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Some Aspects of the Relationship Between Personal Injury and Death Actions

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NOTES AND COMMENT

SOME ASPECTS OF THE RELATIONSHIP BETWEEN PERSONAL INJURY AND DEATH ACTIONS.

In the recent case of *Kwiatkowski v. Lowry*[1] an action was brought by plaintiff as executrix, under the "wrongful death" statute[2] to recover for loss suffered by the next of kin as a result of the death of her testator, occasioned by an injury received while at work on a building. Oral and written statements made by the testator, in which he made no report of the accident, were not admitted in favor of defendant as admissions against interest. It was held that the "wrongful death" statute in New York created a new cause of action in favor of the next of kin, totally disconnected from any right which the deceased may have had during his lifetime. Consequently, any statements made by the deceased could not be used against his next of kin, who, in this action, were not claiming through him. While there is nothing startling or original in the above proposition of law inasmuch as it has been so held by our Court of Appeals too many times to admit of any further profitable discussion;[3] yet, in view of the fact that this marks the first time that a New York court has considered the problem of admissions in a wrongful death action, and in further view of the fact that a reading of some of our cases adjudicated under the statute seems to indicate that in certain instances the rights of the next of kin are dependent upon the primary right of the deceased[4] it would be well to consider the particular problem involved

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[1] 248 App. Div. 459, 290 N. Y. Supp. 627 (2d Dept. 1936).

[2] NEW YORK DECEDENT ESTATE LAW § 130: *"Action by executor or administrator for negligence or wrongful act or default causing death of decedent.* The executor or administrator duly appointed in this State, or in any other state, territory or district of the United States, or in any foreign country, of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent's death * * *."

[3] Crapo v. City of Syracuse, 183 N. Y. 395, 76 N. E. 465 (1906); McKay v. Syracuse Rapid Transit Ry. Co., 208 N. Y. 359, 101 N. E. 885 (1913); Phoenix Indemnity Co. v. Staten Island Rapid Transit Ry. Co., 251 N. Y. 127, 167 N. E. 194 (1929); Werra v. Cassedy, 229 App. Div. 590, 243 N. Y. Supp. 545 (2d Dept. 1930).

[4] For example, where the injured person has recovered a judgment or given a release, such judgment or release has been held to be a good defense to an action under § 130. Littlewood v. City of N. Y., 89 N. Y. 24 (1882). Also where the deceased had failed to prosecute his personal injury action within the statutory period, the defense of statute of limitations is good as

and at the same time briefly observe the manner in which the problem has been dealt with by courts of other jurisdictions. It is elementary that at common law the maxim *"Actio personalis moritur cum persona"* applied.[5] In 1846 there was enacted in England what is commonly known as Lord Campbell's Act[6] which provided, in effect, that an action may be maintained whenever death is caused by a wrongful act, neglect, or default of another, which wrongful act would have entitled the person injured to maintain an action if death had not ensued. The action was to be brought in the name of the executor or administrator of the injured deceased for the benefit of designated persons, members of deceased's family or next of kin, and the damages recoverable in such action were the pecuniary damages suffered by such beneficiaries by reason of the death. Statutes similar to Lord Campbell's Act have been enacted by many of the states in this country; so that, today, in most of our jurisdictions, some form of remedy survives the death of the injured person. In some instances, the cause of action of the injured party does not abate with his death but may be continued for the benefit of his estate;[7] in other instances upon the death of the injured party, his cause of action abates and a new cause of action arises for the benefit of his next of kin.[8] In the former case, the statutes are not true patterns of Lord Campbell's Act for whereas the Act was held to create a new cause of action,[9] one which arose only when death resulted from the injuries, and to permit the recovery of damages, *viz.*, the pecuniary loss sustained by reason of the death of the injured, these survival statutes are designed to *preserve* the action which the deceased himself, had he remained alive, could have maintained. In such cases it seems likely that any statements made by the deceased would be admissible against those bringing the action either as admissions or as declarations against interest, for the damages would then be the loss which the deceased himself would have sustained.

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against the administrator suing under § 130. Kelliher v. N. Y. C. & H. R. R. Co., 212 N. Y. 207, 105 N. E. 824 (1914); see Haas, Adm'x v. N. Y. Post-Graduate Medical School and Hospital, 131 Misc. 395, 226 N. Y. Supp. 617 (1928). See note 19 *infra* for further discussion.

[5] HARPER, THE LAW OF TORTS (1933) § 279.

[6] 9 & 10 Vict. c. 93 (1846).

[7] Kling v. Torello, 87 Conn. 301, 87 Atl. 987 (1913); Micks v. Norton, 256 Mich. 308, 239 N. W. 512 (1932); Cogswell v. Boston & M. R. R. Co., 78 N. H. 379, 101 Atl. 145 (1917).

[8] Morton v. Georgia R. & E. Co., 145 Ga. 516, 89 S. E. 488 (1916); Mooney v. Chicago, 239 Ill. 414, 88 N. E. 194 (1909); Haskell & B. Car Co. v. Logermann, 71 Ind. App. 69, 123 N. E. 818 (1919); Berner v. Whittelsey Mercantile Co., 93 Kan. 769, 145 Pac. 567 (1915); Louisville R. Co. v. Raymond, 135 Ky. 738, 123 S. W. 281 (1909); Melitch v. United R. & E. Co., 121 Md. 457, 88 Atl. 229 (1913); Littlewood v. N. Y., 89 N. Y. 24 (1882); McGahey v. Nassau Electric Ry. Co., 166 N. Y. 617, 59 N. E. 1126 (1901); Matter of Zounek, 143 Misc. 827, 258 N. Y. Supp. 665 (1932); Brown v. Perry, 104 Vt. 66, 156 Atl. 910 (1931); Brodie v. Washington Water Power Co., 92 Wash. 574, 159 Pac. 791 (1916).

[9] Read v. Great Eastern Ry. Co., L. R. 3 Q. B. 555 (1868).

The problem, however, exists in the consideration of the "wrongful death" statutes, wherein we find a great variation in the interpretation which the courts have placed upon the statutes of their respective states. Although the statutes of most jurisdictions are in most respects similar in substance, there is a sharp division of opinion concerning the original or derivative qualities of such a statute.[10] The results of labeling it one or the other are self-evident. Interpret the nature of the action to be derivative, that is, that the rights of the next of kin are founded upon and based on the rights of the deceased, the conclusion is inescapable that statements made by the deceased are admissible.[11] On the other hand, such statements would be inadmissible if we assume the cause of action to be new and original. The next of kin would not then be in privy with the deceased and would therefore not be bound by his statements.[12] Sound and cogent reasoning support the respective contentions. Briefly put, the former construction proceeds on the theory that the liability of the defendant to the party injured and the liability over to the administrator for the benefit of the next of kin is for the same wrongful act and is the same liability.[13] It is further argued that at the time the deceased made his statement, the only right of action there was at all was in the decedent. The executor or next of kin had no claim until he died and then the foundation of their claim was the injury to him. Therefore, since the liability is for the same wrongful act, there is merely a succession in rights, and where there is such succession there is privity between the parties. This being so, the administrator in an action for the benefit of the next of kin, is bound by the acts and words of the deceased.[14] Equally tenable and convincing are the arguments ad-

[10] For example, the Texas wrongful death statute, 3 VERNON'S & SAYLES ANN. CIV. ST. 1914, arts. 4694, 4695, reads: "The wrongful act, negligence, carelessness, unskillfulness * * * must be of such a character as would, if death had not ensued, have entitled the party injured to maintain an action for such injury." In an action brought under the statute, the court admitted statements by the deceased to the effect that he did not blame anybody for the accident. Hovey v. See, 191 S. W. 606 (Tex. 1916); Jewell v. El Paso Electric Co., 47 S. W. (2d) 328 (Tex. 1932). *Contra:* Rowe v. Richards, 35 S. D. 201, 151 N. W. 1001 (1915).

[11] Helman v. Pittsburgh Ry. Co., 58 Ohio 400, 50 N. E. 986 (1898). See 2 WIGMORE, EVIDENCE (1923) § 1081.

[12] Diaz v. Indust. Comm'r, 80 Utah 77, 13 P. (2d) 307 (1932).

[13] Helman v. Pittsburgh Ry. Co., 58 Ohio 400, 50 N. E. 986 (1898) (wherein the court held that in a trial of an action brought by an administrator to recover damages for death by wrongful act, it was competent for defendant to introduce as evidence what the deceased said, after the injury, tending to show that the injury was caused by his own fault, negligence or carelessness). Also see, Republic Iron & Steel Co. v. Industrial Comm., 302 Ill. 401, 134 N. E. 754 (1922).

[14] Walker v. Brantner, 59 Kan. 117, 52 Pac. 80 (1898) (declarations by deceased that he did not look to see if a train was approaching, and that, if he had looked, he could have seen the train and stopped his engine in time to have avoided the accident, were held admissible). Also see, Hughes v. Delaware & H. Canal Co., 176 Pa. St. 254, 35 Atl. 190 (1896); Jewell v. El Paso Electric Co., 47 S. W. (2d) 328 (Tex. 1932).

vanced by the courts entertaining the opposite view. They proceed from the premise that it is the very fact of the *death* from wrongful conduct at the hands of another which creates the foundation for the exercise of the right to sue for damages, and therefore in the very nature of things, could not, under any possible view, exist during or in the lifetime of the deceased. Therefore, to hold that the right of action after death is only the succession of the right as it existed in and belonged to the deceased before his death would be to hold that the right of action in the heirs lies solely in the damages suffered by the deceased by reason of the injuries received. This interpretation is held to be most unreasonable for what damages, in law, could a person himself suffer by reason of his own death caused by the tortious act of another.[15]

At first blush it would seem that the problem of admissions in a wrongful death action brought in New York meets with no difficulties for, as has been pointed out, our courts have repeatedly held Section 130 to create an original cause of action.[16] In certain instances, however, relief has been refused on grounds which would seem to indicate that for certain purposes, at least, the rights of those for whom the action is brought are to be deemed derivative. So where the injured person effected a settlement before death,[17] or where an action was brought by the injured person for his damages, which action went to judgment and the judgment was satisfied before death,[18] or where the decedent's cause of action was barred at his death by the statute of limitations,[19] it has been held that the action

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[15] Jacksonville Electric Co. v. Sloan, 52 Fla. 257, 42 So. 516 (1906) (declarations of deceased husband as to his physical condition on the morning before the afternoon when he was killed, and not part of the *res gestae,* were held inadmissible). To the same effect see, Murphy v. St. Louis, *etc.* Ry., 92 Ark. 159, 122 S. W. 636 (1909); Marks v. Reissinger, 35 Cal. App. 44, 169 Pac. 243 (1917); Diaz v. Industrial Comm., 13 P. (2d) 307 (Utah 1932); Kiser *et ux.* v. Douglas County, 70 Wash. 242, 126 Pac. 622 (1912).

[16] *Supra* note 3.

[17] Dibble v. N. Y. & Erie R. R. Co., 25 Barb. 183 (N. Y. 1857). To the same effect see, Mich. C. Ry. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192 (1913); Seaboard Air Line Ry. Co. v. Oliver, 261 Fed. 1 (C. C. A. 5th, 1919).

[18] Littlewood v. City of N. Y., 89 N. Y. 24 (1882). To the same effect see, Lindsay v. Chic. B. & Q. R. Co., 226 Fed. 23 (C. C. A. 7th, 1915); Perry v. Phila., B. & W. R. Co., 1 Boyce 399, 77 Atl. 725 (Del. 1910). Also see, McGahey v. Nassau Electric Ry. Co., 166 N. Y. 617, 59 N. E. 1126 (1901).

[19] Kelliher v. N. Y. C. & H. R. R. Co., 212 N. Y. 207, 105 N. E. 824 (1914). In this case, plaintiff's intestate was injured in November, 1906 and died February, 1912. Plaintiff's intestate brought no action during his lifetime to recover for his injuries. Within a few months after his decease, his widow and administratrix brought this action to recover damages sustained by her and his next of kin. Plaintiff argued that a limitation applicable to actions for personal injuries cannot be construed to apply to an entirely different and separate cause of action arising only when the injured party dies "and in which the damages are exclusively for the benefit of the decedent's husband or wife and next of kin." The court refused to recognize this contention on the ground that the statute is qualified by the condition that the action may be brought only where the person or corporation "would have been liable to an action in

for wrongful death was barred. While it would seem that such decisions are difficult to reconcile with the view that the statute creates an original right, the reason for the decisions is contained in the wording of the statute itself—" * * * against a * * * person who *would have been liable to an action in favor of the decedent if death had not ensued.*" [20] As was pointed out, most of our "wrongful death" statutes are worded almost identically with Lord Campbell's Act,[21] with the result that there has developed the definite rule that the representatives cannot maintain the action for wrongful death, unless the injured person had a right of action for his injuries immediately before his death.[22] A construction of Lord Campbell's Act by the English courts has led to a similar holding.[23] A careful reading of these decisions discloses that the courts feared that to hold otherwise would, in some instances, permit a double recovery and the wrongdoer would then be forced to pay damages twice for the same wrongful act.[24] In some of our jurisdictions, though, it has been held that a release executed by the injured person before his death cannot deprive the beneficiary of the right of action for the wrongful

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favor of the decedent." Also, if such action were to be allowed, then it would be possible for a deceased's representative to assert a right of action to recover for an injury forgotten by everyone. The force of such reasoning is shown by the case of Howard v. Bell Tel. Co., 306 Pa. 518, 160 Atl. 613 (1932), wherein the decedent's right of action for injuries sustained was barred by the statute of limitations more than nineteen years before such injuries resulted in death. The court held the wrongful death action non-maintainable. To the same effect see, Flynn v. N. Y., N. H. & H. R. Co., 283 U. S. 837, 51 Sup. Ct. 357 (1931); Knabe v. Hudson Bus. Transp. Co., 111 N. J. L. 333, 168 Atl. 418 (1933); Wiersycki v. Pratt & Letchworth Co., 151 Misc. 207, 271 N. Y. Supp. 36 (1934); Piukkula v. Pillsbury Astoria Flouring Mills Co., 44 P. (2d) 162 (Ore. 1935); Grant v. Fisher Flouring Mills Co., 44 P. (2d) 193 (Wash. 1935). *Contra:* Dameron v. So. R. Co., 44 Ga. App. 444, 161 S. E. 641 (1931) (wherein it was held that a mother's cause of action for the wrongful death of her son was not barred, although the son's cause of action for the injury subsequently causing his death was barred by the statute of limitations. The court took the position that a statute of limitations is not intended to destroy a right of action, but to afford security against stale demands by preventing suit thereon. The son's failure to bring a suit until the expiration of the statutory period could not extinguish the wrong so as to bar a cause of action for his subsequent death, which, although resting on the injury to the deceased, could not come into being so as to support a suit until his death.

[20] NEW YORK DECEDENT ESTATE LAW § 130, *supra* note 2.

[21] *Supra* note 8.

[22] TIFFANY, DEATH BY WRONGFUL ACT (2d ed. 1913) § 124; Hecht v. Ohio & M. R. R. Co., 132 Ind. 507, 32 N. E. 32 (1892); Strode v. St. Louis Transit Co., 197 Mo. 616, 95 S. W. 851 (1906); Edwards v. Interstate Chemical Co., 170 N. C. 551, 87 S. E. 635 (1916).

[23] Read v. Great Eastern R. Co., L. R. 3 Q. B. 555 (1868); Williams v. Mersey Docks & Harbour Board, L. R. 1 K. B. 804 (1905).

[24] In Read v. Great Eastern Ry. Co., *supra,* the court said: "The intention of the statute is not to make the wrongdoer pay damages twice for the same wrongful act, but to enable the representatives of the person injured to recover in a case where the maxim *'actio personalis moritur cum persona'* would have applied. It only points to a case where the party injured has not recovered compensation against the wrongdoer".

death which the statute gives him.[25] In the case of *Rowe v. Richards*,[26] wherein plaintiff's husband executed a release to the wrongdoer before his death, it was said:

> "We must confess our inability to grasp the logic of any course of so called reasoning through which the conclusion is drawn that the husband, simply because he may live to suffer from a physical injury, and thus become vested with a cause of action for the violation of his own personal right, has an implied power to release a cause of action—one which has not then accrued; one which may never accrue; one which, if it does ever accrue, will accrue in favor of the wife, and be based solely upon a violation of a right vested solely in the wife."

This conclusion is at variance with that of the great weight of authority construing similar statutes.[27] It is submitted that so long as the statute contains words making the remedy dependent upon the existence in the decedent, at the time of death, of a right of action to recover damages for such injury, such wording must be given full force and effect and that therefore such language clearly excludes the idea that, where the decedent received satisfaction for his injuries, the condition requisite to the right of the surviving relatives may exist notwithstanding.[28] It does not follow from this, however, that the statute assumes derivative characteristics, the nature of which may be enlarged to include admissions of the deceased. The objectives of the statute are more likely to be obtained by holding that the statute creates a new right of action but that such right is dependent upon

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[25] Blackwell v. American Film Co., 189 Cal. 689, 209 Pac. 999 (1922); Denver & R. G. R. Co. v. Frederic, 57 Colo. 90, 140 Pac. 463 (1914); Phillips v. Comm. Traction Co., 46 Ohio App. 483, 189 N. E. 444 (1934); Milwaukee Coke & Gas Co. v. Industrial Commission, 160 Wis. 247, 151 N. W. 245 (1915).

[26] 35 S. D. 201, 151 N. W. 1001 (1915).

[27] See cases cited *supra* note 22.

[28] However, where the statute contains no provision making it dependent on the primary cause of action, then the fact that the decedent had failed to bring his action for injuries within the limitation period is no bar to an action by his representative for the damages resulting from his death. In the recent case of Kaczokowski v. Kalkosinski, 321 Pa. 438, 184 Atl. 663 (1936), the plaintiff's daughter died as a result of injuries sustained in an automobile accident, the car then being operated by the daughter's husband. Plaintiff, alleging that the loss of his daughter deprived him of her contributions to his support, sued the husband's administrator under the Pennsylvania wrongful death statute which provides: "Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life * * * the persons entitled to recover damages for any injuries causing death shall be the * * * husband, widow, children or parents of deceased." Plaintiff was allowed a recovery on the theory that the statute was not qualified by the condition that the injured person, at the time of death should be possessed of a cause of action against the person liable for such injury.

the possession by the deceased of a cause of action at the time of his death.

There is suggested the thought, at this point, that as a result of the present Sections 118, 119 and 120 of the Decedent Estate Law,[29] there is no longer any reason for holding that where an individual procures a judgment or makes a settlement during his lifetime, the wrongful death action is barred. We have seen that at common law, the action abated with the death of the individual.[30] No doubt the legislative intent in creating the wrongful death statutes was to deprive the defendant of the defense of abatement. Much of the reasoning in support of the holdings which barred the action for wrongful death where the decedent during his lifetime had obtained a settlement or judgment was to the effect that to allow both actions would really be compelling the defendant to pay twice. It has been shown that the "wrongful death" statute in New York was promulgated for the benefit of the next of kin.[31] By statute the damages awarded to the plaintiff is such a sum which is deemed to be a fair and just compensation *for the pecuniary injuries, resulting from the decedent's death, to the person or persons for whose benefit the action is brought.*[32] As a result of Sections 118 and 119 it is now the law in New York 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 or because of the death of the person liable for the injury. By Section 120, it is declared that 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.* Also, it is stated that these damages shall form part of the decedent's estate. Thus in a situation wherein an individual has been injured and dies before commencing a personal injury suit, the statute of limitations not having run against him, his administrator has two causes of action: (a) under Section 119, to recover damages accruing *before death,* such damages forming part of the deceased's estate, and (b) under Section 130 for the benefit of the husband, wife or next of kin for damages resulting to them *because of death.* Even where both causes of action are prosecuted to judgment in a single action it is mandatory that the jury bring in two verdicts.[33] Irrebuttable and unyielding is the conclusion that as a result of Sections 118, 119 and 120 taken together with Section 130, our law now provides for the accrual of two distinct causes of action, *a fortiori,* two distinct recov-

[29] NEW YORK DECEDENT ESTATE LAW § 118, added by L. 1935, c. 795, Sept. 1; § 119, added by L. 1935, c. 795, Sept. 1; § 120, added by L. 1935, c. 795, Sept. 1.

[30] *Supra* note 5.

[31] *Supra* note 3.

[32] NEW YORK DECEDENT ESTATE LAW § 132, as amended by L. 1935, c. 224, March 25.

[33] NEW YORK DECEDENT ESTATE LAW § 120, added by L. 1935, c. 795, Sept. 1.

eries. One is for the wrong to the injured person, and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries, and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong but rather two recoveries for two wrongs. In view of the above reasoning, can it possibly still be maintained that a settlement by an individual during his lifetime for damages *he* suffered constitutes a bar to a recovery under the "wrongful death" statute? If, when the individual dies the executor may bring two causes of action, recovering under Section 119 the *same amount of damages* (except that no penalties or punitive damages shall be awarded) *that the deceased would have recovered had he prosecuted the action during his lifetime,* and then is permitted under Section 130 *to recover damages for the benefit of the wife, husband or next of kin,* can we with good reason say that because it is the executor who brings the action to recover damages for the personal injuries of the deceased, that the beneficiaries under Section 130 stand in a better position than where the *deceased himself* had recovered the *same amount* of damages during his lifetime? Sound reasoning does not lend itself to the drawing of such an absurdity of distinction.

Also interesting is it to note at this point the problem of receiving into evidence any statements by the deceased, in a situation wherein both causes of action are consolidated into one action. Since the cause of action under Section 119 is purely derivative, such statements would clearly be admissible. However, in so far as the cause of action under Section 130 is concerned, such action being original in nature, the statements should be inadmissible. Even with proper instructions from the court, it would seem that the jury might unwittingly consider the evidence admitted in the one in its determination of the other. It is suggested that in such situations, that is, where two causes of action are pending, the plaintiff prosecute the actions separately. Where the defendant moves to consolidate the two actions, which by statute, he is permitted to do,[34] it is most probable that such motion would not be granted since the joinder of actions would clearly work to the prejudice of the plaintiff.

Conclusion.

Section 130 of the Decedent Estate Law has been held to create a new cause of action for the benefit of the next of kin.[35] In certain instances such actions have been barred due to the belief that at the time of death it was necessary for the decedent to be possessed of a valid and subsisting claim against the person liable for the injury.[36]

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[34] NEW YORK DECEDENT ESTATE LAW § 120, *supra.*
[35] *Supra* note 3.
[36] *Supra* notes 17, 18, 19.

Whether because of Sections 118, 119 and 120, the courts will now adopt the view that the reasons for barring the claim no longer exist, or whether the legislature will deem it advisable to amend Section 130, by striking out therefrom the words " * * * against a * * * person who, or corporation which, would have been liable to an action in favor of the decedent * * *," is conjectural matter. But, though the above limitation exists, it is most desirable that we do not enlarge the scope of dependency of the wrongful death action on the primary personal injury action. The true purpose of the statute is to allow to the next of kin a recovery of money damages where they have suffered inestimable loss by reason of the death of the injured person, and any attempt to defeat this right must be discouraged by the courts. It is therefore submitted that the ruling in the *Kwiatkowski* case, barring the statements of the deceased from being received in evidence, was quite correct.

HERMAN T. PERS.

THE DOCTRINE OF RES IPSA LOQUITUR IN NEW YORK.

In an ordinary negligence action, the plaintiff must convince the jury that the defendant has been negligent, otherwise the latter will win. The onus of convincing the jury on this issue is called the burden of proof and the plaintiff must satisfy this burden by a preponderance of the evidence in his favor.[1] He must show (1) the legal harm done to him, (2) how the accident happened, and (3) that it was proximately caused by the defendant's negligence.[2] This requires a great deal of positive action on the plaintiff's part and is properly called a burden. But if the plaintiff comes into court with a *res ipsa loquitur* ("The thing speaks for itself") case, and every plaintiff undoubtedly finds this highly desirable, he is spared a great deal of work though the burden of proof on the whole case still rests on him.[3] For where the maxim *res ipsa loquitur* applies, there is a

[1] Griffen v. Manice, 166 N. Y. 188, 59 N. E. 925 (1901); Goldstein v. Pullman Co., 220 N. Y. 549, 116 N. E. 376 (1917).

[2] HARPER, THE LAW OF TORTS (1933) § 77.

[3] Volkmar v. Manhattan Ry. Co., 134 N. Y. 418, 31 N. E. 870 (1892); Hogan v. Manhattan Ry. Co., 149 N. Y. 23, 43 N. E. 403 (1896); Piehl v. Albany Ry. Co., 162 N. Y. 617, 57 N. E. 1122 (1900); Day v. Metropolitan Street Ry. Co., 163 N. Y. 447, 57 N. E. 751 (1900); Griffen v. Manice, 166 N. Y. 188, 59 N. E. 925 (1901); Cunningham v. Dady, 191 N. Y. 152, 83 N. E. 689 (1908); Robinson v. Consolidated Gas Co., 194 N. Y. 37, 86 N. E. 805 (1909); Plumb v. Richmond Light & Ry. Co., 233 N. Y. 285, 135 N. E. 504 (1922); Sandler v. Garrison, 249 N. Y. 236, 164 N. E. 36 (1928); Galbraith v. Busch, 267 N. Y. 230, 196 N. E. 36 (1935); Tortora v. State, 269 N. Y. 167, 199 N. E. 44 (1935); Bressler v. N. Y. Rapid Transit Corp., 270 N. Y. 409, 1 N. E. (2d) 828 (1936); Lessig v. N. Y. Central R. R. Co., 271 N. Y. 250, 2 N. E. (2d) 646 (1936); Smith v. Brooklyn Heights, 82 App. Div. 531, 81 N. Y. Supp. 838 (2d Dept. 1903); Whitcher v. Board of Education, 236 App. Div. 293, 258 N. Y. Supp. 556 (3d Dept. 1932).