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The Wrongful Death Act as Affected by the Survival Statute

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tended to include both the public officer and attorney-at-law, requiring them to sign a waiver of immunity, or forfeit their official position.

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THE WRONGFUL DEATH ACT AS AFFECTED BY THE SURVIVAL STATUTE

Unlike the situation at the common law,[1] one does not take to the grave with him an action against the wrongdoer when dying as a result of personal injuries. The personal representative may, in his own name, commence an action for damages suffered by the deceased.[2] Closely akin to such right of action is that possessed by the same representative to sue for damages, suffered by certain designated beneficiaries by reason of the death, in a case where an action could have been maintained by the deceased had he survived.[3] In such case the damages recovered are distributable to the beneficiaries, separate and apart from the decedent's estate.[4] These substantive rights, not recognized by common law, exist today only by virtue of legislative fiat.[5] The two causes of action may be consolidated and prosecuted in one; but, so related are the rights that it is often difficult to decide where one ends and the other begins, or to distinguish the incidents of one from those of the other.

"And in action merely personal, arising *ex delicto,* for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is that *actio personalis moritur cum persona,* and it never shall be revived either by or against the executors or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity any manner of wrong or injury." [6] This rule, that no civil action would lie for death resulting from injury, was first based on the doctrine that the civil injury was merged in the felony, which was more grave as an offense to the crown.[7] Such reasoning failed where there was no felony. In later decisions the conclusion was reached that the law could not permit the evaluation of damages resulting from the loss of human life.[8] Probably the reason for the existence of

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[1] Stuber v. McEntee, 142 N. Y. 200, 36 N. E. 878 (1894); Roche v. St. John's Riverside Hospital, 96 Misc. 289, 160 N. Y. Supp. 401 (1916) (at common law no right of action for causing death existed).

[2] N. Y. DEC. EST. LAW §§ 119, 120.

[3] *Id.* § 130.

[4] See note 20, *infra.*

[5] De Bevoise v. N. Y., Lake Erie & W. R. R., 98 N. Y. 377 (1885); Stuber v. McEntee, 142 N. Y. 200, 36 N. E. 878 (1894).

[6] 3 BL. COMM. *302.

[7] Conners v. Burlington, etc. Ry., 171 Iowa 490, 32 N. W. 465 (1887).

[8] Philby v. Northern Pac. R. R., 46 Wash. 173, 89 Pac. 468 (1907).

the rule is the unquestioning adherence to the *ipse dixit* of Lord Ellenborough in the case of *Baker* v. *Bolton*.[9] Although the principle above stated was later modified, in some respects, by judicial and legislative action,[10] the New York legislature, assuming that at the common law a personal representative could not maintain an action for a tort, passed a statute permitting such an action for torts to *property* of decedent committed during his lifetime.[11] So strongly imbedded in the common law was the principle that an action for personal injuries dies with the person that further legislation was necessary to compel the courts to disregard such a rule of barbarity.[12]

In 1847 the legislature passed a bill[13] which gave to the personal representative of one whose death had been caused by the wrongdoing of another, a right of action for damages for the benefit of next of kin. It was a substantial model of Lord Campbell's Act,[14] which has inspired much of such legislation in the United States. "The distinguishing features of that act are * * * : First, it is grounded upon the original wrongful injury of the person; second, it is for the exclusive benefit of certain specified relatives; third, the damages are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the decedent had not died from his injuries."[15] The right of action was given constitutional protection in 1894,[16] so that it can never be abrogated, and the amount recoverable shall not be subject to any statutory limitation.[17]

To recover damages for death by wrongful act, the following facts must be proved: (a) the death of a human being, (b) caused by the wrongdoing of another, (c) who would have been liable to an action brought by decedent had he lived, (d) a husband, wife, or next of kin of the decedent surviving him ,and (e) the appointment of a personal representative of the decedent.[18] It would seem that, because the right of action is dependent upon the decedent's right to sue if he were alive, that the enactment, while technically giving a new cause of action, really amounted to a continuation of the original cause of action (which vested in decedent at the moment of injury) for the benefit of

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[9] 1 Camp. 493, 170 Eng. Rep. 1033 (1808); Gulf, etc. Ry. v. Beall, 91 Tex. 310, 42 S. W. 1054 (1897).

[10] Zabriskie v. Smith, 13 N. Y. 322 (1855).

[11] 2 REV. STAT. 114, § 4.

[12] POLLOCK, LAW OF TORTS (13th ed. 1929) 68.

[13] N. Y. Laws 1847, c. 450, §§ 1, 2.

[14] 9 & 10 VICT. c. 93, §§ 1 & 2 (1846); *In re* Meng, 96 Misc. 126, 159 N. Y. Supp. 535 (1916), *aff'd*, 188 App. Div. 69, 176 N. Y. Supp. 290 (1st Dept. 1919), *order rev'd*, 227 N. Y. 264, 125 N. E. 508 (1919), *reargument denied*, 227 N. Y. 669, 126 N. E. 914 (1920).

[15] Michigan C. R. R. v. Vreeland, 227 U. S. 59, 70, 33 Sup. Ct. 192 (1912).

[16] N. Y. CONST. art. I, § 16.

[17] *In re* Taylor, 204 N. Y. 135, 97 N. E. 502 (1912).

[18] *In re* Meng, 96 Misc. 126, 159 N. Y. Supp. 535 (1916), *aff'd*, 188 App. Div. 69, 176 N. Y. Supp. 290 (1st Dept. 1919), *order rev'd*, 227 N. Y. 264, 125 N. E. 508 (1919), *reargument denied*, 227 N. Y. 669, 126 N. E. 914 (1920).

those next of kin designated.[19] However, the better view is that such "death statute" is not a "survival act",[20] but creates a new cause of action, distinct from any the injured person might have had.[21] Accordingly, judgments recovered do not constitute assets of the estate of the deceased, but are a specific fund, the distribution of which is limited to the persons indicated by the statute.[22] If the death statute was a continuation of the cause of action vesting in the decedent, it would be logical to assume that the measure of damages should be the injuries sustained by the deceased for which he may have recovered had he lived. Then, too, it would seem that an action for wrongful death is for an injury to the person rather than to property. The New York view is that the right given under the statute is a property right, and that the action is one to recover damages not for injuries to the person of the decedent, but for wrongs done to the property rights of the beneficiary.[23] Accordingly, an action for wrongful death survives the death of a beneficiary, and it may be continued in behalf of his estate. However, the damages are limited to the pecuniary loss sustained by him up to the time of his death.[24] Although the general purpose of the statute is to compensate the family of the deceased for their pecuniary loss caused by the destruction of the life, the right is extended only where there has been no recovery by the deceased in his lifetime. A prerequisite to a death action is that the deceased have, until the moment of his death, a cause of action for his injuries.[25] Where the injured person recovered for his pain and suffering before his death, it was held that an action for the benefit of the next of kin was barred. The legislature did not intend to create a double liability, though it probably had the power to do so.[26]

In 1935 the legislature finally took cognizance of the injustices resulting from the previous state of the law. It was enacted that "No cause of action for injury to *person* or property shall be lost because of the death of the person in whose favor the cause of action existed" [27] (italics mine). It was further provided that, "Where an injury

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[19] Titman v. City of New York, 57 Hun 469, 10 N. Y. Supp. 689 (1890).

[20] Anderson v. Standard Oil Co. of N. J., 124 Misc. 829, 209 N. Y. Supp. 493 (1925).

[21] Michigan Cent. R. R. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192 (1913); Gulf, etc. R. R. v. McGinnis, 228 U. S. 173, 33 Sup. Ct. 426 (1913); Western Union Tel. Co. v. McGill, 57 Fed. 699 (C. C. A. 8th, 1893); Littlewood v. Mayor, etc., 89 N. Y. 24 (1882); Hegerich v. Keddie, 99 N. Y. 258, 1 N. E. 787 (1885).

[22] Drake v. Gilmore, 52 N. Y. 389 (1873); *Re* Taylor, 204 N. Y. 135, 97 N. E. 502 (1912); *Re* Connor, 198 Misc. 538, 164 N. Y. Supp. 748 (1917), *mod'd*, 178 App. Div. 955, 165 N. Y. Supp. 1081 (4th Dept. 1917), *aff'd*, 222 N. Y. 653, 119 N. E. 1036 (1918).

[23] *Re* Meekin, 164 N. Y. 145, 58 N. E. 50 (1900).

[24] Aider v. General Electric Co., 238 N. Y. 64, 143 N. E. 792 (1924); Greco v. S. S. Kresge Co., 161 Misc. 781, 293 N. Y. Supp. 53 (1937), *aff'd*, 251 App. Div. 667, 297 N. Y. Supp. 258 (2d Dept. 1937).

[25] Keliher v. N. Y. C. & H. R. R., 212 N. Y. 207, 105 N. E. 824 (1914).

[26] Littlewood v. The Mayor, 89 N. Y. 24 (1882).

[27] N. Y. DEC. EST. LAW (L. 1935, c. 795, § 2) § 119; PRASHKER, CASES AND MATERIALS ON NEW YORK PLEADING AND PRACTICE (2d ed. 1937) 867.

caused the death of a person the damages recoverable for such injury shall be limited to those accruing before death, and shall not include damages for or by reason of death. The damages recovered shall form part of the estate of the deceased. Nothing herein contained shall affect the cause of action existing in favor of the next of kin under section one hundred and thirty of this chapter. Such cause of action and the cause of action in favor of the estate to recover damages accruing before death may be prosecuted to judgment in a single action; a separate verdict, report or decision shall be rendered as to each cause of action." [28] These additions to the law were intended to remedy existing defects in the law in respect to abatement and survival; [29] and no doubt they would, but for strange quirks of the judicial mind.

In the case of *Helman* v. *Markoff*,[30] the complaint stated two causes of action: the first, to recover on behalf of the estate of plaintiff's intestate for personal injuries alleged to have been sustained by intestate up to the time of his death, and the second, to recover on behalf of his widow and daughter for his wrongful death. The trial court instructed the jury that they could bring in separate verdicts on each cause of action, or combine the sums and bring in a single verdict on both. The jury brought in a lump sum verdict. Interest, which is allowable in a death action from date of death,[31] was added on the basis of the single verdict. To further complicate matters, neither counsel objected to the charge; but that was not irreparable because the Appellate Division, on appeal, may ignore the lack of exception.[32] This time, however, the Appellate Division did not ignore the lack of exception, and held that although the charge was erroneous, the error was waived by appellant-defendant's failure to except to the charge. The judgment in favor of plaintiff was modified by striking therefrom the allowance of interest on the verdict, and, as so modified, affirmed. Although the statute is in form mandatory, its provisions could be waived by acquiescence. Since it was impossible to separate the damages recovered for one cause of action from those recovered for the other, there was no basis for the computation of interest. The decision of the court is not entirely satisfactory unless one finds that the error committed was not serious or prejudicial and resulted in no injustice.

Appellant-defendant contended [33] that the verdict must be set aside for a very good reason. Damages for personal injuries are

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[28] N. Y. DEC. EST. LAW (L. 1935, c. 795, § 3) § 120.

[29] N. Y. LAW REVISION COMMISSION, Leg. Doc. (1935) No. 60 (E).

[30] 255 App. Div. 991, 8 N. Y. S. (2d) 448 (2d Dept. 1938), *aff'd*, 280 N. Y. 641, 20 N. E. (2d) 1012 (1939).

[31] N. Y. Laws 1870, c. 78; N. Y. DEC. EST. LAW § 132.

[32] Muldoon v. Dock Contractor Co., 199 App. Div. 733, 192 N. Y. Supp. 19 (2d Dept. 1922), *aff'd*, 235 N. Y. 553, 139 N. E. 731 (1923); Pavinoznik v. Fiske, 188 App. Div. 348, 177 N. Y. Supp. 61 (3d Dept. 1919).

[33] Brief for Appellant, p. 8, Helman v. Markoff, 280 N. Y. 641, 20 N. E. (2d) 1012 (1939).

assets of the estate of the deceased person and subject to the claims of creditors, whereas damages for wrongful death are not a part of the estate and are not subject to the claims of creditors. How much of the lump sum verdict will go to the estate and how much is subject to execution by creditors? The respondent admits [34] that the lack of separate verdicts would be a problem only on the question of liquidation of the debts of decedent. However, there is not the slightest evidence that the deceased left any creditors, or if there are creditors, that their claims cannot be satisfied otherwise. Here, whether the verdict was joint or several, the beneficiaries were identical. The undertaker and medical creditors would take from the proceeds of either of the verdicts if they were separately rendered, and certainly they are entitled to payment from the lump sum verdict. The question raised was purely procedural. Apparently, where the rights of creditors did not intervene, and where the beneficiaries of the proceeds of the two causes of action were not the same, a different conclusion might be reached. It is suggested, however, that the result might still be the same, for in *Matter of Fortunoff*,[35] the court directed a hearing for the proper allocation of the settlement sum as between the two causes of action. The *Helman* case, then, may stand for the proposition that although the trial judge committed error in not obeying the mandate of the statute, since it was not prejudicial and counsel did not properly take exception, the verdict will stand.

The 1935 additions to the law would seem to indicate that the legislature had intended to define the damages in a personal injury action so that they would not in any way duplicate those in a death action. The supposed purpose would be to change the rule that a recovery by the injured person prevents the accrual of a cause of action for damages to the beneficiaries for the death of such injured person. This would follow logically from the fact that the beneficiaries have an interest in the life of the injured person.[36] Such interest should not be destroyed by the act of the injured person in recovering damages, which compensate only for his injuries and not for the inva-

[34] Respondent's Brief, p. 11, Helman v. Markoff, 280 N. Y. 641, 20 N. E. (2d) 1012 (1939).

[35] 167 Misc. 119, 3 N. Y. Supp. 549 (1888).

[36] Here we find a situation analogous to that arising under Section 18 of the Decedent Estate Law, where a married person is given an interest in property of his spouse while alive, to the extent provided in the statute. It is an expectant interest dependent on the contingency that property to which it attaches becomes part of the decedent's estate (Newman v. Dore, 250 App. Div. 708, 294 N. Y. Supp. 499 (1st Dept. 1937), *aff'd*, 275 N. Y. 271, 9 N. E. (2d) 966 (1937)); and, it will be protected to the extent that married persons may not strip themselves of their property for the sole purpose of destroying the right of inheritance protected by this statute (Bodner v. Feit, 247 App. Div. 119, 236 N. Y. Supp. 314 (1st Dept. 1936)). However, just as an injured person can, in his lifetime, destroy the cause of action accruing upon his death for damages to his next of kin, so can a married person destroy the interest of his spouse in his property by an *effective* transfer of his property while alive (Newman v. Dore, *supra*).

sion of the interest of the beneficiaries. However, in *Fontheim* v. *Third Avenue Railway*,[37] it was held that "The foundation of every [death] action of this kind is in the injury which caused the death, and not merely in the fact of death itself, and if an injured person recovers a judgment for that injury during his lifetime or compromises his claims and accepts satisfaction for his injury, his representatives cannot maintain any action upon his subsequent death resulting therefrom." On closer study of the statute, this decision appears sound. The enactment does not relate specifically to personal injury actions, but is designed to prevent the abatement of such actions, and applies only to those continued or brought after the death of the injured person. A recovery by one who was permanently disabled for life as a result of a wrongful act, would include damages for the loss of earnings for the probable duration of his working days. These damages would supposedly compensate him for the injury, and enable him to continue to support his family and pay his debts. "In this situation, it is obvious that a recovery under the wrongful death statute, assuming the injury causes premature death, would result in a duplication of damages. Here, one right of action affords complete relief." [38]

BERNARD SCHIFF.

LIABILITY OF DEPARTMENT STORES FOR TORTS OF LESSEES

Theory of Action

It is a fundamental rule in the law of agency, that a principal is liable for the acts of his agent [1] done within the scope of his employ-

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[37] 257 App. Div. 147, 12 N. Y. S. (2d) 90 (1st Dept. 1939), *app. granted*, 257 App. Div. 948, 13 N. Y. S. (2d) 281 (1st Dept. 1939), *app. denied*, 281 N. Y. 392, 24 N. E. (2d) 95 (1940).

[38] N. Y. LAW REVISION COMMISSION, Leg. Doc. (1935) No. 60 (E) p. 55.

[1] Hoffman v. John Hancock Mutual Life Ins. Co., 92 U. S. 161 (1875); Vicksburg & M. R. R. v. O'Brien, 119 U. S. 99, 7 Sup. Ct. 118 (1886); American Bonding and Trust Co. v. Takahashi, 111 Fed. 125 (C. C. A. 9th, 1901); Mather v. Barnes, 146 Fed. 1000 (C. C. A. 2d, 1906); Armour v. Michigan C. R. R., 65 N. Y. 111 (1875); Isham v. Post, 141 N. Y. 100, 35 N. E. 1084 (1894); MECHEM, AGENCY § 704; RESTATEMENT, AGENCY § 140.

The common law maxims *respondeat superior* and *qui facit per alium, facit per se* form the basis for the principal's liability. The thought is that every man owes a duty to use care in conducting his affairs. Violation of this duty by his agent to the subsequent injury of a third party, should make the principal liable, since he has the privilege of selecting his *alter ego*.