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Robert J. Sawyer

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## Wrongful Death Acts Compared Briefly

Robert J. Sawyer\*

THE RIGHT OF ACTION FOR WRONGFUL DEATH was not seriously considered by the common law courts until 1846. It has not been given protection by most of our state constitutions despite the fact that the Federal Constitution has guaranteed life, liberty, and the pursuit of happiness. However, most states have enacted "Wrongful Death" statutes to allow protection to their inhabitants.

In order for the next of kin to recover damages in a Wrongful Death action, there must be shown a relationship to the deceased. The fact must be established that there was an interest akin to insurable interest in the deceased, which has been lost. Therefore in order to recover damages in a death action, under most statutes, proof of dependency is not necessary.<sup>1</sup>

In order to view the problem more systematically the chart set forth below has been provided.

In it we find that a right of action for "Wrongful Death" in most states is limited to the personal representative or executor of the deceased. That representative acts as agent and quasi-trustee. The personal representative may be said to act as agent by legislative appointment, for the effectuation of the purpose of the statute. It gives a right of action to him; and upon recovery he acts as quasi-trustee for those who stand in the position of distributees. However, sole beneficiaries often may compromise before an administrator is appointed, though not usually afterward, and thus prevent him from suing. Once the personal representative begins his suit, no agreement between the beneficiaries and wrongdoer can thwart the action of the representative.<sup>2</sup>

\* A second-year student at Cleveland-Marshall Law School, and a graduate of Central State College and Ohio State University.

<sup>1</sup> *Novak v. Chicago and Calumet Dist. Transit Co.*, 135 N. E. 2d 1 (Ind., 1956) superseding 127 N. E. 2d 116; *Burn's Ann. St. Ind. Sec. 2-404*; *Carianni v. Schwenker*, 118 A. 2d 847 (N. J., 1955); *Smollin v. Wilson*, 74 So. 2d 685 (Fla., 1954).

<sup>2</sup> *Kennedy v. Davis*, 55 S. 104 (Ala., 1911); *Irwin v. Alabama Fuel Co.*, 110 S. 566 (Ala., 1925); *Hampton v. Roberson*, 163 S. 644 (Ala., 1935); *Fischer v. Pope*, 155 S. 579 (Ala., 1934); *Story v. Page*, 273 N. W. 384 (Mich., 1937); *Fetty v. Carroll*, 190 S. E. 683 (W. Va., 1937).

It may be observed that in most states a right of action rests only in the representative. He stands in the shoes of the deceased, and maintains a right of action owned by the deceased if he had lived. As a result of thus standing in the shoes of the deceased, the representative is subject to the defenses which would have been available against the decedent.<sup>3</sup>

While the rulings and tenor of the majority of cases closely follow the above principle, it seems significant that, while the action must be brought by the personal representative, it is also quite possible for the personal representative to act in his individual capacity. If he acts as an individual, the funds may not be distributed properly. The general feeling is that to deny to the heirs or next of kin the right to bring suit, in effect would deny just distribution of the personal estate of the deceased.

There are other situations in which the beneficiaries may bring action where the executor or administrator fails to do so. An example of this would be where the administrator had administered the estate to final settlement without prosecuting the claim for Wrongful Death. Another instance would be where there had been collusion between the appointed administrator and the wrongdoer in order that the wrongdoer could escape liability. In such an eventuality, the widow, if any, or the heirs at law may maintain the action, by making the administrator a party defendant.<sup>4</sup>

It is also worth noting that generally the states' death statutes prohibit recovery for pain and suffering, where it can be established that death was instantaneous. This is explained by the fact that there must be a cause of action on that count. The personal representative cannot bring an action on that score, for the estate, where it is shown that death was instantaneous. In order to allow a recovery for pain and suffering, death must be preceded by a period of conscious suffering.<sup>5</sup>

The Statute of Limitations for such cause is generally two years, and is strictly construed. Lack of sufficient evidence, failure in the appointment of an administrator, and ignorance of the law, have been held to be insufficient excuses for not bringing

<sup>3</sup> *McFadden v. May*, 189 A. 483 (Penna., 1937); *Hames v. City of New York*, 54 N. Y. S. 2d 289, 64 N. E. 2d 449 (N. Y., 1945); *Handley v. City of Hope*, 137 F. Supp. 442 (Ark., 1956); *Beck v. Groe*, 70 N. W. 2d 886 (Minn., 1955).

<sup>4</sup> *Alabama Co. v. Brown* (92 S. 490) (Ala., 1921); *Kent v. Kansas Power and Light Co.*, 123 F. Supp. 662 (Kans., 1954).

<sup>5</sup> *Neuser v. Thelen*, 244 N. W. 801 (Wisc., 1932).

action as specified.<sup>6</sup> The fundamental reason for this strictness lies in the nature and origin of the cause of action. It is a cause of action based on a statute in derogation of the common law.

The amount of damages for Wrongful Death, as we can observe from the chart, in some states is not considered to be compensatory. The purpose of the grant of the right of action by the Legislature was intended for the preservation of human life, regardless of the pecuniary value of a particular life to the next of kin. Primarily, evidence tending to show actual pecuniary loss usually is admissible and relevant. Or measure must be made by reference to the quality of the wrongful act, and the degree of culpability.<sup>7</sup> Hence, evidence tending to show loss of services by those dependent upon the deceased is deemed to be irrelevant in some states, though not in all. The majority view is based upon the thought that the heirs of the deceased should be placed in the same position, as far as this can be done by a money award, as if the death had not occurred.

In contrast to the minority view and weight of authority, there are many states that allow damages to be measured by the probable accumulation of income of the deceased during his life expectancy.<sup>8</sup> And yet there are states holding that, in an action by a parent for the negligent killing of a child, the damages awarded must be founded on pecuniary loss, actual or expected. Mere injury to feelings cannot be considered. Nor can a parent be entitled to damages for the loss of a child's services, in some views. But a child can recover for the loss of benefits of instruction and physical, moral and intellectual training of a deceased parent.<sup>9</sup> Though the action is brought by the personal representative, it usually must be for the exclusive benefit of the next of kin.

<sup>6</sup> *Best v. Kinston*, 10 S. E. 997 (No. Car., 1890); *Hardtner v. Aetna Gas and Surety Co.*, 189 S. 365 (La., 1939).

<sup>7</sup> *Buckalew v. Tenn. Coal, etc.*, 20 S. 606 (Ala., 1896); *Nelson v. Charleston and W. C. Ry. Co.*, 86 S. E. 2d 56 (So. Car., 1955); *Legel v. New Haven G. Light Co.*, 111 A. 2d 547 (Conn., 1955); *McKirdy v. Cascio*, 111 A. 2d 555 (Conn., 1955); *New York Central Railroad Co. v. Johnson*, 127 N. E. 2d 603 (Ind., 1955); *Texas and N. O. R. Co. v. Hanson*, 271 S. W. 2d 309 (Ark., 1954).

<sup>8</sup> *Arizona Binghamton Cooper Co. v. Dickson*, 195 P. 538 (Ariz., 1921), 44 A. L. R. 881; *Wing v. Deppe*, 70 N. W. 2d 6 (Wis., 1955); *Bailey v. Spindler*, 74 N. W. 2d 344 (Nebr., 1956); *Geier v. Tjoden*, 74 N. W. 2d 361 (N. D., 1955); *Cook v. Knox*, 273 P. 2d 865 (Okla., 1954).

<sup>9</sup> *Interurban R. Co. v. Troiner*, 233 S. W. 816 (Ark., 1921); *In re Pridell's Estate*, 133 N. Y. S. 2d 203 (N. Y., 1954).

In an action for Wrongful Death arising out of an automobile collision, for example, it has been held that instructions on damages are erroneous if they emphasize the idea that the sole purpose and object of the death statute is to allow damages solely to those who might reasonably look to the decedent for support.

In the same kind of action it has also been held that instructions as to damages, which limit any award to the mother of the decedent, are erroneous when the decedent left also a father, brother, and sister of the half blood. This is because instructions should mention all the several persons within the designated class who are entitled to be considered.

Where action is brought under the death statute, instructions on damages were held to be erroneous when they directed that if the plaintiff was entitled to recover, the jury should find the pecuniary loss sustained by the decedent's mother, fixing such sum as would equal the probable earnings of the deceased. This is because such instructions required the jury to find a sum equal to the probable earnings of the decedent (but, "fixing such sum with reference to the probable earnings of deceased" would have been proper).<sup>10</sup>

It is obvious that each state sets its own qualification rules. But the substance of most state statutes seems to be the same except in details.

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<sup>10</sup> Wolf v. Lockhart, 78 S. E. 2d 654 (Va., 1953).

**A Comparison of the States' Limitations  
in Wrongful Death Statutes.**

P=Punitive Damages allowed; P. R.=Personal Representative;  
C=Compensatory Damages allowed.

<u>State</u>	<u>Maximum Recovery</u>	<u>Character of Recovery</u>	<u>Who May Bring Action</u>	<u>Statute of Limitations</u>
Alabama	No Limit	P	P. R. "Only"	2 years
Alaska	\$10,000	C	Next of kin	2 years
Arizona	No Limit	C	P. R.	2 years
Arkansas	No Limit	C	P. R.	2 years
California	No Limit	P	P. R.	1 year
Colorado	\$10,000	C	Next of kin	2 years
Connecticut	No Limit	P	P. R.	1 year
Delaware	No Limit	C	P. R.	3 years
District of Columbia	No Limit	C	P. R.	1 year
Florida	No Limit	C	P. R.	2 years
Georgia	No Limit	C	Next of kin	2 years
Hawaii	No Limit	C	P. R.	2 years
Idaho	No Limit	P	P. R.	2 years
Illinois	\$25,000	C	P. R.	1 year
Indiana	\$15,000	C	P. R.	2 years
Iowa	No Limit	P	P. R.	2 years
Kansas	\$25,000	C	P. R.	2 years
Kentucky	No Limit	C	P. R.	1 year
Louisiana	No Limit	C	P. R.	1 year
Maine	\$10,000	C	P. R.	2 years
Maryland	No Limit	C	State	18 months
Massachusetts	Based on de- gree of culpa- bility. Con- scious suffer- ing recovery unlimited	C	P. R.	2 years
Michigan	No Limit	P	P. R.	3 years
Minnesota	\$17,500	P	P. R.	3 years
Mississippi	No Limit	P	P. R.	6 years
Missouri	\$25,000	C	P. R.	1 year

WRONGFUL DEATH ACTS

<u>State</u>	<u>Maximum Recovery</u>	<u>Character of Recovery</u>	<u>Who May Bring Action</u>	<u>Statute of Limitations</u>
Montana	No Limit	C	P. R.	3 years
Nebraska	No Limit	P	P. R.	2 years
Nevada	No Limit	C	P. R.	2 years
New Hampshire	\$7,500	P	P. R.	2 years
New Jersey	No Limit	P	P. R.	2 years
New Mexico	No Limit	C	P. R.	3 years
New York	No Limit	P	P. R.	2 years
North Carolina	No Limit	C	P. R.	2 years
North Dakota	No Limit	C	P. R.	2 years
Ohio	No Limit	C	P. R.	2 years
Oklahoma	No Limit	C	P. R.	2 years
Oregon	\$20,000	C	P. R.	2 years
Pennsylvania	No Limit	C	Next of kin (Priority)	1 year (P. R. must sue within 6 months)
Puerto Rico	No Limit	C	P. R.	1 year
Rhode Island	\$25,000	P	P. R.	2 years
South Carolina	No Limit	P	P. R.	6 years (Generally)
South Dakota	\$20,000	C	P. R.	3 years
Tennessee	No Limit	P	P. R.	1 year
Texas	No Limit	P	P. R.	2 years
Utah	No Limit	P	P. R.	2 years
Vermont	No Limit	C	P. R.	2 years
Virginia	\$25,000	C	P. R.	1 year
Washington	No Limit	P	P. R.	3 years
West Virginia	\$20,000	C	P. R.	2 years
Wisconsin	\$15,000 Pec. loss, + \$2,500 loss of society	←	P. R.	2 years
Wyoming	No Limit	C	P. R.	2 years