

## Wrongful Death - Effect of Tortfeasor's Immunity from Actions by Injured Party

Robert M. Weiss

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**Wrongful Death — Effect of Tortfeasor's Immunity from Actions by Injured Party** — A husband shot and killed his wife. An action was later brought against him to recover for losses suffered by the wife's daughter as a result of the death. The husband claimed immunity from such a suit on the following grounds: The wife could not have sued him if she had lived because a husband is immune from suits by his wife for personal torts; and the wife's representative is subject to the same disability because the wrongful death statute permits an action to be maintained only where deceased could have maintained one if death had not ensued. The lower court gave judgment for defendant.

*Held:* Reversed. A wrongful death action can be maintained against a husband for the murder of his wife notwithstanding the fact that the wife could not have maintained the action if death had not ensued. *Welch v. Davis*, 101 N.E. 2d 547 (Ill., 1951).

In the principal case the problem involved is basically one of reconciling the Married Womens' Act and the Wrongful Death Statutes in the various states.

Married Womens' Acts give married women the right to sue in their own names. Most of the states have implied a limitation on the act to the effect that the statute confers no right on either spouse to sue the other for personal injuries.<sup>1</sup> But a few states, including Wisconsin, have refused to imply such a limitation. These states permit a wife to bring an action against any person who does her injury, even though that person be her husband.<sup>2</sup>

Wrongful death statutes permit an action for damages against the person who commits a wrongful act which causes the death of another. Most of the statutes have an express limitation that the act must be such "as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof."<sup>3</sup> But a few states have adopted the statute without such express limitation.<sup>4</sup> The issue in cases such as the principal ones, appears to revolve around the interpretation of that part of the statute just quoted.

Practically all of the states which first dealt with the problem of a wrongful death action against a husband followed the majority interpretation of both acts.<sup>5</sup> The courts held that the Married Womens' Act gave no right to the wife to sue the husband for personal torts; and the legislature expressly provided that no wrongful death action could be

<sup>1</sup> *Austin v. Austin*, 136 Miss. 61, 100 So. 591 (1924); *Allen v. Allen*, 246 N.Y. 571, 159 N.E. 656 (1927); See note, 89 A.L.R. 118.

<sup>2</sup> *Wait v. Pierce*, 191 Wis. 202, 209 N.W. 475, 210 N.W. 822 (1926).

<sup>3</sup> ILL. REV. STAT. (1949), Chap. 70, par. 1; MISS. CODE (1924), Sec. 1453; WIS. STATS. (1951), sec. 331.03.

<sup>4</sup> 12 P.S., Sec. 1601-1603 (Penn.).

<sup>5</sup> *Keister's Adm'r. v. Keister's Ex't'rs.*, 123 Va. 157, 96 S.E. 315, 1 A.L.R. 439 (1918); *Wilson v. Brown*, 154 S.W. 322 (Tex. Civ. App., 1913); See note, 104 A.L.R. 1271.

maintained unless the deceased could have maintained an action if death had not ensued. The courts followed a strict interpretation of the death statute and concluded that since no action could be maintained unless the deceased could have maintained one, and since the wife could not have maintained one if she had lived, the wife's representative was also barred from suing the husband. As late as 1937 it was said that "heretofore, the disability of one spouse to sue the other has been effectively imposed in all jurisdiction."<sup>6</sup> And some later cases have arrived at the same result.<sup>7</sup>

One of the earliest deviations from this strict rule took place in Pennsylvania, a state which prohibited tort suits between spouses, but which did not expressly require that a wrongful death action be maintained only where deceased could have maintained it if death had not ensued.<sup>8</sup> An action was brought by the father of a deceased wife against the husband, alleging that the husband's negligence caused the wife's death and deprived the plaintiff of contributions to his support. The court rendered judgment for the plaintiff and thus permitted a wrongful death action to be maintained against a husband for the death of his wife.<sup>9</sup> The court pointed out that since the purpose of the death statute was to compensate an independent wrong to the parties named in the statute, there was no reason why the plaintiff should be barred by the fact that the wrongdoer happened to be the husband of the deceased. The disability of the wife to sue was personal; it did not inhere in the tort itself, as is the case where she is guilty of contributory negligence.<sup>10</sup>

The court noted the peculiarity of the Pennsylvania statute by stating: "Our decision is based on our own statute and for that reason is not opposed to those in other jurisdictions which have been confronted with the same problem."

Several later cases have arrived at the same result, but these decisions have also been based on death statutes similar to the Pennsylvania statute.<sup>11</sup>

The instant case arrives at the same result as the Pennsylvania court under death statutes which are more typical of those found in most states. These cases permit the suit against the husband under statutes which expressly provide that no action can be maintained unless deceased could have maintained one if death had not ensued.

At common law there were two good reasons for prohibiting an

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<sup>6</sup> 37 ILL. L. REV. 796 (1937).

<sup>7</sup> Childs v. Childs, 107 S.W. 2d 703 (Tex. Civ. App., 1937); Wright v. Davis, 53 S.E. 2d 335 (W. Va., 1949).

<sup>8</sup> *Supra*, note 4.

<sup>9</sup> Kaczrowski v. Kalkosinski, 321 Pa. 438, 184 Atl. 663, A.L.R. 1267 (1936).

<sup>10</sup> All that the Pennsylvania wrongful death act expressly required was that the death "be occasioned by unlawful violence or negligence."

<sup>11</sup> Russel v. Cox, 65 Idaho 534, 148 P. 2d 221 (1944); Robinson's Adm'r. v. Robinson, 188 Ky. 49, 220 S.W. 1074 (1920).

action by the wife against the husband. First, husband and wife were one and any action had to be brought in the husband's name. Hence, he would be suing himself as defendant. Second, the wife could hold no property in her own name and any recovery would immediately become the property of the husband. Neither of these obstacles exist under modern statutes.<sup>12</sup>

More recently these actions have been prohibited on the ground that a suit by the wife against the husband would tend to disrupt domestic tranquility.<sup>13</sup> But this reasoning is inapplicable where the marriage has already been terminated by the death of one spouse and the action is brought for the benefit of a third person.

Besides, a trespass, negligent or willful, on the person of the wife does not cease to be an unlawful act merely because the husband is exempt from liability to her.<sup>14</sup> Since it is a wrongful act, it should support an action by parties as against whom the husband has no immunity and where no just reason compels the extension of his immunity.

The court, in the principal case, concluded that the requirement that the action must be one which the deceased could have maintained if death had not ensued has no reference to the person entitled to recover, but only to the circumstances of the injury and the nature of the wrongful act which is made the basis of the action.<sup>15</sup> This requirement was inserted solely for the purpose of defining the kind and degree of delinquency with which the defendant must be charged in order to subject him to the action.<sup>16</sup> It would bar recovery where the deceased was guilty of contributory negligence or where there was no proximate cause,<sup>17</sup> but it was not intended to bar recovery because of the personal relationship between deceased and tortfeasor.

In all of the above mentioned cases, the interpretation of the wrongful death act was hampered by the courts restricted interpretation of the Married Womens' Act. But in states such as Wisconsin, where the Married Womens' Act has been interpreted as removing the husband's immunity, the problem of the proper interpretation of the death act is removed in the case of the death of the wife. The action can be maintained against the husband because the injured party, the wife, could have maintained it if death had not ensued.<sup>18</sup>

The general problem of a wrongful death action against a party immune if the action were brought by the party wronged is also typified by a suit by a deceased child's representative against a parent who

<sup>12</sup> PROSSER ON TORTS, Sec. 99 (1941).

<sup>13</sup> Austin v. Austin, *supra*, note 1.

<sup>14</sup> Schubert v. August Schubert Wagon Co., 249 N.Y. 253, 164 N.E. 42, 64 A.L.R. 293 (1928).

<sup>15</sup> King v. Henkie, 80 Ala. 505, 509; 16 AM. JUR., DEATH, Sec. 82.

<sup>16</sup> Whitford v. Panama R.R. Co., 23 N.Y. 465; 16 AM. JUR., DEATH, Sec. 82.

<sup>17</sup> King v. Henkie, *supra*, note 15; PROSSER ON TORTS, p. 966 (1941).

<sup>18</sup> Waite v. Pierce, *supra*, note 2.

negligently causes the death of the child. The Wisconsin court has refused to permit such an action on the grounds that the father's immunity from tort actions by his child<sup>19</sup> also protects him from tort actions by the deceased child's representative.<sup>20</sup>

The same reasoning used to justify death actions against the husband in those states which prohibit suits between spouses could also be used in Wisconsin to justify death actions against the parent. The common law rule of nonliability has even less relevancy in the action against the parent than it does in the action against the husband because there was no common law conception of the legal identity of parent and child as there was husband and wife.<sup>21</sup> The modern rule that suits between members of the family should be discouraged on the ground that it disrupts family harmony is just as inapplicable in the death action against the parent as it is in the action against the husband. And the rule that a trespass on the person of a wife does not cease to be a wrongful act can also be applied to a trespass on the person of a child.

In short, every argument advanced in the principal case to sustain an action against the husband can also be advanced in Wisconsin to sustain the action against the parent. Other courts have already decided that the tortfeasor's immunity from actions by the party wronged should not protect him from wrongful death actions by that party's representative. By applying this rule to actions against a parent, he would be forced to compensate those who suffer as a result of his wrongful act. In addition to being consistent with recent wrongful death decisions, such a holding would also be in line with recent cases which indicate a modern tendency to narrow the scope of the parent's immunity.<sup>22</sup>

ROBERT M. WEISS

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<sup>19</sup> *Wick v. Wick*, 192 Wis. 260, 212 N.W. 787 (1927).

<sup>20</sup> *Cronin v. Cronin*, 244 Wis. 372, 12 N.W. 2d 677 (1944).

<sup>21</sup> *Worrell, d.b.a. Blue Ridge Lines, v. Worrell*, 174 Va. 11, 4 S.E. 2d 345, 346 (1939).

<sup>22</sup> *Signs v. Signs*, 103 N.E. 2d 743 (Ohio, 1952); *Wick v. Wick*, *supra*, note 19 (dissenting opinion).