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### Torts - Wrongful Death Statute - Survival of Cause of Action upon Death of Beneficiary

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toward Star Chamber<sup>17</sup> proceedings, review on appeal should render unlikely such an eventuality.

LYLE E. BALL

**TORTS — WRONGFUL DEATH STATUTE — SURVIVAL OF CAUSE OF ACTION UPON DEATH OF BENEFICIARY** — Action was brought by the Administrator of the estate of Julia Dianiska who was killed by the defendant's train. Prior to the trial the decedent's only living next of kin who sustained pecuniary damages died. On appeal the court *held*, that as there remained no living beneficiary who suffered pecuniary injury as a result of the death of Julia Dianiska and as the cause of action is not such species of property as will pass to the heirs or next of kin of those to whom the right is given,<sup>1</sup> the action could not be maintained. *Danis v. New York Central Ry.*, 160 Ohio St. 474, 117 N.E.2d. 39 (1954).

At common law no action lay for the death of a human being caused by negligent or wrongful act of another,<sup>2</sup> regardless of the relationship between the deceased and the beneficiary and of the financial loss occasioned by the death.<sup>3</sup> This rule was originally supported by the doctrine that when death resulted, the civil remedy was merged in 'the public offense.'<sup>4</sup> It was said to be inconsistent with the policy of law to permit the value of human life to become the subject of litigation.<sup>5</sup> Lord Ellenborough's opinion in the case of *Baker v. Bolton*,<sup>6</sup> seems to be the primary authority supporting the rule. In reference to the case Prosser says, "Lord Ellenborough, whose forte was never common sense, held without citing any authority and declaring in broad terms that, 'in a Civil Court the death of a human being could not be complained of as an injury.'"<sup>7</sup> The holding, which was criticized in both England<sup>8</sup> and the United States,<sup>9</sup> was nullified in England by passage of the Fatal Accidents Act of 1846,<sup>10</sup> better known as Lord Campbell's Act. Today, every American state has a remedy for wrongful death, most of which were modeled after Lord Campbell's Act.<sup>11</sup>

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17. Smith & Zucher, Dictionary of American Politics (1944) p. 291 "A secret proceeding in which a person whose interests are affected is given inadequate or no opportunity to present his case, and in which the proceedings are conducted and conclusions reached in derogation of usual forms. The name is derived from the Star Chamber, an ancient court abolished by Parliament in 1641 which had no jury and was permitted to apply torture."

1. Ohio Rev. Code §2125.02 provides: "that the action shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children, and other surviving next to kin of the decedent who have suffered pecuniary injury as a result of such death."

2. See *Aetna Life Ins. Co. v. Moses*, 287 U. S. 530, 539 (1932); *Kelliher v. New York Central & Hudson River Ry.*, 212 N. Y. 207, 105 N.E. 824 (1914).

3. *Mobile Life Ins. Co. v. Brame*, 95 U. S. 754 (1877); *Tullgren v. Amoskeag Mfg. Co.*, 82 N. H. 268, 133 Atl. 4 (1926) (husband and wife).

4. See *Louisville & Nashville Ry. v. McElwain*, 98 Ky. 700, 34 S.W. 236, 237 (1896).

5. See *Phillip v. Northern Pacific Ry.*, 46 Wash. 173, 89 Pac. 468, 470 (1907).

6. 1 Camp 493, 170 Eng. Rep. 1033, (1808).

7. Prosser, Torts 955 (1941).

8. See *Osborne v. Gillett*, L. R. 8, Exch. 88 (1873) *passim*; *Clark v. London General Omnibus Co.*, 2 K.B. 648 (1906) *passim*.

9. See *West v. Boston & Maine Ry.*, 81 N. H. 522, 129 Atl. 768, 770 (1925); *Rowe v. Richards*, 35 S. D. 201, 151 N. W. 1001, 1003 (1915).

10. 9 & 10 Vict., c. 93.

11. Prosser, Torts 955 (1941).

The rule laid down in the instant case is quite widely followed<sup>12</sup> but in some states is qualified so as to apply only if the action has not been commenced prior to the death of the beneficiary.<sup>13</sup> However, what seems to be the more modern and probably the prevailing view is that the cause of action vests in the beneficiary immediately after the wrongful death, thereafter becoming his property and a part of his estate.<sup>14</sup> The courts allowing the right of action to survive do so mainly on the ground, "that the damages awarded for the negligent act are such as result to the property rights of the person or persons for whose benefit the cause of action was created."<sup>15</sup> Many of the jurisdictions adhering to this rule limit the damages which the representative of the deceased beneficiary may collect to the actual monetary loss suffered by the beneficiary during his life.<sup>16</sup>

The decision of the instant case was based upon a case decided forty-four years previously.<sup>17</sup> The court recognized that the holding was not in accord with the more modern rule, but stated that if the legislature desired a different result, sufficient time had elapsed for statutory effectuation of this desire.

North Dakota has not had to deal with this problem, but has decided one related case in which the tortfeasor died before the action was commenced.<sup>18</sup> The court reasoned that the statute<sup>19</sup> providing that the "action" should not abate on the death of either party to the record should be strictly construed as in derogation of the common law, distinguishing it from death statutes which provide that the "cause of action" might survive the death of either party. Hence they held that the statute did not apply when no action had been begun before the death of the tortfeasor. The decision is in accord with most of the courts having dealt with similar death statutes.<sup>20</sup>

In view of the strict construction given the wrongful death statute by the North Dakota Court, it seems quite probable that it would have followed the

12. *E.g.*, *Billingsley v. St. Louis Iron Mountain & Southern Ry.*, 84 Ark. 617, 107 S. W. 173 (1907); *Huberwald v. Orleans Ry.*, 50 La. 477, 23 So. 474 (1898); *State v. Baltimore & Ohio Ry.*, 70 Md. 319, 17 Atl. 88 (1889) (Here the statute required the action to be brought in the name of the state for the use of the beneficiary, but the court said this made no difference.); *Bean v. Louisville & Nashville Ry.*, 94 Tenn. 388, 29 S.W. 370 (1895) (Strict construction given the death statute as next of kin surviving the beneficiary were being awarded something which never existed at common law); *Schmidt v. Menosha Woodenware Co.*, 99 Wis. 300, 74 N.W. 797 (1898); *See Wabash Ry. v. Gretzinger*, 182 Ind. 155, 104 N.E. 69, 75 (1914).

13. *E.g.*, *Frazier v. Georgia Ry. & Banking Co.*, 101 Ga. 77, 28 S.E. 662 (1897); *Wilcox v. Biedt*, 330 Ill. 571, 162 N.E. 170 (1928); *Gilkeson v. Missouri Pac. Ry.*, 222 Mo. 173, 121 S.W. 138 (1909).

14. *E.g.*, *Union Steamboat Co. v. Chaffin's Adm'rs.*, 204 Fed. 412 (7th Cir. 1913); *Waldo v. Goodsell*, 33 Conn. 432 (1866); *White v. A. T. & S. F. Ry.*, 125 Kan. 537, 265 Pac. 73 (1928); *Johnston v. Bay Street Ry.*, 222 Mass. 583, 111 N.E. 391 (1916); *Meekin v. Brooklyn Heights Ry.*, 164 N. Y. 145, 58 N.E. 50 (1900); *Neil v. Wilson*, 146 N. C. 242, 59 S.E. 674 (1907); *Walsh v. Bressette*, 51 R. I. 354, 155 Atl. 1 (1931); *See Kentucky Utilities Co. v. McCarty's Adm'rs.*, 169 Ky. 38, 183 S.W. 237, 241 (1916); *City of Shawnee v. Cheek*, 41 Okla. 227, 137 Pac. 724, 733 (1913); *Fitzgerald v. Edison Electric Illuminating Co.*, 207 Penn. 118, 56 Atl. 350, 351 (1903).

15. *Meekin v. Brooklyn Heights Ry.*, *supra* note 14 at 53.

16. *E.g.*, *Van Beeck Adm'r. v. Sabine Towing Co.*, 300 U. S. 342 (1936); *Cooper v. Shore Electric Co.*, 63 N. J. L. 558, 44 Atl. 633 (1899); *Sider v. General Electric Co.*, 238 N. Y. 64, 143 N.E. 792 (1924); *See Dotsie v. Lewiston Crushed Stone Co.*, 136 Me. 284, 8 A.2d 393, 397 (1939).

17. *Doyle v. Baltimore & Ohio Ry.*, 81 Ohio St. 184, 90 N.E. 165 (1909) (The court held the cause of action for the sole beneficiary is not such species of property as will, under the provisions of the statute, pass to the heirs or next of kin of the sole beneficiary).

18. *Willard v. Mohn*, 24 N. D. 390, 139 N.W. 979 (1913).

19. N. D. Rev. Code §7690 (1905); N. D. Rev. Code §32-2105 (1943).

20. *Prosser, Torts* 959 (1941).

decision of the principle case. However, recent legislation<sup>21</sup> may prompt North Dakota to adopt the more reasonable and modern view that the cause of action is a property right vesting in the beneficiary immediately after the decedent's wrongful death.

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21. N. D. Rev. Code §28-01261 (Supp. 1953) provides: "No action or cause of action, except for breach of promise, alienation of affections, libel and slander, shall abate by the death of a party or of a person who might have been a party had such death not occurred."