

Wrongful Death: Release From Liability Through Contract of Decedent

William A. Adler

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Repository Citation

William A. Adler, *Wrongful Death: Release From Liability Through Contract of Decedent*, 33 Marq. L. Rev. 251 (1950).
Available at: <http://scholarship.law.marquette.edu/mulr/vol33/iss4/6>

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Wrongful Death — Release from Liability Through Contract of Decedent — Plaintiff's employee, as a condition of employment agreed that, in case of death resulting from an accident in the course of his employment while traveling on a railroad which the employer had agreed to indemnify against any liability for the employee's death from accident, employee's personal representatives would look for compensation solely to the Workman's Compensation Act, and that the railroad would not be held liable. Plaintiff brought an action to enjoin the decedent employee's administratrix from prosecuting an action against the railroad to recover damages for the alleged wrongful death of her intestate, due to the negligence of said railroad. *Held*: the agreement of decedent was enforceable and the employer was entitled to enjoin employee's administratrix from maintaining an action against the railroad for the death of the employee where employee's dependents had received Workmen's Compensation. *Western Union Telegraph Co. v. Cochran*, 91 N.Y.S. (2d) 792 (1949).

One particularly glaring legal deficiency in the comparatively recent common law of both England and the United States was that no remedy existed for the death of a person injured by the wrongful act of another. A tort action lay for injuries sustained while the victim lived, but upon his decease such action died also.¹ Legislative steps were taken to correct this shortcoming and provide redress, not only for the damages suffered by the deceased, but also losses endured by those dependent upon him and close of kin to him.

The first example of such legislation was Lord Campbell's Act in England in 1846.² This act provided a typical pattern from which subsequent American statutes were derived. Notwithstanding the fact that Lord Campbell's Act was used as a pattern, the American statutes presented wide variations, and, in many instances, only remotely resembled the English Act.

There are three distinct types of wrongful death statutes prevalent in the various states. Survival statutes only serve to preserve the right of action had by the deceased while he still lived.³ A new cause of ac-

¹ *City of Milwaukee v. Boynton Cab Co.*, 201 Wis. 581, 231 N.W. 597 (1930).

² 9 & 10 Vict. c. 93 (1846). This statute provides essentially: 1) an action may be maintained whenever death is caused through neglect, wrongful act, or default, which would entitle decedent to sue if death had not ensued; 2) such action is for the benefit of certain designated members of deceased's family or close of kin; 3) the damages recoverable are those suffered by such beneficiaries by reason of the death. *See* 25 C.J.S. 1076.

³ Wis. Stat. (1947) 331.01, "In addition to the actions which survive at common law the following shall also survive: . . . for assault and battery, false imprisonment or other damage to the person. . . ."

tion arises under some of the enactments, which enures to the benefit of designated members of the deceased's family or close of kin.⁴ Finally, the wrongful act itself and culpability therefore is penalized through statutes which provide for such punishment in a civil tort action.⁵

The distinctions between these three types of statutes are apparent upon consideration of the decisions construing them.

Survival statutes are strictly applied with reference to the rights of the decedent. Thus, his contributory negligence presents a valid defense to the action;⁶ so also do releases by him through settlement or other satisfaction.⁷

A decided divergence is found in the application of those statutes which give rise to an entirely new cause of action. There may be found in the cases two lines of interpretation. As is noted in the principal case, New York leans toward the rigidity found in decisions under the survival statutes which consider primarily the rights of the deceased. A far more liberal view is recognized in jurisdictions wherein the primary consideration is not the injury to the deceased, but the damages suffered by the beneficiaries of the recovery. A marked illustration of this latter view is presented by the decision in *Adams v. Northern Ry. Co.*⁸ The issue and facts there were quite analogous to those in the instant New York case, and, in deciding that the decedent could not contract away the rights protected by the statute, the court said:

"The statutes of Idaho are similar to the statutes of this state (Washington), in providing that, when the death of a person is caused by the wrongful act or negligence of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; and in every such action the jury may give such damages, pecuniary or exemplary, as, under all circumstances of the case, may seem just. Under this law the plaintiffs have a right of action to recover for their own loss, and they are not suing to enforce a right of the deceased

⁴ Wis. Stat. (1947) 331.03; 331.04, embracing substantially the same provisions as Lord Campbell's act in note 2 above.

⁵ General Laws of Massachusetts (1932) Chap. 229, sec. 5, ". . . a person who by his negligence or by his wilful, wanton or reckless act . . . causes the death of a person in the exercise of due care, who is not in his employment or service, shall be liable in damages in the sum of not less than five hundred nor more than ten thousand dollars, to be assessed with reference to the degree of his culpability . . . to be recovered in an action of tort. . ." It has been held under penal statutes that the decedent cannot, by contract, release the defendant from liability. *Commonwealth v. Vermont, etc., R. Co.*, 108 Mass. 7, 11 Am.R. 301 (1871).

⁶ *Walkup v. Covington*, 18 Tenn. App. 117, 73 S.W. (2d) 718 (1933).

⁷ *Brown v. Chicago & N. W. Ry. Co.*, 102 Wis. 137, 77 N.W. 748 (1899).

⁸ 95 F. 938, 940 (1899); *affirmed* 116 F. 324 (1902).

to recover damages for the injury which he suffered. Therefore the contract by which the decedent agreed to exempt the defendant from liability has no effect whatever on their right of action."

In looking at decisions based upon the different statutes, it seems apparent that none of them completely remedy the two wrongs involved. They are concerned with either the rights of the decedent, or the rights of his beneficiaries, but not both. The legislature of Wisconsin, with several others, has gone a step further by enacting statutes which not only allow the decedent's action to survive, but also compensate for the resulting wrongs inflicted upon those who depended on him for support and companionship. While such statutes ordinarily limit the amount of recovery that can be had, such limitation is a reasonable one and does afford substantial relief.⁹

The policy evident in Wisconsin and states having similar statutes is to provide complete relief for all injuries resulting from the wrongful act which caused death.¹⁰ There is no particular reason why other jurisdictions should limit the amount of damages to the amount which the decedent might have recovered;¹¹ or determine the rights of beneficiaries of the statutes solely on the basis of the rights of the decedent, as was done in the instant case. Perhaps the courts have lost sight of the legislative intent upon which the enactments were founded. If so, it is incumbent upon such legislatures to reiterate and clarify their intent by appropriate amendments and further enactments.

WILLIAM A. ADLER

Constitutional Law — Discrimination Between Natural and Naturalized Citizens — Plaintiff became a naturalized citizen in 1928. He went to Palestine in 1934 and remained there until 1947, when he returned to the United States. When he presented his certificate of citizenship to the Immigration authorities at New York they excluded him on the ground that he had expatriated himself under Section 804, 8 U.S.C.A. and was an alien without a quota immigration visa. That section provided: "A person who has become a national by naturalization shall lose

⁹ *Supra*, note 3 and note 4.

¹⁰ *Brown v. Chicago & N. W. Ry. Co.* (*supra*, note 7); *Koehler v. Waukesha Milk Co.*, 190 Wis. 52, 208 N.W. 901 (1926). These cases, in distinguishing between the two types of Wis. statutes, note that they give rise to two causes of action: one, a survival of decedent's cause of action, and the other, a new cause of action in favor of the deceased's beneficiaries. Thus, the injuries to both the decedent and the beneficiaries are compensated for.

¹¹ 25 C.J.S. 1238.