Michigan Law Review

Volume 32 | Issue 5

1934

# TORTS - DEATH ACT-PECUNIARY INJURY - EFFECT OF INCURABLE DISEASE

TORTS — DEATH ACT — PECUNIARY INJURY — EFFECT OF INCURABLE DISEASE — Administratrix sued defendant hospital under the "death act" for having negligently caused the death of her husband. The negligence was admitted. Decedent was afflicted with myelitis, an incurable disease, which affected his spine and rendered him a helpless paralytic. Decedent had no ability to earn or support [1] and would have been an object of constant care and expense. *Held*, the court should have directed verdict for defendant. *Smith v. Presentation Academy of Aberdeen*, (S. D. 1933) 248 N. W. 762.

The "death act" of South Dakota provides that " . . . the jury may give such damages . . . as they may think proportionate to the pecuniary injury resulting from such death to the persons . . . " entitled to recover.[2] The phraseology of similar statutes often varies but the interpretation usually is the same.[3] Ever since the authoritative decision of the Queen's Bench in *Blake v. Midland Ry.*,[4] based on Lord Campbell's Act, the courts have uniformly said that it is the

[1] A contrary result may well be reached in cases where support should appear in the form of insurance payable while the disability exists and sufficient to care fully for the incapacitated person, and the wife to some extent.

[2] S. D. Rev. Code (1929), sec. 2931.

[3] See, for example, Illinois C. R. R. v. Barron, 5 Wall. (72 U. S.) 90, 18 L. ed. 591 (1867) (under Illinois statute allowing recovery for "compensation for pecuniary injury"); Hall v. Galveston, H. & S. A. Ry., (C. C. W. D. Tex. 1889) 39 Fed. 18 (under Texas statute providing for "damages proportionate to injury"); Holmes v. Oregon & C. Ry., (D. C. Ore. 1881) 5 Fed. 523 (under Oregon statute providing for "recovery of pecuniary damage to estate"); Butte Electric Ry. v. Jones, (C. C. A. 9th, 1908) 164 Fed. 308 (under Montana statute providing for "just damages"); American R. R. v. Santiago, (C. C. A. 1st, 1926) 9 F. (2d) 753 (under Porto Rican code providing for "just damages under all circumstances"); Little Rock & Ft. S. Ry. v. Barker, 39 Ark. 491 (1882) (under statute providing for "such damages as court or jury may assess"); Pierce v. Conners, 20 Colo. 178, 37 Pac. 721 (1894) (under statute providing for "damages for necessary injury").

[4] 18 Q. B. 93, 118 Eng. Repr. 35 (1852).

pecuniary loss to the beneficiary and not decedent's injury that forms the basis for recovery.[5] The term "pecuniary" is used in contradistinction to matters of sentiment. The beneficiary is compensated for the loss of such benefits as he probably would have received,[6] irrespective of whether such advantages were legally due.[7] Loss of happiness and affection resulting from the breach of the family relationship, or mental suffering, or loss of society, or marital care and counsel are normally classed as non-pecuniary elements.[8] The law considers itself unable to measure such factors in a material sense. There are some jurisdictions, holding a distinctly minority view, which allow recovery for sentimental losses.[9] This view is the result partly of statute,[10] and partly of different notions of policy.[11] And, in all cases, decedent's age, health, business ability, probable duration of life, and other such factors form the basis for estimating the beneficiary's pecuniary loss.[12] Accordingly, in the absence of a showing of loss it would seem to follow on principle that the action cannot be maintained even for nominal damages.[13] But a contrary view has been held in a few[14] and intimated in a great number of cases.[15] Several jurisdictions even presume substantial damages where the relationship is one of husband and wife or of parent and child.[16] Both conceptions seem unwise for defendant is punished with costs when plaintiff's loss was only imaginary, and the statutes do not necessarily call for such

[5] 74 A. L. R. 11 (1931).

[6] 53 A. L. R. 1102 (1928).

[7] 8 R. C. L. 826 (1915); 13 VA. L. REV. 392 (1927); 17 L. R. A. 71 (1892).

[8] 74 A. L. R. 11 (1931); Taylor, B. & H. Ry. v. Warner, 84 Tex. 122, 19 S. W. 449 (1892); Mynning v. Detroit, L. & N. R. R., 59 Mich. 257, 26 N. W. 514 (1886).

[9] Wooten v. United Irrig. & R. Mill. Co., 128 La. 294, 54 So. 824 (1911); Petrie v. Columbia & Greenville R. R., 29 S. C. 303, 7 S. E. 515 (1888); Powhatan Lime Co. v. Whetzel's Adm'x, 118 Va. 161, 86 S. E. 898 (1915); Kelley v. Ohio River R. R., 58 W. Va. 216, 52 S. E. 520 (1905).

[10] The South Carolina statute is the same as that of South Dakota with the word "pecuniary" omitted. The statutes of Virginia and West Virginia allow "such damages as seem just and fair" and "such damages as jury shall deem just and fair." See cases interpreting above, note 9, supra.

[11] "His [tortious defendant's] money ought to pay for their consolation, as far as money can give consolation. Why shall he not do so when he has brought the grey hairs of a father or mother in sorrow to the grave? He has caused the grievous loss from which heart or soul suffers more than from pecuniary loss." Brannon Pres. in, Kelley v. Ohio River R. R., 58 W. Va. 216 at 224, 52 S. E. 520 at 523 (1905).

[12] Bolinger v. St. Paul & D. R. R., 36 Minn. 418, 31 N. W. 856 (1887); Hudson v. Houser, 123 Ind. 309, 24 N. E. 243 (1899).

[13] McGown v. International & G. N. Ry., 85 Tex. 289, 20 S. W. 80 (1892); Lazelle v. Town of Newfane, 70 Vt. 440, 41 Atl. 511 (1898).

[14] Korrady v. Lake Shore & M. S. Ry., 131 Ind. 261, 29 N. E. 1069 (1891); Burk v. Arcata & M. R. R. R., 125 Cal. 364, 57 Pac. 1065 (1899).

[15] See TIFFANY, DEATH BY WRONGFUL ACT, 2d ed., sec. 180, n. 174 (1913); " . . . the statute assuming that every person possesses some relative value to others," Wright, J., in Oldfield v. New York & H. R. R., 4 Kern. (14 N. Y.) 310, 318 (1856).

[16] City of Chicago v. Scholten, 75 Ill. 468 at 471 (1874); Ihl v. Forty-Second St. R. R., 47 N. Y. 317, 7 Am. Rep. 450 (1872); Chicago Bridge & Iron Co. v. La Mantia, 112 Ill. App. 43 (1904).

an implication.[17] The instant case, therefore, is a sound and logical application of a well settled doctrine to a unique set of facts.

M. L.

[17] Hurst v. Detroit City Ry., 84 Mich. 539, 48 N. W. 44 (1891).