



CSU
College of Law Library

1962

Autopsy Evidence

Garcon Weiss

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstrev>



Part of the [Evidence Commons](#), and the [Medical Jurisprudence Commons](#)

[How does access to this work benefit you? Let us know!](#)

Recommended Citation

Garcon Weiss, *Autopsy Evidence*, 11 *Clev.-Marshall L. Rev.* 279 (1962)

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in *Cleveland State Law Review* by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

Autopsy Evidence

*Garcon Weiss**

FREQUENTLY DEATH RESULTS in legal problems, either civil or criminal, the solutions of which depend on the cause of death. The autopsy (necropsy), or post-mortem examination, is the scientific method of determining the cause of death.

An autopsy is the careful inspection of the external and internal structures of the body. There are two types of autopsy, the medical autopsy and the medico-legal autopsy.¹

The medical autopsy is the routine examination of the body of a person who had been treated in the hospital. Its ultimate goal is to verify the diagnosis made prior to death and to evaluate the results of treatment and surgery, thus increasing the store of medical knowledge. Such results also furnish an indication of the standard of medical practice in the hospital. The Joint Commission on Accreditation of Hospitals desires that autopsies be performed in at least twenty percent of hospital deaths, and the American Medical Association requires an autopsy in at least twenty-five percent of hospital deaths, for approval of an intern training program.²

The medico-legal autopsy is performed in order to determine whether death was the result of natural disease or violence. The ultimate objective is to ascertain facts which may be used as substantive evidence to prove or disprove circumstances or conditions indicating legal responsibility. As a result of an autopsy, it may be possible to ascertain whether death was criminally induced, whether an insurance contract must be paid, whether death is compensable under Workmen's Compensation or is the result of a tort actionable in a civil case, and finally whether death is traumatic or natural. For example, autopsy may show that a death which appears natural, *i.e.*, heart attack, actually is the result of a blood clot formed in the extremity after an injury there, which traveled to the lung, causing a fatal pulmonary embolism which but for the injury would not have occurred.³

* B.S. in Pharmacy, Ohio State University, Senior at Cleveland-Marshall Law School.

¹ Gerber, *Postmortem Examinations*, 6 *Clev.-Mar. L. Rev.* 194 (1957).

² *Hospital Law Manual, Attorney's Volume II, Consents II:1* (1959), Health Law Center, University of Pittsburgh.

³ *Use of Medical Evidence in Death Cases to Show "Traumatic or Natural Causes,"* 6 *Curr. Med. for Attys.* 37 (Feb. 1959).

Performance of a medical autopsy without authorization constitutes a wrong for which damages may be recovered. Persons having the right of sepulture also have the right to refuse to permit an autopsy and to place limitations and restrictions on the consent given as to the areas to be examined. Violation of such limitations makes the violator liable for damages.

Generally, the rule recognized in the United States is that those entitled to possession and custody of a body for sepulture have certain legal rights to and in the body of the decedent. Any interference with the rights, such as dissecting or mutilating the body, is an actionable wrong.⁴ Many states have enacted statutes indicating from whom such authorization should be obtained. Some jurisdictions allow a decedent to consent in writing, prior to death, for autopsy of his remains. Generally the statutes provide that surviving spouse, father, mother or child may give consent, or that authorization by any one of the persons listed in the statute who has assumed custody of the body for burial is sufficient.

Ohio Revised Code, Section 313.14, indicates an order of preference for custody of the body of a deceased. Authorization to perform an autopsy should be obtained from the nearest living kin of the deceased available to give consent and from the person assuming custody of the deceased's body for burial as well, if such person is not the nearest living kin.⁵

Where there is no specific statutory indication as to authorization, the statutes and cases dealing with the devolution of legal responsibility for burial must be examined. In addition there must be recognition of the decedent's rights regarding disposition of his remains.

In every state of the United States certain public officials are empowered by statute to perform or to authorize autopsies in order to determine cause of death when circumstances indicate medico-legal significance. This authority may in some instances be limited to cases where violence or an unlawful act is supposed to have caused death before autopsy is permitted.⁶

⁴ Hospital Law Manual, Attorney's Volume II, Consents II:2 (1959) Health Law Center, University of Pittsburgh.

⁵ See also, Hospital Law Manual, Attorney's Volume II, Consents II:28 (1959) Health Law Center, University of Pittsburgh.

⁶ Gerber, Postmortem Examinations, 6 Clev.-Mar. L. Rev. 194, 198 (1957).

Ohio Revised Code Section 313.13⁷ places the decision as to necessity for autopsy in the discretion of the coroner.

Wisconsin has passed a "model autopsy law"⁸ in connection with medical autopsies, to remove some of the difficulty encountered in obtaining consent:

Consent for licensed physician to conduct a post mortem examination of the body of a deceased person shall be deemed sufficient when given by whichever one of the following assumes custody of the body for purposes of burial: father, mother, husband, wife, child, guardian, next of kin, on the absence of any of the foregoing a friend or person charged by law with the responsibility for burial. If two or more of such persons assume custody of the body, consent by one of them shall be deemed sufficient.

This article is limited to the use of the autopsy for medico-legal purposes, *i.e.*, for obtaining and submitting evidence.

It appears that while the autopsy can give valuable information, it must follow the path laid down by the formal rules of evidence. In *Ogilvie v. Aetna Life Insurance Company*⁹ it was held that a written report made by the county autopsy surgeon to the coroner and filed with the county clerk was inadmissible as hearsay:

It was an unsworn statement not subject to cross-examination made by a stranger to this action. . . .

The Court noted that public records "are made receivable as prima facie evidence by virtue of express provision of statute," but none was there cited. The case was cited in *McGowan v. City of Los Angeles*,¹⁰ so that it appears that an autopsy report is inadmissible as evidence except by express statutory provision. For example, under Ohio Revised Code, Section 313.10:

The records of a coroner made by himself or by someone acting under his supervision are public records, and such records or copies certified by the coroner shall be received in evidence as to the facts contained therein.

This was cited and followed in both *Carson v. Metropolitan Life Insurance Company*¹¹ and *Perry v. Industrial Commission*.¹²

⁷ See Baldwin's Ohio Revised Code, 1958.

⁸ West's Wis. Stat. Ann. Sec. 155.05 (1957).

⁹ 189 Cal. 406, 209 P. 26, 27 (1922).

¹⁰ 223 P. 2d 862, 865 (Cal. 1950).

¹¹ 156 Ohio St. 104, 100 N. E. 2d 197 (1951).

¹² 160 Ohio St. 520, 524, 525, 117 N. E. 2d 34 (1954).

However, the two cases are distinguishable. In the *Carson* case the report was inadmissible because of the opinion therein.

The preferred statement was merely an expression of opinion by the coroner that decedent committed suicide, since no one witnessed the killing.

In the *Perry* case the report was admissible because signed by the attending physician, ". . . who had personal knowledge of the fact of the cause of death."

Another Ohio case, *Armstrong v. Travelers Insurance Co.*,¹³ preceding the aforementioned *Oglivie v. Aetna Life* case, held that:

An autopsy paper, signed by the physicians making the post-mortem examination is not admissible as substantive evidence, where the signatures had not been placed under oath and privilege of cross-examination was not accorded, but such paper may be used for the purpose of refreshing the memory of witnesses.

The weight of the authority permits the autopsy report to be admitted in evidence as proof of the facts therein, but not as to the opinions expressed. An exception appears in Arizona, where the statute "expressly directs the coroner to state whether the death appears accidental, suicidal, or homicidal." The Arizona court held that the opinion should have been admitted in evidence along with the rest of the certificate.¹⁴

As to the opinions expressed by the physician who made the autopsy, there is general agreement that his testimony is admissible as the opinion of an expert witness.

In *Texas State Highway Department v. Fillmon*,¹⁵ a workmen's compensation case, the court held (syllabus 3):

Physician in autopsy on employee was properly permitted to testify that employee died as result of heat stroke, or that his opinion was based on facts proved at trial.

In this case the physician testified from both personal experience, having helped at the autopsy, and from expert knowledge based on hypothetical questions.

In *Shepherd v. The Midland Mutual Life Insurance Company*¹⁶ a brief statement of the general rule is that:

¹³ 4 Ohio App. 46 (1914).

¹⁴ Calif. State Life Insurance Co. v. Fuqua, 10 P. 2d 958, 963 (Ariz. 1932).

¹⁵ 242 S. W. 2d 172 (Tex. 1951).

¹⁶ 152 Ohio St. 6, 87 N. E. 2d 156 (1949).

Where ultimate fact for jury is one depending on interpretation of scientific facts beyond the comprehension of jury, witness may express opinion as to probability or actuality of fact pertinent to an issue and admission of such opinion does not constitute invasion of province of jury, though such opinion was on ultimate fact.

Furthermore:

A medical expert's opinion as to cause of death, when cause is pertinent, may be admitted, if it appears the witness attended the person during his illness or examined his body after death.

In *Commonwealth v. Borasky*¹⁷ it was even held that, despite statutes requiring the medical examiner to make an autopsy and to make and file a record thereof, testimony of the physician who performed the autopsy as to his observations of the condition revealed by the autopsy is not incompetent on the ground of the record being the best evidence.

The requirements of notice as to performing an autopsy may affect admissibility of the results into evidence where notice is a statutory requirement, particularly in workmen's compensation cases. For example see *General American Tank Car Corporation v. Zapala*,¹⁸ citing Indiana Workmen's Compensation Law Section 27 requiring timely notice. Failure of notice made the results inadmissible on motion of the adverse party. The court also held that unseasonable request for autopsy worked a waiver of the statutory notice for such autopsy (four months having elapsed before the giving of such notice).

The problem of notice arises often as a result of a clause in an insurance policy giving the insurer the right to an autopsy. In *Gath v. The Traveler's Insurance Company*¹⁹ the demand for an autopsy was made several months after death, though agents of the Company were aware of the insured's death thirty hours before burial. The Court said:

Autopsy clauses as we have here, are construed strictly by the courts in favor of the insured and require a demand for autopsy to be made before burial, especially when the death of the insured is known to the agents of the company and it has reasonable grounds to believe that it was not caused by accidental means.

¹⁷ 214 Mass. 313, 101 N. E. 377, 379 (1913).

¹⁸ 10 N. E. 2d 762, 764 (Ind. 1937).

¹⁹ 113 Ohio St. 369, 374, 143 N. E. 389 (1925).

Evidence obtained from autopsy is generally admitted, where no notice to the accused is given, in cases of homicide. In *King v. State*²⁰ the court said that lack of notice did not render the evidence inadmissible but only affected its credibility. In *Lowe v. People*²¹ the accused lived in Colorado, and the deceased was buried in Illinois though the murder occurred in Colorado. The court held:

In a murder prosecution disclosures of autopsy performed on body of decedent in another state held admissible though defendant was given no notice that the proceeding was contemplated and had no legal representative in attendance.

And in *Benge v. Commonwealth*,²² another homicide case, it was held:

In murder prosecution bullets and other evidence obtained from making post mortem examination of deceased five months after his death without notice to accused were admissible.

Lack of notice did not affect admissibility in *Sun Accident Association v. Olson*,²³ but the court said that secrecy or partisan character in the proceedings of an autopsy might affect its weight and influence with the jury.

Where refusal to permit an autopsy was characterized by the insurer as an admission as to the cause of death, the court in *Vulcan Detinning Company v. Industrial Commission*²⁴ held that:

Refusal to permit autopsy was not an admission and raised no presumption as to the cause of death.

It might be noted that the refusal was made after burial.

In a recent case²⁵ an autopsy was made on the body of the deceased, but the coroner, because of his physical and mental condition, could not be produced as a witness at the trial of the accused. The report itself, however, was admitted. The defendant claimed error because of insufficient evidence to prove the corpus delicti. The court said:

The corpus delicti in homicide cases may be established without the aid of testimony pertaining to coroner's autopsy.

²⁰ 19 S. W. 110 (Ark. 1892).

²¹ 76 Colo. 603, 234 P. 169 (1925).

²² 97 S. W. 2d 54 (Ky. 1936).

²³ 59 Ill. App. 217 (1895).

²⁴ 128 N. E. 917, 920 (Ill. 1920).

²⁵ Commonwealth v. Fletcher, 128 A. 2d 897, 899 (Pa. 1957).

Where autopsy is essential to produce evidence for determination of the issues of a case, a court in its discretion may so order. In *Kusky v. Laderbush*²⁶ the plaintiff sued for injury resulting from an auto accident to the extent of \$25,000, but died and was buried before trial of the cause. The defendant motioned the trial court for an autopsy on the deceased on the ground that plaintiff died of cancer, but was refused. On appeal the Supreme Court of New Hampshire held that the defendant was entitled to an autopsy even though he had other sources of evidence. They based their holding on the ground that a court had the power to order an autopsy if, in its discretion, it was in the interest of the public good or where the demands of justice required an autopsy.

In *Ullendorf v. Brown*,²⁷ a probate court ordered an autopsy to determine heirship. On death of one Jennie Ullendorf, two persons claimed, as her children, two-thirds of her estate. The plaintiff, her third husband, claimed that the children were not those of the deceased but were twins born of another mother in a maternity ward and given to the deceased shortly thereafter and never legally adopted by the deceased and her first husband. Plaintiff's bill stated that all persons by whom he could prove that the defendants were not the children of the deceased were dead, and sought a court order for disinterment and autopsy to determine whether the deceased had ever borne a child. The court said:

. . . we think it entirely within the power and province of the probate judge having jurisdiction, in the exercise of sound judicial discretion, and for the purpose of proving justice and preventing fraud to enter an order directing that the body be exhumed and an autopsy be performed for such purpose, and that findings of the persons making the autopsy be made available in the trial of the cause.

In *Traveler's Insurance Company v. Welch*,²⁸ the court said:

Even where there was no autopsy clause in a disputed insurance, a court of equity was held able to order exhumation and autopsy because of its power to defeat fraud and perpetuate evidence,

citing *Mutual Life Insurance v. Griesa*,²⁹ where the court ordered an autopsy to aid the insurer's defense of suicide by poisoning as

²⁶ 96 N. H. 286, 74 A. 2d 546 (1950).

²⁷ 156 Fla. 655, 24 S. 2d 37, 40 (1945).

²⁸ 82 F. 2d 799, 802, 803 (5th Cir. 1936).

²⁹ 156 F. 398, 399 (Circ. Ct. D. Kan. 1907).

against the beneficiary's claim of death due to a fall from a house roof.

The statutory privilege³⁰ accorded to the physician-patient relation does not affect the admissibility into evidence of the result of an autopsy where the physician performing the autopsy did not treat the deceased during his life, as the privileged relation did not exist. This is the weight of authority, and is in accord with the reason for the privilege, namely to encourage the patient to disclose freely all facts material to his condition, thus facilitating treatment without the fear of disclosure of confidential facts. A physician who is a stranger to the deceased during life cannot create the physician-patient relation with a corpse.³¹ *Traveler's Insurance Company v. Bergeron*³² is illustrative. The autopsy was performed at the request of the treating physician by the pathologist of the hospital where the insured was treated and died, but he had no hand in the patient's treatment. It was held that the privilege did not exist because the physician-patient relation did not exist. The same court said:

Of course where the physician who performs the autopsy was the physician of the deceased person during the latter's lifetime, such physician, in disclosing the facts obtained through the autopsy, must not be permitted either directly or indirectly to disclose facts which come to him when the professional relation existed.

Where the physician performing the autopsy is also the doctor who treated the deceased as a patient there is a conflict of opinion as to whether the results of the autopsy are admissible in evidence. A great preponderance of the cases holds that if the physician-patient relation existed the results of an autopsy performed by the physician are not admissible. In *Bendford v. National Life and Accident Insurance Company*³³ the doctor who performed the autopsy on the decedent attended the decedent for twelve days prior to death. The autopsy was permitted by consent of the plaintiff widow. The doctor in his testimony testified that his conclusions and opinion were based on the record made in connection with decedent's treatment before death as well as on the findings of the autopsy. The court held that:

³⁰ Baldwin's Ohio Revised Code Ann. Sec. 2317.02, for example.

³¹ Ann. 58 A. L. R. 1134; *Ferguson v. Quaker City Life Ins.*, 146 A. 2d 580, 583 (1958); *DeWitt, Privileged Communications between Physicians and Patient*, 130 et seq. (1958).

³² 25 F. 2d 680, 683 (8th Circ. 1928).

³³ 356 Mich. 52, 96 N. W. 2d 113 (1959).

. . . testimony concerning the autopsy findings of the deceased insured and information obtained in treatment of the insured by an attending physician were privileged and inadmissible.

In *Sprouse v. Magee*,³⁴ a case for the wrongful death of the wife as a result of malpractice, the plaintiff on appeal claimed error in rejection of the evidence acquired by the treating doctors in connection with the treatment and as a result of autopsy. Held, that the right to waive the privilege of a physician as evidence survives, and may be exercised after the death of the patient by the heirs as well as by the deceased's personal representative.

As to evidence obtained from an autopsy, we have no hesitancy in saying such is not privileged, when not dependent upon, and when capable of being by the physician segregated from, information which he received as an attending physician.³⁵

In *Mathews v. Rex Health and Accident Insurance Company*³⁶ plaintiff sued as beneficiary of her son's insurance contract. The boy died as a patient in City Hospital of Indianapolis, and an autopsy was made by the hospital pathologist without consent of the parent. The pathologist was not the attending physician. On plaintiff's objection to the admissibility of the pathologist's testimony as to the cause of death, the appellate court held that the testimony was inadmissible, commenting that the autopsy was held without anyone's consent and could result only through the relation of the patient with the hospital. The pathologist was treated as the assistant of the treating physician and the privilege maintained. The court said:

Can a hospital, immediately after death of one of its patients discharge the physician who had attended the patient up to the time of death, and thereafter rush the dead body to the morgue and direct the physician at the head of the pathologist department to perform an autopsy, and thus evade the statute which sealed the lips of the first physician? We think these questions should be answered in the negative, and that a physician under those circumstances steps into the shoes of the attending physician holding the autopsy at the direction of the latter, and that the information acquired by him through the autopsy is privileged.

³⁴ 46 Ida. 622, 269 P. 993, 997 (1928).

³⁵ *Id.*, at 997.

³⁶ 157 N. E. 467, 471 (Ind. 1927)—Discussion of privilege as related to autopsies.

It will be noted that the facts are practically identical with those in *Traveler's Insurance Company v. Bergeron* above.

Admissibility of photographs of a deceased taken at autopsy lie in the sound discretion of the trial judge. If the principal effect of the photograph is to arouse the passions of the jury and to prejudice the defendant because of the gruesome details, the demonstrative evidence will be excluded, but if the probative value as to a fact in issue outweighs the effect of prejudice to the defendant, it will be admitted.³⁷ In *Carter v. People*³⁸ the autopsy surgeon used colored slides to show the nature of the wound and then described the type of instrument that would be required to inflict them. It was held that admission of the slides was not an abuse of the trial court's discretion under the circumstances because the court warned the jury not to be prejudiced by them.

Photographs showing incisions and sutures in performing an autopsy were held inadmissible in *St. Lukes Hospital Association v. Long*³⁹ a civil case, because:

The cause of death was firmly established without dispute that there could be no substantial testimonial value in the picture.

And in *Oxendine v. State*,⁴⁰ a homicide case, the showing of colored slides was held to be prejudicial in view of testimony that the victim died instantly of gunshot wounds:

. . . they had no probative value in establishing any issue in the case but were a mere appeal to passion and prejudice of the jury.

Where the issue of "illegal search and seizure" was raised in connection with an unauthorized autopsy, the Court of Appeals of Kentucky in *Streipe v. Hubbuch Brothers & Wellendorf*,⁴¹ a Workmen's Compensation case involving insurance, held without deciding as to the legality of the autopsy involved, that the results were admissible in either instance under the general rule that the courts do not concern themselves with the method by which the evidence was obtained so long as it is otherwise admissible. Since the Constitutional protection applied only in a

³⁷ *People v. Carter*, 48 Cal. 2d 737, 313 P. 2d 665 (1957).

³⁸ *Ibid.*

³⁹ 240 P. 2d 917, 922 (Colo. 1952).

⁴⁰ 335 P. 2d 940 (Okla. 1958).

⁴¹ 25 S. W. 2d 358, 359 (Ky. 1930).

criminal case, it was inapplicable in the instant case, and for the further reason that there was no right of property in a dead body.

We therefore conclude that a corpse is not a possession, and that a post mortem examination is not an unreasonable search and seizure within the contemplation of the Constitution.

This line of reasoning was followed in the homicide case of *People v. Franskiewicz*,⁴² where the court cited and followed the *Streipe* case, rejecting the appellant's contention that the result of the unauthorized autopsy, not made in strict compliance with the statute,

. . . was inadmissible, for the same reason that testimony obtained by the unlawful use of a search warrant is held to be incompetent and inadmissible.

The Court held that the testimony obtained was admissible.

The courts have recognized the autopsy as a valuable aid in gathering evidence, and have uniformly supported the enforcement of autopsy clauses in insurance contracts,^{43,44} subject only to the rule that demand must be reasonably and seasonably made.^{45,46} Autopsy rights usually appear in insurance contracts in connection with double indemnity clauses as a prerequisite to payment.

To conclude, autopsy results are subject to the same use, abuse, and rules as is any other evidence. The trial judge largely passes on admissibility of results of autopsy as with other evidence, and indeed the autopsy may be the only source of aid to him in determining controversies. It appears to this writer that their use in the main has been very satisfactorily handled, and that the autopsy will remain an important evidentiary tool.

⁴² 4 N. W. 2d 500, 503 (Mich. 1942).

⁴³ *Patterson v. Woodmen of the World Life Ins. Co.*, 84 S. 2d 127 (1955).

⁴⁴ *Cohen v. Guardian Life Ins. Co. of America*, 207 Misc. 266, 138 N. Y. S. 2d 794 (Sup. Ct. Kings Co. 1955).

⁴⁵ 45 C. J. S. Sec. 1070, pp. 1309-10.

⁴⁶ *Gath v. Traveler's Insurance Co.*, *supra* n. 19.