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Burial Disputes and the Work of the Dead

KATE FALCONER

I. Introduction

It is something of an orthodoxy of the common law that death is not merely a biological endpoint, but also a legal endpoint.¹ That is to say, the common law sees death as a moment of transition, not only from a body *qua* organism capable of maintaining an internal homeostatic environment to a mere corpse bereft of life, but also from a body *qua* rights-bearing and duty-owing legal person to, what? The absence of such a person. Nothing. Thus, ‘the Court speaks of the “rights” of a dead body, ... [it] is obviously a popular form of expression – a corpse not being capable of rights.’²

Despite this apparent orthodoxy, however, when faced with various types of disputes we would recognise as falling within the broad ambit of private law,³ courts routinely have recourse to the deceased and their wishes. So, for example, disputes about the posthumous use of reproductive material are at least partly (and at least implicitly) decided on the basis of the deceased’s own views about posthumous parenthood,⁴ and it is a cardinal rule of the construction of testamentary documents that the intention of the deceased be ascertained and complied with.⁵

This recourse to the deceased’s wishes in the resolution of private law disputes is frequently explained on the basis of a need to respect the dead.⁶ Drawing on insights from the interdisciplinary field of death studies, however, the central claim of this chapter is that respect for the dead and their wishes is not the entire picture. Instead of, or more likely in addition to, a respect bestowed on the dead by the living, is a simple

¹ Although as Chau and Herring point out, as much as lawyers might ‘seek to pass the hot potato of defining death over to the doctors’, the issue of biological death is not entirely settled amongst the medical profession: P-L Chau and J Herring, ‘The Meaning of Death’ in B Brooks-Gordon et al (eds), *Death Rites and Rights* (Oxford, Hart, 2007) 13.

² *R v Price* (1884) 12 QBD 247, 253 (Stephens J), referring to *R v Stewart* (1840) 12 Ad & E 773, 779; 113 ER 1007, 1009.

³ And also, surely, disputes that fall within the broad ambit of public law – but this discussion is limited to private law disputes.

⁴ See, eg, *Re H, AE (No 2)* [2012] SASC 177 [25]–[41].

⁵ See M Glover, ‘A Taxonomy of Testamentary Intent’ (2015–16) 23(3) *George Mason Law Review* 569.

⁶ See, eg, S McGuinness and M Brazier, ‘Respecting the Living Means Respecting the Dead Too’ (2008) 28 *OJLS* 297.

premise: the dead continue to be present in private law disputes. They continue to do work in our society (and in our courtrooms). Simply put, the dead continue to make demands of the living, to hold us to account, and to incite us to action.

This chapter examines this previously un(der)explored work of the dead, related to but independent of the respect we feel we owe to the deceased, in the particular context of burial disputes – that is, disputes brought by private parties over how, where, and by whom the deceased's body will be disposed of.⁷ It explores these disputes – both in terms of their litigation and the judgments that resolve them – from four different angles, each perspective showing how burial disputes illuminate the work of the dead in private law.

II. What Is the Work of the Dead?

Before we turn to burial disputes, however, let us consider what is meant by 'the work of the dead'. We have already noted that the common law equates biological death with legal death. In this regard, however, the law is somewhat unique. Since its emergence as a discrete area of academic study in the last 50 years, the field of death studies has shown that death and our relationships with the dead are complex and multifaceted phenomena.⁸ Against this backdrop, disciplines ranging from sociology, history and memory studies to psychology, archaeology and anthropology are quick to emphasise the distinction, indeed the dichotomy, of biological death and lived reality. In these readings, the dead die not once, but twice. The first death is biological – that of the body. The second death is cultural – that of the deceased as a social being.⁹

The time in between biological and cultural death – that is, the time it takes for a person to become nothing in this world¹⁰ – can vary, both on an individual and a societal level. Regardless of its duration, however, it is this intervening period between first and second deaths that we are interested in. Much more so than at anytime in the past two hundred years, in the twenty-first century the interstices dead – the biologically dead but culturally alive – are pervasive.¹¹ They are no longer sequestered away.¹² Instead, we are encouraged to continue, even to build upon and develop, our relationships with the deceased.¹³ And in their pervasiveness, the dead do work.

⁷ This chapter will use the terms 'burial dispute' and 'post-death dispute' interchangeably to refer to this category of cases.

⁸ M Radomska, T Mehrabi and N Lykke, 'Queer Death Studies: Death, Dying and Mourning from a Queerfeminist Perspective' (2020) 35 *Australian Feminist Studies* 81, 85.

⁹ An early and influential account of this argument can be found in the anthropologist Robert Hertz's interpretation of Indonesian mortuary rituals: see 'A Contribution to the Study of the Collective Representation of Death' in R and C Needham (trans), *Death and the Right Hand* (Glencoe, The Free Press, 1960, essay first published 1907).

¹⁰ TW Laqueur, 'The Work of the Dead in 21st Century America' (Australian Death Studies Society Annual Lecture, online, 24 February 2022).

¹¹ See T Walter, 'The Pervasive Dead' (2019) 24 *Mortality* 389.

¹² *ibid.*

¹³ P Jalland, *Changing Ways of Death in Twentieth Century Australia: War, Medicine and the Funeral Business* (Sydney, UNSW Press, 2006) 368–69.

But what is this 'work' that the dead do? We can begin an answer by first considering *how* the dead do work. During the interstice period between natural and cultural death, the dead are unquiet.¹⁴ They continue to '[create], [recreate], [represent], or [disrupt] the social order of which they had been a part'.¹⁵ They are unavoidable and inescapable; they reflect ourselves and our communities back to us, sometimes truthfully and sometimes as in a funhouse mirror. They demand our attention as their due.¹⁶ In this way the dead 'distract, deter, or cajole the living',¹⁷ and we in turn invest the dead with meaning.¹⁸ Both this cajoling and this investment of meaning can, and frequently do, inspire (re)action on the part of the living. This, for our purposes, is the work of the dead.

At times this work is firmly linked to the *bodies* of the dead. These bodies can reconfigure space in a very real and material sense. The bodies buried in Samoan graves, for example, make powerful statements about traditional rank and family status.¹⁹ In a complex system of customary and legal land title, they also localise claims to property by asserting that the land of which the grave is a part, and any house built upon it, belongs to the descendants of the individual interred there.²⁰ Similarly, the (re)burial of 'our' dead (even, or perhaps particularly, the nameless, mass dead of violent conflict) consecrates that soil as 'ours', and can help establish new (or reaffirm old) family groups, communities and even nations:²¹ 'Serbia is wherever there are Serbian graves'.²²

The power to reconfigure nations is not the sole purview of the mass, nameless dead, however. Individual dead are regularly reinvested with meaning in what Verdery calls 'dead-body politics'.²³ In the prolific grave-hopping that took place in Eastern Europe in the immediately post-socialist period, for example, the bodies of politically-relevant dead worked to establish and legitimise new political orders. Such was the case of Hungarian Prime Minister Imre Nagy, an anti-Stalinist reformer, who was overthrown in a violent Soviet-backed coup in 1956, promptly hanged, and buried face-down in an unmarked grave. Nagy was revered in Hungary as a national (and nationalist) martyr, and his exhumation and subsequent reburial (this time appropriately encoffined) in a solemn ceremony held at Heroes' Square in Budapest in 1989

¹⁴ C Moffat, 'Politics and the Work of the Dead in Modern India' (2018) 60 *Comparative Studies in Society and History* 178, 178.

¹⁵ TW Laqueur, *The Work of the Dead: A Cultural History of Mortal Remains* (Princeton, Princeton University Press, 2015) 10.

¹⁶ AF Gordon, *Ghostly Matters: Haunting and the Sociological Imagination*, New University of Minnesota Press ed (Minneapolis, University of Minnesota Press, 2008) xvi.

¹⁷ Moffat (n 14) 181.

¹⁸ Laqueur (n 15) 17–18.

¹⁹ See M Meleisea and P Schoeffel, 'The Work of the Dead in Samoa: Rank, Status and Property' (2016) 125 *Journal of Polynesian Society* 149.

²⁰ *ibid* 159–63.

²¹ See discussion in K Verdery, *The Political Lives of Dead Bodies: Reburial and Postsocialist Change* (New York, Columbia University Press, 1999) ch 3 and RP Harrison, *The Dominion of the Dead* (Chicago, University of Chicago Press, 2003) ch 2. These themes also arise in many of the contributions to F Stepputat (ed), *Governing the Dead: Sovereignty and the Politics of Dead Bodies* (Manchester, Manchester University Press, 2014).

²² Quote attributed to Vuk Drašković, leader of the Serbian opposition to Slobodan Milošević in the 1990s, cited in Verdery (n 21) 98.

²³ See Verdery (n 21).

was attended by over a quarter of a million people. This intensely public honouring of Nagy's body served to legitimise and invigorate the reformist, nationalist, pro-democrat and anti-Soviet factions of the Hungarian government of the day.²⁴ A mere seven months after Nagy's reburial, the Hungarian Parliament would vote to transform the country from a one-party state to a multiparty democracy.

Dead bodies can also do work in ways that do not involve the very real and material redrawing of national borders, or the remaking of a national political system. Sometimes the work of the dead – work which takes place on and in our imagination – is more personal and more ephemeral. The fields of granite tombstones that mark the British Empire's uncountable dead of the Great War across Belgium and France arrest our attention now just as much as they did when they were first erected, for example. The location of each of these uniform grave-markers with their uniform inscription was based solely on a determination of which newly established cemetery was closest in proximity to the place where their sole, identified occupant fell, with no care as to class or rank. This speaks to a reclamation of the individual dead by the nation (indeed, the Empire – it was the task of the Imperial War Graves Commission, after all), and to an equality in remembrance that worked to scuttle the already faltering English class system.²⁵ At the same time, the individual, nameless body taken from the fields of France and ensconced in the tomb of the so-called 'Unknown Warrior' in Westminster Abbey in 1920 worked to represent, in the imagination of a nation, 'all the mighty inarticulate sacrifice' of the preceding years.²⁶ This 'great symbolic act' also worked in the imagination of the individual bereaved whose loved ones had never come home, allowing each of them to say, 'That body may belong to me'.²⁷

Dead bodies do this work because they are concrete – they are manifestly *there*.²⁸ And in their undeniable material presence they demand a material, entirely physical and entirely pragmatic response – they must be dealt with, managed, contained. At the same time, dead bodies 'evoke the awe, uncertainty, and fear associated with "cosmic" concerns' such as our own mortality, this in turn imposing some measure of sacrality upon the corpse.²⁹ The corpse is, after all, the means by which the intangible and unknowable (that is, death) becomes tangible and knowable.³⁰ At once, however, dead bodies represent – they were in fact once – particular individuals who have departed, these individuals having been part of particular communities and social circles which mourn these individual losses. The body after death is centred at an interplay of presence and absence, which ensures the body remains active in social life.³¹ At the same time, the body itself is a powerful symbol of the passage of time and the process of

²⁴ For a description of this process, see KP Benziger, 'The Funeral of Imre Nagy: Contested History and the Power of Memory Culture' (2000) 12 *History and Memory* 142, 147–55.

²⁵ See discussion in Laqueur (n 15) 467–74. The unsavoury practicalities of the task of dealing with one nation's war dead are explored in R Fathi, '"We Refused to Work Until we had a Better Means for Handling the Bodies." Discipline at the Australian Graves Detachment' (2018) 9 *First World War Studies* 35.

²⁶ Unattributed quote cited in Laqueur (n 15) 481.

²⁷ Unattributed quotations cited in *ibid*.

²⁸ Verdery (n 21) 27.

²⁹ *ibid* 31.

³⁰ Laqueur (n 15) 83.

³¹ E Hallam, J Hockey and G Howarth, *Beyond the Body: Death and Social Identity* (London, Routledge, 1999) 24.

decay from which nothingness is wrought – a nothingness to which we will all, at some point, go. A dead body, then, is simultaneously a potentially dangerous physical object, a powerful and emotive symbol of mortality, and the locus of both general and specific cultural and social relations to death and to the dead.

But not all of the work of the dead is body-adjacent. Sometimes the dead do their work in spectral form – that is, they do their work simply as a result of being *dead*. So, for example, the invocation of eighteenth-century Greek Catholic bishop Inochentie Micu in modern Romanian religious disputes impels Greek Catholics of the present to defend their faith with the same steadfastness exhibited by Micu, even in the face of rebuke and violence.³² In the same way, the memory and image of the early twentieth-century Indian revolutionary Bhagat Singh – martyred in his youth by the colonial British state – recalls, for some, the lost glory of a past revolution, inspiring (and demanding) those in the present to particular forms of action, such as hunger strikes.³³ Singh's *body* is doing no work here (in fact it was secretly cremated and the ashes thrown into a river mere hours after his execution). Rather, the deceased Singh, 'supposedly over and done with', continues to make himself known to – that is, continues to haunt – the living.³⁴

What does it mean for the dead to haunt the living? In the words of Avery Gordon, 'haunting describes how that which appears to be not there is often a seething presence, acting on and often meddling with taken-for-granted realities.'³⁵ The ghosts that do this haunting are not the bodies cloaked in white sheets at work in carnival haunted-houses. Rather they are social figures – the means by which something (or someone) supposedly lost makes itself known to us.³⁶ In this way, the deceased, lost to us in corporeal form, casts their social presence before them, demanding they be acknowledged. And so, for example, some who have lost partners or children continue to maintain relationships with their deceased loved ones, the dead being 'felt to be there' and continuing to 'splice' into the land (and the supposed realities, where the dead are simply dead) of the living.³⁷

It is this work of the dead, done both by their bodies and their spectres, that is the focus of this chapter. In the discussions that follow we will explore how the incitement to action that the dead represent is clearly visible in the burial dispute case law. First, however, we will consider how the dead are made to show up for work in the courtroom.

III. Raising the Dead in the Courtroom

As indicated in the Introduction to this chapter, a burial dispute arises when parties are in conflict as to how the body will be disposed of (will it be burial or cremation?),

³² Verdery (n 21) 78.

³³ Moffat (n 14) 186–87.

³⁴ *ibid* 178–79, quoting AF Gordon, 'Some Thoughts on Futurity and Haunting' (2011) 10 *borderlands* 1, 2.

³⁵ Gordon (n 16) 8.

³⁶ *ibid*.

³⁷ Hallam, Hockey and Howarth (n 31) 11, quoting R Simpson, *Changing Families: An Ethnographic Approach to Divorce and Separation* (Oxford, Berg, 1998).

where the remains will ultimately end up (an issue of particular concern for Indigenous Australians, for whom burial on country is frequently of utmost importance) and, underlying everything else, who will have the authority to make the relevant decisions. As also indicated in the Introduction, against the backdrop of this body of case law, this chapter argues that, in the private law, the dead place demands on us and we place demands on the dead.

But how can those supposedly lost to us make demands on us and of us? The answer is simple: they are not truly lost to us. They are present in the background, encouraging parties to bring their disputes to court, and they are present in the courtroom, as the case is heard. There are also traces of them clearly evident in the judgments handed down to resolve these disputes.

Let us begin at the end, by exploring the latter in some detail. Consider the simple act of naming the deceased. In much the same way as a eulogy, it is common in these post-death dispute decisions for the presiding judge to open their judgment with the calling of the deceased's name. 'Sarina Kelly died peacefully on Sunday 25 February 2007'.³⁸ 'The Deceased, Patrick Norman Fisher, was an Aboriginal man born on 3 August 1986'.³⁹ '[Albert Brikha died] on 20 February 1998 as a result of an unlawful killing'.⁴⁰ And in much the same way as a eulogy, this epideictic act of introducing the deceased by name serves to integrate them firmly into an ongoing dialogue and cement their place in ongoing relationships.⁴¹ The deceased is no longer amorphous – one of the seething mass of uncountable nameless dead – but a distinct person, an individual, called by name in an act of necronominalism to attend to the proceedings.

The power which this act of naming the deceased invokes is not unproblematic. For Australia's First Nations peoples, for example – for whom death is already a marker of disadvantage,⁴² and who are far more likely to find themselves a party to a burial dispute than non-Indigenous Australians⁴³ – the act of naming the deceased can be highly disrespectful. This is so for the exact reason just now set out – by naming the deceased, the deceased is called back to attend the dispute. They are prevented from continuing on their journey, and instead recalled to the present. The deceased might be angry or vengeful at having to return, and may take this out on the still-living.⁴⁴ It is for these reasons that some judges deciding burial disputes involving Indigenous Australians refrain from naming the deceased entirely.⁴⁵

So some deceased remain unnamed. And even in those cases where the deceased is introduced by name, after this initial naming event they are frequently referred to

³⁸ *Keller v Keller* [2007] VSC 118, (2007) 15 VR 667 [1].

³⁹ *White v Williams* [2019] NSWSC 437 [1].

⁴⁰ *Escott v Brikha* [2000] NSWSC 458 [1].

⁴¹ T Walter, 'A New Model of Grief: Bereavement and Biography' (1996) 1 *Mortality* 7.

⁴² A Kellehear and I Anderson, 'Death in the Country of Matilda' in K Charmaz, G Howarth and A Kellehear (eds), *The Unknown Country: Death in Australia, Britain and the USA* (Basingstoke, Macmillan, 1997) 12.

⁴³ P Vines, 'Testamentary Freedom and Customary Law: The Impact of Succession Law on the Inheritance Needs of Aboriginal and Torres Strait Islanders in Australia' (2017) 91 *Australian Law Journal* 360, 362.

⁴⁴ For a discussion of this name avoidance practice in the community of Coen in Queensland, Australia (albeit from a non-Indigenous perspective), see BR Smith, "'We Don't Want to Chase 'Em Away': Hauntology in Central Cape York Peninsula' in K Glaskin et al (eds), *Mortality, Mourning and Mortuary Practices in Indigenous Australia* (Farnham, Ashgate, 2008).

⁴⁵ See, eg, *Nayakacalou v Vincent* [2020] NSWSC 24 [1]; *McKenzie v McKenzie* [2023] SASC 71 [1] fn 1.

only as 'the deceased.' The act of naming the deceased, however, is not required in order to call the deceased to be present in burial dispute judgments. Judges deciding disputes regarding the disposal of the deceased's body are, almost as a rule, at pains to write the deceased into their decision. Information about the deceased's birth, their family and what they did for work, along with, of course, at least their date (if not also their cause) of death, are frequently canvassed in detail in any given burial dispute judgment.⁴⁶

Thus, we know that James Lindsey Laing was born in Scotland in 1929 and studied law in Glasgow. 'A highly intelligent and educated man', he worked for the Attorney-General's department in Canberra after emigrating to Australia in the early 1970s. In Canberra, he and his family lived in the same house for 40 years.⁴⁷ We know Mr Laing married his first wife in 1960, and visited her grave every Friday after she died in 2002.⁴⁸ We know he had three children and (at the time of judgment) eight grandchildren.⁴⁹ We know that, once a 'capable and able lawyer, a prudent and conservative man and a devoted and loving husband and father',⁵⁰ Mr Laing's health and personality began to deteriorate, making him vulnerable to the influence of others.⁵¹ And we know that, after suffering a stroke and being intubated and mechanically ventilated for several hours, he died at the age of 84 at Ipswich Hospital in Queensland at 4:15pm on 24 July 2014.⁵²

Not all burial dispute judgments write the dead into existence this clearly, of course. And so we know little about Betty Batson beyond the fact that she made a will in September of 2004, that she was the mother of five surviving children, that she died in December of 2020 and that she wanted to be cremated and to have a modest, private funeral in the hope that this would reduce inter-family tension.⁵³ We know even less about Cyril Michael Roma Snr: only that he was a First Nations man who died on 8 December 2009, had at least seven children and was separated from his former partner.⁵⁴ But, as we will see, even the barely-acknowledged dead are still present in the courtroom.

This recourse to the deceased's life story, as abbreviated and bare bones as it is at times, is perhaps the ultimate adherence to our desire for narrative in legal discourse.⁵⁵ It also raises a spectre of the deceased in the courtroom. This setting out of their life and death is a written instantiation of the deceased that allows, if not requires, the deceased to be present in the decision. It recalls the deceased to the here-and-now and allows them to make themselves known. Importantly, and as we will see in the

⁴⁶ Again, in much the same way as a eulogy, these biographical statements cannot contain everything that is known about the deceased, and so they are necessarily edited and present a particular version of the deceased that some might not recognise: see G Caswell, 'Personalisation in Scottish Funerals: Individualised Ritual or Relational Process?' (2011) 16 *Mortality* 242, 251.

⁴⁷ *Laing v Laing* [2014] QSC 194 [10].

⁴⁸ *ibid* [8].

⁴⁹ *ibid*.

⁵⁰ *ibid* [12].

⁵¹ *ibid* [13]–[15].

⁵² *ibid* [1].

⁵³ See *McCredie v Batson* [2020] NSWSC 1913.

⁵⁴ See *Roma v Ketchup* [2009] QSC 442.

⁵⁵ On this, see, eg, JM Van Durné, 'Narrative Coherence and its Function in Judicial Decision Making and Legislation' (1996) 44 *American Journal of Comparative Law* 463.

discussions below, this written summoning of the dead allows the deceased to make demands of the living – that their own wishes regarding the disposal of their body be complied with, for example – at the same time as it allows the living to make demands of the dead.

In these ways, burial dispute judgments are a very particular form of what Hallam and Hockey call ‘death writing’.⁵⁶ We have already compared them to eulogies. They also share the same biographical bent as the engraved tombstone (although, as we have seen, are frequently far more detailed), whilst bearing the same ritual force as a will.⁵⁷ At the same time, they materialise the dead in the present in a way similar to a photograph,⁵⁸ or a film.⁵⁹ From these judgments emanate outlines of the deceased. The shading within that outline is as heavy or opaque as the judge sees fit, but the outline of the deceased is always there. Post-death dispute judgments are no dime-novel piece of detective fiction, with the deceased a non-character known only by their absence.⁶⁰ Instead they centre the deceased, not merely by virtue of the nature of the dispute, but because the deceased is an unavoidable player in that dispute’s resolution.

So far we have focused on the judgments that resolve burial disputes, and how these judgments raise the dead in the courtroom. But the argument of this chapter is that the dead also do work in the act of *bringing* the dispute and in the arguments made in the *litigation* of that dispute by the living. Locating the presence of the dead is harder here, without a concrete text to guide us.⁶¹ But even on this broader and more general level, it can be said that burial disputes are a practice associated with death that bring the living and the dead into proximity.⁶² They are a powerful cultural strategy that constitute a system of recall on the part of the living.⁶³ The formality and ritual of the court combines with the intensely personal and emotional nature of the conflict itself. As we will see below, parties to burial disputes use these conflicts to institutionalise their relationships to and with the deceased. In this process, memory – of the dead, and their relationships with the still living – is used to make the absent (that is, the deceased) present in the courtroom.⁶⁴ Simply put, burial disputes conjure the deceased into the courtroom and invite them to haunt the living. And once the dead have been raised, they are put to work.

IV. Putting the Dead to Work in the Courtroom

This section explores burial disputes – both as individual cases and as a body of case law – from four different angles.

⁵⁶ See E Hallam and J Hockey, *Death, Memory and Material Culture* (Oxford, Berg, 2001) ch 7.

⁵⁷ *ibid.*

⁵⁸ See P Stokes, *Digital Souls: A Philosophy of Online Death* (London, Bloomsbury, 2021) 55–58; Hallam, Hockey, and Howarth (n 31) 35–38.

⁵⁹ See the discussion of the various film depictions of Bhagat Singh in Moffat (n 14).

⁶⁰ On this issue, see A Bennett, ‘Unquiet Spirits: Death Writing in Contemporary Fiction’ (2009) 23 *Textual Practice* 463.

⁶¹ Although here court transcripts, where available, present one potential avenue of analysis.

⁶² Hallam and Hockey (n 56) 6.

⁶³ *ibid.* 7.

⁶⁴ *ibid.* 3.

A. 'Nothing Is More Dangerous Than to Ignore Them': Complying with the Wishes of the Deceased

Burial disputes are replete with references to the wishes of the deceased regarding the disposal of their body. 'The deceased made clear that any similarity to the public funeral aspect of the service for her husband was not what she wanted.'⁶⁵ 'Joan says that the deceased has always expressed a desire to return home and be buried with his nanna in Narrogin.'⁶⁶ 'The second defendant heard the deceased tell the second defendant's mother that, if anything happened to him, he wanted to come back to Port Augusta.'⁶⁷ With the deceased having no *legal* right to demand that their body be disposed of in any particular way,⁶⁸ it is unsurprising that it is here that calls for a need to respect the wishes of the dead regarding the posthumous treatment of their body are perhaps strongest.⁶⁹

Putting respect to one side, however, and in the absence of any legal right to require their wishes be complied with, this chapter argues that the dead push the living into action on their behalf. Their ongoing presence compels the living to act in their interests. To be clear, this goes beyond the accepted societal belief that the wishes of the deceased should be the primary consideration when arranging for the disposal of the deceased's body.⁷⁰ The argument here is that the still-present dead, in their haunting of the living, *demand* that the living assert the deceased's wishes on their behalf. This is not merely the living bestowing respect upon the absent dead, but rather the still-present dead inciting the living into action.⁷¹ Thus, in burial disputes, parties can be compelled to action, not (just) to give effect to their own wishes and beliefs, but to ensure the deceased's desires are complied with. In burial disputes, the living stand in the place of the deceased.

Thus, in *Sullivan v Public Trustee*,⁷² the plaintiff, a close, personal confidant of the deceased, was compelled to bring an action to require the Public Trustee (as executor of the deceased's estate) to comply with the deceased's wishes regarding the disposal of his body. The deceased, a famous Indigenous artist, was clear in his desire for his body to be buried at Napperby Downs Station in Australia's Northern Territory. He had repeatedly articulated his wishes, which were born of deep emotional, spiritual and

⁶⁵ *McCredie* (n 53) [17].

⁶⁶ *Bertani v Bertani* [2017] WASC 78 [9].

⁶⁷ *South Australia v Smith* [2014] SASC 64, (2014) 119 SASR 247 [45].

⁶⁸ '[It] is trite law that there is no property in a corpse': *AB v Attorney-General (Vic)* (21 July 1998, unreported), VSC. As a result, '[i]f there be no property in a dead body it is impossible that by will or any other instrument the body can be disposed of': *Williams v Williams* (1882) 20 ChD 659, 665. Requests for cremation can provide one exception, as to which, see the discussion later in this section.

⁶⁹ So much so that the topic has been considered by several law reform commissions: see Victorian Law Reform Commission, *Funeral and Burial Instructions* (Report, 2016); Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of a Dead Body* (Report No 69, 2011) ch 5.

⁷⁰ *Funeral and Burial Instructions* (n 69) 28 para 4.3.

⁷¹ Despret gives the example of purgatory, a period during which the dead demand the living pray for them in order to shorten their time spent in the probationary space: V Despret, *Our Grateful Dead*, trans S Muecke (Minneapolis, University of Minnesota Press, 2021) 32.

⁷² The only version of this judgment I have been able to locate is: Transcript of Proceedings, *Sullivan v Public Trustee for the Northern Territory of Australia* (24 July 2002, unreported), NTSC.

cultural need. Napperby Downs was the deceased's 'borning place' and the country of his possum dreaming. It regularly featured in his paintings, and he frequently spoke of the importance of this place and its stories.⁷³ In the face of opposition from the deceased's family regarding his proposed burial place, however, the Public Trustee had instead made alternative disposal arrangements.⁷⁴

The plaintiff was compelled to act. In doing so, as the court noted, '[she was] not seeking the implementation of her own wishes, rather she is seeking the implementation of the deceased's wishes. She [was] only trying to respect and implement the wishes he so clearly expressed'.⁷⁵ Much as the ongoing spectral presence of Bhagat Singh inspires Indian students to acts of revolution in the twenty-first century,⁷⁶ the deceased's ongoing social presence in *Sullivan* compelled the plaintiff to step in to his shoes, to adopt his wishes as her own and to advocate for them vigorously. As the plaintiff herself said, 'Well, someone had to support his wishes, and no-one else seemed to be doing it'.⁷⁷

Conway and Stannard see the vindication of the deceased's wishes regarding the disposal of their body by the living as a desire on the part of the living to 'do right' by the deceased.⁷⁸ I think it can be put in more stark terms. Simply put, for the living to fail to comply with the demands of the dead and assert the deceased's wishes on their behalf is to ignore the power of obligation that links the departed with the still here;⁷⁹ it is a betrayal of the dead. Thus, for the plaintiff in *Sullivan* to fail to act, to fail to take the dispute to court, would be to wrong the deceased, to let him down, to abandon him. The deceased continued to 'splice' into the plaintiff's life and to interrupt her lived reality. When the court sided with the Public Trustee, it was 'absolutely sad for Clifford [the deceased]'.⁸⁰ That is, not (or at least, not solely), for the plaintiff, but rather for the deceased as one still present in the dispute. It was 'heartbreaking'.⁸¹

Further evidence of the work of the dead on the minds of the living can be found in the various pieces of legislation governing cremation in each Australian state and territory. In Queensland, for example, a decedent's request to be cremated must be complied with (if possible) by the person charged with the disposal of the deceased's body, regardless of that person's own thoughts on the matter.⁸² This requirement remains in place even in the case of objection by the deceased's family.⁸³ These provisions were apparently enacted with the express goal of furthering the rights of the deceased⁸⁴ – that is to say, in full acknowledgement of the continued presence of the deceased as one entitled to certain actions on the part of the living even after their death.

⁷³ *ibid* 7–10.

⁷⁴ The wishes of the deceased's family were also deeply grounded in culture and lore.

⁷⁵ *Sullivan* (n 72) 6.

⁷⁶ See Moffat (n 14) 193–201.

⁷⁷ M Sullivan, '7:30: Tjapaltjarri Finally Allowed to Rest in Peace' (ABC, 25 July 2002) <www.web.archive.org/web/20100110044402/http://www.abc.net.au/7.30/content/2002/s629828.htm>.

⁷⁸ H Conway and J Stannard, 'The Honour of Hades: Death, Emotion and the Law of Burial Disputes' (2011) 34 *University of New South Wales Law Journal* 860, 870.

⁷⁹ Despret (n 71) 25.

⁸⁰ *Sullivan* (n 77).

⁸¹ *ibid*.

⁸² See Cremations Act 2003 (Qld) s 7.

⁸³ See *ibid* s 8.

⁸⁴ *Parliamentary Debates*, Queensland Legislative Assembly, 1054 (1 April 2003, Keech).

Importantly, these provisions allow the deceased to demand a particular action of the living in a way that would not necessarily be countenanced in life. One generally cannot in life, for example, demand that another provide you with a service or an item of property (other than those services or items of property to which the demandor has a legal claim, of course). But in death the deceased can exhort their will loudly – no going gentle into that good night here! – and see it imposed on others.

With all that said, however, it should be noted that neither the relevant Queensland provision, nor its equivalents in other jurisdictions, appear to have been tested in court.⁸⁵ But then, anecdotally, the desire to heed a deceased loved one's call to action regarding the disposal of their body is usually so strong,⁸⁶ and the thought of litigating in relation to that disposal so objectionable,⁸⁷ so as to remove the need for recourse to the relevant statutory provisions. In this way, the provisions in the Queensland Cremations Act (and their mere existence is sufficient) serve only to remind us that we ignore the unquiet dead at our peril.⁸⁸ Instead, we are, rather forcefully, cajoled into action.

B. 'This Macabre Dispute': A Judicial Discourse of Revulsion

It is not only the parties to a dispute who are cajoled into action by the dead. As Verdery notes, 'an unburied body is a source of things being not quite right in the cosmos'.⁸⁹ Judges deciding post-death disputes appear to have taken this to heart. Apparently shocked at the 'extraordinary'⁹⁰ and 'macabre'⁹¹ cases in which parties cannot agree as to how the disposal of the deceased's remains will be effected, these judges engage in what Conway and Stannard have termed a 'discourse of revulsion'.⁹²

Representative of this discourse, in *Keller v Keller*, Hargrave J opened his reasons with the following:

Sarina Keller died peacefully on Sunday 25 February 2007, aged 81 years. The aftermath of her death has been anything but peaceful. A bitter and spiteful dispute between her two children has led to the wholly undesirable situation – disrespectful of the deceased and offensive to ordinary standards of common decency – that Sarina's body has yet to be disposed of, by burial or cremation.⁹³

⁸⁵ There appear to be no cases that even mention the equivalent Western Australian provision (Cremation Act 1929 (WA) s 13), and Cremations Act 2003 (Qld) s 7 was not relevant on the facts of the three cases in which it has been mentioned: see *Laing* (n 47); *Tufala v Marsden* [2011] QSC 222; *Reid v Crimp* [2004] QSC 304.

⁸⁶ *Funeral and Burial Instructions* (n 69) 29–30 paras 4.11–4.16 (describing the prevalent community value that is the need to respect the wishes of the bereaved).

⁸⁷ At least in the eyes of the courts, as the discussion in section IV.B below explores.

⁸⁸ That said, there does not appear to be any penalty attached to the Queensland provision requiring compliance with the deceased's wishes to be cremated. In Western Australia, in contrast, failing to comply with the deceased's wishes to be cremated carries a maximum penalty of a \$400 fine or one year imprisonment: Cremation Act 1929 (WA) s 15(1).

⁸⁹ Verdery (n 21) 45.

⁹⁰ *Derwen v Ling* [2008] FamCA 644 [14].

⁹¹ *Rutherford v Wallace* [1999] NSWCA 299 [41].

⁹² Conway and Stannard (n 78) 886.

⁹³ (n 38) 668 [1].

Conway and Stannard suggest this judicial discourse of revulsion stems from two factors: first, distaste at the thought that the deceased's body must be kept 'on ice' throughout the weeks (if not months or years) that the dispute is ongoing, and second, a sense that the parties to the dispute are 'bad people' for being in conflict at a time (ie the death of the deceased) that is expected to bring people together.⁹⁴ Underpinning both of these themes is the perceived societal need to respect the dead, and the closely-related idea that lengthy periods of non-disposal fail to accord the dead this respect, and are otherwise indecent.⁹⁵

A need to protect the deceased and their body from any disrespect or indecency is certainly present in burial dispute decisions.⁹⁶ As Conway and Stannard point out, however, judges deciding these disputes do not seek to actively explore the emotions underpinning these sentiments.⁹⁷ Taking up the task on their behalf, I argue that, rather than judicial disgust at the ongoing non-disposal of the body representing merely an affront to societal standards of decency and respect (perhaps based on notions of how we would like our own dead bodies to be treated), this disgust reflects a more basic – what we might call primeval – concern. A response to the undisposed-of dead that can be found deep in our human history. I argue that the body of the deceased itself demands that it be disposed of, and that this requires action by the still-living (including judges faced with burial disputes).

The desire (need?) to dispose of our dead that their bodies invoke in us is so deeply engrained in the human psyche that some anthropologists and archaeologists consider it to be a unique marker of *humanness*.⁹⁸ It is said that every human society across time and geography of which there exists some record has (had) at least some practices relating to the disposal of the dead. And by the same token, the act of leaving the dead to decompose to nothing where they fall is considered the mark of a society in crisis. This need to dispose of the bodies of the dead is a subliminal pull that is felt even towards those decidedly *outside* of our own communities. And so, for example, international law requires belligerents to inter the bodies of *all* dead honourably, including those of enemy soldiers and prisoners of war, not merely the bodies of those they fought alongside.⁹⁹

There is, of course, truth to the public health rationale that is frequently said to explain our primeval need to dispose of our dead. Our very ancient ancestors may have buried their dead in order to limit the smell of decay, or to avoid attracting scavengers.¹⁰⁰

⁹⁴ Conway and Stannard (n 78) 887–88. They also note a sense of embarrassment and discomfort on the part of judges faced with a dispute as to the disposal of the deceased's body: at 888. The emotions at the centre of burial disputes are explored in detail in Heather Conway's contribution to this collection: see ch 10.

⁹⁵ Conway and Stannard (n 78) 888–91.

⁹⁶ See, eg, *South Australia v Smith* (n 67) [21].

⁹⁷ Conway and Stannard (n 78) 889–91.

⁹⁸ See discussion in Laqueur (n 15) 8–10.

⁹⁹ See volume 2, rule 115 of the ICRC's study on customary international humanitarian law, available at ICRC, 'International Humanitarian Law Databases' https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v2_rul_rule115.

¹⁰⁰ W Dunham, 'Did Neanderthals Bury Their Dead With Flowers? Iraq Cave Yields New Clues' *Washington Post* (25 February 2020) www.washingtonpost.com/national/health-science/did-neanderthals-bury-their-dead-with-flowers-iraq-cave-yields-new-clues/2020/02/21/0815e340-5415-11ea-929a-64efa7482a77_story.html.

And very similar concerns can be seen in the development of the modern common law duty to dispose of a body that is imposed on particular individuals close to the deceased in life, and owed to society at large:¹⁰¹ ‘the dead body could not remain on the surface of the earth. It became necessary that someone should see it consigned to the grave.’¹⁰² But there is something else at play. The improperly-disposed-of body is a locus of recrimination and accusation; the undisposed-of body even more so. The undisposed-of body is an aberration. It is no longer an embodied person, instead it is a powerful symbol – of both the person that once was and the decay that is inevitable – that works on our imagination and demands disposal.¹⁰³ Put another way, the unburied body requires judges to attempt to repair the tear in the cosmos that body represents, and the discourse of revulsion – so calculated as to shame those before them into disposing of the body swiftly – is part of this attempt.

To be very clear, then, the argument here is that the judicial discourse of disgust and revulsion that is evident in the case law reflects something more than societal discomfort at the fact that relatives of the deceased are delaying disposal with the airing of dirty laundry, and thus offering some indignity to the deceased. The claim made in this chapter is that the presence of an undisposed-of body *works on and in the minds of judges* as a deeply cosmic object that is out of place. These are not emotions and responses that the living create amongst their own communities and then reach out and attach to the dead body. They are instead conveyed from the bodies of the dead to the still-living in a transfer of ancient sentiment. They can be explained in part on the basis of public health, in part on the basis of public decency, and in part on the basis of simply being human.

C. ‘A Hideous Gathering of Shades, Sorcerers and Monsters’: Banishing the Difficult Dead

So far we have seen how the deceased as a haunting presence require the living to take up their cause and fight in their name. We have also seen how the spectre of the deceased’s unburied body inspires judges to a discourse of revulsion and the quick resolution of burial disputes. Here, we consider an example in which both the body and the haunting presence of the deceased are the immediate cause of action on the part of the living.

When Ian Stewart-Brady died in May 2017, his intentions regarding the disposal of his body were clear. It was reported that he wished to be cremated, and his ashes emptied into the River Clyde in Glasgow.¹⁰⁴ Action was required. More (and vastly different) action than is usually required in the case of body disposal – because Stewart-Brady, along with Myra Hindley, was one of the infamous Moors murderers responsible for

¹⁰¹ See K Falconer, ‘The Right to Possession of the Body of the Deceased: A History’ (2021) 8 *law&history* 1, 14.

¹⁰² *Tugwell v Heyman* (1812) 3 Camp 298, 299; 170 ER 1389, 1389.

¹⁰³ On this, see JR Martel, *Unburied Bodes: Subversive Corpses and the Authority of the Dead* (Amherst, Amherst College Press, 2018).

¹⁰⁴ *Oldham Metropolitan BC v Makin* [2017] EWHC 2543 (Ch), [2018] Ch 543 [17].

the deaths of five teenagers in Manchester, England in the 1960s. Glasgow refused to have him,¹⁰⁵ and concerns that his ashes might be scattered in proximity to where he had committed his crimes led two metropolitan borough councils (Tameside and Oldham) to seek assurances, and ultimately a court order, that this would not take place.¹⁰⁶

Stewart-Brady's spectre is writ large in Sir Geoffrey Vos' reasons for his decision. More so than the average dead person, he haunted the courtroom. The public – and the court – were revolted by his desire to have the fifth movement of Hector Berlioz's 'Symphonie Fantastique' – which portrays a murderer attending his own funeral in the form of a 'hideous' and 'vulgar' witches' sabbath¹⁰⁷ – played at his cremation.¹⁰⁸ There was public revulsion in communities affected by the murders, with residents concerned that Stewart-Brady's remains would be disposed of in their vicinity, as reports suggested Myra Hindley's remains had been before him.¹⁰⁹ Merseyside Police expressed concerns about public order.¹¹⁰ Simply put, he could not be allowed to be disposed of as and where he saw fit. Stewart-Brady's wishes regarding his body, and on a more basic level the very fact that his body required disposal, demanded, required, incited action.

What is interesting here is the dual nature of the work done by the dead Stewart-Brady. A quintessential example of the 'difficult dead',¹¹¹ he was twice present in the dispute. As a deceased murderer responsible for terrible crimes, he haunted the lives and minds of those affected by his actions. The Deputy Executive Leader of Tameside, speaking for his 220,000 constituents, for example, insisted that '[d]espite these murders happening over 50 years ago, the horror and revulsion has not subsided for the people of Tameside'.¹¹² Stewart-Brady's social presence was (and likely is) still inescapable, and had to be quelled as much as possible. At the same time, his dead body acted as the physical representation of his crimes and his ability to make himself known in the lives of the living; a unique form of toxic necro-waste.¹¹³ For Tameside and Oldham, the idea that his remains – even in the disembodied and dispersed form of cremated ashes – might persist in the community could not be countenanced. The court must intervene.¹¹⁴

And intervene the court did. Ultimately, it was ordered that Stewart-Brady's body be cremated in a spare cremator outside of normal operating hours at a crematorium in the neighbouring borough of Sefton. There were to be no flowers, and no music was allowed to be played. Only a select few (mostly council officials and police) were

¹⁰⁵ *ibid.*

¹⁰⁶ *ibid* [18].

¹⁰⁷ *ibid* [86].

¹⁰⁸ *ibid* [86]–[87].

¹⁰⁹ *ibid* [40].

¹¹⁰ *ibid* [14], [16].

¹¹¹ D Robins and R Smith, 'Hidden Labour in Funeral Directing: Providing Care to "Difficult" Dead Bodies' (2021) 26 *Mortality* 100.

¹¹² *Oldham* (n 104) [40].

¹¹³ D Robins, 'Toxic Necro-Waste' (2017) 6 *Social Epistemology Review & Reply Collective* 39. See also Robins and Smith (n 111) 102–04.

¹¹⁴ *Oldham* (n 104) [18].

permitted to attend. His ashes were to be disposed of at sea.¹¹⁵ Clearly, the strength of his social presence required the court to be cold and clinical in its dealings with Stewart-Brady. And whilst the court acknowledged the existence of a duty to dispose of each and every body decently,¹¹⁶ his unclean and potentially pollutive presence in the courtroom required the boundaries of that duty to be pushed to the very limit. Thus, whilst other courts have noted that 'it is not possible to conduct a service that is compatible with the most basic norms of human dignity without something being said about the deceased',¹¹⁷ no service was allowed at Stewart-Brady's cremation, and no words said to commemorate him.¹¹⁸ He was not to be farewelled so much as banished.

In the context of the existing body of burial dispute case law, this is a unique and emotive obliteration of a dead body, both in practice and in law.¹¹⁹ In its uniqueness, it is a powerful form of commemorative expression.¹²⁰ It is a way of moulding memory, both individually and on a societal level. As McEvoy and Conway point out, '[h]istorically, the physical and symbolic destruction of the body *after* death was an important aspect of the sentence of the court'.¹²¹ The bodies of convicted murderers in eighteenth- and nineteenth-century England, for example, were sent to the dissection table – an infamously terrible punishment considered a fate worse than death.¹²² This fate was so feared because it was not merely their bodies that were destroyed. In their not being afforded the dignity of established disposal practices (notably burial in consecrated ground with a Christian service), the convicted dead were denied an acceptable social existence (as a good Christian and a member of a local community of the dead) in death. Instead, their posthumous existence in the minds and memories of the living, if they enjoyed one at all, was as a perpetual outsider, constantly maligned and suffering a social death intended to be as humiliating as possible.¹²³

The same can be said for the court's treatment of Stewart-Brady's body. The orders made by Sir Geoffrey Vos were designed to strip Stewart-Brady and his body of the usual trappings of a modern funeral, so as to limit his haunting presence as much as possible. He was to be wiped from the world in an act of 'symbolic [sanitation]',¹²⁴ with no trace of his physical self to be left behind, and as little as possible of his social self allowed to endure. His ashes were scattered at sea with only a handful of officials allowed to be present.¹²⁵ The spare crematorium used to cremate his body was to be scrubbed clean after the event to remove any trace of him.¹²⁶

¹¹⁵ *ibid* [88].

¹¹⁶ *ibid* [9].

¹¹⁷ *McCredie* (n 53) [19].

¹¹⁸ *Oldham* (n 104) [88].

¹¹⁹ A point noted by Sir Geoffrey Vos: *ibid* [84].

¹²⁰ K McEvoy and H Conway, 'The Dead, the Law, and the Politics of the Past' (2004) 31 *Journal of Law and Society* 539, 552.

¹²¹ *ibid*.

¹²² R Richardson, *Death, Dissection and the Destitute*, 2nd edn (London, Phoenix Press, 2001) 32–34.

¹²³ *Laqueur* (n 15) 347.

¹²⁴ *Robins and Smith* (n 111) 106.

¹²⁵ *Oldham* (n 104) [88].

¹²⁶ *ibid* [23].

D. 'Nothing Short of Toxic': Demanding a Relationship with the Dead

In the previous discussions, we focused our attention on the demands the dead make of the living. To conclude our consideration of the work of the dead in burial disputes, we turn our attention to the demands the living make of the dead.

We have already seen that the living are compelled to act on behalf of the deceased in the courtroom, standing in place of the dead and advocating for their wishes. That is to say, we have seen that the dead maintain active relationships with the living, and demand that the living 'live up' to their side of the relationship. These ongoing relationships go both ways, however, and the living can and do make similar demands of the dead. How so? To borrow again from the words of Verdery, '[m]anipulating physical remains is a visual and visceral experience that seems to offer true access to the past'.¹²⁷ In bringing post-death disputes, then, the living use the dead, and their relationships with the dead, to access, maintain and project a particular, 'true' view of the(ir) past.

Here, we can return to our comparison of burial disputes and eulogies. In our discussion in section III above we compared the written *judgment* that resolves burial disputes with a eulogy in its acts of naming the deceased and establishing at least an outline of the deceased's life and times. Here, it warrants noting that the person who writes a eulogy controls the narrative of the deceased's life (and their role in it).¹²⁸ The same is very much true of the person responsible for arranging the disposal of the deceased's body – the location of that disposal, any associated ceremony, who is invited and who is not. By virtue of making these arrangements, the person responsible receives public acknowledgement that they were the focal point of the deceased's life.¹²⁹ In competing for the position of decision-maker in this context, then, parties to burial disputes demand that their relationship with the deceased be recognised as taking priority, and that the deceased support their claim by performing their part in this relationship.

Conway and Stannard refer to this approach to burial disputes as an attempt to 'reclaim' and 'monopolise' the deceased in death.¹³⁰ Cases in which parents are in conflict as to the disposal of their deceased child's body are a particularly tragic example of this – the more so when the deceased is a minor child. In these disputes, the two parents frequently attempt to establish that they (and not the other parent) had the closer relationship with their child in the child's lifetime. This is commonly done by emphasising the actions of the parent – the giving of gifts and the payment of financial support on the one hand, and the provision of care and use of a particular last name on the other, for example.¹³¹

For our purposes, however, we are more concerned with those harder-to-grasp moments in which living parents demand that the deceased perform the role of loving child in the courtroom. We can see this in claims that *the deceased child* had a stronger, more intimate relationship with one parent than the other (as opposed to claims about

¹²⁷ Verdery (n 21) 113.

¹²⁸ Caswell (n 46) 251.

¹²⁹ Conway and Stannard (n 78) 879–80.

¹³⁰ *ibid.*

¹³¹ See *AB v CD* [2007] NSWSC 1474.

the nature of the relationship made from the perspective of the parent). Thus, it is an important factor in the resolution of these disputes that the deceased child chose to '[maintain] close contact' with a parent,¹³² or that they 'had a much closer personal relationship with [one parent] prior to [their] death than [they] did with anybody else, including [their other parent]'.¹³³ In emphasising these points, the deceased's parents are demanding the deceased support their claim of priority in the hierarchy of relationships that continue post-death. The deceased is called to stand witness to the veracity of a particular version of the past in what is, in essence, a post-death custody battle.

There is also an important public-facing aspect here that should not be overlooked (at the same time as it should not be over-emphasised). Ultimately, in at least some of these cases, the legal recognition of one party over the other as decision-maker in arranging the disposal of their child's body becomes a 'prize' awarded by courts to the more involved parent (despite protests by courts to the contrary).¹³⁴ That is, the public acknowledgement that is brought about by a decision in one party's favour is not just of the *existence* of a particularly strong relationship with the deceased in a particular family context, but of the *quality* of that relationship as determined by broader community standards. And so, for example, the conscience of a modern community will not favour the claim of a biological mother when the child in question was adopted by another some 20 years ago¹³⁵ – the biological mother's relationship with the deceased is simply not of sufficient quality in the eyes of society.

V. Conclusion

In perhaps his second most famous poem, Dylan Thomas tells us that even when our bones are picked clean and the clean bones gone, 'death shall have no dominion' over us. If we take Thomas to be referring to biological death, then we certainly cannot argue. Biological death, as much as legal death, is *an* end, but it is not *the* end. Instead, after biological death (and the legal death with which it corresponds) there is a long, lingering interstice period before the dead finally fade into nothing. This nothingness, this second death, is *the* end.

This chapter has not been concerned with *the* end. It has been concerned with the interstice period that precedes it. Its argument has been founded on the idea, drawn from the interdisciplinary field of death studies, that in this interstice period the dead and their bodies continue to *do work*. They continue to make demands of the living, and to incite us to action. Thus, we have seen that the deceased, deprived of any legal recourse on their own part, turn to the living to demand that their wishes regarding the disposal of their body be enforced.

¹³² *Burrows v Cramley* [2002] WASC 47 [6], [10].

¹³³ *AG v JB* [2022] NSWSC 326 [38].

¹³⁴ I Freckleton, 'Disputed Family Claims to Bury or Cremate the Dead' (2009) 17 *Journal of Law and Medicine* 178, 182–83.

¹³⁵ *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 697. The deceased in this case was in his early 20s (as opposed to a minor child).

At other times, the demands made by the dead are simpler and more deeply felt. The bodies of the dead demand to be disposed of, not through any particular individual desire on the part of the individual dead to be dealt with in any particular way, but because the very nature of an undisposed-of body makes the demand of disposal of the living. To be human is to dispose of our dead, and to decide a burial dispute is to accord with that demand in the most urgent of ways.

But the living also make demands of the dead. And so we have seen that, in litigating burial disputes, the living call on the dead to affirm and comply with particular views the living have of themselves in their relationships with the deceased. And at times the living are required to banish the dead, to seek to limit the spectral reach of the dead as much as possible.

Underlying all, this chapter has drawn on sociological and historical notions of the pervasiveness of the modern dead and the work that these still-present dead perform in modern society to argue that the deceased themselves, rather than merely a reflexive respect for the deceased on the part of the living, continue to have a real and meaningful presence in burial disputes. And if the dead are at work here, there is no reason to think they are not also at work throughout the entirety of private law.