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Burial of a Tort: The California Supreme Court's Treatment of Tortious Mishandling of Remains in Christensen v. Superior Court

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BURIAL OF A TORT: THE CALIFORNIA SUPREME COURT'S TREATMENT OF TORTIOUS MISHANDLING OF REMAINS IN *CHRISTENSEN v. SUPERIOR COURT*

"A man's dying is more his survivors' affair than his own." [1]

I. INTRODUCTION

From 1980 until 1987, numerous Southern California mortuaries and crematoria engaged in the systematic desecration of human remains.[2] Bereaved families entrusted the bodies of some 16,500[3] decedents to the mortuaries and crematoria for dignified and respectful disposition. The mortuaries and crematoria removed gold from the decedents' teeth with pliers by a process known as "popping chops" or "making the pliers sing."[4] The decedents' bodies were then subjected to mass organ harvesting, during which hearts, eyes, corneas, brains and other body parts were removed and sold to companies for commercial distribution.[5] After organs were harvested, the mortuaries and crematoria cremated the bodies of numerous decedents together,[6] and placed the remains in fifty-five gallon oil drums from which they were distributed to the bereaved families who had innocently entrusted them with the cremation of their family members.[7]

In 1987, the conduct of the mortuaries and crematoria was discovered, and made public through media reports.[8] Several thousand family members brought suit alleging emotional distress resulting from the mistreatment of their decedents' remains.[9] Before the matter proceeded to

1. THOMAS MANN, THE MAGIC MOUNTAIN 532 (H.T. Lowe-Porter trans., Vintage Int'l 1992) (1924).

2. Christensen v. Superior Court, 54 Cal. 3d 868, 878, 820 P.2d 181, 185, 2 Cal. Rptr. 2d 79, 83 (1991).

3. *Id.* at 877 n.5, 820 P.2d at 184 n.5, 2 Cal. Rptr. 2d at 82 n.5.

4. Opposing Brief on the Merits by *Christensen* Plaintiffs and Petitioners at 15, *Christensen* (No. S016890) (on file with *Loyola of Los Angeles Law Review*).

5. *Id.*

6. *Id.*

7. *Id.*

8. *Christensen*, 54 Cal. 3d at 878, 820 P.2d at 185, 2 Cal. Rptr. 2d at 83.

9. The plaintiff class consisted of at least 6050 members. *Id.* at 877 n.5, 820 P.2d at 184 n.5, 2 Cal. Rptr. 2d at 82 n.5.

trial, however, the court had to resolve the question of which, if not all, plaintiffs could sue the mortuaries and crematoria.[10]

The California Supreme Court asked and answered this question in *Christensen v. Superior Court*,[11] and carved out tough new rules for emotional distress tort law in the process. The court chose not to limit the plaintiff class to only those persons who had contracted for, or who possessed the statutory right to control, the disposition of the decedents' remains.[12] Instead, the court recognized that the mortuaries and crematoria owed a duty to family members close to the decedent who were aware that funeral or crematory services were being performed.[13] Those family members could therefore sue for the negligent mishandling of their decedents' remains. At the same time, however, the court held that plaintiffs who had not witnessed the conduct in question could not establish the elements of intentional infliction of emotional distress, and therefore could not sue for intentional mishandling of their decedents' remains.[14]

This Note examines the California Supreme Court's decision in *Christensen*, a case that is significant because it simultaneously articulates a "bright line" rule for negligence actions involving mortuaries and crematoria,[15] while it effectively eliminates similar liability predicated on intentional tort.[16] This Note begins by exploring the background of tortious liability for mishandling of human remains.[17] It includes a discussion of theories other than tort law upon which plaintiffs have relied in seeking recovery for mishandling of remains.[18] Special attention is given to the limitations of these alternative theories as options available to family members who were not parties to the funeral contract.[19]

Part III examines the factual background and procedural posture of the case, as well as the *Christensen* court's reasoning. It compares the court's effort to recognize that a crematorium or mortuary owes a duty

10. *Id.* at 876, 820 P.2d at 183, 2 Cal. Rptr. 2d at 81.

11. 54 Cal. 3d 868, 820 P.2d 181, 2 Cal. Rptr. 2d 79 (1991).

12. *Id.* at 875, 820 P.2d at 183, 2 Cal. Rptr. 2d at 81. California Health and Safety Code § 7100 establishes rights and duties in the disposition of human remains. CAL. HEALTH & SAFETY CODE § 7100 (West 1970 & Supp. 1993). See *infra* part II.C.2.a for a discussion of § 7100.

13. *Christensen*, 54 Cal. 3d at 875, 820 P.2d at 183, 2 Cal. Rptr. 2d at 81.

14. *Id.* at 906, 820 P.2d at 204, 2 Cal. Rptr. 2d at 102.

15. *Id.* at 918, 820 P.2d at 212, 2 Cal. Rptr. 2d at 110 (Kennard, J., concurring in part, dissenting in part).

16. *Id.* at 906, 820 P.2d at 204, 2 Cal. Rptr. 2d at 102.

17. *See infra* part II.

18. *See infra* part II.A-B.

19. *See infra* part II.B.3.

to the immediate family of a decedent,[20] with the court's ready willingness to deny those same plaintiffs the right to sue for intentional mishandling of remains.[21]

In part IV, this Note critically analyzes the majority's holding in *Christensen*. While the court was correct in finding that mortuaries and crematoria owe a duty to close family members of a decedent, and therefore granting those family members standing to sue for negligence,[22] the decision was elsewhere inconsistent. First, the majority was inconsistent in finding a duty owed to close family members, while simultaneously restricting recovery to only those plaintiffs who can show by "a well founded substantial certainty"[23] that their decedents' remains were among those mistreated.[24] Further, the majority was inconsistent in limiting the class of plaintiffs who can sue for intentional mishandling of a decedent's remains to those persons who contemporaneously viewed the defendant's conduct.[25]

Finally, this Note recommends that the California Supreme Court recognize the unique nature of the "mishandling of remains" tort and abandon the requirement that the plaintiff be present at the scene of the alleged conduct in order to sue for intentional mishandling of a decedent's remains.[26]

II. BACKGROUND: TORTIOUS MISHANDLING OF A DECEDENT'S REMAINS

For almost a century, California has recognized that civil liability may arise from the mishandling of the remains of a decedent.[27] The conduct has been variously referred to as the "negligent handling of a corpse,"[28] the "tortious interference with a right to dispose of a dece-

20. *See infra* part III.C.1.
21. *See infra* part III.C.2.
22. *See infra* part IV.A.2.
23. *Christensen*, 54 Cal. 3d at 902, 820 P.2d at 201, 2 Cal. Rptr. 2d at 99.
24. *See infra* part IV.A.3.
25. *See infra* part IV.B.
26. *See infra* part V.
27. *See* O'Donnell v. Slack, 123 Cal. 285, 289, 55 P. 906, 907 (1899).
28. Quesada v. Oak Hill Improvement Co., 213 Cal. App. 3d 596, 603, 261 Cal. Rptr. 769, 773 (1989).

dent's remains,"[29] "wilful mutilation of a corpse"[30] and "tortious interference with rights involving dead human bodies."[31]

However, while there is a long history of tortious liability for the mishandling of a decedent's remains, plaintiffs have not relied solely on tort theories in seeking recovery. Some early cases addressed the possibility of predicating liability on the notion of a "property interest" in the decedent's body.[32] Another approach upon which some courts still rely is to award emotional distress damages for breach of the funeral contract,[33] although, as will be discussed, this remedy is not entirely adequate. Finally, the most common theory relied upon is tortious liability for emotional distress suffered as a result of the defendants' conduct.[34] To better understand these various theories of recovery, this part will examine each in turn.

A. Property Rights in the Decedent's Body

Plaintiffs in early California cases often sought to establish that, as survivors, they possessed some "property rights" in the body of the decedent. This, the plaintiffs argued, accorded them the right to recover for its mishandling[35] under the theory that the defendants' mishandling constituted a trespass.[36] While American courts have traditionally recognized a "quasi-property" right in a decedent's body for the limited purpose of determining who would have custody of the body for burial,[37]

29. Sinai Temple v. Kaplan, 54 Cal. App. 3d 1103, 1112, 127 Cal. Rptr. 80, 86 (1976).

30. Jack Leavitt, *The Funeral Director's Liability for Mental Anguish*, 15 HASTINGS L.J. 464, 473 (1964).

31. Cohen v. Groman Mortuary, 231 Cal. App. 2d 1, 4, 41 Cal. Rptr. 481, 483 (1964), *disapproved by* Christensen v. Superior Court, 54 Cal. 3d 868, 820 P.2d 181, 2 Cal. Rptr. 2d 79 (1991).

32. *See infra* part II.A.

33. *See infra* part II.B.

34. *See infra* part II.C.

35. *See* O'Donnell v. Slack, 123 Cal. 285, 289, 55 P. 906, 907 (1899); Huntly v. Zurich Gen. Accident & Liab. Ins. Co., 100 Cal. App. 201, 207-09, 280 P. 163, 165-66 (1929); Leavitt, *supra* note 30, at 472-73; Michelle B. Bray, Note, *Personalizing Personality: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209, 225-28 (1990).

36. *See* Harry R. Bigelow, Jr., Note, *Damages: Pleading: Property: Who may recover for wrongful disturbance of a dead body*, 19 CORNELL L.Q. 108 (1933). Mr. Bigelow refers to the theory

> whereby the body was said to become a part of the realty upon burial and any interference with it was then trespass *quare clausum fregit*, for which the owner of the lot had a right of action, if his ownership in the plot amounted to as much as an easement and was not a mere license.

Id. at 108. There is authority for the contrary position that the "trespass" in question is to the body itself, and not to the realty in which it is buried. *See* Bray, *supra* note 35, at 227.

37. *See* Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227 (1872); Bray, *supra* note 35, at 227.

plaintiffs in California cases rarely relied upon this right with any success to establish liability for mishandling.[38] In one early case, *Huntly v. Zurich General Accident & Liability Insurance Co.*,[39] the court specifically considered whether a plaintiff could allege ownership in the body of a deceased human being, such that a cause of action could be maintained for damages arising out of a wrongful autopsy.[40] After considering decisions reached by courts of other jurisdictions on the issue, the court concluded that "there is no ownership in the body of a deceased human being."[41]

Commentators have criticized efforts to rely on the "quasi-property" right to establish liability for mishandling of remains as merely a fictional "hook" on which to hang liability that is really based on the plaintiff's emotional distress.[42] Given its lack of acceptance in California courts, there is little reason to believe that the "quasi-property" right theory has any value to a prospective plaintiff beyond the determination of who shall have custody and responsibility for burial.

B. Recovery of Emotional Distress Damages for Breach of Contract

Another, more modern approach to assessing liability for the mishandling of a decedent's remains has been to award damages for breach of the funeral contract to redress the aggrieved party's emotional suffering.[43] Generally, the measure of damages in an action for breach of contract is the amount that will compensate the aggrieved party for all detriment proximately caused by the breach.[44] The vast majority of contracts involve only commercial transactions.[45] In these types of con-

38. *See, e.g.*, *O'Donnell*, 123 Cal. at 289, 55 P. at 907; *Huntly*, 100 Cal. App. at 209, 280 P. at 166.

39. 100 Cal. App. 201, 280 P. 163 (1929).

40. *Id.* at 209, 280 P. at 166.

41. *Id.*; *accord O'Donnell*, 123 Cal. at 289, 55 P. at 907.

42. Bigelow, *supra* note 36, at 110; *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 63 (5th ed. 1984) ("It seems reasonably obvious that such 'property' is something evolved out of thin air to meet the occasion, and that in reality the personal feelings of the survivors are being protected, under a fiction likely to deceive no one but a lawyer.").

43. *See, e.g.*, Allen v. Jones, 104 Cal. App. 3d 207, 211, 163 Cal. Rptr. 445, 448 (1980).

44. Section 3300 of the California Civil Code provides: "For the breach of an obligation arising from contract, the measure of damages . . . is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." CAL. CIV. CODE § 3300 (West 1970 & Supp. 1993). California Civil Code § 3301 provides: "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." *Id.* § 3301 (West 1970 & Supp. 1993).

45. *Allen*, 104 Cal. App. 3d at 211, 163 Cal. Rptr. at 448.

tracts, it is generally not foreseeable that a breach will cause significant emotional distress as distinguished from mere annoyance.[46] Therefore, plaintiffs usually may not recover for nonpecuniary losses, such as emotional distress or annoyance, that result from a contract breach.[47]

1. Rule for breach of "personal" contracts

There are certain types of contracts, however, that are so "personal" in nature,[48] and so affect the vital concerns of the individual, that it is reasonably foreseeable that a breach will cause mental anguish to the non-breaching party.[49] Courts have allowed plaintiffs to recover emotional distress damages for breach of contract in these situations.[50] Examples of these contracts include contracts for long-term health care,[51] insurance contracts[52] and employment contracts.[53]

A contract whereby a mortuary agrees to prepare a body for burial is perhaps the best example of a "personal contract," the breach of which will foreseeably cause the non-breaching party to suffer mental anguish.[54] This is because the parties to the funeral contract are usually in their most difficult and delicate moments.[55] Accordingly, a mortician's chief asset is his or her ability to understand and cater to the feelings of the afflicted.[56]

The first California case in which a plaintiff recovered damages for emotional distress resulting from the breach of a funeral contract was *Chelini v. Nieri*.[57] In *Chelini*, the plaintiff entered into an oral contract

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46. *Id.*

47. *See, e.g.*, John A. Sebert, Jr., *Punitive and Nonpecuniary Damages in Actions Based Upon Contract: Toward Achieving the Objective of Full Compensation*, 33 UCLA L. REV. 1565, 1584 (1986) ("Traditional contract law provides very limited opportunity for a plaintiff to recover for nonpecuniary loss that may result from contract breach, such as emotional distress, inconvenience, and annoyance."). *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981) (noting exclusion of recovery for emotional disturbance except where bodily harm results or emotional disturbance was likely).

48. *Allen*, 104 Cal. App. 3d at 211, 163 Cal. Rptr. at 448.

49. *Id.*

50. *See id. See generally* Charlotte K. Goldberg, *Emotional Distress Damages and Breach of Contract: A New Approach*, 20 U.C. DAVIS L. REV. 57 (1986) (proposing new test for determination of whether emotional distress was foreseeable at time of contract formation).

51. Westervelt v. McCullough, 68 Cal. App. 198, 228 P.2d 734 (1924).

52. Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

53. Wallis v. Superior Court, 160 Cal. App. 3d 1109, 207 Cal. Rptr. 123 (1984).

54. *See Allen*, 104 Cal. App. 3d at 211, 163 Cal. Rptr. at 448; Goldberg, *supra* note 50, at 68-69; Sebert, *supra* note 47, at 1584.

55. *Allen*, 104 Cal. App. 3d at 211, 163 Cal. Rptr. at 448.

56. *Id.*

57. 32 Cal. 2d 480, 196 P.2d 915 (1948).

with the defendant mortician to preserve the body of his mother.[58] The defendant agreed to embalm the body so that the corpse would keep "almost forever" and to provide a hermetically sealed casket.[59] Several months later, at the plaintiff's request, the vault containing the body was opened in the plaintiff's presence.[60] The flesh of the body had disintegrated and was covered with insects.[61] The California Supreme Court affirmed an award to the plaintiff of $10,000 in general damages, on the basis that the plaintiff suffered physical illness as a result of viewing the condition of his mother's body.[62]

2. Physical injury requirement

One major limitation to recovery for emotional distress damages for breach of contract was the requirement that the plaintiff suffer some physical injury.[63] This requirement was an issue in another funeral contract case, *Allen v. Jones*.[64] In *Allen*, the plaintiff made an oral agreement with a mortician to cremate his brother's body and ship the ashes to Illinois.[65] The ashes were thereafter lost in transit.[66] The plaintiff brought actions alleging breach of contract and tort, claiming nervous shock, mental anguish and humiliation.[67] The court in *Allen* relied on the plaintiff's tort theory and did not directly address the question of whether mental distress damages alone, without accompanying physical injury, could support an action for breach of contract.[68] However, in his concurrence, Judge Gardner severely criticized the physical injury requirement as nothing more than an artificial distinction.[69]

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58. *Id.* at 482, 196 P.2d at 916.
59. *Id.*
60. *Id.* at 483, 196 P.2d at 917.
61. *Id.* at 484, 196 P.2d at 917.
62. *Id.* at 481, 196 P.2d at 915-16.
63. *See* Allen v. Jones, 104 Cal. App. 3d 207, 213, 163 Cal. Rptr. 445, 449 (1980).
64. 104 Cal. App. 3d 207, 163 Cal. Rptr. 445 (1980).
65. *Id.* at 209, 163 Cal. Rptr. at 447.
66. *Id.*
67. *Id.*
68. *Id.* at 213, 163 Cal. Rptr. at 449. *But see* Goldberg, *supra* note 50, at 70 n.50 ("Without the physical injury requirement, the *Allen* court probably would have allowed the plaintiff to plead emotional distress damages under a contract theory.").
69. Judge Gardner stated:

> In no other area are the vagaries of our law more apparent than in the distinction between mental and emotional distress accompanied by physical manifestation and such discomfort unaccompanied by physical manifestation. . . .
>
> . . . .
>
> I would like to see the Supreme Court take a sharp knife and cut this whole cockamamie distinction out of the law. . . . It seems to me that the law should drag itself into the 20th century and face up to the fact that mental anguish standing by

The courts abolished the physical injury requirement for emotional distress damages for breach of contract soon after the court's decision in *Allen*.[70] The new rule was applied to a funeral contract in *Ross v. Forest Lawn Memorial Park*.[71] In *Ross*, a mother arranged for a private funeral and burial service for her daughter, a seventeen-year-old punk rocker.[72] While only family and invited guests were to attend, punk rockers attended the funeral and burial, and disrupted the services.[73] Police had to be called to restore order to the services, and when the mother returned the next day she discovered that the grave and flowers had been disturbed.[74] The court of appeal held that the plaintiff could recover for emotional distress, even though she did not allege any physical injuries.[75] The court reasoned that the nature of the contract made emotional distress damages foreseeable in the event of a breach.[76]

3. Recovery limited to the contracting parties

While the physical injury requirement no longer exists as a bar to recovery of emotional distress damages for breach of a funeral contract, the remedy is limited to the contracting parties, and therefore does not redress the injuries of everyone who suffers emotional distress as a result of a defendant's breach. *Cohen v. Groman Mortuary*[77] presented precisely this problem.

In *Cohen*, nine members of the deceased's family brought actions against the mortuary that contracted to provide funeral services and bur-

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itself is as real as such anguish accompanied by some kind of a physical manifestation.

Id. at 216-18, 163 Cal. Rptr. at 451-52 (Gardner, J., concurring).

70. *See* Wynn v. Monterey Club, 111 Cal. App. 3d 789, 801, 168 Cal. Rptr. 878, 884 (1980).

71. 153 Cal. App. 3d 988, 203 Cal. Rptr. 468 (1984).

72. *Id.* at 991, 203 Cal. Rptr. at 470.

73. *Id.* at 991-92, 203 Cal. Rptr. at 470 ("Neither their appearance nor comportment was in accord with traditional, solemn funeral ceremonies. Some were in white face makeup and black lipstick . . . while . . . another wore a dress decorated with live rats.").

74. *Id.*

75. *Id.* at 995, 203 Cal. Rptr. at 473. The *Ross* court stated:

> Respondent maintains that because appellant *has not alleged physical injury* no recovery is permissible. Respondent's duty to provide a private funeral and burial arose from respondent's agreement to do so. Appellant seeks damages for emotional rather than physical injury that resulted from respondent's failure to exclude the unwanted guests. The contract was a lawful contract which by its nature put respondent on notice that a breach would result in emotional and mental suffering by appellant.

Id. (emphasis added).

76. *Id.*

77. 231 Cal. App. 2d 1, 41 Cal. Rptr. 481 (1964), *disapproved by* Christensen v. Superior Court, 54 Cal. 3d 868, 820 P.2d 181, 2 Cal. Rptr. 2d 79 (1991).

ial of their decedent.[78] The complaint alleged that the mortuary wrongfully substituted the body of another in place of the decedent, and that the family members consequently suffered shock and mental anguish.[79] Tort analysis aside, the court in *Cohen* held that only the two family members who were parties to the contract could bring actions based on the mortuary's duty to properly conduct the funeral service.[80]

Funeral contracts have not yet become an area in which third-party beneficiaries to the contract are protected by the law.[81] While this has been criticized as inconsistent with the true nature of funeral and mortuary contracts,[82] the fact remains that survivors who were not parties to the contract cannot seek contract remedies, and must rely instead on tort theories of recovery.

C. *Tortious Infliction of Emotional Distress*

Most plaintiffs seeking recovery for the mishandling of a decedent's remains do so on some theory of tortious infliction of emotional distress. Until now, nearly all successful California cases were predicated on the theory of negligent infliction of emotional distress,[83] although plaintiffs have sometimes sought recovery on an intentional theory where appropriate.[84] Prior to *Christensen v. Superior Court*,[85] California courts faced several issues in deciding cases alleging emotional distress caused by the mishandling of a decedent's remains.

1. The physical injury requirement

Analogous to the distinction formerly recognized in breach of contract actions, historically courts were reluctant to allow recovery in tort

78. *Id.* at 3, 41 Cal. Rptr. at 482-83.

79. *Id.*

80. *Id.* at 9, 41 Cal. Rptr. at 486.

81. *See generally* KEETON ET AL., *supra* note 42, § 93, at 667-71 (noting difficulty faced by party who seeks damages for breach of contract to which he or she was not party). However, permitting recovery for breach of duty that arises out of a third-party contract is consistent with well-established California precedent. *See* Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958) (permitting recovery for negligently prepared will).

82. *See, e.g.*, Leavitt, *supra* note 30, at 466.

83. *See, e.g.*, Quesada v. Oak Hill Improvement Co., 213 Cal. App. 3d 596, 261 Cal. Rptr. 769 (1989). *But see* 2 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 9.4, at 624 (2d ed. 1986).

84. *See, e.g.*, *Quesada*, 213 Cal. App. 3d at 598, 261 Cal. Rptr. at 770; Allen v. Jones, 104 Cal. App. 3d 207, 210, 163 Cal. Rptr. 445, 447 (1980); Cohen v. Groman Mortuary, 231 Cal. App. 2d 1, 3, 41 Cal. Rptr. 481, 483 (1964), *disapproved by* Christensen v. Superior Court, 54 Cal. 3d 868, 820 P.2d 181, 2 Cal. Rptr. 2d 79 (1991).

85. 54 Cal. 3d 868, 820 P.2d 181, 2 Cal. Rptr. 2d 79 (1991).

for mental distress not accompanied by physical injury.[86] The theory underlying the physical injury requirement was that evidence of physical injury guaranteed the sincerity of a plaintiff's claim.[87] However, while physical injury was still required for intentional infliction of emotional distress, many jurisdictions did not require that a plaintiff suffer physical injury in order to recover for negligent mishandling of a corpse because the special circumstances guaranteed the legitimacy of the claim.[88] Further, the California Supreme Court eventually abolished the physical injury requirement for intentional infliction of emotional distress as well.[89]

2. Standing to sue

Determining who may properly sue was the major issue California courts faced before *Christensen* in actions involving tortious mishandling of remains.[90] In deciding who may sue, courts have looked to statutory guidelines[91] and traditional negligence concepts of duty and foreseeability.[92]

a. health and safety code section 7100

California Health and Safety Code section 7100 establishes the boundaries of the right and obligation to dispose of family members' re-

86. *See Allen*, 104 Cal. App. 3d at 213, 163 Cal. Rptr. at 449; *see also* Peter H. Mixon, *Application of Transferred Intent to Cases of Intentional Infliction of Emotional Distress*, 15 PAC. L.J. 147, 150-52 (1983) (noting early acceptance of physical injury requirement in actions for tortious infliction of emotional distress).

87. *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. k (1965); KEETON ET AL., *supra* note 42, § 12, at 59-60.

88. *Allen*, 104 Cal. App. 3d at 213, 163 Cal. Rptr. at 449.

89. *See* State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 338, 240 P.2d 282, 286 (1952).

90. *See, e.g.*, Quesada v. Oak Hill Improvement Co., 213 Cal. App. 3d 596, 261 Cal. Rptr. 769 (1989); Cohen v. Groman Mortuary, 231 Cal. App. 2d 1, 41 Cal. Rptr. 481 (1964), *disapproved by* Christensen v. Superior Court, 54 Cal. 3d 868, 820 P.2d 181, 2 Cal. Rptr. 2d 79 (1991).

91. CAL. HEALTH & SAFETY CODE § 7100; *see infra* part II.C.2.a.

92. *See Quesada*, 213 Cal. App. 3d at 603, 261 Cal. Rptr. at 773.

mains.[93] California courts, including the trial court in *Christensen*,[94] have occasionally relied on section 7100 to limit who may bring an action for emotional distress engendered by the tortious mishandling of remains.[95] However, while the language of section 7100 may provide some guidance on the question of which family members are owed a duty of care by the funeral director or mortuary, the statute is hardly dispositive on the issue.[96]

b. duty of care

Because nearly all cases prior to *Christensen* dealt with the question of which plaintiffs had standing to sue for a funeral director or mortuary's *negligence*, as opposed to intentional conduct,[97] courts resolved the standing question by applying traditional tort principles of duty of care and foreseeability. When the only plaintiffs are parties to the funeral contract or holders of the Health and Safety Code section 7100 right to control disposition, California courts have consistently found that the funeral director or mortuary owed the plaintiffs a duty of care.[98] To arrive

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93. California Health & Safety Code § 7100 provides, in relevant part:

> The right to control the disposition of the remains of a deceased person, unless other directions have been given by the decedent, vests in, and the duty of interment and the liability for the reasonable cost of interment of such remains devolves upon the following in the order named:
>
> (a) The surviving spouse.
> (b) The surviving child or children of the decedent.
> (c) The surviving parent or parents of the decedent.
> (d) The person or persons respectively in the next degrees of kindred in the order named by the laws of California as entitled to succeed to the estate of the decedent.
> (e) The public administrator when the deceased has sufficient assets.

CAL. HEALTH & SAFETY CODE § 7100.

94. 54 Cal. 3d at 880, 820 P.2d at 186, 2 Cal. Rptr. 2d at 84.

95. *See* Sinai Temple v. Kaplan, 54 Cal. App. 3d 1103, 1112, 127 Cal. Rptr. 80, 86 (1976); Cohen v. Groman Mortuary, 231 Cal. App. 2d 1, 5, 41 Cal. Rptr. 481, 484 (1964), *disapproved by* Christensen v. Superior Court, 54 Cal. 3d 868, 820 P.2d 181, 2 Cal. Rptr. 2d 79 (1991).

96. Courts have applied § 7100 to resolve disputes over the primary responsibility to dispose of a decedent's remains, and to determine who will be liable for the costs of interment. *See Sinai Temple*, 54 Cal. App. 3d at 1112, 127 Cal. Rptr. at 86; *Cohen*, 231 Cal. App. 2d at 5, 41 Cal. Rptr. at 484. Occasionally, however, courts have used § 7100 to extend rights even further. *See, e.g.*, Ross v. Forest Lawn Memorial Park, 153 Cal. App. 3d 988, 203 Cal. Rptr. 468 (1984) (holding that as between mother and friends of teenaged decedent, mother could sue for interference with right to private funeral).

97. *But see* Quesada v. Oak Hill Improvement Co., 213 Cal. App. 3d 596, 599-600, 261 Cal. Rptr. 769, 770-71 (1989) (addressing question of whether plaintiff could sue for being ridiculed when she protested that mortuary had delivered the wrong body for burial).

98. *See, e.g.*, Draper Mortuary v. Superior Court, 135 Cal. App. 3d 533, 185 Cal. Rptr. 396 (1982); Allen v. Jones, 104 Cal. App. 3d 207, 163 Cal. Rptr. 445 (1980).

at this conclusion, courts have reasoned that, when the parties enter into the funeral contract, a "special relationship" is thereby created.[99]

The question of duty is more difficult in cases in which the plaintiffs are neither parties to the contract nor statutory rightholders, but instead are family members or close friends of the decedent. Prior to the California Supreme Court's decision in *Christensen*, the California Court of Appeal, in *Cohen v. Groman Mortuary*[100] and *Quesada v. Oak Hill Improvement Co.*,[101] had arrived at conflicting conclusions on the issue of whether family members who were not parties to the funeral contract could sue for negligent mishandling of remains.

In *Cohen*, the brother, sister and other relatives of the decedent brought suit against a mortuary that had substituted the body of another for that of their sister at her funeral.[102] The plaintiffs claimed that they suffered shock and mental anguish.[103] The trial court granted the defendant mortuary's motion for judgment on the pleadings as to all plaintiffs except the widower and another brother who had contracted to pay the funeral expenses.[104] The brother and sister appealed.[105] The court of appeal affirmed, holding that, because the plaintiffs had not contracted with the defendant, it could find "no legally protected right in connection with the disposition of the body of . . . [the plaintiffs'] deceased sister, nor any corresponding duty to them on the part of defendants."[106]

The court of appeal reached the opposite conclusion in *Quesada*, a case in which a funeral home delivered the wrong body to the cemetery for burial.[107] When the family members protested, the mortuary employees ridiculed them and continued the burial ceremony.[108] The sister and niece of the decedent thereafter sued for emotional distress.[109] The dece-

99. *Draper*, 135 Cal. App. 3d at 537-38, 185 Cal. Rptr. at 398-99. In his dissenting opinion in *Draper*, however, Judge McDaniel argued that the special relationship notion should be rejected in favor of a bystander theory consistent with Vanguard Ins. Co. v. Schabatka, 46 Cal. App. 3d 887, 120 Cal. Rptr. 614 (1975), which held that no duty of care was owed to a husband who was not present at the scene of the accident that caused his wife's death. *Draper*, 135 Cal. App. 3d at 538-42, 185 Cal. Rptr. at 399-401 (McDaniel, J., dissenting).

100. 231 Cal. App. 2d 1, 41 Cal. Rptr. 481 (1964), *disapproved by* Christensen v. Superior Court, 54 Cal. 3d 868, 820 P.2d 181, 2 Cal. Rptr. 2d 79 (1991).

101. 213 Cal. App. 3d 596, 261 Cal. Rptr. 769 (1989).

102. 231 Cal. App. 2d at 3, 41 Cal. Rptr. at 482-83.

103. *Id.*

104. *Id.*, 41 Cal. Rptr. at 483.

105. *Id.*, 41 Cal. Rptr. at 482.

106. *Id.* at 5, 41 Cal. Rptr. at 484.

107. 213 Cal. App. 3d at 599-600, 261 Cal. Rptr. at 770.

108. *Id.* at 600, 261 Cal. Rptr. at 771.

109. *Id.* at 598, 261 Cal. Rptr. at 769.

dent's widow had already reached a settlement with the defendants.[110] The trial court held that absent a contractual relationship or a statutory duty, the funeral home owed the sister and niece no duty of care.[111]

The court of appeal in *Quesada* reversed, holding that the funeral home owed a duty of care to the decedent's sister and niece.[112] The court first noted that the restrictive analysis applied in *Cohen* was no longer applicable.[113] In determining that a duty existed, the court instead relied upon a foreseeability analysis.[114] The court determined that the nature of the funeral ritual made it not only foreseeable, but inevitable, that close friends and family members would be present.[115]

The *Quesada* holding might seem to establish that a mortuary owes a duty of care to the relatives and close friends of a decedent, the breach of which may give rise to liability for emotional distress damages. However, given the very specific facts of *Quesada*, in which the plaintiffs *contemporaneously witnessed* the defendants' conduct, the case should not compel a similar conclusion if the plaintiffs did not witness the mishandling, but learned of it years later through media reports.

Before the California Supreme Court's decision in *Christensen*, therefore, it was an open question whether a duty of care would extend to all foreseeable plaintiffs, even those who did not witness the defendants' conduct. A more compelling question before the supreme court was what class of plaintiffs could state a cause of action against a mortuary or crematorium for intentional mishandling of remains resulting in emotional distress.

III. *CHRISTENSEN V. SUPERIOR COURT*: STATEMENT OF THE CASE

A. Factual Background

Various relatives and close friends of several thousand decedents brought a class-action suit against numerous mortuaries, crematoria and the Carolina Biological Supply Company, alleging mistreatment of their decedents' remains.[116] The plaintiffs specifically alleged that the "mortuary defendants" entered into contracts to provide funeral-related services and to cremate the remains of the plaintiffs' decedents "with dignity and

110. *Id.* at 599 n.2, 261 Cal. Rptr. at 770 n.2.
111. *Id.* at 598-99, 261 Cal. Rptr. at 769-70.
112. *Id.* at 599, 261 Cal. Rptr. at 770.
113. *Id.* at 605, 261 Cal. Rptr. at 774.
114. *Id.* at 604, 261 Cal. Rptr. at 773.
115. *Id.* at 606, 261 Cal. Rptr. at 775.
116. Christensen v. Superior Court, 54 Cal. 3d 868, 876-80, 820 P.2d 181, 183-86, 2 Cal. Rptr. 2d 79, 81-84 (1991).

respect."[117] The mortuary defendants[118] allegedly contracted with the "crematory defendants,"[119] which represented that they would perform cremations in a dignified and respectful manner. The crematoria furnished the mortuaries with forms with which to obtain consent to cremation from the decedents' next of kin.[120]

The plaintiffs claimed that the crematory defendants cremated their decedents' remains in a pottery kiln, in a disrespectful manner, with nonhuman residue.[121] They allegedly cremated as many as ten to fifteen bodies together.[122] The crematoria also took and sold gold and other metals from the remains, and placed the cremated remains in urns or other containers without preserving their identity.[123] Finally, the crematoria harvested organs and body parts from the decedents and sold them for profit.[124]

The plaintiffs alleged that another defendant, Carolina Biological Supply Company, requested and purchased human organs and body parts from the crematory defendants.[125] The plaintiffs claimed that Carolina did so under circumstances in which it knew or should have known that desecration of human remains would necessarily occur.[126] The plaintiffs alleged that, on discovering the conduct of the mortuaries and crematoria through media reports,[127] they suffered and would continue to suffer extreme emotional distress.[128]

B. Procedural Posture

The *Christensen* complaint defined the plaintiff class as consisting of surviving spouses, relatives and designated representatives of the decedents.[129] The trial court requested the parties brief and argue the issue of

117. *Id.* at 877, 820 P.2d at 185, 2 Cal. Rptr. 2d at 83.

118. The "mortuary defendants" contracted directly with the decedents' representatives to perform funeral services. *Id.*

119. The "crematory defendants" contracted only with the mortuaries, and not with the decedents' representatives. *Id.*

120. *Id.* at 877-78, 820 P.2d at 185, 2 Cal. Rptr. 2d at 83.

121. *Id.* at 879, 820 P.2d at 186, 2 Cal. Rptr. 2d at 84.

122. *Id.*, 820 P.2d at 185, 2 Cal. Rptr. 2d at 83.

123. *Id.*

124. *Id.*, 820 P.2d at 185-86, 2 Cal. Rptr. 2d at 83-84.

125. *Id.* at 878, 820 P.2d at 185, 2 Cal. Rptr. 2d at 83.

126. *Id.*

127. *Id.*

128. *Id.* at 879, 820 P.2d at 186, 2 Cal. Rptr. 2d at 84 ("On discovering defendants' misconduct plaintiffs suffered and will continue to suffer 'physical injury, shock, outrage, extreme anxiety, worry, mortification, embarrassment, humiliation, distress, grief, and sorrow.' ").

129. *Id.* at 876, 820 P.2d at 184, 2 Cal. Rptr. 2d at 82.

which plaintiffs could actually sue for the conduct alleged.[130] The court ruled that only those plaintiffs who were entitled by statute[131] to control the disposition of the decedents' remains as of the date of the decedents' death, or who were parties to the funeral contract, could sue.[132]

The plaintiffs thereafter petitioned for a writ of mandate, seeking modification of the pretrial order to include close family members and friends of the decedents in the class of plaintiffs.[133] The court of appeal held that close family members could state a cause of action for negligent mishandling of a corpse, and that if the mishandling was intentional, all family members and close friends of the decedent could sue.[134]

The California Supreme Court modified the judgment of the court of appeal. The court held that standing to sue for emotional distress engendered by the defendants' negligence was limited to those close family members who were aware that the services in question were being performed, and on whose behalf the services were rendered.[135] With respect to the issue of who could sue for intentional mishandling of remains, the supreme court held that the court of appeal erred in concluding that any plaintiffs had standing to sue.[136] It reasoned that the court of appeal's conclusion was based on the mistaken reasoning that the crematory and mortuary defendants' conduct established the elements of intentional infliction of emotional distress.[137]

C. *Reasoning of the Court*

Justice Baxter wrote the California Supreme Court's majority opinion, and separately addressed two issues. First, he discussed which plaintiffs had standing to sue for negligent mishandling of their decedents' remains.[138] Second, he addressed which plaintiffs could assert a cause of action for intentional mishandling of remains.[139]

130. *Id.*, 820 P.2d at 183, 2 Cal. Rptr. 2d at 81.
131. CAL. HEALTH & SAFETY CODE § 7100. See *supra* part II.C.2.a for a discussion of § 7100.
132. *Christensen*, 54 Cal. 3d at 880, 820 P.2d at 186, 2 Cal. Rptr. 2d at 84.
133. *Id.* at 876, 820 P.2d at 184, 2 Cal. Rptr. 2d at 82.
134. *Id.* at 882, 820 P.2d at 187, 2 Cal. Rptr. 2d at 85.
135. *Id.* at 900, 820 P.2d at 200, 2 Cal. Rptr. 2d at 98.
136. *Id.* at 902, 820 P.2d at 201, 2 Cal. Rptr. 2d at 99.
137. *Id.* at 902-03, 820 P.2d at 201, 2 Cal. Rptr. 2d at 99.
138. *Id.* at 883-902, 820 P.2d at 188-201, 2 Cal. Rptr. 2d at 86-99.
139. *Id.* at 902-06, 820 P.2d at 201-04, 2 Cal. Rptr. 2d at 99-102.

1. Negligence

a. the duty question

The court first addressed the issue of whether it was bound by its prior decisions in *Dillon v. Legg*[140] and *Thing v. La Chusa*.[141] These decisions limit the standing of plaintiffs who may sue for negligent infliction of emotional distress caused by injury to a third party to only those plaintiffs who were "percipient witnesses" of the conduct in question.[142]

In *Dillon*, a mother was allowed to state a cause of action for negligent infliction of emotional distress after witnessing her daughter being struck by a negligently driven automobile.[143] In *Thing*, a mother brought suit for emotional distress when her child was struck by the defendant's automobile.[144] In *Thing*, the California Supreme Court held that the victim's mother could not recover for emotional distress because she was not present at the scene of the accident, did not observe the defendant's conduct, and was not aware that her son was being injured.[145]

The court distinguished the facts in *Christensen* from those in the line of cases commencing with *Dillon* and culminating in *Thing*. The court first noted that the *Dillon-Thing* line of cases all involved defendants who had no preexisting relationship with the plaintiffs.[146] As such, the defendants had not assumed a duty of care beyond that owed to the general public.[147] The court further distinguished *Christensen* from *Dillon* and *Thing* by recognizing that the peculiar nature of the funeral industry made it an exceptional case in which a family member could observe the type of mishandling of remains alleged in the plaintiffs' complaint.[148]

The court determined that it did not need to rely on the type of "bystander-witness" theory applied in *Dillon* and *Thing*, because it found that the mortuaries and crematoria owed an affirmative duty to the close family members of the decedents arising out of their special relationship.[149] Citing the court of appeal decision in *Draper Mortuary v. Supe-*

140. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
141. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).
142. *Christensen*, 54 Cal. 3d at 883-84, 820 P.2d at 188-89, 2 Cal. Rptr. 2d at 86-87.
143. 68 Cal. 2d at 730, 441 P.2d at 914, 69 Cal. Rptr. at 74.
144. 48 Cal. 3d at 647-48, 771 P.2d at 815, 257 Cal. Rptr. at 866.
145. *Id.* at 669, 771 P.2d at 830, 257 Cal. Rptr. at 881.
146. *Christensen*, 54 Cal. 3d at 884, 820 P.2d at 189, 2 Cal. Rptr. 2d at 87.
147. *Id.*
148. *Id.* at 887, 820 P.2d at 190-91, 2 Cal. Rptr. 2d at 88-89.
149. *Id.*

rior Court,[150] the supreme court concluded that once a mortuary accepts the care, custody and control of a decedent's remains it owes a duty of care to the members of the decedent's family.[151]

Next the court addressed the issue of whether the Carolina Biological Supply Company could be liable to the plaintiffs, even though it did not contract with the plaintiffs for the disposition of decedents' remains, and therefore had no special relationship with the plaintiffs.[152] While the court acknowledged that Carolina did not assume any duty to perform funeral-related services,[153] it found that Carolina could reasonably foresee that its conduct of offering to purchase substantial quantities of human organs and body parts from the crematory defendants would encourage the crematoria to obtain body parts in a manner that could cause emotional distress to those who held the statutory right[154] to control the disposition of their decedents' remains.[155] The court therefore held that only the statutory right holders had standing to seek damages from Carolina Biological Supply Company.[156]

b. policy considerations

The court then discussed in detail the various policy considerations that weigh in favor of recognizing that the mortuaries and crematoria owe a duty to the decedents' close family members.

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150. 135 Cal. App. 3d 533, 185 Cal. Rptr. 396 (1982). In *Draper*, the defendant mortuary failed to lock the chapel where the decedent's remains were kept. *Id.* at 535, 185 Cal. Rptr. at 397. A third party entered the chapel, removed the decedent's clothing, and sexually assaulted the decedent. *Id.* The court held that the decedent's family members could state a cause of action for negligent infliction of emotional distress. *Id.* at 538, 185 Cal. Rptr. at 399.

151. *Christensen*, 54 Cal. 3d at 887-88, 820 P.2d at 191, 2 Cal. Rptr. 2d at 89. The California Supreme Court also noted that the court of appeal reached a similar conclusion in Quesada v. Oak Hill Improvement Co., 213 Cal. App. 3d 596, 261 Cal. Rptr. 769 (1989) (holding that decedent's sister could recover for emotional distress suffered as result of mortuary's negligence in handling corpse). *Christensen*, 54 Cal. 3d at 888, 820 P.2d at 191-92, 2 Cal. Rptr. 2d at 89-91. The supreme court further acknowledged that two courts of appeal decisions, Cohen v. Groman Mortuary, 231 Cal. App. 2d 1, 41 Cal. Rptr. 481 (1964), *disapproved by* Christensen v. Superior Court, 54 Cal. 3d 868, 820 P.2d 181, 2 Cal. Rptr. 2d 79 (1991), and Sinai Temple v. Kaplan, 54 Cal. App. 3d 1103, 127 Cal. Rptr. 80 (1976), appeared to conflict with its finding of a duty owed by the mortuaries and crematoria. *Christensen*, at 889-90, 820 P.2d at 192-93, 2 Cal. Rptr. 2d at 90-91. However, the court specifically disapproved of the *Cohen* decision. *Id.* at 889, 820 P.2d at 193, 2 Cal. Rptr. 2d at 91. Further, it distinguished *Sinai Temple* as not involving the mishandling of a corpse. *Id.* at 890, 820 P.2d at 193, 2 Cal. Rptr. 2d at 91.

152. *Christensen*, 54 Cal. 3d at 891, 820 P.2d at 194, 2 Cal. Rptr. 2d at 92.

153. *Id.*

154. CAL. HEALTH & SAFETY CODE § 7100; *see supra* part II.C.2.a.

155. *Christensen*, 54 Cal. 3d at 894, 820 P.2d at 196, 2 Cal. Rptr. 2d at 94.

156. *Id.*

i. foreseeability and certainty of injury

The court began by addressing the issue of foreseeability and certainty of injury in funeral-related services.[157] The court noted that, in all cases involving the liability of a mortuary for negligently conducting funeral-related services, the relatives permitted to recover were aware that the services were being performed, and were persons for whose benefit the defendant had undertaken to provide the services.[158] The court reasoned that only those relatives were foreseeable victims of the defendants' conduct, and concluded that the class of plaintiffs seeking recovery for negligence should be limited to close relatives who were aware, and for whose benefit the defendants agreed to perform funeral-related services.[159]

ii. moral blame

The court next addressed the mortuary and crematory defendants' arguments that the policy of the state recognizes only the rights of parties to the mortuary contract and the holders of the statutory right to control the disposition of their decedents' remains.[160] Citing several California statutes,[161] the court concluded that imposing civil liability for mishandling remains is consistent with the degree of moral blame attached to that sort of conduct, with the goal of deterring future harm of a similar nature.[162]

iii. burden and consequences to the community

The supreme court then addressed the defendants' argument that imposing liability on the mortuary and crematory defendants would result in decreased availability or increased cost of funeral-related services.[163] The court disagreed. It first noted that its limitation of the plaintiffs' class to only those close relatives of the decedents who were aware of the funeral-related services, and for whom the services were

157. *Id.*

158. *Id.* at 895, 820 P.2d at 197, 2 Cal. Rptr. 2d at 95.

159. *Id.* at 896, 820 P.2d at 197, 2 Cal. Rptr. 2d at 95.

160. *Id.*

161. CAL. HEALTH & SAFETY CODE § 7100 (setting forth who has right to control disposition of decedent's remains); *id.* § 7152 (West 1970 & Supp. 1993) (limiting anatomical gifts if decedent was member of religious group); *id.* § 7050.5 (West 1970 & Supp. 1993) (mandating proper disposition of Native American remains); *id.* § 8115 (West 1970 & Supp. 1993) (permitting cities and counties to establish standards governing interment). *Christensen*, 54 Cal. 3d at 896-97, 820 P.2d at 197-98, 2 Cal. Rptr. 2d at 95-96.

162. *Christensen*, 54 Cal. 3d at 898, 820 P.2d at 198, 2 Cal. Rptr. 2d at 96.

163. *Id.*

being performed, reduced the defendants' potential liability.[164] The court then concluded that, although insurance may not be available to the defendants because their conduct was intentional, the costs of avoiding future misconduct was minimal.[165]

iv. disproportionate culpability

The supreme court next considered the defendants' argument that if the "bystander-witness" limitation articulated in the *Dillon-Thing* line of cases was not applied, the defendants would suffer liability that was disproportionate to their culpability.[166] In response, the court reiterated its reasoning that requiring the plaintiffs to be percipient witnesses of the defendants' conduct is unrealistic in the context of torts involving funeral-related services.[167] The court also reiterated that the class of potential plaintiffs who may sue for negligent mishandling of their decedents' remains is appropriately limited to only those close relatives who were aware of the nature of the funeral-related services that were to be performed on their behalf.[168]

v. causation

Finally, the court considered the mortuary and crematory defendants' argument that the plaintiffs could not establish a causal connection between their emotional distress and the media reports of the defendants' alleged conduct.[169] The court first stated that media reports of a general pattern of conduct were not sufficient, in and of themselves, to establish that the defendants' alleged misconduct included mishandling of the remains of each plaintiff's decedent.[170]

The court then concluded that the question of whether each plaintiff could establish that he or she knew that his or her decedent was a victim of the defendants' misconduct was not relevant to the court's determination of which plaintiffs had standing.[171] For standing purposes, the only question was whether the plaintiffs' complaint sufficiently alleged direct

164. *Id.*
165. *Id.*
166. *Id.* at 899, 820 P.2d at 199, 2 Cal. Rptr. 2d at 97.
167. *Id.*
168. *Id.* at 900, 820 P.2d at 200, 2 Cal. Rptr. 2d at 98.
169. *Id.*
170. *Id.* at 901, 820 P.2d at 200, 2 Cal. Rptr. 2d at 98.
171. *Id.* at 902, 820 P.2d at 201, 2 Cal. Rptr. 2d at 99.

causation between the defendants' conduct and the plaintiffs' emotional distress.[172] The court concluded that it did.[173]

2. Intentional tort

The court of appeal in *Christensen* had reached the conclusion that, because the mishandling of the decedents' remains was intentional and outrageous, all family members and close friends of the decedents could recover for emotional distress caused by the defendants' conduct.[174] The California Supreme Court reached the opposite conclusion and agreed with the trial court that, because no plaintiffs alleged they were *present* when the misconduct occurred, and the defendants had not acted with *intent* to cause emotional distress toward the plaintiffs, they did not have standing to sue for intentional infliction of emotional distress arising from the mishandling of their decedents' remains.[175]

The court first examined the elements necessary to establish a cause of action for intentional infliction of emotional distress.[176] Noting the requirement of intentional or reckless, outrageous conduct, the court stated that the mere fact that the conduct was both intentional and outrageous was insufficient.[177] Rather, the court concluded that the conduct must also be specifically directed toward the plaintiff.[178]

The court acknowledged that there have been instances of recovery for mishandling of remains on a theory of intentional infliction of emotional distress.[179] However, it concluded that, to justify recovery on this

172. *Id.* at 901, 820 P.2d at 201, 2 Cal. Rptr. 2d at 99.

173. *Id.* The court also briefly addressed the argument that permitting recovery under the facts of *Christensen* would create tort liability for the emotional impact of reports broadcast in the evening news. *Id.* at 901-02, 820 P.2d at 201, 2 Cal. Rptr. 2d at 99. The court rejected this argument, noting that "[a] plaintiff who is unable to establish that he or she suffered severe emotional distress, and that the emotional distress was caused by a well-founded substantial certainty that his or her decedent's remains were among those reportedly mistreated, may not recover damages." *Id.* at 902, 820 P.2d at 201, 2 Cal. Rptr. 2d at 99.

174. *Id.* at 902-03, 820 P.2d at 201, 2 Cal. Rptr. 2d at 99.

175. *Id.* at 906, 820 P.2d at 204, 2 Cal. Rptr. 2d at 102.

176. The court listed the elements as:

> " '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual or proximate causation of the emotional distress by the defendant's outrageous conduct. . . .' Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community."

Id. at 903, 820 P.2d at 202, 2 Cal. Rptr. 2d at 100 (quoting Davidson v. City of Westminster, 32 Cal. 3d 197, 209, 649 P.2d 894, 901, 185 Cal. Rptr. 252, 259 (1982)).

177. *Id.*

178. *Id.*

179. *Id.* at 905, 820 P.2d at 203, 2 Cal. Rptr. 2d at 101.

theory, the conduct must be directed at the plaintiff. Alternatively, if reckless disregard is the basis of recovery, the plaintiff must be present at the time of the conduct and the defendant must know of the plaintiff's presence.[180]

The court concluded that, because none of the plaintiffs had alleged that the mortuary or crematory defendants' conduct was directed primarily at them, was calculated to cause them severe emotional distress, or was done with the knowledge of their presence, none of the plaintiffs had standing to sue for intentional infliction of emotional distress associated with the mishandling of their decedents' remains.[181]

3. Justice Mosk's concurrence and dissent

Justice Mosk agreed with the majority on the issue of which plaintiffs may properly sue for negligent infliction of emotional distress arising out of the mishandling of their decedents' remains.[182] However, he dissented on the issue of which plaintiffs may sue for intentional infliction of emotional distress.[183]

Justice Mosk found it "paradoxical" that the majority held the defendants liable for negligence but not for intentional tort when their conduct was so reprehensible.[184] He asserted that the intent element in an intentional infliction of emotional distress cause of action may be established in three ways,[185] *including* reckless behavior leading to emotional

180. *Id.* at 906, 820 P.2d at 204, 2 Cal. Rptr. 2d at 102. The court stated: "Where reckless disregard of the plaintiff's interests is the theory of recovery, the presence of the plaintiff at the time the outrageous conduct occurs is recognized as the element establishing a higher degree of culpability . . . ." *Id.*

181. *Id.* In its conclusion, the court briefly considered an ambiguity raised by the court of appeal's decision that Health and Safety Code § 7100 devolves. *Id.* The court clarified that, while the statutory right to control the disposition of a decedent's remains does devolve, the class of plaintiffs who may sue for negligent mishandling of their decedents' remains is limited to those close family members who were aware of the funeral-related services. *Id.*

182. *Id.* at 907, 820 P.2d at 204, 2 Cal. Rptr. 2d at 102 (Mosk, J., concurring in part, dissenting in part).

183. *Id.* (Mosk, J., concurring in part, dissenting in part).

184. *Id.* (Mosk, J., concurring in part, dissenting in part). Justice Mosk stated:

> The majority assert [*sic*] that to require defendants to perform the acts in plaintiffs' presence ensures the high degree of culpability necessary to justify the greater damages allowed in an IIED [intentional infliction of emotional distress] case. In my view, if the acts alleged are found to be true, defendants are highly culpable regardless of whether plaintiffs witnessed the mutilation.

Id., 820 P.2d at 204-05, 2 Cal. Rptr. 2d at 102-03 (Mosk, J., concurring in part, dissenting in part).

185. "IIED may be shown in three ways: a subjective intention to cause emotional distress, a substantial certainty that such distress could result, or reckless behavior leading to emotional distress." *Id.*, 820 P.2d at 205, 2 Cal. Rptr. 2d at 103 (Mosk, J., concurring in part, dissenting in part).

distress. While the mortuary and crematory defendants may not have had a subjective intent to inflict emotional distress on the plaintiffs, they were reckless in that they must have known that their conduct would potentially cause the decedents' family members severe emotional distress.[186]

Justice Mosk further noted that the majority placed unjustified limits on the tort of intentional infliction of emotional distress.[187] He stated that the public policy limitations imposed on liability for intentional conduct are not the same as those imposed on liability for negligence.[188] He emphasized that society seeks to punish the intentional wrongdoer, not the negligent individual.[189] Finally, he expressed that he would not limit the class of potential plaintiffs who may sue for intentional mishandling of remains to family members, because a close friend of the decedent could conceivably establish that he or she suffered severe emotional distress as a result of the defendants' conduct.[190]

4. Justice Kennard's concurrence and dissent

Justice Kennard agreed with the majority that the complaint did not state a cause of action for intentional infliction of emotional distress.[191] She further agreed that, where the plaintiffs held the statutory[192] or contractual right to control the disposition of their decedents' remains, those plaintiffs need not have witnessed the alleged mishandling of remains in order to state a cause of action for negligence.[193]

Justice Kennard disagreed, however, with the majority on the issue of who, beyond those who held a statutory or contractual right, may sue for negligent mishandling of remains.[194] She believed that the majority disregarded the court's prior decisions limiting the scope of liability for intangible injuries.[195] In Justice Kennard's view, the mere fact that it

186. *Id.* at 907-08, 820 P.2d at 205, 2 Cal. Rptr. 2d at 103 (Mosk, J., concurring in part, dissenting in part).

187. *Id.* at 908, 820 P.2d at 205, 2 Cal. Rptr. 2d at 103 (Mosk, J., concurring in part, dissenting in part).

188. *Id.* at 909, 820 P.2d at 206, 2 Cal. Rptr. 2d at 104 (Mosk, J., concurring in part, dissenting in part).

189. *Id.* (Mosk, J., concurring in part, dissenting in part).

190. *Id.* (Mosk, J., concurring in part, dissenting in part).

191. *Id.* at 910, 820 P.2d at 206, 2 Cal. Rptr. 2d at 104 (Kennard, J., concurring in part, dissenting in part).

192. CAL. HEALTH & SAFETY CODE § 7100; *see supra* part II.C.2.a.

193. *Christensen*, 54 Cal. 3d at 910, 820 P.2d at 206, 2 Cal. Rptr. 2d at 104 (Kennard, J., concurring in part, dissenting in part).

194. *Id.* (Kennard, J., concurring in part, dissenting in part).

195. *Id.* (Kennard, J., concurring in part, dissenting in part).

was foreseeable that the defendants' conduct would cause the plaintiffs to suffer emotional distress was insufficient.[196] She stated that she would have limited the class of plaintiffs who could state a cause of action for negligence without witnessing the defendants' conduct to the statutory rightholders and contracting parties; all others would be required to prove that they witnessed the conduct in question.[197]

Finally, Justice Kennard took issue with the majority's conclusion that a plaintiff is required to show "by a well-founded substantial certainty" that their decedents' remains were among those mishandled.[198] Viewing this as inconsistent with the finding of a duty extending to close family members, Justice Kennard declared that a plaintiff should only be required to prove that the defendants engaged in a pattern or practice of mistreating remains.[199] The burden should then shift to the mortuary or crematory defendants to prove that the decedents' remains were not mishandled.[200]

IV. ANALYSIS

By its holding in *Christensen*, the California Supreme Court expanded liability for negligent conduct,[201] but drastically restricted liability for the same acts committed intentionally.[202] Even the burden of proof the court placed on potential negligence plaintiffs will function to preclude many from recovery.[203] As a consequence of the court's holding, numerous plaintiffs' emotional distress claims arising out of the mortuary and crematory defendants' conduct will go unredressed.[204] What is perhaps worse, those defendants who were entrusted with the bodies of decedents, and who thereafter committed acts of mishandling—including ripping out and selling human organs, commingling ashes, and "unceremoniously" disposing of commingled ashes—will not be held accountable to the plaintiffs for their clearly intentional acts.

196. *Id.* at 912, 820 P.2d at 208, 2 Cal. Rptr. 2d at 106 (Kennard, J., concurring in part, dissenting in part).

197. *Id.* at 914, 820 P.2d at 209, 2 Cal. Rptr. 2d at 107 (Kennard, J., concurring in part, dissenting in part).

198. *Id.* at 919, 820 P.2d at 213, 2 Cal. Rptr. 2d at 111 (Kennard, J., concurring in part, dissenting in part).

199. *Id.* at 919-20, 820 P.2d at 213, 2 Cal. Rptr. 2d at 111 (Kennard, J., concurring in part, dissenting in part).

200. *Id.* (Kennard, J., concurring in part, dissenting in part).

201. *Id.* at 883-902, 820 P.2d at 188-201, 2 Cal. Rptr. 2d at 86-99.

202. *Id.* at 902-06, 820 P.2d at 201-04, 2 Cal. Rptr. 2d at 99-102.

203. *Id.* at 902, 820 P.2d at 201, 2 Cal. Rptr. 2d at 99.

204. *Id.* at 919, 820 P.2d at 213, 2 Cal. Rptr. 2d at 111 (Kennard, J., concurring in part, dissenting in part).

A. *The Court's Treatment of Negligent Mishandling of Remains*

1. Rejecting the bystander-witness theory

The California Supreme Court was correct to reject an application of the "bystander-witness" theory to negligence in the context of funeral-related services. The bystander-witness theory, which was first articulated in *Dillon v. Legg*,[205] and modified in *Thing v. La Chusa*,[206] reflects a public policy exception to the general rule that accords liability to those who cause injury to another by failing to exercise ordinary care.[207] The theory limits the right of a bystander, who was not threatened with physical injury, to recover only for emotional distress suffered as a result of *witnessing* negligent conduct causing injury to a third person.[208] While the theory may have some proper application in a funeral scenario in which the plaintiff actually is a bystander,[209] its application is misplaced where it is improbable that the plaintiffs would witness the conduct.[210]

Where the conduct of a mortuary or crematorium occurs after the funeral service, behind closed doors, there is no possibility that the plaintiffs will be percipient witnesses.[211] As the *Christensen* court correctly noted, the responsibility assumed by the mortuary defendants includes the obligation to prepare the decedents' remains for cremation.[212] This responsibility is delegated to the mortuary because the decedents' family

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205. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

206. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989).

207. The California Civil Code codifies the standard for ordinary care. Section 1714(a) provides, in relevant part:

> Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.

CAL. CIV. CODE § 1714(a) (West 1985 & Supp. 1993).

208. *Christensen*, 54 Cal. 3d at 885, 820 P.2d at 189-90, 2 Cal. Rptr. 2d at 87-88.

209. For example, in Quesada v. Oak Hill Improvement Co., 213 Cal. App. 3d 596, 261 Cal. Rptr. 769 (1989), the plaintiffs were bystanders, and witnessed the results of the defendants' conduct. The defendants delivered the wrong body to the cemetery and ridiculed the plaintiffs when they protested. *Id.* at 599-600, 261 Cal. Rptr. at 770-71. Similarly, in Cohen v. Groman Mortuary, 231 Cal. App. 2d 1, 41 Cal. Rptr. 481 (1964), *disapproved by* Christensen v. Superior Court, 54 Cal. 3d 868, 820 P.2d 181, 2 Cal. Rptr. 2d 79 (1991), the plaintiffs viewed the wrong body at the funeral service. *Id.* at 3, 41 Cal. Rptr. at 483.

210. *See* Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc., 48 Cal. 3d 583, 770 P.2d 278, 257 Cal. Rptr. 98 (1989). "[T]he *Dillon* guidelines . . . [serve] only to define the scope of duty where plaintiff sought to recover damages suffered as the percipient witness to another's injury." *Id.* at 589 n.4, 770 P.2d at 281 n.4, 257 Cal. Rptr. at 101 n.4.

211. *See* Gail D. Cox, *Cremation Litigation: Lurid, but Often Lucrative*, NAT'L L.J., Sept. 21, 1987, at 14, 14 ("The cremation procedure is one that society has been happy to keep behind closed doors.").

212. *Christensen*, 54 Cal. 3d at 890-91, 820 P.2d at 193, 2 Cal. Rptr. 2d at 91.

members do not want to undertake or witness this preparation.[213] Applying the limits created by the bystander-witness approach to mishandling of remains in situations in which no plaintiff is likely to witness the conduct would, in effect, immunize mortuaries and crematoria from emotional distress liability.[214]

2. Recognition of a duty of care

The court in *Christensen* also correctly observed that the bystander-witness theory developed out of cases in which the defendants had no preexisting relationship with the plaintiffs, and therefore had not assumed a duty of care beyond that owed to the public in general.[215] As those cases are factually distinguishable from *Christensen*, a different negligence analysis should apply.

The *Christensen* court properly reasoned that when a mortuary agrees to provide funeral services and burial or cremation of a decedent, a special relationship is created between the mortuary and the close relatives of the decedent.[216] This special relationship imposes a duty on the mortuary to perform the funeral-related "services in the dignified and respectful manner [that] the bereaved expect of mortuary and crematory operators."[217] When the mortuary and crematory defendants mishandle the remains of a decedent, they breach this duty of care and are liable to the close family members for emotional distress that proximately results.[218]

3. Burden of proof

Justice Kennard, writing separately in *Christensen*, appropriately remarked that: "What the majority gives with one hand, it takes with the

213. *Id.* at 886-87, 820 P.2d at 190, 2 Cal. Rptr. 2d at 88.

214. *Id.* at 887, 820 P.2d at 190-91, 2 Cal. Rptr. 2d at 88-89. The supreme court's rejection of the bystander-witness theory is entirely consistent with the California Court of Appeal's reasoning in Quesada v. Oak Hill Improvement Co., 213 Cal. App. 3d 596, 261 Cal. Rptr. 769 (1989), and Draper Mortuary v. Superior Court, 135 Cal. App. 3d 533, 185 Cal. Rptr. 396 (1982).

215. *Christensen*, 54 Cal. 3d at 884, 820 P.2d at 189, 2 Cal. Rptr. 2d at 87.

216. *Id.* at 890-91, 820 P.2d at 193, 2 Cal. Rptr. 2d at 91.

217. *Id.* at 891, 820 P.2d at 193, 2 Cal. Rptr. 2d at 91. The California Supreme Court previously recognized that a duty may arise out of a special relationship, the breach of which may result in emotional distress damages. *See* Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc., 48 Cal. 3d 583, 590, 770 P.2d 278, 282, 257 Cal. Rptr. 98, 102 (1989).

218. Notably, the *Christensen* court did limit the class of persons to whom the mortuary owes this duty to only those *close relatives* of the decedent who were *aware* that funeral-related services were to be undertaken. *See* 54 Cal. 3d at 896, 820 P.2d at 197, 2 Cal. Rptr. 2d at 95.

other."[219] While the majority broadened the scope of liability for mishandling remains, the court simultaneously restricted recovery by those plaintiffs who could not show by "a well-founded substantial certainty" that their decedents' remains were "among those reportedly mistreated."[220]

The court imposed this burden to ensure a sufficiently direct causal connection between the mortuary and crematory defendants' conduct and the plaintiffs' alleged emotional distress.[221] However, the particular type of conduct alleged in *Christensen* occurred in secret, and was only discovered years after it took place.[222] The plaintiffs themselves only discovered the possibility that their decedents' remains had been mishandled through public media reports.[223] Application of the *Christensen* court's burden of "well-founded substantial certainty" will likely preclude recovery for many, if not all, of the plaintiffs whose interests were invaded.[224] Further, this burden is inconsistent with the burden placed on other civil litigants, who are required only to prove a defendant's negligence by a preponderance of the evidence.[225]

A better approach to the burden of proof issue is that proposed by Justice Kennard in her concurring and dissenting opinion. Under Justice Kennard's approach, once the plaintiffs prove that they suffered emotional distress caused by the knowledge that their decedent was entrusted to the defendants for cremation during a time when the defendants frequently mishandled remains, the burden of proof shifts to the mortuary and crematory defendants to prove that the remains were not mishandled.[226]

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219. *Id.* at 919, 820 P.2d at 213, 2 Cal. Rptr. 2d at 111 (Kennard, J., concurring in part, dissenting in part).

220. *Id.* at 902, 820 P.2d at 201, 2 Cal. Rptr. 2d at 99.

221. *Id.* at 901, 820 P.2d at 201, 2 Cal. Rptr. 2d at 99.

222. *Id.* at 878, 820 P.2d at 185, 2 Cal. Rptr. 2d at 83.

223. *Id.*

224. *Id.* at 919, 820 P.2d at 213, 2 Cal. Rptr. 2d at 111 (Kennard, J., concurring in part, dissenting in part).

225. California Evidence Code § 115 provides, in relevant part: "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." CAL. EVID. CODE § 115 (West 1966 & Supp. 1993); *see also* KEETON ET AL., *supra* note 42, § 38, at 239 ("In civil suits . . . the jury [must] be convinced . . . that a preponderance of the evidence is in favor of the party sustaining the burden.").

226. *Christensen*, 54 Cal. 3d at 919-20, 820 P.2d at 213, 2 Cal. Rptr. 2d at 111 (Kennard, J., concurring in part, dissenting in part). Such burden shifting is well established in California. *See, e.g.*, Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970) (holding that pool owner has burden of showing statutory violation was not cause of death by drowning); Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948) (shifting burden to each of two hunters to establish that other's gunshot caused plaintiff's injury).

In sum, while the court was correct to reject the bystander-witness approach in favor of recognizing a duty running from the mortuaries to the plaintiffs, the court's imposition of the "well-founded substantial certainty" burden of proof will operate to preclude many plaintiffs who would otherwise qualify for recovery.[227] The court should reject this burden of proof in favor of an approach that places the burden on the tortfeasors to prove they did not participate in the alleged mishandling.

B. Intentional Mishandling of Remains

In *Christensen* the supreme court held that none of the plaintiffs could sue for intentional infliction of emotional distress caused by the mishandling of their decedents' remains, because the defendants' conduct was not directed at them and they did not witness it.[228] In so holding, the court effectively immunized the mortuary and crematory defendants for their indisputably outrageous intentional conduct. An examination of several factors compels the conclusion that the *Christensen* court was incorrect in denying the plaintiffs an opportunity to plead a cause of action for intentional mishandling of remains.

1. The defendants' conduct satisfies the elements of intentional infliction of emotional distress

The *Christensen* plaintiffs should have been able to state a cause of action for intentional infliction of emotional distress, as that tort has been recognized. California defines the elements of a cause of action for intentional infliction of emotional distress as:

> "(1) extreme and outrageous conduct by the defendant with the intention of causing, *or reckless disregard of the probability of causing*, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. . . . Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community."[229]

In mishandling the remains of decedents entrusted to their care, the mortuary and crematory defendants' conduct was admittedly outra-

227. *Christensen*, 54 Cal. 3d at 919, 820 P.2d at 213, 2 Cal. Rptr. 2d at 111 (Kennard, J., concurring in part, dissenting in part).

228. *Id.* at 906, 820 P.2d at 204, 2 Cal. Rptr. 2d at 102.

229. Davidson v. City of Westminster, 32 Cal. 3d 197, 209, 649 P.2d 894, 901, 185 Cal. Rptr. 252, 259 (1982) (emphasis added) (citations omitted) (quoting Cervantez v. J.C. Penney Co., 24 Cal. 3d 579, 593, 595 P.2d 975, 983, 156 Cal. Rptr. 198, 206 (1979)).

geous. A trier of fact could conclude that the defendants acted with reckless disregard of the probability that the plaintiffs would suffer emotional distress.[230] Under the established definition of intentional infliction of emotional distress, the plaintiffs should therefore be able to state a cause of action.

The California Supreme Court, however, was unwilling to accord plaintiffs standing to sue for intentional infliction of emotional distress under the reckless disregard theory because no plaintiffs witnessed the defendants' conduct.[231] In so holding, the court applied the rule that limits liability for intentional infliction of emotional distress arising out of a reckless disregard of the plaintiff's interests to situations where the plaintiff was present at the time the conduct occurred.[232] The court stated that this presence requirement ensures the high degree of culpability necessary to justify the greater damages available in an intentional infliction of emotional distress case.[233]

This reasoning is flawed, however, when applied to a case like *Christensen* because the nature of the conduct is such that the defendant is highly culpable regardless of whether the plaintiffs were present to witness the mutilation.[234] The plaintiffs in these cases entrusted the mortuaries and crematoria with the remains of their deceased family members. The defendants violated this trust by ripping out organs, commingling remains and disposing of corpses in a disrespectful manner. While this conduct by its very nature takes place out of the family's presence,[235] there is a great probability that it will cause a deceased's family members emotional distress if the conduct is ever discovered.

Further, the court expressly rejected an application of a bystander-witness theory[236] in holding that close family members could state a cause of action for negligent mishandling of remains.[237] Why the court chose not to require the plaintiffs to have witnessed the defendants' con-

230. *See* KEETON ET AL., *supra* note 42, § 34, at 213 (stating that reckless disregard may be found from acts "of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow").

231. *Christensen*, 54 Cal. 3d at 906, 820 P.2d at 204, 2 Cal. Rptr. 2d at 102.

232. *Id.*

233. *Id.*

234. *Id.* at 907, 820 P.2d at 205, 2 Cal. Rptr. 2d at 103 (Mosk, J., concurring in part, dissenting in part). Prosser and Keeton note that tortious mishandling of remains presents "an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious." KEETON ET AL., *supra* note 42, § 54, at 362.

235. *See* Cox, *supra* note 211, at 14.

236. See *supra* part III.C.1.a for a discussion of the bystander-witness theories.

237. *See Christensen*, 54 Cal. 3d at 883-94, 820 P.2d at 188-96, 2 Cal. Rptr. 2d at 86-94.

duct to sue for *negligence*, but required those same plaintiffs to have witnessed the conduct to sue for *intentional tort*, is unclear.[238] This inconsistency is problematic, and the court should have allowed the plaintiffs to sue on the theory of intentional infliction of emotional distress.

2. Mishandling of remains is a unique tort

The majority's refusal to allow the plaintiffs to sue for intentional tort may be rooted in the court's unwillingness to recognize intentional mishandling of remains as a tort independent from intentional infliction of emotional distress.[239] By refusing to recognize the independent nature of the tort of mishandling of remains, the court backed itself into a position where it had to deny recovery to plaintiffs for emotional distress because of restrictions created by prior cases with facts entirely dissimilar to those in *Christensen*.[240]

The unique nature of the conduct at issue in *Christensen* warrants the recognition of a unique tort. The conduct alleged was mutilation of a decedent's remains, commingling of remains and unauthorized harvest-

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238. Justice Mosk notes this inconsistency in his concurring and dissenting opinion in *Christensen*:

> The limits that the majority seek to place on the tort of IIED are, in this context, unjustified. To require that plaintiffs be present at the scene of the outrageous conduct is unrealistic. It will be a rare case indeed in which a funeral home mutilates a decedent's body in the presence of the grieving family or displays the mutilated body to them. The majority thus effectively limit [*sic*] a plaintiff's recourse in cases involving this type of reprehensible conduct to the lesser tort of NIED [negligent infliction of emotional distress].

Id. at 908, 820 P.2d at 205, 2 Cal. Rptr. 2d at 103 (Mosk, J., concurring in part, dissenting in part).

239. *See id.* at 884, 820 P.2d at 188-89, 2 Cal. Rptr. 2d at 86-87. "It is true, as defendants observe, that the tort with which we are concerned is negligence. Negligent infliction of emotional distress is not an independent tort, *nor is negligent mishandling of human remains*." *Id.* (emphasis added) (citation omitted). The *Christensen* court also stated:

> Recovery on an intentional infliction of emotional distress theory and based on reckless conduct has been allowed in the funeral-related services context. However, as Professors Prosser and Keeton note, the cases which describe the tort as intentional mishandling of a corpse actually seek to protect the personal feelings of the survivors. *Therefore the tort is properly categorized as intentional infliction of emotional distress* . . . .

Id. at 905, 820 P.2d at 203, 2 Cal. Rptr. 2d at 101 (emphasis added) (citation omitted).

240. An example of this is the *Christensen* court's reliance on Cervantez v. J.C. Penney Co., 24 Cal. 3d 579, 595 P.2d 975, 156 Cal. Rptr. 198 (1979), in which the court granted recovery for intentional infliction of emotional distress, where the plaintiff was arrested despite the defendants' knowledge that the plaintiff had not committed an offense. The *Christensen* court cites this case for the proposition that intentional infliction of emotional distress requires conduct *directed toward* a particular plaintiff. *See* 54 Cal. 3d at 903, 820 P.2d at 202, 2 Cal. Rptr. 2d at 100.

ing of organs.[241] Because no court in California had addressed conduct of this sort—mistreating of dead bodies done behind closed doors—the court should have approached the plaintiffs' allegations with the purpose of redressing their injuries, and should have regarded the prior case law as instructive, not restrictive.

Further, it is unclear why the court refused to acknowledge a new tort tailored to the peculiar nature of the defendants' outrageous conduct, when such an acknowledgement is widely accepted in tort law.[242] In fact, cases decided prior to *Christensen* have freely recognized the unique nature of the mishandling of remains tort,[243] and have tailored their analysis accordingly.[244] If the majority had simply recognized the unique nature of the tort of mishandling of remains, it could have accorded the plaintiffs standing without feeling it was disturbing prior case law.

3. Applying the doctrine of transferred intent

The court rejected out of hand the application of transferred intent to tortious mishandling of remains.[245] The doctrine of transferred intent dictates that when a defendant intends to harm a person other than the plaintiff or intends to cause a type of harm different from the actual injury sustained by the plaintiff, the defendant's tortious intent is "trans-

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241. *Christensen*, 54 Cal. 3d at 879, 820 P.2d at 185, 2 Cal. Rptr. 2d at 83.

242. As Professors Prosser and Keeton state:

> New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before. The intentional infliction of mental suffering, . . . the invasion of the right of privacy, the denial of the right to vote, the conveyance of land to defeat a title, the infliction of prenatal injuries, the alienation of the affections of a parent, . . . to name only a few instances, could not be fitted into any accepted classifications when they first arose, but nevertheless have been held to be torts. The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.

KEETON ET AL., *supra* note 42, § 1, at 3-4.

243. *See* Quesada v. Oak Hill Improvement Co., 213 Cal. App. 3d 596, 604 n.3, 261 Cal. Rptr. 769, 773 n.3 (1989):

> The fact that the expected, and often sole, injury flowing from such tort is that of mental trauma *does not transform the cause of action into one for the . . . infliction of emotional distress*. This is not an instance of recovery being based solely on infliction of emotional distress, but rather the respondents' duties toward the close relatives of the deceased to handle the corpse properly.

Id. (emphasis added) (citation omitted).

244. *See id.*

245. *Christensen*, 54 Cal. 3d at 905, 820 P.2d at 203, 2 Cal. Rptr. 2d at 101.

ferred" to the resulting injury that the plaintiff actually suffered.[246] The defendant is therefore rendered liable for the harm he or she caused.[247]

The doctrine of transferred intent has not been applied to broaden the scope of liability for intentional infliction of emotional distress.[248] However, plaintiffs who are unintended victims may establish the requisite intent to cause emotional distress if the defendant's outrageous conduct was *substantially certain* to cause the plaintiff emotional distress.[249]

Further, the doctrine of transferred intent is available where the defendant intended to commit an assault upon a third party but instead caused injury to the plaintiff.[250] As recovery for both assault and intentional infliction of emotional distress share a common purpose—protection of an individual's interest in freedom from mental invasion[251]—it is unclear why intentional infliction of emotional distress, unlike the tort of assault, should continue to be exempt from the doctrine of transferred intent.

Applying transferred intent to the conduct of the mortuary and crematory defendants would have compelled the *Christensen* court to reach a different result on the standing issue. The conduct directed toward the remains of the decedents entrusted to the defendants' care would be transferred to the family members who so entrusted the remains. This would satisfy the intent requirement that the *Christensen* court found lacking, and eliminate the standing barriers faced by plaintiffs who wish to sue for intentional mishandling of their decedents' remains.

4. Moral culpability

Because compensation in tort law is based largely on the concept of the defendant's fault,[252] the moral culpability of the defendant's conduct should be a strong factor in deciding liability.[253] Application of this prin-

246. Mixon, *supra* note 86, at 147.

247. *Id.*

248. *Id.* at 149.

249. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 87, § 46 cmt. l; Mixon, *supra* note 86, at 152.

250. *See* Mixon, *supra* note 86, at 148.

251. *Id.* at 163.

252. *See id.* at 159; Lawrence Vold, *The Legal Allocation of Risk in Assault, Battery and Imprisonment.—The Prima Facie Case*, 17 NEB. L. BULL. 149, 163 (1938).

253. Rowland v. Christian, 69 Cal. 2d 108, 113, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968); Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 314-15, 379 P.2d 513, 525, 29 Cal. Rptr. 33, 45 (1963), *overruled by* Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 71 (1968); Mixon, *supra* note 86, at 159. The *Amaya* court stated: "[T]he increased liability imposed on an intentional wrongdoer appears to reflect the psychological fact that solicitude for the interests of the actor weighs less in the balance as his moral guilt increases

ciple dictates that the family members who entrusted their decedents to the care of the mortuary and crematory defendants should have standing to sue for intentional tort.

A mortuary or crematory that mishandles the remains of a decedent is especially morally culpable because a relationship of trust is created when it enters into a funeral contract. While California courts do not recognize a property right in a decedent's remains,[254] they have long recognized that a person entrusted with the care of a dead body holds it as a *sacred trust* for the benefit of all—including family and friends—who may have an interest in it.[255] The existence of this sacred trust makes outrageous conduct by a mortuary or crematorium more morally culpable than the same conduct by one who has not entered into a funeral contract.[256] Application of this principle yields the conclusion that the court should broaden, rather than limit, the class of plaintiffs who may sue for intentional mishandling of remains.

V. RECOMMENDATION

The California Supreme Court should overrule the portion of the *Christensen* opinion that limits the class of plaintiffs who may sue for intentional mishandling of remains to only those individuals who *witnessed* the mishandling. The court failed to recognize that the very nature of funeral services dictates that no plaintiffs will witness misconduct by a mortuary or crematorium.[257] Because of the private nature of the

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and the social utility of his conduct diminishes." 59 Cal. 2d at 315, 379 P.2d at 525, 29 Cal. Rptr. at 45.

254. *See supra* part II.A.

255. *See* Huntly v. Zurich Gen. Accident & Liab. Ins. Co., 100 Cal. App. 201, 207-08, 280 P. 163, 166 (1929). The court, in Quesada v. Oak Hill Improvement Co., stated: "As a society we want those who are entrusted with the bodies of our dead to exercise the greatest of care. . . . [I]t is beyond a simple business relationship—*they have assumed a position of special trust toward the family*." 213 Cal. App. 3d 596, 610, 261 Cal. Rptr. 769, 778 (1989) (emphasis added) (citation omitted).

256. Professor Leavitt illustrates this argument by pointing out that an undertaker who offers a photograph of a widow's decedent for newspaper publication will incur liability, while the same conduct done by a newspaper reporter is not actionable if newsworthy. Leavitt, *supra* note 30, at 480-82.

257. However, the court did recognize this in its negligence analysis. The court stated:

> [T]he relationship between the family of a decedent and a provider of funeral-related services exists in major part for the purpose of relieving the bereaved relatives of the obligation to personally prepare the remains for burial or cremation. The responsibility is delegated to others because family members do not want to *undertake or witness those preparations*. Therefore, *it would be the exceptional case in which any family member would observe misconduct of the type alleged in the complaint.*

Christensen, 54 Cal. 3d at 886-87, 820 P.2d at 190, 2 Cal. Rptr. 2d at 88 (emphasis added).

misconduct, the requirement that plaintiffs be percipient witnesses is inappropriate.

The *Christensen* court created an immunity for intentional misconduct, while it simultaneously broadened the class of plaintiffs who could sue for the same conduct done negligently.[258] Mortuary and crematory defendants should not escape liability simply because their conduct occurs behind closed doors. The court should recognize the moral culpability associated with mistreating human remains,[259] apply the doctrine of transferred intent,[260] and allow those same close family members who can state a cause of action for negligence to sue for intentional mishandling of remains.

Further, the court should restate its holding on the burden of proof issue to coincide with the position articulated by Justice Kennard.[261] A plaintiff stating a cause of action for negligent mishandling of a decedent's remains should only have to prove his or her decedent was entrusted to the mortuary or crematory defendant at a time when the defendant frequently mishandled remains.[262] The burden should then shift to the defendant to prove that the remains of the plaintiff's decedent were not mishandled.[263] This is the better approach because it does not deny recovery to plaintiffs who are otherwise eligible, simply because the covert nature of the defendants' conduct makes proof by a well-founded substantial certainty impossible.

VI. CONCLUSION

In *Christensen v. Superior Court*,[264] the California Supreme Court correctly determined that mortuaries and crematoria owe a duty of care to close family members of decedents who are entrusted to their care. However, the court erred when it established a burden of proof that limits recovery for negligent mishandling of remains to only those who can show by a well-founded substantial certainty that their decedent's remains were mishandled. This heightened burden will preclude recovery for plaintiffs who should otherwise qualify.

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258. *Id.* at 907, 820 P.2d at 204, 2 Cal. Rptr. 2d at 102 (Mosk, J., concurring in part, dissenting in part).

259. *See supra* part IV.B.4.

260. *See supra* part IV.B.3.

261. *See Christensen*, 54 Cal. 3d at 919-20, 820 P.2d at 213, 2 Cal. Rptr. 2d at 111 (Kennard, J., concurring in part, dissenting in part).

262. *Id.* at 920, 820 P.2d at 213, 2 Cal. Rptr. 2d at 111 (Kennard, J., concurring in part, dissenting in part).

263. *Id.* (Kennard, J., concurring in part, dissenting in part).

264. 54 Cal. 3d 868, 820 P.2d 181, 2 Cal. Rptr. 2d 79 (1991).

The better approach is to shift the burden to the defendants to prove there was no mishandling once the plaintiffs prove knowledge that their decedents were entrusted during a time when those defendants frequently mishandled remains. This approach is preferable because it takes into consideration the concealed nature of the mortuary and crematory defendants' conduct.

The *Christensen* court also incorrectly decided the issue of who may sue for intentional mishandling of remains. While the court broadened the class of plaintiffs who may sue for negligent conduct, the court severely limited the class of plaintiffs who can sue for the same mishandling of corpses done intentionally, simply because the plaintiffs did not witness the mishandling of their decedents' remains.

This is incorrect because the defendants' conduct—done behind closed doors—was such that the plaintiffs could not have observed it. Yet the relatives of the decedents who learned of the mishandling suffered emotional distress, just as if they had witnessed it. The court should overrule its decision in *Christensen* to allow the same family members to sue for intentional tort as may currently sue for negligence.

*Alex William Craigie**

* This Note is dedicated to my mother, Mary Craigie, and to Trish. I wish also to thank Professors David Leonard and John Calmore for their helpful comments.