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## DEATH BY WRONGFUL ACT - EFFECT OF RECOVERY BY PLAINTIFF'S INTESTATE

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**DEATH BY WRONGFUL ACT — EFFECT OF RECOVERY BY PLAINTIFF'S INTESTATE** — The decedent recovered from defendant a judgment for personal injuries which was satisfied during deceased's lifetime. Six months later the deceased's death was caused by these same injuries. This action was brought by plaintiff as next of kin to recover damages for the wrongful death under the New York Wrongful Death Act.<sup>1</sup> *Held*, the judgment recovered by plaintiff's intestate is a bar to this action notwithstanding the enactment of survival statutes<sup>2</sup> which sweep away the rule that an action for personal injuries abates on the death of the injured party or wrongdoer. *Fonthelm v. Third Avenue Ry.*, 257 App. Div. 147, 12 N. Y. S. (2d) 90 (1939).

At common law a cause of action in tort was abated by the death of the person injured thereby.<sup>3</sup> This rule of law resulted in a great deal of hardship to the next of kin who depended on the deceased for support. To remedy this situation Lord Campbell's Act,<sup>4</sup> which in substance bestows a right of recovery upon the families of those killed by wrongful acts, was enacted. At present practically every state has a statute resembling this act.<sup>5</sup> These "wrongful death" statutes must be distinguished from the "survival" acts, which keep alive the right of the aggrieved party to recover for the injury caused by the tort.<sup>6</sup> The "wrongful death" act, instead of preserving an already existent right,

<sup>1</sup> N. Y. Consol. Laws (McKinney, 1939), "Decedent Estate Law, § 130: "The executor or administrator duly appointed . . . of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued."

<sup>2</sup> N. Y. Consol. Laws (McKinney, 1939), "Decedent Estate Law," § 118: "No cause of injury to person or property shall be lost because of the death of the person liable for the injury." *Ibid.*, § 119, provides that a personal injury action is not lost because of the death of the injured person but such action may be brought or continued by the executor or administrator of the deceased person.

<sup>3</sup> TIFFANY, *DEATH BY WRONGFUL ACT*, 2d ed., § 1 (1913).

<sup>4</sup> Lord Campbell's Act, 9 & 10 Vict., c. 93 (1846): "Whereas no action at law is now maintainable against a person who by his wrongful act, neglect or default may have caused the death of another person . . . Be it enacted,

"I, That whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable. . . .

"II, That every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased. . . .

"III, That not more than one action shall lie for and in respect of the same subject-matter of complaint. . . ."

It is interesting to note that section III is not included in the New York statute.

<sup>5</sup> For a list of state statutes, see TIFFANY, *DEATH BY WRONGFUL ACT*, 2d ed., §§ 19, 24 (1913).

<sup>6</sup> Any recovery under the "survival" statute becomes a part of the decedent's estate and is subject to his debts. *Blackwell v. American Film Co.*, 189 Cal. 689, 209 P. 999 (1922).

creates a right which did not previously exist.<sup>7</sup> It is apparent that the wrongful act which causes death is the common foundation for two actions, since two interests have been invaded: (1) the interest in bodily security of the injured person giving rise to an action in tort against the defendant; (2) the statutory interest of the next of kin whereby they are deprived of support and financial contribution from the decedent. It is true that one act has violated these two interests, yet since these interests are inherently different in nature and belong to two different persons it would seem that two different causes of action accrue. Therefore, the satisfaction of one cause of action whether by release or judgment as to one party should not have any effect on the statutory right of the other party; i.e., the right of the next of kin which would arise the moment the aggrieved party dies. Thus the South Dakota court in *Rowe v. Richards*<sup>8</sup> said:

"We must confess our inability to grasp the logic of any so-called reasoning through which the conclusion is drawn that the husband simply because he may live to suffer from a physical injury and thus become vested with a cause of action for the violation of his own personal right, has an implied power to release a cause of action—one which has not then accrued; one which may never accrue; one which from its very nature cannot accrue until his death; and one which, if it ever does accrue, will accrue in favor of his wife and be based solely upon the violation of a right vested solely in his wife."

A minority of the courts have followed this logical reasoning,<sup>9</sup> the majority of the courts refusing relief when there has been a recovery by the decedent during his lifetime.<sup>10</sup> The majority of these courts look to the language of the statute, which in substance says the executor or administrator can maintain the action if the decedent could have maintained the action before death ensued. These courts then interpret those words, obviously placed in the statute for the purpose of qualifying the act done, as meaning that the deceased must have an action at the time of his death or that the cause of action for his personal injury must be still outstanding and unsettled.<sup>11</sup> This construction strains the meaning of the statute, and it would seem that what was really meant was that if the deceased was guilty of contributory negligence,<sup>12</sup> or if the person that caused the death

<sup>7</sup> *Ames v. Adams*, 128 Me. 174, 146 A. 257 (1929); *Mahoning Valley Ry. v. Van Alstine*, 77 Ohio St. 395, 3 N. E. 601 (1908); *Blake v. Midland Ry.*, 18 Q. B. 93, 118 Eng. Rep. 35 (1852). The New York court also recognizes this doctrine.

<sup>8</sup> 35 S. D. 201 at 215-216, 151 N. W. 1001 (1915).

<sup>9</sup> *Blackwell v. American Film Co.*, 189 Cal. 689, 209 P. 999 (1922); *Denver & R. G. R. v. Frederick*, 57 Colo. 90, 140 P. 463 (1914); *Bowes v. City of Boston*, 155 Mass. 344, 29 N. E. 633 (1892).

<sup>10</sup> *Hecht v. Ohio & M. Ry.*, 132 Ind. 507, 32 N. E. 302 (1892); *Strode v. St. Louis Transit Co.*, 197 Mo. 616, 95 S. W. 851 (1906); *Legg v. Britton*, 64 Vt. 652, 24 A. 1016 (1892). For collections of cases, see L. R. A. 1915E 1095; 39 A. L. R. 579 (1925).

<sup>11</sup> *Price v. Railroad Co.*, 33 S. C. 556, 12 S. E. 413 (1890); *Charlton v. St. Louis & S. F. R. R.*, 200 Mo. 413, 98 S. W. 529 (1906).

<sup>12</sup> This contributory negligence on the part of the decedent is a bar to a recovery by the next of kin. *O'Brien v. Standard Oil Co.*, (C. C. A. 5th, 1930) 38 F. (2d) 808. For a discussion of the effect of contributory negligence on the part of the

was not a wrongdoer in the legal sense of the word, no cause of action should arise. The fear of double recovery and excessive verdicts is another reason given by the courts for denying recovery. There is really no double recovery, however, for while the injured party may recover for his own losses—i.e., medical bills, physical pain, etc.—the beneficiaries named by the statute can only recover the actual pecuniary loss suffered by them because of the deprivation of their source of support. Even if it be assumed that there is a reasonable danger of an excessive verdict because of the overlapping of the damages awarded in each action, it would seem that a better solution of this problem would be to have the judge limit the jury in its awards by strict instruction rather than to deny any relief at all to an innocent party. The New York court in the principal case said that to allow a recovery to the next of kin would prevent a compromise between the injured party and the wrongdoer, because the latter would not want to bargain for a release when there is a chance that he would be hailed to court for the same wrongful act; and that the prevention of arbitration between the parties is against public policy. On analysis, this seems a poor argument, for the legislature, by creating this new legal interest, has dictated the public policy of the state and the legislature's will in this respect is paramount. The writer believes the minority view to be the more desirable for it recognizes the distinct and independent interest protected by the action given for death by the statute, while the majority view in many ways resurrects the very hardships that the wrongful death statute was intended to obviate. It would seem that the best solution to the problem would be a plan of uniform legislation throughout the forty-eight states.<sup>18</sup>

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beneficiaries designated by the wrongful death statute, see 44 HARV. L. REV. 294 (1930).

<sup>18</sup> For a survey of existing statutes, see 44 HARV. L. REV. 980 (1931).