

1946

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Recommended Citation

Robert K. Eifler, *DEATH BY WRONGFUL ACT-EFFECT OF DOUBLE DEATH ON RECOVERY UNDER MINNESOTA "DEATH" AND "SURVIVAL" STATUTES*, 44 MICH. L. REV. 1146 (1946).

Available at: <https://repository.law.umich.edu/mlr/vol44/iss6/16>

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DEATH BY WRONGFUL ACT—EFFECT OF DOUBLE DEATH ON RECOVERY UNDER MINNESOTA “DEATH” AND “SURVIVAL” STATUTES—Recovery was sought by the surviving spouse and next of kin against the estate of a negligent driver where both the passenger and the driver were fatally injured and died “in the same traffic accident.” *Held*, where both the injured person and the wrongdoer die, an action survives against the personal representatives of the wrongdoer. *Kuhle v. Swedlund*, 220 Minn. 573, 20 N.W. (2d) 396 (1945).

Prior to the amendment of the Minnesota “survival” statute¹ in 1941, it had been held that a cause of action for bodily injuries or death did not survive the death of the tort-feasor.² At that time the “survival” statute read in part “a cause of action arising out of an injury to the person dies with the person of either party, except as provided in §.9657,” and the “death” statute provided that³ “. . . the personal representative of the decedent may maintain an action . . . if he might have maintained an action, had he lived, for an injury caused by the same act or omission.”⁴ The “survival” statute was amended in 1941⁵ to read in part “. . . dies with *the person of the party in whose favor it exists*, except as provided in Section 9657. It also dies with the person against whom it exists, except a cause of action arising out of bodily injuries or death caused by the negligence of a decedent survives against his personal representatives.”⁶ The “death” statute has not been amended. As pointed out in an article by Dean Evans of the University of Kentucky Law School,⁷ three possibilities present themselves: (1) the injured party may die before the tort-feasor, (2)

¹ Minn. Stat. (Mason, 1927) § 9656.

² *Green v. Thompson*, 26 Minn. 500, 5 N.W. 376 (1880); *Gilman v. Maxwell*, 79 Minn. 377, 82 N.W. 669 (1900); *Eklund v. Evans*, 211 Minn. 164, 300 N.W. 617 (1941).

³ Minn. Stat. (Mason, 1927) § 9657.

⁴ For an analysis of “death” statutes in other jurisdictions as relates to this problem, see Evans, “Survival of the Action for Death by Wrongful Act,” 1 UNIV. CHI. L. REV. 102 (1933).

⁵ Minn. Laws (1941) c. 440, Minn. Stat. (Mason, 1941) § 9656.

⁶ For an analysis of “survival” statutes in other jurisdictions, see Evans, “A Comparative Study of the Statutory Survival of Tort Claims for and against Executors and Administrators,” 29 MICH. L. REV. 969 (1931). See also 27 GEO. L. J. 100 (1938).

⁷ “Survival of the Action for Death by Wrongful Act,” 1 UNIV. CHI. L. REV. 102 (1933).

the injured party may die at the same time as the tort-feasor,⁸ or (3) the injured party may die after the tort-feasor. The first question seems to be amply cared for under the present Minnesota law.⁹ The principal case is an example of the second possibility.¹⁰ Assuming that this case does decide that simultaneous death or even death in a common disaster shall not bar recovery,¹¹ is it altogether certain that the same result should be reached in the third alternative?¹² It is the Minnesota view that the "death" statute creates a new cause of action in favor of the surviving spouse and next of kin,¹³ with no provision in that statute regarding against whom it may arise¹⁴ except the common law rule that it must

⁸ For a thorough discussion of the classes of cases in which survivorship in a common disaster is important, and the difficulties and necessities of evidence involved, see Tracy and Adams, "Evidence of Survivorship in Common Disaster Cases," 38 MICH. L. REV. 801 (1940).

⁹ It is the general rule that, in the absence of special survival statutes, the death of a tort-feasor abates an action or right of action against him to recover damages for personal injuries or for death due to his wrongful or negligent act. For cases arising on this point, and for the results in several states with special statutes, see 61 A.L.R. 830 (1929), and the cases subsequently noted.

¹⁰ "Where both the wronged person and the wrongdoer die an action survives against the personal representative of the wrongdoer." Principal case at 398, note 5.

¹¹ See 70 A.L.R. 1319 (1931) and cases subsequently noted for the conflict of decisions arising on this point. In this field it is important to remember that the provisions of the specific statute of the jurisdiction bearing on the question greatly alter the decisions in that jurisdiction. For example, *Fowlie v. First Minneapolis Trust Co.*, 184 Minn. 82, 237 N.W. 846 (1931), was decided before the Minnesota "survival" statute had been so amended to allow recovery for bodily injuries or death subsequent to the time of the tort-feasor's death. It then follows that that case cannot be authority against recovery for bodily injuries or death when both the tort-feasor and the injured party die in the same accident, since that question could not be considered under the then existing statute. However, it has been cited as authority for that proposition. It is also important to distinguish fact situations clearly, as illustrated by that same case; for though the injured party's death actually occurred some time after that of the tort-feasor, the case is noted as one bearing on the point of simultaneous death. On the other hand, it has not been noted as an example of recovery allowed under the fact situation of the third possibility discussed in the text above, though there are possibilities that it might be considered as bearing on that point despite the fact that recovery for wrongful death could not be considered under the then existing statute.

¹² See 112 A.L.R. 343 (1938) and cases subsequently noted, for the conflict of decisions on this point. Although it is true that "while there is but little direct authority upon the question . . . the weight of authority supports the view that no death action can be maintained where the alleged tort-feasor's death preceded that of his victim, at least in the absence of clear statutory authority in that regard," there are some recent cases in honored jurisdictions holding for recovery where death of the tort-feasor preceded that of the wronged party. However, in general it may be said that these decisions are based upon judicial interpretation of statutes peculiar to those jurisdictions. The principal case for this latter holding is *In re Olney's Estate*, 309 Mich. 65, 14 N.W. (2d) 574 (1944), decided by a divided court on a variety of grounds.

¹³ *Fowlie v. First Minneapolis Trust Co.*, 184 Minn. 82, 237 N.W. 846 (1931). See also L.R.A. 1915 E, 1095; *id.* 1104; L.R.A. 1916 D, 121 for a survey of the holdings on this question in other jurisdictions, and the results which flow from the variations.

¹⁴ Minn. Stat. (Mason, 1927) § 9657.

arise against a living person. True, the "survival" statute has been amended to provide for the *survival* of causes of action *arising* out of death,¹⁵ but a cause may not survive which does not exist, and no words in that statute indicate a legislative intent that such causes of action shall arise against the personal representative if they have not previously arisen against the decedent. The use of the word "survives" might indicate the opposite intent.¹⁶ Then if there is no one against whom the cause of action may arise under the "death" statute, nor any cause of action to survive under the "survival" statute, is it clear that the court would again interpret the legislative intent¹⁷ in terms of the wrongful act as the gist of the cause of action¹⁸ to say that recovery "for the exclusive benefit of a surviving spouse and the next of kin"¹⁹ will not be barred by the inherently unimportant fact that the tort-feasor's death actually preceded the injured person's death?²⁰ Is it not again timely to quote what has been so often and so well said?²¹ "The unsatisfactory nature of existing reforms renders doubly desirable the enactment of survival legislation broad enough to relegate [this question] . . . once and for all to the museum of legal antiquities."²²

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¹⁵ Minn. Laws (1941) c. 440, Minn. Stat. (Mason, 1941) § 9656.

¹⁶ *Beavers v. Putnam*, 110 Va. 713, 67 S.E. 353 (1910); *Martinelli v. Burke*, 298 Mass. 390, 10 N.E. (2d) 113 (1937). But compare *Kerr v. Basham*, 62 S.D. 301, 252 N.W. 853 (1934), and *In re Olney's Estate*, 309 Mich. 65, 14 N.W. (2d) 574 (1944), where different statutory provisions led to a contrary result.

¹⁷ ". . . it seems apparent to us that the legislative intent was to amend the existing law so as to permit recovery against the personal representative of a wrongdoer in cases such as we have before us. Whether the Legislature chose language which adequately expresses such intent requires our consideration." Principal case, 20 N.W. (2d) 396 at 397 (1945).

¹⁸ Quoting 25 C.J.S., Death, § 23: "Whether the cause of action under the statute is deemed a transmitted right, a survival right, or an independent cause of action, the foundation and gist of it in all cases is the wrongful act which produced the injury resulting in the death"; despite the fact that this section is concerned, as it states in the next sentence, with "the nature of the act on which a cause of action may be based." *Id.* at 398.

¹⁹ Minn. Stat. (Mason, 1927) § 9657.

²⁰ For cases holding as suggested see 112 A.L.R. 343 (1937).

²¹ Evans, "Survival of the Action for Death by Wrongful Act," 1 UNIV. CHI. L. REV. 102 (1933); Evans, "A Comparative Study of the Statutory Survival of Tort Claims for and against Executors and Administrators," 29 MICH. L. REV. 969 (1931); 4 ILL. L. REV. 425 (1910).

²² 48 HARV. L. REV. 1008 at 1013 (1934).