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Liability of Funeral Directors for Negligence

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NOTES

LIABILITY OF FUNERAL DIRECTORS FOR NEGLIGENCE

INTRODUCTION

Funeral directing cannot be classed absolutely as a "profession."[1] On the contrary, the funeral director's principal concern probably is the sale of caskets and burial supplies, thus making him a "merchant" or "trader."[2] However, for purposes of rendering services in connection with the care and burial of the dead as well as in accommodating the family and friends of the deceased, the funeral director is considered a "professional man."[3] It is the latter capacity which is under consideration here.

It is inconsequential for legal purposes whether a mortician is referred to as a "funeral director,"[4] an "embalmer," or an "undertaker." An embalmer is one whose function it is to disinfect and preserve dead human bodies.[5] An undertaker is one whose vocation involves the caring for dead human bodies and the burial or other disposition of them, together with the conduct of the funeral and burial services.[6] These various terms are used interchangeably within this article, although "funeral director" is apparently the preferred usage.[7]

In most of the cases involving negligence in the performance of professional services, the plaintiff has a choice of remedies. There is usually a contract upon which the action may be based. In addition, the relationship (*e.g.*, doctor-patient, lawyer-client) may form the basis for the imposition of tort duties. Finally, the existence of a contract may serve as the occasion for liability in tort, as where the contract is held to create specific tort duties. In this latter case, the duties imposed may or may not be identical with tort duties imposed generally. Unfortunately, it is not always discernible from the case itself upon

1. JACKSON, THE LAW OF CADAVERS 467 (2d ed. 1950).
2. STREET, MORTUARY JURISPRUDENCE § 5 (1948).
3. *Id.* § 6.
4. "Present-day use of the term 'undertaker,' presents nonlegal considerations which seem to argue strongly in favor of its abolition, on the ground that the morticians of by-gone years who were designated by it were deficient in their practices, as compared with the funeral director of today." *Ibid.*
5. JACKSON, *op. cit. supra* note 1, at 440. See also State *ex rel.* Kemplinger v. Whyte, 177 Wis. 541, 188 N.W. 607 (1922).
6. "The work of the undertaker commences when the work of the physician ends, and continues, notwithstanding the work of the embalmer, until final disposition of the body. It is to the undertaker that the public must principally look for the enforcement of sanitary rules and regulations." People v. Ringe, 197 N.Y. 143, 90 N.E. 451, 453 (1910). See also JACKSON, *op. cit. supra* note 1, at 438-39.
7. See note 4 *supra*.

which basis the action is founded. This appears to be particularly true where the court decides the gist of the action by considering the facts pleaded and proved.

Simply stated, to establish a cause of action based on negligence, it is generally recognized that the plaintiff must show that the defendant breached a duty owed to the plaintiff, thus causing damage to him. The duty, or obligation, must be one recognized by law as imposing upon the defendant a certain standard of conduct in order to protect others against unreasonable risks. A failure to comply with the required standard constitutes a breach of duty. However, there will be no liability unless there is a reasonably close causal connection between the breach and the injury. In addition, it is also essential to the plaintiff's case that he show actual loss or damage. If any of these elements is missing, the plaintiff's action fails.

A cause of action based upon a contract is to be distingnished from the action for negligence. Parties to a contract impose duties upon themselves by their consent to fulfill promises made. Failure to perform the promise made gives rise to a cause of action for the breach of the contract. The measure of damages in a breach of contract action is based upon what was reasonably within the defendant's contemplation at the time of the contract.

Often it may be extremely important to know upon which basis the action is founded. In some cases it may be advantageous for the plaintiff to proceed in contract. For example, by suing on the contract the plaintiff may avoid the requirement of proving negligence (as would be necessary in tort), have the benefit of a longer statute of limitation, be entitled to proceed notwithstanding the death of one of the parties, be able to receive the benefit of a bargain in damages, or assign his claim. On the other hand, the plaintiff may desire to proceed in tort since often the damages allowed are greater, not being restricted to those within the contemplation of the parties at the time the contract was made. Also, in some situations recovery may be had more readily for mental suffering if the action is in tort. A great many other advantages to be considered are the basic defenses to which a contract is subject, but which are inapplicable in tort, for instance—illegality, want of consideration, the statute of frauds, infancy, or the parol evidence rule.

It is thus obvious that differing consequences may result from the choice of theories. However, it will be noted that many of the cases which follow come within the confused area in which the choice is available, but fail to make clear which remedy has been chosen. Although it is not possible to reconcile or explain some of the cases, it is possible to make the reader aware of the chaos. In any event, there is some value in considering the factual situations which have been

litigated in these areas. Whatever the doctrinal confusion, an examination of the cases may apprise the professional man and his counsel of the probable consequences of negligence in the various phases of his professional activity.

DUTY

In English history from the time of the Norman Conquest until the nineteenth century, possession and disposition of dead bodies was a matter of ecclesiastical concern, the theory being that the body must be held by the church to await resurrection, the spirit having previously passed on to supernatural realms.[8] The jurisdiction of the common law was restricted to material matters such as tangible possessions of the deceased and also the monument.[9]

In the United States, a dead body has never been considered property in the commercial sense;[10] however, the English common law rule constituted a stumbling block to recovery.[11] The barrier was finally broken down as American jurists began to realize that the English doctrine was undesirable. The court in *Larson v. Chase*[12] said:

> But whatever may have been the rule in England under the ecclesiastical law, and while it may be true still that a dead body is not property in the common commercial sense of that term, yet in this country it is . . . universally held that those who are entitled to the possession and custody of it for purposes of decent burial have certain legal rights to and in it which the law recognizes and will protect. Indeed, the mere fact that a person has exclusive rights over a body for the purpose of burial leads necessarily to the conclusion that it is his property in the broadest and most general sense of that term, viz., something over which the law accords him exclusive control. But this whole subject is only obscured and confused by discussing the question whether a corpse is property in the ordinary commercial sense, or whether it has any value as an article of traffic.[13]

The existence of a duty to exercise a certain standard of care when dealing with a dead body is based upon the notion that there is a quasi-property right in the body.[14] This qualified property right is of

8. Renihan v. Wright, 125 Ind. 536, 25 N.E. 822, 823 (1890); JACKSON, *op. cit. supra* note 1, at 125-26.
9. JACKSON, *op. cit. supra* note 1, at 126.
10. Jefferson County Burial Soc. v. Scott, 218 Ala. 354, 118 So. 644 (1928) (not to be held as security for funeral costs); O'Donnell v. Slack, 123 Cal. 285, 55 Pac. 906 (1899) (not part of the assets of an estate); Driscoll v. Nichols, 71 Mass. 488 (1855) (not the subject of a gift causa mortis); Keyes v. Konkel, 119 Mich. 550, 78 N.W. 649 (1899) (not subject to replevin); Toppin v. Moriarty, 59 N.J. Eq. 115, 44 Atl. 469 (1899) (not common law larceny to steal a corpse).
11. JACKSON, *op. cit. supra* note 1, at 130-31.
12. 47 Minn. 307, 50 N.W. 238 (1891).
13. 50 N.W. at 239.
14. Sanford v. Ware, 191 Va. 43, 60 S.E.2d 10 (1950).

relatively recent origin. The classic explanation is that made by Ruggles:[15]

> [M]uch of the apparent difficulty of this subject arises from a false and needless assumption, in holding that nothing is property that has not a pecuniary value. The real question is not of the disposable, marketable value of the corpse, or its remains, as an article of traffic, but it is of the sacred and inherent right to its custody, in order to decently bury it, and secure its undisturbed repose. . . . The establishment of a right so sacred and precious, ought not to need any judicial precedent. Our courts of justice should place it, at once, where it would fundamentally rest for ever, on the deepest and most unerring instincts of human nature; and hold it to be a self-evident right of humanity, entitled to legal protection, by every consideration of feeling, decency, and Christian duty. The world does not contain a tribunal that would punish a son who should resist, even unto death, any attempt to mutilate his father's corpse, or tear it from the grave for sale or dissection; but where would he find the legal right to resist, except in his peculiar and exclusive interest in the body?[16]

Once it became established that those responsible for burial of the dead also had rights in this regard,[17] it resulted that the mortician was responsible for due care in exercising his skill.[18] The standard of care appears to be based upon the same general standard imposed upon others who hold themselves out to the public as especially proficient in certain areas,[19] that is, reasonably prudent care as exercised by others engaged in the same activity within the same or a similar community.[20]

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15. See In the Matter of Beekman Street, 4 Bradf. Surr. 503 (N.Y. 1856).
16. *Id.* at 529.
17. Absent a contrary expression of intent by the deceased, the surviving spouse has paramount rights and responsibilities in the matter of burial. 15 AM. JUR. *Dead Bodies* § 9 (1938). If there is no surviving spouse, and absent any other considerations, then the next of kin in the order of their relation to the deceased has the right to bury the body. *Id.* § 10. For a criticism of the rule that one's property right in a dead body arises from his duty to bury the body, see Note, 30 N.C.L. REV. 299 (1952), urging that the right should be in the family and next of kin.
18. "We are persuaded that when an embalmer engages to embalm a dead body and to prepare it for retention for more than the usual length of time after death, he contracts with the family that he will accomplish the desired end if it can be done with reasonable care and skill, and if he fails because of this lack he will indemnify the disappointed one for his breach." Taylor v. Bearden, 6 Tenn. Civ. App. 33, 36 (1915). See also Lamm v. Shingleton, 231 N. C. 10, 12, 55 S.E.2d 810, 812 (N.C. 1949).
19. See Brown Funeral Homes Ins. Co. v. Dobbs, 228 Ala. 482, 153 So. 737 (1934), in which the plaintiff alleged that the defendant undertaker had "the duty to exercise the care of a reasonably prudent and careful man, skilled in the art of embalming corpses and preparing the same for burial." The court said: "The duty arising out of these circumstances is not unlike that resting upon a physician or surgeon called to professionally attend a patient, 'to exercise such reasonable care and skill in respect to the duty assumed as physicians and surgeons in the same general neighborhood, in the same general line of practice, ordinarily have and exercised in like cases'. . . ." 153 So. at 738. See also PROSSER, TORTS 132-34 (2d ed. 1955).
20. PROSSER, TORTS 134 (2d ed. 1955).

BREACH OF DUTY

The work of a mortician may be divided primarily into three distinct phases—embalming, burial, and transportation. Embalming is "the art of preserving dead bodies from decay."[21] Most of the cases in which negligent embalming is alleged are based upon the fact that the body is not as well preserved as the family desires. Probably the most frequent manifestation that there has been negligence in the embalming of the deceased is early decomposition. A 1933 Alabama case[22] is illustrative. Suit was initiated against the undertaking establishment by the wife of the deceased for negligent embalming, resulting in offensive odors three or four hours after embalming and also in the flowing of liquid and blood from the mouth and nose of the body. It was also alleged that the body was discolored as a result of improper embalming. There was expert testimony to the effect that a properly embalmed body would not have emitted foul odors nor purged within three hours after treatment, and although an expert testified that an undertaker is unable to prevent discoloration in pneumonia cases because the discoloration is present very soon after death, it was shown in this case that the body was not discolored when received by the defendant. Consequently the plaintiff established negligence on the part of the defendant and recovered damages for her mental anguish,[23] apparently under the breach of contract theory as discussed below.

Negligent embalming was also involved in *Hall v. Jackson*,[24] in which the plaintiff's action was based upon an allegation that her husband's body had decomposed prior to the funeral. The body was embalmed in Denver, Colorado, and shipped from there to Pennsylvania for the funeral. The extent of the decomposition made it necessary to leave the casket in the open air near the place where the funeral was conducted. Although negligence was evident in this situation, there was held to be no recovery for mental anguish because the defendant's conduct was not wilful or wanton.[25]

"In the case of Phillips vs. Higginbotham, decided by the U.S. District Court, Western District of Arkansas, in May, 1941, reported only in the files of the court, it was decided that a funeral director is not liable for unsatisfactory results of embalming done by a licensed embalmer with ordinary care and in the use of methods commonly used by embalmers in the same locality." STREET, *op. cit. supra* note 2, § 206. See also Chelini v. Nieri, 188 P.2d 564, 567 (Cal. App.), *modified*, 32 Cal. 2d 480, 196 P.2d 915 (1948).

21. JACKSON, *op. cit. supra* note 1, at 436.

22. Brown Funeral Home & Ins. Co. v. Baughn, 226 Ala. 661, 148 So. 154 (1933).

23. See also Loy v. Reid, 11 Ala. App. 231, 65 So. 855 (1914), in which there was recovery for mental anguish resulting from the decomposition of the body of a two year old child because of negligence in embalming.

24. 24 Colo. App. 225, 134 Pac. 151 (1913).

25. This case represents the majority view that there can be no recovery under breach of contract for mental anguish alone unless the breach was wilful or wanton.

A Tennessee decision, *Phillips v. Newport*,[26] involved the interesting problem of whether the defendant undertaker had performed an unprivileged autopsy[27] or had merely embalmed the body of the plaintiffs' infant child. It is profitable to examine the case from the standpoint of evidence concerning embalming procedures. The body was received by the defendant within an hour after death, in good condition and with no incisions. No permission was given for a post-mortem examination. When the mother came to dress the baby, she pulled the sheet back and saw that incisions had been made. After the funeral the mother had the body disinterred for the purpose of determining whether there had been a post-mortem examination. During the course of the trial it was established by the testimony that because of the smallness of arteries and veins a baby is more difficult to embalm than an adult; that removal of all the organs of the body is not necessary when embalming through the abdominal aorta or through the arch of the aorta; and that none of the undertakers and embalmers who testified had ever found it necessary to employ the method used by the defendant in this case.[28] This testimony, when added to the unexplained disappearance of the liver and stomach proved adequate to convince the jury that the defendant had performed an unauthorized autopsy and should therefore be liable for both compensatory and punitive damages. In allowing damages for this intentional tort the court said, "If the operations were done for the purpose of embalming the body, plaintiffs cannot recover, *even if such operations were unnecessary and were negligently done.*"[29] It is possible to conclude from this dictum that Tennessee follows the majority rule which will not allow damages in tort for mental anguish caused by mere negligence.[30]

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26. 187 S.W.2d 965 (Tenn. App. 1945).

27. An autopsy is generally defined as the post-mortem examination of a dead body by dissection to determine the cause, seat, or nature of disease. E. O. Painter Fertilizer Co. v. Boyd, 93 Fla. 354, 114 So. 444 (1927).

28. "Incisions were made from near the point of each shoulder to the center of the breast bone where they met. These incisions made a V shaped mark on the body. The ribs had been removed from the breast bone, so this V shaped part of the body was completely detached from the rest of the body. From the point where these incisions met, a long incision was made down the front of the body completely to the pelvis bone. These operations left the body wide open from the pelvis bone to the neck. The stomach, heart, liver, lungs, intestines, and one kidney were completely detached from the rest of the body. The organs which were in the body at the time of this examination were removed from the body by these doctors. They did not find the liver and stomach." 187 S.W.2d at 969.

29. 187 S.W.2d at 967. (Emphasis added.)

30. *But see* Taylor v. Bearden, 6 Tenn. Civ. App. 33 (1915), in which recovery was allowed for mental anguish in a breach of contract action for negligent embalming. The court stated: "It is also contended by able counsel that this is an action for breach of contract and that recoveries for mental anguish in such cases are unknown to and unauthorized by the law; and it is insisted that the damages awarded Bearden were for these only. The general rule is that there can be no recovery of damages for mental anguish occasioned

Burial of dead bodies also presents occasion for negligence in funeral directing. Although in theory recovery for mental anguish is not generally allowed for mere negligence on the part of the funeral director in the performance of his duties relative to proper disposal of the body, in practice there seems to be a tendency for the courts to find some means of granting compensatory damages for mental suffering and shock occasioned by impropriety in connection with the burial of the dead. Following are cases in which recovery has been allowed.

Lamm v. Shingleton[31] furnishes an interesting situation concerning the undertaker and his activities regarding the burial process. The plaintiff entered into a contract with defendant undertaker to inter the body of her deceased husband. Plaintiff based her claim upon the allegation that the defendant had negligently failed to lock one end of the casket at the time of the original interment. As a result, during a rainy spell the vault had risen about six inches above the ground. This necessitated reinterment. Plaintiff's witnessing of the vault out of the ground and the mud and rain which had seeped into it, thus damaging the casket and the body, constituted the basis for her claim of mental anguish. The court held that plaintiff could recover, but that the action was in contract and not in tort.[32] This case represents the minority view that there may be recovery in contract for a negligent breach resulting in mental anguish only.[33]

In another case,[34] the parents of a deceased infant daughter brought an action against an undertaker for negligence in allowing the body to be buried, or otherwise disposed of, thus breaching the contract by which the defendant was to keep the body in a secure vault until the plaintiffs were ready to inter it. The court said that the tort and contract were incapable of separation and allowed recovery for mental anguish.

Sanford v. Ware[35] presents a situation in which there was negligence on the part of an undertaker in reinterring a dead body. Plaintiff

by breach of contract, but to this rule there are some exceptions. One well-known exception is of that class of actions which sound more in tort than for breach of contract. Another exception, or rather one branch of the exceptional cases just referred to, is where the parties enter into a contract with personal feelings, sentiments and wishes in contemplation, especially where it is understood at the time of contracting that there will be keen mental anguish and suffering consequent upon a breach. In all such cases there may be a substantial recovery for mental anguish alone." *Id.* at 35-36.

31. 231 N.C. 10, 55 S.E.2d 810 (1949).

32. "The . . . allegation that the defendants' failure to lock the vault at the time of the burial, as a result of which water and mud entered the vault and forced its top to the surface, was due to their negligence and carelessness does not convert it into an action in tort." 55 S.E.2d at 812.

33. See Note, 6 VAND. L. REV. 757, 766 (1953).

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

35. 191 Va. 43, 60 S.E.2d 10 (1950).

desired to have the remains of her deceased husband moved from one cemetery to another and contracted with defendant to have him perform this service. During the process of removing the body, defendant contacted plaintiff and informed her that the wooden case in which the casket was placed would need to be replaced. Plaintiff agreed to this. About a month after plaintiff had been told by defendant that the body had been satisfactorily reburied she heard a rumor that in fact her husband's body had not been removed. Upon investigation of both graves she found that the old grave contained the casket and case and that the new grave contained the body only a few inches below the ground and that it was "without the benefit of a casket, case, or shroud." Plaintiff recovered both pecuniary loss from having the job performed improperly and for mental suffering. The court considered the action to be in tort.[36]

Transportation to and from the cemetery for the relatives and friends of the deceased is ordinarily furnished by the funeral director.[37] This phase of the mortician's work also presents situations in which there may be negligence. Generally the rules of agency are applicable. Where the funeral director has undertaken by contract to provide transportation for the family and friends of the deceased, it is generally true that he may be held liable to these people for personal injuries resulting from his own negligence or that of his servants. However, the authorities are in some confusion concerning the mortician's liability in the borrowed or hired servant situation.[38] It appears primarily to be an agency question which depends upon the facts.

It is apparently well settled that an undertaker cannot avoid liability which may result from his contractual obligation to furnish transportation by borrowing or hiring an independent contractor.[39] The courts differ concerning whether an action pursuant to this obligation to transport is in contract[40] or tort.[41] However, even if the contract theory is followed it appears certain that the obligation extends to the members of the family and friends as well as to the one who actually negotiated the contract with the funeral director.[42]

36. "While the notice of motion alleges the making of the contract between the parties for the removal of the remains of the plaintiff's husband, and the breach thereof, it sounds in tort." 60 S.E.2d at 12.
37. JACKSON, *op. cit. supra* note 1, at 463.
38. STREET, *op. cit. supra* note 2, § 151.
39. Dippel v. Juliano, 152 Md. 694, 137 Atl. 514 (1927).
40. John J. Radel Co. v. Borches, 147 Ky. 506, 145 S.W. 155 (1912). See JACKSON, *op. cit. supra* note 1, at 464.
41. *E.g.*, Grothmann v. Hermann, 241 S.W. 461 (Mo. 1922).
42. "We think it clear that, in arranging for the transportation of the decedent's relatives and family, the undertaking company owes the same obligation to each of them, though it may not know, save in the most general way, the number and name of those who are to be transported." John J. Radel Co. v. Borches, 147 Ky. 506, 145 S.W. 155, 156 (1912).

A funeral director who obligates himself to furnish transportation and who either borrows or hires a vehicle and driver will be liable for any personal injuries resulting from the negligent operation of the vehicle if he, and not the owner, has the power to control the driver's actions.[43] This does not mean that actual control must have been exercised—the mere right to control is sufficient.[44]

The majority of cases are decided on the basis of the power to control test although just what constitutes the power to control is not clear. Following are some cases in which liability was found: In *Sack v. A. R. Nunn & Son*,[45] the funeral director hired cars and drivers to accommodate the family of the deceased by transporting them to and from the funeral. The funeral director placed the cars in the procession line and also placed stickers[46] containing driving rules on the windshields. The court held that there was sufficient right to control to hold the undertaker liable under the doctrine of respondeat superior for personal injuries sustained by the brother of the deceased. Sufficient right to control was also found in *Grothmann v. Hermann*,[47] in which the defendant undertaker hired cars for use in a funeral. Here the driver of one hired car negligently slammed a door on the hand of the plaintiff who was a passenger in a car hired from a different party. Although the extent of the undertaker's direction to the drivers was to follow a certain route, he was held liable for the plaintiff's injury even though he had nothing to do with the operation of the car.

Greenberg & Bond Co. v. Yarbrough[48] furnishes an illustration of liability based upon the power to control test. In this case the defendant undertaker had hired taxicabs for funeral transportation and had directed the drivers to take certain persons to the funeral and to take them where they wanted to go afterwards. Plaintiff was injured when the driver of her cab ran into a telephone pole while he was speeding.

In *Dippel v. Juliano*,[49] there was negligence on the part of the borrowed driver of a borrowed car while returning from a funeral. The route, destination, speed, and the passengers who were to occupy the car were controlled by the defendant in this situation. Here the court

43. "In the majority of cases the undertaker has been held liable or relieved of liability by a determination of whether under general rules, the undertaker was or was not the master of the offending driver. . . ." JACKSON, *op. cit. supra* note 1, at 464.
44. See Sack v. A. R. Nunn & Son, 129 Ohio St. 128, 194 N.E. 1 (1934).
45. 129 Ohio St. 128, 194 N.E. 1 (1934).
46. See Pantell v. Shriver-Allison Co., 61 Ohio App. 119, 22 N.E.2d 497 (1938), in which "funeral stickers" were placed on cars volunteered for use in the funeral procession. However, the sticker did not create a master-servant relationship between the funeral director and the volunteer.
47. 241 S.W. 461 (Mo. 1922).
48. 26 Ga. App. 544, 106 S.E. 624 (1921).
49. 152 Md. 694, 137 Atl. 514 (1927).

spoke in terms of liability because of the master-servant relationship and also the aspect of one's not being able to avoid his obligation under contract by borrowing the services of an independent contractor.

John J. Radel Co. v. Borches[50] seems to stand for the minority proposition that injury to a mourner is covered by the contractual obligation to provide safe transportation and need not be based upon a finding of a master-servant relationship, implying that this relationship would be necessary only if the rights of a stranger to the deceased were involved. To the same effect is *Mahany v. Kansas City Rys. Co.*,[51] involving an injury to plaintiff-pallbearer who was riding in a hired car which collided with a street car. He obtained a judgment on the basis of defendant undertaker's failure to exercise due care in performing the contract to provide transportation in connection with the funeral services.

Those cases which hold that the undertaker is not liable for the negligence of the borrowed driver are based upon findings of no right to control. *Frerker v. Nicholson*[52] goes back to the "horse and buggy days," but the same law is still applicable. The undertaker[53] hired a horse and carriage for use in a funeral but exercised no control except to instruct as to the general route to take to the cemetery and to return the passengers to their homes. It was held that the owner of the carriage was liable for the driver's negligence in starting suddenly as the plaintiff was alighting from the carriage.

Dubisson & Goodrich v. McMillin[54] held that the undertaker was not liable for negligence of a hired car and driver since the extent of his control was to tell the driver the time and place to go.

A taxicab company was held liable for personal injuries in *Burke v. Shaw Transfer Co.*[55] on the ground that the driver was not a servant of the undertaker who hired cabs for funeral transportation and who was billed at the end of each month.

Two cases have been found involving an undertaker's use of flower trucks. In a Kansas case[56] the defendant undertaker furnished, as a part of his services, transportation of flowers from the place of the funeral service to the cemetery. On this particular occasion he had borrowed a truck and driver from a florist and while delivering flowers for the undertaker the driver hit a young boy who was bicycling.

50. 147 Ky. 506, 145 S.W. 155 (1912).
51. 254 S.W. 16 (Mo. 1923).
52. 41 Colo. 12, 92 Pac. 224 (1907).
53. It was decided in Nicholson v. E. P. McGovern Undertaking Co., 41 Colo. 1, 92 Pac. 225 (1907), that there was no cause of action against the undertaker.
54. 163 Ark. 186, 259 S.W. 400 (1924).
55. 211 Mo. App. 353, 243 S.W. 449 (1922).
56. Moseman v. L. M. Penwell Undertaking Co., 151 Kan. 610, 100 P.2d 669 (1940).

Employing the control test, the court held the undertaker liable. In a Missouri case,[57] however, an undertaker who loaned a flower truck to another undertaker under an association arrangement was held liable for the driver's negligence under the right to control test.

It has been suggested as a preventive measure that the funeral director who is unwilling to assume the responsibilities connected with borrowed cars and drivers should inform his client that he is acting as an agent in securing them.[58] Whenever possible this should be made a clause in the contract.[59]

OTHER INSTANCES OF LIABILITY

As expressed previously, funeral directors are subject to liability for negligence in many situations, not all of which are peculiar to their particular business. For example, liability has been found where a visitor to the funeral home fell on icy steps approaching the building;[60] where a visitor stepped upon and displaced a plank which was placed upon concrete steps which were being repaired;[61] and where a hearse was negligently driven out of a driveway causing a collision which injured a passenger in the other car.[62]

Walker v. Joseph P. Geddes Funeral Service, Inc.,[63] presents a clear case of negligence in a rather unusual setting. Ambulance attendants were carrying an elderly patient on a stretcher and while going down stairs allowed her to fall. In the fall, the patient received a severe blow to the head, contusions to the arm, and a broken right hip; a few days later she died. Since there was conflicting testimony concerning her condition before the fall, damages of only $100 were awarded.

CAUSATION

While causation is a significant factor in any attempt to obtain damages, its importance here is diminished because it is not a difficult matter to prove. Although recovery of damages for mental suffering is discussed below, it is to be noted here that if recovery for mental anguish is sought in a breach of contract action, the plaintiff must show that the damage was reasonably within the contemplation of

57. O'Brien v. Rindskopf, 334 Mo. 1233, 70 S.W.2d 1085 (1934).

58. STREET, *op. cit. supra* note 2, § 155. For a discussion of this problem see Dubisson & Goodrich v. McMillin, 163 Ark. 186, 259 S.W. 400 (1924), and John J. Radel Co. v. Borches, 147 Ky. 506, 145 S.W. 155 (1912).

59. For example: " 'It is mutually understood that the Funeral Director is to secure from a third party or parties—passenger cars and drivers to be used in carrying funeral passengers, that in securing such cars and drivers the Funeral Director acts as the client's agent, and shall not be liable for accidents due to fault of such third parties and/or drivers.' " STREET, *op. cit. supra* note 2, § 155.

60. Chatkin v. Talarski, 123 Conn. 157, 193 Atl. 611 (1937).

61. Dougherty v. Brandt, 122 Pa. Super. 410, 186 Atl. 419 (1936).

62. Stroud v. Davis-Lawhead Funeral Home, 154 So. 476 (La. App. 1934).

63. 33 So. 2d 570 (La. App. 1948).

the parties at the time of contracting.[64] If, on the other hand, damages for mental anguish are sought in a tort action, it must be established that the damage was the natural and proximate result of the wrong.[65] No difficulty is posed with regard to proving the connecting link[66] since it is reasonably clear that improper care of a dead body is likely to result in mental suffering by the relatives of the deceased.[67] Even though causation is established, however, most courts will not compensate mental suffering alone.

DAMAGES

The unique, and perhaps the most difficult, phase of this subject is presented in a consideration of recovery by a relative of the deceased for mental anguish resulting from the mortician's negligence in handling the body. The plaintiff may pursue one of two remedies—breach of contract[68] or tort.

Courts quite generally have taken the position that damages in a breach of contract action should place the plaintiff in the position which the fulfillment of the contract would have left him.[69] At common law the general rule did not allow recovery for mental anxiety resulting from breach of contract;[70] however, in *So Relle v. Western*

64. "The tenderest feelings of the human heart center around the remains of the dead. When the defendants contracted with plaintiff to inter the body of her deceased husband in a workmanlike manner they did so with the knowledge that she was the widow and would naturally and probably suffer mental anguish if they failed to fulfil their contractual obligation in the manner here charged. The contract was predominantly personal in nature and no substantial pecuniary loss would follow its breach. Her mental concern, her sensibilities, and her solicitude were the prime considerations for the contract, and the contract itself was such as to put the defendants on notice that a failure on their part to inter the body properly would probably produce mental suffering on her part. It cannot be said, therefore, that such damages were not within the contemplation of the parties at the time the contract was made." Lamm v. Shingleton, 231 N.C. 10, 13-14, 55 S.E.2d 810, 813-14 (1949).

65. "But it is universally held that where a personal tort, such as that with which we are here concerned, has been committed which will support an action to recover some damages, compensation for mental suffering may be recovered in addition thereto if such suffering is a natural and probable result of the act." Sanford v. Ware, 191 Va. 43, 60 S.E.2d 10, 13 (1950).

66. See Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035-36 (1936).

67. In Wright v. Beardsley, 46 Wash. 16, 89 Pac. 172 (1907), damages for mental anguish were allowed for burial of a stillborn baby in a rough box on top of another casket. Relative to causation the court said: ". . . Where one person agrees to give a dead body a decent burial, and under such agreement obtains possession of the body, and in violation of this duty casts the body by the way, or wrongfully mutilates it, or disposes of it, or deposits it in a grave without covering in such a manner as to cause the relatives or persons charged with its decent sepulture to naturally suffer mental anguish, it would shock the sensibilities to hold that there was no remedy for such a wrong." *Id.* at 173.

68. For general background concerning recovery for mental anguish in the breach of contract actions, see Note, 6 VAND. L. REV. 757 (1953).

69. MCCORMICK, DAMAGES § 137 (1935).

70. See Taylor v. Bearden, 6 Tenn. Civ. App. 33 (1915) and note 30 *supra*.

Union Telegraph Co.,[71] the court allowed the plaintiff to recover general damages for negligence of the telegraph company in transmitting and delivering a message relating to the death of plaintiff's mother, thus causing him to miss the funeral services. It was held that the plaintiff should be compensated for his mental suffering since this was within the parties' contemplation when the contract was made. While this rule is still not generally followed,[72] it has been adopted in a few states.[73]

Illustrative of the *So Relle* minority rule allowing damages for mental suffering resulting from breach of contract is *Lamm v. Shingleton*,[74] discussed above. The facts of this case leave little room for doubt concerning the validity of the plaintiff's claim of mental distress. Not only was the appearance of her husband's body a source of distress, but one of the defendants replied, when asked to remove the mud and water from the vault, "To hell with the whole damned business, it's no concern of mine." Plaintiff stated that this statement added to her nervousness.

It is also generally agreed that no tort action can be maintained for mental disturbance caused by negligence without accompanying physical injury.[75] However, there are exceptions, one of which, the negligent handling of dead bodies,[76] is recognized by a few courts. Apparently the only seemingly valid reason for denying recovery for negligence causing only mental anguish is the great possibility of false claims.[77] However, this reason fails in the case of misconduct involving a dead body, since there is assurance that the mental anxiety of the deceased's relatives is genuine.[78] Nevertheless, most courts still require either physical harm[79] or wilful and wanton[80] conduct before mental anquish will be compensated. Although no case involving an undertaker has been found to represent the minority view, it is reasonable to assume that the courts which have allowed recovery against others who have dealt negligently with dead bodies, would also grant damages for mental suffering if an undertaker were the defendant.

CONCLUSION

Funeral directors, like all men who offer skills to the public, are

Generally, see Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).

71. 55 Tex. 308 (1881).
72. McCORMICK, DAMAGES § 145 (1935).
73. *Ibid.*
74. 231 N.C. 10, 55 S.E.2d 810 (1949).
75. PROSSER, TORTS 180 (2d ed. 1955).
76. 2 HARPER & JAMES, TORTS § 18.4, n.1 (1956).
77. PROSSER, TORTS 177 (2d ed. 1955).
78. *Id.* at 180-81.
79. *E.g.*, Dunahoo v. Bess, 146 Fla. 182, 200 So. 541 (1941).
80. 2 HARPER & JAMES, *op. cit. supra* note 76, § 18.4.