

## Is it unlawful to treat the dead without respect and dignity?

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Two recent incidents led to the writing of this article. The first was an email from a colleague who wrote: "I just found this tweet about a nurse who allegedly took a photograph of a deceased patient and shared it with a friend on WhatsApp". The tweet has a photo attached to it and reads: "Look at this old ugly person *ndikusendela lento* [I am sending you this] to give you nightmares". The second was "Corpse shock on Johannesburg's M1-highway", an article in TimesLive written by Naledi Shange on 18 November 2017 when the wheels came off a trailer on the highway and some boxes containing dead bodies were dropped. The Public Safety Member of Mayoral Committee, Michael Sun, expressed his shock stating that the bodies were transported neither in a dignified nor hygienic manner and no respect was shown to the deceased and their families.

When a person passes away in hospital the body will be washed and dressed with clean linen. The doctor will issue a death notice stating that the death was due to natural causes (our scenario). If a hospital does not have any mortuary facilities, the funeral home will arrange for the body of the deceased to be collected from the hospital. When the body is identified at the mortuary, it is issued with a body number. The funeral home then arranges for the further burial services. All is performed with respect and dignity.

The jurist sees a natural person (human being), other than a juristic person (a trust or a company in law), as having a legal *persona* that terminates after death. It means a deceased has no legal standing and does not have rights or obligations. The law further regulates the disposal of a deceased body and does not make mention of respect or dignity for the dead, *per se*. Law-making arises out of the rights of the living and not those of the dead.

Having said that, why then, is it perceived to be unethical – even unlawful in certain instances – to treat the dead without the necessary respect or dignity?

The popular answer would be something like, "it is the moral thing to do" or it is "what society expects or perceives the right thing to be". The old Roman writers described it as the *boni mores* of society; "it is to be held that, we may not do things which violate good customs" (Paulus Digesta 28.7.15). The modern term is, amongst others, public policy. Public policy is norms, values or principles that direct proper, constitutional and legally permissible behaviour in society (De Vos P 2014 'South African Constitutional Law in Context' 786). Thus, to summarise, in terms of the legal convictions of the community, a dead body should be respected and treated with dignity. Or, said differently: we (as the general public) are shocked and emotionally upset if bad things are done to dead bodies as we recognise and appreciate that it is the body of someone's loved one. Apart from this personal or moral preference, cultural and religious beliefs are also found to play a major role, however, this falls outside the scope of this discussion.

Having a closer look at the law, the South African court accepts that the legal responsibility of the general public is based on the simple notion, namely 'not to cause harm' (*Loureiro and Others v Imvula Quality Protection (Pty) Ltd* [2014] ZACC4; 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC)); this includes not violating the rights of others. Subsequently, any positive conduct (any act) that harms another would be *prima facie* wrongful. It means that because the action harmed another, the court holds it to be wrongful until it is shown that it was not wrongful or until it is shown that no harm was caused. On the face of it, any conduct that results in injury (including emotional or physical injury) is wrongful and actionable.

When considering the TimesLive incident, the National Health Act (61 of 2003) describes the requirements necessary to transport dead bodies and the transporter

should have a certificate of competence (section 5) before getting the green light to transport corpses. In addition, the transport vehicle and the premises should not be used in a way that is hazardous to the health of the workers and the general public (section 9(1)(a)). The Act lists the hygiene requirements and waste standards necessary when moving or transporting corpses because of a real healthcare risk if these prescriptions are not complied with (chapter 4).

The transporter was not performing his legal duty in a responsible manner. He failed grimly to comply with legislation. He neglected his duty to protect the general public against material health risks (physical and emotional). He acted in contrast with the interest of greater society (*contra bonos mores*). A member of the broader public at large would have a civil case for harm caused by the transporter because of an increased health risk if they could show that it caused harm; any one of the family members of these deceased persons would have a civil case against the transporter if they proved that they suffered emotional damage as a result of the unlawful (not complying with legislation) and undignified manner in which the transporter handled the dead bodies.

In both incidents one's thoughts immediately gravitate to the dead being treated in an *undignified* manner. It is just shocking that the nurse-tweet shows a nurse, who is perceived by society to be in a caring role, acting in such a disrespectful way.

With South Africa being passionate about constitutional rights, one would not want to omit consulting our Constitution. The Constitution describes human dignity as a foundational value of our democratic state (section 1) and provides that 'Everyone has inherent dignity and the right to have their dignity respected and protected' (section 10).

It is so that the law recognises the *dignitas* of a person which is protected under the Constitution (*Le Roux v Dey* (44/2009) [2010] ZASCA 41 ("*Le Roux v Dey*"). *Dignitas* is a collective name for all personality aspects like dignity, honour, self-worth, identity, reputation and bodily integrity and so forth. It is clear that the interpretation of *dignitas* is subjective (personal) in nature and directly related to feeling aggrieved, a feeling of derision, feeling a lack of self-worth or marginalisation. It is however, interconnected with the concept of *fama*, which is linked to a person's good standing in public. In contrast, the latter is an objective test and *fama* can only be violated when defamatory information is published to third parties. The test for defamation requires that the publication must be without justification and unreasonable under the circumstances with the intention to hurt or to ridicule before it can be seen as unlawful and *contra bonos mores*. But, as mentioned before, the South African court sees an individual's dignity as a part of his *persona* in

society and this social role ends with death. An action for defamation only protects the reputation of a living person. This leads to the obvious question: whether the family can sue the nurse for defamation of the deceased's *fama* and if not, whether there is another legal remedy available?

In addition, the protection of a right to privacy is well recognised under the Constitution and may be more necessary in recent times to respond to a *progressively intrusive and meddling social media* (writer's emphasis) with no respect for privacy. Our law is clear that the right to privacy is a fundamental right protecting the inner sanction of a person's life (*Ferreira v Levin NO and Other* (CCT5/95) [1995] ZACC 13 ("*Ferreira*") and *Vryenhoek and Others v S Powel NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 49). The right to privacy can be divided into four different elements: an invasion into one's private life; unwarranted public disclosure or publication of embarrassing private facts; false information disclosed to the public; appropriation of a private name or public image to the advantage of another without consent (*Ferreira*). One can accept that a public image like that of our late President Mandela carries ongoing value after death (intellectual property rights), which is not the point of discussion at present. Thus, to add to the previous question: does the public image of an ordinary person end with death?

The Human Tissue Act (65 of 1983) prohibits the publication of certain facts (chapter 5). More particularly, section 33 prohibits the publication (in the sense of unauthorised disclosure of information to a third party) without a patient's written consent or *that of the next of kin in the event of a dead body* (writer's emphasis). For the protection of privacy, in medical publications – usually for educational purposes – the person's identity is often withheld even where only parts of the body were photographed. All publications are done with written consent of the patient (even if a case study was used without the photographs) explaining the specific medical purpose of each case.

Our courts acknowledge that in certain instances the correct principle of our law would be that family members of a "deceased party who has been slanderously aspersed [reputation of integrity], have a right of action only if the nature of the aspersion be such that they themselves are directly affected in status or patrimonial interest" (*Spendiff v East London Daily Dispatch Ltd* 1929 EDL 113).

In this light, one can imagine that an action for defamation of the image of the dead might be sustained, for example, to prevent the propagation of further publications and ridicule. It would also go without surprise if the family members of a dead person who has been defamed are not only interested to clear the good name of the deceased, but also see it as their duty to pursue the ends of justice to clear

the deceased's name and character and to seek *solatium* – compensation for consolation – for the injury done to their beloved and their own feelings. In such a case the family members (as plaintiffs) would bear the onus of proving that the tweets uttered indeed impaired the *dignitas* and *fama* of the deceased and that this subsequently caused emotional shock and damage to the family members. One foresees the plaintiffs testifying as to how they, subjectively, experienced the hurt when they saw the tweet of the nurse; that it negatively affected their own feelings of self-respect and dignity; that (in sensitive cases) they cannot get this image out of their minds and that it causes emotional upset to the effect that they cannot work, and so forth. The court opines that someone who is not affronted by a publication and does not feel humiliated will not seek redress to right a wrong. In the light of our constitutional influence and cultural and religious authorities one might also see a desire for restoration of the honour (*fama*) of the deceased person.

In the event of our courts being open to such award (*solatium*), defamation has to be proved which includes *animus iniuriandi* (the intention to injure) and consciousness of the wrongfulness of the action. It is perceived that the nurse would offer as a defence that she did not have the intention to defame the deceased and that her intention (tasteless as it may sound) was a joke and that she was not even aware that there was such a thing as defamation. The court previously assessed the defence of 'lack of *animus iniuriandi*' (*Le Roux v Dey*) and found that fault need not be in issue only in particular circumstances, for example, where the publication was justifiable and where the publisher reasonably believes that the information published is true (*Mthembi-Mahanyele v Mail & Guardian Ltd* [2004] 3 All SA 511; 2004 (6) SA 329 (SCA) para 47); however, the latter is not particularly relevant to our discussion.

Turning to the offensive nature of the nurse's conduct, it is incumbent for nurses to be conscious about the rights of patients which they ought to appreciate and apply in the course of practising their profession. Considering constitutional values, it is imperative to uphold the dignity of others (*Essop v S* [2014] ZAKZPHC 45 12) and to refrain from derogatory behaviour.

Furthermore, in terms of the Nursing Regulations enacted by the Nursing Act (50 of 1978) it is one of the prescribed duties of a nurse *to attend to the care of the dying patient and the care of a recently deceased patient* (writer's emphasis) within the execution of the nursing regimen (chapter 2 para 2; chapter 3 para 3 and chapter 4 para 4). Finally, in accordance with the South African Nursing Council's Code of Ethics, "Ethics is an integral part of the nursing profession and forms the foundation thereof. This Code of Ethics for Nursing in South Africa reminds all Nursing Practitioners of their responsibilities towards individuals, families, groups and communities, namely to protect, promote and restore health, to prevent illness, preserve life and alleviate suffering. These responsibilities will be carried out with the required respect for human rights, which include cultural rights, the right to life, choice and dignity without consideration of age, colour, creed, culture, disability or illness, gender, sexual orientation, nationality, politics, race or social status. The persons in the care of every Nursing Practitioner must be able to trust such Nursing Practitioner with their health and wellbeing. This Code of Ethics also serves as a declaration by nurses that they will always provide due care to the public and healthcare consumers to the best of their ability while supporting each other in the process. It is premised on the belief that the nursing profession embraces respect for life, human dignity and the rights of other persons." This contrasts sharply against the action of the nurse.

Defamation invariably involves an affront to any person's dignity which would be aggravated by publication. The nurse's conduct against legal, ethical and policy considerations amounts to an impairment of the deceased's *fama* and consequently the dignity of the deceased's family. Not only was it *contra bonos mores* and, as such, wrongful, it was intentionally and maliciously performed. She failed to carry out her duty and function as a nurse without the necessary professional skill and care. Her conduct was unethical and she should be found guilty of unethical behaviour before the Nursing Council. The hurt caused to the family should be vindicated in a civil court of law with monetary compensation for proven damages.

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