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ACTIONS FOR WRONGFUL DEATH IN TENNESSEE

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Familiar to most lawyers is the bit of law-lore to the effect that the reason the earliest Pullman cars were so constructed that passengers slept with their heads towards the front of the train was so that they would be killed rather than merely injured if an accident occurred.[1] Although the reason assigned for the Pullman Company's practice is purely fictitious the logic of the fiction is sound, for the common law gave no civil action for a wrongfully inflicted injury if death occurred before a judgment was recovered,[2] and it thus was cheaper to kill a person than to inflict a nonfatal injury. Not only was it held that the cause of action which the decedent would have had if death had not ensued was extinguished by his death,[3] even if an action had already been commenced;[4] but also it was held, without apparent reason,[5] that his surviving dependents had no cause of action for the death of their provider.[6]

Whatever the supposed reasons for these common law rules they were not long considered of great weight, for at an early date legislatures stepped

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1. It has also been suggested that the true reason that fire axes were placed at the end of each car was so that the conductor could quickly dispatch from this world any who were merely injured.

2. For discussion and criticism of the common law rules see Coliseum Motor Co. v. Hester, 43 Wyo. 298, 3 P.2d 105 (1931); 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 333-36, 576-85, 676-77 (3d ed. 1923); POLLOCK, TORTS 66-72 (12th ed. 1923); PROSSER, TORTS 950 (1941); TIFFANY, DEATH BY WRONGFUL ACT c. 1 (2d ed. 1913); Holdsworth, *The Origin of the Rule in* Baker v. Bolton, 32 L.Q. REV. 431 (1916); Voss, *The Recovery of Damages for Wrongful Death at Common Law, at Civil Law, and in Louisiana*, 6 TULANE L. REV. 201, 203-05 (1932); Winfield, *Death As Affecting Liability in Tort*, 29 COL. L. REV. 239 (1929); Note, 18 CALIF. L. REV. 44, 45-47 (1929).

3. This was but a part of the doctrine *actio personalis moritur cum persona*, that personal actions were extinguished by the death of either party. See Winfield, *Death As Affecting Liability in Tort*, 29 COL. L. REV. 239, 244-53 (1929). The reasons for this rule are obscure and the rule has been severely criticized. *See* Harris v. Nashville Trust Co., 128 Tenn. 573, 581, 162 S.W. 584 (1913).

4. Dillon v. Great Northern Ry., 38 Mont. 485, 100 Pac. 960 (1909).

5. For discussion of some reasons which have been asserted in support of the doctrine see 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 333-36 (3d ed. 1923); TIFFANY, DEATH BY WRONGFUL ACT §§ 12-16 (2d ed. 1913); Holdsworth, *The Origin of the Rule in* Baker v. Bolton, 32 L.Q. REV. 431 (1916).

6. The case generally conceded to be the origin of this doctrine is Baker v. Bolton, 1 Camp. 493, 170 Eng. Rep. 1033 (N.P. 1808). For criticism of this case, in addition to that found in authorities cited *supra* note 2, *see* Osborn v. Gillett, L.R. 8 Ex. 88, 93-99 (1873) (Bramwell, B., dissenting).

At one time such actions may have been maintained. Shields v. Yonge, 15 Ga. 349, 60 Am. Dec. 698 (1854); *cf.* Cross v. Guthery, 2 Root 90, 1 Am. Dec. 61 (Conn. 1794); Ford v. Monroe, 20 Wend. 210 (N.Y. Sup. Ct. 1838); TIFFANY, DEATH BY WRONGFUL ACT §§ 6-10 (2d ed. 1913); Winfield, *Death as Affecting Liability in Tort*, 29 COL. L. REV. 239, 252 (1929).

It is at once apparent that both the injured party and others have interests in the unimpaired continuance of the injured party's life, and distinguishing between the interests of the injured party and the interests of others is a *sine qua non* to the understanding of the problems which have arisen in this field of law.

in to provide remedies for this undesirable situation in which the common law had failed to fulfil its promise that "for every wrong there is a remedy." Statutes were enacted in some jurisdictions providing that all actions commenced, but not brought to judgment, before the death of a party may be revived for or against the estate of the deceased party.[7] In addition, most legislatures provided for the survival of all or specifically designated classes of tort claims,[8] even though no action was commenced before death of the party. With regard to these types of statutes it is immaterial whether the deceased party died from the injury giving rise to the cause of action or died from some independent cause.

All of the states have also enacted statutes particularly applicable to situations where death results from wrongfully inflicted injuries.[9] These statutes are of two basic types, the first being patterned after Lord Campbell's Act[10] and granting a new cause of action to designated beneficiaries for their own loss consequent upon the death,[11] and the second merely preserving the cause of action the decedent would have had if death had not resulted from the injury.[12] Many states have statutes of both types, and in those states having only one such statute recovery is usually enlarged by express provision, or judicial interpretation, to include damages of both types,[13] so that in most cases the scope of recovery is virtually the same. However, as will be seen, in some situations it is vitally important to determine whether the basic theory of the statute is to grant a new cause of action or merely preserve that of the decedent.

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7. See, *e.g.*, NEB. REV. STAT. § 25-1402 (1943) (a few express exceptions); OHIO GEN. CODE ANN. § 11397 (1940) (a few express exceptions); TENN. CODE ANN. § 2846 (Williams 1934). Most states have statutes providing for revivor only where the cause of action would have survived if no action had been commenced before death. See, *e.g.*, CAL. CODE CIV. PROC. § 385 (1949); NEV. COMP. LAWS ANN. § 8561 (1930).

8. Evans, *A Comparative Study of the Statutory Survival of Tort Claims For and Against Executors and Administrators*, 29 MICH. L. REV. 969 (1931). While the statutes are of many different types they may be roughly categorized into four groups: (1) all tort claims; (2) claims for injuries to tangible property and person; (3) all tort claims except personal injuries; (4) all claims for injuries to tangible property. Legis., 48 HARV. L. REV. 1008, 1009 (1935).

9. PROSSER, TORTS 955 (1941); TIFFANY, DEATH BY WRONGFUL ACT §§ 24-26 (2d ed. 1913), Rose, *Foreign Enforcement of Actions for Wrongful Death*, 33 MICH. L. REV. 545, 550 (1935). In those states which have both a general survival statute and a wrongful death statute, difficult problems have arisen as to the applicability of each statute. See *e.g.* Schumacher, *Rights of Action Under Death and Survival Statutes*, 23 MICH. L. REV. 114 (1924); Note, 44 HARV. L. REV. 980 (1931), 21 MISS. L.J. 392 (1950).

10. 9 & 10 VICT., c. 93 (1846). A much earlier Massachusetts statute provided recovery, in the nature of a penalty, for the relatives of persons killed by reason of defects in public ways. TIFFANY, DEATH BY WRONGFUL ACT 5, n.5 (2d ed. 1913); Green, *The Texas Death Act*, 26 TEXAS L. REV. 133, 461 (1947-48).

11. TIFFANY, DEATH BY WRONGFUL ACT §§ 24-25 (2d ed. 1913); Schumacher, *Rights of Action Under Death and Survival Statutes*, 23 MICH. L. REV. 114, 115 (1924).

12. TIFFANY, DEATH BY WRONGFUL ACT § 26 (2d ed. 1913); Schumacher, *Rights of Action Under Death and Survival Statutes*, 23 MICH. L. REV. 114, 116 (1924).

13. PROSSER, TORTS 956 (1941).

TENNESSEE STATUTES

There are several Tennessee statutes providing for the survival of various types of civil actions upon the death of one of the parties, without regard to the cause of the death. As early as 1835 a statute was passed providing for the survival of all civil actions except those "affecting the character of the plaintiff,"[14] for which an action was commenced before the death of either party.[15] A much later statute provides that the death of a tortfeasor shall not abate any cause of action for a tortious injury accruing during his lifetime, for which no action was instituted before his death.[16] However, no such general statute has yet been passed providing that causes of action for torts shall survive the death of the injured party if death occurs before an action is commenced, although an 1877 statute provides for the survival of claims for injuries to real property if the person who could have sued dies before an action is instituted.[17]

None of these statutes preserves claims for personal injuries where the injured party dies prior to the commencement of any action, but Tennessee is not without legislative aid in such situations. In 1850, less than four years after Lord Campbell's Act was passed, the Tennessee legislature enacted statutes[18] designed to provide some remedy for wrongfully inflicted injuries which resulted in death.[19] The section describing the character of the right provided as follows:

"The right of action, which a person who dies from injuries received from another, or whose death is caused by the wrongful act or omission of another, would have had

14. Libel, slander, malicious prosecution, breach of marriage contract, etc.

15. TENN. PUB. ACTS 1835-36, c. 77. This is now TENN. CODE ANN. § 8694 (Williams 1934).

16. "Hereafter in all cases where a person shall commit a tortious or wrongful act causing injury or death to another, or property damage, and such person committing such wrongful act shall die before suit is instituted to recover damages therefor, such death of such person shall not abate any cause of action which the plaintiff would have otherwise had, but such cause of action shall survive and may be prosecuted against the personal representative of such tort-feasor or wrongdoer, and the common-law rule abating such actions upon the death of the wrongdoer and before suit is commenced is hereby abrogated." TENN. CODE ANN. § 8243.1 (Supp. 1949). Under this section it has been held that actions for seduction and breach of promise of marriage will lie if commenced after the death of the defendant, although under TENN. CODE ANN. § 8694 (Williams 1934) such actions would abate if commenced before the wrongdoer's death. Goins v. Coulter, 185 Tenn. 346, 206 S.W.2d 379 (1947), 20 TENN. L. REV. 373 (1948).

17. "When any person entitled to sue for injuries to real property shall die before commencing action, it shall be lawful for the personal representative of said party to sue and recover for the benefit of the deceased." TENN. CODE ANN. § 9323 (Williams 1934). No statute preserves causes of action for injuries to personal property. Cherry v. Hardin, 51 Tenn. 199 (1871); *but see* Haymes v. Halliday, 151 Tenn. 115, 119, 268 S.W. 130 (1924). But in cases of conversion the tort may be waived and suit brought, as it could at common law, in quasi-contract for unjust enrichment. Baker & Paul v. Huddleston, 62 Tenn. 1 (1873); Alsbrook v. Hathaway, 35 Tenn. 245 (1856).

18. Tenn. Pub. Acts 1849-50, c. 58, §§ 1, 2. These provisions are now codified, as subsequently amended, as TENN. CODE ANN. §§ 8236-38 (Williams 1934).

19. The original sections have been amended and new sections added so that the statutes now provide as follows: "The right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act, omission,

against the wrong-doer, in case death had not ensued, shall not abate or be extinguished by his death; but shall pass to his personal representative for the benefit of his widow and next of kin, free from the claims of creditors."[20]

While this statute, in its express terms, apparently only preserved the action which the deceased would have had for the damage he suffered because of the injury, subsequent judicial interpretations and legislative amendments created, at least for a time, considerable confusion as to the character of the right and the scope of recovery permissible under the statute. Since many important decisions rest upon a determination of the nature of the right,

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or killing by another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and, in case there is no widow, to his children or to his next of kin; or to his personal representative, for the benefit of his widow or next of kin, in either case free from the claims of creditors.

"The right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his or her legally adoptive parents or parent when and where his or her natural parents or parent or next of kin are unknown, or to the administrator for the use and benefit of the said adoptive parents or parent." TENN. CODE ANN. § 8236 (Supp. 1949).

"The action may be instituted by the personal representative of the deceased or by the widow in her own name, or, if there be no widow, by the children of the deceased or by the next of kin; also, without the consent of the personal representative, either may use his name in bringing and prosecuting the suit, on giving bond and security for costs, or in the form prescribed for paupers. The personal representative shall not, in such case, be responsible for costs, unless he sign his own individual name to the prosecution bond." TENN. CODE ANN. § 8237 (Williams 1934).

"If the deceased had commenced an action before his death, it shall proceed without necessity of a revivor. The damages shall go to the widow and next of kin, free from the claims of the creditors of the deceased, to be distributed as in the case of the distribution of personal property." *Id.* § 8238.

"A suit for the wrongful killing of the wife may be brought in the name of the husband for the benefit of himself and the children of the wife, or in the name of administrator of the deceased wife, or in the name of the next of kin of the wife." *Id.* § 8239.

"Where a person's death is caused by the wrongful act, fault, or omission of another, and suit is brought for damages, as provided by sections 8236 to 8237, inclusive, the party suing shall, if entitled to damages, have the right to recover for the mental and physical suffering, loss of time, and necessary expenses resulting to the deceased from the personal injuries, and also the damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received." *Id.* § 8240.

"The damages which may be recovered for the wrongful killing of any married woman shall go to the surviving husband and children of the deceased equally, the husband taking a child's share, and if any child be dead leaving descendants, such descendants shall take the deceased child's part. If there are no children nor descendants of children, then the damages shall go exclusively to the husband. If the husband shall die after the cause of action accrued and before recovery is collected, then his share shall go to his next of kin." TENN. CODE ANN. § 8241 (Williams 1934).

"No suit for personal injuries or death from wrongful act, in any of the courts of this state, whether on appeal or otherwise, and whether in an inferior or appellate court, shall abate or be abated, because or on account of the death of the beneficiary or beneficiaries for whose use and benefit said suit was brought, and such suit shall be proceeded with to final judgment, as though such beneficiary or beneficiaries had not died, for the use and benefit of the next of kin of such deceased beneficiary." *Id.* § 8242.

"Death of a primary beneficiary, after the death of one so injured and before suit is brought, shall not work a loss of cause of action, which shall be deemed to survive in behalf of those who, after such beneficiary, are the next of kin of such decedent." *Id.* § 8243.

20. TENN. CODE § 2291 (Meigs and Cooper 1858). For the wording of this section as it now stands see § 8236, *supra* note 19.

and in turn the scope of permissible recovery, extended treatment of the law on those points will be helpful.

The first reported case bearing upon those points is *Louisville & N.R.R. v. Burke*,[21] decided in 1868. There the decedent met instantaneous death on defendant's railroad and an action was commenced under the above-quoted statute to recover damages for the death. The circuit judge charged the jury that the damages recoverable were those suffered by the widow and chidren by reason of the killing of the husband and father, and thus allowed recovery even though the decedent died instantly. The Tennessee Supreme Court, in holding this instruction erroneous, said: "The damages recoverable are those suffered by Burke, and which he could have recovered had he lived; and not those suffered by his widow and children in consequence of his being killed."[22] And, "The killing of a man is not of itself a cause of civil action. The damages recoverable are, for what was incurred or suffered while the person lived. If the killing be absolutely instantaneous, damages are not recoverable, for that would be giving damages for the mere act of killing."[23] Since there was no interval between the injury and death during which the decedent could suffer damage the court held that there could be no recovery.

The holding of the *Burke* case was not destined to be long-lived, for it was overruled by *Nashville & C.R.R. v. Prince*[24] in 1871. There also death was instananeous and in the action which followed the only damages claimed were those sustained by the widow and children because of the death of the husband and father. The court construed the statute to manifest a legislative intent to provide an action whether the decedent lived a period of time before death or not,[25] and from this concluded that:

> "It would have been absurd to give the right of action for damages for the mental and bodily sufferings of a person whose death was instantaneous. Yet a right of action

21. 46 Tenn. 45 (1868).
22. *Id.* at 49.
23. *Id.* at 52.
24. 49 Tenn. 580 (1871).
25. "It will be observed that two classes of cases are provided for in the section, connected together by the use of the disjunctive conjunction, 'The right of action which a person *has* who dies from injuries received from another.' This language describes one class of cases—those in which death results after the injuries received, but not instantaneously, as we understand the language. As to the second class, 'The right of action which a person, whose death is caused by the wrongful act or omission of another, *would have had* against the wrong-doer, in case of death had not ensued, shall not be extinguished by his death.' This is the second class of cases. One class embraces rights of action which the person *has* who dies from injuries received; the other class, rights of action which the person *'would have had* whose death is caused by the wrongful act or omission of another,' etc. The distinction between the two classes of cases is by no means clear. If there is any difference, it is in this: That the language used in describing the second class, more clearly includes cases of instantaneous death than that used in describing the first class; and we infer that the language was used in the alternative, with the view of more distinctly indicating the purpose of the Legislature to include cases of instantaneous death, as well as those of death ensuing from injuries previously re-

> is given for the benefit of the widow or next of kin. It follows, that the damage intended to be provided for, was the loss of husband or father."[25]

This decision, and the opinion announcing it, was destined to cause confusion in subsequent cases, because it seemed to approve recovery of damages purely in the right of the beneficiaries—to construe the statute to provide a new cause of action for the widow or next of kin *in addition* to preserving that of the decedent.

The case of *Collins v. East Tenn., V. & G.R.R.*[27] suggested a rationale of the result reached in the *Prince* case which was perhaps more logical than the one there employed. The court refused to revoke the doctrine of the *Prince* case, and in further explanation of that doctrine said:

> "Now it is argued, that it is only the right of action which the deceased would have had, had he lived, that passes to the widow, and that this does not include the incidental injuries to his family occasioned by the wrong to himself, as well as, his mental and bodily suffering, etc. If he had lived and had been disabled for life, or a series of years, or even seriously injured, he would have been entitled to *compensatory* damages. If he had a wife and children whom he had supported by his industry—to whom he was now unable to render any assistance on account of his injuries—this privation of himself and family would necessarily constitute an element in the computation of damages. And, if his life is lost to them, why may not the privation to them of the aid and maintenance he had given them, still enter into the computation of actual damages sustained by them? The widow has lost her husband, the child a father, and both have lost the food and raiment which his industry provided. Had he lived, he could have indemnified the last privation by his action against the wrong-doer; and, having died, the same right of indemnity passes to them."[28]

This language, though not perfectly clear, seems to indicate a process of reasoning based upon a theory that the deprivation of continued existence is a wrong to the decedent—that the recovery sanctioned by the *Prince* case is not primarily the economic loss to the surviving beneficiaries but rather the economic loss sustained *by the decedent* (or his estate) because of the premature termination of his life.[29]

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ceived. But whether the Legislature used the two different forms of expression for the purpose suggested, or not, it can not be controverted that the language, 'whose death is caused by the wrongful act or omission of another,' includes cases of instantaneous death; and the language which immediately follows, 'would have had against the wrongdoer, in case death had not ensued, shall not abate and be extinguished by his death,' necessarily means that the representative of the deceased person shall have a right of action, whether the deceased dies after the injuries were received, or died simultaneously with the infliction of the injury which caused death. . . ." *Id.* at 585-86.

26. *Id.* at 587. The court also said: "Looking to the obvious purpose of the Legislature in this alteration of the common law, we are satisfied it was intended that the representative of a person who had died from personal injuries, should have the right to recover damages, not only for the mental and bodily suffering, loss of time, and necessary expenses resulting immediately to the deceased from the personal injuries, but also for the damages resulting to the parties for whose benefit the right of action survives, from the death consequent upon the injuries received." *Id.* at 585. The latter part of this passage was destined to be embodied, almost verbatim, into a subsequent amendment of the statutes. See *infra* p. 295.

27. 56 Tenn. 841 (1872).

28. *Id.* at 851.

29. *See* Davidson Benedict Co. v. Severson, 109 Tenn. 572, 616, 72 S.W. 967 (1903).

Had the court in this case been only a little more explicit in explaining that all recovery was in the right of the decedent, and none of it primarily in the right of the beneficiaries, much confusion might possibly have been avoided, for subsequent cases[30] indicate that many judges did not understand the interpretation given the *Prince* doctrine by the *Collins* case but understood those cases as holding that the statute gave a new cause of action to the widow or next of kin for the loss sustained by them because of the death of the decedent.[31] Some later cases stated that the *Prince* case and those following it "stand on doubtful grounds" because the only recovery allowed by the statute was for damage suffered by the decedent;[32] other decisions merely stated the rule of recovery solely in terms of damage to the deceased;[33] and indeed, some cases considered the doctrine to have been repudiated by cases subsequent to the *Collins* case.[34]

Whatever was the true status of the law in the period of confusion between the *Prince* decision and 1883, much of the dispute was settled at the latter time when the legislature amended the statutes by adding a section which provided in part as follows:

> "[T]he party suing shall, if entitled to damages, have the right to recover damages for the mental and physical suffering, loss of time, and necessary expenses resulting to the deceased from the personal injuries, and also the damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received."[35]

This section, which enacted almost the exact words of the *Prince* opinion,[36] while eliminating further dispute as to the efficacy of the *Prince* rule, nevertheless was to raise serious problems of interpretation.

Whaley v. Catlett[37] directly presented for adjudication the nature of the cause of action given by the statute, as amended by the Act of 1883,

30. For an excellent review of all the cases, prior to 1903, interpreting the *Prince* case and the *Collins* case see Davidson Benedict Co. v. Severson, 109 Tenn. 572, 72 S.W. 967 (1903).

31. *See* East Tennessee, V. & G.R.R. v. Gurley, 80 Tenn. 46, 53 (1883); Chicago, St. Louis & N.O.R.R. v. Pounds, 79 Tenn. 127, 130 (1883); East Tennessee, V. & G.R.R. v. Toppins, 78 Tenn. 58, 66 (1882); Louisville & N.R.R. v. Conley, 78 Tenn. 531, 534 (1882); Nashville & Chatt. R.R. v. Smith, 77 Tenn. 470, 474 (1882); Trafford v. Adams Exp. Co., 76 Tenn. 96, 109 (1881); Fowlkes v. Nashville & D.R.R., 64 Tenn. 663 (1875).

32. *See* Trafford v. Adams Exp. Co., 76 Tenn. 96, 109 (1881); Fowlkes v. Nashville & D.R.R., 64 Tenn. 663, 668 (1875).

33. East Tennessee, V. & G.R.R. v. Gurley, 80 Tenn. 46, 53 (1883); Chicago, St. Louis & N.O.R.R. v. Pounds, 79 Tenn. 127, 130 (1883); East Tennessee, V. & G.R.R. v. Toppins, 78 Tenn. 58, 66 (1882); Louisville & N.R.R. v. Conley, 78 Tenn. 531, 534 (1882); Nashville & Chatt. R.R. v. Smith, 77 Tenn. 470, 474 (1882).

34. *See* Railroad v. Wyrick, 99 Tenn. 500, 508, 42 S.W. 434 (1897); Railroad v. Johnson, 97 Tenn. 667, 670, 37 S.W. 558 (1896); Loague v. Railroad, 91 Tenn. 458, 460, 19 S.W. 430 (1892); Louisville & Nashville R.R. v. Gower, 85 Tenn. 465, 470, 3 S.W. 490 (1887).

35. Tenn. Pub. Acts 1883, c. 186. This is now TENN. CODE ANN. § 8240 (Williams 1934).

36. 49 Tenn. at 585.

37. 103 Tenn. 347, 53 S.W. 131 (1899).

for there the problem raised was when the statute of limitations would begin to run against the right provided by the amended statute. A previous case had said by way of dictum that the "act in question constitutes a new cause of action"[38] and from this it was argued that the statute began to run at the time of the death rather than at the time of the injury. However, the court rejected this contention and held that the cause of action, notwithstanding the amendment, was only that which the deceased would have had with new elements of damage added. This was not a satisfactory process of reasoning, however, since if damages were sanctioned by the amendment which were not previously recoverable as damages suffered by the deceased the statute did *in fact* give a new cause of action for the beneficiaries.

It was not until 1903 that a satisfactory explanation of the nature of the cause of action provided by the amended statute was given, in the case of *Davidson Benedict Co. v. Severson.*[39] In that case the circuit judge had charged in part as follows:

> "There are two classes of damages provided for in the statute: First, Such damages as the deceased himself could have recovered had he been permanently disabled for life and he himself were prosecuting the suit. In estimating this case of damages, you will take into consideration the mental and physical suffering of the deceased, his earning capacity and the probability of his continuance of life. . . .
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> "Second. In addition to such damages, the plaintiff would be entitled to recover also such pecuniary damages as have been sustained by the widow and child consequent upon the death of Hollister."[40]

Error was assigned upon this portion of the charge, and the question for determination was whether the statute as amended provided for the recovery of such duplicate damages as the quoted charge would permit. In support of the instruction it was argued that under the *Prince* case it had been held that all those elements of damage enumerated in the first part of the charge were allowable under the statute as it stood before amendment, as damages suffered by the deceased; and that if the Act of 1883 was to have any meaning it must be construed to intend recovery of something in addition to those damages recoverable before enactment of the amendment. In support of this proposition were cited those cases which had said that the Act extended the scope of recovery.[41] The court, speaking through Mr. Justice Neil, answered these contentions in a very thorough opinion and held the instruction erroneous. The reasoning was to the effect that while the statute by its terms provided for recovery of two types of damages

38. Chicago, St. Louis & N.O.R.R. v. Pounds, 79 Tenn. 127, 130 (1883). See also East Tenn., V. & G. Ry. v. Lilly, 90 Tenn. 563, 566, 18 S.W. 243 (1891).

39. 109 Tenn. 572, 72 S.W. 967 (1903).

40. 109 Tenn. at 635, 72 S.W. at 982.

41. *See* Whaley v. Catlett, 103 Tenn. 347, 354, 53 S.W. 131 (1899); Railroad v. Johnson, 97 Tenn. 667, 670, 37 S.W. 558, 34 L.R.A. 442 (1896); Loague v. Railroad, 91 Tenn. 458, 461, 19 S.W. 430 (1892).

it was merely a codification of the rule announced by the *Prince* case and all recovery is actually in the right of the deceased.[42] Enactment of the amendment was desirable because of the confusion which had arisen as to the efficacy and scope of the *Prince* doctrine.

According to this leading case the Tennessee statutes merely preserve the right the decedent would have had, had he lived and sued, and all damages recoverable are for injuries suffered by the decedent or his estate, although such injuries might also have been incidentally injurious to the beneficiaries designated to share in the recovery. Recovery is for the damage suffered by the decedent during life, plus the value of his life, which was an asset of his estate.[43] Or, as it was later expressed in another case:

> "The theory of our cases seems to be that no new or independent right of action arises from death by wrongful act; that the pecuniary value of the life is its value to

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42. "It is thus apparent from the authorities that there are, under the sections of the Code referred to and the act of 1883, two classes of damages recoverable in the same action: First, damages purely for the injury to the deceased himself; second, the incidental damages suffered by his widow and children, or next of kin, from his death. . . . In some of the cases referred to (notably the case which first made the suggestion—Collins v. Railroad) it is said that damages belonging to what has just been denominated the 'second class,' are to be estimated as if the deceased were himself still alive, but totally disabled, and in that condition suing for such injury. In the same connection, however, it is said that, if he were so alive, and so injured, he would be unable to give his family that attention and care which he could otherwise give to them, and that in this manner they would also suffer as well as he. But this is merely a method of showing how the injury to the husband and father has resulted in an incidental damage to the wife and children, or widow and children, or next of kin; illustrating the principle above referred to that there is only one cause of action, that of the person who was killed or injured, and that this cause of action is always viewed by the court as a single one. Or it may be said that, for convenience in estimating damages, and in order to separate in the mind the damages for the deceased's pain and suffering, mental and physical, his loss of time, and necessary expenses attendant upon the injury (those damages peculiarly personal to him), from the incidental damages which the widow and children or next of kin are entitled to recover because of the incidental injury sustained by them, it is held that the latter damages are to be assessed as if the deceased were still alive, and totally disabled. For practical purposes, however, it is unnecessary that this supposition should be called to the attention of the jury, or considered by them as the starting point of the inquiry, or at any stage of it. It is sufficient that the pecuniary value of the life destroyed may be ascertained, as far as such a matter can be ascertained at all, in the manner and according to the rules already laid down." 109 Tenn. at 614-17, 72 S.W. at 977-78.

43. "At first blush, it seems a solecism to speak of a man having a right of action for his own death. We can readily understand how he can have an action for mental and bodily suffering, and for loss of time, and for expenses incurred, all of these happening in his lifetime, and caused by the injury complained of. But when he dies, that is the end of him, personally, in this sphere of being; and the loss occasioned by the mere act of death itself can not, in any strictly logical sense, be said to be his loss, but rather the loss of those who come after him, and who were interested in his continuance in life. Yet it can not be doubted that the legislature could endow his estate with such a right of action, and vest the right to sue thereon in his administrator for the benefit of his widow, children or next of kin, and that this was the thing in fact done was held by this court in the *Prince* case." 109 Tenn. at 628, 72 S.W. at 981.

An interesting question which has arisen in some jurisdictions is: Can a person recover during his life for the shortening of his normal life expectancy? Some cases have held that he can recover for both the economic and physical loss, and an eminent legal scholar, in a very thorough analysis of the problem and relevant cases, argues that it "would be unworthy of law or logic to hold that an individual may have redress in damages for interferences which obstruct or preclude the legal expression of personality but shall be without remedy for injuries which impair or cut it short. That every man

> the estate of the deceased; that the amount of money representing this value represents also the loss which the beneficiary suffered, because he is entitled, under the statute of distribution, to the money as the substitute for the life of the deceased; in other words, that the value of the life of the deceased represents the 'damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received.'"[44]

From this view there has been no subsequent dissent, and there are only a few indications that it has been misunderstood on occasion.[45]

Having a well-settled and well-understood interpretation of the nature of the right and the scope of recovery intended by the statute renders the solution of other problems less difficult, for as previously stated, the solution of many problems depends directly upon determination of this question. It is believed that most of the holdings, both prior and subsequent to the *Severson* case, may be fitted into this theory in a logical manner.

WHEN ACTION MAINTAINABLE

The Tennessee statutes provide recovery only for injuries resulting in the dealth of a "person."[46] While it might seem at first blush that this limitation would cause no difficulty of interpretation the problem is in reality not so simple. The court experienced little difficulty in declaring a married woman a "person" within the meaning of the statute, even before the "emancipation acts" were passed,[47] or in declaring a minor child to be a person.[48] However, the court may be some day beset with a problem which has perplexed other courts for many years—whether an unborn infant is a "person."[49] Until recently no appellate court had allowed recovery for the

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has a redressible interest in the *integrity* of his personality is attested daily by judgments of our courts allowing damages for personal injuries culpably caused. . . . An injury which cuts life short involves an amputation of all interests of personality. Surely the victim suffers as real a loss in such a case as another sustains from a crippling injury which narrows, without shortening, the free expression of his personality. To assess the dimensions of interests of personality we are bound by common sense to multiply the breadth of life by its length." Smith, *Psychic Interest in Continuation of One's Own Life: Legal Recognition and Protection,* 98 U. OF PA. L. REV. 781, 788 (1950). It has also been held that the psychic loss sustained by the decedent, by reason of the shortening of his life expectancy, for which compensation could have been compelled during his lifetime, is compensable under a survival statute after his death. Ford v. Rose, [1937] A.C. 826, [1937] 3 All E.R. 359. No Tennessee case raising this point has been found, but it is suggested that a strong case for allowing such recovery in Tennessee might be made out on the strength of statements in some of the cases previously discussed and cited herein.

44. Potts v. Leigh, 15 Tenn. App. 1, 10 (M.S. 1931).

45. *See, e.g.,* Landrum v. Callaway, 12 Tenn. App. 150, 158 (E.S. 1930); Knoxville Ry. & Light Co. v. Davis, 3 Tenn. Civ. App. 522, 530 (1912).

46. TENN. CODE ANN. § 8236 (Williams 1934). That section also provides that the death must be caused by the "wrongful act, omission, or killing by another." Nevertheless, recovery has been denied where the wrongful act consisted of libel or slander. Benton v. Knoxville News-Sentinel Co., 174 Tenn. 658. 130 S.W.2d 105 (1939); *cf.* Jones v. Stewart, 183 Tenn. 176, 191 S.W.2d 439 (1946) (no proximate cause where decedent committed suicide because of defendant's false accusations of crime).

47. Bream v. Brown, 45 Tenn. 168 (1867).

48. Louisville & N.R.R. v. Connor, 56 Tenn. 19 (1871).

49. This problem has previously been discussed by the author in Note, *Tort Actions for Injuries to Unborn Infants,* 3 VAND. L. REV. 282 (1950).

wrongful death of such infants,[50] recovery being denied chiefly on the ground that such infants were not "persons";[51] but recent cases indicate a trend to hold viable infants to be "persons" and allow recovery.[52] The question is still an open one in Tennessee, even as to prenatal injuries not resulting in death, and while the weight of authority is otherwise, holding such an infant to be a "person" under the Tennessee statutes is not inconceivable. Perhaps the most desirable solution would be for the legislature to anticipate such a problem by expressing its will by statute[53] after careful study and evaluation of the opposing policy factors.[54]

Also essential to recovery under the statute is proof that death resulted from the injury complained of, and not from some independent cause.[55] Nor is it sufficient to show some causal relation, for the wrongfully inflicted injury must have been the *proximate* cause of death.[56] Since no general survival statute preserves a cause of action for personal injuries not sued upon before the death of the injured party and the death statutes apply only where the wrongfully inflicted injury was the proximate cause of the death, no action can be maintained where death proximately results from some independent cause before suit is brought. This result is perhaps more undesirable than any other part of the Tennessee law on this subject, and should be corrected by legislation.

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50. *Id.* at 285.

51. *E.g.,* Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638, 48 L.R.A. 255, 75 Am. St. Rep. 176 (1900), *affirming* 76 Ill. App. 441 (1898); Dietrich v. Inhabitants of Northhampton, 138 Mass. 14, 52 Am. Rep. 242 (1884).

52. Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946); Verkennes v. Corniea, 38 N.W.2d 838 (Minn. 1949); Jasinsky v. Potts, 153 Ohio St. 529, 92 N.E.2d 809 (1950); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949).

53. California has enacted that "A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth; but any action by or on behalf of a minor for personal injuries sustained prior to or in the course of his birth must be brought within six years from the date of the birth of the minor." CAL. CIV. CODE § 29 (1949).

54. Perhaps the strongest argument for denying actions for injuries to or death of unborn infants is the inherent difficulty of proof. Note, 3 VAND. L. REV. 282, 288-92 (1950). Despite this difficulty, most writers favor allowing such actions. See authorities cited in *id.* at 286, n.32. In addition see Note, 28 N.C.L. REV. 245, 249 (1950); 19 FORD. L. REV. 108, 112 (1950); 7 WASH. & LEE L. REV. 117, 122 (1950).

55. Payne v. Illinois Cent. R.R., 155 Fed. 73 (6th Cir. 1907); Jones v. Stewart, 183 Tenn. 176, 191 S.W.2d 439 (1946); Daniel v. Coal Co., 105 Tenn. 470, 58 S.W. 859 (1900).

56. Jones v. Stewart, 183 Tenn. 176, 191 S.W.2d 439 (1946) (no proximate cause where decedent committed suicide because of defendant's allegedly false accusations of crime); Nashville v. Reese, 138 Tenn. 471, 197 S.W. 492, L.R.A. 1918B 349 (1917) (no proximate cause where deceased died of pneumonia contracted while in a weakened condition from an injury previously inflicted by defendant); Willis v. Heath, 21 Tenn. App. 179, 107 S.W.2d 228 (M.S. 1937) (no proximate cause where decedent died from cerebral hemorrhage 56 days after injury to arm); *see* Southern Extract Co. v. Green, 103 F.2d 232, 233 (6th Cir. 1939), *cert. denied,* 308 U.S. 568, 60 Sup. Ct. 81, 84 L. Ed. 476 (1939). For a leading Tennessee case on intervening acts see Chattanooga Light & Power Co. v. Hodges, 109 Tenn. 331, 70 S.W. 616, 60 L.R.A. 459, 97 Am. St. Rep. 844 (1902).

It will be remembered that the *Burke* case,[57] the first case involving determination of the nature of the right given by the statute, was a case in which death was instantaneous. Recovery was denied on the theory that the decedent had suffered no damage before death since there was no interval between the injury and the death,[58] and there was no cause of action to be preserved. This is the general rule in states having only "survival" statutes, even where the statutes expressly sanction recovery for damage resulting to the beneficiaries.[59] However, the holding of the *Prince* case,[60] overruling the *Burke* case, to the effect that recovery can be had where death is instantaneous is consistent with the basic theory of the Tennessee cases which consider the taking of the life to be an injury to the decedent or his estate. The holding of the *Prince* case, that an action will lie where death is instantaneous, has been consistently followed in subsequent cases.

Although all recovery under the statute is in the right of the deceased, it is nevertheless essential to recovery that the existence of beneficiaries entitled to take under the statute be both alleged and proved,[61] because the statute displays a legislative intention to allow survival of the decedent's right only if there are surviving beneficiaries.[62] However, the fact that all recovery is for damage done to the decedent or his estate makes it unnecessary to aver or prove that the beneficiaries suffered any pecuniary loss

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57. Louisville & N.R.R. v. Burke, 46 Tenn. 45 (1868).

58. It is said to be a medical fact that there must necessarily be some interval between the impact and death. *See* Clark v. Manchester, 62 N.H. 577, 584 (1883); Smith, *Psychic Interest in Continuation of One's Own Life: Legal Recognition and Protection*, 98 U. OF PA. L. REV. 781, 817, n.109 (1950).

59. For an excellent discussion and exhaustive collection of cases see Carolina, C. & O. Ry. v. Shewalter, 128 Tenn. 363, 161 S.W. 1136, L.R.A. 1916C, 964, Ann. Cas. 1915C, 605 (1913). Also see PROSSER, TORTS 956 (1941); TIFFANY, DEATH BY WRONGFUL ACT § 74 (2d ed. 1913).

60. Nashville & C.R.R. v. Prince, 49 Tenn. 580 (1871).

61. Daniel v. East Tenn. Coal Co., 105 Tenn. 470, 58 S.W. 859 (1900); Louisville & N.R.R. v. Pitt, 91 Tenn. 86, 18 S.W. 118 (1892); *see* Western & A.R.R. v. Hughes, 8 F.2d 835, 836 (6th Cir. 1925); Hale v. Johnston, 140 Tenn. 182, 204, 203 S.W. 949 (1918); Tennessee Cent. R.R. v. Brown, 125 Tenn. 351, 356, 143 S.W. 1129 (1911). Under the theory that the existence of some surviving beneficiaries must be proved, it has been held that the existence of any or *all* may be proved. Freeman v. Illinois Cent. R.R., 107 Tenn. 340, 64 S.W. 1 (1901); Collins v. East Tenn., V. & G.R.R., 56 Tenn. 841 (1874). This doctrine has been carried further to allow proof not only of the number of surviving children but also their age and sex. Spiro v. Felton, 73 Fed. 91 (C.C.E.D. Tenn. 1896); Illinois Cent. R.R. v. Davis, 104 Tenn. 442, 58 S.W. 296 (1900). In view of the fact that under the theory of the Tennessee statutes the number, ages, sex, etc., of the beneficiaries should be immaterial to the amount of recovery, and the fact that the existence of only *one* eligible beneficiary need be proved, Tennessee Cent. R.R. v. Brown, 125 Tenn. 351, 143 S.W. 1129 (1911); Southern Ry. v. Brubeck, 6 Tenn. App. 493 (E.S. 1927), it is difficult to understand why such unnecessary, but highly prejudicial, evidence should be admitted.

62. This intention is apparent from the express provision of the statute that recovery shall be free from the claims of creditors. TENN. CODE ANN. §§ 8236, 8238 (Williams, 1934). And, where there are no surviving beneficiaries an action will not lie for creditors, or, in the absence, thereof, for benefit of the state. East Tenn., V. & G. Ry. v. Lilly, 90 Tenn. 563, 18 S.W. 243 (1891).

because of the death.[63] This point is forcefully illustrated by *Potts v. Leigh.*[64] There a husband was permitted to recover $10,000 although there was no claim of pain and suffering of the decedent or other damage accruing before death, and the husband had been estranged from his wife for eight years and suffered no pecuniary loss because of her death. In explaining that pecuniary loss to the husband need not be proved the court said:

> "The theory of our cases seems to be that no new or independent right of action arises from death by wrongful act. . . . Under this rule it is immaterial that the deceased and her husband had been estranged. It does not affect the pecuniary value of her life."[65]

DEFENSES

An offhand opinion as to the availability of defenses in wrongful death cases might well be that the nature of the action provided by the statute was of the utmost importance—that under statutes merely preserving the cause of action of the decedent all defenses would be admissible which could have been asserted against him, while under statutes granting a new cause of action to named survivors defenses to the decedent's right would not necessarily be available. However, Lord Campbell's Act, the first statute giving a new cause of action to surviving relatives, provides, as do most statutes patterned after it, that the decedent must have had an action in order for his survivors to have one after his death.[66] It has been argued that the limitation in such statutes means only that the decedent must have had an action at one time, not that he must have had an action at the time of death; and that defenses which have to do with whether or not there was once a cause of action, such as contributory negligence of the deceased, should bar the action while defenses pertaining to destroying a cause of action once existent, such as settlement by the deceased, should not defeat an action by the surviving beneficiaries.[67] The point seems well taken with regard to those statutes. And it can well be argued that such a distinction should be drawn,

63. Louisville & N.R.R. v. Summers, 125 Fed. 719 (6th Cir. 1903); Potts v. Leigh, 15 Tenn. App. 1 (M.S. 1931); Heggie v. Barley, 5 Tenn. Civ. App. 78 (1914); *see* Walkup v. Covington, 18 Tenn. App. 117, 127, 73 S.W.2d 718 (M.S. 1933). The first-mentioned case reasons that the result follows since the beneficiaries are entitled to recover if they would have been likely to have received benefit from the decedent's continued existence; the last reasons that the law presumes pecuniary loss to parents. Neither of these theories is sound. The true basis is that pecuniary loss to the beneficiaries is immaterial.

64. 15 Tenn. App. 1 (M.S. 1931).

65. *Id.* at 10.

66. "That whensoever the Death of a Person shall be caused by wrongful Act, Neglect, or Default, and the Act, Neglect, or Default is *such as would . . . have entitled the Party injured to maintain an Action* and recover Damages in respect thereof, then and in every such Case the Person who would have been liable if Death had not ensued shall be liable to an Action for Damages, notwithstanding the Death of the Person injured. . . ." 9 & 10 VICT., c. 93 (1846) (italics added).

67. PROSSER, TORTS 967 (1941); Green, *The Texas Death Act,* 26 TEXAS L. REV. 133, 461 (1947-48).

as a matter of policy, with regard to "survival" statutes as well, since a basic fact to be recognized in this field of law is that there are two separate and distinct interests to be protected—that of the deceased and that of his relatives—regardless of the type of statute employed, and the deceased should not be allowed to render the relatives' interest unprotectible. However, no such distinction is generally drawn and usually any defense that could be asserted against the deceased can be asserted in the action for his death, regardless of the type of statute.[68]

Because the cause of action, under the Tennessee statutes, is that of the deceased, the plaintiff must prove the usual elements of a tort claim in favor of the decedent. These elements ordinarily are: duty toward the decedent, breach of that duty by defendant, and injury proximately resulting to the decedent.[69] These points need no further discussion because they are not peculiar to wrongful death cases, nor are procedural rules such as that admitting into evidence the admissions of the injured party.[70] A few rules as to defenses, however, merit particular attention.

Since all recovery is in the right of the decedent there can be no recovery by the administrator, or other persons entitled to sue, after death where the decedent could not have maintained an action while he lived because of some immunity of the wrongdoer. Thus no action will lie against the husband of a decedent who died from the husband's wrongful act.[71] Nor can recovery be had for the death of a child which resulted from the father's negligent conduct,[72] even though suit is brought against one for whom the father was acting as servant (agent) with respect to the act which caused the death.[73] It can be effectively argued that death destroys the only reason for the immunity[74] but strict application of the basic theory of the Tennessee statutes compels the result which has been reached.

As previously explained, the statute of limitations starts to run at the time of the injury.[75] The rule is the same whether the decedent lives a time

68. *Ibid.*

69. *See* Nashville, C. & St. L. Ry. v. Wade, 127 Tenn. 154, 158, 153 S.W. 1120, 1121 (1912).

70. *See* Middle Tenn. R.R. v. McMillan, 134 Tenn. 490, 507, 184 S.W. 20 (1916).

71. Wilson v. Barton, 153 Tenn. 250, 283 S.W. 71 (1926).

72. Graham v. Miller, 182 Tenn. 434, 187 S.W.2d 622, 162 A.L.R. 571 (1945), 46 COL. L. REV. 148, 19 TENN. L. REV. 88; McCreary v. Nashville, C. & St. L. Ry., 161 Tenn. 691, 34 S.W.2d 210 (1931); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664, 64 L.R.A. 991, 102 Am. St. Rep. 787, 1 Ann. Cas. 130 (1903).

73. Graham v. Miller, 182 Tenn. 434, 187 S.W.2d 622, 162 A.L.R. 571 (1945). There are many impressive arguments for allowing recovery in such situations. For case authority pro and con see Note, 131 A.L.R. 312 (1941).

74. See 31 ILL. L. REV. 796 (1937).

75. Whaley v. Catlett, 103 Tenn. 347, 53 S.W. 131 (1899); Fowlkes v. Nashville & D.R.R., 56 Tenn. 829, 64 Tenn. 663 (1876); *see* Mosier v. Lucas, 207 S.W.2d 1021, 1022 (Tenn. App. M.S. 1947).

after death or dies instantly,[76] and it is immaterial if the plaintiff-beneficiary is an infant,[77] although that fact would toll the statute if the action was in his right. Some judges, particularly concerned with the harshness of the rule, have dissented from the holdings to this effect,[78] but the rule is so firmly established by an unbroken string of authority that any change would probably have to come by legislative act.

Since the cause of action is that of the deceased, his contributory negligence will have the same effect as if suit had been brought by him during his lifetime.[79] Thus if the defendant was merely negligent and decedent's negligence proximately contributed to his own injury there can be no recovery by the administrator,[80] but if decedent's negligence was only remotely contributory that negligence goes only to mitigate damages.[81] If however, the defendant's act may be described as willful or wanton no amount of negligence on the part of the decedent will bar recovery[82] but goes only in mitigation of damages.[83]

There is said to be a presumption that the decedent exercised reasonable care for his own safety, because of the instinct of self-preservation,[84] but this presumption falls with the introduction of any evidence to the contrary.[85] The jury may not weigh this presumption against evidence of contributory

76. Whaley v. Catlett, 103 Tenn. 347, 53 S.W. 131 (1899); Fowlkes v. Nashville & D.R.R., 56 Tenn. 829 (1872), 64 Tenn. 663 (1876).

77. Whaley v. Catlett, 103 Tenn. 347, 53 S.W. 131 (1899); Greenlee v. Railroad, 73 Tenn. 418 (1880).

78. *See* Fowlkes v. Nashville & D.R.R., 56 Tenn. 829, 834-41 (1876).

79. And, accordingly, anything which would excuse acts which would ordinarily amount to contributory negligence may be set up by the plaintiff. Marks v. Borum, 60 Tenn. 87, 25 Am. Rep. 764 (1873) (no showing that defendant, who shot the deceased while he was committing larceny of defendant's goods, could not have prevented the larceny by other means); Coppenger v. Babcock Lumber & Land Co., 8 Tenn. App. 108 (E.S. 1928) (deceased was in a position of sudden peril when he did the acts alleged to be contributorily negligent).

80. Greenlaw v. Louisville & N.R.R., 114 Tenn. 187, 86 S.W. 1072 (1905); Louisville & N.R.R. v. Wilson, 88 Tenn. 316, 12 S.W. 720 (1890); Shelton v. City of Memphis, 222 S.W.2d 681 (Tenn. App., W.S. 1949); Buckner v. Southern Ry., 20 Tenn. App. 212, 96 S.W.2d 600 (E.S. 1935); Tennessee Copper Co. v. Simpson, 6 Tenn. Civ. App. 536 (1915).

81. Phillips-Buttorff Mfg. Co. v. McAlexander, 15 Tenn. App. 618 (M.S. 1932); *see* Walkup v. Covington, 18 Tenn. App. 117, 73 S.W.2d 718 (M.S. 1933); McDermott, *Remote Contributory Negligence,* 2 TENN. L. REV. 109 (1924).

82. Stagner v. Craig, 159 Tenn. 511, 19 S.W.2d 234 (1929); Fairbanks, Morse & Co. v. Gambill, 142 Tenn. 633, 222 S.W. 5 (1920); Cash v. Casey-Hedges Co., 139 Tenn. 179, 201 S.W. 347 (1918); Memphis St. Ry. v. Roe, 118 Tenn. 601, 102 S.W. 343 (1907).

83. Louisville & N. Ry. v. Wallace, 90 Tenn. 53, 15 S.W. 921 (1891); Louisville, N. & G.S.R.R. v. Fleming, 82 Tenn. 128 (1884); Hemmer v. Tennessee Elec. Power Co., 24 Tenn. App. 42, 139 S.W.2d 698 (M.S. 1940). The same rule applies where death results from failure of railroads to observe the precautions prescribed by TENN. CODE ANN. § 2629 (Williams 1934); Artenberry v. Southern Ry., 103 Tenn. 266, 52 S.W. 878 (1899); *see* Louisville & N.R.R. v. Howard, 90 Tenn. 144, 19 S.W. 116 (1891).

84. Tennessee Cent. R.R. v. Herb, 134 Tenn. 397, 183 S.W. 1011 (1916); Hamilton v. Moyers, 24 Tenn. App. 86, 140 S.W.2d 799 (E.S. 1940); Louisville & N.R.R. v. Frakes and Payne, 11 Tenn. App. 593 (M.S. 1928).

85. Shelton v. Memphis, 222 S.W.2d 681 (Tenn. App., W.S. 1949); Tennessee Cent. Ry. v. Dial, 16 Tenn. App. 646, 65 S.W.2d 610 (M.S. 1933); Phillips-Buttorff Mfg. Co. v. McAlexander, 15 Tenn. App. 618 (M.S. 1932); Tennessee Cent. Ry. v. Melvin, 5 Tenn. App. 85 (E.S. 1927).

negligence,[86] nor may the presumption be used to prove the defendant negligent.[87]

A strictly logical application of the theory that the cause of action is that of the deceased would render immaterial contributory negligence on the part of beneficiaries,[88] in the absence of a master-servant relation between beneficiary and deceased so that the negligence of the beneficiary could be imputed to the deceased.[89] However, the courts have consistently denied recovery to beneficiaries whose negligence proximately contributed to the death,[90] on the general theory that no one should be allowed to profit by his own wrong.[91] The negligence of one beneficiary does not defeat recovery by innocent beneficiaries[92] unless the negligence can be imputed to them because of a master-servant relationship with the negligent party,[93] and thus recovery is not absolutely denied unless there are no innocent beneficiaries. Mere misconduct, such as adultery by the surviving wife, does not bar recovery.[94]

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86. *See* Tennessee Cent. Ry. v. Dial, 16 Tenn. App. 646, 651, 65 S.W.2d 610 (M.S. 1933).

87. Nichols v. Smith, 21 Tenn. App. 478, 111 S.W.2d 911 (M.S. 1937).

88. It was so held in Wymore v. Mahaska County, 78 Iowa 396, 43 N.W. 264, 6 L.R.A. 545, 16 Am. St. Rep. 449 (1889), and other cases collected in Note, 2 A.L.R.2d 785, 811 (1948). For general discussion of the effect of contributory negligence on the part of beneficiaries see PROSSER, TORTS 423-24 (1941); TIFFANY, DEATH BY WRONGFUL ACT §§ 69-72 (2d ed. 1913); Gilmore, *Imputed Negligence*, 1 WIS. L. REV. 193, 257 (1921); Wettach, *Wrongful Death and Contributory Negligence*, 16 N.C.L. REV. 211, 219-31 (1938); Wigmore, *Contributory Negligence of the Beneficiary as a Bar to an Administrator's Action for Death*, 2 ILL. L. REV. 487 (1908); Notes, 70 U.S.L. REV. 502 (1936), 2 A.L.R.2d 785 (1948); 17 B.U.L. REV. 429 (1937); 2 VAND. L. REV. 722 (1949).

89. Very few courts now impute negligence from bailor to bailee, from driver to passenger, and from parent to child; but most do impute negligence in situations involving a master-servant relationship, a joint enterprise, a partnership and other so-called agency relations. See PROSSER, TORTS § 55 (1941); Gilmore, *Imputed Negligence*, 1 WIS. L. REV. 193, 257 (1921); Keeton, *Imputed Contributory Negligence*, 13 TEXAS L. REV. 161 (1935). No Tennessee wrongful death case has been found applying this doctrine. For a case refusing to impute negligence from father to child see Bamberger v. Citizens' St. R.R., 95 Tenn. 18, 30, 31 S.W. 163, 28 L.R.A. 486, 49 Am. St. Rep. 909 (1895).

90. Nichols v. Nashville Housing Authority, 187 Tenn. 683, 216 S.W.2d 694 (1949); International Agr. Corp. v. Cobble, 146 Tenn. 120, 240 S.W. 295 (1922); Hines v. Partridge, 144 Tenn. 219, 231 S.W. 16 (1921); Anderson v. Memphis St. Ry., 143 Tenn. 216, 227 S.W. 39 (1921); Bamberger v. Citizens' St. Ry., 95 Tenn. 18, 31 S.W. 163, 28 L.R.A. 486 (1895); Highland Coal & Lumber Co. v. Cravens, 8 Tenn. App. 419 (M.S. 1928).

91. *See* Bamberger v. Citizens' St. R.R., 95 Tenn. 18, 31 S.W. 163, 28 L.R.A. 486, 49 Am. St. Rep. 909 (1895)

92. Hines v. Partridge, 144 Tenn. 219, 231 S.W. 16 (1921); Anderson v. Memphis St. Ry., 143 Tenn. 216, 227 S.W. 39 (1921); Highland Coal & Lumber Co. v. Cravens, 8 Tenn. App. 419 (M.S. 1928). This view is supported by most courts and writers. However, a few courts hold the contributory negligence of beneficiaries to be immaterial, and a few cases hold the contributory negligence of one beneficiary to bar all recovery. See the authorities cited in note 88, *supra*. An excellent collection of cases on this point may be found in Note, 2 A.L.R.2d 785 (1948).

93. Nichols v. Nashville Housing Authority, 187 Tenn. 683, 216 S.W.2d 694 (1949). For full development of this point see the discussion of this case in 2 VAND. L. REV. 722 (1949).

94. Johnson v. Morgan, 184 Tenn. 254, 198 S.W.2d 549 (1947); Koontz v. Fleming, 17 Tenn. App. 1, 65 S.W.2d 821 (E.S. 1933); Heggie v. Barley, 5 Tenn. Civ. App. 78 (1914).

Just as settlement by the deceased would be a defense to an action by him during his lifetime, so such a settlement is a valid defense to an action after his death by the administrator.[95] This rule allows the decedent to deprive the beneficiaries of any compensation for his death, and it has received some criticism[96] and is somewhat inconsistent with the policy which prevents the decedent from disposing of the cause of action for wrongful death by will.[97] It is, however, consistent with the theory that the right of action is that of the deceased.

The defendant may also show in defense that his acts which caused the decedent's death were committed in self-defense,[98] that at the time he inflicted the injuries upon the decedent his consciousness was impaired or destroyed by the decedent's blows,[99] or that the decedent was killed while committing a felony which could not have been prevented by less drastic means.[100]

DAMAGES

A pertinent section of the Tennessee statutes provides in part that "the party suing shall, if entitled to damages, have the right to recover for the mental and physical suffering, loss of time, and necessary expenses resulting to the deceased from the personal injuries,"[101] these damages being purely for the injury to the deceased himself. Thus recovery may be had for pain and suffering of the deceased, and this may be implied where not alleged, if the decedent lived a time after the injury;[102] but there can be no recovery for

95. *See* Brown v. Chattanooga Elec. Ry., 101 Tenn. 252, 253, 47 S.W. 415, 70 Am. St. Rep. 666 (1898).

96. Green, *The Texas Death Act,* 26 TEXAS L. REV. 133, 461-63 (1947-48). This writer suggests that a more desirable result would be achieved by a statutory enactment providing that settlement by the decedent shall not constitute a bar to a subsequent action by survivors, but go only in reduction of damages in the subsequent suit. *Id.* at 463, 497. Such a provision would have the undesirable feature of discouraging settlement while an injured person still lived, and it is normally the policy of the law to encourage settlement.

97. Haynes v. Walker, 111 Tenn. 106, 76 S.W. 902 (1903); *see* Black v. Roberts, 172 Tenn. 20, 22, 108 S.W.2d 1097 (1937). *But cf.* Trafford v. Adams Exp. Co., 76 Tenn. 96, 103 (1881) (cause of action assignable). It has been said that the criterion of assignability is survivability. Haymes v. Halliday, 151 Tenn. 115, 118, 268 S.W. 130 (1925). If this is true should not the cause of action for wrongful death be assignable, and capable of being disposed of by will?

98. Hunt-Berlin Coal Co. v. Paton, 139 Tenn. 611, 202 S.W. 935 (1918); *see* Marable v. State *ex rel.* Wackernie, 222 S.W.2d 234 (Tenn. App., M.S. 1949) (defense not available to one who provokes an affray and continues aggressive acts until adversary is killed). The law of self-defense in civil suits is the same as in criminal cases, except the cause is decided on a preponderance of the testimony. *See* Hunt-Berlin Coal Co. v. Paton, 139 Tenn. 611, 622, 202 S.W. 935 (1918).

99. Jenkins v. Hankins, 98 Tenn. 545, 41 S.W. 1028 (1897).

100. Love v. Bass, 145 Tenn. 522, 238 S.W. 94 (1922); *see* Marks v. Borum, 60 Tenn. 87, 25 Am. Rep. 764 (1873) (defense not available in absence of showing that the felony could not have been prevented by less drastic means). As to liability for killing one engaged in commission of a felony see 9 TENN. L. REV. 259 (1930).

101. TENN. CODE ANN. § 8240 (Williams 1934).

102. Brown and Basham v. Ellison, 12 Tenn. App. 27 (E.S. 1926).

pain and suffering if death was instantaneous[103] or the decedent was unconscious from the time of injury to the time of death.[104] In proving pain and suffering it is competent to show the circumstances relating to the condition and treatment of the deceased from the time of injury until death.[105]

Also recoverable under this class of damages are medical expenses incurred because of the injury.[106] It has been held that funeral expenses may also be recovered,[107] and this may perhaps be reasoned to be an expense resulting to the decedent's estate because of the wrongful injury. But most courts with survival statutes deny recovery of such expenses,[108] and it has been held in at least one case that such expenses cannot be recovered under a statute expressly permitting recovery for damage to the estate, for the reason that funeral expenses would necessarily have resulted at some time and the only additional expense is the acceleration of their accrual.[109]

The statute quoted above provides further that recovery may be had, in addition to those damages purely for the injury to the deceased, for the "damages resulting to the parties for whose use and benefit the right of action survives."[110] It has been shown that this provision does *not* mean exactly what it says, but instead, according to the courts, sanctions recovery of the "pecuniary value of the life of the deceased,"[111] regardless of whether or not the beneficiaries suffered any pecuniary loss.[112] Since it is not the value of the life to the beneficiaries which is to be recovered it must be the value of the life to the estate for which recompense is to be given.

What, however, is the measure of the value of the life to the estate? At least three distinct measures have been approved by other courts faced with a similar question,[113] these being: (1) the present value[114] of the aggregate

103. *See* Nashville & C.R.R. v. Prince, 49 Tenn. 580, 587 (1871). Whether or not death was instantaneous is a jury question. Western & A.R.R. v. Roberson, 61 Fed. 592 (6th Cir. 1894).

104. Nashville, C. & St. L. Ry. v. Mangrum, 15 Tenn. App. 518 (W.S. 1932); *see* Phillips-Buttorff Mfg. Co. v. McAlexander, 15 Tenn. App. 618 (M.S. 1932); Potts v. Leigh, 15 Tenn. App. 1, 8 (M.S. 1931).

105. Wabash Screen Door Co. v. Black, 126 Fed. 721 (6th Cir. 1903).

106. *See* Davidson-Benedict Co. v. Severson, 109 Tenn. 572, 614, 72 S.W. 967 (1903); Potts v. Leigh, 15 Tenn. App. 1, 7 (M.S. 1931).

107. Landrum v. Callaway, 12 Tenn. App. 150 (E.S. 1930). See 7 TENN. L. REV. 320 (1929).

108. Reynolds v. Maisto, 113 Conn. 405, 155 Atl. 504 (1931); Cochrane v. C. Hennecke Co., 186 Wis. 149, 202 N.W. 199 (1925). For further discussion and collection of cases see 7 TENN. L. REV. 320 (1929).

109. Brady v. Haw, 187 Iowa 501, 174 N.W. 331, 7 A.L.R. 1306 (1919) (interest on funeral expenses for the term of the life expectancy of deceased may be recovered, because the expense was prematurely incurred).

110. TENN. CODE ANN. § 8240 (Williams 1934).

111. *See* Davidson-Benedict Co. v. Severson, 109 Tenn. 572, 614-17, 72 S.W. 967 (1903).

112. Potts v. Leigh, 15 Tenn. App. 1 (M.S. 1931).

113. MCCORMICK, DAMAGES § 96 (1935); Notes, 163 A.L.R. 247 (1946), 26 A.L.R. 593 (1923), 7 A.L.R. 1314 (1920).

114. The doctrine of present worth is almost universally applied in situations where present compensation must be given for damages or losses which will or would have been

of gross earnings which the deceased would probably have made during the remainder of his life expectancy;[115] (2) the present value of the total of net earnings similarly calculated, but with deductions being made from the gross earnings for the individual living expenses which would probably have been incurred had the decedent's life continued for its normal span;[116] and (3) the present value of the amount which the deceased would probably have accumulated through savings had not death interfered.[117] The Tennessee courts have committed themselves to no one of these measures by direct adjudication.

Some early cases said by way of dictum that damages of this class were "such as the injured party himself could have recovered, if instead of being killed he had been disabled for life; if not the same amount, at least the same elements of damage."[118] Application of such an analogy would result in allowing recovery of gross earnings, a result which is logically unsound since death also cuts off living expenses which would have been incurred, while mere permanent disability does not.[119] The latter part of the quoted statement, however, may indicate that the analogy was furnished only for the purpose of distinguishing in the minds of the jurors the two types of damages recoverable, and not for the purpose of defining the meaning of "the value of the life." At any rate, the *Severson* case declared the analogy unnecessary, and useful only for the purpose of so distinguishing between the two classes of damages and showing how the injury to the decedent and his estate is also an incidental injury to the beneficiaries.[120] It is not reasonable to assume that the court, if faced with the problem, would adopt this, the first of the above-mentioned theories.

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incurred at some future time, and is thus applicable in wrongful death cases. It is designed to give a sum which with normal interest compounded upon that sum until the date the loss would have been incurred will at that time equal the amount of the loss. For full discussion of the application of the rule see McCormick, Damages 304-06 (1935). Tennessee courts are familiar with its application in death cases, since the doctrine must be applied in cases arising under the Federal Employers' Liability Act. *See* Nashville, C. & St. L. Ry. v. Hines, 20 Tenn. App. 1, 12, 94 S.W.2d 397, 404 (E.S. 1935). For discussion of methods of allowing for this factor through the use of annuity and other actuarial tables see *infra* pp. 311-12.

115. *E.g.*, Williams v. McCranie, 27 Ga. App. 693, 109 S.E. 699 (1921); Lexington Utilities Co. v. Parker, 166 Ky. 81, 178 S.W. 1173 (1915); Davis v. Michigan Cent. R. Co., 147 Mich. 479, 111 N.W. 76 (1907).

116. *E.g.*, Louisville & N.R.R. v. Garnett, 129 Miss. 795, 93 So. 241 (1922); Pitman v. Merriman, 80 N.H. 295, 117 Atl. 18, 26 A.L.R. 589 (1922); Gurley v. Southern Power Co., 172 N.C. 690, 90 S.E. 943 (1916); Sebille v. Dunn, 99 Atl. 831 (R.I. 1917).

117. *E.g.*, Arizona Binghampton Copper Co. v. Dickson, 22 Ariz. 163, 195 Pac. 538, 44 A.L.R. 881 (1921); Denver & R.G.R.R. v. Spencer, 27 Colo. 313, 61 Pac. 606, 51 L.R.A. 121 (1900); Florida East Coast R.R. v. Hayes, 67 Fla. 101, 64 So. 504, 7 A.L.R. 1310 (1914).

118. *See, e.g.*, East Tenn., V. & G.R.R. v. Gurley, 80 Tenn. 46, 53 (1883); Nashville & C.R.R. v. Smith, 77 Tenn. 470, 474 (1882).

119. However, such a theory was used by the appellate court in estimating the amount of recovery in Coppenger v. Babcock Lumber & Land Co., 8 Tenn. App. 108 (E.S. 1928). The court, in granting a remittitur, estimated the sum which, if invested in an annuity, would yield the decedent's *gross* income, although it had been argued that his living expenses were also cut off by his death. *Id.* at 119.

The third theory, that of net accumulations, involves deductions of expenditures other than the individual living expenses of the deceased, such as the cost of supporting his family, and since the words of the statute seem to indicate an intention that such costs shall be recoverable[121] it is highly improbable that this theory would be adopted. The second theory, that of net earnings, remains and is logically consistent with the Tennessee cases.

It has been repeatedly emphasized in the cases that damages of this type do not admit of fixed rules or mathematical precision,[122] because of inherent uncertainty in the determining factors (such as life expectancy, probable future earnings, etc.), and that their assessment rests in the sound discretion of the jury.[123] A cursory application of this idea might lead one to the conclusion that more explicit definition of "the value of the life" would invade the jury's field of discretion, but fuller consideration reveals such a conclusion to be erroneous. An instruction pointing out to the jury the *nature* and *composition* of that which they seek to compensate would in no way impinge upon their freedom in weighing the probabilities and assessing the amount of that compensation. An instruction that the "value of the life" is the present value of the aggregate of probable net earnings not only would be legally sound and in itself of great help to the jury, but would also make more useful and correct other commonly used instructions.[124]

120. Davidson-Benedict Co. v. Severson, 109 Tenn. 572, 617, 72 S.W. 967, 978 (1903).

121. The "party suing shall, if entitled to damages, have the right to recover . . . the damages resulting to the parties for whose use and benefit the right of action survives." TENN. CODE ANN. § 8240 (Williams 1934).

122. Railroad v. Spence, 93 Tenn. 173, 23 S.W. 211, 42 Am. St. Rep. 907 (1893). The Tennessee courts have been much more reluctant than most courts to permit instructions tending to define specifically the measure of recovery. Thus it was held erroneous to charge that "in estimating the damages, the jury should look to the proof as to what was the expectancy of life of the deceased, and see what amount he was able to and was earning at and before his death, and from all the proof . . . decide what he would have earned during the expectancy of life from the time of his death, and then allow her such sum as would reasonably compensate her for the loss of what he would have earned during that expectancy of life from the time of his death." "The assessment of damages in actions of this character does not admit of fixed rules and mathematical precision, but is a matter left to the sound discretion of the jury. The Courts refuse to lay down any cast-iron rules or mathematical formula by which such damages are to be ciphered out by juries. It is the duty of the Court to point out the different elements proper to be considered in the assessment of damages, but it is erroneous to give the jury a rule by which to figure out the damages as they would a mathematical problem in cases like this, where the future earnings of the deceased and his expectation of life are mere probabilities." 93 Tenn. at 188, 189, 23 S.W. at 215.

123. Railroad v. Spence, 93 Tenn. 173, 23 S.W. 211, 42 Am. St. Rep. 907 (1893); *see* Spivey v. St. Thomas Hospital, 211 S.W.2d 450, 458 (Tenn. App. M.S. 1947); Williamson v. Howell, 13 Tenn. App. 506 (W.S. 1931); Brown and Basham v. Ellison, 12 Tenn. App. 27, 32 (E.S. 1926). The extreme of this view is found in Louisville & N.R.R. v. Stacker, 86 Tenn. 343, 6 S.W. 737, 6 Am. St. Rep. 840 (1888). There it was said that the "primal inquiry is not, what is the value of the life taken. It is whether and how much negligence was displayed in taking it, and whether and to what extent the negligence of the deceased caused or contributed to it; and from the reasonable and just compensation to be given upon determining the first inquiry against the negligent wrongdoer, what amount should be deducted on account of the contributing fault of the deceased." 86 Tenn. at 352, 6 S.W. at 740. While this may be the rule in fact applied by juries it is not the rule which the theory of the statutes supports.

124. Instructions are commonly based on a quotation from the *Severson* case, 109

Whatever the measure of the "value of the life," evidence of a number of factors has been properly held admissible to aid the jury in performing their function. In general these factors are directed toward proving life expectancy and probable future earnings. Some factors admissible to prove the former are: age, health and life expectancy[125] as shown by mortality tables.[126] The defendant may show that the deceased was in poor health at the time of the injury[127] or was engaged in a hazardous occupation which might make his life expectancy shorter than the normal expectancy.[128] In proving the decedent's probable future earnings his probable earning capacity for the remainder of the decedent's life expectancy is to be derived and it is competent to show: occupation,[129] capacity for labor and for earning money through any skill,[130] and personal habits as to sobriety and industry.[131] Evidence of decedent's earning capacity before death is admissible, and if such evidence is unavailable it may be shown what the decedent customarily spent on his family,[132] not because what he spent on his family is in any way the measure of damages but only because evidence of that type would tend to prove the approximate amount of the decedent's earning capacity prior to his death. The defendant correspondingly may show such things as personal habits which would

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Tenn. 572, 614, 72 S.W. 967 (1903), to the effect that in "the second class [of damages] is embraced the pecuniary value of the life of the deceased . . . , to be determined upon a consideration of his expectancy of life, his age, condition of health and strength. . . , capacity for labor, and for earning money through skill in any art, trade, profession, occupation, or business . . . , and his personal habits as to sobriety and industry . . . ; all modified, however, by the fact that the expectation of life is at most only a probability, based upon experience, and also by the fact that the earnings of the same individual are not always uniform. . . . All of these elements are to be taken into consideration by the jury, and, after weighing them all, they should assess such amount of damages as may be sufficient to compensate for the loss of the life whose value they are attempting to estimate." See, *e.g.*, Louisville & N.R.R. v. Evins, 13 Tenn. App. 57, 95, 96 (M.S. 1930). A charge based on this quotation alone is practieally useless to a jury because it in no way defines or points out the ultimate goal.

125. Knight v. Hawkins, 26 Tenn. App. 448, 173 S.W.2d 163 (W.S. 1941); Walkup v. Covington, 18 Tenn. App. 117, 73 S.W.2d 718 (M.S. 1933); Tennessee Cent. Ry. v. Dial, 16 Tenn. App. 646, 65 S.W.2d 610 (M.S. 1934); Railroad v. Spence, 93 Tenn. 173, 188, 23 S.W. 211, 42 Am. St. Rep. 907 (1893); Railroad v. Stacker, 86 Tenn. 343, 353, 6 S.W. 737, 6 Am. St. Rep. 840 (1888).

126. Such evidence is admissible even where the evidence shows the decedent to have been in very poor health because of some other illness, if the jury was properly instructed to take that factor into consideration. Memphis St. Ry. v. Berry, 118 Tenn. 581, 102 S.W. 85 (1907).

127. *See* Memphis St. Ry. v. Berry, 118 Tenn. 581, 102 S.W. 85 (1907).

128. *See* Railroad v. Spence, 93 Tenn. 173, 190, 23 S.W. 211, 42 Am. St. Rep. 907 (1893).

129. *See* Railway Co. v. Howard, 90 Tenn. 144, 150, 19 S.W. 116 (1891); Railroad v. White, 73 Tenn. 540, 541 (1880). However, as it was held in these two cases, evidence of past earnings not particularly indicative of probable future earnings, is not admissible.

130. It was held in one case where total disability rather than death resulted that samples of the injured person's needlework might be exhibited to the jury as evidence to prove earning capacity. Bridge Co. v. Barnes, 98 Tenn. 401, 39 S.W. 714 (1897).

131. East Tennessee, V. & G.R.R. v. Gurley, 80 Tenn. 46 (1883); Nashville & C.R.R. v. Prince, 49 Tenn. 580 (1871).

132. Memphis Consol. Gas & Elec. Co. v. Letson, 135 Fed. 969 (6th Cir. 1905).

adversely affect earning capacity, such as: drunkenness, general worthlessness, carelessness and imprudence.[133]

The indicia of probable future earnings are meagre enough when the decedent is an employed male, but there is even less basis for an estimation when the decedent is a minor child[134] or a married woman.[135] A young child is usually neither employed nor sufficiently developed that his future economic activity or success can be forecast; and a married woman often has no employment other than as a housewife. However, the uncertainty inherent in a jury finding of such damages has not prevented the recovery of substantial verdicts in either case.[136] As to children it is sufficient to show age, health and other characteristics developed before death.[137] In estimating the value of the life of a married woman the jury may, of course, consider evidence of any activity from which she might receive monetary compensation, but it is not clear what economic value should be placed on her duties as a housewife, for which she receives payment in kind. Certainly no recovery can be had in the nature of *solatium,*[138] but it would seem that evidence should be admitted to show her abilities and normal habits as a housewife in order to determine the economic value of those services.[139]

133. Louisville & N.R.R. v. Conner, 61 Tenn. 382 (1872); Nashville & C.R.R. v. Prince, 49 Tenn. 580 (1871).

134. Determining compensation for the death of a minor child raises equally difficult problems under wrongful death statutes which provide for the recovery of only pecuniary damages resulting to the beneficiaries. See MCCORMICK, DAMAGES § 101 (1935); PROSSER, TORTS 964-65 (1941); TIFFANY, DEATH BY WRONGFUL ACT §§ 164-65 (2d ed. 1913); Notes, 16 MINN. L. REV. 409 (1932), 13 VA. L. REV. 392 (1927). Statistics as to the cost of rearing a child to the age of majority make it somewhat doubtful that parents sustain any substantial pecuniary loss by virtue of the death of a child. See DUBLIN AND LOTKA, THE MONEY VALUE OF A MAN c. 4 (2d ed. 1946). Damages to the parents for loss of the child's services, which are recoverable under these statutes, are not recoverable under the Tennessee death statutes. A Tennessee statute provides an action for loss of services, TENN. CODE ANN. § 8630 (Williams 1934); but this statute is held to apply only to injuries which do not result in death. *See* St. Louis, I.M. & S. Ry. v. Leazer, 119 Tenn. 1, 16, 107 S.W. 684 (1907).

135. It might be supposed that under those statutes measuring damages by the loss to the beneficiaries a surviving husband might recover for the loss of "consortium," just as he could if his wife had suffered a nonfatal disabling injury, but this is not the general rule. MCCORMICK, DAMAGES § 100 (1935); TIFFANY, DEATH BY WRONGFUL ACT § 163 (2d ed. 1913).

136. See *infra* Appendix.

137. Walkup v. Covington, 18 Tenn. App. 117, 73 S.W.2d 718 (M.S. 1933); Yellow Cab Co. v. Gattuso, 11 Tenn. App. 109 (W.S. 1929); Brown v. Ellison, 12 Tenn. App. 27 (E.S. 1926).

138. Nashville & Chatt. R.R. v. Smith, 77 Tenn. 470 (1882).

139. "Viewing the life of Mrs. Davis in the light of all the surroundings and facts with the object of ascertaining its pecuniary value *to her husband,* it must be borne in mind that her services in her own home where she was interested to the extent of voluntarily taking on herself the duties of housekeeper and cook and seamstress, etc., were vastly more valuable than the services of mere employed or hired help could have possibly been. Her services not only saved the husband the expenses of paying wages to a housekeeper and a cook and a seamstress, etc., but saved the expenses of having in the family these servants, and necessarily resulted in a large saving over and above that of merely paying wages. The wife's services were the services of one looking after her own, and of one who is shown by the record in this case to have been more than willing to assume those duties. So, we are of the opinion that, regarded merely in the light of its pecuniary value *to her husband,* the life of Mrs. Davis must be regarded as vastly more than that of the ordinary housekeeper, cook, seamstress, etc., and we say

In most cases the jury is left largely to its own devices in weighing, connecting and summarizing all these factors with the result that there is little uniformity in their verdicts.[140] This must necessarily result, to some extent, because only probabilities are involved; but it is likely that some of the otherwise unexplainable differences in verdicts may be attributed to inability of juries scientifically to compute a final result after they have, in the exercise of their discretion, determined all the probabilities. For instance, after deciding what under all the facts was the decedent's life expectancy and what was his future rate of earnings they might still be at a loss as to how accurately to reduce that compensation to an equivalent lump sum. Actuarial science has developed much data which, if presented to the jury, could be of invaluable aid to them in performing this function,[141] without in any way encroaching upon the jury's province of discretion. The introduction of mortality tables, from which may be determined the normal life expectancy of a person of a given age, has been sanctioned in death cases.[142] No express sanction has been found for the introduction in these cases of other types of actuarial data, although other types are available which would be pertinent.

Some of these other types are relatively simple, such as annuity tables given the present value[143] of x dollars per month (or other period) for n number of years or for the remainder of the life of a person of a given age with a normal life expectancy.[144] Even such simple tables as this would be of great value to a jury in assessing the pecuniary value of a life, and most courts allow such tables to be considered by the jury.[145] Now, however, a

this without regard to any element of damages that could be classed as mere *solatium.*" Knoxville Ry. & Light Co. v. Davis, 3 Tenn. Civ. App. 522, 531-32 (1912). It is submitted that the value to the husband, which is emphasized in this quotation, is the value to the husband as an *employer*, and not as a *beneficiary* under the statutes. Household services, and the manner in which they were performed, have been considered in several cases in estimating damages for the death of a married woman. *E.g.*, Tennessee Cent. R.R. v. Vanhoy, 143 Tenn. 312, 226 S.W. 225 (1920); Henry v. Sharp, 9 Tenn. App. 350 (E.S. 1928); Kingsport Utilities Inc. v. Mort, 2 Tenn. App. 270 (E.S. 1925). No proof should be allowed for the purpose of showing what the deceased could have earned in some other occupation unless it is probable she would have obtained such employment.

140. Compare the verdicts set forth in Appendix, *infra.*

141. For an excellent example of what actuarial data can be prepared for use in this field, a very comprehensive book prepared by statisticians of the Metropolitan Life Insurance Company, see DUBLIN AND LOTKA, THE MONEY VALUE OF A MAN (2d ed. 1946).

142. Memphis St. Ry. v. Berry, 118 Tenn. 581, 102 S.W. 85 (1907). Such tables may be found in 7 TENN. CODE ANN., Appendices 589 (Williams, 1934).

143. Where a lump sum is to be awarded for damages which would occur in a number of future installments the burden upon juries of computing "present value," as described in note 114 *supra*, would be tremendous. Consequently, most courts allow the introduction and use of tables prepared for that and similar purposes. See MCCORMICK, DAMAGES 305 (1935).

144. Such tables, at various rates of interest, may be found in 7 TENN. CODE ANN., Appendices 590-91 (Williams 1934).

145. A result derived from such a table would at least be more accurate than computations such as evidently were suggested to the jury in Louisville & N.R.R. v. Evins, 13 Tenn. App. 57 (M.S. 1930) (trial court refused instruction that the jury could not take average earnings and multiply by life expectancy, or take the value of earnings for twelve months and figure what amount would, at interest, be required in order to yield a return of that amount).

highly developed actuarial science has made possible the collection and compilation of data and tables which would be even more useful.[146] Ordinary annuity tables assume a uniform future return or income, and it is at once apparent that, in fact, earnings do not usually remain uniform, but ordinarily increase for a time and then decrease.[147] It is also apparent that these changes ordinarily occur at different ages and with differing degrees of sharpness in the various income strata.[148] Still further, it may be observed that individual costs of living, which are to be deducted from gross earnings in order to arrive at net earnings, also vary at different ages and incomes.[149] Yet, complex as the combination of all these variables may seem, simple tables have been constructed which account for all these variables, and which yield the average present net value of a life merely by referring to the age of the decedent and his rate of earnings at the time of death.[150] And, in addition, such tables have been constructed to yield similar results with regard to the lives of persons with life expectancies greater or less than normal.[151]

It is not suggested that such data be conclusive in the jury's determination, or that the discretion of the jury in any way be impaired,[152] but it is suggested that the submission of such data to the jury, under proper instructions and merely to *aid* the jury in exercising its discretion, would serve the ends of justice, accuracy and uniformity. Juries should not be deprived of such valuable aid as actuarial tables and courts would be justified in encouraging the presentation of such data. Such action would be in keeping with the modern tendency of courts to keep abreast of, and make use of, scientific developments.

In addition to the compensatory damages specifically sanctioned by the Tennessee statutes, punitive damages may be recovered where the acts of the defendant are wanton or grossly negligent.[153] This result follows because the

146. *E.g.*, DUBLIN AND LOTKA, THE MONEY VALUE OF A MAN. Appendix E (2d ed. 1946).
147. *Id.* at 64-66.
148. *Id.* at 65, fig. 4.
149. *Id.* at 74-75.
150. *Id* at 194-95, table 52.
151. *Id.* at 196-99, tables 53, 54.
152. An improper use of such tables may be found in Coppenger v. Babcock Lumber & Land Co., 8 Tenn. App. 108, 120 (E.S. 1928). There the court found the normal life expectancy for a man of decedent's age, and calculated what amount, if invested in an annuity, would yield the amount of the decedent's earning capacity, at the time of death, for the term of his normal life expectancy. The verdict was then reduced to approximately this amount. Such a technique, it is submitted, invades the jury's province by depriving it of the freedom to determine whether or not decedent's life expectancy was normal and whether or not his earning capacity would have remained constant had he survived. Railroad v. Spence, 93 Tenn. 173, 23 S.W. 211, 42 Am. St. Rep. 907 (1893).
153. Union Ry. v. Carter, 129 Tenn. 459, 166 S.W. 592 (1914); Railway Co. v. Daughtry, 88 Tenn. 721, 13 S.W. 698 (1890); Haley v. Mobile & O.R.R., 66 Tenn. 239 (1874); Pratt v. Duck, 28 Tenn. App. 502, 191 S.W.2d 562 (W.S. 1945); *see* Garis v. Eberling, 18 Tenn. App. 1, 28, 71 S.W.2d 215 (M.S. 1934). However, granting punitive damages is purely within the discretion of the jury, and a charge in mandatory terms is erroneous. Louisville & N.R.R. v. Satterwhite, 112 Tenn. 185, 79 S.W. 106 (1904).

decedent could have recovered such damages had he lived and his right is merely preserved for the designated parties. There are forceful arguments against allowing such damages[154] but most states having "survival" statutes,[155] allow them in proper cases.[156]

The problem of whether damages are recoverable for the mental suffering of the beneficiaries consequent upon the wrongful death has caused much litigation and confusion. Soon after the *Prince* case, it was argued[157] that that case sanctioned the recovery of such damages, for that case had approved recovery of "damages resulting to the parties for whose benefit the right of action survives, from the death consequent upon the injuries received."[158] However, the court concluded that it thought it "safest" to deny such recovery.[159] Despite this holding it became apparent that many trial judges understood the *Prince* case to approve such damages[160] and it is probable that the Supreme Court at later times so understood the case.[161] After the Act of 1883 there was some feeling that some additional elements of damage must have been intended by the legislature to be recoverable and that recovery for the mental suffering of the surviving beneficiaries was intended.[162] The Supreme Court, however, when faced with the question, held that such damages could not be recovered,[163] saying that the Act of 1883 was merely

154. Perhaps the most forceful argument against allowing recovery of punitive damages is that when a death results from an injury maliciously, wantonly or grossly negligently inflicted some criminal punishment is usually given. Accordingly, some states hold that where a criminal sentence has been imposed no other "punitive" measures are warranted and no exemplary damages can be assessed. Tennessee, however, has expressly rejected this contention. Pratt v. Duck, 28 Tenn. App. 502, 191 S.W.2d 562 (W.S. 1945). For collection of cases denying or allowing recovery of exemplary damages in such circumstances see 15 AM. JUR., *Damages* § 275 (1938); Notes, 9 Ann. Cas. 638 (1908), 11 Ann. Cas. 1175 (1909), Ann. Cas. 1915B 128 (1915), 16 A.L.R. 771, 798 (1922), 123 A.L.R. 1115, 1122 (1939).

155. Such damages are not generally recoverable under those acts which provide recovery in the right of specified beneficiaries, to be measured by their pecuniary loss. MCCORMICK, DAMAGES § 103 (1935); TIFFANY, DEATH BY WRONGFUL ACT § 155 (2d ed. 1913). In a few states recovery is to be proportioned according to the culpability of the defendant. *Cf.* Karpeles v. City Ice Delivery Co., 198 Ala. 449, 73 So. 642 (1916); Ouligan v. Butler, 189 Mass. 287, 75 N.E. 726 (1905); MO. REV. ST. ANN. § 3654 (1939).

156. For discussion and collection of cases from other jurisdictions see Pratt v. Duck, 28 Tenn. App. 502, 191 S.W.2d 562 (W.S. 1945).

157. Nashville & C.R.R. v. Stevens, 56 Tenn. 12 (1871).

158. Nashville & C.R.R. v. Prince, 49 Tenn. 580, 585 (1871).

159. The court also placed considerable reliance on the fact that those statutes which expressly provided for recovery of damages resulting to the beneficiaries provided for recovery of only "pecuniary damage." 56 Tenn. at 18.

160. This is apparent from the number of reported cases in which the trial court had instructed the jury that such damages were recoverable. See note 167 *infra*.

161. "[S]ome of the cases seem to have introduced a new element of damages in cases where the action is brought by the representative; that is, damages for the loss of the society, etc., etc., of the husband, father, or relative, to the widow or next of kin." Fowlkes v. Nashville & D.R.R., 56 Tenn. 829, 833 (1872). *See* Davidson-Benedict Co. v. Severson, 109 Tenn. 572, 621, 630, 72 S.W. 967 (1903).

162. *See* Davidson-Benedict Co. v. Severson, 109 Tenn. 572, 625, 72 S.W. 967 (1903), interpreting expressions in Whaley v. Catlett, 103 Tenn. 347, 354, 53 S.W. 131 (1899); Chattanooga Elec. Ry. v. Johnson, 97 Tenn. 667, 670, 37 S.W. 558, 34 L.R.A. 442 (1896); League v. Memphis & C.R.R., 91 Tenn. 458, 461, 19 S.W. 430 (1892).

163. Knoxville, C.G. & L.R.R. v. Wyrick, 99 Tenn. 500, 42 S.W. 434 (1897).

the *Prince* doctrine "re-enacted" and that since under that doctrine recovery for such damage had been denied it would be presumed that the legislature intended to exclude such recovery under that Act.[164] It was also stated that whereas the Act specifically approved compensation for pain and suffering of the deceased it only referred to the "damage" to the beneficiaries and therefore must have meant only "pecuniary damage."[165] In view of the established theory of the recovery granted by the statute it would perhaps be more accurate and clearer to say that these elements are in no way an injury to the decedent or his estate and are not recoverable for that reason. It may well be argued that such damage is very real and as a matter of policy should be recoverable,[166] but denying it is logical under the statute as it now stands and the Supreme Court has consistently disallowed such recovery.[167]

The appellate courts have fairly consistently upheld juries as to the amounts awarded as damages.[168] However this practice has no doubt been encouraged by the tendency of Tennessee juries to award sums relatively small in comparison with awards in other jurisdictions,[169] and also by the tendency of trial courts to require remittiturs when the award seems to them to be out of proportion.[170] At any rate there seems to be no pressing need in Tennessee for statutory limitation of the amount of recovery such as some states have seen fit to enact.[171]

RIGHTS OF OTHERS

The discussion thus far has centered primarily around the decedent's right, which is the basis for the action. The statutes, however, give certain

164. 99 Tenn. at 510.

165. *Id.* at 508.

166. Accordingly, some states allow recovery for such elements of damage. See Note 74 A.L.R. 11, 33-44 (1931).

167. Bristol Gas & Elec. Co. v. Boy, 261 Fed. 297 (6th Cir. 1919); Railroad v. Bentz, 108 Tenn. 670, 69 S.W. 317, 58 L.R.A. 690, 91 Am. St. Rep. 763 (1902); Knoxville, C.G. & L.R.R. v. Wyrick, 99 Tenn. 500, 42 S.W. 434 (1897); Nashville & C.R.R. v. Smith, 77 Tenn. 470 (1882) (advice and protection of deceased wife and mother); Nashville & C.R.R. v. Stevens, 56 Tenn. 12 (1871); *see* Garis v. Eberling, 18 Tenn. App. 1, 28, 71 S.W.2d 215 (M.S. 1934); Phillips-Buttorff Mfg. Co. v. McAlexander, 15 Tenn. App. 618 (M.S. 1932) (moral aid, comfort and companionship). But see Landrum v. Callaway, 12 Tenn. App. 150, 158 (E.S. 1930).

168. See *infra* Appendix.

169. Compare the following verdicts with those classified *infra* Appendix A. Casey v. American Export Lines, 173 F.2d 324 (2d Cir. 1949) ($59,670); Neddo v. State, 275 App. Div 492, 90 N.Y.S.2d. 650 (3d Dep't 1949) ($137,566.74); Hanley v. Erie R.R., 273 App. Div. 257, 77 N.Y.S.2d 153 (2d Dep't 1948) ($60,000); Jennings v. McCowan, 215 S.C. 404, 55 S.E.2d 522 (1949), *cert. denied,* 338 U.S. 956 (1950) ($70,000 actual damages, $20,000 punitive damages). For collection of other recent cases in which verdicts of over $50,000 were rendered see 5 NACCA L.J. 225-35 (1950), 4 NACCA L.J. 281-90 (1949).

170. See *infra* Appendix.

171. Such a limitation is imposed in about one-third of the states, with $10,000 being the most common limitation. MCCORMICK, DAMAGES 358-59 (1935).

rights, both procedural and substantive, to other designated persons, and these rights merit some attention.

Right to Sue

The original Tennessee statutes provided only that "The action may be instituted by the personal representative of the deceased; but if he decline it, the widow and children of the deceased may, without the consent of the representative, use his name in bringing and prosecuting the suit."[172] Under this statute no beneficiary could bring the action in his own name,[173] although the action of the decedent was preserved "for the benefit of his widow and next of kin," and the representative had the prior right to sue. This situation was soon found undesirable, however, and in 1871 the statute was amended to permit the widow, or, in case there was no widow, the children, to bring the action in their own names.[174] This statute was construed to intend that the personal representative could not maintain the action[175] unless the widow had waived her prior right,[176] and the next of kin could under no circumstances sue in their own names.[177]

Although this statute only provided that the "widow" might maintain the action, it was held in two early cases that the husband of a deceased married woman could maintain the action.[178] It was reasoned that since the

172. TENN. CODE § 2292 (Meigs and Cooper 1858).

173. Bledsoe v. Stokes, 60 Tenn. 312 (1872); Flatley v. Memphis & C.R.R., 56 Tenn. 230 (1872); Hall v. Nashville & C.R.R., 1 Tenn. Cas. 141 (1859).

174. "Be it enacted, &c., That section 2291 of the Code of Tennessee, be so amended as to provide that the right of action . . . shall pass to his widow, and in case there is no widow, to his children, or to his personal representative, for the benefit of his widow or next of kin, free from the claims of his creditors." And "Be it further enacted, That section 2292 be so amended as to allow the widow, or if there be no widow, the children, to prosecute suit, and that this remedy is provided in addition to that now allowed by law in the class of cases provided for by said section and section 2291 of the Code, which this Act is intended to amend." Tenn. Pub. Acts 1871, c. 78.

175. Greenlee v. Railroad, 73 Tenn. 418 (1880); Koontz v. Fleming, 17 Tenn. App. 1, 65 S.W.2d 821 (E.S. 1933); *see* Prater v. Marble Co., 105 Tenn. 496, 498, 58 S.W. 1068 (1900); Holder v. Railroad, 92 Tenn. 141, 144, 20 S.W. 537 (1892); Webb v. Railway Co., 88 Tenn. 119, 129, 12 S.W. 428 (1889); Stephens v. Nashville C. &. St. L. Ry., 78 Tenn. 448, 451 (1882). Superiority of the widow's right may be raised by the tortfeasor in a suit by the personal representative. Koontz v. Fleming, 17 Tenn. App. 1, 65 S.W.2d 821 (E.S. 1933).

176. Railroad v. Acuff, 92 Tenn. 26, 20 S.W. 348 (1892); *see* Koontz v. Fleming, 17 Tenn. App. 1, 65 S.W.2d 821 (E.S. 1933) (no waiver by unreasonable delay where administrator commenced suit five months before the running of the statute of limitations); Spitzer v. Knoxville Iron Co., 133 Tenn. 217, 221, 180 S.W. 163 (1915) (waiver of right to administer not waiver of right to sue); Webb v. Railway Co., 88 Tenn. 119, 129, 12 S.W. 428 (1889).

177. Holston v. Coal & Iron Co., 95 Tenn. 521, 32 S.W. 486 (1895); Hall v. Nashville & C.R.R., 1 Tenn. Cas. 141 (1859); Whitson v. Tennessee Cent. Ry., 163 Tenn. 35, 39, 40 S.W.2d 396 (1931) (summons commencing action in father's name may be amended to be in name of father as administrator, even after statutory period of limitations has run); Chess-Wymond Co. v. Davis, 4 Tenn. Civ. App. 197, 200 (1913).

178. Railroad v. Johnson, 97 Tenn. 667, 37 S.W. 558, 34 L.R.A. 442 (1896); Trafford v. Adams Exp. Co., 76 Tenn. 96 (1881). An earlier case had held that a married woman was a "person" within the meaning of the statutes, so that her personal representative might maintain an action for her wrongful death. Bream v. Brown, 45 Tenn. 168 (1867).

cause of action was that of the deceased, and under the common law doctrine of *jus mariti* the husband was entitled to all his wife's causes of action, the husband retained his right to sue after the death of his wife.[179] The emancipation statutes,[180] which were subsequently enacted, would have destroyed the force of this reasoning, but by that time the legislature had provided that the husband could sue in his own name.[181]

Thus the law stood—that parents of deceased children or other next of kin could maintain no action in their own name—until 1932. At that time the statute was codified to provide: "The right of action . . . shall pass to his widow, and, in case there is no widow, to his children or to his next of kin; or to his personal representative, for the benefit of his widow or next of kin . . . ."[182] Under this section it has been held that the next of kin, as well as the widow or children, may institute suit in his own name,[183] since all classes of beneficiaries are mentioned as ones to whom the right passes before any mention of the alternative provision "or to his personal representative, for the benefit of his widow or next of kin . . ."[184]

The right to settle a claim for wrongfully inflicted injuries resulting in death has been considered a necessary adjunct to the right to sue,[185] and the person or persons having this right are not bound by a purported settlement with some other person,[186] unless those having the prior right received some benefit[187] from the settlement. Thus the widow, when she has the prior right to sue, may settle the claim or dismiss the suit,[188] unless she has previously waived this right;[189] and her disposition of the claim is binding upon the

179. The opinion in the earliest case indicates that this rationale was not concurred in by the entire court, but no other theory is advanced to support the result, in which the entire court concurred. *See* Trafford v. Adams Exp. Co., 76 Tenn. 96, 112 (1881).

180. TENN. CODE ANN. § 8460 (Williams 1934).

181. *Id.* § 8241.

182. *Id.* § 8236.

183. Cummins v. Woody, 177 Tenn. 636, 152 S.W.2d 246 (1941); Mosier v. Lucas, 30 Tenn. App. 498, 207 S.W.2d 1021 (M.S. 1947).

184. TENN. CODE ANN. § 8236 (Williams 1934).

185. Spitzer v. Knoxville Iron Co., 133 Tenn. 217, 180 S.W. 163 (1915); Prater v. Marble Co., 105 Tenn. 496, 58 S.W. 1068 (1900); Holder v. Railroad, 92 Tenn. 141, 20 S.W. 537 (1892); Stephens v. Nashville, C. & St. L. Ry., 78 Tenn. 448 (1882); Greenlee v. Railroad, 73 Tenn. 418 (1880); Davis v. Freels, 15 Tenn. App. 152 (E.S. 1932); Smalling v. Kreech, 46 S.W. 1019 (Tenn. Ch. App. 1897).

186. *See* Louisville & N.R.R. v. Cantrell, 25 Tenn. App. 529, 533, 160 S.W.2d 444 (M.S. 1942).

187. Doten v. Southern Ry., 32 F. Supp. 901 (W.D. Tenn. 1940) (use of part of proceeds paid in settlement to ship decedent's body to the family cemetery in Missouri was sufficient benefit to parent to be legal consideration for settlement).

188. Spitzer v. Knoxvill Iron Co., 133 Tenn. 217, 180 S.W. 163 (1915); Prater v. Marble Co., 105 Tenn. 496, 58 S.W. 1068 (1900); Holder v. Railroad, 92 Tenn. 141, 20 S.W. 537 (1892); Stephens v. Nashville, C. & St. L. Ry., 78 Tenn. 448 (1882); Greenlee v. Railroad, 73 Tenn. 418 (1880); Smalling v. Kreech, 46 S.W. 1019 (Tenn. Ch. App. 1897). Settlement under the Workmen's Compensation Statutes bars recovery under the Death Acts. McCreary v. Nashville, C. & St. L. Ry., 161 Tenn. 691, 34 S.W.2d 210 (1931), 9 TENN. L. REV. 210.

189. Railroad v. Acuff, 92 Tenn. 26, 20 S.W. 348 (1892) (widow waived her prior right by permitting the administrator to sue without objection on her part); *see* Spitzer v. Knoxville Iron Co., 133 Tenn. 217, 180 S.W. 163 (1915) (waiver of right to administer not waiver of right to sue or settle).

children even though made over their objection.[190] Nor can beneficiaries having a right to share in the proceeds of the claim[191] but not having the right to settle assert, in a suit by them, that the settlement was procured by fraud on the part of the defendant.[192]

Right to Share in Proceeds

Entirely apart from the question of who may bring the action is the question of who may share in the proceeds of the action. It has been held from the beginning that the personal representative, as such, has no rights in the recovery[193] since he is merely the means of enforcing the substantive rights of the designated beneficiaries, and holds the proceeds, if suit is brought by him, as "trustee" for those beneficiaries.[194] Since the statutes expressly provide that recovery is to be free from the claims of creditors, creditors have no right in the recovery;[195] and the state has no claim to recovery if there are no beneficiaries or creditors[196]—indeed, no action will then lie because there are no beneficiaries entitled to take recovery.

One section of the original Tennessee statutes provided:

> "If the deceased had commenced an action before his death, it shall proceed without a reviver. *The damages shall go to the widow and next of kin,* free from the claims of the creditors of the deceased, *to be distributed as personal property.*"[197]

While this section might seem to apply only where an action was commenced before the death of the decedent and proceeded without revivor, it has been consistently held that it also controls the distribution of the proceeds of actions brought under the other sections.[198] Thus rights to the proceeds remained unchanged by the changes in permissible methods of suit,[199] and the rights of the beneficiaries to share in the proceeds are the same regardless

190. Stephens v. Nashville, C. & St. L. Ry., 78 Tenn. 448 (1882); Greenlee v. Railroad, 73 Tenn. 418 (1880).

191. The beneficiaries are entitled to share in the proceeds of settlement in the same proportion as proceeds of a judgment.

192. Spitzer v. Knoxville Iron Co., 133 Tenn. 217, 180 S.W. 163 (1915); Prater v. Marble Co., 105 Tenn. 496, 58 S.W. 1068 (1900); Davis v. Freels, 15 Tenn. App. 152 (E.S. 1932).

193. *See* Cummins v. Woody, 177 Tenn. 636, 641, 152 S.W.2d 246 (1941); Whitson v. Tennessee Cent. Ry., 163 Tenn. 35, 43, 40 S.W.2d 396 (1931); Sanders v. Louisville & N.R.R., 111 Fed. 708 (6th Cir. 1901).

194. Throgmorton v. Oliver, 144 Tenn. 282, 230 S.W. 967 (1921); Tennessee Cent. R.R. v. Brown, 125 Tenn. 351, 143 S.W. 1129 (1911); *see* Powell v. Blake, 161 Tenn. 516, 33 S.W.2d 78 (1930); Jackson v. Dobbs, 154 Tenn. 602, 290 S.W. 402 (1926).

195. Louisville & N.R.R. v. Pitt, 91 Tenn. 86, 18 S.W. 118 (1892); East Tennessee, V. & G. Ry. v. Lilly, 90 Tenn. 563, 18 S.W. 243 (1891).

196. East Tennessee, V. & G. Ry. v. Lilly, 90 Tenn. 563, 18 S.W. 243 (1891).

197. TENN. CODE § 2293 (Meigs and Cooper 1858) (italics added).

198. Throgmorton v. Oliver, 144 Tenn. 282, 230 S.W. 967 (1921); Collins v. East Tennessee, V. & G.R.R., 56 Tenn. 841 (1874); *see* Walkup v. Covington, 18 Tenn. App. 117, 126, 73 S.W.2d 718 (M.S. 1933); Sample v. Smith, 1 Tenn. Cas. 284 (1874).

199. Collins v. East Tennessee, V. & G.R.R., 56 Tenn. 841 (1874).

of whose name the action is prosecuted in, since this law governs the distribution of the proceeds—"gives direction to the recovery."[200]

Since the proceeds are to be distributed as surplus personalty the widow, if she survives, is entitled to share recovery equally with the children, she taking a child's part;[201] but she can not charge against their interest expenses incurred in supporting her children,[202] nor can she subject it to the widow's allowance or funeral expenses of the deceased.[203] And, of course, it is improper for her pay the deceased husband's debts with the children's share.[204]

The two early cases which held that a husband of a deceased married woman could bring an action in his own name for her wrongful death also held that he was entitled to *all* recovery, to the exclusion of the next of kin,[205] because he took, not under the statute, but by virtue of his *jus mariti*. While the legislature no doubt intended from the beginning that the husband of a deceased married woman be a beneficiary, and entitled to some recovery, it is doubtful that he was ever intended to be entitled to the whole proceeds. In any event a statute was passed in 1897[206] providing that the husband should share recovery with the children of the deceased, just as where the deceased party is the husband.

While the beneficiaries surviving at the time of judgment in the action were entitled to share in the same proportion as they would under the laws of descent and distribution,[207] it was held under the earliest statutes that the suit abated as to beneficiaries who died while the suit was pending.[208] To meet this situation, the legislature, in 1903, enacted the following:

> "That no suit now pending or hereafter brought for personal injuries or death from wrongful act in any of the courts of this State, whether by appeal or otherwise, and whether in an inferior or superior court, shall abate or be abated, because or on account of the death of the beneficiary or beneficiaries for whose use and benefit said suit was brought, and that such suit shall be proceeded with to final judgment, as though such beneficiary or beneficiaries had not died, for the use and benefit of the heirs at law of such deceased beneficiary."[209]

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200. *Id.* at 849.
201. Felton v. Spiro, 78 Fed. 576 (6th Cir. 1897), *reversing* 73 Fed. 91 (6th Cir. 1896); Powell v. Blake, 161 Tenn. 516, 33 S.W.2d 78 (1930); Throgmorton v. Oliver, 144 Tenn. 282, 230 S.W. 967 (1921).
202. Throgmorton v. Oliver, 144 Tenn. 282, 230 S.W. 967 (1921).
203. Throgmorton v. Oliver, 144 Tenn. 282, 230 S.W. 967 (1921); Cunningham v. Hutcherson, 14 Tenn. App. 173 (M.S. 1931).
204. Powell v. Blake, 161 Tenn. 516, 33 S.W.2d 78 (1930).
205. Chattanooga Elec. Ry. v. Johnson, 97 Tenn. 667, 37 S.W. 558, 34 L.R.A. 442 (1896); Trafford v. Adams Exp. Co., 76 Tenn. 96 (1881).
206. See § 8241, *supra* note 19.
207. *Supra* note 198.
208. Sanders' Adm'x v. Louisville & N.R.R., 111 Fed. 708 (6th Cir. 1901); Heald v. Wallace, 109 Tenn. 346, 71 S.W. 80 (1902); Louisville & N.R.R. v. Bean, 94 Tenn. 388, 29 S.W. 370 (1895); Loague v. Memphis & C.R.R., 91 Tenn. 458, 19 S.W. 430 (1892); East Tennessee, V. & G. Ry. v. Lilly, 90 Tenn. 563, 18 S.W. 243 (1891).
209. Tenn. Pub. Acts 1903, c. 317. This section is now embodied in TENN. CODE ANN. § 8242 (Williams 1934).

This section did not entirely remedy the situation, however, for the court construed it to apply only to cases in which action had been commenced before the beneficiary died, and the suit abated as to beneficiaries who died before an action was commenced.[210] This gap was subsequently closed by another section[211] however, so that now an action commenced before or after a beneficiary's death proceeds for the benefit of the heirs of that beneficiary.[212]

Although various persons may bring an action, on behalf of the eligible beneficiaries, for the wrongful death of the deceased, those beneficiaries not bringing suit are entitled to share in the recovery even if not joined in the suit.[213] In enforcing this right against the beneficiary getting judgment, several actions are available. An action will lie in tort for conversion of the plaintiff's portion of the recovery,[214] or the beneficiary may waive the tort and bring a quasi-contract action to recovery money wrongfully withheld.[215] It has frequently been stated that the person recovering takes as "trustee" for the other eligible beneficiaries,[216] but this has been construed to mean only that the law raises an obligation to pay.[217] Thus the statute of limitations applicable to quasi-contract actions has been held to apply, rather than the statute applicable to express trusts.[218] It has also been held that the proceeds do not constitute such trust property that the beneficiaries entitled to share in it may assert their rights against one who in good faith gave a mortgage on land purchased with the proceeds.[219]

Conflict of Laws

It is a familiar rule of Conflict of Laws that in tort actions the law of the place of the injury, rather than the law of the forum, controls the substantive rights of the parties.[220] Thus, although it is held that causes of action for wrongful death given by other states may be enforced in Tennessee

210. Lones v. McFall, 152 Tenn. 239, 276 S.W. 866 (1925); 4 Tenn. L. Rev. 108 (1926).
211. Tenn. Code Ann. § 8243 (Williams 1934).
212. Ridge v. Bright, 172 Tenn. 87, 110 S.W.2d 312 (1937).
213. Throgmorton v. Oliver, 144 Tenn. 282, 230 S.W. 967 (1921); Collins v. East Tennessee, V. & G.R.R., 56 Tenn. 841 (1874); Sample v. Smith, 1 Tenn. Cas. 284 (1874).
214. *See* Powell v. Blake, 161 Tenn. 516, 520, 33 S.W.2d 78 (1930).
215. Powell v. Blake, 161 Tenn. 516, 33 S.W.2d 78 (1930); Throgmorton v. Oliver, 144 Tenn. 282, 230 S.W. 967 (1921); *see* Jackson v. Dobbs, 154 Tenn. 602, 290 S.W. 402 (1926) (action barred by statute of limitations).
216. See cases cited in note 194 *supra*.
217. Jackson v. Dobbs, 154 Tenn. 602, 290 S.W. 402 (1926).
218. Jackson v. Dobbs, 154 Tenn. 602, 290 S.W. 402 (1926); *see* Powell v. Blake, 161 Tenn. 516, 520, 33 S.W.2d 78 (1930).
219. Smalling v. Kreech, 46 S.W. 1019 (Tenn. Ch. App. 1897).
220. *See* Sharp v. Cincinnati, N.O. & T.P. Ry., 133 Tenn. 1, 10, 179 S.W. 375 (1915). And a statute of one state giving a cause of action for wrongful death, such a right being unknown to the common law, does not give a cause of action for a death resulting from wrongful acts occurring in another state or country. Nashville & C.R.R. v. Eakin, 46 Tenn. 582 (1869).

courts,[221] if their provisions are not penal in nature,[222] the statutes giving the cause of action must be both pleaded and proved.[223] Since the statutes giving an action for wrongful death are in derogation of the common law, it must be pleaded and proved that the foreign state also had a statute giving a similar cause of action or it will be presumed that the common law controls[224] and no action will lie.[225]

While it is true that states usually will not enforce laws of foreign states that are penal in nature or are contrary to a strong policy of the forum,[226] the states in general, and Tennessee in particular, have been very liberal in enforcing the wrongful death statutes of other states,[227] when properly pleaded and proved, although such statutes are almost as numerous in kind as they are in number and their provisions vary widely.[228] It has been held that an action under a foreign statute may be maintained and that statute control even though that statute provides a different method of bringing the action,[229]

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221. Wilson v. Massengill, 124 F.2d 666 (6th Cir. 1942), *cert. denied* 316 U.S. 686 (1941); *see* Dixie Ohio Exp. Co. v. Butler, 179 Tenn. 358, 360, 166 S.W.2d 614, (1942); Parsons v. American Trust & Banking Co., 168 Tenn. 49, 73 S.W.2d 698 (1934); Hartman v. Duke, 160 Tenn. 134, 22 S.W.2d 221 (1929); Howard v. Nashville, C. & St. L. Ry., 133 Tenn. 19, 179 S.W. 380 (1915); Whitlow v. Nashville, C. & St. L. Ry., 114 Tenn. 344, 84 S.W. 618, 68 L.R.A. 503 (1904); Chesapeake, O. & S.W.R.R. v. Higgins, 85 Tenn. 620, 4 S.W. 47 (1887); Nashville & C.R.R. v. Sprayberry, 56 Tenn. 852 (1874); McWhorter v. Gibson, 19 Tenn. App. 152, 84 S.W.2d 108 (E.S. 1935). For thorough discussion of this subject see BEALE, CONFLICT OF LAWS §§ 391.1-97.1 (1935); GOODRICH, CONFLICT OF LAWS §§ 101-05 (3d ed. 1949); Rose, *Foreign Enforcement of Actions for Wrongful Death*, 33 MICH. L. REV. 545 (1935).

222. *See* Whitlow v. Nashville, C. & St. L. Ry., 114 Tenn. 344, 348, 84 S.W. 618, 68 L.R.A. 503 (1904).

223. Dixie Ohio Exp. Co. v. Butler, 179 Tenn. 358, 166 S.W.2d 614 (1942); Nashville & C.R.R. v. Eakin, 46 Tenn. 583 (1869); *see* Parsons v. Amer. Trust & Banking Co., 168 Tenn. 49, 61, 73 S.W.2d 698 (1934); Nashville & C.R.R. v. Sprayberry, 56 Tenn. 852, 854 (1874). But the declaration may be amended, even after the running of the statute of limitations, to allege the foreign law. Dixie Ohio Exp. Co. v. Butler, 179 Tenn. 358, 166 S.W.2d 614 (1942); Kennard v. Illinois C.R.R., 177 Tenn. 311, 148 S.W.2d 1017, 134 A.L.R. 770 (1941); Nashville, C. & St. L.R.R. v. Foster, 78 Tenn. 351 (1882); *cf.* Nashville, C. & St. L. Ry. v. Anderson, 134 Tenn. 666, 679, 185 S.W. 677, L.R.A. 1918C 1115, Ann. Cas. 1917C 902 (1915).

224. In some iustances it will be presumed that the statutory law of a foreign state is the same as that of the forum, but the presumption is not indulged where the statutory law of the forum is in derogation of the common law. *See* Dixie Ohio Exp. Co. v. Butler, 179 Tenn. 358, 361, 166 S.W.2d 614 (1942).

225. Dixie Ohio Exp. Co. v. Butler, 179 Tenn. 358, 166 S.W.2d 614 (1942); Nashville & C.R.R. v. Eakin, 46 Tenn. 582 (1869); *see* Nashville & C.R.R. v. Sprayberry, 56 Tenn. 852, 854 (1874).

226. *See* Whitlow v. Nashville, C. & St. L. Ry., 114 Tenn. 344, 355, 84 S.W. 618, 68 L.R.A. 503 (1904).

227. For an excellent discussion of the enforcement of foreign death statutes see Whitlow v. Nashville, C. & St. L. Ry., 114 Tenn. 344, 84 S.W. 618, 68 L.R.A. 503 (1904).

228. For an elaborate consideration of many statutes providing an action for wrongful dcath, and their various provisions, see Carolina, C. & O.R.R. v. Shewalter, 128 Tenn. 363, 161 S.W. 1136 (1913).

229. *See* Nashville & C.R.R. v. Sprayberry, 67 Tenn. 341, 343, 35 Am. Rep. 705 (1874).

measuring damages,[230] distributing proceeds,[231] or prescribes a different period for the running of the statute of limitations.[232]

CONCLUSION

It is unfortunate that the common law developed and adhered to the illogical and patently unjust rules which denied all recovery for wrongfully inflicted injuries resulting in death, because its methods of development by accretion would almost certainly have brought more satisfactory, consistent and uniform[233] results than those achieved by statutory reform. It is no more true in Tennessee than in other jurisdictions that the statutes have been poorly drawn from the standpoints of expressing the legislative intent and harmonizing in one logical pattern the various provisions, but the courts of the state have been sorely pressed at times to fill the gaps and clear up seeming inconsistencies. In general the courts have been successful in fitting the various statutes and decisions into a logical scheme, and, at the same time, reaching desirable results; but there are a few points at which the law is either undesirable or insufficiently developed.

A general survival statute providing for the survival of all civil actions, whether or not an action was commenced before the death of either party would be very desirable.[234] Not only would it eliminate existing inconsistencies and anomalies,[235] but it would also favorably extend the law to allow survival of actions for personal injuries where death results from some independent cause[236] and clarify the law with regard to the survival of *ex delicto* actions for injuries to personal property.[237]

Also helpful would be a statute removing the immunity which prevents intra-family tort actions. The widespread use of liability insurance makes

230. Whitlow v. Nashville, C. & St. L. Ry., 114 Tenn. 344, 84 S.W. 618, 68 L.R.A. 503 (1904).

231. Hartman v. Duke, 100 Tenn. 134, 22 S.W.2d 221 (1929).

232. Wilson v. Massengill, 124 F.2d 666 (6th Cir. 1942), *cert. denied,* 316 U.S. 686 (1942).

233. The frequency with which wrongful death actions are brought in states other than the one giving the cause of action and the consequent necessity and difficulty of applying foreign statutes, the number and provisions of which are almost as numerous as the states, makes adoptions of a uniform law desirable. Such a law, as proposed to the National Conference of Commissioners on Uniform State Laws, is set out in Oppenheim, *The Survival of Tort Actions and the Action for Wrongful Death—A Survey and a Proposal,* 16 TULANE L. REV. 386, 420-32 (1942).

234. Note, 48 HARV. L. REV. 1008, 1013 (1935). Such a statute could except from its operation those actions affecting the character of the plaintiff—*e.g.,* libel, slander, malicious prosecution, etc.—as do the present statutes of Tennessee and many other states. However, the desirability of such an exception is questionable. *Id.* at 1013.

235. One section would cover the situation now covered by several, see *supra* pp. 291-93, and such anomalies as that pointed out in note 16 *supra* would be eliminated.

236. Such a statute should expressly not apply to situations covered by the present wrongful death statutes so that no conflict or duplication of remedies would result. See note 9 *supra.*

237. *Compare* Haymes v. Halliday, 151 Tenn. 115, 119, 268 S.W. 130, 131 (1924), *with* Cherry v. Hardin, 51 Tenn. 199 (1871).

it desirable that at least some intra-family torts be actionable,[238] and one statute properly drawn would cover both suits during life and wrongful death actions.

To a somewhat lesser degree a statute providing for the treatment to be given actions for injuries to unborn infants would be desirable. Certainly such injuries should be actionable if the infant continues to live after birth, but the legislature might conclude, after due consideration, that no recovery should be allowed if death occurred before or at birth. An appropriate statute could easily express their decision, whatever it might be, and eliminate problems which are otherwise almost certain to arise.

Besides these suggestions as to changes in related points, a few suggestions specifically applicable to wrongful death actions may be made. One harsh rule which should be changed is that the statute of limitations commences to run at the time of the injury to the decedent, rather than at the time of his death. It is true that this rule is logically consistent with the survival theory, but it is by no means certain that the contrary result could not have been reached[239] and the harshness of the rule in certain circumstances warrants a statutory change. No undesirable consequences are envisioned from such a change and certainly some would be eliminated.

The legislature, in its desire fully to protect the interests of the deceased and his surviving relatives, has rendered absolutely unprotectible the interests of a class of persons who may have very real and substantial interests in the continued life and well-being of the deceased. These persons are his creditors. Many of them advance credit in reliance, to a great extent, upon his continued life and well-being—on the pecuniary value of his life. Even if it be conceded that policy dictates that dependent survivors be accorded some preference over the claims of creditors, it is difficult to understand why that preference should extend beyond their actual pecuniary loss, or why creditors should be shut out when there are no beneficiaries eligible to recover under the statutes.[240] Some change with regard to this point should be considered.[241]

While it would be a simple matter to clarify the measure of the "value of the life to the estate" by enacting legislation providing that the measure shall be the present value of the probable net earnings, such a result could as

238. Note, 15 B.U.L. REV. 857, 864 (1935). In general see PROSSER, TORTS 898-910 (1941); Farage, *Recovery for Torts Between Spouses*, 10 IND. L.J. 290 (1935); McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930).

239. *See* Fowlkes v. Nashville & D.R.R., 56 Tenn. 829, 834-41 (1872) (dissenting opinions of Sneed and Turner, JJ.).

240. An 1899 statute attempted to allow recovery for the benefit of the decedent's estate, which would be available to creditors, if no next of kin survived. Tenn. Pub. Acts 1899, c. 213, p. 457. However the statute was held unconstitutional because of a defective caption. Southern Ry. v. Maxwell, 113 Tenn. 464, 82 S.W. 1137 (1904).

241. Killion, *Wrongful Death Actions in California: Some Needed Amendments*, 25 CALIF. L. REV. 170, 190-91 (1937); Note, 44 HARV. L. REV. 980-81 (1931).

easily be achieved by judical announcement. No previous holding would be contradicted, and, indeed, such an announcement would actually be a normal and helpful extension of previous holdings. The admissibility and use of actuarial data for determining this value is also a problem more properly left to an enlightened judiciary which can supervise and control the use of such material[242] to obtain the greatest possible benefit with the least amount of abuse.

A survey of this whole field of law in Tennessee discloses a gratifying picture.[243] The judicial decisions reveal a consistency which could not be expected from a cursory examination of the statutes, a consistency maintained by adherence to a central thesis—that the cause of action sanctioned is that of the deceased. Yet desirable results have not generally been forsaken for the sake of casily-gained superficial consistency. The legislature has also taken forward, even if halting and uncoordinated, steps toward a more perfect overall result. With continuance of the enlightened and progressive co-operation of these two agencies we may expect further and more satisfactory abrogation of the harsh common law rules.

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242. The mortality and annuity tables found in 7 TENN. CODE ANN., Appendix 589-93 (Williams, 1934), should be supplemented and kept up to date for use in these cases, but other material should be allowed in evidence if shown to be reliable.

243. The Tennessee statutes have been commended for allowing recovery of both the damage suffered by the decedent during his life and the pecuniary value of his life in one action. MCCORMICK, DAMAGES 364 (1935); Note, 44 HARV. L. REV. 980, 981 (1931).

[Appendix on next page.]

APPENDIX

DAMAGES IN REPRESENTATIVE TENNESSEE CASES

Age	Earnings	VERDICT			REMARKS	CITATION
		Jury	Trial Ct.	App. Ct.		
35	$4 day	$8,000	$8,000	$8,000	Male, industrious, sober	Tenn. Coal & R. R. v. Roddy, 85 Tenn. 400, 5. S.W. 710 (1887)
33		$15,000	$15,000	$15,000	Male, deceased very prudent, Defendant very reckless	Chesapeake, O. & S. W. R. R. v. Hendricks, 88 Tenn. 710, 13 S. W. 696 (1890)
57	$300–400 per mo.	$10,000	$10,000	$10,000	Male, strong, active, lumber business	Rosenbaum v. Shoffner, 98 Tenn. 624, 40 S. W. 1086 (1897)
17		$7,500	$7,500	$7,500	Male, excellent character, industrious	Southern Queen Mfg. Co. v. Morris, 105 Tenn. 654, 58 S. W. 651 (1900)
21		$10,000	$10,000	$10,000	Female, married, good health, Did housework	Tennessee Cent. R. R. v. Vanhoy, 143 Tenn. 312, 226 S. W. 225 (1920)
45		$3,500	$3,500	$3,500	Female, married, cared for 9 children, did housework	Kingsport Utilities Inc. v. Mort, 2 Tenn. App. 270 (E. S. 1925)
	$30–40 per wk.	$3,000	$2,000	$2,000	Syrian peddler	Yellow Cab Co. v. Maloaf, 3 Tenn. App. 11 (W. S. 1925)
12		$10,000	$7,500	$7,500	Male, healthy, active	Brown v. Ellison, 12 Tenn. App. 27 (E. S. 1926)
41	$780 per yr.	$15,000	$15,000	$10,500	$10,500 would purchase annuity yielding deceased's income for duration of expectancy	Coppenger v. Babcock Lumber & Land Co., 8 Tenn. App. 108 (E. S. 1928)
15	$1.50 per day plus board	$10,000	$10,000	$10,000	Male, could read and write, intense pain	Highland Coal & Lumber Co. v. Cravens, 8 Tenn. App. 419 (M. S. 1928)
57		$5,000	$5,000	$5,000	Female, married, several children, kept house	Henry v. Sharp, 9 Tenn. App. 350 (E. S. 1928)
		$10,000	$10,000	$2,000	Deceased contributorily negligent	Nashville, C. & St. L. Ry. v. White, 158 Tenn. 407, 15 S. W. 2d 1 (1929)
7		$10,000	$5,000	$5,000	Female, bright and intelligent	Yellow Cab. Co. v. Gattuso, 11 Tenn. App. 109 (W. S. 1929)
63		$10,000	$7,500	$7,500	Male, able bodied, five days suffering	Knoxville v. Ryan, 13 Tenn. App. 163 (E. S. 1929)
16	$10 per wk.	$3,000	$2,500	$2,500	Male, negro, great pain and suffering	Billions v. Garland, 12 Tenn. App. 186 (E. S. 1929)
34	$8–10 per wk.	$10,000	$10,000	$10,000	Female, married (but estranged), good health	Potts v. Leigh, 15 Tenn. App. 1 (M. S. 1931)
36	$6 per day plus board	$10,000	$9,000	$9,000	Female, trained nurse	Johnson v. Maury County Trust Co., 15 Tenn. App. 326 (M. S. 1932)
5½		$10,000	$10,000	$6,500	Female, died a few hours after injury	Garis v. Eberling, 18 Tenn. App. 1, 71 S. W. 2d 215 (M. S. 1934)
34	$2,350 per yr.	$16,500	$13,000	$13,000	Male, some income from hunting and trapping	Tennessee Elec. Power Co. v. Hanson, 18 Tenn. App. 542, 79 S. W. 2d 818 (M. S. 1925)
30		$10,000	$10,000	$10,000	Male, musician, good health exemplary character	Walters v. Staton, 21 Tenn. App. 401, 111 S. W. 2d 381 (M. S. 1938)
24	$1,000 per yr.	$5,000	$5,000	$5,000	Male, deaf and dumb, operated shoe shop	Hamilton v. Moyers, 24 Tenn. App. 86, 140 S. W. 2d 799 (E. S. 1940)
5		$15,000	$7,500	$7,500	Male	Rea Const. Co. v. Lane, 25 Tenn. App. 125, 152 S. W. 2d 1033 (M. S. 1941)
41		$15,000	$15,000	$15,000	Male, mechanic, good health, much suffering	Stanford v. Holloway, 25 Tenn. App. 379, 157 S. W. 2d 864 (M. S. 1942)
67	$500–600 per mo.	$8,000	$8,000	$8,000	Male, physician, good health	Knight v. Hawkins, 26 Tenn. App. 448, 173 S. W. 2d 163 (W. S. 1943)
32		$8,500	$2,500	$2,500	Male, supported wife and three children	Inter-City Trucking Co. v. Daniels, 181 Tenn. 126, 178 S. W. 2d 756 (1944)
48	$20–25 per wk.	$1,500	$1,500	$1,500	Male, deceased contributorily negligent	Southern Ry. v. Kuykendall, 186 S. W. 2d 617 (Tenn. App., E. S. 1945)
76		$6,000	$5,000	$6,000	Male, death almost instantaneous	Hall v. Nash, 198 S. W. 2d 649 (Tenn. 1947)
26		$20,000	$20,000	$20,000	Male, left widow and child	Spivey v. St. Thomas Hospital, 31 Tenn. App. 12, 211 S. W. 2d 450 (M. S. 1949)
18	$120 per mo.	$20,500	$20,500	$20,500	Female, good health	Foster & Creighton v. Hale, 222 S. W. 2d 222 (Tenn. App., E. S. 1950)
25	$170 per mo.	$22,900	$22,900	$22,900	Male, perfect health	Foster & Creighton v. Hale, 222 S. W. 2d 450 (Tenn. App., M. S. 1950)