</sup> The following is a survey of the states that do and do not require physical injury for emotional distress recovery for mishandling of human remains.<sup>80</sup> The cases span from mistreatment of burial places, removal of the deceased's body parts without permission, wrongful burial of the deceased, mutilation of the corpse, misplacement, misidentification or misdelivery of human remains, loss of the corpse, and failure to embalm, to

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77. See *e.g.*, *White Consol. Indus., Inc. v. Wilkerson*, 737 So. 2d 447, 449 (Ala. 1999) (holding that plaintiffs whose house had been destroyed by a fire could not recover damages for mental distress because at the time of the fire they were away from home, therefore, they were not in the zone of danger created by the defect—a zone in which they would have been at immediate risk of physical harm).

78. See *e.g.*, *Zeigler v. F Street Corp.*, 235 A.2d 703, 705 (Md. 1967) (“It is generally held that under ordinary circumstances there can be no recovery for mental anguish suffered by plaintiff in connection with an injury to his property. Where, however, the act occasioning the injury to the property is inspired by fraud, malice, or like motives, mental suffering is a proper element of damage.”). *Accord Whaley*, 197 S.W.3d at 670.

79. See generally STUART M. SPEISER, CHARLES F. KRAUSE & ALFRED W. GANS, 4A AMERICAN LAW OF TORTS § 16:12 (Monique C. M. Leahy ed., 2021) (“When emotional distress is the sole damage resulting from negligent acts, courts are cautious in awarding damages.”).

80. For ease of discussion, this Article combines both intentional infliction of emotional distress (IIED) and negligent infliction of emotional distress (NIED) in a single analysis. For example, a jurisdiction permitting IIED claims without physical injury or manifestation is included even if that jurisdiction does not allow NIED claims under those circumstances.

interference with the next of kin's right to bury their loved ones.<sup>81</sup>

*A. No Physical Injury or Manifestation Required*

Thirty-six states allow for emotional distress recovery for the mishandling of human remains without a need for showing physical injury or manifestation.<sup>82</sup> These states are: Alabama, Alaska, Arizona, Arkansas, California, Connecticut, District of Columbia,<sup>83</sup> Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin and Wyoming.

1. *Alabama*

As early as 1895, the Alabama Supreme Court lamented,

[e]xactly what the rights of one are to the burial place of his dead—in the absence of a fee to the soil, or his right to the possession thereof—as respects the maintenance of a civil action for its disturbance, is one of delicate and, as yet, not very satisfactory solution. People have so much respect for the final resting place of the dead, and there is so little to tempt one to disturb their repose, cases are of rare occurrence where such disturbances

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81. These categories are similar to those mentioned in the *Restatement (Second) of Torts*. See RESTATEMENT (SECOND) OF TORTS, § 868 reporter's note (AM. L. INST. 1979) (noting that "[t]he Section is supported by the following:" (1) intentional interferences, including mutilation of the body, including unauthorized autopsies; disinterment; prevention of proper burial; and other intentional interference; (2) reckless interferences; and (3) negligent interferences, including negligent embalming, negligent shipment, physical damage to body, and other negligent interferences).

82. See *infra* Section IV.A (discussing cases originating throughout these thirty-six states).

83. Because the District of Columbia is not a state, it is only included here for its law on emotional distress recovery and is not included in the fifty-state count.

have become the subject of litigation and the adjudication of the courts.<sup>84</sup>

Slightly over a century later, the court in *Gray Brown-Service Mortuary, Inc. v. Lloyd* observed, “[i]t has long been the law of Alabama that mistreatment of burial places and human remains will support the recovery of damages for mental suffering.”<sup>85</sup> In that case, employees of a mortuary company, without the plaintiff’s permission and without the required permit from the Department of Public Health, disinterred the remains of the plaintiff’s wife because of the odor coming from the casket.<sup>86</sup> Once the casket was open, the wife’s remains were exposed. “An employee distributed a caustic chemical called Viserock throughout the casket and on the remains of the wife.”<sup>87</sup> The employee “testified that he tossed the Viserock ‘by the cupful’ onto [decedent’s] chest, thoracic area, face, and neck.”<sup>88</sup> After this action failed to solve the odor problem, the mortuary employees disinterred the wife’s remains for a second time, again, without contacting the plaintiff and without obtaining the required permit from the Department of Public Health.<sup>89</sup> Defendant’s employees opened the casket, physically removed the wife’s remains, and then placed them in a plastic body bag—leaving behind body tissues and fluids.<sup>90</sup> A few pounds of Viserock were placed in the body bag with wife’s remains, and the remains in the body bag were then placed in a different casket, which was then reentombed.<sup>91</sup> Following the reentombment, the employees then left the original casket in a

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84. *Bessemer Land & Improvement Co. v. Jenkins*, 18 So. 565, 567 (Ala. 1895).

85. *Gray Brown-Serv. Mortuary, Inc. v. Lloyd*, 729 So. 2d 280, 285 (Ala. 1999) (citing *Smith & Gaston Funeral Dirs., Inc. v. Wilson*, 262 Ala. 401, 79 So. 2d 48 (1955)).

86. *Id.* at 282–83.

87. *Id.* at 283.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

wooded area adjacent to the cemetery. Days later, the casket was buried in an unmarked location.<sup>92</sup>

The plaintiff was distraught upon learning of what happened to his wife's body.<sup>93</sup> He later testified that he had "been miserable since 1994," when he found out what had actually happened, and that he had had nightmares about his wife's remains being in a body bag and about the chemical being thrown on her face.<sup>94</sup> He sued the mortuary company, alleging, among others, "the tort of outrage; trespass to the remains of [decedent]; unlawful and unwarranted interference with the entombed remains of [decedent]; unlawful and illegal disinterment of the remains of [decedent]; wanton and willful desecration, injury, invasion, and mutilation of the remains of [decedent]; abuse of a corpse; breach of contract; suppression; and failure to provide perpetual care for the tomb of [decedent]."<sup>95</sup> The court found the plaintiff had suffered emotional distress and had provided ample evidence to support the jury's award of \$2 million, "based on the undignified and disrespectful manner" in which the mortuary treated his wife's remains.<sup>96</sup>

In another Alabama case, *George H. Lanier Memorial Hospital v. Andrews*, the court upheld a jury verdict of \$200,000 for mental anguish as a result of "negligent or wanton removal of the corneas of a deceased minor."<sup>97</sup> In this case, the hospital went forward with harvesting a minor patient's corneas after the charge nurse attempted, but failed, to get the parents' telephonic consent for the child to be an organ donor.<sup>98</sup> In upholding the jury verdict for the parents, the court noted that "[i]t is well settled that a plaintiff may recover compensatory damages for mental anguish, even when mental anguish is the

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92. *Id.*

93. *See id.* at 286.

94. *Id.*

95. *Id.* at 284.

96. *Id.* at 286.

97. *George H. Lanier Mem'l Hosp. v. Andrews*, 901 So. 2d 714, 717 (Ala. 2004).

98. *Id.* at 718-19.

only injury visited upon the plaintiff.”<sup>99</sup> The court further stated that “[t]he inquiry is not whether traumatic events have occurred, but whether the plaintiff has actually suffered as a result of those events.”<sup>100</sup>

Finally, in *Wadley v. St. Vincent’s Hospital*, the Alabama state court noted that “[t]here are several Alabama decisions that recognize the applicability of an outrage, or intentional infliction of emotional distress, claim in circumstances involving the burial of a loved one’s remains.”<sup>101</sup> Thus, cases in which plaintiffs are allowed to recover for emotional distress without showing physical injury are a legion in Alabama.

## 2. Alaska

In Alaska, the general rule is that damages are not awarded for negligent infliction of emotional distress in the absence of showing physical injury.<sup>102</sup> However, Alaska plaintiffs can recover for the emotional distress they suffer in select circumstances.<sup>103</sup> In *Kallstrom v. United States*, the Alaska Supreme Court observed that there are two established exceptions to the rule allowing recovery in the state—the bystander exception and the pre-existing duty exception.<sup>104</sup> Relevant here, under what has become known as the pre-existing duty exception to the physical injury requirement, “a plaintiff may recover when the parties stand in a contractual or fiduciary relationship and the nature of this relationship imposes a duty that would foreseeably result in emotional harm

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99. *Id.* at 725 (citing *Ala. Power Co. v. Harmon*, 483 So. 2d 386, 389 (Ala. 1986)).

100. *Id.* at 726 (citing *Orkin Exterminating Co. v. Jeter*, 832 So. 2d 25, 37 (Ala. 2001)).

101. *Wadley v. St. Vincent’s Hosp.*, No. CV-2004-1257-RSV, 2006 WL 2061785, at \*9 (Ala. Cir. July 20, 2006).

102. *Kallstrom v. United States*, 43 P.3d 162, 165 (Alaska 2002) (“Generally, damages are not awarded for NIED in the absence of physical injury.”).

103. *Id.* at 165.

104. *Id.* at 165–66. The bystander exception allows certain bystanders to recover damages for emotional distress caused by witnessing physical injury to another. *See Schack v. Schack*, 414 P.3d 639, 641 (Alaska 2018).



to the plaintiff.”<sup>105</sup> Three decades prior to *Kallstrom*, the court in *Edwards v. Franke* noted that the law generally recognizes the right of a surviving spouse or next of kin to “possess, preserve and bury, or otherwise dispose of, a dead body.”<sup>106</sup> The court further noted that a violation of this right constitutes a tort for which a plaintiff can be awarded damages for mental suffering and “a willful invasion of the rights relating to dead bodies.”<sup>107</sup> In this case, the tort alleged was wrongful burial of the remains of a woman who, the plaintiff claimed, was his common law wife.<sup>108</sup>

Similarly, in *Burns v. Anchorage Funeral Chapel*, the administrator of the decedent’s estate sued a funeral chapel alleging that it had prematurely “embalmed the body of [the deceased] without the consent of her next of kin, and that this unauthorized act caused the next of kin emotional distress.”<sup>109</sup> Even though the administrator was denied standing, the Alaska Supreme Court reiterated the rule stated in *Edwards v. Franke* that interference of the next of kin’s right to bury their dead is an actionable tort, and that damages for mental suffering are recoverable for a “willful invasion of the rights relating to dead bodies.”<sup>110</sup> Therefore, it would seem that in Alaska, emotional distress damages for interference with a dead body are recoverable as a tort so long as the parties stand in a contractual or fiduciary relationship with the decedent and the plaintiff’s harm is foreseeable as a result of the defendant’s actions.

### 3. Arizona

In the Arizona case *Morton v. Maricopa County*, the plaintiffs sued the county for incinerating their son’s then-unidentified

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105. *Larsen v. Banner Health Sys.*, 81 P.3d 196, 203 (Wyo. 2003) (citing *Chizmar v. Mackie*, 896 P.2d 196, 203 (Alaska 1995)).

106. *Edwards v. Franke*, 364 P.2d 60, 63 (Alaska 1961).

107. *Id.*

108. *Id.* at 60.

109. *Burns v. Anchorage Funeral Chapel*, 495 P.2d 70, 72 (Alaska 1972).

110. *Id.* at 73 (quoting *Edwards*, 364 P.2d at 63).

remains, for which the jury awarded damages for the plaintiffs and the defendants appealed.<sup>111</sup> The appellate court reversed the damages for the siblings but upheld the damages for the parents.<sup>112</sup> Specifically, the appellate court held that the county medical examiner's office owed a duty to the victim's parents "to not negligently prevent the proper interment or cremation of [their son's] dead body."<sup>113</sup> In so holding, the court observed in a footnote "that comment (a) of the *Restatement (Second) of Torts* at 275 provides, '[t]here is no need to show physical consequences of the mental distress' for emotional damages resulting from negligent interference with dead bodies" and that this principle has been followed in the State of Arizona.<sup>114</sup>

#### 4. Arkansas

In *St. Louis Southwestern Railway Company v. White*, the Arkansas Supreme Court concluded that "where a railroad has mutilated a corpse" regardless of whether the railroad is responsible for the death, a right to sue for the mutilation is created if the railroad negligently fails to perform its "duty of gathering up the body and its fragments found on the track, and decently preserving them for burial."<sup>115</sup> In this case, a man was shot and killed by two other men, and to conceal their crime, the killers "placed the body of the deceased upon the track of the [defendant] railroad company, where it was run over and badly mutilated by one of [defendant's] trains."<sup>116</sup> Citing a North Carolina case, the Arkansas court approved mental anguish damages in such cases noting:

[T]he other case, and one which we think sounder in reason, is that of [Kyles v. Southern Railroad Company], where it was held that the mutilation

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111. *Morton v. Maricopa County*, 865 P.2d 808, 810 (Ariz. Ct. App. 1993).

112. *Id.* at 814.

113. *Id.* at 812.

114. *Id.* at 812 n.2.

115. *St. Louis Sw. R.R. Co. v. White*, 91 S.W.2d 277, 279 (Ark. 1936).

116. *Id.* at 278.

of a dead body, either wantonly or negligently, was itself an actionable wrong and that “where the rights of one legally entitled to the custody of a dead body are violated by mutilation of the body or otherwise, the party injured may in an action for damages recover for the mental suffering caused by the injury.”<sup>117</sup>

Similarly, in *Travelers Insurance Co. v. Smith*, an insurance company refused to pay for funeral expenses until an autopsy was done because it suspected that the deceased may have had a preexisting condition that led to his death.<sup>118</sup> Even though the deceased died from a vehicle accident, and even though the surviving spouse consented to the autopsy, the insurance company never performed it.<sup>119</sup> This insistence for an autopsy, where none was needed, caused a delay that led to the body deteriorating before burial.<sup>120</sup> As a result, the body was not deemed presentable for an open casket funeral and the plaintiffs sued.<sup>121</sup> The court upheld an award for the tort of outrage, or intentional infliction of emotional distress, writing:

[c]ourts have, to a great extent, based civil liability for wrongful acts with regard to a dead body on the interference with the right of burial, recognizing that interference with the rights of person to bury the body of her spouse or kin is an actionable wrong, whether by mutilation of the body after death, the withholding of the body, or the conveyance of a communication which delays the person so entitled.<sup>122</sup>

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117. *Id.* at 279 (quoting *Kyles v. S. Ry. Co.*, 61 S.E. 278, 280 (N.C. 1908)).

118. *Travelers Ins. Co. v. Smith*, 991 S.W.2d 591, 593–94 (Ark. 1999).

119. *Id.*

120. *Id.* at 594.

121. *Id.*

122. *Id.* at 596.

### 5. California

In California, the right to recover damages for mental distress without physical injury for negligent mishandling of a corpse has been recognized for many years.<sup>123</sup> As early as 1948, the California Supreme Court allowed recovery for emotional distress in *Chelini v. Nieri*, where a mortician promised to preserve the body of plaintiff's mother indefinitely.<sup>124</sup> Instead, the body ended up rotted, decomposed, and became an "insect and worm infested mass."<sup>125</sup> In affirming the general damages award, the court upheld a ruling from a prior case, quoting a jury instruction which mandated that

[w]henever the terms of a contract relate to matters which concern directly the comfort, happiness, or personal welfare of one of the parties, or the subject matter of which is such as directly to affect or move the affection, self-esteem, or tender feelings of that party, he may recover damages for physical suffering or illness proximately caused by its breach.<sup>126</sup>

More recently, in *Allen v. Jones*, a California district court held that damages are recoverable for mental distress without a showing of physical injury for negligent mishandling of a corpse by a mortuary.<sup>127</sup> In this case, the decedent's next of kin sued a mortuary to recover damages for the mental distress suffered upon learning that the mortuary had lost the cremated remains of his brother while in transit to Illinois.<sup>128</sup> The court rationalized that mental distress is a highly foreseeable result of mishandling human remains and that, in most cases, victims

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123. See, e.g., *Saari v. Jongordon Corp.*, 7 Cal. Rptr. 2d 82, 86 (Ct. App. 1992) ("The right to recover damages for emotional distress for breach of mortuary and crematorium contracts has been well established in California for many years.").

124. *Chelini v. Nieri*, 196 P.2d 915, 916 (Cal. 1948).

125. *Id.*

126. *Id.* (citing *Westervelt v. McCullough*, 228 P. 734, 738 (Cal. Dist. Ct. App. 1924)).

127. *Allen v. Jones*, 163 Cal. Rptr. 445, 450 (Ct. App. 1980).

128. *Id.* at 447.

can only be compensated for wrongs committed against them through a claim for negligent mishandling of human remains.<sup>129</sup> In other words, the decision was grounded in public policy.<sup>130</sup>

More poignant to this discussion is the concurring opinion by Justice Gardner, who begins by criticizing the “artificial distinction between emotional distress accompanied by physical manifestation” and calls on the court to abolish it.<sup>131</sup> He points out its absurdity as follows:

My mental anguish is the same accompanied or unaccompanied by physical manifestation. If as a result of someone’s negligent conduct, I suffer the horrors of gut-wrenching, sleepless nights worrying about the wellbeing of myself, my wife and my children, I should be allowed to recover without having to dream up some foundational physical ailment. If I throw up as a result of my emotional distress, I can recover. However, if I am blessed with a strong stomach, then no matter how acute my mental anguish may be, I cannot recover. This distinction is not only gossamer, it is whimsical. Nevertheless, it is firmly embedded in our law and from my place in the judicial pecking order, I can do nothing but grumble about it.<sup>132</sup>

In sidestepping the issue, the majority opinion rejects Justice Gardner’s call to abolish the distinction by noting that “[i]t is neither necessary nor appropriate for us in this case to take that giant leap for mankind espoused by the concurring opinion.”<sup>133</sup> In hindsight, Justice Gardner’s words can only be described now as coming from his lips to God’s ears.

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129. *Id.* at 450.

130. *See id.* (“Public policy requires that mortuaries adhere to a high standard of care in view of the psychological devastation likely to result from any mistake which upsets the expectations of the decedent’s bereaved family.”).

131. *Id.* at 451–52 (Gardner, J., concurring) (“I would like to see the Supreme Court take a sharp knife and cut this whole cockamamie distinction out of the law.”).

132. *Id.* at 451.

133. *Id.* at 450.

### 6. Connecticut

Connecticut does recognize a cause of action for interference with dead bodies.<sup>134</sup> In *Ginsberg v. Manchester Memorial Hospital*, the Superior Court of Connecticut found that a cause of action for the interference with dead bodies is sustainable under Connecticut law.<sup>135</sup> In that case, plaintiffs commenced an action against a hospital and a funeral home alleging that the defendants allowed the decedent's corpse to be damaged with a gash on the forehead, bruised eyes, and a broken nose, while under the defendants' care.<sup>136</sup> Additionally, plaintiffs sought recovery for both intentional and negligent infliction of emotional distress.<sup>137</sup> The court held that the plaintiffs had sufficiently pleaded a cause of action for negligent infliction of emotional distress.<sup>138</sup>

### 7. District of Columbia

The law of emotional distress recovery for negligent mishandling of a corpse has changed in the District of Columbia in a period of less than twenty years.<sup>139</sup> Starting with *Washington v. John T. Rhines Co.*, the court was presented with an issue of first impression of whether the jurisdiction recognizes—or should recognize—the tort of negligent infliction of emotional distress arising from the alleged mishandling of a dead body.<sup>140</sup> In that case, the plaintiff's husband died in D.C. and the plaintiff

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134. See *Del Core v. Mohican Historic Hous. Assocs.*, 837 A.2d 902, 905 (Conn. App. Ct. 2004) (“In our view, however, Connecticut should recognize a claim for negligent interference with the right of a family member to control the proper burial of a deceased.”).

135. *Ginsberg v. Manchester Mem'l Hosp.*, No. CV095030482S, 2010 WL 816982 at \*9 (Conn. Super. Ct. Feb. 2, 2010).

136. *Id.* at \*1.

137. *Id.* at \*1–2.

138. *Id.* at \*23.

139. Compare, e.g., *Washington v. John T. Rhines Co.*, 646 A.2d 345, 348 (D.C. 1994) (noting that courts within the District of Columbia have reiterated that the “zone of danger test is the sole means for assessing a claim for damages for negligently inflicted emotional distress”), with *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 792 (D.C. 2011) (holding that the zone of danger test need not be applied in every case alleging negligent infliction of emotional distress).

140. *Washington*, 646 A.2d at 346.

then contracted with the defendant funeral home to prepare, embalm, and dress the body before shipping it to a funeral home in El Paso, Texas, for an open-casket memorial service and burial.<sup>141</sup> But when the casket arrived in El Paso,

the clothing and the inside of the shipping case were drenched with fluid; there was an offensive odor of embalming and body fluids; there were extreme skin slips, blisters, and discolorations on several parts of the body; the body had begun to turn green and was rapidly decomposing; there was swelling in the face and neck areas; and a catheter tube which had been inserted in the deceased's body during his hospitalization had not been removed.<sup>142</sup>

The plaintiff filed a complaint against defendant alleging that as a result of defendant's mishandling of her husband's body, "she 'suffered severe nervous shock and great mental and emotional pain, anguish, and stress for a long period of time.'"<sup>143</sup> The trial court dismissed her complaint.<sup>144</sup> On appeal, the D.C. Court of Appeals affirmed the trial court's decision, refusing to recognize a cause of action for negligently inflicted emotional distress resulting from the mishandling of a corpse, and held that the zone of danger test is the sole means for assessing a claim for damages for negligently inflicted emotional distress.<sup>145</sup>

*Washington* was later severely limited by *Hedgepeth v. Whitman Walker Clinic*, which did not involve a corpse.<sup>146</sup> There, the court was confronted with the question of "whether the 'zone of physical danger test' should be applied to preclude the appellant's claim that his doctor's negligent misdiagnosis

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141. *Id.*

142. *Id.*

143. *Id.* at 346–47.

144. *Id.* at 347.

145. *Id.* at 348.

146. *See Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 792 (D.C. 2011).

caused him serious emotional injury.”<sup>147</sup> After canvassing the law in the District and other jurisdictions, the court concluded that the zone of physical danger requirement must be applied sparingly.<sup>148</sup> Specifically, the court held that

a plaintiff may recover for negligent infliction of emotional distress if the plaintiff can show that (1) the defendant has a relationship with the plaintiff, or has undertaken an obligation to the plaintiff, of a nature that necessarily implicates the plaintiff’s emotional well-being, (2) there is an especially likely risk that the defendant’s negligence would cause serious emotional distress to the plaintiff, and (3) negligent actions or omissions of the defendant in breach of that obligation have, in fact, caused serious emotional distress to the plaintiff.<sup>149</sup>

The D.C. Court rejected the rationale in *Washington* by noting that

[a]pplication of the physical zone of danger test in *Washington* not only deprived the plaintiff from presenting her case even though her complaint pled all the traditional requirements for a finding of liability for negligence—duty, breach, causation and damages—but also effectively immunized the funeral home from liability for the injury most likely to be caused by its negligence: serious emotional distress in a situation fraught with emotional feelings of sorrow and loss.<sup>150</sup>

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147. *Id.*

148. *Id.* (“[T]he zone of physical danger requirement imposes an unnecessary limitation upon, and is not to be applied indiscriminately in all cases to, claims of emotional distress brought against a defendant who has a relationship with the plaintiff, or has undertaken an obligation to the plaintiff, and whose negligence causes serious emotional distress to the plaintiff.”).

149. *Id.* at 810–11.

150. *Id.* at 805.



It can therefore be concluded that, in D.C., after *Hedgepeth*, plaintiffs can now recover for emotional distress resulting from negligent mishandling of human remains so long as there is “an existing, legally recognized relationship between the parties, and the defendant owes a duty to the plaintiff.”<sup>151</sup>

#### 8. Delaware

In Delaware, in *Green v. House of Wright Mortuary, Inc.*, the Delaware Superior Court granted summary judgment in favor of a mortuary which had misplaced the bodies of decedents into different graves from what was listed in the cemetery interment records.<sup>152</sup> The mother and daughter of the decedent sued the mortuary for, among other claims, both negligent and intentional infliction of emotional distress.<sup>153</sup> The court framed the issue as whether the funeral home and the funeral director had a duty to obtain and maintain a record as to where the body was left at the cemetery.<sup>154</sup> Although the court found that the plaintiffs failed to establish that there was either a contractual or non-contractual duty to maintain that record, it however left open the possibility for emotional distress recovery in future cases, by stating

[a]nd with respect to the negligent infliction of emotional distress, as I hinted at during the argument, in a case like this one, that claim is subsumed in the negligence claim itself. But I think, as I also made clear, so there’s no doubt about it, the Court is very much leaving open the possibility that in another case if a funeral director’s carelessness means that a body is lost, it may be that the funeral director will have to pay

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151. *Id.* at 807.

152. *Green v. House of Wright Mortuary, Inc.*, No. 02C-11-242MMJ, 2005 WL 3194484, at \*7 (Del. Super. Ct. Nov. 17, 2005).

153. *Id.* at \*1.

154. *Id.* at \*21.

damages for that carelessness even if no one is physically harmed by it.<sup>155</sup>

Therefore, it would appear that in Delaware, emotional distress recovery for mishandling of human remains is possible, regardless of a showing physical injury or not.

#### 9. *Hawaii*

In Hawaii, in *Guth v. Freeland*, the plaintiffs sued the defendants for failing to refrigerate the decedent's body, causing it to decompose.<sup>156</sup> The trial court granted summary judgment in favor of the defendants on the grounds that a statute barred recovery for emotional distress absent physical injury.<sup>157</sup> The Hawaii Supreme Court reversed, holding that "those who are entrusted with the care and preparation for burial of a decedent's body have a duty to exercise reasonable care. . . . [and] that the minority view, that does not require the plaintiff's emotional distress to manifest itself in a physical injury, is the better reasoned approach."<sup>158</sup>

#### 10. *Idaho*

Idaho recognizes a claim for interference with dead bodies as an exception to the general rule requiring physical injury in cases involving emotional distress.<sup>159</sup> In *Brown v. Matthews Mortuary Inc.*, the plaintiffs sued a mortuary after loss of decedent's cremated remains.<sup>160</sup> They sought damages for emotional distress based on breach of contract, negligent infliction of emotional distress, and damages for emotional distress caused by the defendants' alleged outrageous conduct

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155. *Id.* at \*16–17.

156. *Guth v. Freeland*, 28 P.3d 982, 983 (Haw. 2001).

157. *Id.* at 984.

158. *Id.* at 989; *accord* *Ritchie v. Wahiawa Gen. Hosp.*, 597 F. Supp. 2d 1100, 1112–13 (D. Haw. 2009).

159. *Brown v. Mathews Mortuary, Inc.*, 801 P.2d 37, 44 (Idaho 1990).

160. *Id.* at 39.

relating to the mishandling of decedent's cremated remains.<sup>161</sup> In recognizing the tort of interference with dead bodies, the court cited section 868 of the *Restatement (Second) of Torts* and noted

in accordance with the above cited authorities which we adopt and follow, we hold that an exception to the general rule involving damages for mental distress now exists in Idaho for cases involving mishandling of decedents' bodies and remains. A plaintiff entitled to recover need not manifest any accompanying physical injuries in order to recover for emotional distress in this particular type of case.<sup>162</sup>

### 11. *Illinois*

The Illinois Supreme Court held in *Cochran v. Securitas Sec. Services USA, Inc.* that emotional distress damages are recoverable in cases for negligent interference with right to possess a corpse.<sup>163</sup> There, decedent's body was transferred to a medical center for an autopsy.<sup>164</sup> The body was received by the defendant's employees, who neither placed a visible identification tag on decedent's body, nor affixed an identification label to the closed steel case containing decedent's body.<sup>165</sup> The employees also erroneously documented in the morgue's records that the body contained in the steel case was that of a different man.<sup>166</sup> Representatives from a funeral home then picked up the mislabeled body and cremated it.<sup>167</sup> The decedent's mother sued the defendant for tortious interference with her right to possess her son's body, and she further alleged

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161. *Id.*

162. *Id.* at 44.

163. *Cochran v. Securitas Sec. Servs., USA., Inc.*, 93 N.E.3d 493, 503 (Ill. 2017).

164. *Id.* at 495.

165. *Id.*

166. *Id.*

167. *Id.*

that, “as a proximate result of defendant’s acts and omissions, she experienced and suffered severe emotional distress, mental suffering, embarrassment, humiliation, and financial losses.”<sup>168</sup> The plaintiff lost in the trial court and appealed.<sup>169</sup>

The Illinois Court of Appeals reversed, holding that “a plaintiff who is a direct victim of defendant’s negligence may bring a cause of action for negligent infliction of emotional distress without the added requirement of demonstrating a physical injury or impact.”<sup>170</sup> The Illinois Supreme Court affirmed the Court of Appeals decision, writing first that it had abandoned the physical impact rule,<sup>171</sup> and second, that it has never held that willful and wanton misconduct is an essential prerequisite for the recovery of emotional distress damages in cases involving interference with the right to possess a corpse.<sup>172</sup> Rather, damages for the resulting emotional distress are recoverable in cases involving negligent interference with the right to possess a corpse, as long as the defendant commits ordinary negligence.<sup>173</sup> In so holding, the court abrogated several Illinois cases requiring showing of physical injury.<sup>174</sup>

## 12. *Indiana*

In Indiana, in *Blackwell v. Dykes Funeral Home, Inc.*, parents filed suit against a cemetery and funeral home for losing the cremated remains of their deceased son.<sup>175</sup> The parents alleged multiple claims, including breach of contract, and both intentional and negligent infliction of emotional distress.<sup>176</sup> The trial court found for the defendants, but the Indiana Court of

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168. *Id.*

169. *Id.* at 496.

170. *Cochran v. Securitas Sec. Servs., USA Inc.*, 59 N.E.3d 234, 245 (Ill. App. Ct. 2016), *aff’d*, 93 N.E.3d 493 (Ill. 2017).

171. *Cochran*, 93 N.E.3d at 498.

172. *Id.* at 502.

173. *Id.* at 494.

174. *Id.* at 497.

175. *Blackwell v. Dykes Funeral Homes, Inc.*, 771 N.E.2d 692, 694 (Ind. Ct. App. 2002).

176. *Id.*

Appeals reversed, finding that the impact rule did not apply in a case such as this.<sup>177</sup> Specifically, the court held that parents could maintain an action for emotional distress against a funeral home that mishandled the remains of their son even though no physical impact occurred.<sup>178</sup> Thus, the Indiana Court of Appeals was in accord with the jurisdictions that have either modified or abrogated the impact rule.<sup>179</sup>

### 13. *Iowa*

Iowa has long made an exception for emotional distress recovery absent physical injury where unique circumstances justify the imposition of such a duty on the defendant.<sup>180</sup> Starting with *Mentzer v. W.U. Tel. Co.*, the court found in favor of the plaintiff, where the defendant—a telegraph company—negligently failed to deliver a telegram notifying plaintiff of the death of his mother, thereby preventing him from attending her funeral.<sup>181</sup> The court cited a long history of Iowa cases allowing emotional distress recovery without physical injury.<sup>182</sup> This principle was further reiterated in *Overtuff v. Raddatz Funeral Services, Inc.*, where the court wrote “[t]his court has previously held that a plaintiff may recover damages ‘for mental distress, absent physical trauma, arising out of the breach of a contract to perform funeral services.’”<sup>183</sup>

### 14. *Kentucky*

A treatise on Kentucky wrongful death actions provides that “[t]he mishandling of a corpse is an action that would arise at

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177. See *id.* at 697 (“The rationale underlying the impact rule that prevents concocted claims of mental anguish, is not implicated here.”).

178. See *id.*

179. See *Spangler v. Bechtel*, 958 N.E.2d 458, 465 n.4 (Ind. 2011) (rejecting the call to completely abandon the modified impact rule in Indiana).

180. See, e.g., *Millington v. Kuba*, 532 N.W.2d 787, 792–93 (Iowa 1995).

181. *Mentzer v. W. Union Tel. Co.*, 62 N.W. 1, 1 (Iowa 1895).

182. *Id.* at 5–6.

183. *Overtuff v. Raddatz Funeral Servs., Inc.*, 757 N.W.2d 241, 245 (Iowa 2008).

any time when a body has been mishandled. Such an action would arise in the name of family members who were injured by the knowledge of such an act.”<sup>184</sup> Additionally, starting with *R.B. Tyler Co. v. Kinser*, regarding an action for desecration of a grave,<sup>185</sup> the Kentucky Supreme Court wrote that, in Kentucky, the “next of kin have a right to recover damages for mental anguish for ‘unwarranted interference with the grave of a deceased person’ as well as for an act which affected the body interred therein if either act was done maliciously or wantonly or by gross negligence.”<sup>186</sup>

Kentucky also allows recovery for emotional distress damages resulting from the wrongful mishandling of a corpse.<sup>187</sup> In *Hazelwood v. Stokes*, a widow sued a funeral home “to recover damages for mental anguish . . . suffered as the result of an alleged wrongful post-mortem examination of the dead body of her husband made at the request and direction of [a coroner].”<sup>188</sup> Although the court upheld summary judgment in favor of the defendants—finding that in this widow’s case there was no actionable injury—the court explained that unlawful mishandling of a corpse does create a cause of action for the widow:

The rule is firmly established in this state that a surviving widow, in the absence of a different disposition by will, has the right to possession of the dead body of her husband, which the law will recognize and protect from unlawful invasion by awarding damages for injury to her sensibilities and feelings resulting from any wrongful mishandling of the corpse.<sup>189</sup>

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184. RONALD W. EADES, KENTUCKY WRONGFUL DEATH ACTIONS § 8:9 (2020–2021 ed., 2020).

185. *R.B. Tyler Co. v. Kinser*, 346 S.W.2d 306, 307 (Ky. 1961).

186. *Id.* at 308.

187. *See Hazelwood v. Stokes*, 483 S.W.2d 576, 577 (Ky. 1972).

188. *Id.* at 576.

189. *Id.* at 577.

As far as recovering for emotional distress under a pure negligence cause of action, Kentucky has voided its impact rule and now allows for recovery in the absence of physical touch or injury.<sup>190</sup> In 2012, the Kentucky Supreme Court abandoned the impact rule in *Osborne v. Keeney*.<sup>191</sup> There, the plaintiff sued her attorney, “claiming he breached his professional duty to her by failing to file suit against a pilot before the statute of limitations expired.”<sup>192</sup> Because of the attorney’s breach, the plaintiff argued that she lost the ability to recover from the pilot for losses she suffered from the pilot crashing his airplane into her home.<sup>193</sup> Because the plaintiff had alleged emotional distress without physical injury, the court had the occasion to consider whether the physical impact rule firmly embedded in Kentucky tort law remained the proper threshold standard for claims involving emotional distress.<sup>194</sup> The court held that the physical rule was no longer the threshold standard in Kentucky law for claims involving emotional distress.<sup>195</sup>

A year after *Osborne*, the Kentucky Court of Appeals addressed the issue of emotional distress recovery as a result of mishandling of a corpse in *Keaton v. G.C. Williams Funeral Home, Inc.*<sup>196</sup> There, a family sued a funeral home for burying their mother in the wrong lot.<sup>197</sup> The family filed claims for negligence, intentional infliction of emotional distress, negligent misrepresentation, and breach of contract, among others.<sup>198</sup> The court acknowledged that the recent *Osborne*

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190. See, e.g., *Osborne v. Keeney*, 399 S.W.3d 1, 17 (Ky. 2012); *Keaton v. G.C. Williams Funeral Home, Inc.*, 436 S.W.3d 538, 543–44 (Ky. Ct. App. 2013).

191. *Osborne*, 399 S.W.3d at 17.

192. *Id.* at 5.

193. *Id.*

194. *Id.*

195. *Id.* at 5–6.

196. *Keaton v. G.C. Williams Funeral Home, Inc.*, 436 S.W.3d 538, 541 (Ky. Ct. App. 2013).

197. *Id.*

198. *Id.* Plaintiffs’ IIED claim failed for reasons irrespective of the court’s recent rescindment of the impact rule. Both the trial court and appellate court agreed that the family failed to make the required prima facie showing that the defendant’s conduct—here, an improper burial—was outrageous. *Id.* at 545. The family also “failed to present sufficient affirmative evidence concerning any ‘severe emotional distress’ its members had experienced or were suffering.” *Id.*

decision rendered the trial court's rationale for dismissing the family's negligence claims erroneous.<sup>199</sup> Although this meant that one could now recover for emotional damages related to the mishandling of a corpse under a simple negligence framework, the Court of Appeals highlighted *Osborne's* requirement that a plaintiff must present affirmative evidence of severe emotional distress for the claim to survive.<sup>200</sup> Simply "present[ing] their own statements that [the family members] suffered severe emotional distress" as a result of the improper burial was insufficient to meet the burden, and as such, the claim for negligent infliction of emotional distress was dismissed.<sup>201</sup>

#### 15. Louisiana

In Louisiana, in *Blanchard v. Brawley*, a mother and her five surviving children sued the defendant auto services company for mental pain and anguish resulting from the defendant burning her son's body.<sup>202</sup> The defendant's agents lit an acetylene blowtorch to cut a chain to permit extrication of the decedent's body, which had been pinned by logs when the truck the decedent was driving overturned.<sup>203</sup> When the torch was lit, gasoline ignited a fire that burned the body so badly that the casket containing the body was kept closed during the wake.<sup>204</sup> The court observed, "[t]rue the Courts of this state have not been previously presented with a claim for damages for mental anguish resulting from the mutilation of a human corpse. However, the Courts of this state have recognized the claim for damages for mental anguish, humiliation and

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199. *Id.* at 543 ("[A]t first blush, it would appear we must reverse the trial court's grant of summary judgment on the Family's negligence claim in light of *Osborne's* holding that recovery for mental anguish resulting from negligence no longer requires a physical touching or an injury to the person—a fact relied upon by the trial court.").

200. *Id.* at 543–44.

201. *Id.*

202. *Blanchard v. Brawley*, 75 So. 2d 891, 892 (La. Ct. App. 1954).

203. *Id.* at 893.

204. *Id.*



embarrassment.”<sup>205</sup> The court concluded that “the prevailing rule of the state is that damages are recoverable for mental pain and anguish,” and that, under the provisions of article 2315 of the Louisiana Civil Code,<sup>206</sup> the plaintiffs had asserted a cause of action.<sup>207</sup> The same principle was followed in *Green v. Southern Transplant Service, Inc.*, where the Louisiana Court of Appeals held that article 2315 of the Louisiana Statutes was broad enough to cover emotional damages where defendants were sued for their unauthorized removal of bone and tissue from the decedent’s body for organ transplant purposes unrelated to the autopsy.<sup>208</sup>

#### 16. Maine

Maine has “long allowed recovery for mental anguish and loss of enjoyment of life in most tort actions.”<sup>209</sup> For example, in *Gammon v. Osteopathic Hospital of Maine, Inc.*, a plaintiff sued an osteopathic hospital and a funeral home for negligent infliction of emotional distress when he discovered a bloodied leg, severed below the knee, in a bag which he had been told contained his deceased father’s personal effects.<sup>210</sup> In reversing the trial court’s verdict in favor of the defendants, the Supreme Judicial Court of Maine stated that it had previously recognized that courts in other jurisdictions have allowed recovery for

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205. *Id.* at 894.

206. LA. CIV. CODE. ANN. Art 2315 (2021). This article provides:

Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. . . . Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person. Damages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or disease. Damages shall include any sales taxes paid by the owner on the repair or replacement of the property damaged.

*Id.*

207. *Blanchard*, 75 So. 2d at 894.

208. *Green v. S. Transplant Serv., Inc.*, 698 So. 2d 699, 700 (La. Ct. App. 1997).

209. *Curtis v. Porter*, 784 A.2d 18, 26 (Me. 2001).

210. *Gammon v. Osteopathic Hosp. of Me., Inc.*, 534 A.2d 1282, 1283 (Me. 1987).

mental distress alone for the negligent mishandling of corpses.<sup>211</sup> Furthermore, it added “courts have concluded that the exceptional vulnerability of the family of recent decedents makes it highly probable that emotional distress will result from mishandling the body.”<sup>212</sup> In essence, Maine accords legal protection to both emotional and physical injuries.<sup>213</sup>

### 17. Maryland

Maryland courts allow recovery for negligent and intentional infliction of emotional distress where a disinterment of a body causes either emotional or physical harm.<sup>214</sup> In *Walser v. Resthaven Memorial Gardens Inc.*, a mother and siblings sued a cemetery and vault company for moving their deceased family member from one burial plot to another without their approval.<sup>215</sup> In discussing the law of disinterment in Maryland, the court cited *Restatement (Second) of Torts* section 868,<sup>216</sup> noting that the *Restatement* “covers conduct well beyond the wrongful disinterment of properly buried corpses.”<sup>217</sup> It also applies to cases “involving conduct occurring prior to burial—mostly unauthorized or negligently performed autopsies or the improper preparation of the body by morticians or others,” as well as cases “arising from wrongful burials, including negligence in conducting burials or in the manner of

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211. *Id.* at 1286.

212. *Id.* at 1285.

213. *See id.* at 1283 (“A person’s psychic well-being is as much entitled to legal protection as is his physical well-being.”).

214. *See Walser v. Resthaven Mem’l Gardens, Inc.*, 633 A.2d 466, 472 (Md. Ct. Spec. App. 1993) (“If we accept that there is a right not to have the bodies of deceased next-of-kin disturbed and a concomitant duty to respect that right, and we further recognize that a breach of that duty can cause significant emotional distress and possibly physical injury as well, the existing causes of action for negligence and intentional infliction of emotional distress suffice.”).

215. *Id.* at 469.

216. RESTATEMENT (SECOND) OF TORTS § 868 (AM. L. INST. 1979). “One who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body.” *Id.*

217. *Walser*, 633 A.2d at 472.

interment.”<sup>218</sup> Regarding wrongful disinterment, the court concluded that “civil liability does exist on the part of persons who, without the consent of those who have a say in the matter, disinter properly buried bodies.”<sup>219</sup>

#### 18. *Massachusetts*

Massachusetts similarly allows recovery for emotional damages in the absence of physical damage in cases involving a decedent’s remains.<sup>220</sup> In *Kelly v. Brigham & Women’s Hospital*, a spouse brought a cause of action against the hospital and two doctors for tortious interference with a dead body.<sup>221</sup> The plaintiff had given written consent for a limited autopsy, but the defendants made a large cut on the decedent’s body that was plainly visible.<sup>222</sup> On viewing the pictures of her husband’s body, the plaintiff became upset and had a panic attack.<sup>223</sup> The plaintiff stated in her deposition that “she had experienced various psychosomatic ailments and had taken antidepressant medications prescribed by a physician after observing post-autopsy photographs of her husband’s corpse.”<sup>224</sup> In analyzing whether the plaintiff provided sufficient evidence of emotional distress, the court observed that “a claim of emotional distress requires ‘enough’ objective evidence of emotional distress caused by the defendant’s negligence.”<sup>225</sup> The court cited *Restatement (Second) of Torts* section 868 for the principle that there is “no need to show physical consequences of mental distress in claims based on negligent mistreatment or

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218. *Id.*

219. *Id.*

220. See *Kelly v. Brigham & Women’s Hosp.*, 745 N.E.2d 969, 976–77 (Mass. App. Ct. 2001) (wrongful autopsy); *Brown v. Bayview Crematory, LLC*, 945 N.E.2d 990, 994–5 (Mass. App. Ct. 2011) (mistaken disposition of remains).

221. See *Kelly*, 745 N.E.2d at 971, 973.

222. *Id.* at 972.

223. *Id.*

224. *Id.* at 976.

225. *Id.* at 977.

interference with a dead body.”<sup>226</sup> Ultimately, the court concluded that “the plaintiff’s allegation of emotional distress was sufficient to withstand the motion for summary judgment, notwithstanding her limited evidence of accompanying physical harm and the absence of corroborative evidence.”<sup>227</sup>

### 19. *Minnesota*

In Minnesota, a plaintiff is more likely to succeed on a negligent infliction of emotional distress claim if there is a special likelihood of genuine and serious mental distress arising from the circumstances.<sup>228</sup> Such a likelihood “serves as a guarantee that the claim is not spurious.”<sup>229</sup> It is, however, unclear, “whether a claim for wrongful interference with a dead body can be supported by a showing of mere negligence, or whether it requires a showing of willful or wanton misconduct similar to an NIED case.”<sup>230</sup> In *Gooch v. North Country Regional Hospital*, plaintiffs sued the hospital for tortious interference with a dead body after the hospital lost their fetus.<sup>231</sup> The trial court directed a verdict in favor of the hospital, but the appellate court reversed, noting that the Minnesota Supreme Court had adopted the tort of tortious interference with a dead body over a century ago.<sup>232</sup> Additionally, the court found that the jury could have found the hospital’s actions to be wanton in that the hospital not only failed to preserve the fetus for burial in the manner selected by the plaintiffs, but its loss of the fetus also permanently deprived them of any ability to bury the

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226. *Id.*

227. *Id.* at 978.

228. BRENT A. OLSON, MINNESOTA PRACTICE SERIES: BUSINESS LAW DESKBOOK, ADVANCED TOPICS IN BUSINESS LAW § 33:62 (Nov. 2020 ed.).

229. *Id.*

230. *Gooch v. N. Country Reg’l Hosp.*, No. A05-576, 2006 Minn. App. Unpub. LEXIS 294, at \*6–7 (Minn. App. Mar. 28, 2006).

231. *See id.* at \*3–4.

232. *Id.* at \*5. The cause of action was first recognized in *Larson v. Chase*, 50 N.W. 238, 239–40 (Minn. 1891) (“[W]here the wrongful act constitutes an infringement on a legal right, mental suffering may be recovered for, if it is the direct, proximate, and natural result of the wrongful act.”).

remains.<sup>233</sup> It is also worth noting that earlier Minnesota cases allowed recovery for mental suffering associated with mishandling of corpses.<sup>234</sup>

## 20. Montana

In Montana, plaintiffs can recover for either physical or emotional distress resulting from mishandling of human remains.<sup>235</sup> For example, in *Contreraz v. Michelotti-Sawyers*, during a family viewing before the decedent's funeral, plaintiffs observed that clothes on the right side of the body had a rust-colored stain that was over a foot long.<sup>236</sup> The stain came from embalming fluid leaking from a surgical incision.<sup>237</sup> The children and grandchildren of the deceased sued the funeral home, alleging negligent preparation of the deceased's body, emotional distress damages, and breach of contract.<sup>238</sup> The trial court granted summary judgment in favor of the defendants.<sup>239</sup>

On appeal, the Montana Supreme Court addressed the issue of whether damages may be recovered for emotional distress caused by negligent conduct.<sup>240</sup> The court noted, "[n]egligent infliction of emotional distress claims focus on impacts to the living which result from mistreatment of the decedent's

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233. *Gooch*, 2006 Minn. App. Unpub. LEXIS 294, at \*14.

234. *See, e.g., Larson v. Chase*, 50 N.W. 238, 240 (Minn. 1891) (allowing a wife to recover for injury to her feelings and mental suffering resulting from the unlawful mutilation and dissection of her husband's corpse); *Sworski v. Simons*, 293 N.W. 309, 309, 311–12 (Minn. 1940) (allowing damages for humiliation and mental suffering for parents after the coroner embalmed their son's body, without their permission, and refused to let them view the body).

235. *See Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411, 418–25 (Mont. 1995) (reviewing Montana case law and authorities from other jurisdictions regarding negligent infliction of emotional distress and noting that "[a] cause of action for negligent infliction of emotional distress will arise under circumstances where serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant's negligent act or omission").

236. *Contreraz v. Michelotti-Sawyers*, 896 P.2d 1118, 1119 (Mont. 1995).

237. *Id.*

238. *Id.*

239. *Id.* at 1120.

240. *Id.*

body.”<sup>241</sup> The court ultimately held that “one who negligently removes, withholds, mutilates, embalms, provides funeral, burial, or crematory services, or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to the deceased person’s close relatives for resulting emotional distress.”<sup>242</sup>

### 21. *Nebraska*

Nebraska rejected the impact rule in 1937.<sup>243</sup> In subsequent cases, the Nebraska Supreme Court abandoned the zone of danger rule and adopted the bystander recovery test in emotional distress cases.<sup>244</sup> For example, in *James v. Lieb*, parents sued a garbage truck company for negligent infliction of emotional distress, on behalf of their son who had watched as the garbage truck driver backed into an intersection, through a stop sign, and hit and ran over their daughter.<sup>245</sup> The son watched the entire incident and as a result of witnessing his sister’s peril, became physically ill, and suffered mental anguish and emotional distress.<sup>246</sup> The court poignantly wrote, “[w]hile physical manifestation of the psychological injury may be highly persuasive, such proof is not necessary given the current state of medical science and advances in psychology.”<sup>247</sup> More germane, the court views mishandling or mutilation of corpses as “extreme and outrageous conduct” warranting recovery for negligent infliction of emotional distress.<sup>248</sup> Therefore, based on

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241. *Id.* at 1121.

242. *Id.*

243. *See Rasmussen v. Benson*, 275 N.W. 674, 678–79 (1937).

244. *James v. Lieb*, 375 N.W.2d 109, 116–17 (Neb. 1985). Under this rule, “a bystander can recover for emotional harm caused by contemporaneously observing bodily harm to a close relative, even though the bystander is not in the zone of danger.” RESTATEMENT (THIRD) OF TORTS § 47 (AM. L. INST. 2007).

245. *James*, 375 N.W.2d at 111.

246. *Id.*

247. *Id.* at 116.

248. *See Hassing v. Wortman*, 333 N.W.2d 765, 767 (Neb. 1983) (“Examples of such behavior can be found in W. Prosser, *Law of Torts, Infliction of Mental Distress* § 12 (4th ed. 1971). Among

Nebraska case law, one can deduce that no physical injury is required for plaintiffs to recover for mishandling of human remains. But Nebraska imposes one additional hurdle, what the courts call “medically diagnosable emotional distress.”<sup>249</sup> In other words, to be actionable, “emotional distress must have been so severe that no reasonable person could have been expected to endure it.”<sup>250</sup>

## 22. Nevada

Although Nevada requires proof of serious emotional distress causing physical injury in order to recover,<sup>251</sup> the court has made exceptions for desecration of a loved one’s remains.<sup>252</sup> In *Boorman v. Nevada Memorial Cremation Society*, the United States District Court for the District of Nevada certified questions to the Nevada Supreme Court, “relating to causes of action for the alleged negligent handling of a deceased person’s remains.”<sup>253</sup> There, family members sued a mortuary and the county for returning the deceased’s body to England without its internal organs.<sup>254</sup>

The Nevada Supreme Court held that close family members who were aware of the death of a loved one and that mortuary services were being provided, may assert an emotional distress claim against a mortuary for the negligent handling of a deceased person’s remains.<sup>255</sup> Those persons do not need

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them are threatening a schoolgirl with prison and public disgrace unless she signs a confession of immoral misconduct; mishandling or mutilation of corpses; and various repeated and high-pressure tactics by collection agencies.”).

249. See, e.g., *Sell v. Mary Lanning Mem’l Hosp. Ass’n*, 498 N.W.2d 522, 525 (Neb. 1993).

250. *Id.* (quoting *Schleich v. Archbishop Bergan Mercy Hosp.*, 491 N.W.2d 307, 310–11 (1992)).

251. See, e.g., *Olivero v. Lowe*, 995 P.2d 1023, 1026 (Nev. 2000) (“We therefore hold that in cases where emotional distress damages are not secondary to physical injuries, but rather, precipitate physical symptoms, either a physical impact must have occurred or, in the absence of physical impact, proof of ‘serious emotional distress’ causing physical injury or illness must be presented.”).

252. See, e.g., *Boorman v. Nev. Mem’l Cremation Soc’y*, 236 P.3d 4, 8 (Nev. 2010).

253. *Id.* at 5.

254. *Id.* at 6.

255. *Id.* at 8.

to observe or have any sensory perception of the offensive conduct, and do not need to present evidence of any physical manifestation of emotional distress.”<sup>256</sup> The court distinguished its prior holding requiring proof of serious emotional distress causing physical injury by noting:

Our historical concern that emotional distress must be demonstrated by some physical manifestation of emotional distress is not implicated in this context. We need not question the trustworthiness of an individual’s emotional anguish in cases involving desecration of a loved one’s remains. . . . Therefore, while a plaintiff must allege some emotional disturbance resulting from the defendant’s negligent conduct, there is no need to demonstrate any physical manifestation of that emotional distress.<sup>257</sup>

### 23. *New Jersey*

New Jersey has long had an exception to its physical injury requirement for claims of negligent handling of a corpse.<sup>258</sup> For example, in *Strachan v. John F. Kennedy Memorial Hospital*, parents of a boy who had shot himself and was subsequently declared brain-dead requested that the hospital cease life support.<sup>259</sup> The hospital, in an apparent effort to harvest the victim’s organs, delayed turning off the respirator for three days.<sup>260</sup> The parents sued, alleging negligent infliction of emotional distress.<sup>261</sup> The court found “ample evidence to support the jury’s conclusion that defendants violated their

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256. *Id.* at 6.

257. *Id.* at 8.

258. *Strachan v. John F. Kennedy Mem’l Hosp.*, 538 A.2d 346, 353 (N.J. 1988) (citing *Muniz v. United Hosps. Med. Ctr. Presbyterian Hosp.*, 379 A.2d 57, 58–59 (N.J. Super. Ct. App. Div. 1977)).

259. *Id.* at 347–48.

260. *Id.* at 347–48, 351.

261. *See id.* at 348.



duty to honor [the parents'] legitimate request to turn over their son's dead body."<sup>262</sup> The court then examined whether the limitations on tort claims for emotional distress barred the parents from recovering for defendant's breach of duty.<sup>263</sup> Referring to its abandonment of the physical injury requirement for emotional distress claims, the court found no bar to the parents' claims, noting, "[w]e need look no further than the long-recognized exception for negligent handling of a corpse . . . or the especial likelihood that this claim is genuine . . . to conclude that plaintiffs need not demonstrate any physical manifestations of their emotional distress here."<sup>264</sup>

The *Strachan* rule was further applied in *Lacy v. Cooper Hospital/University Medical Center*.<sup>265</sup> There, parents sued the hospital and several physicians alleging that the physicians performed an invasive medical procedure on their son after he was pronounced dead.<sup>266</sup> In resolving a disagreement between the parties as to the applicable tort, the federal district court, looking at *Strachan*, explained that New Jersey law does not recognize mishandling of a corpse as an independent tort, but instead permits recovery "for intentional or negligent infliction of emotional distress *based upon the mishandling of a corpse*."<sup>267</sup>

#### 24. *New Mexico*

In New Mexico, it is also required that emotional distress be severe for recovery to be available.<sup>268</sup> For example, in *Flores v. Baca*, the funeral home exhumed the decedent's body for autopsy two weeks after interment, when the decedent's family discovered that the lower half of the body had not been

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262. *Id.* at 353.

263. *Id.* at 351.

264. *Id.* at 353.

265. See *Lacy v. Cooper Hosp./Univ. Med. Ctr.*, 745 F. Supp. 1029, 1035 (D.N.J. 1990).

266. *Id.* at 1030.

267. *Id.* at 1033 (emphasis added).

268. *Flores v. Baca*, 871 P.2d 962, 969 (N.M. 1994) ("Plaintiffs must prove severe emotional distress as an element of damages.").

embalmed.<sup>269</sup> The court describes the events surrounding the autopsy as follows:

Three sons accompanied the body to the autopsy and then reported back to the others the determinations of the medical examiners. The autopsy revealed that the embalming ended at about the waist. Decomposition included the sloughing of skin over the entire lower part of the body. When the body was returned to the funeral home for reinterment, [deceased's wife] and several of the children smelled the decay coming from the garage where the casket was located. [She] could not view [deceased's] body again because of the overpowering smell and she later overheard her sons describing to her other children the condition of the body. At the first trial, [she] described her feelings of distress, including sleeplessness, lack of appetite, and depression. At the second trial, she testified to the loss of physical control of her body upon smelling her husband's body, crying, depression, and long-term emotional pain. Her children also testified that she had been depressed, suffered frequent crying spells, and that she stated she felt her husband's body had been disgraced and dishonored.<sup>270</sup>

The family members alleged several causes of action, including breach of contract, negligence, fraud, intentional infliction of emotional distress, gross negligence, and outrage.<sup>271</sup> The jury awarded damages to the deceased's wife only.<sup>272</sup> On appeal, the New Mexico Supreme Court affirmed the judgment awarding compensatory damages to the deceased's wife and

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269. *Id.* at 964.

270. *Id.* at 965.

271. *Id.* at 964.

272. *Id.*

remanded the question of compensatory and punitive damages for severe emotional distress suffered by the surviving children.<sup>273</sup> Specifically, the court observed that recovery for mental anguish caused by the breach of a contract is usually permitted, noting that “[b]urial cases furnish the most obvious example of cases in which the contract for decent treatment of a body seems to guarantee not merely a price but proper respect for feelings of survivors, so that emotional distress damages would seem to be recoverable.”<sup>274</sup> In negligence actions for emotional distress, New Mexico permits recovery only where the duress is severe.<sup>275</sup> The court has also held that “physical manifestation should not be the *sine qua non* by which to establish damages resulting from emotional trauma. Modern advances in medical and psychiatric science have eliminated the practical necessity that led to the requirement of evidence of resulting physical injury to validate a claim of emotional distress.”<sup>276</sup>

## 25. *New York*

New York has a long line of cases addressing emotional distress arising from mishandling of corpses.<sup>277</sup> The first of these cases was *Finley v. Atlantic Transport Company*, which involved a man who died while at sea on a steam ship.<sup>278</sup> The defendants embalmed the body but later threw it in the sea along the coast of Massachusetts, instead of delivering it to the decedent’s son for burial in New York.<sup>279</sup> The son sued for, among other claims, negligence, unlawful interference with and violation of his rights to the solace and comfort of a burial of the body of his

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273. *Id.*

274. *Id.* at 967.

275. *Id.* at 969.

276. *Folz v. State*, 797 P.2d 246, 259 (N.M. 1990).

277. See *Whack v. St. Mary’s Hosp. of Brooklyn*, No. 3627/00, 2003 N.Y. Misc. LEXIS 50, at \*4 (N.Y. Civ. Ct. Jan. 22, 2003) (noting that the cause of action for negligent mishandling of a corpse has been recognized “for more than one hundred years”).

278. *Finley v. Atl. Transp. Co.*, 115 N.E. 715, 716–17 (N.Y. 1917).

279. *Id.*

father, and infliction of mental distress, anguish, and suffering.<sup>280</sup> The New York Court of Appeals found that “[t]he plaintiff had a legal right to the possession of the body for burial and any unlawful interference with that right was an actionable wrong.”<sup>281</sup>

In *Baumann v. White*, the Supreme Court of New York observed that “[r]ecoveries have been had in [New York] by next of kin suffering mental anguish as a result of a wrongful withholding of the body of a deceased from the next of kin charged with its burial as well as damages for mental anguish where an unauthorized autopsy was performed.”<sup>282</sup> Additionally, courts in the state “have permitted recovery for injuries consisting of mental anguish and shock although no physical contact or impact was transmitted to the claimant.”<sup>283</sup>

In that same vein, the court in *Lott v. State* awarded damages to next of kin based solely on suffering mental anguish.<sup>284</sup> In that case, the hospital mortuary tagged the wrong names on two bodies, each of which was collected by a different undertaker in preparation for burial.<sup>285</sup> One family discovered the error and notified the hospital.<sup>286</sup> In finding for the plaintiffs, the court reaffirmed the principle that next of kin are entitled to damages when someone “improperly deals with the decedent’s body” or otherwise interferes with their “right to the immediate possession of [the] body for preservation and burial.”<sup>287</sup> The court then explained that, in this type of case, the primary concern is not “the extent of the physical mishandling or injury to the body per se, but rather how such improper handling or injury affects the feelings and emotions of the surviving kin.”<sup>288</sup>

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280. *Id.* at 717.

281. *Id.* at 718.

282. *Baumann v. White*, 234 N.Y.S.2d 272, 273 (Sup. Ct. 1962).

283. *Id.*

284. *Lott v. State*, 225 N.Y.S.2d 434, 437 (N.Y. Ct. Cl. 1962).

285. *Id.* at 435.

286. *Id.*

287. *Id.* at 436.

288. *Id.*

In other words, “[t]he cause of action is primarily for mental suffering caused by improper dealing with and not injury to the dead body.”<sup>289</sup>

In *Massaro v. Charles J. O’Shea Funeral Home*, the decedent’s son and grandchildren sued the funeral home, casket company, and cemetery for negligent infliction of emotional distress.<sup>290</sup> About eighteen months after the burial, the decedent’s granddaughter noticed that the mausoleum where her grandmother was interred was emitting a “noxious odor.”<sup>291</sup> After the casket was disinterred, “it was discovered that the casket was cracked and its contents leaking.”<sup>292</sup> Citing *Lott*, the appellate court allowed recovery, stating “[a]lthough a cause of action involving the mishandling of a corpse generally requires a showing of interference with the right of the next-of-kin to dispose of the body, the next-of-kin may also recover where one ‘improperly deals with the decedent’s body.’”<sup>293</sup> Regarding the requisite proof for emotional distress, the court stated that the son’s “failure to seek medical treatment or psychological counseling for his alleged injuries, while relevant to the issue of damages, did not necessarily preclude recovery.”<sup>294</sup> In other words, physical injury or manifestations of physical injury are not needed. Still, New York courts require that the mental distress be genuine and serious.<sup>295</sup>

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289. *Id.* (quoting *Sworski v. Simons*, 293 N.W. 309, 311 (Minn. 1940)).

290. *Massaro v. Charles J. O’Shea Funeral Home, Inc.*, 738 N.Y.S.2d 384, 385 (App. Div. 2002).

291. *Id.*

292. *Id.* at 386 (quoting *Lott*, 225 N.Y.S.2d at 436 (internal citation omitted)).

293. *Id.*

294. *Id.*

295. *See, e.g., Estate of LaMore v. Sumner*, 848 N.Y.S.2d 754, 756 (App. Div. 2007) (“There is no allegation here that decedent’s body, which remained encased in the burial vault, was mishandled in any way by anyone during disinterment or reinterment. Nor does a search of this record reveal any special circumstances that might reasonably be characterized as an act of desecration or otherwise give rise to an especial likelihood of genuine and serious mental distress.”).

## 26. North Carolina

North Carolina has traditionally recognized claims by surviving spouses for mental anguish concerning the negligent treatment of their spouses' dead bodies by others.<sup>296</sup> In *Parker v. Quinn-McGowen Company*, a widow filed an action against a funeral home to recover compensatory damages for mental anguish allegedly caused by the unauthorized embalming of the body of her husband.<sup>297</sup> In granting judgment for the widow, the court stated the law in North Carolina

recognizes that the next of kin has a quasi-property right in the body—not property in the commercial sense but a right of possession for the purpose of burial—and that there arises out of this relationship to the body an emotional interest which should be protected and which others have a duty not to injure intentionally or negligently.<sup>298</sup>

Furthermore, where a defendant's conduct is willful or malicious, punitive damages may also be recovered.<sup>299</sup>

## 27. North Dakota

North Dakota requires a showing of bodily harm to sustain a claim for relief for negligent infliction of emotional distress.<sup>300</sup> However, “[b]odily harm may be caused not only by impact or trauma, but also by emotional stress.”<sup>301</sup> For example, in *Hougum v. Valley Memorial Homes*, the court stressed that “long continued nausea or headaches may amount to physical illness,

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296. See *Kyles v. S. Ry. Co.*, 61 S.E. 278, 281 (N.C. 1908); *Bonaparte v. Fraternal Funeral Home*, 175 S.E. 137, 139 (N.C. 1934).

297. *Parker v. Quinn-McGowen Co.*, 138 S.E.2d 214, 217 (N.C. 1964).

298. *Id.* at 215–16.

299. *Id.* at 216.

300. *Hysjulien v. Hill Top Home of Comfort, Inc.*, 827 N.W.2d 533, 549 (N.D. 2013) (“For a claim of negligent infliction of emotional distress, a plaintiff claiming negligent infliction of emotional distress must show bodily harm.”) (quoting *Hougum v. Valley Mem’l Homes*, 574 N.W.2d 812, 819 (N.D. 1998)).

301. *Muchow v. Lindblad*, 435 N.W.2d 918, 921 (N.D. 1989).

which is bodily harm; and even long continued mental disturbance, as for example in the case of repeated hysterical attacks, or mental aberration, may be classified by the courts as illness, notwithstanding their mental character."<sup>302</sup>

In *Muchow v. Lindblad*, parents and siblings sued the Police Department and the City of Fargo for intentional or negligent infliction of emotional distress stemming from the investigation of their family member's death.<sup>303</sup> There, the deceased body was discovered in a river.<sup>304</sup> The investigating police officer concluded that the cause of death was suicide by drowning, without conducting any serious investigation and despite obvious signs of foul play.<sup>305</sup> The officer described to the family the grim details of the deceased's suicide and told them her body was found nude, when in fact her body was partially clothed.<sup>306</sup> An autopsy was not immediately performed because the investigating officer reported to the coroner that the manner of death was suicide.<sup>307</sup>

Although the court ruled that the plaintiffs could not recover based on their evidence, it engaged in an in-depth discussion of whether bodily harm is a prerequisite for recovery for negligent infliction of emotional distress.<sup>308</sup> The plaintiffs had urged the court "to follow the minority 'trend' and abolish the bodily harm requirement as illogical and unjust."<sup>309</sup> The court responded by saying:

While a minority of jurisdictions has dispensed with the bodily harm requirement for negligent infliction of emotional distress . . . those jurisdictions nonetheless require "serious" or

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302. *Hougum*, 574 N.W.2d at 819 (quoting RESTATEMENT (SECOND) OF TORTS § 436A cmt. c (AM. L. INST. 1995)).

303. *Muchow*, 435 N.W.2d at 919.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *See id.* at 921–23.

309. *Id.* at 923.

“severe” emotional distress in place of bodily harm . . . . Assuming, *arguendo*, that we would follow the minority view, we do not believe that the plaintiffs have satisfied the threshold of severe or serious emotional distress necessary for negligent infliction of emotional distress.<sup>310</sup>

It would seem that a showing of severe or serious emotional distress would, therefore, suffice for recovery in North Dakota.

## 28. Ohio

Ohio law recognizes the tort of negligent infliction of emotional distress and does not require a “contemporaneous physical injury.”<sup>311</sup> And just like in North Dakota, the emotional injuries sustained must be both serious and reasonably foreseeable to allow recovery.<sup>312</sup> More specifically, “Ohio law has long recognized a cause of action for abuse of a dead body,” including actions arising out of the mishandling of a dead body, desecration of a grave, and abuse of a corpse.<sup>313</sup>

In *Chesher v. Neyer*, family members sued the local coroner for violation of constitutional rights and negligent infliction of emotional distress.<sup>314</sup> There, the defendants allowed a photographer to access, view, manipulate, or photograph the dead bodies for an art project while such bodies were in custody of the County Coroner’s Office without permission from the legal representatives of the deceased.<sup>315</sup> In denying the defendants’ motions for summary judgment, the court noted “serious emotional distress” occurs where the distress is both severe and debilitating and renders “a reasonable person,

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310. *Id.* (emphasis added) (citations omitted).

311. *Frys v. City of Cleveland*, 668 N.E.2d 929, 932 (Ohio Ct. App. 1995).

312. *Id.*; see *Muchow*, 435 N.W.2d at 923.

313. 14 THOMAS SMITH, OHIO JUR. 2D CEMETERIES AND DEAD BODIES § 76, Westlaw (database updated August 2021).

314. *Chesher v. Neyer*, 392 F. Supp. 2d 939, 943 (S.D. Ohio 2005), *aff’d*, 477 F.3d 784 (6th Cir. 2007).

315. *Id.* at 943, 946.



normally constituted, . . . unable to cope adequately with mental distress.”<sup>316</sup> Yet, “‘seriousness’ might also suffice, in the mishandling of a corpse arena, where . . . the plaintiffs were ‘horrified,’ ‘angry,’ ‘saddened,’ ‘wept,’ and ‘were unable to sleep.’”<sup>317</sup>

### 29. *Oregon*

Oregon law recognizes “a right in a surviving spouse to recover for mental anguish caused by the unauthorized or negligent handling of the deceased.”<sup>318</sup> In *Hovis v. City of Burns*, a widow sued the city for emotional shock and mental anguish she suffered when the city disinterred the remains of her husband.<sup>319</sup> The court stated that “[t]he surviving spouse has the legal right to have the remains of the deceased undisturbed; and if mental suffering results from an unauthorized infringement of this right, a cause of action exists therefor.”<sup>320</sup> Additionally, in *Burrough v. Twin Oaks Memorial Garden, Inc.*, “plaintiff sought damages against defendant cemetery for burying her deceased husband in the wrong gravesite.”<sup>321</sup> The court reiterated the holding in *Hovis* above, noting that “where the wrongful act constitutes an infringement of a legal right, mental suffering may be recovered for, if it is the direct, proximate, and natural result of the wrongful act.”<sup>322</sup>

### 30. *Pennsylvania*

Pennsylvania follows section 868 of the *Restatement (First) of Torts*, “which limits recovery to emotional distress resulting

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316. *Id.* at 955 (quoting *Paugh v. Hanks*, 451 N.E.2d 759, 761 (Ohio 1983)).

317. *Id.* at 955 (quoting *Carney v. Knollwood Cemetery Ass’n*, 514 N.E.2d 430, 432 (Ohio Ct. App. 1986)).

318. *Hovis v. City of Burns*, 415 P.2d 29, 31 (Or. 1966).

319. *Id.* at 29.

320. *Id.* at 31.

321. 822 P.2d 740, 741 (Or. Ct. App. 1991).

322. *Id.* at 742 (quoting *Hovis*, 415 P.2d at 31).

from intentional or wanton mistreatment of the body.”<sup>323</sup> The Pennsylvania Supreme Court first recognized the tort of interference with a dead body in *Papieves v. Lawrence*.<sup>324</sup> There, the defendant struck and killed the plaintiffs’ son with a motor vehicle.<sup>325</sup> The defendant failed to obtain medical assistance or notify the parents.<sup>326</sup> Rather, he and a friend removed the victim’s body from the scene of the accident, took it to the defendant’s home, and hid it in his garage, and a few days later buried the body next to a road.<sup>327</sup> Over two months later, “the partially decomposed body [of the victim] was found, and his remains were returned to his parents.”<sup>328</sup>

The victim’s parents sued for mental anguish, emotional disturbance, embarrassment, humiliation, and invasion of and unlawful interference with their right to the possession of the decedent’s body.<sup>329</sup> In reversing the trial court and finding for the parents, the Pennsylvania Supreme Court concluded that “recovery may be had for serious mental or emotional distress directly caused by the intentional and wanton acts of mishandling a decedent’s body which are here alleged.”<sup>330</sup>

This rule was further reiterated in *Weiley v. Albert Einstein Medical Center*, where the plaintiff sued the hospital for the alleged mishandling and mistreatment of his father’s body.<sup>331</sup> In the case, the plaintiff’s father died at the hospital and, without notifying the plaintiff or getting his consent, the hospital had a funeral home transfer the body to a medical school for holding.<sup>332</sup> After spending several days locating it, the plaintiff’s father’s body “showed evidence that post-mortem operations

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323. 1 SUMM. PA. JUR. 2D TORTS § 10:17, Westlaw (database updated March 2022) (citing RESTATEMENT (FIRST) OF TORTS § 868 (AM. L. INST. 1939)).

324. *Papieves v. Lawrence*, 263 A.2d 118, 122 (Pa. 1970).

325. *Id.* at 119.

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.* at 121.

331. *Weiley v. Albert Einstein Med. Ctr.*, 51 A.3d 202, 206, 209 (Pa. Super. Ct. 2012).

332. *Id.* at 207.

had been performed, including disfiguring post-mortem scars to the face, head and body, and evidence that the brain had been removed and/or operated on.”<sup>333</sup> The court found plaintiff had stated a cause of action for tortious interference with a dead body,<sup>334</sup> but failed to plead sufficient facts for intentional infliction of emotional distress, because he was not present at the time of the tortious conduct.<sup>335</sup> He also failed to allege sufficient facts for negligent infliction of emotional distress because he failed to establish that the hospital owed him a fiduciary duty of care.<sup>336</sup> The conclusion here is that recovery exists in Pennsylvania as long as the plaintiff suffers serious mental or emotional distress directly caused by the intentional and wanton acts of the defendant.

### 31. *Tennessee*

Tennessee adheres to the rule that “any interference with the right of possession for burial, by mutilating or otherwise disturbing the body, is an actionable wrong and a subject for compensation.”<sup>337</sup> In *Hill v. Travelers’ Insurance Company*, the plaintiff sought damages for an unauthorized mutilation and exposure of the body of her deceased husband.<sup>338</sup> The plaintiff had consented for the insurance company to perform an autopsy with certain limitations, including a requirement that the autopsy be conducted in a private place and the body could not be mutilated. However, the defendants performed the autopsy “in an open space in the cemetery, in plain view of

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333. *Id.* at 208 (internal quotations omitted).

334. *Id.* at 213.

335. *Id.* at 216 (citing RESTATEMENT (SECOND) OF TORTS § 46(2) (AM. L. INST. 1965)).

336. *Id.* at 217. *But see* *Toney v. Chester Cnty. Hosp.*, 36 A.3d 83, 84–85 (Pa. 2012) (“[W]e would hold that NIED is not available in garden-variety ‘breach of contractual or fiduciary duty’ cases, but only in those cases where there exists a special relationship where it is foreseeable that a breach of the relevant duty would result in emotional harm so extreme that a reasonable person should not be expected to endure the resulting distress. We further conclude that recovery for NIED claims does not require a physical impact.”).

337. *Hill v. Travelers Ins. Co.*, 294 S.W. 1097, 1098 (Tenn. 1927) (citing *Larson v. Chase*, 50 N.W. 238 (Minn. 1891)).

338. *Id.* at 1097.

nearby residences, and where the public might and did look upon the autopsy; and in that parts of vital organs, including the heart, were removed from the body and retained by the defendants."<sup>339</sup> The court held that the defendants had violated the plaintiff's limitations on the permission given for the autopsy, therefore, constituting an actionable wrong.<sup>340</sup>

More recent cases in Tennessee have emphasized that the torts of intentional infliction of emotional distress and negligent infliction of emotional distress require the plaintiff to prove serious or severe mental injury.<sup>341</sup> For example, in *Akers v. Prime Succession of Tennessee*, parents sued a crematory operator for intentional infliction of emotional distress due to alleged mishandling of their deceased son's body, which had been sent to the crematorium for cremation.<sup>342</sup> Later, the parents received what was purported to be their son's "cremains," but it was discovered that the defendant had not been cremating bodies, rather, "burying or dumping the bodies in various places on the . . . property."<sup>343</sup> In fact, an investigation by the Georgia Bureau of Investigation

recovered bodies and body parts of over 320 persons, in widely varying stages of decay. Some were buried in shallow graves. Some had been dumped in surface trash pits. Human remains and bodies were found in virtually every building on the property. A body was found in a hearse, another in a van, and a partially mummified corpse of a man in a suit was discovered in a box. Some of the bodies recovered had been partially cremated, some were without arms and legs, and some had their extremities burned away. An

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339. *Id.*

340. *Id.* at 1099.

341. *See, e.g., Rogers v. Louisville Land Co.*, 367 S.W.3d 196, 206 (Tenn. 2012) ("[T]he torts of intentional infliction of emotional distress and negligent infliction of emotional distress share a common, identical element—the "serious or severe" mental injury requirement.").

342. *Akers v. Prime Succession of Tenn., Inc.*, 387 S.W.3d 495, 498 (Tenn. 2012).

343. *Id.*

unburned corpse was laying in the crematory's retort.<sup>344</sup>

After these events, the parents took the box containing their son's "cremains" to the authorities and were told that the box contained potting soil and cement.<sup>345</sup> The court noted that "[n]ormally, the law does not [] permit recovery of damages for emotional distress unless the emotional distress is severe," and found sufficient material evidence of the defendant's reckless conduct to support imposition of liability for intentional infliction of emotional distress.<sup>346</sup>

### 32. Texas

Texas imposes no requirement that emotional distress manifest itself physically to be compensable.<sup>347</sup> In *Pat H. Foley and Company v. Wyatt*, the plaintiff sued a funeral home for failure to properly prepare, embalm, preserve, and protect her son's body for burial.<sup>348</sup> In that case, the plaintiff contracted with the funeral home to prepare the body for burial.<sup>349</sup> On the day of the funeral, when the casket was opened "there emanated from the body of her son a grossly offensive odor."<sup>350</sup> In response to the plaintiff's allegation of mental anguish, the defendant argued as a "general rule that if no physical harm to the person of the plaintiff is disclosed, no right of recovery exists by virtue on mental suffering alone."<sup>351</sup> The court noted that although the general rule was correct, Texas allowed an

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344. *Id.* at 499.

345. *Id.*

346. *Id.* at 503-04.

347. *Boyles v. Kerr*, 855 S.W.2d 593, 598 (Tex. 1993).

348. *Pat H. Foley & Co. v. Wyatt*, 442 S.W.2d 904, 905 (Tex. Civ. App. 1969).

349. *Id.*

350. *Id.*

351. *Id.* at 906. After the casket was opened, the plaintiff became ill and even fainted. *Id.* "It may be fairly said," opined the court, "that the impact of the occurrence occasioned a significant effect upon the sensibilities of the plaintiff." *Id.*

exception to the physical harm rule where the contract is personal in nature.<sup>352</sup> The court wrote,

Where the contract is personal in nature and the contractual duty or obligation is so coupled with matters of mental concern or solicitude, or with the sensibilities of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, and it should be known to the parties from the nature of the contract that such suffering will result from its breach, compensatory damages therefor may be recovered.<sup>353</sup>

Although the language from the Court of Appeals refers to contracts, it is worth pointing out that contractual privity is not required to recover mental anguish damages.<sup>354</sup> In *Rader Funeral Home, Inc. v. Chavira*, a funeral home delivered the wrong body for a service.<sup>355</sup> After being informed of his son's death in a town about 750 miles away, plaintiff contacted a local funeral home and asked them to make arrangements with the defendant's facility where the body was stored, to be delivered to the plaintiff for burial.<sup>356</sup> The defendant then flew the body to the plaintiff and when the casket was opened, the family realized that the wrong body had been delivered to them.<sup>357</sup>

The plaintiffs sued for negligent infliction of emotional distress as a result of their having to cancel the wake and suffering emotional distress.<sup>358</sup> Because the agreement to ship the dead body was between a local funeral home in El Paso and the defendant facility, the defendant "filed a motion for summary judgment, asserting that it had no duty as a matter of

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352. *Id.*

353. *Id.* (quoting *Lamm v. Shingleton*, 55 S.E.2d 810, 813 (N.C. 1949)).

354. *SCI Tex. Funeral Servs., Inc. v. Nelson*, 540 S.W.3d 539, 542 (Tex. 2018).

355. *Rader Funeral Home, Inc. v. Chavira*, 553 S.W.3d 10 (Tex. App. 2018).

356. *Id.* at 11–12.

357. *Id.* at 12.

358. *Id.*

law to avoid negligently inflicting emotional distress because it did not have a relationship with the [plaintiffs], contractual or otherwise, as required under Texas law to recover for mental anguish damages.”<sup>359</sup> The appellate court rejected the defendant’s argument, holding that the funeral home had an independent legal duty “to not mishandle [the plaintiffs’] loved one’s remains and thus interfere with putting him to rest,” and breach of this duty made it liable for mental anguish damages.<sup>360</sup> This holding was based on the Texas Supreme Court’s recent decision in *SCI Texas Funeral Services v. Nelson*, where it held that a contractual relationship is not required if the defendant breaches an independent legal duty, such as the duty to not negligently mishandle a corpse and that the duty to not negligently mishandle a corpse is such a duty.<sup>361</sup>

### 33. Utah

Utah abandoned the impact rule in *Johnson v. Rogers*.<sup>362</sup> There, the court established general guidelines for the tort of negligent infliction of emotional distress.<sup>363</sup> The *Johnson* court enunciated the “Dillon rule,”<sup>364</sup> which consists of the following three factors that determine the degree of foreseeability of the plaintiff’s injury: “(1) whether the plaintiff was located near the scene of the accident; (2) whether the emotional trauma to the plaintiff was caused by actually witnessing the accident; and (3) whether the plaintiff and the victim were closely related.”<sup>365</sup> More recent, in *Carlton v. Brown*, the court stated that “we have held previously that it is not enough for a plaintiff to merely allege emotional distress. Instead, she must prove that distress by means of severe physical or mental manifestations.”<sup>366</sup> Even

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359. *Id.* at 13.

360. *Id.* at 14, 17.

361. *Id.* at 16–17; *SCI Tex. Funeral Servs., Inc. v. Nelson*, 540 S.W.3d 539, 546–48 (Tex. 2018).

362. *Johnson v. Rogers*, 763 P.2d 771, 780, 783 (Utah 1988).

363. *Id.* at 783.

364. *See Dillon v. Legg*, 441 P.2d 912, 914 (Cal. 1968).

365. *Johnson*, 763 P.2d at 781 (citing *Dillon*, 441 P.2d at 920).

366. *Carlton v. Brown*, 323 P.3d 571, 585 (Utah 2014).

though Utah may have required emotional distress to manifest itself physically in order to recover for negligent mishandling of human remains,<sup>367</sup> it is safe to say mental manifestations are now enough.<sup>368</sup>

#### 34. *Vermont*

Like many states, Vermont started out with the physical injury requirement and then modified it under special circumstances.<sup>369</sup> More than a century ago, in *Nichols v. Central Vermont Railway Co.*, the Vermont Supreme Court denied a claim for injured feelings when a parent of a deceased sued the defendant for negligence in handling the dead body of her minor child.<sup>370</sup> The court was called on to decide “whether damages for mental suffering independent of physical injury are recoverable when occasioned by the mere negligent conduct of the defendant” and held that “in ordinary actions for negligence there can be no recovery for mental suffering where there is no attendant physical injury.”<sup>371</sup>

Although Vermont has kept the physical injury requirement for emotional distress recovery,<sup>372</sup> it appears the Court either

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367. In *Covert v. Kennecott Copper Corp.*, the plaintiff sued to recover damages for emotional distress resulting “from the mutilation of her husband’s body . . . caused by the defendant’s negligence in removing him from where he had been buried in an ore slide at the defendant’s . . . plant.” See 461 P.2d 466, 467–68 (Utah 1969) (holding that plaintiff can only recover “for severe emotional distress, though not accompanied by bodily impact or physical injury, where the defendant intentionally engaged in some conduct toward the plaintiff, (a) with the purpose of inflicting emotional distress, or, (b) where any reasonable person would have known that such would result; and his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality”).

368. See *Carlton*, 323 P.3d at 585.

369. *Nichols v. Cent. Vt. Ry. Co.*, 109 A. 905, 907 (Vt. 1919).

370. *Id.* at 905, 908.

371. *Id.* at 907.

372. See *Jobin v. McQuillen*, 609 A.2d 990, 993 (Vt. 1992) (rejecting negligent infliction of emotional distress claim because plaintiff “did not allege that she suffered physical harm . . . or that she was subject to a reasonable fear of immediate physical injury” when the medical examiner, while conducting an authorized autopsy, removed and retained her son’s brain for further study).



abandoned or modified the rule in 2013.<sup>373</sup> In *Vincent v. Devries*, the court confronted, for the first time, the question of whether emotional distress damages are available in legal malpractice cases.<sup>374</sup> The court noted that in following the physical injury requirement in the past, it did not necessarily “foreclose the possibility of allowing for emotional-distress damages absent physical manifestations under special circumstances where the nature of the tortious act guarantees the genuineness of the claim.”<sup>375</sup> These special circumstances included “negligent transmission of a message, especially one announcing death, and negligent mishandling of corpses.”<sup>376</sup> The court ultimately held that

a plaintiff may recover for negligent infliction of emotional distress if the plaintiff can show that (1) the defendant has a relationship with the plaintiff, or has undertaken an obligation to the plaintiff, of a nature that necessarily implicates the plaintiff’s emotional well-being, (2) there is an especially likely risk that the defendant’s negligence would cause serious emotional distress to the plaintiff, and (3) negligent actions or omissions of the defendant in breach of that obligation have, in fact, caused serious emotional distress to the plaintiff.<sup>377</sup>

### 35. *West Virginia*

In West Virginia, “a cause of action for negligent or intentional mishandling of a dead body does not require a showing of physical injury or pecuniary loss. Mental anguish is

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373. *Vincent v. Devries*, 72 A.3d 886, 891 (Vt. 2013).

374. *Id.* at 890.

375. *Id.* at 891 (quoting *Fitzgerald v. Congleton*, 583 A.2d 595, 600 (Vt. 1990)).

376. *Id.* (quoting W. PAGE KEETON, WILLIAM LLOYD PROSSER, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, *PROSSER AND KEETON ON TORTS* § 54, at 362 (5th ed.1984)).

377. *Id.* at 893.

a sufficient basis for recovery of damages.”<sup>378</sup> In *Whitehair v. Highland Memory Gardens, Inc.*, the defendant contracted with the West Virginia Department of Highways to relocate bodies buried in a cemetery.<sup>379</sup> The plaintiff alleged that the “removal was done in an incredibly careless manner,” and specifically that “the remains of her sister and two aunts were lost or misplaced after removal, and that the defendant also failed to remove all of the remains of her cousin.”<sup>380</sup> Thus, the plaintiff argued that the defendant’s actions exceeded simple negligence and amounted to willful, wanton, and reckless, conduct and resulted in substantial mental anguish and suffering.<sup>381</sup> She claimed no pecuniary loss or physical injury.<sup>382</sup>

The case presented a question of first impression in West Virginia as to “whether a person can recover damages for mental anguish caused by the intentional, reckless, or negligent mishandling of a relative’s remains where the removal itself is lawful.”<sup>383</sup> In finding for the plaintiff, the court ruled that a cause of action for negligent or intentional mishandling of a dead body does not require a showing of physical injury or pecuniary loss.<sup>384</sup> Additionally, the court noted, “losing bodies, and parts of bodies, after disinterment and thereby preventing reinterment, is also actionable.”<sup>385</sup>

### 36. *Wisconsin*

In Wisconsin, claims for negligent infliction of emotional distress do not require proof of physical manifestation of severe emotional distress.<sup>386</sup> More than a century ago, the Wisconsin Supreme Court held in *Koeber v. Patek* that “mental suffering

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378. *Whitehair v. Highland Memory Gardens, Inc.*, 327 S.E.2d 438, 443 (W. Va. 1985).

379. *Id.* at 439.

380. *Id.*

381. *Id.* at 440.

382. *Id.*

383. *Id.*

384. *Id.* at 443.

385. *Id.* at 442.

386. *Bowen v. Lumbermens Mut. Cas. Co.*, 517 N.W.2d 432, 443 (Wis. 1994).

may be an actual injury, for which award is to be made strictly as compensation in proper cases.”<sup>387</sup> In *Jackson v. McKay-Davis Funeral Home, Inc.*, the plaintiffs filed suit against funeral home alleging, among others, negligent handling of human remains and negligent infliction of emotional distress, stemming from the loss of the cremated remains of their family member.<sup>388</sup> The defendant moved for summary judgment contending that there was no cause of action for the negligent handling of human remains in either Wisconsin or Oklahoma.<sup>389</sup> The court denied the motion, finding that, to the contrary, Wisconsin did recognize the cause of action.<sup>390</sup> Further, while older caselaw from the state indicated that an emotional distress claim in this context required “a showing of severe emotional distress plus accompanying injury,” the subsequent evolution of Wisconsin’s NIED law meant that “the accompanying physical injury requirement [had] been eliminated.”<sup>391</sup>

### 37. Wyoming

Wyoming first confronted the tort of negligent infliction of emotional distress in *Gates v. Richardson*.<sup>392</sup> There, the family members sued defendant for injuries sustained in an accident when an automobile being driven by the defendant collided with a bicycle being ridden by the six-year-old victim.<sup>393</sup> The victim did not die but suffered massive brain injuries from which he was unlikely to recover.<sup>394</sup> The victim’s mother, sister, and brother sought damages from the defendant for the emotional distress they suffered from observing the victim’s severe injury at the scene of the accident.<sup>395</sup> The trial court

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387. *Koerber v. Patek*, 102 N.W. 40, 44 (Wis. 1905) (citations omitted).

388. *Jackson v. McKay-Davis Funeral Home, Inc.*, 830 F. Supp. 2d 635, 639 (E.D. Wis. 2011).

389. *Id.* at 650.

390. *Id.* at 651, 655.

391. *Id.* at 651.

392. *Gates v. Richardson*, 719 P.2d 193, 194 (Wyo. 1986).

393. *Id.*

394. *Id.*

395. *Id.*

denied recovery on the grounds that the tort did not exist in Wyoming.<sup>396</sup> The Wyoming Supreme Court reversed, concluding that the tort of negligent infliction of emotional distress is actionable in Wyoming under some limitations, namely, restricting the class of plaintiffs who can recover to spouses, children, parents, and siblings of the victim, allowing recovery when the plaintiff either witnesses the accident or arrives on the scene while the victim is still there, and the primary victim must die or suffer serious bodily injury.<sup>397</sup>

Similarly, in *Larsen v. Banner Health System*, the United States District Court for the District of Wyoming certified the question to the Wyoming Supreme Court “whether Wyoming allows recovery of purely emotional damages in a negligence action brought by a mother and daughter who were separated because two babies were switched at birth.”<sup>398</sup> The state court answered in the affirmative.<sup>399</sup> The court stated that “[t]raditionally, recovery for mental or emotional injury was only allowed when such injury was linked to an actual or threatened physical impact.”<sup>400</sup> However, several exceptions to the impact rule had emerged.<sup>401</sup> The court agreed with the Iowa Supreme Court’s exception to the physical injury rule when one party owes a duty to the other to avoid causing emotional harm by exercising ordinary care.<sup>402</sup> “This exception is applied in circumstances involving contractual relationships for services that carry with them deeply emotional responses in the event of breach,” for example, recovery for the mishandling of corpses.<sup>403</sup>

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396. *See id.* at 194, 197.

397. *Id.* at 198–99.

398. *Larsen v. Banner Health Sys.*, 81 P.3d 196, 198 (Wyo. 2003).

399. *Id.* at 196.

400. *Id.* at 199 (citations omitted).

401. *See id.* at 202–03.

402. *Id.* (quoting *Lawrence v. Grinde*, 534 N.W.2d 414, 421 (Iowa 1995)).

403. *Id.* at 203.

In conclusion, four common themes emerge in the states that do not require physical injury for emotional distress recovery for mishandling of human remains. First, many of them follow the *Restatement (Second) of Torts* section 868.<sup>404</sup> Thus, these states hold that a plaintiff need not allege physical consequences of mental distress in connection with harm suffered.<sup>405</sup> Second, some states seem to favor emotional distress recovery when the defendants' conduct is intentional, i.e., intentional infliction of emotional distress, in contrast to where there is negligence, i.e., negligent infliction of emotional distress. There are key distinctions between intent and negligence that are relevant here. Intentional actions indicate greater fault than negligent ones.<sup>406</sup> There is a difference between doing something on purpose or knowing to a substantial certainty that the harm will occur and taking that risk. The survey of the states above suggests that some jurisdictions do make distinctions between intentionally caused emotional distress and negligently caused emotional distress. However, as discussed earlier in this Section, on the critical point of whether physical injury or manifestation is required or not required, both are identical, so analysis on this point is blended.<sup>407</sup> Third, some states allow recovery when the defendant has a special relationship with the plaintiff.<sup>408</sup> These states recognize that special relationships or

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404. See *supra* notes 216–227 and accompanying text citing cases following *Restatement (Second) of Torts* section 868.

405. See RESTATEMENT (SECOND) OF TORTS § 868 cmt. a (AM. L. INST. 1979).

406. See David Crump, *Evaluating Independent Torts Based Upon "Intentional" or "Negligent" Infliction of Emotional Distress: How Can We Keep the Baby from Dissolving in the Bath Water?*, 34 ARIZ. L. REV. 439, 454 (1992).

407. See, e.g., *Rogers v. Louisville Land Co.*, 367 S.W.3d 196, 206 (Tenn. 2012); Geoffrey Christopher Rapp, *Defense Against Outrage and the Perils of Parasitic Torts*, 45 GA. L. REV. 107, 140–41 (2010) ("As with IIED claims, many early decisions recognizing NIED imposed a requirement that emotional disturbance manifest itself in the form of bodily harm. . . . With time, however, this requirement has been watered down in both IIED and NIED, giving further support to the narrative told about the rising importance of emotional harm in the law of torts.").

408. See *supra* notes 105, 113, 115, 126, 151, 180, 352, 377 and accompanying text (identifying Alaska, Arizona, Arkansas, California, District of Columbia, Iowa, Texas, and Vermont as states that allow recovery when the defendant has a special relationship with the plaintiff).

undertakings create duties to protect against emotional harm.<sup>409</sup> Finally, some of the states allow recovery where mental distress is a highly foreseeable result of mishandling human remains.<sup>410</sup> One can conclude that although results in the emotional distress cases are divergent, states have coalesced around a small range of options. There is still though, a minority of states that impose the physical injury requirement.

### B. *Physical Injury or Manifestation Required*<sup>411</sup>

The fourteen states that still require some form of physical injury or manifestation include Colorado, Florida, Georgia, Kansas, Michigan, Mississippi, Missouri, New Hampshire, Oklahoma, Rhode Island, South Carolina, South Dakota, Virginia and Washington.

#### 1. *Colorado*

In Colorado, “recovery for mental distress resulting from negligent interference with a dead body” is not allowed unless “the affected person is in the range of physical peril.”<sup>412</sup> Although Colorado recognized a cause of action for severe emotional distress without accompanying physical injury in *Rugg v. McCarty*,<sup>413</sup> it appears to limit recovery to outrageous

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409. See, e.g., *Dobbs, supra* note 62, at 57 (“Recognizing that special relationships or undertakings create duties to protect against emotional harm is not radical.”); *Noah v. Univ. of Tex. Med. Branch at Galveston*, 176 S.W.3d 350, 356 (Tex. Ct. App. 2004) (“Special relationship cases generally have three common elements: (1) a contractual relationship between the parties, (2) a particular susceptibility to emotional distress on the part of the plaintiff, and (3) the defendant’s knowledge of the plaintiff’s particular susceptibility to the emotional distress, based on the circumstances.”); *Toney v. Chester Cnty. Hosp.*, 36 A.3d 83, 84 (Pa. 2011).

410. See, e.g., *Allen v. Jones*, 163 Cal. Rptr. 445, 448 (Ct. App. 1980); *Gammon v. Osteopathic Hosp. of Me., Inc.*, 534 A.2d 1282, 1285 (Me. 1987); *Frys v. Cleveland*, 668 N.E.2d 929, 932 (Ohio Ct. App. 1995).

411. Physical injury or manifestation as used here contemplates either the physical impact itself (e.g., bleeding, bruising, broken bones) or something that manifests after the impact such as high blood pressure, nausea, fainting, depression etc.

412. *Kimelman v. City of Colo. Springs*, 775 P.2d 51, 52 (Colo. App. 1988).

413. *Rugg v. McCarty*, 476 P.2d 753, 756 (Colo. 1970).

conduct only.<sup>414</sup> Moreover, the state does not allow recovery for negligent infliction of emotional distress resulting from mishandling of a dead body.<sup>415</sup> For example, in *Kimelman v. City of Colorado Springs*, the plaintiffs contracted with the defendants to provide a casket and funeral services for their deceased son.<sup>416</sup> After the funeral service, the plaintiffs “went to the grave site, where the pallbearers set the casket on a lowering device designed to lower the casket gradually into the grave. The device failed, and the casket fell headlong into the grave, where the lid slid back and revealed the decedent’s upright upper body.”<sup>417</sup> Plaintiffs sued for negligent infliction of emotional distress and emotional distress resulting from breach of contract.<sup>418</sup> The trial court granted summary judgment in favor of the defendants on the emotional distress claim because the plaintiffs were not in the zone of danger; and on the breach of contract claim “because the breach was not accompanied by willful, insulting, or wanton conduct on the part of the defendants.”<sup>419</sup> In affirming the trial court, the Court of Appeals rejected the plaintiffs’ argument to “adopt the *Restatement (Second) of Torts* [section] 868 (1965), which allows recovery for mental distress resulting from negligent interference with a dead body, regardless of whether the affected person was in range of physical peril.”<sup>420</sup> The Court of Appeals observed that the Colorado Supreme Court “has declined to reach the issue of allowing damages when fear of personal safety is absent . . . and . . . has explicitly rejected recovery where the plaintiff observed injury to a living family member but was in no danger

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414. See *id.*; *Culpepper v. Pearl St. Bldg., Inc.*, 877 P.2d 877, 882 (Colo. 1994) (quoting *Destefano v. Grabrian*, 763 P.2d 275, 286 (Colo. 1988)) (“‘Outrageous conduct’ is defined as conduct that is ‘so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.’”).

415. See, e.g., *Kimelman*, 775 P.2d at 52.

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.*

herself.”<sup>421</sup> Put succinctly, the court refused to carve out an exception to the zone-of-danger rule.<sup>422</sup>

A decade after *Kimelman*, the Colorado Supreme Court was presented with the issue of whether “plaintiffs, whose deceased son’s body was mistakenly cremated before an autopsy could be performed, suffered a compensable injury.”<sup>423</sup> There, the son’s body had been placed in a cooler with a second body that was marked for cremation.<sup>424</sup> The crematorium employees mistakenly took the plaintiffs’ son’s body for cremation, instead of the second one.<sup>425</sup> The plaintiffs sued for conversion and destruction of property, breach of contract, outrageous conduct, and civil rights violations.<sup>426</sup> The trial court granted summary judgment in favor of the defendants, ruling that the plaintiffs failed to show “actual damages” and presented no evidence that the defendants had acted intentionally to cause them emotional distress.<sup>427</sup> The Court of Appeals affirmed, holding in part that “there was no cause of action for negligent infliction of emotional distress resulting from mishandling of a dead body.”<sup>428</sup> The Colorado Supreme Court affirmed, writing that the plaintiffs “produced no evidence that the defendants intended to cause them emotional distress or acted recklessly in cremating the wrong body . . . [and] that no reasonable person could have found that the conduct of the defendants was outrageous.”<sup>429</sup>

Notably, Colorado jury instructions state that for a plaintiff to recover for negligent infliction of emotional distress, the jury must find by a preponderance of the evidence that “the defendant was negligent; the defendant’s negligence created an

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421. *Id.*

422. *Id.*

423. *Culpepper v. Pearl St. Bldg., Inc.*, 877 P.2d 877, 878 (Colo. 1994).

424. *Id.* at 879.

425. *Id.*

426. *Id.*

427. *Id.* at 878.

428. *Id.*

429. *Id.* at 883.



unreasonable risk of physical harm to the plaintiff; [and that] the defendant's negligence caused the plaintiff to be put in fear for her own safety."<sup>430</sup> Such fear must be shown by "physical consequences or long-continued emotional disturbance, rather than only momentary fright, shock, or other similar and immediate emotional distress."<sup>431</sup>

## 2. Florida

In Florida, recovery for mental anguish caused by interference with a corpse "requires a showing of either a physical impact to the claimant or malicious conduct by the defendant."<sup>432</sup> Florida first recognized the tort of tortious interference with human remains in *Kirksey v. Jennigan*.<sup>433</sup> There, the Supreme Court ruled that there can be "no recovery for mental pain and anguish unconnected with physical injury in an action arising out of the negligent breach of a contract whereby simple negligence is involved."<sup>434</sup> The court made an exception where defendants actions were malicious.<sup>435</sup>

This rule was further reiterated in *Gonzalez v. Metropolitan Dade County Public Health Trust* where the question presented was whether the plaintiffs may recover damages for emotional distress caused by a tortious interference with a dead body, based on allegations and proof that a hospital morgue negligently delivered the wrong body of an infant to a funeral home, which was presented at a funeral by the plaintiffs, and where the plaintiffs suffered no physical impact.<sup>436</sup> The court

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430. COLO. JUD. BRANCH, PATTERN CIVIL JURY INSTRUCTIONS: CHAPTER 9:2, NEGLIGENCE INFLICTION OF EMOTIONAL DISTRESS — ELEMENTS OF LIABILITY 20 (2021), [https://www.courts.state.co.us/userfiles/file/Court\\_Probation/Supreme\\_Court/Committees/Civil\\_Jury\\_Instructions\\_Committee/2021/Chapter%209.pdf](https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Civil_Jury_Instructions_Committee/2021/Chapter%209.pdf).

431. *Id.*

432. *Gonzalez v. Metro. Dade Cnty. Pub. Health Tr.*, 626 So. 2d 1030, 1033 (Fla. Dist. Ct. App. 1993) (citing *Kirksey v. Jennigan*, 45 So. 2d 188, 189 (Fla. 1950)), *aff'd*, 651 So. 2d 673 (Fla. 1995).

433. *Kirksey*, 45 So. 2d 188.

434. *Id.* at 189.

435. *See id.*

436. *Gonzalez*, 626 So. 2d at 1030–31.

cited a line of Florida cases, holding that there can be no recovery for mental anguish in an action based on negligent mishandling of a corpse where the claimant has suffered no physical impact.<sup>437</sup> Therefore, Florida adheres to two lines of cases allowing recovery for interference with dead bodies: first, requiring physical impacts, and second, involving claims for outrageous and malicious acts by the defendant.<sup>438</sup>

### 3. Georgia

Just like Florida, Georgia adheres to the physical impact rule, unless the defendant's conduct is malicious, willful, or wanton.<sup>439</sup> For example, in *Hang v. Wages & Sons Funeral Home, Inc.*, family members contracted with a funeral home to cremate the decedent in accordance with Cambodian Buddhist funeral rituals.<sup>440</sup> Instead, the funeral home cremated the body five days prior to the scheduled date, and could not confirm whether the urn given to the family members actually contained the ashes of the decedent.<sup>441</sup> Family members sued the funeral home for negligence, fraud, and interference with the family's right to closure.<sup>442</sup> They sought "damages for severe emotional distress and injury to peace, happiness, and feelings."<sup>443</sup> The trial court

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437. *Id.* at 1031 (citing *Baker v. Florida Nat'l Bank*, 559 So. 2d 284 (Fla. Dist. Ct. App. 1990)).

438. *Id.* at 1032. Because the impact rule is still applied in Florida, the state is categorized, for the purposes of this discussion only, as requiring physical injury. *See generally* *Willis v. Gami Golden Glades LLC*, 967 So. 2d 846, 850 (Fla. 2007) ("In Florida, the prerequisites for recovery for negligent infliction of emotional distress differ depending on whether the plaintiff has or has not suffered a physical impact from an external force. If the plaintiff has suffered an impact, Florida courts permit recovery for emotional distress stemming from the incident during which the impact occurred, and not merely the impact itself. If, however, the plaintiff has not suffered an impact, the complained-of mental distress must be 'manifested by physical injury,' the plaintiff must be 'involved' in the incident by seeing, hearing, or arriving on the scene as the traumatizing event occurs, and the plaintiff must suffer the complained-of mental distress and accompanying physical impairment 'within a short time' of the incident."). *But see id.* at 861 (Pariante, J., concurring) ("In other words, if there is an impact, a plaintiff can recover for emotional distress regardless of whether the plaintiff suffered a physical injury.").

439. *See* *Hang v. Wages & Sons Funeral Home, Inc.*, 585 S.E.2d 118, 120 (Ga. Ct. App. 2003).

440. *Id.* at 119.

441. *Id.*

442. *Id.* at 120.

443. *Id.*

granted the defendant's motion for partial summary judgment.<sup>444</sup> In affirming the trial court decision, the Georgia Court of Appeals explained that parties claiming negligent infliction of emotional distress must "show a physical impact resulting in physical injury," unless the defendant's conduct is malicious, willful, or wanton.<sup>445</sup>

Perhaps no case in Georgia crystallized the impact rule more than *Coon v. Medical Center, Inc.*<sup>446</sup> There, an Alabama resident went to a hospital in Columbus, Georgia where she delivered a stillborn baby.<sup>447</sup> The plaintiff informed the hospital staff that the baby's remains were to be released to a funeral home in her hometown in Alabama.<sup>448</sup> Because of a misidentification, the hospital released the wrong baby to the funeral home.<sup>449</sup> About two weeks later, but after the plaintiff had buried what she believed was her baby, the hospital discovered the mistake and informed her that it had released the wrong baby for burial.<sup>450</sup> The next day, the baby who had been wrongfully buried was exhumed.<sup>451</sup> The plaintiff later sued the hospital for damages for the emotional distress she suffered as a result of the mishandling of her stillborn child's remains.<sup>452</sup>

The trial court agreed with the hospital that under Georgia law, the plaintiff's claims failed because she suffered no physical impact,<sup>453</sup> which was affirmed by the Georgia Court of Appeals.<sup>454</sup> The plaintiff appealed to the Georgia Supreme Court, arguing that Alabama law should apply because that was where she suffered the injury.<sup>455</sup> The Georgia Supreme

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444. *Id.* at 119.

445. *Id.*

446. *Coon v. Med. Ctr. Inc.*, 797 S.E.2d 828 (Ga. 2017).

447. *Id.* at 829.

448. *Id.* at 830.

449. *Id.*

450. *Id.* at 831.

451. *Id.*

452. *Id.*

453. *Id.* at 831–32.

454. *Id.* at 832.

455. *Id.* at 831, 833.

Court disagreed, opting to follow the common law in Georgia.<sup>456</sup> More pertinent, the Court observed, “Georgia follows the physical impact rule for claims of negligent infliction of emotional distress, which this Court first adopted in an 1892 decision.”<sup>457</sup> The Court writes, somewhat dryly, “the facts of this case, while tragic, do not warrant the creation of a new exception to the physical impact rule.”<sup>458</sup> Succinctly put, Georgia rejects the creation of an exception to the physical impact rule for cases involving the negligent mishandling of human remains.<sup>459</sup>

#### 4. Kansas

In Kansas, the emotional distress must cause a physical injury or impact before a plaintiff can recover for a claim of negligent infliction of emotional distress.<sup>460</sup> As an example, in *Dill v. Barnett Funeral Home Inc.*, a widow sued a funeral home for failing to promptly retrieve her husband’s body after being notified of his death; embalming the body without her consent; failing to ensure that the body was placed in the proper burial plot; misrepresenting the size of casket required; and for utilizing unlicensed staff members to arrange her husband’s funeral.<sup>461</sup> She alleged negligent of infliction of emotional distress and intentional mishandling of a corpse.<sup>462</sup> The court found that the widow’s claims of “lack of sleep, recurring dreams, and general fatigue without seeking professional

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456. *Id.* at 829.

457. *Id.* at 836 (citing *Lee v. State Farm Mut. Ins. Co.*, 533 S.E.2d 82, 84 (Ga. 2000)).

458. *Id.* at 837.

459. *Id.*; see also *Simson*, *supra* note 16, at 829 (criticizing the Georgia Supreme Court’s decision in *Coon* for denying plaintiff emotional distress recovery for negligent mishandling of human remains, because defendant’s actions did not include physical injury to plaintiff).

460. *Dill v. Barnett Funeral Home, Inc.*, No. 90,653, 2004 Kan. App. Unpub. LEXIS 1068, at \*8 (Ct. App. Feb. 13, 2004); see also *Ware ex rel. Ware v. ANW Special Educ. Coop.* No. 603, 10 P.3d 610, 613 (Kan. Ct. App. 2008) (“To succeed on a claim for negligent infliction of emotional distress, a plaintiff must first establish that he or she has a qualifying physical injury under Kansas law.”).

461. *Dill*, 2004 Kan. App. Unpub. LEXIS 1068, at \*7.

462. *Id.* at \*8–9.

medical assistance [were insufficient] to support a claim for negligent infliction of emotional distress.”<sup>463</sup> As for the intentional mishandling of a corpse claim, the court observed “[a]lthough a cause of action for interference with a dead body provides an exception to the requirement of proof of physical symptoms, this cause of action requires intentional conduct, not merely negligent conduct.”<sup>464</sup>

### 5. Michigan

In Michigan, negligent infliction of emotional distress “is a limited tort that is recognized where a person witnesses the negligent injury or death of a third person.”<sup>465</sup> It has not been extended to other situations.<sup>466</sup> In *Vogelaar v. U.S.*, a case against the U.S. military based on its alleged failure to identify remains of a service member killed in Vietnam, the federal district court canvassed Michigan law regarding recovery for emotional distress.<sup>467</sup> The court noted, “there is precedent for allowing recovery for negligent infliction of emotional distress without a physical impact so long as there is some definite and objective physical injury.”<sup>468</sup> In fact, Michigan courts are quite lenient when it comes to considering allegations of physical injury to be sufficient for these claims.<sup>469</sup> For example, “allegations of weight loss, extreme nervousness, or inability to function day to day have been found to be sufficient.”<sup>470</sup>

In *Kogelshatz v. Gendernalik Funeral Home, Inc.*, the plaintiffs sued a funeral home for storing their mother’s cremation remains for many months instead of burying the remains

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463. *Id.* at \*8.

464. *Id.*

465. 7 MICH. CIV. JURIS., CORPSES AND BURIAL § 49 (2020).

466. *Id.*

467. *Vogelaar v. United States*, 665 F. Supp. 1295, 1297–1306 (E.D. Mich. 1987).

468. *Id.* at 1306 (quoting *Daley v. LaCroix*, 179 N.W.2d 390, 395 (Mich. 1970)).

469. *Id.* (citing *Apostle v. Booth Newspapers, Inc.*, 572 F. Supp. 897, 901 (W.D. Mich. 1983)).

470. *Id.*

immediately according to the family's wishes.<sup>471</sup> Plaintiffs alleged gross negligence and negligent infliction of emotional distress.<sup>472</sup> The trial court granted summary judgment in favor of the funeral home.<sup>473</sup> The appellate court affirmed, writing that in order for plaintiff to prevail on negligent infliction of emotional distress, plaintiff would have to prove:

(1) a serious injury is threatened or inflicted on a third person, (2) the nature of the injury is such as to cause severe mental disturbance to the plaintiff, (3) the shock results in actual physical harm, (4) the plaintiff is a member of the third person's immediate family, and (5) the plaintiff is present at the time the third person is injured or suffers shock fairly contemporaneously with that injury.<sup>474</sup>

The court further stated that claims for negligent infliction of emotional distress are not based on some negligent action that causes a plaintiff to suffer severe emotional distress, but "rather, the claim is predicated on a plaintiff's witnessing of a negligent injury to an immediately family member and suffering severe mental distress resulting in actual physical harm."<sup>475</sup> Because plaintiffs' mother had already passed away and had been cremated by the time of the alleged event, plaintiffs could not have witnessed a negligent injury being threatened or inflicted on their mother.<sup>476</sup> Therefore, it appears that in Michigan, if one does not witness the negligent injury or death of a third person, there would be no recovery.<sup>477</sup>

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471. *Kogelshatz v. Gendernalik Funeral Home Inc.*, No. 293977, 2010 WL 4628678, at \*2 (Mich. Ct. App. Nov. 16, 2010).

472. *Id.*

473. *Id.*

474. *Id.* at \*4.

475. *Id.* (citing *Duran v. Detroit News, Inc.*, 504 N.W.2d 715, 719–20 (Mich. Ct. App. 1993)).

476. *Id.*

477. 7 MICH. CIV. JURIS., CORPSES AND BURIAL § 49 (2020).

### 6. *Mississippi*

Just like Michigan, Mississippi also requires some form of physical or mental injury to recover for negligent infliction of emotional distress. In *Adams v. U.S. Homecrafters Inc.*, the Mississippi Supreme Court was presented with the question of whether Mississippi law requires “proof of physical manifestation in order to recover damages for emotional distress caused by simple negligence rather than an intentional tort.”<sup>478</sup> The Court canvassed the cases in the state and noted that its language in previous cases adopting the term “demonstrable harm” instead of “physical injury” showed that the proof “may solely consist of evidence of a mental injury without physical manifestation.”<sup>479</sup> Despite the plaintiff-friendly and promising move from physical injury to demonstrable harm in *Adams*, later Mississippi case law still requires that the plaintiff prove some sort of injury.<sup>480</sup> For example, in *Evans v. Mississippi Department of Health and Human Services*, the Court of Appeals wrote that “in 2001, the Supreme Court changed course, holding that ‘some sort of physical manifestation of injury or demonstrable physical harm’ was required.”<sup>481</sup>

### 7. *Missouri*

In Missouri, to prevail on a negligent infliction of emotional distress claim, a plaintiff must prove: (1) that the defendant should have realized “that his conduct involved an unreasonable risk to the plaintiff; (2) that the plaintiff was present at the scene of an injury producing, sudden event; and (3) that the plaintiff was in the zone of danger.”<sup>482</sup> Thus, also like

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478. *Adams v. U.S. Homecrafters, Inc.*, 744 So. 2d 736, 741 (Miss. 1999).

479. *Id.* at 743.

480. *See id.*; *Evans v. Miss. Dep’t of Hum. Servs.*, 36 So. 3d 463, 476 (Miss. Ct. App. 2010).

481. *Evans*, 36 So. 3d at 476 (quoting *Am. Bankers’ Ins. Co. of Fla. v. Wells*, 819 So. 2d 1196, 1209 (Miss. 2001)).

482. *See Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 465 (Mo. 2001) (emphasis added).

Michigan, Missouri requires physical presence at the scene of the injury. Therefore, it appears that the door is shut for mental anguish recovery for mishandling of human remains where the distress occurs after the shocking event, or after the person has been buried.

As a saving grace, Missouri recognizes the right of sepulcher<sup>483</sup> and “allows the next of kin to bring an action for the negligent handling of a deceased relative.”<sup>484</sup> However, a plaintiff’s recovery may be limited to the pecuniary losses caused by a defendant’s negligent acts in caring for the body.<sup>485</sup>

### 8. *New Hampshire*

In New Hampshire, the tort of negligent infliction of emotional distress “requires, as an element of liability, that the plaintiff prove that physical injury resulted from the emotional distress caused by the defendant.”<sup>486</sup> In *In re Bayview Crematory, LLC*, the plaintiffs sued the crematorium and other funeral homes that contracted with it, alleging that all parties “breached their duties to ensure that the cremations were authorized by the State and performed in accordance with the standard of care for a crematorium, resulting in emotional suffering, stigma

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483. “[The] ‘right of sepulcher’ means the right to choose and control the burial, cremation, or other final disposition of a dead human body.” MO. REV. STAT. § 194.119 (2005).

484. See *Jackson v. Christian Hosp. Ne.-Nw.*, 823 S.W.2d 137, 138 (Mo. Ct. App. 1992); see also *McGathey v. Davis*, 281 S.W.3d 312, 320 (Mo. Ct. App. 2009); *Sale v. Slitz*, 998 S.W.2d 159, 165 (Mo. Ct. App. 1999) (allowing plaintiffs to recover for mental anguish for interference with right of sepulcher). Other cases dealing with human remains in Missouri concern the interment and disinterment of human remains. See, e.g., *In re Removal of Hum. Remains from Cemeteries in Kan. City v. Unknown*, 297 S.W.3d 616, 619 (Mo. Ct. App. 2009) (addressing the relocation of human remains from private cemeteries as allowed by a statute); *Talbert v. D.W. Newcomer’s Sons*, 870 S.W.2d 472, 474 (Mo. Ct. App. 1994) (rejecting plaintiff’s claim for mental anguish after cemetery owner buried her husband in the wrong grave, on the ground that a Missouri statute excused the cemetery owner from liability if he made a mistake in the original burial).

485. See *Jackson*, 823 S.W.2d at 138.

486. See *In re Bayview Crematory, LLC*, 930 A.2d 1190, 1195 (N.H. 2007) (citing *Palmer v. Nan King Rest.*, 798 A.2d 583 (N.H. 2002)); see also *O’Donnell v. HCA Health Servs. of N.H. Inc.*, 883 A.2d 319, 324 (N.H. 2005) (“To recover for emotional distress under a traditional negligence theory, we have consistently required plaintiffs to demonstrate physical symptoms of their distress regardless of physical impact.”).



damages, and other injuries.”<sup>487</sup> Plaintiffs moved for class certification alleging that there were “hundreds of putative Class Members whose next-of-kin or loved ones were cremated” by the defendants.<sup>488</sup> In denying class certification, the New Hampshire Supreme Court ruled that plaintiffs’ claims could not meet the second requirement of class action lawsuits, i.e., there are questions of law or fact common to the class which predominate over any questions affecting only individual members.<sup>489</sup> Specifically, the Court wrote, “[t]o ensure that the emotional injury is sufficiently serious to warrant legal protection and establish a cause of action, expert testimony is required to prove *physical symptoms* suffered from alleged negligent infliction of emotional distress.”<sup>490</sup>

### 9. Oklahoma

In Oklahoma, “[u]pon proper proof, the plaintiff may recover for mental anguish where it is caused by physical suffering and may also recover for mental anguish which inflicts physical suffering.”<sup>491</sup> For example, in *Brady v. Criswell Funeral Home, Inc.*, a plaintiff brought suit against the defendant funeral home for negligence and intentional infliction of emotional distress arising from the alleged wrongful cremation of plaintiff’s deceased mother.<sup>492</sup> The defendant contended that, absent a physical injury, plaintiff could not recover damages for mental anguish on a negligence claim.<sup>493</sup> In response, the appellate

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487. 930 A.2d at 1192.

488. *Id.*

489. *Id.* at 1194–95.

490. *Id.* at 1195.

491. *Ellington v. Coca Cola Bottling Co. of Tulsa*, 717 P.2d 109, 111 (Okla. 1986); *see also* *Richardson v. J.C. Penney Co.*, 649 P.2d 565, 566 (Okla. Civ. App. 1982) (“Modern psychology and medicine recognize the impact of unseen emotional or mental stresses on one’s physical body. Although many jurisdictions are moving toward this holistic approach, the law in Oklahoma demands some measure of tangible physical manifestation of damage—a broken limb or even the pain of hunger would suffice. The Oklahoma Supreme Court has repeatedly denied recovery for negligently inflicted mental distress alone.”).

492. *Brady v. Criswell Funeral Home, Inc.*, 916 P.2d 269, 269 (Okla. App. Div. 1996).

493. *Id.* at 271.

court noted that “[a]lthough a plaintiff may not recover for mental anguish alone in a negligence case, if there is some physical suffering connected therewith, the mental anguish may be recovered for.”<sup>494</sup>

#### 10. Rhode Island

Although Rhode Island rejected the impact rule many years ago,<sup>495</sup> it requires at least some proof of medically established physical symptoms to recover for emotional distress. For example, in *Gross v. Pare*, the Rhode Island Supreme Court explained that

[i]n order to impose liability on a defendant for intentional infliction of emotional distress: (1) the conduct must be intentional or in reckless disregard of the probability of causing emotional distress, (2) the conduct must be extreme and outrageous, (3) there must be a causal connection between the wrongful conduct and the emotional distress, and (4) the emotional distress in question must be severe.<sup>496</sup>

The court further noted that recovery for both intentional and negligent infliction of emotional distress requires “at least some proof of medically established physical symptomatology.”<sup>497</sup>

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494. *Id.*

495. The Rhode Island Supreme Court wrote:

The seminal Rhode Island case, *Simone v. Rhode Island Co.*, 28 R.I. 186, 66 A. 202 (1907), rejected the impact rule, which was then the law of the overwhelming majority of jurisdictions. The court held that when a person was physically endangered by the acts of a defendant, even though no physical impact resulted, that person could recover for the fright experienced from the defendant’s negligence, when that fright is followed by physical ills or gives rise to nervous disturbances which in turn lead to physical ills.

*See D’Ambra v. United States*, 354 F. Supp. 810, 813 (D.R.I. 1973), *aff’d*, 481 F.2d 14 (1st Cir. 1973), *aff’d*, 518 F.2d 275 (1st Cir. 1975).

496. *Id.* at 818; *see also* *Gross v. Pare*, 185 A.3d 1242, 1246 (R.I. 2018).

497. *Gross*, 185 A.3d at 1245–46 (citing *Swerdlick v. Koch*, 721 A.2d 849, 862 (R.I. 1998) (quoting *Champlin v. Washington Tr. Co. of Westerly*, 478 A.2d 985, 989 (R.I. 1984))) (internal citations omitted).

Additionally, Rhode Island also follows the bystander theory for claims of negligent infliction of emotional distress. To succeed under the bystander theory, plaintiffs must actually witness the accident that caused their emotional distress and “(1) be a close relative of the victim, (2) be present at the scene of the accident and be aware that the victim is being injured, and (3) as a result of experiencing the accident, suffer serious emotional injury that is accompanied by physical symptomatology.”<sup>498</sup> At first blush, this would seem to rule out pure emotional distress recovery for negligent mishandling of dead bodies. However, it is worth noting that, as far back as 1872, the Rhode Island Supreme Court recognized that a dead person’s surviving family members had a duty to properly bury their dead, and therefore were protected from others unlawfully interfering with that duty.<sup>499</sup> The court observed that

[t]here is a duty imposed by the universal feelings of mankind to be discharged by someone towards 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; it may therefore be considered as a sort of *quasi* property, and it would be discreditable to any system of law not to provide a remedy in such a case.<sup>500</sup>

How this case would square with the modern Rhode Island rules on recovery for intentional or negligent infliction of emotional distress without a physical impact, is rather unclear.

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498. *Id.* at 1247 (quoting *Marchetti v. Parsons*, 638 A.2d 1047, 1049 (R.I. 1994)).

499. *See Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 238 (1872).

500. *Id.*; *see also Sullivan v. Catholic Cemeteries Inc.*, 317 A.2d 430, 432 (R.I. 1974) (“*Pierce* also recognized that although a dead body is not classified as ‘property’ in the true legal sense of that term, it has a status of ‘quasi property,’ to which are attached certain rights.”).

11. *South Carolina*

South Carolina adopted the tort of negligent infliction of emotional distress in *Kinard v. Augusta Sash & Door Company*.<sup>501</sup> There, a mother and daughter were injured “when a load of roof trusses fell from defendant’s truck and struck the car in which they were riding. . . . [and] [t]he daughter was severely injured and remained comatose for three months.”<sup>502</sup> The mother sought damages for her physical injuries as well as the severe shock and emotional trauma resulting from witnessing serious injury to her daughter.<sup>503</sup> The court held that, while a bystander such as the mother may recover damages for emotional trauma arising from witnessing the injuries to her daughter, the bystander rule requires a manifestation of physical injury.<sup>504</sup> Accordingly, the mother was unable to recover for the “emotional upset arising from her voluntary vigil at her daughter’s bedside following the accident.”<sup>505</sup>

Regarding mishandling of human remains, in *Karoly v. Sumner*, the decedent passed away at the Medical University of South Carolina.<sup>506</sup> The plaintiffs then contracted with defendants for the removal, preparation, and transportation of the decedent’s body from South Carolina to Pennsylvania.<sup>507</sup> However, the person assigned to perform the embalming and preparation “either did not embalm or failed to properly embalm the decedent’s body.”<sup>508</sup> Consequently, when the decedent’s body arrived in Pennsylvania, the corpse was in an advanced state of decomposition, preventing the family from

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501. See *Kinard v. Augusta Sash & Door Co.*, 336 S.E.2d 465, 467 (S.C. 1985).

502. *Id.* at 466.

503. *Id.*

504. *Id.* at 467.

505. *Id.* at 467 n.3.

506. *Karoly v. Sumner*, No. 2007-UP-360, 2007 WL 8327950, at \*2 (S.C. Ct. App. July 31, 2007).

507. *Id.* at \*1–2.

508. *Id.* at \*2.

conducting a viewing of the body and local friends and family from properly paying their respects.<sup>509</sup>

The plaintiffs filed a complaint in the Pennsylvania Court of Common Pleas alleging, among others, “intentional/negligent mishandling of a corpse” and “intentional/negligent infliction of emotional distress.”<sup>510</sup> The court found that plaintiffs had failed to state any facts to support a claim that defendants intentionally mistreated the decedent’s corpse.<sup>511</sup> Additionally, it found that “Pennsylvania law does not permit recovery for the negligent mishandling of a corpse” and, therefore, dismissed the plaintiffs’ claims.<sup>512</sup> The plaintiffs then filed the case in South Carolina alleging the same causes of action as they had alleged in Pennsylvania.<sup>513</sup> The South Carolina Court of Appeals held that the plaintiffs’ causes of action were barred by *res judicata* and the full faith and credit clause of the United States Constitution.<sup>514</sup> Although this case was decided on claim preclusion grounds, one can predict that had it gone forward, the South Carolina courts would have applied the bystander rule and denied plaintiffs recovery since they were not present during the precipitating events and suffered no physical harm.

Statutorily, section 16–17–600 of the South Carolina Code regarding destruction or desecration of human remains or repositories, and liability of crematory operators provides in pertinent part, “[i]t is unlawful for a person willfully and knowingly, and without proper legal authority to destroy or damage the remains of a deceased human being.”<sup>515</sup> However, this statute does not provide a private right of action; therefore,

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509. *Id.* at \*2–3.

510. *Id.* at \*2–3.

511. *Id.* at \*3.

512. *Id.*

513. *Id.* at \*4.

514. *Id.* at \*6.

515. S.C. CODE ANN. § 16-17-600 (A)(1) (2021).

plaintiffs cannot use it as a basis for suit in the event of negligent mishandling of human remains.<sup>516</sup>

## 12. *South Dakota*

In South Dakota, the manifestation of physical symptoms is required to recover for the tort of negligent infliction of emotional distress.<sup>517</sup> However, where a defendant's act is willful or malicious—as distinguished from being merely negligent—one may recover for mental anguish, even if physical injury does not result.<sup>518</sup> In *Chisum v. Behrens*, for example, the plaintiff filed an action against a mortician alleging violation of her right to immediate possession of the body of her husband and that the defendants, without her consent, had made dissections and incisions into the body for the purpose of embalming.<sup>519</sup> She sought “actual damages for mental anguish and physical illness, together with exemplary damages, following her husband's untimely death.”<sup>520</sup> In denying recovery for the plaintiff, the South Dakota Supreme Court summed the law applicable to the case as follows:

It is well established that damages for mental anguish or suffering cannot be sustained where there has been no accompanying physical injury . . . unless there has been some conduct on the part of defendant constituting a direct invasion of the plaintiff's rights such as that constituting slander, libel, malicious prosecution, seduction, or other like willful, wanton, or malicious misconduct.<sup>521</sup>

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516. See *Trask v. Beaufort County*, 709 S.E.2d 536, 541 (S.C. Ct. App. Mar. 2, 2011) (clarifying that Section 16-17-600 is a criminal statute that provides only for criminal sanctions).

517. *Nelson v. Webb Water Dev. Ass'n*, 507 N.W.2d 691, 699 (S.D. 1993).

518. *Chisum v. Behrens*, 283 N.W.2d 235, 240 (S.D. 1979).

519. *Id.* at 236.

520. *Id.*

521. *Id.* at 240 (citing *State Farm Mut. Auto. Ins. Co. v. Village of Isle*, 265 Minn. 360, 367 (Minn. 1963)).

The rule in *Chisum* was further reiterated in a Missouri case regarding negligent mishandling of a dead body.<sup>522</sup> In *Galvin v. McGilley Memorial Chapels*, the children of the deceased brought a negligence action against a funeral home for the mishandling of the deceased's remains.<sup>523</sup> The deceased died in Kansas City, Missouri, but his remains were to be transported to Sioux Falls, South Dakota for burial.<sup>524</sup> The funeral home in Kansas City shipped the wrong body to South Dakota, and the plaintiffs alleged that they suffered mental anguish and continued to suffer mental anguish by the defendant's conduct in failing to deliver the proper body to Sioux Falls, South Dakota.<sup>525</sup> The appellate court applied the law of the state with the most significant contacts with the case—South Dakota—because the “[p]laintiffs’ injury, that is, the emotional distress, occurred in South Dakota where it first became known there had been a switching of the bodies.”<sup>526</sup> Relying on South Dakota law, the court noted:

The Supreme Court of South Dakota, in its most recent pronouncement on the subject, adopted in *Chisum v. Behrens* . . . the position of the Restatement (Second) of Torts, § 868, and the majority view, that liability for emotional distress for the mishandling of a dead body does not exist under a standard of negligence absent physical injury; the proof must show the act was intentional or malicious to recover. As such, plaintiffs’ cause of action may not be recognized under the substantive law of South Dakota.<sup>527</sup>

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522. See *Galvin v. McGilley Mem'l Chapels*, 746 S.W.2d 588, 591–92 (Mo. Ct. App. 1987).

523. *Id.* at 589.

524. *Id.* at 590.

525. *Id.*

526. *Id.* at 591.

527. *Id.* at 591–2.

### 13. *Virginia*

In Virginia, “actions for negligent infliction of emotional distress are not actionable unless the claim for emotional disturbance is accompanied by physical injury.”<sup>528</sup> In *Risal v. SCI Virginia Funeral Services*, the plaintiffs sued a funeral home for damages connected with funeral services for their relative.<sup>529</sup> The contract for funeral arrangements included an open casket service, but as the plaintiffs arrived before the service, they discovered that the man in the casket dressed in their relatives’ clothes was not their relative.<sup>530</sup> Employees of the funeral home, with assistance of the family members, later found the relative’s body in an off-site storage facility.<sup>531</sup> He was in hospital clothing and unprepared for the planned funeral service, resulting in the funeral service being delayed for hours.<sup>532</sup> The plaintiffs sued for negligent infliction of emotional distress, intentional infliction of emotional distress, and unlawful invasion of relative’s right to bury.<sup>533</sup> Citing the Supreme Court of Virginia in *Sanford v. Ware*, the *Risal* court reasoned that “[t]ortious invasion of a property right in a dead body also requires actionable physical injury or pecuniary damages before there can be a recovery for mental or emotional distress.”<sup>534</sup> Since the

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528. *Risal v. SCI Va. Funeral Servs., Inc.*, 81 Va. Cir. 372, 374 (Va. Cir. Ct. 2010). *See also* *Kiwanuka v. Bakilana*, 844 F. Supp. 2d 107, 120 (D.D.C. 2012) (“In *Hughes v. Moore*, 197 S.E.2d 214 (Va. 1973), the Supreme Court of Virginia announced that ‘where conduct is merely negligent, not willful, wanton, or vindictive, and physical impact is lacking, there can be no recovery for emotional disturbance alone.’”).

529. *Risal*, 81 Va. Cir. at 372.

530. *Id.*

531. *Id.*

532. *Id.*

533. *Id.* at 373.

534. *Id.* at 374; *see also* *Hughes v. Moore*, 197 S.E.2d 214, 219 (Va. 1973) (“We adhere to the view that where conduct is merely negligent, not willful, wanton, or vindictive, and physical impact is lacking, there can be no recovery for emotional disturbance alone. We hold, however, that where the claim is for emotional disturbance and physical injury resulting therefrom, there may be recovery for negligent conduct, notwithstanding the lack of physical impact, provided the injured party properly pleads and proves by clear and convincing evidence that his physical injury was the natural result of fright or shock proximately caused by the defendant’s negligence. In other words, there may be recovery in such a case if, but only if, there is shown



plaintiffs did not allege any physical injury or pecuniary damages, they lacked the requisite evidence to support their claims.<sup>535</sup>

#### 14. *Washington*

Washington state law requires bodily harm or objective symptomatology in negligent infliction of emotional distress cases.<sup>536</sup> In 1976, the Washington Supreme Court pronounced that “the sight of physical injury caused otherwise than to a human being, e.g.[.] to a corpse, to an animal or to property resulting in a shock is not actionable.”<sup>537</sup> In other words, Washington does not recognize an action for negligent interference with a dead body.<sup>538</sup> In *Whitney v. Cervantes*, for example, plaintiffs sought control of the burial of their uncle’s body.<sup>539</sup> However, the funeral home released the body to the personal representative as per the decedent’s instructions.<sup>540</sup> The plaintiffs sued the funeral home asserting claims for intentional interference with the right to control and direct the burial of a family member’s corpse, tortious interference with a dead body, and negligence.<sup>541</sup> The trial court granted summary judgment for the funeral home.<sup>542</sup> In affirming the lower court, the reviewing court ruled that plaintiff could not prevail for an action for negligent interference with a dead body since Washington law did not recognize such a tort.<sup>543</sup>

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a clear and unbroken chain of causal connection between the negligent act, the emotional disturbance, and the physical injury.”).

535. *Risal*, 81 Va. Cir. at 374.

536. See *Kloepfel v. Bokor*, 66 P.3d 630, 633–34 (Wash. 2003) (“Many states, including this one, have distinguished negligent infliction of emotional distress from intentional infliction of emotional distress by making bodily harm or objective symptomatology a requirement of negligent but not intentional infliction of emotional distress.”).

537. *Hunsley v. Giard*, 553 P.2d 1096, 1100 (Wash. 1976).

538. *Whitney v. Cervantes*, 328 P.3d 957, 962 (Wash. Ct. App. 2014).

539. *Id.* at 958.

540. *Id.* at 958–59.

541. *Id.* at 959.

542. *Id.*

543. *Id.* at 962 (citing *Adams v. King County*, 192 P.3d 891, 899 (Wash. 2008)).

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In sum, the jurisdictions that require physical injury or impact to recover for emotional distress rely on the familiar arguments supporting the distinction between physical and emotional injury, such as emotional injury not being sufficiently severe to warrant legal action, or that physical injuries are more legitimate than psychological injuries. These arguments are palpably unpersuasive. Additionally, some jurisdictions apply the bystander rule which has the practical effect of barring many plaintiffs from recovery in negligent mishandling of corpses cases since in many instances, plaintiffs do not directly witness the events.<sup>544</sup>

As if this is not enough of a hurdle for plaintiffs, even in jurisdictions that allow recovery for emotional distress without showing of physical injury, one more hurdle lurks, that is, standing.

#### V. STANDING AS A FURTHER LIMITATION TO RECOVERY: WHO HAS THE RIGHTS TO SUE?

Although most states now allow pure emotional distress recovery for mishandling of human remains, the issue of who can or cannot sue, or to whom that duty devolves, differs from state to state. As an example, the *Restatement (Second) of Torts* section 868 refers to the class of plaintiffs as “a member of the family of the deceased who is entitled to the disposition of the body.”<sup>545</sup> But the *Restatement* does not specifically say who is entitled to the disposition of the body. Rather, one of the comments provides a general statement that “decisions in which recovery has been allowed for interference with a dead body have thus far been those in which the plaintiff has been the person entitled to disposition of the body or one of a group, such as children of the deceased, who have equal right of

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544. See, e.g., *Ortiz v. Zambrana*, 809 F. Supp. 2d 1, 5 (D.P.R. 2011); see generally *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968), and its progeny.

545. RESTATEMENT (SECOND) OF TORTS § 868 (AM. L. INST. 1979).

disposition.”<sup>546</sup> So how have states addressed the issue of standing?

Some states have addressed standing through legislation,<sup>547</sup> while others have left it to the courts to decide the class of eligible plaintiffs.<sup>548</sup> Some states provide a descending list of relatives in order of their relation to the decedent.<sup>549</sup> In Alaska, for example, “the right to possess, preserve and bury, or otherwise dispose of, a dead body belongs to the surviving spouse and, if none such, then to the next of kin in the order of their relation to the decedent.”<sup>550</sup> Hawaii limits recovery to “immediate family members” and defines this group as “the decedent’s surviving spouse, reciprocal beneficiary, children, parents, siblings, or any other person who in fact occupies an equivalent status.”<sup>551</sup> Louisiana jurisprudence gives standing to parents, children, surviving spouses and the siblings of the decedent, but not to a step-parent.<sup>552</sup>

On the other hand, many courts use the term “next of kin” or “nearest relative” without delineating a specific order or defining what those terms mean.<sup>553</sup> In Arkansas, for example,

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546. *Id.* § 868 cmt. g.

547. *See, e.g.*, ARIZ. REV. STAT. § 36-831 (2021) (providing an order of the “duty of burying the body of or providing other funeral and disposition arrangements for a dead person”); CONN. GEN. STAT. § 45a-318(d) (2021) (providing in pertinent part that the right to the custody and control of a deceased’s corpse remains with the surviving spouse unless the decedent designated another person, or the spouse is unwilling or unable to exercise such right); LA. STAT. ANN. § 8:655 (2019) (providing right of disposing remains and listing the vesting order as (1) the surviving spouse, if not judicially separated from the decedent; (2) the “surviving adult children of the decedent;” (3) the “surviving adult grandchildren of the decedent;” (4) the “surviving parents of the decedent;” (5) the surviving brothers and sisters of the decedent); TEX. HEALTH & SAFETY CODE ANN. § 7.11.002(a) (2021) (prescribing who has the right to control the disposition of a decedent’s remains).

548. *See, e.g.*, *Edwards v. Franke*, 364 P.2d 60, 63 (Alaska 1961); *Guth v. Freeland*, 28 P.3d 982, 990 (Haw. 2001); *Fortuna v. St. Bernard Mem’l Gardens*, 529 So. 2d 883, 884 (La. Ct. App. 1988).

549. *See, e.g.*, LA. STAT. ANN. § 8:655.

550. *Edwards*, 364 P.2d at 63.

551. *Guth*, 28 P.3d at 990.

552. *Fortuna*, 529 So. 2d at 884.

553. Determining a decedent’s next of kin or nearest relative can be difficult to ascertain. For example, Vicki Lynn Marshall (also known as Anna Nicole Smith) died in Florida in 2007. The

“[a] quasi-property right in dead bodies vests in the nearest relatives of the deceased, arising out of their duty to bury their dead.”<sup>554</sup> In Idaho, only the surviving spouse or next surviving kin has standing to sue.<sup>555</sup> Illinois law states that the next of kin has a “common-law right to possess and make appropriate disposition of a decedent’s remains.”<sup>556</sup> The Kentucky Supreme Court, in *R.B. Tyler v. Kinser*, observed that “next of kin have a right to recover damages for mental anguish for ‘unwarranted interference with the grave of a deceased person’ as well as for an act which affected the body interred therein if either act was done maliciously or wantonly or by gross negligence.”<sup>557</sup>

Massachusetts law provides that “[i]n the absence of direction from the decedent, a surviving spouse, or, failing such a spouse . . . then the decedent’s next of kin, have a ‘possession’ of the body so that they may dispose of it for burial according to their wishes.”<sup>558</sup> Maryland follows the *Restatement (Second) of Torts* section 868 by defining the class of persons who can recover as “those entitled to disposition of the body.”<sup>559</sup> The same applies to Tennessee where “any tort claims for negligent, reckless[,] or intentional interference with a dead body . . . can be brought

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court was presented with three claimants as next of kin: Anna Nicole’s mother, her longtime companion, and her five-month-old daughter. The court eventually granted the body for burial to Anna Nicole’s five-month-old daughter, as the sole heir and next of kin. Ord. Granting Dannielynn Hope Marshall Stern’s Mo. to Recognize Her Sole Right to Determine the Disposition of Her Mother’s Remains, 20, In re Vickie Lynn Marshall a/k/a Anna Nicole Smith, No. 07-00824(61) (Fla. Broward County Ct. 2007).

554. *Travelers Ins. Co. v. Smith*, 991 S.W.2d 591, 595 (Ark. 1999).

555. *Brown v. Matthews Mortuary, Inc.*, 801 P.2d 37, 44 (Idaho 1990).

556. *Cochran v. Securitas Sec. Servs. USA, Inc.*, 93 N.E.3d 493, 502 (Ill. 2017).

557. *R.B. Tyler Co. v. Kinser*, 346 S.W.2d 306, 308 (Ky. 1961) (citations omitted).

558. *Stackhouse v. Todisco*, 346 N.E.2d 920, 922 (Mass. 1976).

559. *Walser v. Resthaven Mem’l Gardens, Inc.*, 633 A.2d 466, 473 (Md. Ct. Spec. App. 1993) (quoting RESTATEMENT (SECOND) OF TORTS § 868 cmt. g (AM. L. INST. 1979)). Other states acting consistently with the *Restatement (Second) of Torts* section 868 include: Massachusetts, see *O’Dea v. Mitchell*, 213 N.E.2d 870, 872 (Mass. 1966); North Carolina, see *Dumouchelle v. Duke Univ.*, 317 S.E.2d 100, 103 (N.C. Ct. App. 1984); and West Virginia, see *Whitehair v. Highland Memory Gardens, Inc.*, 327 S.E.2d 438, 443 (W. Va. 1985), among others.

only by the person or persons who have the right to control disposition of the body.”<sup>560</sup>

California, Nevada, Ohio, Montana, and Wisconsin have perhaps the broadest rules. These states grant standing to all individuals to whom the defendant owes a recognized legal duty.<sup>561</sup> In *Christensen v. Superior Court*, the question presented was

whether persons other than those who contract for the services of mortuaries and crematoria or have the statutory right to direct the disposition of the body of a decedent may recover damages for emotional distress engendered by knowledge of the negligent or intentional mishandling of the decedent’s remains when they did not observe the misconduct or its consequences.<sup>562</sup>

The California Supreme Court held that “the class of persons who may recover for emotional distress negligently caused by the defendants is not limited to those who have the statutory right to control disposition of the remains and those who contract for disposition.”<sup>563</sup> But the court still placed some limitations on persons who can recover by noting that a plaintiff must be owed a legally recognized duty by the defendant, and specifically “in this context, the duty is owed only to close family members who were aware that funeral and/or crematory services were being performed, and on whose behalf or for whose benefit the services were rendered.”<sup>564</sup>

The reasoning in *Christensen* proved to be persuasive to the Nevada Supreme Court as it relates to what class of persons

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560. Crawford v. J. Avery Bryan Funeral Home, Inc., 253 S.W.3d 149, 159–60 (Tenn. Ct. App. 2007).

561. See *Christensen v. Super. Ct.*, 820 P.2d 181, 183 (Cal. 1991).

562. *Id.*; accord *Contreras v. Michelotti-Sawyers*, 896 P.2d 1118, 1118 (Mont. 1995).

563. *Christensen*, 820 P.2d at 183.

564. *Id.*

may assert an emotional distress claim against a mortuary.<sup>565</sup> In Nevada, “close family members who [are] aware of the death of a loved one and to whom mortuary services [are] being provided may assert an emotional distress claim for the negligent handling of a deceased person’s remains against a mortuary.”<sup>566</sup> Furthermore, those persons need not “observe or have any sensory perception of the offensive conduct” and need not present evidence of any physical manifestation of emotional distress.<sup>567</sup>

Montana rejects the quasi-property approach and general rule that standing is limited to the person who legally holds the right to the disposition of the body.<sup>568</sup> Rather, the state allows both the children and grandchildren, as close relatives, to have standing to sue.<sup>569</sup> Ohio too rejects the quasi-property limitation and allows grandchildren to have standing to sue.<sup>570</sup> In Wisconsin, standing is “granted to living kin who have suffered emotionally or physically from the defendant’s negligent conduct.”<sup>571</sup>

Two more limitations to standing merit mentioning here. The first is the bystander rule. Under this theory, “a [p]laintiff may only recover if he or she: (1) is physically close to scene of the accident; (2) directly witnesses the incident; and (3) is a close relation of the victim.”<sup>572</sup> By deduction, this would bar many plaintiffs in bringing cases for negligent mishandling of a corpse because in many instances, the plaintiffs do not directly witness the events. However, the “outrageous mistreatment of a dead body in the presence of surviving relatives would

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565. *Boorman v. Nevada Mem’l Cremation Soc’y, Inc.*, 236 P.3d 4, 6 (Nev. 2010) (“We are persuaded by the California Supreme Court’s reasoning in *Christensen* as it relates to what class of person may assert an emotional distress claim against a mortuary.”).

566. *Id.*

567. *Id.*

568. *Contreras v. Michelotti-Sawyers*, 896 P.2d 1118, 1121 (Mont. 1995).

569. *Id.* at 1122–23.

570. *Carney v. Knollwood Cemetery Ass’n*, 514 N.E.2d 430, 435–36 (Ohio Ct. App. 1986).

571. *Jackson v. McKay-Davis Funeral Home, Inc.*, 830 F. Supp. 2d 635, 645 (E.D. Wis. 2011).

572. *Ortiz v. Zambrana*, 809 F. Supp. 2d 1, 5 (D.P.R. 2011); see *Dillon v. Legg*, 441 P.2d 912, 920 (Cal. 1968).

appear to be a proper case for liability under [Restatement] Section 46."<sup>573</sup>

The second limitation is the distinction between torts and contract damages. In Idaho, for example, an award for emotional distress is not allowed in a contract action.<sup>574</sup> The same applies to Montana where the statute prohibits parties from asserting a pure contract claim to recover for emotional distress.<sup>575</sup> On the other hand, some courts have held that acts of negligence could give rise to a breach of contract action.<sup>576</sup> In Texas, for example, a contractual relationship "is not required if the defendant breaches an independent legal duty," such as the duty to not negligently mishandle a corpse.<sup>577</sup> Put differently, even though there is no general duty in Texas not to negligently inflict emotional distress, "mental anguish damages may be compensable when they are a foreseeable result of the breach of a duty arising out of certain 'special relationships,' including 'a very limited number of contracts dealing with intensely emotional noncommercial subjects such as preparing a corpse for burial.'"<sup>578</sup>

In sum, even when a plaintiff has a private cause of action for emotional distress damages, standing may yet be another barrier. But the greatest limitation of course, is the language of the law itself.

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573. RESTATEMENT (SECOND) OF TORTS § 868 cmt. g (AM. L. INST. 1979).

574. See *Brown v. Matthews Mortuary, Inc.*, 801 P.2d 37, 46 (Idaho 1990) ("[W]e hold that in Idaho, when damages are sought for breach of a contractual relationship, there can be no recovery for emotional distress suffered by a plaintiff. If the conduct of a defendant has been sufficiently outrageous, we view the proper remedy to be in the realm of punitive damages."); see also *Wiggins v. Royal Convalescent Hosp.*, 206 Cal. Rptr. 2, 4 (Ct. App. 1984) (rejecting plaintiff's cause of action for emotional distress based on negligent breach of contract).

575. *Contreras v. Michelotti-Sawyers*, 896 P.2d 1118, 1123 (Mont. 1995) (citing MONT. CODE ANN. § 27-1-310 (1995)).

576. *Sackett v. St. Mary's Church Soc'y*, 464 N.E.2d 956, 958 (Mass. App. Ct. 1984) ("This does not mean that acts of negligence by the defendants, leading to embarrassing incidents during their conduct of funeral and interment proceedings, could not be the foundation of an action for breach of contract . . .").

577. *SCI Tex. Funeral Servs., Inc. v. Nelson*, 540 S.W.3d 539, 547 (Tex. 2018).

578. *Noah v. Univ. of Tex. Med. Branch at Galveston*, 176 S.W.3d 350, 356 (Tex. App. 2004) (citations omitted).

VI. IS IT TIME TO ABANDON RESTATEMENT (SECOND) OF TORTS  
SECTION 46?

The *Restatement (Second) of Torts* section 46 states, “(1) [o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”<sup>579</sup> Stripped to its essential elements, this rule requires that for emotional distress to be actionable, the defendant’s conduct must be “extreme and outrageous,”<sup>580</sup> and the resulting injury must be severe.<sup>581</sup> Indeed, comment j of the rule emphasizes that “[t]he law intervenes only where the distress inflicted is *so severe* that no reasonable man could be expected to endure it.”<sup>582</sup> Comment k on bodily harm adds that “if the conduct is sufficiently *extreme and outrageous* there may be liability for the emotional distress alone, without such harm.”<sup>583</sup> Again, the import here seems to be on extreme and outrageous conduct.<sup>584</sup>

Despite a body of empirical research showing that the effects of emotional distress are just as detrimental as the effects of physical injury,<sup>585</sup> why do we still require emotional distress

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579. RESTATEMENT (SECOND) OF TORTS § 46(1) (AM. L. INST. 1965).

580. *Brown v. Matthews Mortuary Inc.*, 801 P.2d. 37, 41 (Idaho 1990) (“However one defines what persons can expect from society it is plain that courts have required very extreme conduct before awarding damages for the intentional infliction of emotional distress.”).

581. *Id.*

582. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. L. INST. 1965) (emphasis added).

583. *Id.* § 46 cmt. k (emphasis added).

584. RESTATEMENT (SECOND) OF TORTS § 868 (AM. L. INST. 1979) (“One who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body.”). This section of the rule does not require extreme or outrageous conduct on the part of the defendant. However, comment g cross references section 46 and notes:

[u]nder the rule stated in § 46 one who by extreme and outrageous conduct intentionally or recklessly inflicts severe emotional distress upon another is subject to liability for the emotional distress. The outrageous mistreatment of a dead body in the presence of surviving relatives would appear to be a proper case for liability under that Section.

*Id.* § 868 cmt. g.

585. See discussion *infra* Part I.



injury to be severe in order to provide recovery? Imagine if the *Restatement* explained physical injury the same way it did emotional injury by commenting that “[t]he law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.”<sup>586</sup> Would such an interpretation be accepted by the majority? Put differently, why can’t the defendant’s conduct be judged under ordinary negligence standards in emotional distress cases?<sup>587</sup> The reasons oft cited for this distinction pale in comparison to the burden imposed on emotional distress victims.

As a threshold matter, the distinction between physical and emotional pain denies a remedy to a surfeit of emotional distress victims.<sup>588</sup> For example, Justice Harlan, arguing against a more stringent test to govern the grant of damages in constitutional cases noted, “[w]hen we automatically close the courthouse door solely on this basis [conserving judicial resources], we implicitly express a value judgment on the comparative importance of classes of legally protected interests.”<sup>589</sup> Of course, *Bivens* is about the vindication of constitutional rights, but it emphasizes the broader issue of remedies that are arbitrarily being denied. That is, by demanding a more stringent standard of proof for emotional distress recovery, section 46 and the courts that adhere to it are expressing a value judgment that emotional injuries are not that important compared to physical injuries. Not only is this

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586. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. L. INST. 1965).

587. See, e.g., *Cochran v. Securitas Sec. Servs. USA, Inc.*, 59 N.E.3d 234, 249 (Ill. App. Ct. 2016) (“We find that, although courts have traditionally been reluctant to allow negligence actions where only emotional damages are claimed, the more modern view supports the position taken by plaintiff in the instant case and recognizes an ordinary negligence cause of action arising out of the next of kin’s right to possession of a decedent’s remains.”).

588. See, e.g., *Dan B. Dobbs*, *supra* note 62, at 59 (“Emotional distress is real and poisons the living of life and the pursuit of happiness. Anyone who is not a sociopath has experienced distress and can recognize it in others. Even sociopaths probably can recognize the situations that promote emotional distress in others. That fact makes it easy in many cases to conclude that the plaintiff’s emotional distress is real and would naturally follow from the defendant’s negligent acts.”).

589. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Harlan, J., concurring).

distinction absurd, but it is no longer grounded in reputable support. Indeed, “[m]odern advances in medical and psychiatric science have eliminated the practical necessity that led to the requirement of evidence of resulting physical injury to validate a claim of emotional distress.”<sup>590</sup> One court noted that “the law of mental anguish damages is rooted in societal judgments, some no longer current, about the gravity of certain wrongs and their likely effects.”<sup>591</sup>

Another common reason cited for the stringent standard is that emotional pain is hard to prove. However, just because it is difficult to prove harm, does not mean that the law should not grant a remedy. For example, in *Spokeo, Inc. v. Robins*, the majority noted that “[t]his does not mean, however, that the risk of real harm cannot satisfy the requirement of concreteness . . . . [T]he law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure.”<sup>592</sup> Although *Spokeo* was not about standing for an emotional distress claim, the court’s acknowledgement that the risk of real harm can satisfy the concreteness prong of standing is equally applicable here.

Finally, some courts have averred that “[m]ental anguish is substantially more difficult to foresee than other injuries because ‘[t]he invasion of the same legal right may lead to extreme anguish in one person while causing essentially no emotional damage to another.’”<sup>593</sup> But this argument runs out of steam viewed alongside the aforementioned countervailing arguments. Not to mention, the foreseeability argument is severely undercut by the fact that many courts have not had any difficulty with foreseeability issues.<sup>594</sup> Regarding the invasion

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590. *Folz v. State*, 797 P.2d 246, 259 (N.M. 1990).

591. *SCI Tex. Funeral Servs., Inc. v. Nelson*, 540 S.W.3d 539, 543 (Tex. 2018) (quoting *City of Tyler v. Likes*, 962 S.W.2d. 489, 496 (Tex. 1997)).

592. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

593. *SCI Tex. Funeral Servs., Inc.*, 540 S.W.3d at 544–45.

594. *See, e.g., Allen v. Jones*, 163 Cal. Rptr. 445, 448 (Ct. App. 1980) (“There are, however, certain contracts which so affect the vital concerns of the individual that severe mental distress

of the same legal right leading to extreme anguish in one person while causing essentially no emotional damage to another, a response might be, just as physical injuries cause different reactions and levels of pain in different people, what is different or unusual with mental anguish causing different reactions and levels of pain to different people? Consider this apt description of a stoic plaintiff who sought emotional distress damages after the damage of his house:

Plaintiffs ask the court to award Jourdain \$200,000 in damages other than for the loss of property. Plaintiffs seek to justify the award on two grounds. The first is to recover for Jourdain's emotional distress from his ordeal. The second is for the anguish, inconvenience, annoyance, and humiliation from the loss of his home and personal property. On the stand, Jourdain spoke little of his emotional distress and inconvenience or annoyance. Indeed, he gave sparse testimony on this. The court takes note of Jourdain's stoic nature. It also is aware of Jourdain's age, schooling, and health, and recognizes that he had to speak English in court, when this may not be his tongue of choice. *Stoics unwilling or unable to orate on their anger, fear, worry, or pain feel these no less keenly than the voluble. When the law entitles a man to damages, he should not be penalized for his reserve.* The court has kept all this in mind when finding facts about damages for Jourdain's non-property losses.<sup>595</sup>

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is a foreseeable result of breach. . . . A contract whereby a mortician agrees to prepare a body for burial is one in which it is reasonably foreseeable that breach may cause mental anguish to the decedent's bereaved relations."); *Gammon v. Osteopathic Hosp. of Me., Inc.*, 534 A.2d 1282, 1285 (Me. 1987) ("Courts have concluded that the exceptional vulnerability of the family of recent decedents makes it highly probable that emotional distress will result from mishandling the body.").

595. *Red Lake Band of Chippewa Indians v. United States*, 1990 WL 515095, at \*28, n.11 (D.D.C. 1990) (emphasis added) *rev'd on other grounds*, 936 F.2d 1320 (D.C. Cir. 1991).

The takeaway from the above discussion is that “[a] person’s psychic well-being is as much entitled to legal protection as is his physical well-being.”<sup>596</sup> The risk of harm to a plaintiff should be reasonably foreseeable to a defendant, without requiring that the defendant’s conduct be extreme and outrageous, or the plaintiff have a certain preordained reaction to that conduct. Therefore, the *Second Restatement’s* focus on conduct that is sufficiently extreme and outrageous as a predicate for emotional distress recovery, is anachronistic and should go into a state of innocuous desuetude.

## VII. SUGGESTED APPROACHES

Providing recommendations for pure emotional distress recovery is an exceedingly difficult task because the recommendations will be superfluous for the jurisdictions that already allow pure emotional distress recovery, and those that do not might simply ignore them. Nevertheless, there are three approaches that courts, litigants, academics, and other practitioners might apply when dealing with emotional distress recovery for mishandling of human remains.

### A. *Adopting the Third Restatement Approach*

First, states can adopt section 47 of the *Restatement (Third) of Torts*. Section 47 endorses recovery for pure emotional distress, does not require extreme or outrageous conduct, and expands the causes to “categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional [disturbance].”<sup>597</sup> This reflects a

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596. *Gammon*, 534 A.2d at 1283.

597. Section 47 of the *Restatement (Third) of Torts* provides that “an actor whose negligent conduct causes serious emotional disturbance to another is subject to liability to the other if the conduct: (a) places the other in danger of immediate bodily harm and the emotional harm results from the danger; or (b) occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional harm.” RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 47 (AM. L. INST. 2012).

broader sensitivity to emotional distress and death, which this Article calls for.<sup>598</sup>

Section 47 also diminishes the distinction between physical and emotional distress. In fact, the drafters comment that

[t]he distinction between physical and emotional harm is not precise and may be difficult to determine in some cases. Most physical harm, with the exception of disease, results from traumatic impact with the human body, while emotional harm can occur without such trauma, indeed without any event that resembles a physical-harm tort.<sup>599</sup>

This approach ensures that the dead person's next of kin recover for their pure emotional distress, while at the same time, putting reasonable limitations on the recovery by requiring that the negligent conduct be likely to cause serious emotional disturbance. This is an appropriate balance.

### B. Evidenced-Based Lawmaking

Second, courts and practitioners should follow evidence-based law regarding the negligent mishandling of corpses. The concept of evidence-based lawmaking is relatively new, but it "draws on an extensive body of 'evidence-based' areas, such as evidence-based medicine, evidence-based policy, [and] evidence-based management," to mention a few.<sup>600</sup> In 2011, Professor Rachlinski published an article calling on the legal profession—particularly legislatures and courts—to convert empirical studies into evidence-based law.<sup>601</sup> Since then, some

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598. *Id.* § 45 (broadly defining emotional harm to mean "impairment or injury to a person's emotional tranquility").

599. *Id.* § 45 cmt. a.

600. Rob van Gestel & Jurgen de Poorter, *Putting Evidence-Based Law Making to the Test: Judicial Review of Legislative Rationality*, 4 *THEORY & PRAC. LEGIS.* 155, 155 (2016).

601. See Jeffrey J. Rachlinski, *Evidence-Based Law*, 96 *CORNELL L. REV.* 901, 911–17 (2011).

states have moved in the direction of legislating evidence-based programs.<sup>602</sup>

Although courts have always been slow to shift from laws that are deeply rooted in American tradition and history to modern changes in human behavior, this has not gone without critique from judges themselves. For example, Judge Richard Posner's critique of the spontaneous statements exceptions to the hearsay rules is quite apropos, writing:

[t]he rationale for these exceptions is that spontaneous utterances, especially in emotional circumstances, are unlikely to be fabricated, because fabrication requires an opportunity for conscious reflection . . . As with much of the folk psychology of evidence, it is difficult to take this rationale entirely seriously, since people are entirely capable of spontaneous lies in emotional circumstances. Old and new studies agree that less than one second is required to fabricate a lie . . . It is time the law began paying attention to such studies.<sup>603</sup>

In the same spirit with Judge Posner's critique of hearsay exceptions, it is time tort law began paying attention to emotional distress studies. As discussed in Part I, various studies have shown that physical and emotional pain rely on the same behavioral and neural mechanisms that register pain-related affect.<sup>604</sup> Additionally, the fears that led courts to circumscribe recovery for stand-alone emotional distress claims, such as opening the proverbial floodgates of emotional

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602. See, e.g., TENN. CODE ANN. § 37-5-121 (2018) (implementing evidence-based programs for the prevention, treatment, or care of delinquent juveniles); H.B. 2536, 62nd Leg., Reg. Sess. (Wash. 2012) (concerning the use of evidence-based practices for the delivery of services to children and juveniles); *TAD Information*, WIS. DEP'T JUST., <https://www.doj.state.wi.us/dci/tad-information> (last visited Dec. 1, 2021).

603. *Lust v. Sealy, Inc.*, 383 F.3d 582, 588 (7th Cir. 2004) (internal quotation marks omitted).

604. See, e.g., DeWall et al., *supra* note 36, at 931; Eisenberger, *supra* note 36, at 601–29.

distress lawsuits,<sup>605</sup> or the difficulty of measuring pain and suffering,<sup>606</sup> have not been borne out by time and empirical evidence. Succinctly put, jurisdictions that deny stand-alone emotional distress claims ignore the scientific evidence and steep themselves in tradition and history.<sup>607</sup>

There is enough empirical evidence in the medical and social science literature to put the struggle to bed. Accordingly, this Article suggests the use of evidenced-based law.

### C. Moral Law

Third, courts might do well to apply principles of moral law in this area. Even though moral law is disfavored by the courts,<sup>608</sup> this approach is not such a radical idea. For example,

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605. Robert L. Rabin, *Emotional Distress in Tort Law: Themes of Constraint*, 44 WAKE FOREST L. REV. 1197, 1198 (2009).

606. For example, courts and juries have not had difficulty determining pain and suffering damages in personal injury cases. *See id.* at 1199–1203 (noting various other mechanisms for tort claims with either physical or economic damages). In addition, there are several psychological distress measures used. *See* Ctr. of Excellence for Health Disparities Rsch., *Psychological Distress Measures*, U. MIA., <https://elcentro.sonhs.miami.edu/research/measures-library/psychological-distress-construct/index.html> (last visited Dec. 1, 2021). They include but are not limited to Generalized Anxiety Disorder Scale (GAD-7), Davidson Trauma Scale (DTS), and Center for Epidemiological Studies Depression Scale (CES-D). *Id.*

607. Professor Dobbs observed that

courts firmly accept recovery for negligently inflicted emotional distress as damages parasitic to physical harm, that is, as a form of pain and suffering. But negligently inflicted stand-alone emotional distress is a different matter . . . Courts have slowly, but more or less constantly, changed their answers over the last one hundred years or so as they have struggled to deal with negligently inflicted stand-alone emotional harm.

Dobbs, *supra* note 62, at 51.

608. *See* Lawrence v. Texas, 539 U.S. 558, 571 (2003) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992)):

It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns, but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. ‘Our obligation is to define the liberty of all, not to mandate our own moral code.’

legislatures balance moral concerns against risks and costs of alternatives all the time.<sup>609</sup> Other scholars have also written in favor of moral law. In his provocative book on civil liberties and public moralities, Professor Robert George argues that law should be used to enforce morals and notes that moral-based laws “are necessary to help establish the virtuous character of people by (1) preventing self corruption from choosing to indulge in immoral conduct; (2) preventing a wrong example that others may emulate; (3) preserving the moral ecology; and (4) informing people about what is morally right and wrong.”<sup>610</sup> Professor George’s defense of moral legislation is apt here.

A moral argument can be made that just as living people have an interest in the integrity of their bodies, they also have an ongoing interest in the integrity of their own bodies after their death.<sup>611</sup> This might seem counterintuitive, but as Professor Young observes, “[l]iving individuals have an interest in their bodily integrity that grounds rights against interference without consent. We may conceive of this interest in bodily integrity as surviving death, such that to contravene people’s prior wishes is to harm the dead.”<sup>612</sup> This is easily understood if one subscribes to the belief that there is life after death.<sup>613</sup> But, even if one does not believe in life after death, respect and

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609. See *Harris v. W. Ala. Women’s Ctr.*, 139 S. Ct. 2606, 2607 (2019) (Thomas J., concurring) (“Ordinarily, balancing moral concerns against the risks and costs of alternatives is a quintessentially legislative function.”).

610. ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* 1 (1995).

611. See Lowth, *supra* note 71, at 259. In a case regarding the withdrawal of artificial nutrition and hydration from a person in a persistent vegetative state, where the judge noted that most people would prefer “an honourable and dignified death and we think it wrong to dishonour their deaths, even when they are unconscious that this is happening. We pay respect to their dead bodies and to their memory because we think it an offence against the dead themselves if we do not.” See *id.*

612. Hilary Young, *The Right to Posthumous Bodily Integrity and Implications of Whose Right It Is*, 14 MARQ. ELDER’S ADVISOR 197, 200 (2013).

613. It is common for many people to have either talked about or heard someone talk about the dead as if they are still alive. Thus, such statements as “my [dead person] is watching over me” or “I am sure your [dead person] is so proud of you right now” are not uncommon and do not evoke any surprises. Of course, some would argue that these types of statements refer to the soul, rather than the dead body.



reverence for the dead are universal concepts.<sup>614</sup> Many cultures bury their dead in caskets, some more elaborate than others.<sup>615</sup> Many cultures disfavor and punish desecration of the dead.<sup>616</sup> Relics of saints, political leaders, martyrs, freedom fighters, or soldiers are highly venerated, which indicate a lot of respect for human remains.<sup>617</sup> This respect could be partly attributed to the fact that “as a society, we wish to see ourselves as people who respect the wishes of the dead,” maybe because “we believe the dead have moral interests and we want to act morally by respecting those interests, or because we think the living will benefit if we respect the prior wishes of the dead.”<sup>618</sup>

The punishment or compensation that might be appropriate for mishandling of a dead body can flow from the same moral argument. That is, it is immoral to mishandle a dead body and anyone who causes injury to a corpse should be liable to either the dead person or to her heirs, estate, personal representative, or next of kin.<sup>619</sup> Of course, critics will argue that dead people are incapable of experiencing pain and cannot recover for any harm,<sup>620</sup> let alone experience emotional distress. But just because dead people cannot experience harm in the physical sense, does not mean recovery should be denied. To reconcile the reverence for the dead that many societies and cultures share—including beliefs that the dead continue to influence our lives long after they are gone—on the one hand, but denying

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614. See Lowth, *supra* note 71, at 276 (“Human communities have consistently treated corpses as if human for over ten thousand years. Our recognition of dead loved ones as persons is a result of the same social bonds that we rely on for solidarity with all shared endeavours, including law itself, so the law cannot easily stand separate from it.”).

615. See Young, *supra* note 613, at 232.

616. For example, there are numerous offenses one could face if they are found to have desecrated a body. See, e.g., 25A C.J.S. *Dead Bodies* § 67 (2021) (“[A]t common-law, it is an offense to treat a dead human body indecently as by keeping, handling, and exposing it to view to create the impression that the decedent is still alive.”).

617. See KATHERINE VERDERY, *THE POLITICAL LIVES OF DEAD BODIES: REBURIAL AND POSTSOCIALIST CHANGE* 1–3 (1999) (“Dead bodies have enjoyed political life the world over and since far back in time.”).

618. Young, *supra* note 613, at 200–01.

619. See generally *id.* at 232.

620. See *id.* at 215.

them any form of rights or ability to recover for harm because they are dead, on the other hand, is a contradiction.<sup>621</sup> Without some means to reconcile the two leads to untenable results.<sup>622</sup> The application of moral law can bridge this gap.<sup>623</sup> Potential advantages include avoidance of negligent harm on the dead, reduction of pain and suffering among next of kin, and imposition of a moral standard that many people can agree on, whether they are liberal or conservative. That is to say, we all bleed red for our dead.

### CONCLUSION

Death is unique in the human race in the sense that once someone dies, unlike in many other species, humans still have attachment and respect for the dead. This attachment and respect should be reflected in the law of the dead. To help understand this law, this Article has surveyed cases of emotional distress recovery for negligent mishandling of human remains among the fifty states. Three clear conclusions can be made from this survey.

First, jurisdictions that allow pure emotional distress recovery (i.e. stand-alone emotional distress recovery) have coalesced around a small range of options, including: adopting the *Restatement (Second)* section 868, making a distinction between intentionally inflicted emotional distress and negligently inflicted emotional distress, and allowing recovery

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621. Lowth, *supra* note 71, at 278 (“[T]he inconsistency between the three areas of law which address the corpse—medical law, disposal law, and criminal law regarding selfish or malevolent invasion of corpses—could be resolved by recognising the corpse as a kind of person.”); see generally HELAINE SELIN & ROBERT RAKOFF, *DEATH ACROSS CULTURES: DEATH AND DYING IN NON-WESTERN CULTURES* (2019).

622. One such result is produced by the bystander rule which has the practical effect of barring many plaintiffs from recovery in negligent mishandling of corpses cases since in many instances, plaintiffs do not directly witness the events. See *Ortiz v. Zambrana*, 809 F. Supp. 2d 1, 5 (D.P.R. 2011); *Kinard v. Augusta Sash & Door Co.*, 286 S.C. \*579, \*582–83 (1985).

623. See, e.g., *Christensen v. Super. Court*, 820 P.2d 181, 195 (Cal. 1991) (“The statutes governing the disposition of human remains exist not only to ensure removal of dead bodies and protect public health, but also to prevent invasion of the religious, *moral*, and esthetic sensibilities of the survivors.”) (emphasis added).

where there is special relationship or where mental distress is a highly foreseeable result of mishandling human remains.

Second, jurisdictions that do not allow stand-alone emotional distress recovery for mishandling of human remains still rely on the familiar arguments supporting the distinction between physical and emotional injury (impact rule) and treating the latter as less legitimate. For these jurisdictions, consider the following words from Chief Justice Burger: “we cannot escape the reality that the law on occasion adheres to doctrinal concepts long after the reasons which gave them birth have disappeared and after experience suggest the need for change.”<sup>624</sup> This is such a case.

Third, even among the jurisdictions that allow pure emotional distress recovery, standing is a further limitation to plaintiffs’ recovery.

To reconcile these inconsistencies and apathetic approaches to emotional distress recovery, this Article proposes three solutions: abandoning the *Second Restatement’s* section 46 in favor of the *Third Restatement’s* approach; incorporating the principles of evidenced based law in negligent mishandling of human remains; and finally, resort to moral law as a way to respect the dead.

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624. Trammel v. United States, 445 U.S. 40, 48 (1980).