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Recovery of Damages for Mental Anguish Relating to Death Grief: the Jurisprudence of Certain Common Law Jurisdictions

Anatoliy A. Lytvynenko
https://orcid.org/0000-0002-0036-0677
Doctor of Legal Sciences (PhD)
Lecturer at the Baltic International Academy
Room 216, Valērijas Seiles 4/1, LV-1003, Rīga, Latvia
E-mail: anat.lytvynenko@gmail.com

Recovery of Damages for Mental Anguish Relating to Death Grief: the Jurisprudence of Certain Common Law Jurisdictions

Anatoliy A. Lytvynenko
(Baltic International Academy (Latvia))

Summary. Courts in Common Law jurisdictions usually did not grant the recovery of damages for mental suffering unaccompanied with a physical injury or other wrong until the late 19th century. However, the given maxim changed when American courts allowed recovering damages for mental suffering in cases of improper delivery (or non-delivery) of telegraph messages, which primordially related to the death or serious illness of close relatives. English courts also recognized nervous shock to be recoverable in a handful of cases of the late 19th – early 20th century. In the several subsequent decades, the world of Common Law witnessed a multitude of cases, where the plaintiffs managed to recover damages caused by disinterment of graves, maltreatment of cadavers, negligence in burials and similar causes, where injury to feelings was connected with the demise of a close relative, or, as proposed by the author of the article, for the matter of brevity, *death grief*. In England, the recovery of damages for mental suffering from death grief was recognized by the judiciary in the case of *Owens v. Liverpool Corp.* (1938), which became one of paramount cases on recovery of damages for mental suffering relating to death grief, whereas there is a multitude of legal precedents of such recognition in the United States, and the key precedent upon this subject in Canada is the case of *Mason v. Westside Cemeteries, Ltd.* (1996). The article discusses English, American and Canadian cases, where the given topic is invoked.
Keywords: recovery of damages, mental anguish, Common Law jurisdictions, Civil Law.

Žalos dėl psichinių kančių, susijusių su mirties sielvartu, atlyginimas: tam tikrų bendrosios teisės jurisdikcijų jurisprudencija

Anatoliy A. Lytvynenko
(Tarptautinė Baltijos akademija (Latvija))

Santrauka. Bendrosios teisės jurisdikcijų teismai paprastai neleisdavo susigrąžinti žalos, patirtos dėl psichinių kančių be fizinių sužalojimų ar kitų nelaimių, iki XIX amžiaus pabaigos. Tačiau pateikta maksima pasikeitė, kai Amerikos teismai leido išieškoti žalą už dvasinius išgyvenimus netinkamo telegrafo pranešimų pristatymo (ar nepristatymo) atvejais,

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kurie iš pradžių buvo susiję su artimų giminaičių mirtimi ar sunkia liga. Anglijos teismai taip pat pripažino, kad nervų sukrėtimas gali būti išgydomas, keliose XIX amžiaus pabaigos – XX amžiaus pradžios bylose. Per kelis ateinančius dešimtmečius bendrosios teisės pasaulyje pasitaikė daugybė bylų, kai ieškovams pavyko susigrąžinti žalą, padarytą dėl kapų išardymo, netinkamo elgesio su lavonais, aplaidumo laidojant ir panašiomis priežastimis, kai jausmų sužalojimas buvo susijęs su artimo giminaičio mirtimi arba, kaip siūlo straipsnio autorius, dėl trumpumo – mirties sielvartas. Anglijoje žalos, patirtos dėl sielvarto mirties, išieškojimą pripažino teismai byloje *Owens v. Liverpool Corp*. (1938), kuri tapo viena iš svarbiausių bylų, susijusių su žalos, patirtos dėl dvasinių kančių, sukeltų mirties sielvarto, išieškojimo. Kadangi yra daugybė teisinių tokio pripažinimo precedentų Jungtinėse Amerikos Valstijose, o pagrindinis precedentas šiuo klausimu Kanadoje yra atvejis *Mason v. Westside Cemeteries, Ltd*. (1996), straipsnyje aptariami Anglijos, Amerikos ir Kanados atvejai, kai pasitelkiama nurodyta tema.
Pagrindiniai žodžiai: žalos atlyginimo išieškojimas, dvasinės kančios, bendrosios teisės jurisdikcijos, civilinė teisė.

Introduction

In the early decades of the 20th century, courts in common law jurisdictions started to recognize mental anguish (mental suffering) as an element of damages, when defendants had invaded some legally-protected right, but, in some cases, mental anguish even became the sole ground of action, agreeing that the impact on the physical well-being of the aggrieved party must be substantial (Murray 1965, p. 499–501). Learned scholars and commentators, as, for instance, J.M. Kerr (1917), L. Green (1934–1935), J.L. Borda (1939), W.L. Prosser (1939), and even earlier, W.C. Rodgers (1895) and G. Ainslie (1902), discussed the issue of recovery of damages for mental suffering, by proposing new concepts – for instance, mental peace and tranquility by J.L. Borda, and the tort of intentional infliction of mental suffering by W.L. Prosser (1939), who claimed that the courts had already created a new tort, whereas, earlier, the courts had been very reluctant to recognize the legal interest of the person to preserve the peace of mind as something which would be deserving legal protection in an action for damages (Rodgers 1895, p. 209–228; Ainslie 1902, p. 311–320; Kerr 1917, p. 203–214; Green 1934–1935, p. 460–490, Borda 1939, p. 55–67; Prosser 1939, p. 874–892).

This reluctance, upon W.L. Prosser, was a consequence that older English Law never previously recognized mental suffering to be actionable, as it was a practically intangible right, which could not be measured by calculations, in contrast, to, for instance, a broken limb, and, in earlier times, damages for mental suffering were considered to be too 'remote' to be recoverable, and the reasoning also included the concept that to make mental suffering actionable would cause not only a considerable amount of fraudulent lawsuits, but to very trivial litigation which would involve mere bad manners (Prosser 1939, p. 874–877). He wrote: "If the plaintiff is to recover every time that her feelings are hurt, we should all be in court twice a week…" (Prosser 1939, p. 877).

J.L. Borda (1939) paid attention that, in earlier Case Law, mental suffering could be actionable, if some other, everlastly-recognized right was violated, which included such actions as assault, libel and malicious prosecution (Borda 1939, p. 55–56). Speaking of the problem of myriads of unreasonable lawsuits before courts, J.L. Borda held that there may be a considerable number of tests which the court needs to estimate before handing down the judgment in such a case, such as the intent of the tortfeasor, foreseeability and unreasonableness of the conduct of the defendant, and the question of mental suffering, and its impact to the physical health (including mental health) could be given to medical experts; in the earlier Case Law, he noted, lack of redress for mental suffering was reasoned by the difficulties with weighty evidence, emotionally-unstable people as plaintiffs (i.e., who would render even a slight shock to be hazardous enough to institute a lawsuit), the possibilities for fraudulent litigation (as W.L. Prosser denoted in his treatise (1939) that it is easy to lie of what is in the plaintiff's head, being thus

unable to be checked); as well as a difficult estimation of damages by the court (Borda 1939, p. 56–57) (for instance, in a Canadian 'cemetery case', *Mason v. Westside Cemeteries Ass'n.* (1996), para. 62–63, the court estimated that the plaintiff's loss of funeral urns of his deceased parents has caused moderate emotional stress, denoting that the sums of recovery for mental suffering are usually low (*Mason v. Westside Cemeteries Ass'n*, 1996, para. 62–63).

L. Green in his treatise on relational interests (to which he, to wit, included the interests in deceased relatives) included feelings and emotions, as well as several categories of personal rights, which nowadays constitute the element of the right to privacy, such as the right to name and likeness, history and privacy itself (Green 1934–1935, p. 460–462). Here, we may come to a question: does a person have any relational interest in a deceased relative, and, if so, is there a remedy for violating the said interest, which takes a shape in the injury to feelings of a mourning person? L. Green (1934–1935) strongly affirmed it, by claiming that mishandling of corpses, unlawful autopsies, disinterments and misarrangements of the mode of burial usually gave a foundation for an action for mental suffering, which had a substantial number of Case Law examples in the first decades of the 20th century within American courts, and it was repeatedly stated by the courts that mental suffering was the chief element of the redress (Green 1934–1935, p. 485–487).

To wit, W. L. Prosser presented a similar approach in classifying the wrongs which are associated with deceased relatives, and which may invoke mental suffering, by adding that, in most of such cases, courts adhered to the theory of a quasi-property right to control over the body of a deceased relative (Prosser 1939, p. 885). Prosser called this concept as "something evolved out of thin air to meet the occasion," and which is, in reality, the personal interests of the surviving relatives of the deceased (the same position could be found in the comment of H.R. Bigelow (1933), who considered that the theory of the quasi-property right over the body of a deceased relative is a 'cover' for mental anguish (Bigelow 1933, p. 110–112; Prosser 1939, p. 886).

A.J. Pregaldin (1958) described the said concept of quasi-property as something less than the objects which are a subject of ownership, and the courts, in most cases (as an example *a contrario*, see the Canadian case of *Miner v. C. P. R.* (1911) (*Miner v. C.P.R.*, 1911, p. 413–414)) did not recognize property rights in cadavers, by finding that it would be unwise, and that probably there could be abuses, had property rights in a corpse been established, as a sale of it (Pregaldin 1958, p. 289). The feelings hurt by some unlawful act done to a deceased relative, mishandling of a cadaver, or the negligent conduction of the funeral affects the feelings of a mourning relative. Let us, for the matter of brevity, call it '*death grief*', since all the issues of deaths of the loved ones are omnipresently surrounded by grief. Apart from the cases relating to maltreatment of corpses or negligent funerals, death grief cases also involved litigation between telegram senders and telegraph companies, which failed to deliver the message for some reason, and most of such cases usually involved messages relating to the death or a serious illness of a close relative (Kerr 1917, p. 205–207), which was most prominently known from the case of *SoRelle v. W. U. Telegraph Co*. (1881), adjudicated by the Supreme Court of Texas – in this case, the plaintiff successfully sued the telegraph company for a negligent failure to transmit and deliver the message revealing that his mother had died, to him (*SoRelle v. W. U. Telegraph Co*., 1881, p. 308–314). J. F. Chmiel (1957) called the telegraph cases to be the first kind of cases where courts granted redress sustained for mental suffering (Chmiel 1957, p. 487–488).

Several states followed the rule adopted by the Supreme Court of Texas, while, in some other state jurisdictions, the courts criticized this judgment (Duggan 1926, p. 6–7). Besides, the *SoRelle* judgment was overruled in 1883 (*The Gulf, C. & Santa Fe R'y Co v. Levy*) and then again reinstated in 1886 (*Stuart v. Western Union Telegraph Co*.), remaining in force thereafter (*The Gulf, C. & Santa*

Fe R'y Co v. Levy, 1883, p. 563–569; *Stuart v. Western Union Telegraph Co*., 1886, p. 580–585). Now, as it may be deduced from the works of L. Green (1934–1935), W.L. Prosser (1939), B.F. Crabtree (1942), and the Anonymous commentary (1960), the issue of mental suffering originating from death grief may be reviewed as a distinct category of cases invoking mental suffering. For instance, B. F. Crabtree discussed the issue of recovery for an unauthorized autopsy, distinguishing the acts of the defendant (i.e., a coroner or a physician) is not directed against the living plaintiff (who may be not even present anywhere around), but against a cadaver. And so, Crabtree concluded that, to show that the surviving next of kin, or a surviving spouse has a legally-protected interest that will be protected by Law, it has to be proven that 1) the next of kin has a property right (or, as mostly said by courts, a quasi-property right) over the body of the decedent (this concept was occasionally criticized); 2) there is a relationship between the plaintiff and the decedent; 3) the right to possession of the body of the decedent as it existed at the time of death (see, for instance, the American case *Infield v. Cope*, where the court held that such a right, alongside others, is included into the meaning of a legitimate right to possession of the corpse before burial (Crabtree 1942, p. 309–310, *Infield v. Cope*, 1954, p. 719/312).

L. Green (1934–1935) paid considerable attention to the relationships between living and deceased relatives, calling them as real, as if they had been the living members of the family, and found that the family relations should be understood as ongoing after one's death. He contended that the interest in a deceased relative could be observed either in harm to the body, or harm of appropriation, such as unlawful autopsies, disinterments, negligently conducted funerals, etc.; while also outlining that the transportation cases, where the issue of mental anguish (as independent grounds for action) arose, were frequently discussed in 'cemetery cases' (Green 1934–1935, p. 485–486). L.S. Grean and P. Hesse (1967) explained what the right of next of kin, who has the legal right to possession of a cadaver looks like: the first is the surviving spouse (husband/wife), followed by the surviving kinfolk (that is, the surviving children), then go the brothers and sisters, and, after that, the surviving more distant relatives (Grean and Hesse 1967, p. 117–118). Notably, L.S. Grean and P. Hesse found that the corpse should be considered as a tangible object, which is "*potentially dangerous, which must be disposed of*," and the surviving next of kin, who is in charge for the disposal of the body (that is, its funeral), has certain rights and privileges (Grean and Hesse 1967, p. 117–118). From the theoretic material which has been discussed above, it could be deduced that *death grief* involves not only some damage negligently or willfully done to the corpse, but also relates to all malpractice arising from the preparation of the body for funeral and the conduction of the funeral itself, and includes accidents and incidents springing out of funeral processions (*Owens v. Liverpool Corp.*, 1938, p. 394–401).

1. United Kingdom Law

A hundred years ago, W.F. Kuzenski published a prominent article relating to property rights over the bodies of the deceased. In this article, he outlined that the jurisdiction over the deceased in England had exclusively belonged to the Church since the early Middle Ages, which had a trifold aim: to protect from sacrilege (this was considered an indictable Common Law misdemeanor), those days, the burial grounds belonged to the churches, and, after death, the Church possessed probate jurisdiction (Kuzenski 1924, p. 18).

In some American cases, we may find that there is very little in terms of relating English authorities to the burial rights, since the issues of burial exclusively belonged to the ecclesiastical courts[1]. What

[1] See, for instance, *Whitehair v. Highland Memory Gardens, Inc.*, 174 W.Va. 458, 327 S.E. 2d 438, 54 A.L.R. 4th 383, 01.03.1985.

was the actual mechanism of such protection? Disinterment of a corpse was considered a misdemeanor (*R v. Sharpe*, 1857, p. 160–163/959–960), and, in case someone would prefer to conduct a disinterment in order to reinter the body in some other cemetery, he or she needed to obtain a faculty of a consistory court in case the interment took place at consecrated grounds, and the permission of the Home Secretary in some other cases (*In Re Church Norton Churchyard*, 1987, p. 37–46).

Since there never were any ecclesiastical courts in the United States, these principles never applied in that country, but they remained applicable in England. There were some cases on the record which proved that there might be disputes in terms of burials: for instance, in *Gilbert v. Buzzard & Boyer* (1821), adjudicated by the Consistory Court of London, the plaintiff sued a priest for forcibly preventing the burial of his deceased wife in an iron coffin, in *Bryan v. Whistler* (1828), the plaintiff sued a church rector for burying a different deceased person in a vault in which he had previously buried his deceased relative, to which, as he thought, he had acquired exclusive rights to, since he had paid the rector for making the same, and, in the case of *McGouth v. Lancaster Burial Board* (1888), the plaintiff unsuccessfully litigated with a cemetery board for removing a glass shade with a galvanized wire covering where the court found that burial rights vested to him did not include placing such constructions upon the grave (*Gilbert v. Buzzard & Boyer*, 1821, p. 333–369; *Bryan v. Whistler*, 1828, p. 288–295/1050–1053, *McGouth v. Lancaster Burial Board*, 1888, p. 323–329).

The English Law recognized that the duty to conduct the funeral in a proper manner belonged to the deceased testator's executor (*Tugwell v. Heymann*, 1812, p. 1380; *Rogers v. Price, Executor*, 1829, p. 36/1083). In *Rogers v. Price* (1829), which was an action by an undertaker to recover the funeral expenses from the deceased testator's executor, the court (per Hullock, B.) said the following: "It is the duty of the executor to dispose of the [deceased] testator in the usual manner, viz. by burying him. It is not that sort of duty which can be enforced by mandamus or other proceedings at law; but it is a duty which decency and the interest of society render incumbent upon the executor" (*Rogers v. Price, Executor*, 1829, p. 36/1083). The English jurisprudence shows that burial rights are not absolute, and that they are regulated by both burial laws and the concerns of public and environmental health (*McGouth v. Lancaster Burial Board*, 1888, p. 323–329; *Hoskins-Abrahall v. Paignton Urban District Council*, 1928, p. 375–389), and these burial rights are quite limited in their nature, not incurring the obligations of the grantee, for instance, to apply decent care for the burial place which he or she had bought (*London Cemetery Co. Ld. v. Cundey*, 1953, p. 786–793); P. Sparkes (1991) denoted that burial rights are limited by their direct destination, giving the right to the interment of bodies of the deceased in the burying ground, and thus compared burial rights to a right to sit at a certain pew at a church, which is enclosed to the building of the church (Sparkes 1991, p. 134–135).

The right to recovery of mental suffering for death grief in the English Law is covered by the case of *Owens v. Liverpool Corp.* (1938), where the Court of Appeal held that mental suffering, unaccompanied with an actual physical injury, may be a sufficient ground for an action for damages (*Owens v. Liverpool Corp.*, 1938, p. 394–401). The case, in fact, raised a substantially broader issue of recovering damages for mental suffering, being one of the precedents, which upheld this theory, which originated in several transportation cases (i.e., in cases where the defendant was a transportation company, and damages to the plaintiffs occurred due to the negligence of the servants of this company in different situations), cases involving breach of contract and nervous shock. Let us observe how English courts had been resolving the issue of mental suffering before *Owens v. Liverpool Corp*. (1938), and what was the key reasoning for the decisions.

Initially, the English Law did not recognize a claim in mental suffering, as it was held in *Victorian Railway Commissioners v. Coultas* (1888). In that case, the plaintiffs were riding on a buggy, and their

road crossed a railway; the railway gate-keeper offered them to pass it, and, when they were driving over the rails, a train approached at a high speed, the plaintiffs were lucky not to be run over; one of the plaintiffs, a woman, fainted. The jury returned a verdict for plaintiffs, the Privy Council reversed the judgment, ordering the judgment for defendants, by finding that, according to the English rule of negligence, "It is that the damages must be the natural and reasonable result of the defendants' act; such a consequence as in the ordinary course of things would flow from the act," the mental anguish unaccompanied with an actual physical injury but only mental suffering, could not be considered a consequence which would arise from the negligence of a railway gate-keeper, and ruling that to hold otherwise, there would be a claim for damages based on mental anguish in any accident caused by negligence, which would consequently lead to a multitude of similar imaginary claims (*Victorian Railway Commissioners v. Coultas*, 1888, p. 222–226).

This judgment was not followed in Ireland (which was then part of the United Kingdom, until partitioning in 1922), where, in *Bell v. The Great Northern Railway of Ireland* (1890), a woman managed to recover damages from a nervous shock which originated from a great fright owing to the mode of the defendant's operating a train, where the plaintiff was a passenger, while transporting the carriages over an incline: the train was unable to run over the incline, and therefore the railway workers divided the carriages into two portions, after which, the plaintiff's carriage remained with the locomotive; the train passed the incline at a very high velocity, until it stopped with a severe jerk. The plaintiff did not sustain physical injuries, but experienced a strong nervous shock, which was supported by a medical witness testimony. The Exchequer Division (per Palles C.B.) refused to follow *Victorian Railway Commissioners v. Coultas*, due to finding that this judgment assumed that, "as a matter of law, that nervous shock is something which affects merely the mental functions, and is not in itself a peculiar physical state of the body," concluding this statement to be erroneous, and adhering to an unreported case from Ireland, *Byrne v. Great Southern and Western Railway Company* (1884), where the plaintiff managed to recover on the basis of claiming a mental shock.

According to the case report of *Bell*, the case circumstances were the following: the Superintendent of the Telegraph Office had an office at the railway stations located at the end of one of the railway sidings, between which and the office, a permanent buffer was placed, and when, once, in December 1881, some of the railway points were negligently left open, a train entered the siding, running over the buffer and breaking the wall of the office; the plaintiff conceded not to have sustained a physical injury, but rather a nervous shock; the Common Pleas Division found for the plaintiff, awarding damages, and the defendant's appeal was dismissed by the Court of Appeals. The Exchequer Division decided to follow the *Byrne* case, finding for the plaintiff. In the concurring opinion, Murphy J., it was held, that it is immaterial what the injury to the plaintiff was called (by referring to it as a nervous shock, or any other term), but it was the plaintiff's health, or the capacity of her for discharging of her respective duties and life enjoyment affected by what had happened to the carriage, and was it caused by the negligence of the defendants. With this reasoning, as Murphy J. denoted, the jury answered these questions affirmatively, and there was enough evidence to support their findings (*Byrne v. Great Southern and Western Railway Company*, 1884, unreported; *Bell v. The Great Northern Railway of Ireland*, 1890, p. 428–444).

In the 1896 case, *Pugh v. The London, Brighton and South West Railway Company*, the court discussed the issue of whether an insured railway worker could recover a policy on the basis of a nervous shock sustained by a near-accident situation occurring while he was in the defendant's employment. The plaintiff was a railway signalman, insured by the defendants, upon the policy of which he was entitled to a week's allowance if being incapacitated by all accidents originating from discharging his duties

at the railway. Once, the plaintiff, sitting in the signal box, saw a train approaching, with one of the carriages in such a condition that an accident was irreversible unless the train was stopped; he waved a red flag to attract the attention of the machinist, and the train was soon stopped without any accident. Despite the plaintiff not getting hurt by the train, and no train accident occurring, either, but the shock, sustained by the plaintiff, caused his incapacity for over a year of time, which was only initially paid by the defendants for some time, but, later, the defendants disputed their liability, and so the plaintiff filed an action to recover the sum of a year's allowance; at the trial, the jury returned a verdict for the plaintiff, by finding that he was incapacitated because of an accident sustained while on his duties, and the defendants appealed. Lord Esher, M.R., denoted that the plaintiff was in a great responsibility to prevent the accident, and acted correctly; and the result of the occasion was a substantial shock to his nerves, which brought to incapacity. In terms of whether the allowance could be recovered, Lord Esher M.R. held that the physical disease of the plaintiff was caused by fright, arising from responsibility, which suddenly arose from the responsibility in the occasion to stop the train to avert an accident; the fright which the plaintiff underwent was an accident, which happened in the course of the plaintiff's employment at the defendant company, which incapacitated him, and so the case was found to be in terms with the policy. Kay L.J. held that if the train accident had actually occurred, and thereby in some way injured the plaintiff, then it would be within the policy; in this case, the plaintiff was not physically injured, but Kay L.J. found that it was an accident as the plaintiff would have been thrown down by the train, and thus it was within the terms of the policy. Smith L.J. also held that the accident was within the terms of the policy, by denoting that the plaintiff actually did not only suffer from mental pain, but he was under such a strong shock that he was out of employment for months. So, the judgment was for the plaintiff. What concerns the 1890 decision of *Victorian Railway Commissioners v. Coultas*, Lord Esher stated that, in contrast to that case, the Pugh case was relating to a contract, not negligence, and the *Coultas* case was "different" (*Pugh v. The London, Brighton and South Coast Railway Company*, 1896, p. 248–253).

In the next case relating to the recovery of a nervous shock, *Wilkinson v. Downton* (1897), all the circumstances arose from a practical joke the defendant made on the plaintiff. The facts were simple: the plaintiff's husband went on a race-meeting, and the defendant came to the plaintiff's house and said that he had been injured in an accident when returning home with his friends, and that both of his legs were broken. In fact, all these statements were false, but the plaintiff believed his words and sent some people to take care of her husband; the plaintiff felt a severe nervous shock, and her health declined. Wright J. stated that the defendant did the act willfully, which was calculated to cause harm to the plaintiff, thereby infringing her right to personal safety, and which actually caused harm to her, and a willful *injuria* is found to be malicious by Law, albeit no motive was imputed to the defendant. Speaking of whether the defendant's acts were calculated to cause some adverse effect on the plaintiff, which was proved to be in an ordinary state of health and of sane mind. Wright J. found that it was truthful, as it was hard to imagine that such statements, made with considerable seriousness, would fail to make grave effects on anybody, except on a very indifferent person. Speaking of whether the adverse effect on the plaintiff, Wright J. held that it was not too remote in Law (so as to not constitute a wrong for which recovery at a court is possible). And, speaking of the case authorities, especially *Coultas*, Wright J. denoted that, in the *Pugh* case, it was treated as 'open to question', and it was also refused to follow by the Exchequer Division (Ireland) in the case *of Bell v. Great Northern Railway of Ireland* (1890), due to finding that the case of *Coultas* was not an authority upon which the case at stake should be decided, finding that the judgment shall be for the plaintiff (*Wilkinson v. Downton*, 1896, p. 57–61).

The next case, where the court allowed redress for mental anguish, was *Dulieu v. White & Sons* (1901). The facts were the following: the plaintiff's husband was a victualler, maintaining a public-house; in July 1900, the plaintiff, then pregnant, was nearly run over by a two-horse van of the defendants, driving to the plaintiff's husband's public-house, because of which, the child was born prematurely and was diagnosed with idiocy. The defendants contended that the damages were too remote so as to constitute a claim for negligence. Kennedy J. did not agree to this contention, and he stated that the defendant had a duty of care in driving the horse van, finding as proven that the negligent driving of the defendant's servant caused a nervous shock to the plaintiff by her apprehension of bodily hurt, and premature childbirth, along with the physical pain and suffering springing out of it, which was a direct consequence of the said shock. The shock, as outlined by the court, "where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself." Reviewing the authorities, Kennedy J. denoted that the case of *Coultas* was highly criticized both in Case Law, and in legal literature, and, after having reviewed the case, the law authorities adhered to the position expressed by the Irish courts. Phillimore J., commenting on the authorities, agreed with the position expressed in *Bell v. Great Northern Railway Company of Ireland* (1890) that a railway company has a duty not only to convey passengers "...not merely safely, but securely in the etymological sense of the word, and that when it fails, and physical damage accrues to a passenger through the fright which its failure occasions, the passenger may have an action," and, speaking of *Wilkinson v. Downton* (1897), Phillimore J. denoted that everyone has the right to personal safety, and it is tortious to encroach on it by willful statements, which are false, which cause an injury to the aggrieved party (in that case, neither the plaintiff, nor her husband were anyhow physically hurt). The judgment was for the plaintiff (*Dulieu v. White and Sons*, 1901, p. 669–686).

The last case before Owens, which also confirmed the position of recovery for mental suffering, was *Hambrook v. Stokes Bros.* (1924), adjudicated by the Court of Appeals. The plaintiff's deceased wife accompanied her three children on the way to school, soon leaving them. The defendants left a lorry with a running engine on the top of the street, where the plaintiff, was going, and probably did not put the lorry on handbrake, and the lorry, while being unattended, started moving by itself down the street, approaching the plaintiff's wife. Whereas the lorry stopped not far from where she was standing, the woman felt anxious for the safety of her children. Later, a crowd gathered, and there were rumors of the accident: as it was discovered later, the two sons were not injured, but the daughter was knocked down by the lorry and sustained considerable injuries. The plaintiff's wife, pregnant at that time, suffered from a severe mental shock, which caused a severe hemorrhage, she lost the child and soon died; the plaintiff filed an action on the basis of the Fatal Accidents Act, alleging the negligence from the side of the defendants. Bankes L.J. stated that the defendant had to anticipate that if the lorry moved down the narrow street, it could terrify somebody who could sustain a nervous shock and thus suffer an injury to health, and it was immaterial of whether the shock was to this person, or to the child of this person, thereby finding that the plaintiff could recover damages by proving the factual circumstances of the case – that is, that the demise of his wife was caused by shock, etc. Atkin L.J. held that the theory of damages, as perceived by Law, being not recoverable in case of personal injuries unless a physical injury occurred was already obsolete, with *Coultas* as its final representation, which was repeatedly criticized in different court decisions. He outlined that the duty of a motor car owner is not to injury any of the wayfarers, and the breach of this duty occurs not only when the motor vehicle strikes and injures someone; the lorry was left unattended (this act of negligence was conceded by the defendant) in such a condition that it could run down, and so, there was a breach of duty to the plaintiff's wife. The cause of action, he denoted, lay in the defendant's breach of duty to express reasonable care to avoid

inflicting personal injuries (which could occur due to accidents – A.L.), and this duty shall be extended to avoid personal injuries to the child under such circumstances, as to cause damage to the forbearer or guardian, and speaking of the duty of care owed by an automobile driver. Atkin L.J. held that, "… for the degree of care to be exercised by the owner of the vehicle would still in practice be measured by the standard of care necessary to avoid the ordinary form of personal injuries." Meanwhile, Sargant L.J. stated that the of duty, owed by the defendant, the neglect of which caused damage, could not be limited to a physical impact done to the plaintiff, but shall include an immediate threat of impact to the person, which may produce a physical injury, though made through the nervous system, and when there is such a threat of imminent danger to the plaintiff, then it should be regarded as an interference into the plaintiff's personality as if the ailment was caused by actual physical injuries. But this was correct as concerning to the plaintiff, not to third persons, and, in this case, the apprehension of injury related to the children of the plaintiff's deceased wife, finding that damages could not be recovered if the apprehension of injury is to a third person, regardless of whether it was a relative or not. However, the majority of the court ruled to allow the appeal (*Hambrook v. Stokes Bros*., 1924, p. 141–165).

So, hereby we are approaching to the case of *Owens v. Liverpool Corp.* (1938), prior to which a substantial body of Case Law had formed, allowing recovery of damages for mental suffering, both in England and in the United States. This case was a 'cemetery' one, where the facts were the following: a funeral procession was being held along Scotland Road in Liverpool. There were two vehicles participating in it: a hearse, that is, a catafalque, carrying the coffin with the body of a deceased man, a relative of the plaintiffs, and a carriage that was following the catafalque, where the plaintiffs were sitting – the mother, the uncle, the cousin and the cousin's husband. A tramcar approached the procession and was being so negligently driven by the driver that it hit the hearse, breaking its glass side and overturning the coffin, so that it ended up falling onto the road. Only the uncle of the deceased saw the collision of the tramcar with the hearse, while the other relatives witnessed the effects after the collision had taken place. The plaintiffs did not incur any injuries, and it was not mentioned that the corpse, or the coffin, would be damaged. The plaintiffs sued the defendant for negligence, claiming that they had suffered a severe shock of what had happened.

The trial court found that the damage done to the hearse was caused by negligent driving on behalf of the tramcar, and each of the plaintiffs suffered an injury from the shock from their sight of damage occurring from the collision of the tramcar and the hearse, but dismissed the action, by finding that, in order for the plaintiff to recover, there had to be an apprehension of injury to a human being, or at least witnessing such injury. The plaintiffs appealed against this judgment: counsel for the plaintiffs contended that a nervous shock must be regarded as a physical injury, citing the case of *Pugh* (see comment on it *supra*), and the case of *Hambrook*, where the court held that despite the earlier Common Law verdicts, damages could not be proven unless a physical injury occurred, which was incorrect to hold so upon the recent Case Law developments, as well as the cases of *Wilkinson* and *Dulieu* to the same point. Counsel for the defendants reasoned that there was no apprehension of injury to a human being, and that only one of the plaintiffs saw the accident, and questioned the breach of duty the defendant owed to the plaintiffs, and even if it had existed at all.

The court (per Mackinnon L.J), having reviewed the earlier authorities, concluded that the *Coultas* case was much discredited, and the *Dulieu* (1901) and *Hambrook* (1925) cases dealt with a nervous shock from apprehension either to the plaintiffs themselves or to the person in whose safety the plaintiff was being concerned (i.e., the concern of the mother in the safety of her children). In both *Dulieu* and *Hambrook* cases, as the reader may remember, the concern was in living people, and herein it was regarding a coffin with a corpse, contained in a hearse, which was hit by a tramcar. So, the court asks:

must the apprehension of injury to a human being be involved in any case in a lawsuit for damages for a nervous shock? And could it not be something else, for instance, a beloved dog[2]? The court concluded that the right to recover damages originating from a nervous shock that was caused by the defendant's negligence should not be limited to the situation when there is an apprehension of injury to a human being. "The principle, – says the court – must be that mental or nervous shock, if in fact caused by the defendant's negligent act, is just as really damage to the sufferer as a broken limb – less obvious to the layman, but nowadays equally ascertainable by the physician." The court declared that the shock was not caused by fear for the life of a human being, but rather by the danger to the coffin containing the body of the plaintiff's deceased relative, and held that the plaintiffs supposedly belong to those, highly susceptible to the luxury of grief to be completely upset by any unfortunate event occurring during the funeral. And so, said the court, everyone who is guilty of negligence towards the aggrieved party, has to accept, as it is, the peculiarities of the said party that increase the possibility or the level of damages sustained, giving an example that in a claim for breaking the skull, the offender cannot answer that the skull was an unusually fragile one.

So, the court decided that the plaintiffs suffered from a nervous shock because of the negligence caused by the defendants' servant, and the plaintiffs were entitled to recover damages, and thus the appeal has to be allowed (*Owens v. Liverpool Corp.*, 1938, p. 394–401). What is notable, the case did not involve a discussion relating to the quasi-property rights of the plaintiffs over the decedent's body, or for the damages, e.g., to the coffin after the collision of the catafalque with the tramcar operated by the defendant's servant.

The case of *Owens v. Liverpool Corp.* (1938) was not the only '*death grief*' case which involved the issue of recovering damages invoking death grief. In 1952, the Nottingham County Court heard the case of *Loach & Son Ltd. v. Kennedy*, where the plaintiffs, undertakers, arranged the funeral for the defendant's deceased wife, and they were instructed to transport the corpse from the mortuary to the cemetery, but, instead, they removed the body from the mortuary (it was Saturday) and left it in a machine shop until Monday, when the funeral was scheduled. The defendant learned of this fact only after the funeral, and blamed the plaintiffs for a breach of contract. The court held that the plaintiffs apparently mishandled the body, and encroached upon the defendant's rights, causing anxiety and distress to the family of the defendant. The court found, that the acts of the plaintiffs constituted a breach of contract, and so the defendant was entitled to damages; leaving the body of the defendant's deceased wife at a machine shop was found to be a breach of contract. It was not discussed whether there was any damage to the corpse, which was placed at the plaintiff's machine shop for two days (*Loach & Son Ltd. v. Kennedy*, 1952, p. 76).

In a more recent case, *Taylor v. Somerset Health Authority* (1993), the plaintiff's husband suffered from a heart attack at work, was hospitalized in the defendant's hospital, where he was pronounced dead shortly thereafter; the plaintiff was informed so by the doctor, causing her a nervous shock; then she went to the hospital mortuary, where she beheld the body of her husband (where she went, firstly, as she was requested to do so, and secondly, as she did not believe her husband had died indeed), which caused her even more of a nervous shock, as a result of which she suffered from a psychiatric illness. The reason of the plaintiff's spouse's death is that the hospital failed to diagnose and treat a severe heart condition; the hospital authority admitted its negligence and consented to the judgment against

[2] In the Canadian case of *Newell v. Canadian Pacific Airlines, Ltd*, 14 O.R. (2d) 752, 21.10.1976 (Ontario County Court, District of Peel), the plaintiff managed to recover damages for mental suffering because of a negligent transportation of his two pet dogs during a flight, in the course of which both dogs unfortunately died (*Newell v. Canadian Pacific Airlines, Ltd.*, 1976, p. 752)

it in terms of malpractice. The plaintiff also claimed damages for a nervous shock, which, however, were not awarded by the court. In order to recover damages in such a case, the court held that, for a 'psychiatric injury', it is when the accident and the injury or death occurred within the plaintiff's 'sight or hearing', that is, the plaintiff should have witnessed or at least heard the accident (notably, in the case of *Owens v. Liverpool Corp.* (1938), only one of the deceased man's relatives witnessed the accident with the tramcar by sight).

There were two exceptions to this doctrine, namely, if 1) the event where an injury or death took place was owing to the defendant's breach of duty, which immediately caused it; 2) the way how the plaintiff perceived such an event, as a) by physical presence at the scene of the accident; b) by exposure to it; c) or to the victim of the accident as soon that the shock, caused by events and its consequences are brought to the plaintiff. In this case, the court held that the only event was the final consequence of the plaintiff's deceased husband's heart disease, which was failed to be diagnosed by the defendant; the heart failure of the plaintiff's husband and his subsequent death, informing the plaintiff of what had happened, etc., did not, upon the view of the court, constitute such an event as to be recoverable. The other concept of *immediate aftermath*, when the plaintiff does not hear or see the accident, but comes to the scene of it upon its immediate aftermath, did not apply in such a case, as the court found that the communication of the physician to the plaintiff concerning her husband's death did not come within the concept, and so did the plaintiff's visit to the mortuary, where the sight of the body of the deceased did not remind her of the circumstances of the heart attack. So, these features did not fall under the categories of events that would entitle her to recover (*Taylor v. Somerset Health Authority*, 1993, p. 262–269).

To sum up the discussion on the cases relating to mental suffering and the role of the case of *Owens v. Liverpool Corp.* (1938), the author has to denote that, firstly, the law which relates to funerals in England lies in both fields of Civil Law and Ecclesiastical Law, which do not contradict each other, but are harmonized with a firm body of Case Law, and, occasionally, statutes. Even though the earlier English Common Law did not recognize an action for damages for a mental anguish, the maxim changed with the cases of *Pugh*, *Wilkinson* and *Dulieu*, as well as the case of *Bell* in Ireland, which was frequently cited in English cases. Although the case of *Hambrook* (1925) set out a rule that nervous shock may be recovered only if there was an apprehension of injury to a human being, this rule was extended to the body of a deceased relative in *Owens v. Liverpool Corp.* (1938), in which, the sentiments of the mourners were taken into account. The case of *Owens* was cited in a notable Canadian 'cemetery case' of *Mason v. Westside Cemeteries Ltd.* (1996), which we shall discuss below, as well as in an Australian 'death grief' case of *Chester v. The Council of the Municipality of Waverley* (1939), where the plaintiff unsuccessfully litigated with the defendant, after having sustained a severe nervous shock, when the body of her drowned 7-year-old son was recovered from a deep trench, dug by the defendant (*Chester v. The Council of the Municipality of Waverley*, 1939, p. 1–48).

2. United States of America Law

The discussion of recovery from mental distress because of an injury to feelings relating to death grief is relatively rare in legal literature, as once denoted by L. Green (1934–1935) in his notable treatise *Relational Interests* (Green 1934–1935, p. 485). One of such prominent discussions could be found in the work of an anonymous author in the *Duke Law Journal* (1960). As it is held in the said article, damages to personal or domestic security, libel, promise to marry are known to be the situations when redress for mental suffering is possible; and, since the late 19th century, redress for a maltreatment of

a dead body was known in the American Common Law (Anonymous, 1960, p. 135–136). However, not in all cases are cadavers maltreated in an ordinary sense of the term. It may be mere negligence in conducting the funeral service without any actual damage to the corpse itself, but it still may be actionable (*Spiegel v. Evergreen Cemetery Co*., 1936, p. 586–590/90–97).

In the judgment of the Supreme Court of New Mexico, *Infield v. Cope* (1954)[3], the court provided an explanation, according to which, the quasi-property right to a possession over a cadaver should be understood fourfold, deriving the following rights: 1) the right to custody of the cadaver; 2) the right to have it in the condition, in which the death came, without mutilation; 3) the right to have it treated with appropriate respect; 4) the right to bury the body without interference (*Infield v. Cope*, 1954, p. 719/312). A comment from 1933, by H.R. Bigelow, relating to a *quasi-property right* to a body of a deceased person, held that the use of the term '*quasi-property right*' in this respect is a legal 'hook' which covers the actual foundation for the action for damages, which is based upon mental anguish (it should be outlined that, in the early decades of the 20th century, it was a far call from all courts recognizing mental anguish as a basis of redress), and, hence, the comment proceeds, at [its] present time, the courts granted recovery for mental anguish on two grounds: 1) in case mental anguish is the proximate result of the breach (i.e., that of a contract or negligence), and 2) when there is no action for the violation of personal or property rights, but the acts by the defendant were wanton and willful (Bigelow 1933, p. 110).

At the same time, there may be situations which do not ultimately fit these conditions, or are different in their gist, for instance, an incorrect arrangement of a funeral. In a case adjudicated by the Supreme Court of New Jersey, *Spiegel v. Evergreen Cemetery Co*. (1936), the court firmly recognized that the right to be present at the funeral is a Common-Law right arising from domestic relations (*Spiegel v. Evergreen Cemetery Co*., 1936, p. 586–590/90–97).

A number of notable cases involved actions against mortuary enterprises for delivering the corpse in a considerably decomposed state (*Hall v. Jackson*, 1913, p. 225–238 / 151–156) because of revealing the name of the decedent within the transportation of the body in an advertisement (*Fitzsimmons v. Olinger Mortuary Ass'n*, 1932, p. 544–552/535–538), a failure to make the decedent's photograph before the funeral (*Plummer v. Hollis*, 1937, p. 43–44/140–141), or to put the previously prepared jewels onto the hand of the plaintiff's deceased wife while preparing for the burial (*Grill v. Abele Funeral Home*, 1940, p. 788–789/51–53), lawsuits on careless embalming of the corpse (*Hall v. Jackson*, 1913, p. 225–238/151–156; *Dunahoo v. Bess*, 1941, p. 182–186/541–543; *Lott v. State of New York*, 1962, p. 296–299/434–437; *Naughle v. Feenie-Hornak Shadeland Mortuary, Inc*., 1986, p. 1298–1301), taking the flowers from the grave of the plaintiff's deceased mother (*Turner v. Joiner*, 1948, p. 603–

[3] *Infield v. Cope,* 58 N.M. 308, P. 2d 716, 12.05.1954 (Supreme Court of New Mexico). In this case, the plaintiff's husband died of asphyxiation in a fire, when the plaintiff was out of New Mexico. An unspecified person had organized the funeral with a defendant mortician, and was later shipped to Denver, Colorado. The defendant refused the widow to review the remains, by claiming that the body had been burned beyond recognition. The court found that the quasi-property right to possession of a cadaver was not violated: the plaintiff was not deprived over the custody of the said cadaver, she received it in the condition it was left by death (no allegations or evidence was presented that the body was anyhow mutilated), and no outrage or indignified conduct was found in the defendant's acts. The court also paid attention to the aspect of the defendant's refusal to allow the widow to view the remains. Since the defendant claimed that the cadaver was heavily burned, then, the motive for saying so arose, upon the view of the court, from the solicitude of the plaintiff's feelings. There was no contract between the plaintiff and the defendant, and the way the demand was expressed, it meant to deliver the body to the plaintiff, and this wish was complied with. So, the court concluded that, although the plaintiff initially had no right to view the body, or proceed to have a public view on it, yet, she was ultimately granted the right, the action failed, and the judgment of the trial court was affirmed.

620/909–918), and an incorrect installation of a headstone on the cemetery (*Dunker v. Babitt Funeral Home, Inc*., 1996, p. 1–3), or the refusal of the undertaker to permit the widow to view the body of her deceased husband who died in a fire (*Infield v. Cope*, 1954, p. 308–314/716–720); losing the bodies of the deceased during the conduction of an exhumation (*Whitehair v. Highland Memory Gardens, Inc*., 1985, p. 439–444/459–464); sending the cremated remains of the plaintiff's son without an urn in a plastic sack (*Corrigal v. Ball & Dodd Funeral Home*, 1978, p. 960–963/580–582)[4]; actions for an allegedly negligent burial, which required a reburial (*Frys v. City of Cleveland*, 1995, p. 281–288, 929–930); damaging the grave of the plaintiff's ancestors while digging another grave and accidentally exhuming the remains, which was later shown on a television broadcast (*Carney v. Knollwood Cemetery Assn*, 1986, p. 31–41, 430–439); ill and negligent preparation to the funeral, though without any actual damage to the corpse (*Lunsford v. Cravens Funeral Home, Inc*., 2015, p. 1–4).

The cemetery could mitigate the damages for an accidental burial of a deceased person in an incorrect burial plot, in case this mistake was corrected by a proper re-interment (*Louisville Cemetery Association v. Downs*, 1931, p. 774–779/5–7). The most recent American jurisprudence firmly recognizes a right of action by the next of kin for an unlawful interference to a body of a decedent, as it was in the case of *Fox v. City of Bellingham* (2021), where the plaintiff managed to recover damages upon the fact that medical tubes were inserted into his deceased brother's body before the funeral as a part of exercises of a fire department (*Fox v. City of Bellingham*, 2021, p. 379–396/897–906). The quasi-property right to control over the deceased body also spreads on cases where some maltreatment or negligence occurs after the burial of the deceased (*Sanford v. Ware*, 1950, p. 43–52/10–14; *Payne v. Alabama Cemetery Ass'n, Inc.*, 1982, p. 1067–1073). In the earlier cases, civil actions for the disinterment of graves lay in the foundation of trespass (*quare clausum fregit*), which could be traced from the late 19th century (*Thirkfield v. Mountain View Cemetery Association*, 1895, p. 75–83/564–566; *Jacobus v. Congregation of the Children of Israel*, 1899, p. 518–524/853–856), and even earlier cases could be found in the American historical jurisprudence where the plaintiffs litigated against religious communities who decided to dissolve cemeteries and move the bodies to another cemetery (*Windt et al v. The German Reformed Church*, 1847, p. 471–476). These judgments seem to be of unique nature, having no, or barely no legal analogues in the English Law, where the Law of Burials and issues relating to decedents were governed by Ecclesiastical Law and ecclesiastical courts (Kuzenski 1924, p. 18–19), which was also outlined by judges in several American cases (*Matter of Johnson*, 1938, p. 218–219/81–89; *Infield v. Cope*, 1954, p. 311–313/718–719; *Whitehair v. Highland Memory Gardens, Inc*., 1985, p. 440–441/460–461); but there were (and still are) no ecclesiastical courts in the United States of America, and so neither the cadavers, nor their respective burial, were under the cognizance of ecclesiastical authorities, and the legal rights which spring out of the care to the deceased ones and their burial are protected by the courts (*Pierce v. Proprietors of Swan Point Cemetery*, 1872, p. 234).

[4] *Corrigal v. Ball and Dodd Funeral Home, Inc.*, 89 Wn. 2d 959, 577 P. 2d 580, 20.04.1978, No. 44918 (Supreme Court of Washington, *en banc*). In this case, the plaintiff's son drowned, and the plaintiff arranged cremation with the defendant's funeral home, which was done, later selecting and paying for the urn where the remains were supposed to be located. However, the defendant sent a cardboard box with a plastic package, where the remains were found by the plaintiff. So, the plaintiff filed an action for outrage, negligence and breach of contract. For the outrage concerning death grief, see the following judgments: *Johnson v. Women's Hospital*, 527 S.W. 2d 133, 12.02.1975 (Court of Appeals of Tennessee, Western Section); *Burgess v. Perdue*, 239 Kan. 473, 721 P. 2d 239, 13.06.1986, No. 58522 (Supreme Court of Kansas) (*Johnson v. Women's Hospital*, 1975, p. 133–144; *Burgess v. Perdue*, 1986, p. 463–482). The court concluded that the actions of the defendant (and, moreover, the defendant did not impugn that he had failed to deliver the urn) constituted a negligent infliction of mental distress, reversing and remanding the judgment of the trial court (*Corrigal v. Ball and Dodd Funeral Home, Inc.*, 1978, p. 959–963, 580–581).

Let us discuss several cases upon the given topic in detail.

In *Spiegel v. Evergreen Cemetery Co*. (1936), the plaintiffs arrived to the cemetery to the funeral of their deceased father and discovered that the grave had been dug in the wrong plot, and the cemetery superintendent promised to dig one more at the right place and conduct the funeral that day later, but, when the family returned to the cemetery later that day, they found that the burial had already taken place without their presence. After three months (initially, the casket was not opened due to the lack of permission), the casket was opened, the decedent was identified, and the re-interment took place at once. The plaintiffs instituted an action in tort, claimed the breaches of duties: 1) to inhume the deceased father in a proper manner; 2) to proceed with the burial with the presence of plaintiffs. The jury returned a verdict for the plaintiffs; the Supreme Court dismissed the defendants' appeal, by affirming the trial court judgment. The court found that there occurred an infringement of the right of the plaintiffs, since, in Common Law, there is a right to be present at the funeral, which springs out of domestic relations, the court calls it a civil right, which has an adequate legal protection, which includes the right to know the departed relatives' final resting place, holding that the right to bury the deceased and preserve the remains is a quasi-property right, the infringement of such a right may result in a lawsuit for damages. Speaking of whether mental anguish is compensable, the court stated that, as a general rule, damages for mental suffering not accompanied with a physical injury cannot be recovered, but, in Common Law, in cases of a willful wrong, when mental anguish would be the proximate consequence, with regard especially to personal rights, "…especially those affecting the liberty, character, reputation, personal security, or domestic relations of the injured party," it is considered that there are exceptions from this rule. The judgment of the trial court was affirmed (*Spiegel v. Evergreen Cemetery Co*., 1936, p. 586–590/90–97).

In *Sanford v. Ware* (1950), the Supreme Court of Appeals of Virginia discussed the issue of whether the plaintiff could recover damages based upon mental anguish due to the undertaker's negligent reburial of the remains of her husband, which was requested by the plaintiff herself. In 1947, the plaintiff's (defendant on appeal) husband died, and his body was interred at a cemetery in Westmoreland County. Next year, the plaintiff decided to re-inter the remains of her deceased husband at a different cemetery in the same county, and applied to the defendant (designated as the plaintiff on appeal), and an undertaker who agreed to move the remains, i.e., the casket as well as the tombstone, who later informed the plaintiff in the course of his work that the case where the casket was placed was in poor condition and a new one was required, for which the plaintiff paid; later, the plaintiff's daughter visited the cemetery, where she found the defendant who told her that all the work had been properly done, and the plaintiff paid for it. Later, rumors reached the plaintiff that the remains of her deceased husband had not been removed, and she applied to another undertaker to investigate the issue; the examination of the new grave revealed that the body had been interred badly, without a shroud or a casket, just a few inches below the surface of the ground. At trial, the defendant conceded that the work had been done frugally, for which he blamed his workers, by claiming that he intended to return and inter the body properly, but never did so, and later went to hospital for an operation due to some chronic disease. The trial judge instructed the jury that mental and emotional suffering was a proper element when assessing the damages. On appeal, the court held that, although there is no property in a dead body in a commercial sense (i.e., *res extra commercium*), the right to the burial and preservation is recognized and protected by the courts as a quasi-property right, upon a violation of which an *ex delicto* action may be instituted. The court admitted that the courts in various jurisdictions had varied views in terms of recovery for mental anguish: the existing Virginia cases relating to determining of whether mental anguish could be recoverable, though not upon the topic of burials, cemeteries, etc., ruled that mental anguish could not be recoverable alone, or that it could be limited to conditions where the defendant

acted willfully, wantonly, or in severe negligence. The court estimated that the defendant's acts were grossly negligent, bordering willful misconduct – he apparently knew that his workers had badly interred the body and had done nothing to rectify this situation, while concealing this fact and accepting money for work from the plaintiff. Mental suffering, as it was held by the court, was natural, and it was a probable consequence of the defendant's negligence; and the defendant, according to his calling and experience, would have known that the plaintiff would naturally suffer mental anguish had she learned that the body had been indecently buried. Thus, the court found that the jury was correctly instructed both in terms of pecuniary loss and mental anguish, thereby affirming the judgment below (*Sanford v. Ware*, 1950, p. 43–51/10–14).

In *Allen v. Jones* (1980), the plaintiff made an oral contract with a mortuary to cremate the remains of his deceased brother, and to deliver the cremated remains to Illinois. However, as a result of the defendant's negligence, the remains had been lost in transit, and the package arrived thereby empty. The plaintiff sued for negligent performance of a contract, intentional infliction of mental distress, and deceit. The trial court dismissed the action, but the California Court of Appeal found for the plaintiff, reversing the case. The court held that a contract where the mortician prepares a cadaver for burial is of such nature that its breach would cause mental anguish, citing *Fitzsimmons v. Olinger Mortuary Ass'n* (1932)[5], adjudicated by the Supreme Court of Colorado, and *Lamm v. Shingleton* (1949)[6], adjudicated by the Supreme Court of North Carolina. Here, the court also reckoned up an earlier California case, *Chelini v. Nieri* (1948), which had quite similar case circumstances, but with a different outcome of the plaintiff's suffering, which turned out to be a physical illness which proceeded to a disability (*Chelini v. Nieri*, 1948, p. 481–483), and the court said, that, to date (i.e., before 1980), the cases where damages for mental distress were granted, distress had caused a physical illness, whereas, in the case at stake, there was no such circumstance, but the court concluded that damages for mental distress without an actual physical injury are recoverable for a mishandling of a corpse, by stating that: "...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," adding that mental distress is highly predictable as a result of such negligent conduct, and is by far the only form of damages, which occur, and so, in such a case, the recovery of the plaintiff on the basis of a mental distress is a proper means in which the bereaved victim may have redress for the wrongs it sustained. Hence, the court reversed the judgment of the trial court sustaining the demurrer to the first cause of action (*Allen v. Jones*, 1980, p. 209–216).

Another case which the author would like to present in the article represents the situation when the original burial did not reveal any negligence from a funeral home, but it was discovered years later. So, we may wonder whether the surviving next of kin could recover damages upon such a case. In *Payne v. Alabama Cemetery Ass'n, Inc.* (1982), adjudicated by the Supreme Court of Alabama, the court held that the recovery in such a case is possible. The appellant's mother died, and was buried at Remount Park Cemetery, in 1953; in 1975, the appellant's grandmother died, and, according to appellant and her great-aunt, the grandmother wished to be interred with the appellant's mother, which would require digging up the coffin of the appellant's mother and deepening the already existing grave to hold two vaults. The funeral work was done without a single incident. However, as the time went on, in 1979, the appellant's grandmother's brother visited the grave, and it was sinking; it was quickly arranged to open the grave to determine the cause of sinking. Upon opening the grave, it was discovered that the appellant's mother's grave and vault were missing; one of the funeral association workers simply told he did not know where

[5] *Fitzsimmons v. Olinger Mortuary Ass'n*, 91 Colo. 544, 17 P. 2d 535, 28.11.1932 (Supreme Court of Colorado). The facts and judgment shall be described in the main body of the text.

[6] *Lamm v. Shingleton*, 231 N.C. 10; 55 S.E. 2d 810, 01.11.1949 (Supreme Court of North Carolina).

the casket and the remains were. A lawsuit, alleging trespass and negligent or intentional destruction of the remains of the appellant's mother, followed. The circuit court entered a summary judgment for the defendants, but the decision was reversed by the Supreme Court. The court held that the plaintiff's action is based upon the rights, which are vested in the next of kin, whose gist is an unwarranted interference with a buried cadaver, and the court ruled that such an action may be granted both in trespass and in tort, and the plaintiff, as the nearest next of kin, could maintain it. The appellees claimed that, according to a one-year statute of limitations, the action that was instituted in 1980, was already time-barred, since the casket disappeared in 1975 (besides, it remained unknown under which circumstances the casket had been lost, and where it was located at the time of the action); the appellant, instead, contended that the statute of limitations should not have run until May 1979, when the loss of the casket was discovered. Upon analyzing the state jurisprudence on the statute of limitations, the court held that the statute of limitations for the liable party starts running when the foundation of the action appears, and the foundation of the said action appears as soon as the party in favor of which it arose is entitled to maintain it, and the plaintiff's ignorance does not postpone the running of the statute. In the cases, as the one at stake, the court held, that the complained act does not cause damage at once, but the damage occurs as a result of, and due to the subsequent development of, the acts of the defendant; so, in such cases, the statute of limitations starts running *at the time when the damages were sustained*. This is the way it was in the present situation: it was discovered that the grave was sinking in May 1979; when it was opened, it was discovered that one casket had been gone, and this was the moment when the injuries took place, since, before that, the appellant had nothing to complain for. So, the court ruled to reverse the judgment of the circuit court and remand the case (*Payne v. Alabama Cemetery Ass'n, Inc.*, 1982, p. 1067–1073).

In *Sackett v. St. Mary's Church Soc*. (1984), the plaintiffs attended the funeral of their deceased father. After the committal service, the casket was not lowered to the grave, as the family wished a burial at a family plot, for which the cemetery workers dug another grave hole. However, when the casket was being put on the lowering device and the process of lowering started, the straps were released, and the casket unfortunately fell into the grave hole, and ended up getting damaged. The family sought exhumation, which later revealed that the casket had got damaged, and the remains were disarranged; the casket was later changed and reinterred by the costs of the funeral home. The plaintiffs sued on the basis of tort and of contract, but the defendants sought a summary judgment on the same grounds, having obtained it, since the Law of Massachusetts has a rule that mental suffering is not recoverable in actions on breach of contract, and that mental suffering is not a basis for the recovery unless it is a result or cause of physical harm. The plaintiffs argued that mortuary contracts had peace in mind as the 'heart' of the contract, and the damages to it will be to the senses of the remaining next-of-kin of the deceased, by citing a number of cases with case circumstances where mishandling of corpses had taken place. The court declared that the defendants' acts in the cited cases were more intentional than negligent. Therefore, whereas the defendant's duty originates in contract, mental distress damages would be rather recoverable in tort, while adding that it would not mean that the negligent acts of the defendants in conducting funeral could not be a basis of an action *ex contractu* where the remains were re-interred in a decent manner. Yet, we may wonder whether there was any negligence from the side of the defendants. Evidence showed that the cemetery workers were doing their duties in a hurry, but nothing suggested that it was related to the breach of the lowering devices' gears, which had operated in a good condition the day before. The court outlined that the defendants themselves exhumed the casket and re-interred it by their own costs, thus rectifying the error of judgment, which became the foundation of the action at stake. So, the judgment of the trial court was affirmed (*Sackett v. St. Mary's Church Soc*., 1984, p. 186–190/956–959).

In a very similar case of *Kimelman v. City of Colorado Springs* (1988), the plaintiffs agreed with a funeral home to inter the casket with the body of their deceased son, but the lowering device failed, and the casket flew down into the grave hole. The trial court upheld a summary judgment for the defendants, by finding that the plaintiffs were not in the zone of danger, and the negligence of the defendants in conducting the funeral was not associated with willful, wanton, or insulting conduct, which was a Case-Law rule formed in the Colorado jurisprudence, to which the court of appeals adhered as well. The courts of Colorado earlier rejected granting damages for mental suffering in absence of willful and wanton conduct from the side of the defendant. Speaking of the case of *Hall v. Jackson*[7], no recovery was allowed on the basis of non-existence of wantonness, and, speaking of the cases of *Fitzsimmons*, the court clearly distinguished the present case and the cited one, since the use of the deceased person's name and a photograph, which was clearly made for commercial (i.e., advertising) purposes, was found to be wanton by the court, which bore no similarity with the given case. Hence, the judgment of the trial court was affirmed (*Kimelman v. City of Colorado Springs*, 1988, p. 51–53).

In *Whitehair v. Highland Memory Gardens, Inc*. (1985), adjudicated by the Supreme Court of Appeals of West Virginia, the defendant contracted with the West Virginia Department of Highways so as to provide for the relocation of the bodies, which were buried at Buckhannon Old Baptist Cemetery. The plaintiff claimed that, during the said works, the defendant lost or misplaced the remains of her sister, as well as two aunts, and failed to remove the remains of her cousin, while refusing to remove the remains of her uncle and father, and did not notify the plaintiff that they were going to conduct the disinterments. The plaintiff brought an action for damages for mishandling the bodies, but the trial court dismissed it; the Supreme Court of Appeals reversed and remanded the case. The court stated a question of whether the plaintiff could recover damages for mental anguish because of mishandling the remains of her relatives in case the removal of such was in itself legitimate. The court, speaking regarding the Law on cadavers, underlined that there are no ecclesiastical courts in the United States which used to control this issue in England long ago, and the American Law recognizes a quasi-property right to control over the remains of their deceased relatives, which includes to right of custody, receiving it in the condition it was at the moment of death, treatment with decent respect, and the right to bury the said body without interferences (quoting *Infield v. Hope*[8]); in this context, losing remains is perceived as an interference, due to which, the said remains could not be properly interred, which also gives a right to an action for recovering the damages, and the surviving spouse or next of kin may maintain some rights over the control of the body even after the burial. So, the court held that the fact that the disinterment was conducted legitimately did not mean that there may be no action for damages so as to the way it was actually performed, while denoting that, when it is possible, the mortuary shall notify the surviving relatives that the disinterment and further re-interment would take place in the near future, so that the surviving relatives may be sure that the remains would be moved while being accompanied with the proper religious ceremonies and without any indignity; hence, the court held that the failure to inform the plaintiff of the future disinterment was actionable, as was the losing of the bodies, or their parts after the disinterment, and, respectively, precluding re-interment. Speaking of damages for mental anguish, the court denoted that a cause of action for mishandling a cadaver does not require an accompanying physical injury or a pecuniary loss, and the mental anguish already is a proper foundation for recovery. Thus, the court ruled to reverse and remand the judgment (*Whitehair v. Highland Memory Gardens, Inc*., 1985, p. 458–464, 438–444).

[7] *Hall v. Jackson*, 24 Colo. App. 225, 134 P. 151, 10.06.1913 (Colorado Court of Appeals).

[8] See note 3 *supra*.

In two 1990s cases from Ohio, *Frys v. City of Cleveland* (1995) and *Dunker v. Babitt Funeral Home, Inc.* (1996), the courts handed down the judgment for the defendants: in the first case, the woman, whose deceased mother had been initially buried in a temporary grave did not prove that the defendant was negligent in doing so, and, even though the tort of negligent infliction of emotional distress was recognized in Ohio, it was not proven by the plaintiff to be serious and reasonably foreseeable[9], whereas, in the second case, the plaintiff unsuccessfully litigated with a funeral home for an erroneous placing of a tombstone over his father's grave, but the court found that no mishandling of the corpse had occurred (and it was not claimed, either), nor was any negligence observed in performing the funeral[10]. Notably, the rule that a cause of action for negligent infliction of emotional distress may be stated without a contemporaneous injury in the State of Ohio was expressed in the Supreme Court's judgment in 1983 (*Schultz v. Barberton Glass Company*, 1983, p. 131–140/109–116).

Let us contend that there is a class of cases where there is not only mental suffering relating to death grief, like it has been in a multitude of cases, where plaintiffs litigated with funeral homes, but where this mental suffering is accompanied with audio-visual effects that relate to the deceased, and that may cause mental anguish to the surviving relatives. Widely-known privacy cases, *Douglas v. Stokes* (1912) and *Bazemore v. Savannah Hospital* (1930) featured situations where the photographs of deceased infants were published without the consent of the forbearers – in the first case, it was a body of Siamese twins, whereas, in the second case, this was a body of an infant born with a rare pathological condition, in which the heart was placed outside of the body; in both cases, the plaintiffs prevailed in action (*Douglas v. Stokes*, 1912, p. 506–509 / 849–850; *Bazemore v. Savannah Hospital*, p. 194–199/257–266). R. Kennedy (1965) called such cases as representatives of a 'relational' right to privacy, where the plaintiffs could recover the damages for a violation of the right to privacy committed not to them directly, but their deceased relatives (Kennedy 1965, p. 324–328). Such a right, however, was not omnipresently recognized. For instance, in *Young v. That Was The Week That Was* (1969), featuring a class action of the relatives of a deceased woman who was mentioned in a telecast in 1965, the court, however, concluded that the right to privacy is a personal right, and that it may be recoverable only by the person whose right was invaded, and none of the plaintiffs were publicized in the program or identified therein, and thus the action was dismissed (*Young v. That Was The Week That Was*, 1969, p. 1337–1343).

In another case, *James v. Screen Gems, Inc.* (1959), the plaintiff filed an action for portraying her deceased husband, the son of an infamous outlaw: again, the court found that no right to privacy was invaded, and the plaintiff was not portrayed in the film, the plot of which was entirely fictitious (*James v. Screen Gems, Inc*., p. 650–654). In an earlier case, *Smith v. Doss* (1948), the plaintiffs sued the owner of a local radio broadcast for a program where the life of their deceased father was portrayed who was known to having feigned his death and having lived for over two decades unbeknownst to the plaintiffs; in this case, the court ruled in favor of the public interest, by finding that the story of their deceased father became a part of the community (*Smith v. Doss*, 1948, p. 250–254/118–121).

If we transpose the issue of the right to privacy in a deceased relative onto the issue of mental suffering for death grief, we may find some cases on the record which correspond to our aim. The first one is *Fitzsimmons v. Olinger Mortuary Ass'n.* (1932), adjudicated by the Supreme Court of Colorado. The plaintiff contracted with the defendant, a funeral home, to bring the body of her deceased husband

[9] *Frys v. City of Cleveland*, 107 Ohio App. 3d 281, 668 N.E. 2d 929, 06.11.1995 (Court of Appeals of Ohio, Eighth District, Cuyahoga County).

[10] (1) *Dunker v. Babitt Funeral Home*, 1996 WL 199827, 25.04.1996, No. 69727 (Court of Appeals of Ohio, Eighth District, Cuyahoga County).

(2) *McCraken v. Ziehm*, 3 Ohio Abs. 573 1925 WL 3055 (Ohio App. 8 dist.), 20.04.1925, No. 5622 (Court of Appeals of Ohio, Eighth District, Cuyahoga County).

from the city of Walden to Denver, where it was expected that the defendant would prepare the body for a burial. Due to heavy snowfalls, it was necessary to charter an airplane. When it was done, the plaintiff claimed to the defendant that she would not tolerate any unnecessary publicity that could have sprung out of the unusual method of transportation; but, once the body arrived to Denver, the defendant took a picture of the body while it was being moved from the airplane to the catafalque. The defendant later used the photograph in two local newspapers for advertising purposes, accompanied by the name of the plaintiff and her deceased husband, as well as comments on the well-conducted works done by the funeral home. The plaintiff filed an action for mental suffering, but lost the case at the trial; on appeal, the Supreme Court of Colorado reversed the judgment. The court, upon discussing the issue of funeral home contracts, stated that most of such are oral, as they are rarely written, and the mortician, while preparing a corpse for the funeral, usually deals with people in difficult and delicate moments. "The exhibition of callousness or indifference, the offer of insult and indignity, can, of course, inflict no injury on the dead, but they can visit agony akin to torture on the living," said the court, while continuing that a proper respect for the feelings must be implied in every contract for the services of a mortician. If it is not true, the court continued, then, nothing would prevent a mortician from embalming the body and parading it through the streets so that everyone could observe it. And, if the surviving relatives ask for avoiding publicity, then it should be considered. The court concluded that, in this case, the contract implied that no actions would be done to commit an outrage regarding the feelings of an ordinary person, or to make the surviving relative feel "*humiliation and mental suffering and agony*," then, the court found that the contract was breached, and that the plaintiff had a right to recovery. The defendant contended that there was no breach as such, and that it was only advertising, by claiming that the plaintiff had no legal interest in it, not having been included into the picture, and the matter advertised was a matter of public interest; however, the court, after having examined the picture, the court found that the acts of the defendant constituted a breach of contract, and had to result in damages for mental suffering (*Fitzsimmons v. Olinger Mortuary Ass'n*, 1932, 544–552/535–538).

The next case, *Carney v Knollwood Cemetery Ass'n*, dealt with the topic of a negligent desecration of a grave. The facts, in short, were the following: the relatives arranged a funeral with the defendant for their deceased mother, who died in 1982. When the backhoe was digging ground, it uncovered an old vault that contained a coffin. The cemetery superintendent was called, but, after having learnt of the problem, he instructed to dig further, and the vault, as discovered later, contained the remains of the decedent's long-deceased mother, who had died back in 1929. When the cemetery workmen finished digging, they took away all the dirt and debris from the digging and put it on a site of the cemetery; the funeral was conducted without any incidents. Half a year later, a local TV station made a report that skeletal remains were dumped behind the cemetery; a film crew came to the cemetery where the workers showed them the remains, the police were notified of the incident, and the search discovered brass handles and a plate name of the deceased, alongside with the hair and bones from the remains. This incident was broadcast by the TV station, and the plaintiffs discovered that their grandmother's remains were disturbed. The plaintiffs filed an action, winning the case at the trial court, and the appellate court affirmed the judgment below. Firstly, the court recognized that an abuse to a dead body is actionable, by quoting an earlier case, *Brownlee v. Pratt* (1946)[11]. The tort of infliction

[11] See *Brownlee v. Pratt*, 77 Ohio App. 533 69 N.E. 2d 798, 21.01.1946, No. 512. The quote goes as follows*:* "The policy of the law to protect the dead and preserve the sanctity of the grave comes down to us from ancient times, having its more immediate origin in the Ecclesiastical Law. This salutary rule recognizes the tender sentiments uniformly found in the hearts of men, the natural desire that there be repose and reverence for the dead, and the sanctity of the sepulcher" (*Brownlee v. Pratt*, 1946, p. 537–538, 800–801).

of emotional distress, the court denoted, was of a far more recent origin, and, in order to be actionable, the following four elements shall be proven by the plaintiffs for the redress to be granted: 1) the actor (that is, the defendant – A.L.) either intended to cause such stress, or should have known that his acts would have caused such stress; 2) the acts of the actor were of that outrage, as to exceed "beyond all possible bounds of decency," and, to be so outrageous as to be considered as "utterly intolerable in a civilized community; 3) the acts were the proximate cause of the mental injury of the plaintiffs, and 4) the mental suffering should be serious that "no reasonable man could expect to endure." Speaking of this, the defendants contended that the plaintiffs did not anyhow prove this mental anguish, e.g., by the evidence of medical and psychological treatment.

The court turned to the case of *Paugh v. Hanks* (1983)[12], which was adjudicated by the Supreme Court of Ohio, where it was outlined that there are three criteria serving to determine the possible foreseeability of an emotional injury: 1) whether the plaintiff has to be located closely to the accident (this case involved a series of accidents); 2) whether the shock sustained by the plaintiff resulted from a direct emotional impact upon the person of the plaintiff from the sensory or contemporaneous observation of the accident which the plaintiff witnessed; 3) whether the plaintiff and the victim (if there was such a victim of the accident) were related (i.e., whether they were relatives), in contrast to the absence or remoteness of such relations (*Paugh v. Hanks*, 1983, p. 79/761). The court, however, stated that these factors are not necessarily decisive in the case at bar, where a desecration of a grave is involved, by finding that the legal authorities have long accepted the existence of likelihood of mental anguish for the mishandling of corpses, and found that the determination of foreseeability should go on a case-by-case basis, thereby denoting that, even though the infliction of emotional stress was not recoverable until the recent times, the issue of corpse maltreatment "*...has received extraordinary treatment of the courts*." The court went on, by finding that in order not to use the theory of infliction of emotional distress, the courts in such cases frequently used the theory of the quasi-property right in a dead body, which surviving relatives enjoy, citing *Bigelow* (1933), who wrote that the *quasi-property* theory is nothing else but mental anguish, which is wrapped in a legal fiction of *quasi-property*. The defendants contended that only one of the plaintiffs, the daughter of the deceased whose remains were dumped, as the closest of kin, was entitled to institute the said action, but the court found that all the other plaintiffs had standing in an action for the mistreatment of their grandmother's remains. The court ruled to reject the "*quasi-property*" theory and acknowledged a cause of action for mishandling a corpse as a sub-species of a newly created tort – the infliction of emotional distress. The judgment of the trial court was affirmed (*Carney v. Knollwood Cemetery Ass'n*, 1986, p. 31–41, 430–439).

3. Canadian Law

The volume of Canadian Law in respect with recovering damages for mental suffering related to death grief is smaller than that of the United States, but it has its own lead precedent – the case of *Mason v. Westside Cemeteries Ltd*. (1996), where the Ontario Supreme Court decided to award damages for mental suffering for the defendant's loss of urns containing the ashes of the plaintiff's deceased forbearers. In the earlier days of the Canadian Common Law, it was firmly recognized that an unauthorized interference into a grave was considered to be a trespass (*O'Connor v. City of Victoria*, 1913, p. 577–580). The Canadian Criminal Code of 1985, sec. 182, provided punishment for those who neglected to perform the duties of burial, as well as those indecently interfering or offering indignity

[12] *Paugh v. Hanks*, 6 Ohio St. 3d 72, 451 N.E. 2d 759, 27.07.1983, No. 82-993 (Supreme Court of Ohio).

to a body of a deceased person, or human remains, stating the sanction of imprisonment for a term of not more than five years (*Criminal Code*, 1985, c. C-46). For instance, in one of the criminal trials, the undertaker was not held criminally liable for negligently filling the graves, which caused the coffins to collapse under the weight of earth within weeks or months after burial (*R v. Mills*, 1992, p. 318–329).

There was a handful of civil cases which defined the main principles of the "law of the deceased" in the Common Law of Canada before the case of *Mason v. Westside Cemeteries Ltd.* (1996). The first of such cases was *Miner v. C.P.R.* (1911), which was also a 'death grief' case, but with no damages recovered by the plaintiff. In this case, the plaintiff on 15 July 1910 was transporting the coffin with the body of her deceased son from Revelstoke (British Columbia) to Bawlf (Alberta) with a change of train in Calgary (Alberta), which would go to Wetaskiwin, and then to Balwf, while telegraphing her husband that she was going to arrive on Friday, and he, respectively made arrangements for the funeral. By a mistake, the coffin was not taken out in Bawlf, but, instead, in Banff, which the plaintiff discovered after having arrived in Calgary. As a result, the body arrived to Bawlf two days after it was initially expected to be there (and when the body came, it had already started decomposing). Furthermore, at Wetaskiwin, the plaintiff discovered that her mourning clothes had not come, and she had to buy the new clothes at the town. The plaintiff sued the Canadian Pacific Railway, for incurring expenses for the mourning clothes, telegraph services, telephone calls, conveyances, and hotel bills. The court went to discuss whether there are property rights in a body of a deceased person. The court had reviewed the English and American authorities, and held that, in Law, there is a property in a cadaver, but which is subject to certain obligations – that is, to decent care and burial, as well as to the limitation of its voluntary, or involuntary disposal and use, as prescribed by Law (the court mentions conditions enabling the use of the cadaver for anatomical purposes), or originating from the conditions that the thing itself is a corpse. Thus, here, the Supreme Court of Alberta adopted a considerably different view from the English courts, which firmly discarded any property rights over a dead body, and American courts, which usually reviewed such cases through the prism of a quasi-property right, which was firmly recognized in Case Law. The defendant had paid for the pecuniary loss ($100) of the plaintiff to court, but the plaintiff also argued she suffered from mental anguish because of the delay of the body's arrival and the fact that the body had already started to decompose. The court said that had it been a case involving a breach of contract, then, mental suffering, as an immediate result from the wrong, would be recoverable, but this was a negligence case; the court adopted the same view "…I think the mental sufferings, of the immediate relations of the deceased were the natural and reasonably to be expected result of the defendant company's breach of duty…", finding that the plaintiff was the mother of the deceased man, and had lawful possession and the interest in the cadaver. Therefore, the judgment was handed down for the plaintiff; the defendant appealed, and the court decided to allow the appeal, and it found that the sum of damages ($100) was sufficient. The court elected to adopt the principle, laid down in the Privy Council's 1888 decision of *Victorian Railway Commissioners v. Coultas*, finding that "The mental state of anguish or grief in the case before us, however, is not derived through the senses, but is a product of the imagination," stating that there was no willfulness from the side of the defendant, or any 'exceptional' treatment of the plaintiff (*Miner v. C.P.R.*, p. 408–422).

In the case of *Edmonds v. Armstrong Funeral Home Limited* (1930), the widower arranged funeral preparation with the defendant for the burial of the body of his deceased wife. The funeral home allowed conducting an autopsy on the body of the deceased woman to a certain man who made an incision and removed certain anatomy from the body. Therefore, the plaintiff blamed the defendants in these unauthorized acts and claimed that he suffered from mental anguish. The court distinguished *Miner v. C.P.R.* (1911), which was a case of negligence, holding that this case "does not intend to de-

cide that damages may not be recovered for mental anguish in such a case as the present." The court turned to *Clerk & Lindsell on Torts*, 8 Ed., where it was mentioned that any violation of the right of possession of the body of a deceased person, such as an unauthorized post-mortem (autopsy) gives a right of action in trespass, by citing two Scottish cases[13], and mentioned that the English Anatomy Act of 1832 allowed authorizing the person in charge of the cadaver for examination, but, even then, with the previous consent of the deceased. The court agreed that the plaintiff may maintain the action on the ground of the defendant's acts: "If mental suffering can be properly considered in assessing damages in such actions as assault, defamation, malicious prosecution, seduction, etc., as it properly can, there seems no good reason why it should not be so considered in such a case of misconduct as this is alleged to be when it is a natural and certain consequence of the defendants' acts," hence, finding for the plaintiff and allowing the appeal.

There was another, a much earlier 'autopsy' case in the Canadian jurisprudence, specifically, *Phillips v. Montreal General Hospital*, adjudicated in 1908 by the Superior Court of Québec. The plaintiff was a widow of an elderly man who was sent to a local hospital to be treated for cancer, but soon died. The hospital authorities took possession and performed an autopsy of the body unbeknownst to her, and so she sued to recover damages for the unauthorized autopsy, which, as she claimed, caused her depression and insomnia. The court reviewed the English, American, French and Belgian authorities, by finding that, in English Law, the no-property-in-a-dead-body law is supplemented with the protection of Criminal Law for an unlawful interference to it, and, in Belgian Law, the person, during life, could himself/herself decide of how to dispose of her body, but in a means, which does not contradict the public order and police regulations. The court found that the plaintiff should prevail in action, by stating: "In as high a class, at the least, are the almost reverential feelings with which a family safeguards the body of its dead. Immunity as regards them all is itself a property. The control of a husband or wife over the remains of the other and their burial is paramount, provided normal relations of marriage existed at the time of death" (*Phillips v. Montreal General Hospital*, 1908, p. 477–483).

In *McNeal v. Forest Lawn Memorial Services, Ltd.* (1976), a considerably later case, the daughter of the plaintiffs died under suspicious circumstances, possibly a violent death (however, the suspect was later discharged for lack of evidence), and the father instructed the funeral home to obtain her body and arrange the view of the body by the forbearers, and to cremate it thereafter. For the funeral purposes, the plaintiffs bought a dress which cost $35. However, due to a confusion in internal communications, the funeral home cremated the body of the plaintiffs' daughter without giving the possibility to view the body. The court allowed to recover only the costs of the dress, bought by the plaintiffs for the purposes of the funeral: the court held that the lawsuit invoked mental anguish, and that there was no evidence on the adverse consequences to the health of the plaintiff, or his wife, the co-plaintiff. The only pecuniary loss, suffered by the plaintiffs, was the costs of the funeral clothes which originated from the defendant's breach of contract, and the rest of the claim, the court stated, which was explicitly for mental anguish, was not compensable. Hence, the judgment was rendered in favor of the plaintiff (father) for $35, and the co-plaintiff's (mother) claim was dismissed (*McNeal v. Forest Lawn Memorial Services Ltd*., 1976, p. 556–561).

The case of *Mason v. Westside Cemeteries, Ltd.* (1996), adjudicated by the Ontario Supreme Court, had a somewhat different approach in terms of awarding damages for mental anguish regarding death

[13] The cases spoken about are *Pollok v. Workman* [1900] ScotLR 37, 270, 09.01.1900 (Court of Session, Inner House, Second Division), as well as *Conway v. Dalziel and Others* [1901] ScotLR 38, 662, 13.06.1901 (Court of Session, Inner House, Second Division). Both of these cases concerned an unauthorized post-mortem of the widow's deceased husband (*Pollok v. Workman*, 1900, p. 270–272; *Conway v. Dalziel and Others*, 1901, p. 662–665).

grief. The facts were the following: the plaintiff, an elderly man, sued the cemetery for losing the urns containing the ashes of his deceased mother and father, who died in 1970 and 1974, respectively, and were hereinafter cremated, the ashes were contained in small metal urns of a coffee-can size, and labeled from both inside and outside. In 1974–1979, the urns were being maintained at Thomson Funeral Home, an employee of which contacted the plaintiff in 1979, saying that they can no longer maintain them, and it was agreed to transfer the urns to Westside Cemeteries, Ltd. for their placement into common ground, for which a fee was paid. The plaintiff himself found that this placement of urns was temporary, and, in 1993, following the purchase of a burial plot for herself by the plaintiff's daughter, the plaintiff also bought a burial plot for himself, his wife and his deceased forbearers, but, when he went to Westminster Cemeteries, Ltd., no one could locate the given urns, despite of an extensive search. There was evidence, that the urns were transferred from Thomson Funeral Home to Westminster Cemeteries, Ltd., but what happened to them thereafter remained completely unknown. The plaintiff sued for a breach of bailment, and, alternatively, for negligence. The reasoning of the court could be summarized as follows:

1. *Bailment*: the plaintiff claimed that when Westminster received the urns with the ashes, it was a sub-bailee, having knowledge of his peculiar interest in them. The court said that there are bailment relations in such a case, by holding that once the remains of the dead are placed in the cemetery, it is charged for responsibility for the care of them. The next of kin, being the only who has interest in the remains, does not lose all the 'burial' rights after the funeral, and he or she continues to possess the right to direct the disposition of the remains, but with restrictions, which are imposed by statutes and to "practical impossibilities created by nature and the passage of time," as denoted by the court. Transposing this principle to the case at stake, as the court stated, the plaintiff found the placement of the urns in common ground in 1979 to be temporary, and that they could be removed, if necessary. The cemetery did not object to the plaintiff's right to move the urns, and would have fulfilled the plaintiff's request had the cemetery been able to find the urns (but it did not), and so Westminster was the holder of the urns, it had possession over them, and this possession is subordinate to the right of the next of kin, the plaintiff in this case. Thus, the court deduced, these circumstances fit into the principles of bailment. The plaintiff had definite interest in the urns, and these urns were impossible to be found or returned to the plaintiff. The cemetery did not prove that the loss of the urns was unconnected with the failure of exercising the proper care for them, and, what is more, the defendant exercised a profound system of record-keeping, but, even despite this fact, the urns were nevertheless lost. So, the court found that the defendant was liable.

2. *Negligence*: it goes beyond doubt that the defendant had a duty of care towards the urns, which were delivered to it, and this duty of care, as stated by the court, involves the tracing of the location of the said remains, and the defendant apparently knew that the loss of the urns would adversely affect the plaintiff, since the plaintiff was in the class of people who would be reasonably adversely effected by the loss of the urns maintained at the cemetery. The court positively estimated the system of the record-keeping at the cemetery, but the result did not change – the urns were lost, and so the defendant was liable for negligence.

3. Discussing the *damages*, and speaking of *special damages*, the court denoted that the plaintiff had substantial 'sentimental value' in the urns, despite their actual price, they had a considerable meaning exactly for the plaintiff, despite even that could be held not without a critical view: the plaintiff firstly moved the urns to the cemetery years after his forbearers had died, and never visited these ashes until 1993, and even did not see them, but the court stated that these facts do not mean that the plaintiff did not love his forbearers, or had no grief concerning their death, or distress of losing the urns. The court found the nominal value of $1 for each of urns, and ruled to award the plaintiff $2 for both of them.

4. Speaking of *general damages*, the court denoted that it could be said that plaintiff lost the peace of his mind, but this experience was not devastating for him, and he did not require any specific medication resulting from mental suffering. The court cited a number of authorities, especially by citing *Owens v. Liverpool Corp.* (1938), where the court, as the reader may remember from the first part of the article, said that a nervous shock, caused by the negligent act of the defendant, is just as real to the aggrieved party as a broken limb (*Owens v. Liverpool Corp.*, 1938, p. 400). The court stated that the relationships between the plaintiff and Westminster were such that the defendant could expect that it would bring a mental distress for the plaintiff had he learnt that the cemetery had lost the urns, and of which Westminster was aware. Thus, the court found that there were no reasons for which the plaintiff could not recover under the conditions of the case at stake: *"*If damages are recoverable for upset over the loss of a dog or for the disappointment of a ruined holiday, surely, the distress caused by the loss of the remains of someone's deceased parents is likewise compensable." The court ascertained that it was quite foreseeable that it would be a mental distress for the next of kin because of the defendant's negligence, and the plaintiff was clearly in the group of people which would suffer as a result of the defendant's negligence, by adding that, even though there was no critical suffering, such as a psychiatric illness or a nervous breakdown, this emotional pain, as stated by the court, was real, foreseeable, and compensable.

5. Therefore, the court ruled that the defendant, i.e., Westminster Cemeteries, was liable for a breach of bailment and for negligence, the special damages were assessed as $50 (it was the price of the transfer of the two urns from Thomson Funeral Home to Westminster), special damages for the market value of the property lost tolling $2, the plaintiff was not entitled to any special damages for the sentimental value, and was entitled to general damages for mental distress tolling $1000. Hence, the judgment was rendered for the plaintiff.

Inferences

Having reached the conclusion of this article, the author has arrived to the following inferences:

1. Since the late 19th century, the courts in Common Law jurisdictions have adjudicated many cases where mental anguish became not only an element of damages, but occasionally became the sole foundation of the claim, which originated in railroad and transportation cases, as well as some others. Among all the categories of such cases, there is one peculiar aspect, which could be designated as 'death grief', which is related to maltreatment of cadavers, misarrangement and negligent conduction of funerals, negligent preparation of the body for funeral, unauthorized autopsy, and so on. The legal scholarship spoke about this category (to wit, L. Green (1934–1935), W.L. Prosser (1939), B.F. Crabtree (1942) and an Anonymous Author (1960) can be mentioned), which did not receive a peculiar name, but was firmly recognized by scholars as an existing one. The author of this article designates it as 'death grief', which is a disturbance of a relational interest in the proper care and treatment of the body of a deceased relative, which is well summarized in the American case of *Infield v. Cope* (1954).
2. The article overviewed the jurisprudence of England (with the leading precedent of *Owens v. Liverpool Corp.* (1938)), the United States (a substantial number of cases could be cited as precedents in their respective states), as well as Canada with the leading case of *Mason v. Westside Cemeteries, Ltd.* (1996). The courts recognize the interest in the next of kin (or other relatives) in the proper care and funeral of their deceased loved ones, and the interference with such rights, which includes a failure to conduct the funeral in a decent manner, a negligent burial, a failure to

prepare the cadaver for funeral in a proper manner, as well as a failure to exercise proper care in securing the remains after the funeral is actionable in Common Law jurisdictions.

3. The mental anguish in such a case relates to the injury to feelings of the surviving next of kin, or the closest relatives of the deceased, which attributes to death grief – that is the mourning originating from the death of a relative. In England, where the rules of burial are governed by both Common Law and Ecclesiastical Law, the Court of Appeal recognized mental suffering originating from death grief to be actionable in *Owens v. Liverpool Corp.* (1938), which created a valuable precedent for all other Common Law jurisdictions. A multitude of cases in the United States of America, spanning from negligent arrangement of funerals to desecration of graves, also firmly recognize the interest of the surviving relatives in a proper handling of their deceased. Finally, in the Canadian judgment of *Mason v. Westside Cemeteries, Ltd.* (1996), the court awarded damages for mental distress for the loss of funeral urns of the plaintiff's deceased forbearers, finding even a moderate mental anguish to be sufficient enough to be compensable.
4. From the above-given, we may deduce that *death grief* may be a category of relational interests (according to L. Green), the interference of which is already actionable, and encompasses all kinds of malpractice relating to the treatment of the body of the deceased and the process of the funeral, and, in some cases, even post-funeral maintenance and post-mortal memory, which may be interfered with the means of mass-media or television.

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Anatoliy Lytvynenko is a Doctor of Legal Sciences and a Lecturer at the Baltic International Academy (Riga, Latvia). His areas of scientific interest include Civil Law, Theory of Law, Medical Law, History of Law, Ecclesiastical Law, and Human Rights Law.

Anatoliy Lytvynenko yra teisės mokslų daktaras ir Tarptautinės Baltijos akademijos (Ryga, Latvija) lektorius. Jo mokslinių interesų sritys – civilinė teisė, teisės teorija, medicinos teisė, teisės istorija, bažnytinė teisė ir žmogaus teisių teisė.