[2015] JMSC Civ 3

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2014HCV05681

BETWEEN	**ADASA BLAIR**	**FIRST CLAIMANT**
AND	**CATHLYN HAY**	**SECOND CLAIMANT**
AND	**JUSTIN BLAIR**	**THIRD CLAIMANT**
AND	**ENSERT BLAIR**	**FOURTH CLAIMANT**
AND	**UDENCIA WHITE**	**FIFTH CLAIMANT**
AND	**GLADSTONE BLAIR**	**SIXTH CLAIMANT**
AND	**HYACINTH BLAIR**	**SEVENTH CLAIMANT**
AND	**ASHBURN BLAIR**	**EIGHTH CLAIMANT**
AND	**HUBERT BLAIR**	**NINTH CLAIMANT**
AND	**AMOS BLAIR**	**TENTH CLAIMANT**
AND	**LAUNDRERY BLAIR**	**ELEVENTH CLAIMANT**
AND	**NEVILLE BLAIR**	**FIRST DEFENDANT**
AND	**BROWN'S AND SON FUNERAL PARLOUR LTD**	**SECOND DEFENDANT**

IN CHAMBERS

Courtney Kazembe instructed by Kazembe and Associates for the claimants

November 21, 2014 and January 21, 2015

INJUNCTION – WITHOUT NOTICE APPLICATION TO STOP FUNERAL

SYKES J

[1] Mr Gladstone Blair is a retired police officer who lives in the parish of St Elizabeth. His mother was the late Mrs Marian Adina Blair who lived a long and respectable life. She died on Toronto, Canada on November 4, 2014. It seems that Mrs Blair was quite a producer of children. According to Mr Blair, she and her husband, produced twenty one children. She has outlived all her children except thirteen.

[2] On Mrs Blair's death, all the surviving children caucused and decided that she would be buried in Jamaica after a memorial service was held in her honour in Canada. Mr Gladstone Blair states that the general agreement among the surviving children was that the internment and service in Jamaica would take place on December 6, 2014. This would have allowed the surviving children and others who resided outside of Jamaica to attend the funeral.

[3] Sometime before November 22, 2014, Mr Gladstone Blair became aware that his mother's funeral service was promoted in the media as scheduled for November 22, 2014. It is now November 21, less than twenty four hours before the funeral and Mr Gladstone Blair wants to stop the funeral from going ahead. This change of date has been attributed to Mr Neville Blair, one of the surviving children. Mr Neville Blair lives in Canada. The inference seems to be that he and the body of

his mother arrived in Jamaica and while here he has unilaterally decided to take charge of all matters relating to the funeral including the date for the funeral service. He and Brown's and Sons Funeral Home made these arrangements.

[4] Mr Gladstone Blair has applied for an injunction. His grounds are that:

a. Mr Neville Blair took it upon himself to change the date of the funeral without any reference to the other siblings;

b. all the children have acted collectively when making decisions concerning their mother while she was alive and special deference being shown to the views of Miss Adasa Blair;

c. it is important for all the siblings to attend;

d. there is no urgency for the deceased to be buried on November 22;

e. Mr Neville Blair acted maliciously and unreasonably by setting the funeral for November 22;

f. no harm will flow if the funeral is postponed;

g. irreparable harm will result if the funeral goes ahead on the planned date;

h. the siblings, nieces and nephews need to attend to get closure by seeing Mrs Marian Blair one last time;

i. all siblings have an equal right to participate in the planning of their mother's funeral.

[5] Mr Kazembe endeavoured to fashion some legal right in the claimants to the body of the deceased or at least a right to plan and participate in any funeral service to be undertaken. Mr Kazembe even appealed to numbers, arguing that Mr Neville Blair was just one out of the many siblings and he, by his unilateral

action, should not be allowed to subvert the will of the majority. Learned counsel, in one final attempt to persuade the court to grant the injunction, submitted that this case should be the one to break new ground if that was what was required to do justice. In the end, on November 21, 2014, the court declined to grant the injunction. These are the written reasons; an oral judgment was delivered on the day of the refusal.

[6] This issue of who should have possession of body for the purposes of burial is not new. It has generated case law in England, Canada, Australia, the United States of America and now Jamaica. This court does not purport to review every case on the subject but only a sufficient number to indicate how the issue has been treated and to see what principles can be deduced from the decided cases.

The English cases

[7] The research shows that all discussion on this area involves a consideration of **Williams v Williams** (1882) 20 Ch D 659. In that case, the testator stated in his will that he wished his body to be cremated and the executors were to pay the expense of doing that. The cremation was to be done by a Miss Williams. The body was not cremated and it was buried in a cemetery. Miss Williams was dissatisfied and successfully petitioned the relevant Secretary of State to have the body exhumed and handed over to her. She had the body taken to Italy where it was cremated. Miss Williams then sought to recover the cost of her effort from the executors. She failed.

[8] Kay J held that the directions given by the testator on how his body was to be disposed of were unenforceable and therefore Miss Williams' claim for reimbursement for her expenses incurred in the exhumation, transportation and cremation of the body were not recoverable. His Lordship's next step was to examine at least one previous case, **R v Sharpe** Dea & Bell CC 160, in which the defendant was charged with unlawfully digging up and taking the body of a

deceased out of a grave. The defendant was the son of the deceased and was dissatisfied with where his father was buried and so he took out the body to have it reburied at where he considered to be the appropriate place. He was prosecuted. The defendant in that case found to be activated by the purest of motives. Despite this the conviction was upheld. Erle J, in **Sharpe**, held that the law did not recognise the right of any child to the body of his parent because there was no property in a corpse. Erle J specifically found that familial relationship cannot justify the removal of the body from its burial site to another and therefore, with great reluctance, the conviction was upheld. This case was one of the pillars used by Kay J to ground his decision to refuse recovery of the expenses. Simply put, there was no property in a body sufficient to give rise to a claim for expenses in the circumstances of the case.

[9] The second point considered by Kay J in **Williams** was the rights of executors with respect to burial. His Lordship referred to the venerable text of **Williams on Executors** which expressed the view that the executor or administrator must bury the deceased in a manner suitable to the estate left behind by the deceased. From this statement and also from a statement attributed to Mr Justice Blackstone in his *Blackstone's Laws of England*, Kay J deduced that 'that primâ facie the executors are entitled to the possession and are responsible for the burial of a dead body' (p 664). Kay J went on to examine other cases in order to establish the proposition that although there was no property in a body, the executor had the right to possession as against a gaoler who held the body against unpaid pecuniary claims. His Lordship referred to two cases in which a gaoler was subject to mandamus compelling him to hand over the body to the executors. Thus his Lordship felt able to conclude that '[a]ccordingly the law in this country is clear, that after the death of a man, his executors have a right to the custody and possession of his body (although they have no property in it) until it is properly buried' (p 665). It must be observed that Kay J referred to two specific instances alone in order to develop his general proposition which, as formulated, extended beyond the specific instances of gaolers to a proposition

that seemed to be applicable to all circumstances where there is a will. Presumably, from his Lordship's reasoning the same applies to the administrator where there is no will.

[10] It would appear that Kay J was endeavouring to show that the executors could not be sued because, if anyone could claim to have a 'right to possession' of a body it would be them because they would have a 'duty' to claim the body for burial or at least for safe and effective disposition. Since, they had carried out their duty then there was no basis for the claim against them.

[11] There is a problem with Kay J's analysis. Kay J did not explain how he arrived at the conclusion that from two specific instances alone in which the judges referred to spoke specifically to circumstances of gaoler and executor, the law was as general as stated by him. This omitted step in the chain of reasoning becomes more significant when it is recalled that on death the executor's authority begins and is confined to dealing with the deceased's estate, real and personal. Nowhere in the law on executorship does the executor have any right to the body of the deceased. Higgins J has convincingly demonstrated in his dissenting judgment in **Doodeward v Spence** 6 CLR 406, that there is no such thing as executors having any special or general right to a body.

[12] It seems to this court that true position is as stated by Higgins J where his Honour reasoned, based on an examination of the relevant cases, that there is no such thing as property in body dead or alive. Also, Higgins J held that although courts have intervened by way of injunction it was on the basis that the person seeking the injunction wanted the body for the purposes of burial or cremation where cremation is permitted. Consequently, no executor or administrator has any right to the body of the deceased that is greater than anyone else's. This court finds the dissenting judgment of Higgins J convincing. From this it would seem to this court that Kay J's proposition ought to be recast to say that executor and administrators can only claim a body on the ground that

the body is needed for disposition whether by burial or cremation for the reasons given by Higgins J. Kay J's reliance on the two specific cases involving gaolers are too highly specific to enable any general propositions beyond the specific facts and circumstances of the two cases to be developed.

[13] However, despite this weakness in Kay J's analysis, English courts have proceeded on the basis that executors have a right to a body. In the case of **University Hospital Lewisham NHS Trust v Hamuth** [2006] EWHC 1609 there was a dispute over whether the will preferred was genuine and therefore there was a great cloud over whether the named executors could properly act to bury the body. The deceased had died at the health facilities of the claimant. Hart J held that the 'authorities establish that an executor in general has the right to make arrangements for the disposal of a dead body, but also establish that any directions given by the deceased with regard to the disposal of his body are not enforceable as a matter of law' (para 13). His Lordship also held that the 'authorities also establish that at common law it is the duty of a householder under whose roof a person has died to make arrangements for the dignified and decent burial of the deceased, at least in circumstances where the deceased is a poor person in relation to whom no other arrangements can be made' (para. 13). In the circumstances, Hart J found that the hospital was the proper person to make arrangements for the burial since the deceased died under its roof since it was not possible for the court to resolve the issue of the validity of the will which itself would determine whether the appointed executor could properly act.

[14] A similar issue arose in **Lakey v Medway NHS Foundation Trust** [2009] EWHC 3574 (QB). In that case the deceased died in 2006 and was not buried up to the date of the litigation in 2009. Her husband wanted the body preserved so that various charges of malpractice alleged against the medical profession could be investigated. Silber J reasoned that the primary duty of burying the body falls on the personal representative and to that extent they have a corresponding right to have custody and possession of the body until it is properly buried. Since the

husband was not taking any steps to have the body buried, then, according to Silber J, whoever has lawful custody of the body, has the right to make proper arrangements for disposal of the body. In that case the body was in the possession of the Trust and so it was held that it could make arrangements for the burial of the body since the husband was not prepared to do so.

[15] Silber J expressed his opinion in this way at paragraph 10:

> *Applying those principles to the present case, it seems clear that Mr Lakey, as the personal representative of his wife, has and had a duty to arrange a proper burial, but that right takes with it a duty to ensure that it is done within a reasonable period taking into account all relevant factors. If there is not a proper disposal arranged by a personal representative of the deceased the body in what Hart J described as being: "currently lawful possession of the body," has the power to make proper arrangements for the disposal of the body. If this were not so the Executor or personal representative of the deceased would be entitled to leave the corpse of the deceased in the custody of the hospital or place where the body was lying indefinitely and without any obligation to pay for its storage.*

[16] If there is this right in the executors and administrators to take custody of the body for the purpose of burial why is there this 'exception' insisted upon by the English courts that somebody else can undertake the task of disposing of the body? The answer is provided by Higgins J in **Doodeward** where it is stated that the foundation of the doctrine of no property in a body rested on the 'imperious necessity for speedy burial (or other disposition) of the dead' which was 'recognised and enforced by the common law of England, irrespective of the particular facts or expediency of each case' (p 442). The explanation by Higgins

J not only provides the answer but undermines the proposition that executors and administrators have the right to bury the body. It is not that they have the right to possession of the body, it is that the law permits them to exercise the option of making suitable arrangements for the burial of the body since in the scheme of things they would be among the class of persons who would have an interest in seeing that the body is properly disposed of. However, the 'imperious necessity' for proper disposal of bodies meant that other persons could take the body for proper disposition of the persons who would be expected to do so fail to act within an acceptable period of time. This is why Higgins J dissented from his brethren and held that the claimant could not maintain an action for detinue against the police who took the body from the claimant in order to have it buried. The majority sought to explain their position by appealing to special work done on a corpse, as in mummies, which would take the corpse out of the realm of dead bodies simpliciter to a valuable chattel. The only problem with this explanation of the majority is that the facts of the case did not indicate that any such work had been done on the corpse to have the effect contended for.

[17] Therefore when the common law speaks of the necessity for proper disposal of bodies, of necessity, only the living can perform that task and so there are persons to whom one would first look to see if they are interested in effecting proper disposal of the body. Among these are executors, administrators, close relatives or the person under whose roof the person died. These are what one could all the persons expected to be ones who would undertake the burial or other disposal of the body. From Higgins J's analysis, the class of persons who can undertake this task is not and could not be closed because the emphasis was on proper disposal and not who did the act; in **Doodeward**, it was the police who wished to bury the body. Not even the majority in **Doodeward** claimed that the police were not an appropriate party to seek to claim a body for burial. What they sought to do was establish the proposition that, in the circumstances of that case, sufficient time had passed and work (not proven or admitted) done on the body to remove from the class of bodies awaiting burial to a profit earning chattel.

The common law was not preoccupied with whom carried out the disposition as long as it was done. All this explains why the common law did not permit anyone to have property in a body. In the view of this court it is not entirely correct for Hart J and Silbert J to be speaking of a right or duty in the executors or administrators to dispose of the body. It is that they are among a class of persons who would be assisted by the law to take the body for disposal. This means that if there are other person who are doing this in the planned disposition is effective, safe and compliant with all relevant public health laws then there would be no legal basis for executors and administrators to intervene. This explains why relatives can plan funerals and make suitable arrangements for disposal of the body without reference to executors or administrators.

Australian cases

[18] Doodeward v Spence will be examined more closely. The corpse in that case was a still-born two headed child. The factual background is that the mother of the child gave birth some forty two years earlier. It was still born. Dr Donahoe, the mother's physician took the body and preserved it and kept it in his surgery until he died in 1870. After the doctor's death, the body was sold at auction. The appellant's father bought the body. The appellant began displaying the body for gain. He was arrested and charged by the police for an offence for which he was convicted. The appellant brought an action in detinue to recover the body from the police. He was non-suited by the trial court and it was this decision that precipitated the appeal to the High Court of Australia. No skill or labour was exercised on the body sufficient to alter its character.

[19] All three judges gave written opinion and by a majority, the appeal was allowed and the non-suit set aside. The courts below had held that there can be no right of property in a dead human being and consequently there cannot be an action for detinue or trover. Griffith CJ, one of the majority, reasoned that the fact that a person dies and is awaiting burial which itself imposes a duty on certain named persons, does not in and of itself mean that property can never be acquired in a

body. His Honour did not accept the implicit proposition in the police officer's argument which was that continued possession of a body unless it be for burial is, without more, unlawful. The Chief Justice continued by saying that if continued possession of the body was unlawful unless it be for burial then the foundation for such rule must be that 'that such possession is injurious to the public welfare, and the notion that it is so injurious must be founded upon considerations of religion or public health or public decency' (p 413). For the Chief Justice, '[t] The question of whether a particular act is injurious to the public on any such grounds is a mixed question of law and fact, so that what may be injurious at one time or under one set of circumstances may not be so at another time and under different circumstances' (p 413). Chief Justice Griffith set out his major conclusions at pp 413 – 414:

> *In my opinion there is no law forbidding the mere possession of a human body, whether born alive or dead, for purposes other than immediate burial. A fortiori such possession is not unlawful if the body possesses attributes of such a nature that its preservation may afford valuable or interesting information or instruction. If the requirements of public health or public decency are infringed, quite different considerations arise.*
>
> *To apply these principles to the present case. Neither public health nor public decency is endangered by the mere preservation of a perhaps unique specimen of malformation. Public decency may, perhaps, be offended by the public exhibition of such an object. But the fact that an object may not be publicly exhibited affords no criterion for determining the lawfulness of the possession of that object. In my opinion it is not contra bonos mores to retain such a specimen unburied. If one medical or scientific student may lawfully*

possess it, he may transfer the possession to another. Nor can the right of possession be limited to students. The manner of use may be controlled, but the possession is not of itself unlawful.

If, then, there can, under some circumstances, be a continued rightful possession of a human body unburied, I think, as I have already said, that the law will protect that rightful possession by appropriate remedies. I do not know of any definition of property which is not wide enough to include such a right of permanent possession. By whatever name the right is called, I think it exists, and that, so far as it constitutes property, a human body, or a portion of a human body, is capable by law of becoming the subject of property. It is not necessary to give an exhaustive enumeration of the circumstances under which such a right may be acquired, but I entertain no doubt that, when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial, but subject, of course, to any positive law which forbids its retention under the particular circumstances.

[20] Barton J, the other member of the majority, agreed with the reasoning of the Chief Justice but was careful to add that 'I do not wish it to be supposed that I cast the slightest doubt upon the general rule that an unburied corpse is not the subject of property, or upon the legal authorities which require the proper and decent disposal of the dead' (p 417). Barton J seemed to be saying the child was

not a human being but rather a monster and therefore could not be regarded as a human being awaiting burial at the time of the child's death. His Honour also stated that since the body was preserved from thirty nine years it had acquired monetary value. The conclusion from Barton J is that possession of a body for a sufficient period of time as the intrinsic power to transform the body from one which should be buried to one which has some monetary value.

[21] Higgins J, on the other hand, accepted that if the body of the child could be regarded as property then the claimant would have a better claim to possession than the police officer. However, his Honour reasoned, the body of child was inherently incapable of becoming property and so an action for detinue or trover was not sustainable. Higgins J referred to the learned texts of ancient times (Coke's, Institutes, East's Pleas of the Crown, Blackstone's and others). There is the unanimous opinion that whether the body is normal of lusus naturae (that is a freak of nature) there is no property in the body.

[22] In response to this citation of authority, the learned Chief Justice offered this reason as a justification for not following the ancient texts at page 412:

> *Many doctrines have been asserted on the supposed authority of learned persons, who, addressing themselves to one aspect of a question, have used language which has been generalized in a manner at which no one would have been more surprised than the supposed authors of the doctrines. I do not, myself, accept the dogma of the verbal inerrancy of ancient text writers. Indeed, equally respectable authority, and of equal antiquity, may be cited for establishing as a matter of law the reality of witchcraft. But in my opinion none of the authorities cited afford any assistance in the present case. We are, therefore, free to regard it as a case of first instance arising in the 20th*

> *century, and to decide it in accordance with general principles of law, which are usually in accord with reason and common sense.*

[23] What is obvious from this passage is that the learned Chief Justice exercised the power of choice which he undoubtedly had. However, his Honour did not show that the conclusions advanced by the ancient writers were no longer valid or were based on faulty reasoning. Thus the question respectfully is not whether the learned Chief Justice should accepted the dogma of ancient writers but rather whether the expression of law of the ancient writers was correct, or should be departed from even if correct at the time of their utterance.

[24] Higgins J referred to a number of cases from the United States of America and concluded that preponderance of opinion was that there was no property in a corpse and thus his Honour concluded at pp 421 - 422 that:

> *From first to last, I can find no instance of any Court asserting any property in a corpse except in favour of persons who wanted it for purposes of burial, and who by virtue of their close relationship with the deceased might be regarded as under a duty to give the corpse decent interment. I confess that I am unable to see how we can ignore such definite decisions and pronouncements as to the law.*

[25] In this passage and others, Higgins J is making the point, that there is a class of persons upon whom the duty to bury the person is said to fall. This class arises out of sheer human necessity since the dead cannot bury themselves. Thus next of kin, spouses, children and others with familial ties and friends are within the class of persons whom the court would aid if it is that they are seeking to obtain the body for burial. It is also on this same foundation, it is submitted, that executors and administrators, can claim the body for burial. The burial was

insisted on not as an end in itself but rather as a means of effective and safe disposition of the body from a health, public welfare and decency perspective. This explains why the law also permits the person, even if a complete stranger, under whose roof the person died to make arrangements for the burial.

[26] Therefore, when the law speaks of lending assistance to persons to secure the body of a deceased persons it is not on the basis that the claimant has any property in the body but on the basis that they wish to carry out an important health and safety function.

The Canadian cases

[27] In **Hunter v Hunter** [1930] 4 DLR 255, there was a dispute between the Roman Catholic widow who insisted that her late husband had changed his faith from Anglican to Roman Catholic and other family member who insisted that he had not changed his faith. McEvoy J held that the executor has the right to have the body for the purpose of burial. According to McEvoy J he who has the right to bury has the right to possession of the body for that purpose. The authority for this was Kay J in **Williams v Williams.** However, as already noted, there is no right to anyone to bury but rather a general obligation on the living to dispose of the body properly and there are what one would call the natural constituents to whom one would look to see if they were willing to carry out the task.

[28] Earlier than **Hunter**, there was the case of **Miner v Canadian Pacific Railway** 3 Alta LR 408, 18 WLR 476. Beck J, after referring to a number of English cases and texts, concluded that English law had decided that there can be no property in a corpse and to this rule there was no exception. Beck J, not satisfied with the law as he found it, then travelled to the United States where he found authority for the view that there is property in a body subject to a trust to properly dispose of the body. Beck J also found comfort in the majority decision in **Doodeward**. This court has already indicated why the minority decision of Higgins J is preferable.

The United States of America

[29] The case relied on by Beck J is **Pettigrew v Pettigrew** 207 Pa 313, 56 A 878. In that case one James Pettigrew died and was buried in Whitesburg Cemetery. His widow Margaret wanted to have him buried at Elderton Cemetery. The brothers and sisters of the deceased opposed this and took the matter to court. Mitchell CJ reasoned that since Pennsylvania law placed a duty on the executors or administrators of paying the deceased's funeral expenses out of the deceased's estate then prima facie, 'therefore, the duty to determine when, where, and in what manner the body shall be buried rests with the executor or administrator' but 'his right is not absolute, nor his judgment conclusive' (p 316). The Chief Justice then made the link to a Pennsylvania statute that said that the right to administer the estate belongs, first, to the surviving spouse. The learned Chief Justice referred to Kay J in **Williams v Williams** and declined to follow it. He suggested that the case was perhaps 'unconsciously influenced by the English conservatism in regard to burial, and the attendant reluctance to countenance in any way the innovation of burning' (p 317). According to the Chief Justice at pp 316 - 317:

> *The determination must rest, as said in Fox v. Gordon, supra, 'upon considerations arising partly out of the domestic relations * * * partly out of the universal sentiment * * * that the dead should repose in some spot where they will be secure from profanation; partly out of what is demanded by society for the preservation of the public health, morality, and decency; and partly often out of what is required by a proper respect for and observance of the wishes of the departed themselves.' Under the statute in Pennsylvania the right to administration belongs first to the surviving husband or widow. To such survivor, therefore, belongs the right of control of the body for interment, and a waiver of the right to administer will not include a waiver of such right of control,*

> *unless it be express and absolute. In the exigencies of business and the interests of the estate it is not unfrequently desirable that a stranger, or even a creditor, should administer; but no court would sanction a disregard by such an administrator of the wishes of a widow, or even of the next of kin, as to the place and manner of burial.*

[30] This passage applied to the first internment. The Chief Justice added that different considerations apply to a second interment.

The current position

[31] This court has not been able to find any written decisions on this area in Jamaica. It seems that all the jurisdictions referred to above are agreed that there is no property in a body. So no child or relative of the deceased has any greater claim to body than another child or relative. The jurisdictions tend to give pride of place to executors and the administrators of the deceased's estate. Higgins J has explained the reasons for saying that no one, including the executor or administrator, having any property in the body. There is no analysis by any of the courts referred capable of eroding Higgins J's logic and consistency of reasoning. In **Pettigrew**, the court sought to justify its position regarding executors and administrators by referring to the fact that they are the persons to pay all reasonable funeral expenses. From that fact, the Chief Justice took a giant step in reasoning to hold that they have right to determine when, where, and in what manner the body is buried. There is simply no legal foundation for this conclusion.

[32] Even those courts which were minded to erect some special position in favour of executors and administrators had to concede that the alleged duty of these persons to bury the body and by extension they have the right to possession was

not absolute and must give way if they have not done the duty within an acceptable time.

[33] The true position is that the common law imposes an obligation on the living to dispose of the body in a dignified and safe way. The underlying idea seems to be one of public health and public safety. Executors and administrators are part of the natural group of persons to whom one would look to see who is going to perform that duty. The law comes to aid of anyone who wishes to perform that duty, even if that person is a stranger, when it becomes clear that persons who would normally undertake the job are not doing, have not done or perhaps have no intention of doing it. Prudence would suggest that before a stranger takes up that task, it would be good to enquire whether the relatives, executors or administrators are willing and able to do the job but there is certainly no prima facie legal basis for saying that relatives, executors and administrators have a better claim to the body than a stranger. It is simply that the courts may in its discretion prevent a stranger from disposing of the body if there are relatives who are prepared to do so. Thus when executors and administrators do not interfere with the disposal of the body by relatives, it is not on the basis that the relatives have a better legal claim to the body but because, the relatives, on the face of it, are disposing of the body properly. If that is not the case, the executors, administrators and indeed any other person can intervene to get the body for safe and satisfactory disposal.

Application to case

[34] The siblings of Mr Neville Blair may be upset with him for seeking to carry out the burial earlier than they would like but there is really nothing that they can do to stop that. They have no greater claim to the body than Mr Neville Blair. The common law leans in favour of early, effective and safe disposal of the body. Mr Neville Blair is acting in a manner consistent with the objective of the common law.

[35] Mr Kazembe indicated that his client is willing to give an undertaking to pay all expenses arising from the postponement of the funeral. Learned counsel also spoke of the emotional and psychological trauma of the other relatives if the funeral were allowed to go ahead.

[36] The court has taken these submissions into consideration but at the end of the day the court was not convinced that it should intervene to stop the funeral. On the face of it, Mr Neville Blair, has lawful custody of the body (no one has suggested otherwise) and wishes to carry out the burial before the other siblings arrive. There is nothing to suggest that he is disposing of the body in an unsafe manner. Mr Blair may well incur the wrath of his siblings and may well become a pariah in the family, but clearly, that is a risk he is prepared to take. Undoubtedly, Mr Neville Blair will be remembered in his family for this action.

[37] Consistent with the common law, this court is not concerned with who disposes of the body so long as it being done safely. The wishes of the other siblings while they are to be respected cannot and do not create any legal right to stop the funeral. The arrangement between them does not appear to be a contract; at least, the case was not argued on the basis of a breach of contract. This is not surprising since it would be extremely unlikely that the parties intended to create legal relations when they arrived at the understanding that the burial would be December 6. This court has every sympathy for the other siblings and family members but unfortunately the court cannot base its decision on its personal views of the matter. Mr Neville Blair is in fact acting in a manner consistent with the law and there is simply no legal basis for stopping him. Not even the reasoning of the majority in **Doodeward** can aid Mr Kazembe and his clients. No right has been infringed. No law has been breached. The only breach of Mr Neville Blair is perhaps a societal norm which suggests that he ought to have given the other relatives and friends an opportunity to attend the funeral.

Disposal

[38] The application for the injunction is refused.