

Don't let a remains-mishandling case haunt you

Mortuaries, crematoriums and cemeteries are fertile grounds for lawsuits by survivors

By William Veen and Andje Morovich Medina

The loss of a loved one is one of the most intimate and personal experiences in our lives. We cope with death with rituals that allow us to say our final farewells to loved ones with honor and respect. Usually, the most powerful aspects of these rituals involve what we do with the decedent's remains. To cremate or bury: Scattering ashes near a beach filled with memories; laying a loved one to rest aside a beloved spouse. Respect for the dead and sympathy for a family mourning a loss are some of the few things that unite us all. Also uniting us is the overwhelming sense of outrage we feel when we learn of unimaginable neglect in the handling of remains, sometimes involving deliberate fraud and the worst forms of human greed.

These cases can occur in the tiny cemetery in a small town as well as in the most famous and grand resting places of our fallen heroes. Recent headlines describe allegations of negligence at Arlington National Cemetery. The Washington Post has reported unmarked graves, headstones not recorded on cemetery maps, and unearthed burial urns. The emotions of the family members were no doubt unearthed along with those urns.

Representing family members in an action against a funeral services provider may be one of the most rewarding cases of your career. They involve heart-wrenching and emotional issues, and achieving justice for a family wronged in this way can be immensely satisfying.

Our legal system, from legislators to courts and juries, recognizes the need for prosecution and just compensation in mishandled-remains cases. As a result, these cases involve some surprising advantages that set them apart from typical plaintiff's cases.

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Remains-mishandling cases often have limited legal issues, sympathetic plaintiffs, unsympathetic and adequately insured defendants, and high verdict potentials. The causes of action commonly plead include: negligence, intentional infliction of emotional distress, breach of contract, fraud, and misrepresentation. Despite common belief, there is no cause of action for "negligent mishandling of human remains"; instead, it is a simple negligence claim.

Cases can involve losing remains entirely, damaging remains in a motor vehicle accident, improperly refrigerating remains, improperly embalming remains, cremating remains when burial is ordered, mixing the cremains of multiple persons, improperly throwing fetal remains away as medical waste, conducting unlawful autopsies, and unlawfully removing organs or tissue from non-donors to name a few.

When you are evaluating these cases, there are some important facts that must be gathered. First, who has standing to recover – identifying the obvious and not-so-obvious plaintiffs. Second, what claims are available – damages and implied covenants you may not know about. Third, how old was the decedent – yes, age matters.

Recognizing the plaintiffs and claims

What claims are available and who has standing to recover damages in remains-mishandling cases? More people than you think.

•Contracting parties

The parties to the contract for funeral services have standing to sue for breach of contract when funeral services are carried out in a negligent manner. (*Saari v. Jongordon Corp.* (1992) 5 Cal.App.4th 797, 802.) One tremendous advantage that some attorneys do not know about is the fact that emotional distress damages are recoverable for this type of breach of contract claim. In addition, the California Supreme Court has held that there are implied covenants in all funeral services contracts, which makes proving breach much easier in these cases.

In standard breach of contract cases, emotional distress damages are not foreseeable and therefore not recoverable. However, mortuary and crematorium contracts "so affect the vital concerns of the contracting parties that severe emotional distress is a foreseeable result of breach." (*Allen v. Jones* (1980) 104 Cal.App.3d 207, 211.) As such, courts allow the recovery of emotional distress damages for this type of contract breach.

Additionally, few people are aware that there is an implied covenant in all funeral services contracts to provide "appropriate and dignified services of the type that bereaved family members normally anticipate." (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 886; *Wilson v. Houston Funeral Home* (1996) 42 Cal.App.4th 1124.) Courts recognize that "those who come in contact with the bereaved should show the greatest solicitude," because the relationship "is beyond a simple business relationship – they have assumed a position of special trust toward the family." (*Quesada v. Oak Hill Improvement Co.* (1989) 213 Cal.App.3d 596, 600.) "It is well recognized the real objects of the agreement between the family and the mortuary are consolation, consideration, dignity and peace of mind." (*Wilson, supra*, 42 Cal.App.4th 1133.)

The impact of this implied covenant is far reaching. Imagine a case where a family enters into a funeral services contract for the cremation of a deceased family member. The funeral services provider cremates the body, then returns the wrong remains to the family. Eventually, the family obtains the correct remains. Upon reading the terms of the funeral services contract it may be that no express breach has occurred. But how can defendants get away with this behavior? The answer is they cannot. All funeral services contracts must be carried out in a respectful and dignified manner and damages for undignified services are available.

•Disposition right holders

Most courts recognize that the next of kin have a "quasi-property" right in a decedent's body for the purposes of disposition and burial. (*Newman v. Sathyavaglswaran* (9th Cir. 2002) 287 F.3d 786, 789.) California Health and Safety Code section 7100 outlines, in order, those with authority to "control the disposition of the remains of a deceased person." (Health & Saf. Code, § 7100.) Included in that code section are obvious plaintiffs, such as: the agent under power of attorney for health care and duty of disposition, competent surviving spouse, competent adult children, competent surviving parents, competent adult siblings, competent adult in the next degree of kinship, and a public administrator. This statute creates standing rights absent contrary testamentary intent. Not included and often overlooked additional plaintiffs can be found in case authority as highlighted below.

Identifying not so obvious plaintiffs

•Close family member third-party beneficiaries

What about the family members who are not next in line under the Health and Safety Code and who did not execute the funeral services contract? Do they have a *Dillon* claim for emotional distress damages even though they did not witness the mishandling?

It goes without saying that mishandling human remains is almost never witnessed in real-time. So how do we get around the rule established in *Dillon v. Legg* (1968) 68 Cal.2d 728 and *Thing v. La Chusa* (1989) 48 Cal.3d 644 that requires a plaintiff to be "present at the scene of the injury-producing event at the time it occurs" and also have awareness of the injury to the victim? (*Thing, supra*, 48 Cal.3d 647.) Are defendants rewarded for their behind-closed-doors negligence? No. California courts have carved out an exception to the general standing limitations outlined in *Dillon* and its progeny and expanded the class of persons who

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can recover for emotional distress caused by this tort. The public policy considerations in favor of imposing limitations on most *Dillon* claims do not carry over to mishandling-remains scenarios.

In most *Dillon* situations, there is no preexisting relationship between the plaintiffs and defendants. In a funeral services setting, the provider of funeral services stands in a special relationship with the family members of the decedent to relieve the "bereaved relatives of the obligation to personally prepare the remains for burial or cremation." (*Christensen, supra,* 54 Cal.3d 887.) Included in the services is the relief not to witness the preparation of the body. In fact, almost all services are rendered outside the presence of the relatives. This fact persuaded Justice Baxter, author of the majority opinion in *Christensen*, to carve out a *Dillon* exception.

> It would be the exceptional case in which any family member would observe misconduct of the type alleged.... In arguing that the right of persons who do not witness the misconduct or its consequences to recover for emotional distress be limited to the statutory right holder or contracting party, defendants ...invite this court to create an immunity protecting them from liability for the serious emotional distress caused by such egregious, but clandestine, misconduct. ... Were this approach adopted, the persons suffering the greatest harm might well be barred from recovering for their emotional distress while one much less affected would be permitted to recover.

(*Christensen, supra,* 54 Cal.3d 887.)

Justice Baxter also refused to limit standing to the contracting parties stating:

> There is no reason to assume that the person who makes the arrangements is any more susceptible to emotional distress if the services are not competently performed than are the other family members. Indeed, in light of the emotional impact of the death of a close family member of the bereaved, it may be the relative least affected who is chosen by the family to represent them in arranging for funeral and related services.

(*Christensen, supra,* 54 Cal.3d 887.)

The Court in *Christensen* recognized that some standing limitations were necessary, but also realized that the class of affected parties in these cases was hard to define. For these reasons, the Court expanded the class but remained vague on its limits. The expansion now reached "close family members who were aware that funeral and/or crematory services were being performed, and on whose behalf or for whose benefit the services were rendered." (*Christensen, supra,* 54 Cal.3d 875.) But who is considered a "close family member?"

Although "close family members" were not specifically defined in the *Christensen* opinion, the Court in *Thing* limited recovery for emotional distress damages to those persons "closely related to the injury victim" and provided the following footnote definition: "absent exceptional circumstances, recovery should be limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim." (*Thing, supra,* 48 Cal.3d 667-668.) The challenge for most attorneys and courts will be to determine what constitutes "exceptional circumstances." One could imagine that a niece or nephew raised by the decedent after abandonment by an unfit sibling would qualify as an "exceptional circumstance." A similar scenario was presented to the Court in *Quesada v. Oak Hill Improvement Co.* (1981) 213 Cal.App.3d 596. In *Quesada*, the Court refused to deny a niece standing during the initial stages of litigation stating:

> We must recognize one of the realities of life – that the deceased, usually aged, frequently will leave few, if any, family members of close blood relationship; death may rob us of those naturally closest to us. One cousin may stand at the funeral of another or a niece may sit alone at her aged aunt's funeral. The simple expedient of calculation of the degree of consanguinity in order to assess liability is not, of itself, a sufficient basis to reject the niece's claim. Whether the niece can plead and prove her relationship to the decedent was one falling within the category of "exceptional circumstances" remains to be demonstrated. We simply hold that she may not be excluded merely because she is the niece of the decedent.

(*Quesada, supra*, 213 Cal.App.3d 610).

The key for attorneys representing family members not included in the express group of persons outlined in *Thing* will be to plead with particularly the characteristics of the relationship between the decedent and the plaintiff to demonstrate the existence of "exceptional circumstances."

Human remains – Does age matter?

The perpetual debate of "when life begins" has spilled over into the tort of mishandling human remains. Once again, attention has been drawn to the difference between an embryo and a fetus. A "fetus" is defined as a developing human from usually two months after conception to birth. (Merriam-Webster Online Dictionary at http://www.merriam-webster.com (July 7, 2010).) An "embryo" is defined as a developing human from the time of implantation to the end of the eighth week after conception. (Merriam-Webster Online Dictionary at http://www.merriam-webster.com (July 7, 2010).)

Some courts appear to have drawn a line between the embryo and fetal status, recognizing a claim only once fetal status is achieved. (See, e.g. *Emeagwali v. Brooklyn Hosp. Ctr.* 11 Misc.3d 1055(a), 815 N.Y.S.2d 494 (Table), 2006 WL 435813 (N.Y. Sup. 2006) (cause of action for mishandling the remains of a 21 1/2 week fetus); *Janicki v. Hospital of St. Raphael*, 46 Conn. Supp. 204, 744 A.2d 963, 968, 25 Conn. L. Rptr. 511 (Sup.Ct. 1999) (cause of action for mishandling the remains of a stillborn nonviable 19 week fetus);

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Wadley v. St. Vincent's Hosp., CV-2004-1257-RSV, 2006 WL 2061785 (Ala. Cir. Ct. July 20, 2006) (cause of action for mishandling 13 week fetus that died in utero).)

Other jurisdictions have imposed additional age restrictions and do not simply allow recovery once the embryo reaches fetal status. (See, e.g. *Walker v. Firelands Community Hosp.*, 170 Ohio App. 3d 785, 2007-Ohio-871, 869 N.E.2d 66 (6th Dist. Erie County 2007) (refused to recognize a cause of action for mishandling fetal remains if the fetus was less than 20 weeks and did not survive birth).)

California has not yet addressed this question. However, California Penal Code section 187 does clearly include a "fetus" for purposes of determining liability for criminal homicide. (Pen. Code, § 187.) Therefore, a strong argument can be made that if criminal liability extends to the murder of a fetus, civil liability should extend to the mishandling of fetal remains.

Conclusion

Remains-mishandling cases are unique, and the law recognizes this with a wide range of advantages for plaintiffs. They include expansive damages, helpful implied covenants, and a broader range of potential claimants able to recover emotional distress damages. If you take a remains-mishandling case, carefully research what claims are available and who your potential plaintiffs may be. Remember to plead breach of contract highlighting the implied covenants. Do not overlook any potential plaintiffs and plead facts demonstrating "exceptional circumstances" when necessary. In successfully prosecuting a case on behalf of an aggrieved family, you are helping families recover much more than money.


Veen


Medina

William Veen founded The Veen Firm, P.C. *as a sole practitioner in 1975, gradually developing it into a firm of talented attorneys and staff representing severely injured workers and consumers. He is a member of the American Board of Trial Advocates and honored as the Trial Lawyer of the Year by the San Francisco Trial Lawyers Association in 2003.*

Andje Morovich Medina is an associate on the Label-Vallejo Trial Team at The Veen Firm, P.C. *Her practice focuses on litigating catastrophic injury cases. For more information, go to www.veenfirm.com.*

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