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a century legislation and judicial precedent have avoided the duplication of remedies.\(^{26}\) In line with this policy, he indicated his approval of some plan, similar to workmen’s compensation, which would make veterans compensation the exclusive remedy.\(^{27}\) This is the only logical and consistent solution to the problem.\(^{28}\) The allowance of concurrent remedies results at best in unnecessary complication and confusion and, at worst, in duplication. It is submitted that the situation can only be corrected by legislative action.

**TORTS — WRONGFUL DEATH — MAINTENANCE OF ACTION AGAINST NEGLIGENT SOLE BENEFICIARY ALLOWED.**—In an action for wrongful death, plaintiff-administratrix sued decedent’s negligent husband, who was the sole statutory beneficiary of the decedent. The defendant moved to dismiss on the ground that the action was barred as a matter of law. In affirming the denial of the motion, the Supreme Court of New Hampshire held that, although a negligent sole statutory beneficiary is precluded from sharing in any recovery, the action could be maintained in view of the statutory provision for deduction, before distribution, of the cost of recovery and the expenses of administration, burial, and last sickness. *Pike v. Adams*, 108 A.2d 55 (N.H. 1954).

Wrongful death statutes, although a great improvement over the common law,\(^1\) nevertheless present many problems,\(^2\) not the least of which is the status of the negligent sole beneficiary.\(^3\) Some jurisdic-

\(^{26}\) *Id.* at 104-105.

\(^{27}\) *Id.* at 107 n.14. For a comparison between veterans compensation and workmen’s compensation, see *Note*, 20 Geo. Wash. L. Rev. 90, 98-101 (1951).

\(^{28}\) "This Act, however, should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." *Feres v. United States*, 340 U.S. 135, 139 (1950).

\(^1\) At common law there could be no action for trespass when a felonious act was included in the res gestae. Since homicide was presumably a felony, no civil action could be maintained against one who negligently caused the death of another. The numerous railway accidents of the middle nineteenth century brought to light the harsh effects of this lack of remedy. See *Pollack, Torts* 54 (15th ed., Landon, 1951). The resulting dissatisfaction culminated in the passage in 1846 of Lord Campbell’s Act (Fatal Accidents Act, 1846, 9 & 10 Vict., c. 93), after which the great majority of American death statutes are patterned. See *Prosser, Torts* 955-956 (1941).

\(^2\) See *Prosser, Torts* 971 (1941).

\(^3\) This article is concerned only with negligent sole beneficiaries. However, where such negligent person is not the sole beneficiary, but one of several, the general view is that he alone is precluded from recovery. His negligence has no effect on the recovery of the other beneficiaries. See, *e.g.*, *Bowler v. Roos,*
tions permit a negligent sole beneficiary to recover in a wrongful death action. However, the great weight of modern authority prohibits recovery, on the ground that the beneficiary's negligence or contributory negligence bars the action. It has been said that such a recovery would contravene the well established common-law principle that one should not be permitted to profit by his own wrong. On the other hand, the courts in jurisdictions allowing recovery base their conclusion on a strict construction of the statute. It is reasoned that the legislature created a new cause of action when it enacted the wrongful death statute, and set forth the condition upon which the action could be maintained, namely, that the action must be brought by the personal representative of one who would have had a good cause of action had he lived. Since the right to bring the action depends solely on the right the decedent would have had, the negligence or contributory negligence of the beneficiary should not bar recovery.

The New York wrongful death statute is so construed. Consequently, in cases involving a negligent beneficiary, full recovery is allowed. The reasoning in Rozewski v. Rozewski, in which the

213 Cal. 484, 2 P.2d 817 (1931); Cleveland, C., C. & St. L. Ry. v. Bossert, 44 Ind. App. 245, 87 N.E. 158 (1909); Kokesh v. Price, 156 Minn. 304, 161 N.W. 715 (1917).


7 See, e.g., Ashcraft v. Jerome Hardwood Lumber Co., 173 Ark. 135, 292 S.W. 386, 387 (1927); Willy v. Atchison, T. & S.F. Ry., 115 Colo. 306, 172 P.2d 958 (1946). "These maxims [that one should not be allowed to profit from his own wrong, or his own fraud] are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes." Riggs v. Palmer, 115 N.Y. 506, 511, 22 N.E. 188, 190 (1889) (emphasis added).


10 N.Y. DEC. EST. LAW §§ 130-134.


12 181 Misc. 793, 46 N.Y.S.2d 743 (Sup. Ct. 1944). But see O'Shea v. Lehigh Valley R.R., 79 App. Div. 254, 79 N.Y. Supp. 890 (3d Dep't 1903). In this case a negligent sole beneficiary was denied recovery, the court holding that the contributory negligence of the beneficiary would bar any recovery on his part. Although never expressly overruled, the O'Shea case has not been followed.
plaintiff-administrator was the sole beneficiary and the only negligent party, was that the doctrine prohibiting one from profiting by his own wrong is inapplicable since it applies only to wilful wrongs in contradistinction to negligent wrongs. Consequently, there can be a recovery in such a situation. Even in cases where the beneficiary is the defendant in the action, a recovery may be had. Thus, in *Zinman v. Newman* the defendant was the husband of the decedent and a statutory beneficiary. His motion to dismiss the complaint was denied, the court declaring, in effect, that such an action could be maintained despite the fact that the negligent defendant was the beneficiary.

The New Hampshire view, as stated in *Niemi v. Boston & M. R.R.*, was that no suit could be maintained if the sole beneficiary caused, or contributed to the death. In the instant case the defendant, a negligent sole beneficiary, relied on the *Niemi* case in moving for a dismissal. However, the New Hampshire statute, as amended, provides for deduction, before distribution, of the cost of recovery and the expenses of administration, burial and last sickness. Prior to the amendment only the cost of recovery was deductible. The remainder of the damages, in which creditors were given no rights, went to the beneficiaries. The Court in the principal case reasoned that this amendment was undoubtedly enacted to insure payment to creditors of these specified expenses since it is expressly provided that they are to be deducted and paid to the estate, which in turn is liable over to the creditors. Consequently, the Court held that the action was maintainable, recovery being limited, however, to the expenses enumerated in the statute.

The decision in the instant case established a minor exception to the New Hampshire rule. Whereas, formerly, no recovery was allowed in cases of this kind, now a limited one is permitted. This innovation may be challenged on the ground that it indirectly aids the negligent beneficiary by increasing the size of the estate, and by providing a fund for the payment of expenses for which the beneficiary might have been liable in the event the estate proved inadequate. However, this limited recovery may be justified on the ground that its primary result is the protection of creditors. Apart from any consideration of the merits of the instant case, the New Hampshire view seems much more suited to the accomplishment of justice than the New York position. The New York courts, in permitting recovery, have chosen not to apply the “profit-from-wrong” maxim. The pos-

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14 87 N.H. 1, 173 Atl. 361 (1934).
sibility of fraud being perpetrated on insurance companies has been dismissed with a statement that the presence or absence of insurance in the case was not "an element to be considered." 19 Similarly, the fact that such a recovery may run counter to public policy is passed over with a statement by one court to the effect that public policy is constantly changing.20 Paradoxically enough, the New York courts have held that a husband's contributory negligence is a complete bar to recovery in an action for damages for the loss of his wife's services.21 No apparent reason exists for permitting recovery in a wrongful death action while denying it in an action for loss of services.22

Inevitably, the conclusion is reached that some legislative action should be taken in New York to prevent recovery by a negligent beneficiary. The ideal solution would be an amendment to the wrongful death statute which would codify the result reached in the instant case. Thus, recovery would be allowed only to the extent of cost of recovery and the expenses of administration, burial and last sickness.

**WILLS—Effect of Contract to Make Testamentary Disposition on Widow's Right of Election.**—Testator entered into a separation agreement with his first wife, whereby he contracted to bequeath to her a life income in his entire estate. This agreement was later incorporated in a divorce decree. The testator then remarried. In 1952 he died, leaving a will in conformity with the separation agreement. His second wife thereupon sought to exercise her right of election pursuant to Section 18 of the New York Decedent Estate Law. The Surrogate held that a wife could not be deprived of her statutory share in her husband's estate by a prior contract to will his estate to another. *Matter of Erstein*, 205 Misc. 924, 129 N.Y.S.2d 316 (Surr. Ct. 1954).

The question of whether a contract to devise and bequeath an estate, made by a testator during his lifetime, could be enforced to the

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19 See *Rozewski v. Rozewski*, supra note 18 at 798, 46 N.Y.S.2d at 746.
20 *Id.* at 797, 46 N.Y.S.2d at 745.
22 It could be argued that in an action for loss of services the plaintiff sues in his own capacity, while in a wrongful death action the plaintiff sues in the capacity of personal representative. See *Prosser, Torts* 421-422, 957 (1941). However, this is a purely academic distinction, since the recovery in either action would inure to the benefit of the negligent party.