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TORTS; WRONGFUL DEATH AND SURVIVAL

Amends NRS 41.100 and 698.180

Repeals NRS 12.090, 41.080, 41.090, 41.110, 41.120

SB 99 (Committee on Judiciary); STATS 1979, Ch 305

Chapter 305 amends NRS 41.100 and adds a new section to NRS Chapter 41. Previously, both wrongful death and survival actions were governed by NRS 41.100, as well as several other statutes now repealed. Chapter 305 removes the wrongful death action from NRS 41.100 and consolidates the applicable law into one section. It also amends NRS 41.100 to allow survival of all causes of action,¹ restrict the persons who may maintain the suit, and allow recovery for the decedent's pain and suffering.²

Wrongful Death

At common-law the cause of action for personal injuries died with the injured party. Statutory law now provides a cause of action for death caused by a wrongful act, the general purpose of which is to compensate the decedent's family for its pecuniary loss.³ Chapter 305 adds a new section to NRS Chapter 41 giving to the decedent's heirs and personal representatives separate causes of action for the decedent's wrongful death.⁴

Recovery by the heirs

Although previous law⁵ did not allow recovery for decedent's pain and suffering,⁶ the heirs may now recover pecuniary damages for decedent's pain, suffering, and disfigurement, as well as their own grief, sorrow, and loss of support, companionship, society, comfort, and consortium.⁷ Damages recovered by the decedent's heirs cannot be reached by creditors to satisfy the decedent's debts.⁸

Recovery by the representative

On behalf of the decedent's estate, the legal representative may recover special damages, including funeral expenses, and penalties that the decedent could

have recovered had he or she lived.⁹ The representative cannot recover for decedent's pain, suffering, or disfigurement. Damages recovered by the decedent's representative on behalf of the estate can be reached by decedent's creditors, unless otherwise exempted by law.¹⁰

Recovery when the wrongdoer dies

If the wrongdoer is dead, his or her personal representatives may be sued.¹¹

Survival of a Cause of Action

At common-law, an action abated upon the death of a plaintiff or defendant. Certain causes of action (usually those relating to injuries to property and property rights) might survive and the decedent's heirs or personal representative might be able to revive the action. Most states have enacted laws to change the common law.¹² In Nevada, NRS 41.100 provides that no cause of action is lost upon either party's death.¹³

When the plaintiff dies

The plaintiff's cause of action survives in favor of the decedent's executors or administrators only; heirs may no longer sue under NRS 41.100,¹⁴ although previous law allowed survival of the cause of action in favor of the decedent's heirs and legal representative.¹⁵ NRS 41.100 allows the executor or administrator to recover punitive damages, as well as damages for decedent's losses sustained before death, pain, suffering, and disfigurement,¹⁶ and loss of support, companionship, society, comfort, and consortium.¹⁷ Previously, awards were allowed as the court or jury deemed just; this included exemplary damages and damages for loss of companionship, society, and comfort.¹⁸ NRS 41.100 does not specifically make the proceeds of judgment free from attachment by the decedent's creditors. However, it does not specify that the creditors may attach the award. Because the cause of action originally belonged to the decedent and is to be enforced by the decedent's estate, creditors may be able to attach the award as any other debt due the deceased.¹⁹

When the wrongdoer dies

If the wrongdoer in the action dies, the cause of action survives against his or her legal representative.²⁰ NRS 41.100, prior to amendment by Chapter 305, allowed an award of punitive and exemplary damages, even though the defendant had died.²¹ In Allen v. Anderson,²² the Nevada Supreme Court held that neither the father nor the estate of the wrongdoer could be liable for punitive damages when the wrongdoer was dead. Because punitive damages are assessed to deter wrongful conduct in the future, such an award is of no deterrent value where the deceased wrongdoer will not be punished. NRS 41.100 as amended does not allow an award of damages imposed primarily for the sake of example or punishment when the wrongdoer dies.²³ The plaintiff may, however, recover all other damages which would have been awarded had the defendant lived.²⁴

Assignability of the cause of action

Although prior to amendment by Chapter 305 NRS 41.100 stated that it should not be construed as making causes of action for personal injuries assignable,²⁵ Chapter 305 does not address this problem.

Joinder of Actions

The wrongful death suit brought by decedent's heirs under the new section of NRS Chapter 41 may be joined with the survival action or the wrongful death action brought by the decedent's executor or administrator pursuant to NRS 41.100 or both. The two causes of action must have arisen from the same wrongful act or neglect.²⁶

The Motor Vehicle Insurance Act

Chapter 305 also amends NRS 698.180. The meaning of "survivor" under the Motor Vehicle Insurance Act (NRS Chapter 698) now includes heirs and personal representatives of the decedent who are entitled to receive benefits because of the decedent's death.²⁷ The purpose of this amendment appears to be to avoid conflicting definitions between the Motor Vehicle Insurance Act and the wrongful death and survival statutes. Many wrongful death and personal injury actions arise

from automobile accidents. Recovery for these actions may be based on the Motor Vehicle Insurance Act.²⁸ This amendment allows benefits to be paid to the survivors (i.e., heirs and representatives) of the decedent in conformity with Chapter 41.

NRS Chapter 698 is repealed by 1979 Nev. Stats. ch. 660, effective January 1, 1980. Until then NRS 698.180 will be in effect as amended.

Noreen M. Evans

FOOTNOTES

1. Previous law allowed survival of causes of action for personal injuries only. 1969 Nev. Stats. ch. 211, §1, at 286 (amended by 1979 Nev. Stats. ch. 305 (hereinafter "Ch. 305") §2).
2. Ch. 305 §2 (amending NRS 41.100(2)).
3. 22 Am. Jur. 2d, Death §2 (1965).
4. Ch. 305 §1 ¶2 (adding to NRS Ch. 41).
5. NCL §9194 (NRS 41.080).
6. Borrego v. Stauffer Chemical Co., 315 F. Supp. 980, 986 (D. Nev. 1970).
7. Ch. 305 §1 ¶4 (adding to NRS Ch. 41).
8. Id.
9. Id. §1 ¶5 (adding to NRS Ch. 41).
10. Id.
11. Id. §1 ¶2 (adding to NRS Ch. 41).
12. 1 Am. Jur. 2d, Abatement, Survival, and Revival, §51 (1962).
13. Ch. 305 §2 (amending NRS 41.100(4)).
14. Id. §2 (amending NRS 41.100(1)).
15. 1969 Nev. Stats. ch. 211 §1, at 285.
16. Note that Chapter 305 gives both the heirs and executors a cause of action for decedent's pain, suffering, and disfigurement. Where both the heirs and executors sue, the court may have difficulty deciding who shall recover for decedent's pain, suffering, and disfigurement, since both are entitled. Compare Ch. 305 §1 ¶4 with §2 ¶3.
17. Ch. 305 §2 (amending NRS 41.100(3)).

18. 1969 Nev. Stats. ch. 211 §1, at 286.
19. See 6 Am. Jur. 2d, Attachment and Garnishment §135 (1963).
20. Ch. 305 §2 (amending NRS 41.100(1)).
21. 1969 Nev. Stats. ch. 211 §1, at 285 (NRS 41.100).
22. 93 Nev. 204, 207, 562 P.2d 487, 488 (1977).
23. Ch. 305 §2 (amending NRS 41.100(2)). See also NRS 42.010.
24. Ch. 305 §2 (amending NRS 41.100(2)).
25. 1969 Nev. Stats. ch. 211 §1, at 286.
26. Ch. 305 §1 ¶3 (adding to NRS Ch. 41).
27. Id. §3 (amending NRS 698.180).
28. See generally, NRS Chapter 698.

TORTS; UNIFORM BRAIN DEATH ACT

Adds to NRS Chapter 451

SB 5 (Close and Wilson); STATS 1979, Ch 162

Chapter 162 provides for the adoption of the Uniform Brain Death Act.¹ Although Nevada is the first state to enact the Uniform Brain Death Act, several other states have enacted brain death legislation.²

Chapter 162 provides that for both legal and medical purposes, a person sustaining irreversible cessation of all brain function, including the brain stem, is dead.³ This determination will be made in accordance with reasonable medical standards.⁴ Apparently, the local standard of reasonableness will apply.⁵

Historically, death was defined as the cessation of heart and lung function.⁶ Due to advances in medicine and problems in the criminal law,⁷ another definition was needed. The Uniform Brain Death Act is designed to supply this definition.⁸ Using brain death as the definition may permit more organs to become available for transplant. For example, where a patient's brain function has ceased, but the heart and lungs have been kept functioning thus preserving other organs, termination of a life support system upon removal of organs for transplant will no longer be the "cause" of death.⁹ Similarly, where one injures another person so severely that brain activity ceases, but the injured person is attached to a life support system, the person causing the original injury has caused death and cannot escape liability by arguing that death was caused by the termination of the life support system.¹⁰