Recognizing and Handling the Growing Claims for Loss of Sepulcher Rights

Daniel Flanzig  Contact All Articles

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A disturbing but growing number of claims appear to be the common law tort of the destruction or loss of sepulcher rights, that is, the loss, destruction or interference of one's burial right of their next of kin.

As Justice James Catterson wrote in *Melfi v. Mt. Sinai Hospital,*¹ "for thousands of years the right of sepulcher has encompassed a solely emotional injury, a concept that, in general, did not gain currency in New York until the late 1950's during its evolution in the common law." "Therefore, claims for the loss of sepulcher have compelled the courts to struggle with the legal concepts and theories underpinning the compensable wrong. At this point the Courts have recognized that the right of sepulcher is less a quasi-property right, and more the legal rightness of the surviving next of kin to find solace and comfort in the ritual of burial." Justice Catterson went on to cite numerous examples dating back to pre-Christian civilizations, the Egyptian mummification process, and the Roman civil laws' imposition of a duty of burial, and virtually every faith and society has exhibited a reverence for the dead.²

**Common Law Cause of Action**

It is well established that the common law right of sepulcher gives the next of kin the absolute right to the immediate possession of a decedent's body for preservation and burial, and that damages will be awarded against any person who unlawfully interferes with that right or improperly deals or delays the possession.³ The cultural imperative to bury one's dead is rooted in thousands of years of civilization. Although common
law does not regard dead bodies as property, our courts, through the centuries, have treated them in a quasi-property context. However, the cause of action does not accrue until interference with the right directly impacts on the "solace and comfort" of the next of kin, that is, until interference causes mental anguish and that the next of kin is aware that the loss occurred." Such a destruction or loss will create a common law claim against the person or entity responsible for the loss.

Statutory Cause of Action

In addition to the common law claim, a plaintiff may also maintain a statutory cause of action under various sections of the New York Public Health Law as well as the New York City Rules and Regulations. The courts have recognized and sometimes supplemented the common law right with health code regulations. (see also, PHL Sec. 4201, PHL 2800, 10 NYCRR 405.9(f)(9), 24 RCNY Health Code Reg. Sec 205.19). For instance, 10 NYCRR 405.9(f)(9) titled "Hospital-Minimum Standards" reads: "A dead body, including a stillborn, infant, or fetus estimated by an attending physician to have completed 20 weeks of gestation, shall be delivered only to licensed funeral director or undertaker of his/her agent." Hence, a hospital or other facility is under statutory duty to deliver to a funeral director or his or her agent, any body that is in excess of 20 weeks of gestation, and any violation or delay in delivery creates a statutory private right of action.

Proving Damages

A plaintiff may recover for emotional injuries flowing from the defendant's interference with the right to be in possession of a family member's remains. It is not rendered deficient merely because a plaintiff did not submit medical evidence to support his injuries. While evidence of a specific medical diagnosis or treatment may be relevant to issue of damages, it is not necessary to the prosecution of such an inherently genuine claim. Plunkett v. NYU Downtown Hospital, 21 A.D.3d 1022, 801 N.Y.S.2d 354, (2d Dept. 2005); see also, Massaro v. Charles J. O'Shea Funeral Home, 292 A.D.2d 349, 738 N.Y.S.2d 384 (2d Dept. 2002). In such a case there exists a special likelihood of genuine and serious mental distress arising from the special circumstance which serves as a guarantee that the claim is not spurious. Massaro, supra.
The Second Department has held that punitive damages are appropriate in an action against a hospital to recover for emotional injuries flowing from the hospital's alleged negligent interference with the right of possession of a patient's remains. *Plunkett*, supra. A jury may be allowed to give damages that express the indignation at the defendant's wrong rather than a value set on plaintiff's loss. *Voltz v. Blackmor*, 64 N.Y. 440, 444; *Liberman v. Riverside Memorial Chapel*, 225 A.D.2d 283 (1st Dept.1996).

**Types of Claims**

As disturbing as these claims are, the reality is that they can arise under many different sets of facts involving the mishandling of remains.

In *Whack v. St. Mary's Hospital of Brooklyn*, the plaintiff bought a cause of action to recover monetary damages for the defendant's negligent handling of the plaintiff's deceased brother. The plaintiff's deceased brother was taken to the defendant hospital where he died that same day as a result of a cardiac arrest. The deceased's body was then placed in the hospital morgue, but due to lack of proper refrigeration, decomposition occurred and the body could not be properly embalmed, a proper funeral could not be held, and the funeral was postponed. The New York Civil Court denied defendant's motion to dismiss, holding the plaintiff had a recognizable tort claim as a result of the hospital's negligence in the handling of the body.

A cause of action may also be maintained due to a hospital's failure to properly notify a decedent's next of kin for months following his death. In *Coto v. Mary Immaculate Hospital*, 26 Misc.3d 1205(A), 906 N.Y.S.2d 778 (Sup. Ct. Queens Co.), the court denied defendant's motion for summary judgment to dismiss plaintiff's claim for the failure to timely notify the plaintiff of her brother's death. In *Coto*, the decedent was found by the New York City Fire Department EMS on a street in Queens. He was admitted to defendant hospital and died the next day. The hospital was unable to identify the decedent and contacted the police department. Two days later, the hospital contacted the medical examiner's office as per its own policy and procedure. The hospital contended that after the medical examiner accepted the decedent's case, its duty ended and the medical examiner was responsible for identifying the body.
In opposition, plaintiff submitted a face sheet from the defendant hospital dated the same day that the decedent was found that reflected his full name, address, date of birth and Social Security number. The face sheet also revealed that the decedent was not transferred to the medical examiner's office until three days after he died. Plaintiffs contended that for three days no one from defendant hospital attempted to verify the address or attempt to contact anybody at the decedent's home. The court held that the hospital's failure to make any attempt to notify next-of-kin was not reasonable under the circumstances and led to months of delay in notification to next of kin. The court denied the motion.

In *Emeagwali v. Brooklyn Hospital Center*, the lower court, after a jury verdict in plaintiff's favor, refused to set aside the verdict and affirmed that the plaintiff had a cognizable claim. In *Emeagwali*, the mother delivered a child at the defendant hospital. The hospital argued it delivered the stillborn fetus to the pathology department for disposal, and not to the parents, due to the gestational age and size of the fetal remains. The hospital never disclosed what became of the remains after they were sent to the pathology department.

Plaintiffs sued on the grounds that the hospital violated the plaintiffs' rights to bury their stillborn fetus. Specifically, the plaintiffs alleged that the hospital did not seek to acquire permission from the parents prior to disposal of the remains. The remains of the plaintiffs' stillborn child were never recovered, and plaintiffs never received an explanation of the whereabouts of their stillborn's body.

The court recognized that the plaintiffs had a common law statutory right of action of sepulcher as well as statutory claims, and held that these rights exist whether or not the fetus was ever alive after delivery. The court allowed the jury's verdict to stand for its claim of emotional distress.

**The Handling of the Claim**

As a practical matter, the handling of a sepulcher rights claim requires the practitioner to educate the court on the rights of the plaintiff as well as the applicable laws and statutes, as most trial judges are not normally confronted with this type of trial. In addition, the attorneys should be prepared to assist the court with the drafting of its
own jury charge as the Pattern Jury Instructions do not include a common law claim for the destruction of sepulcher rights.

Conclusion

The preparation and trial of a sepulcher rights case creates issues for the court and the attorneys not normally found in other tort actions. Counsel should be prepared to help educate the court on this unique claim, burden of proof and damages.

Daniel Flanzig is a partner at Flanzig and Flanzig in Mineola. He can be reached at DFlanzig@Flanziglaw.com.

Endnotes:

1. 64 A.D.3d 26, 877 N.Y.S.2d 300 (1st Dept. 2009).

2. Melfi, supra at 304, 305.

3. Melfi, supra, at 304; see also, Darcy v. Presbyterian Hosp. in City of N.Y., 202 N.Y. 259, 95 N.E. 695 (1911).


5. Id.


8. Emeagwali, supra.