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TORTS — CONTRIBUTORY NEGLIGENCE OF ONE OF SEVERAL BENEFICIARIES AS A BAR TO RECOVERY UNDER DEATH STATUTE — The administrator of a deceased infant brought an action under the Massachusetts death statute to recover for the death of the child. Death was caused by the negligence of defendant's servant, the father of the deceased. Defendant contended that plaintiff should not prevail because the father, as one of the next of kin

sharing in the distribution of the money recovered, would thereby profit from his own wrong. *Held*, the Massachusetts death statute was penal in nature, and since there was at least one beneficiary whose fault did not contribute to the wrongful death, recovery could be had without regard to the fault of the other beneficiary.¹ *O'Connor v. Benson Coal Co.*, (Mass. 1938) 16 N. E. (2d) 636.

In considering the mass of decisions arising under the death statutes that deal with the problem of a beneficiary's contributory negligence as a bar to recovery, no reconciliation of the divergent results can successfully be attempted until it is recognized that there are several types of death statutes.² In a few states the statutes give the right of action to the survivors individually; and where such is the case, it has uniformly been held that the contributory negligence of the plaintiff bars the action.³ The death statutes in the remaining states provide for an action to be brought by the decedent's executor or administrator. Though having this much in common, we find these statutes are of three types as to their respective purposes. First, those where the amount recoverable is paid to named beneficiaries as compensation for the loss to them of the decedent. Second, those where the amount recovered becomes an asset of the decedent's estate. Third, those where the amount recovered is paid to named beneficiaries but depends on the culpability of defendant's wrongful act. If the sole beneficiary or next of kin is contributorily negligent, the better reasoned decisions under all three of these latter types of statutes bar recovery.⁴ However, in the common situation where but one of several beneficiaries is contributorily negligent, we discover the full effect of these differently-purposed statutes. The majority of jurisdictions under the first type allow recovery; but the damages are ascertained by deducting from the total loss to all the beneficiaries the share of the negligent beneficiary, and this sum is then distributed to the innocent

¹ The question of distribution of the money recovered under the statute was not before the court, though by way of dictum the court said, "the proceeds of recovery must be distributed among the innocent beneficiaries alone as if the guilty beneficiaries did not exist." 16 N. E. (2d) 636 at 637. See *infra*, note 12, for further discussion of this point.

² Lord Campbell's Act, 9 & 10 Vict., c. 93 (1846), is the model from which the death statutes of the several states have been worded. As will be shown in the text of this note, the Massachusetts death statute has no relation to Lord Campbell's Act either in purpose or wording.

³ *Alabama Great So. Ry. v. Dobbs*, 101 Ala. 219, 12 So. 770 (1892); *Muller v. Standard Oil Co.*, 180 Cal. 260, 180 P. 605 (1919); *Baltimore & Ohio Ry. v. State*, 30 Md. 47 (1868); *Shaffer v. Mowery*, 265 Pa. 300, 108 A. 654 (1919); *Vinette v. Northern Pac. Ry.*, 47 Wash. 320, 91 P. 975, 18 L. R. A. (N. S.) 328 (1907); *Turner v. St. Louis-San Francisco Ry.*, 106 Kan. 591, 189 P. 376 (1920).

⁴ *Niemi v. Boston & Maine Ry.*, 87 N. H. 1, 173 A. 361, 175 A. 245 (1934); *Bamburger v. Citizens' St. Ry.*, 95 Tenn. 18, 31 S. W. 163 (1895); *Richmond F. & P. Ry. v. Martin's Admr.*, 102 Va. 201, 45 S. E. 894 (1903); *Flintoff v. Muskegon Traction & Lighting Co.*, 208 Mich. 527, 175 N. W. 438 (1919). *Contra*: *Bastedo v. Frailey*, 109 N. J. L. 390, 162 A. 621 (1932); *McKay v. Syracuse Rapid Transit R. R.*, 208 N. Y. 359, 101 N. E. 885 (1913); *Wymore v. Mahaska County*, 78 Iowa 396, 43 N. W. 264 (1889).

beneficiaries.⁵ The maxim that "one should not profit from his own wrong" is the reason generally given for denying the negligent beneficiary recovery of his share.⁶ Where the amount recovered is considered an asset of the deceased's estate, most of the courts allow complete recovery.⁷ It is submitted that this result is undesirable, for upon distribution of the estate the negligent beneficiary indirectly profits by his own wrong.⁸ The death statute which has penal characteristics⁹ is an interesting variation from those previously mentioned. In discussing the several Massachusetts acts, all of which have stemmed from the original death statute of 1786,¹⁰ the supreme court of that state has said: "the Legislature in creating a remedy might have adopted the theory that

⁵ 2 TORTS RESTATEMENT, § 493, comment (1934); *Wolf v. Lake Erie & Western Ry.*, 55 Ohio St. 517, 45 N. E. 708 (1896); *Phillips v. Denver City Tramway Co.*, 53 Colo. 458, 128 P. 460 (1912); *Bowler v. Roos*, 213 Cal. 484, 2 P. (2d) 817 (1931); *Anderson v. Memphis Street Ry.*, 143 Tenn. 216, 227 S. W. 39 (1921); 70 U. S. L. REV. 502 at 513 (1936); and see extensive annotation of cases on this subject in 23 A. L. R. 670 (1923).

⁶ *Wolf v. Lake Erie & Western Ry.*, 55 Ohio St. 517 at 531, 45 N. E. 708 (1896); and cases cited in note 5, *supra*.

⁷ 2 TORTS RESTATEMENT, § 493, comment (1934); *Southern Ry. v. Shipp*, 169 Ala. 327, 53 So. 150 (1910); *Warren v. Manchester Street Ry.*, 70 N. H. 352, 47 A. 735 (1900).

⁸ See Wigmore, "Contributory Negligence of the Beneficiary as a Bar to an Administrator's Action for Death," 2 ILL. L. REV. 487 at 493 (1908).

⁹ Few articles dealing with the problem at hand make mention of the unusual type of death statute existing in Massachusetts. For a discussion of the Massachusetts death statutes, see Hay, "Death as a Civil Cause of Action in Massachusetts," 7 HARV. L. REV. 170 (1893); *Hudson v. Lynn & Boston Ry.*, 185 Mass. 510, 71 N. E. 66 (1904); *Porter v. Sorell*, 280 Mass. 457, 182 N. E. 837 (1933). An examination of the death statutes of the several states reveals the following also to be of a penal nature: Ala. Code Ann. (1928), § 5696; Colo. Stat. Ann. (1935), c. 50, § 1; Ga. Code (1933), § 105-1302; Ky. Stat. (1930), § 241 (penal in re willful neglect); Mo. Rev. Stat. (1929), § 3262.

¹⁰ Mass. Acts (1786), c. 81, § 7, Mass. Gen. Laws (1823), p. 307, which provided that if the life of a traveller was lost through a defect in a public way, the county, town or person whose duty it was to keep it in repair should "be liable to be amerced in one hundred pounds" for the use of the heirs, devisees, or creditors "upon a conviction . . . on a presentment or indictment of the grand jury." By subsequent legislation the system of imposing a punishment for wrongfully causing death in place of giving to the family of the deceased an action for compensation was extended to other situations. Beginning with Mass. Acts (1881), c. 199, statutes were passed providing an action of tort as the only remedy, but the character of the liability of the defendant was not changed, it remaining penal.

The particular death statute in Massachusetts under which the cause of action in the principal case was brought is Mass. Gen. Laws (Ter. Ed. 1932), c. 229, § 5: "a person who by . . . the negligence . . . of his agents or servants while engaged in his business, causes the death of a person in the exercise of due care, who is not in his employment or service, shall be liable in damages in the sum of not less than five hundred nor more than ten thousand dollars, to be assessed with reference to the degree of his culpability or that of his agents or servants, to be recovered in an action of tort . . . by the executor or administrator of the deceased. . . ."

compensation should be given the surviving relatives of the person killed, as did Lord Campbell's act . . . but 'the Massachusetts acts are exactly what Lord Campbell's act is not.' . . . Their basic theory as to damages is punishment, not compensation."¹¹ Since the important purpose of this statute is punishment for defendant's wrong and only incidentally to afford a remedy to next of kin, the contributory negligence of one of several beneficiaries should be given no attention in allowing recovery or the amount thereof. But, as the instant case suggests, the attitude of the common law toward wrongdoers should be carried over to this situation so that the whole sum would go to the innocent beneficiaries alone.¹² Common sense and legal principles combine to approve the court's decision in the principal case.

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¹¹ *Porter v. Sorell*, 280 Mass. 457 at 462, 182 N. E. 837 (1932).

¹² 2 TORTS RESTATEMENT § 493, comment (1934).