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The Florida Death Acts

Leo M. Alpert

THE FLORIDA DEATH ACTS*

LEO M. ALPERT**

THE COMMON LAW

In an early Florida automobile case the view is stated that at common law, conformable with the maxim *actio personalis moritur cum persona,* there was no right of action for injury resulting in death caused by the wrongful act or negligence of another.[1] The writers of *American Jurisprudence,* though agreeing that this was, and is, the general thought, take pains to observe:[2]

> "[E]minent judges have vigorously dissented from and even repudiated the view that at common law no action would lie for causing the death of a human being and have maintained the existence of a right of action in certain cases, at least where the act causing the death was not a capital crime."

Continuing, they state succinctly the various and varied reasons for the common law rule:[3]

> "The common law rule denying a civil right of action against a tortfeasor who wrongfully causes the death of a human being, was, apparently, originally based on the doctrine that by the death the civil injury was merged in the felony. This theory lends no support to the rule where there is no felony. Later decisions, while arriving at the same result, base the rule on the ground that it is inconsistent with the policy of the law to permit the value of human life to become the subject of judicial computation. Some authorities have been content to base their compliance with the stated rule on the maxim

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**A.B. 1932, Johns Hopkins University; LL.B. 1935, Yale University; author of numerous articles in law reviews and other publications; Member of Miami, Florida, Bar, Maryland Bar, and Bar of Supreme Court of the United States.

[1]Nolan v. Moore, 81 Fla. 594, 88 So. 601 (1920).

[2]16 AM. JUR., *Death* §44 (1938).

[3]*Id.* §48.

> 'actio personalis moritur cum persona,' although, as has been pointed out, this maxim does not seem to deal with the remedy for the wrong done to the dependents of the decedent by being deprived of his assistance.
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> "The common law rule denying the right to recover for loss of services caused by wrongful death has been based upon the reason that the relationship, on which the right to sue for the loss of services is founded, is terminated by the death, so that the very act, which gives the right of action, destroys the right of action. None of the various reasons assigned seems entirely satisfactory, and the real, practical foundation of the rule as now established is probably the ipse dixit of Lord Ellenborough in the early case of Baxter v. Bolton."

The inanity of these "reasons" is manifest. And that the "real, practical foundation of the rule" is an ipse dixit of Lord Ellenborough adds shame to horror: the shamefulness, as Justice Holmes once said, of any ruling based on nothing more than "it was once so decided"; and the horror that the person who so decided was the only English judge who can be ranked, in all senses of the word, as the Tory of all time.

Thus, on ipse dixit, "the principle of the common law" became established and with time too deeply embedded to be changed, except by statute; the Florida Supreme Court in 1933 expressed its misgivings about the common law rule, saying that it might have decided the matter differently had it not been for the accretion of over a hundred years.[4]

The common law rule was changed in England in 1846 by Lord Campbell's Act – the prolific and able Lord Campbell of whom it was said sourly that his ponderous *Lives of the Lord Chancellors* and *Lives of the Chief Justices* added new terrors to death.[5] So one lord gave what another had taken away, for the object of the Act was to permit an action for wrongful death to be maintained for the benefit of the deceased's dependents in order that they, in their respective standings as determined by a jury, might be recompensed in some measure for the financial loss caused by the death.

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[4]Florida E.C. Ry. v. McRoberts, 111 Fla. 278, 149 So. 631 (1933).

[5]For other interesting sidelights on Lord Campbell see Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40, 50 (1938).

The pertinent parts of Lord Campbell's Act provide:[6]

"Whereas no action at law is now maintainable against a person who by his wrongful act, neglect or default may have caused the Death of another person, and it is oftentime right and expedient that the Wrongdoer in such case should be answerable in damages for the injury so caused by him: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, 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 (if death had not ensued) 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, and although the death shall have been caused under such circumstances as amount in law to Felony.

"II. And be it enacted, that every such Action shall be for the benefit of the Wife, Husband, Parent and Child of the person whose death shall have been so caused and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such Action shall be brought; and the amount so recovered after deducting the costs not recovered from the defendant shall be divided amongst the before-mentioned parties in such shares as the Jury by their Verdict shall find and direct.

"III. Provided always, and be it enacted, that not more than one Action shall lie for and in respect of the same subject matter of Complaint, and that every such action shall be commenced within twelve calendar months after the death of such deceased person.

"V. And be it enacted, that the following words and expressions are intended to have the meanings hereby assigned

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

> to them respectively, so far as such meanings are not excluded by the context or by the nature of the subject matter, that is to say . . . the word person shall apply to bodies politic and corporate; and the word parent shall include father and mother and grandfather and grandmother and stepfather and stepmother; and the word child shall include son and daughter and grandson and granddaughter and stepson and stepdaughter."

The example set by our brothers-in-law across the sea was followed in the United States, but with many unfortunate results. Few of the state acts followed Lord Campbell's Act strictly in language; many used their own conceptions of what the act was about; and most were confused as to the kind of cause of action created. All were agreed, however, that they had adopted Lord Campbell's Act or a reasonable facsimile thereof. The result has been confusion compounded across the several states of the United States,[7] and Florida has not been left untouched.

THE FLORIDA STATUTES

Florida has three acts, the first of which is Rabelaisian in the grandeur of its obfuscation. What is supposed to be the counterpart of Lord Campbell's Act, usually called the Florida Wrongful Death Act, and hereinafter referred to as the Death Act, was originally enacted in 1883 and has been amended a number of times, although never in salient particulars. Omitting the portion concerning the statutes of limitations,[8] the pertinent parts of Florida Statutes 1955 read:

> "768.01 Right of action for death. —
> (1) Whenever the death of any person in this state shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness, or default of any corporation, or by the wrongful act, negligence, carelessness, or default, of any

[7]See the discussion in 25 C.J.S., *Death* §15 (1941).

[8]On the theory that the Acts create a new and independent cause of action, it was held in an action for wrongful death against a city that the requirement that suit shall be filed within 12 months from the date of injury was overridden by the Death Acts' limitation of two years. Parker v. Jacksonville, 82 So.2d 131 (Fla. 1955).

agent of any corporation, acting in his capacity of agent of such corporation (or by the wrongful act, negligence, carelessness or default of any ship, vessel or boat or persons employed thereon) and the act, negligence, carelessness or default, is such as would, if the death had not ensued, have entitled the party injured thereby to maintain an action (or to proceed in rem against the said ship, vessel or boat, or in personam against the owners thereof, or those having control of her) and to recover damages in respect thereof, then and in every such case the person or persons who, or the corporation (or the ship, vessel or boat), which would have been liable in damages if death had not ensued shall be liable to an action for damages (or if a ship, vessel or boat, to a libel in rem, and her owners or those responsible for her wrongful act, negligence, carelessness or default, to a libel in personam), notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

"(2) The right of action as set forth in subsection (1) above shall extend to and include actions ex contractu and ex delicto.

"768.02 Parties; damages; proviso. — Every such action shall be brought by and in the name of the widow or husband, as the case may be, and where there is neither widow nor husband surviving the deceased, then the minor child or children may maintain an action; and where there is neither widow nor husband, nor minor child or children, then the action may be maintained by any person or persons dependent on such person killed for a support; and where there is neither of the above classes of persons to sue, then the action may be maintained by the executor or administrator, as the case may be, of the person killed. In case of the death of any person solely entitled, or of all the persons jointly entitled to sue, before action brought or before the recovery of a final judgment in action brought by him or them, the right of action or the action as the case may be, shall survive to the person or persons next entitled to sue under this section, and in case of the death of one or more persons jointly entitled to sue before action brought or before the recovery of a final judgment in an action brought by them, the right of action or the action, as the case may be, shall survive to the survivor of such persons so jointly entitled to sue; and in every such action the jury shall give such damages as the

party or parties entitled to sue may have sustained by reason of the death of the party killed; provided, that any person or persons to whom a right of action may survive under the provisions of this act shall recover such damages as by law such person or persons are entitled in their own right to recover, irrespective of the damages recoverable by the person or persons whom he or they may succeed."

The second act, hereinafter referred to as the Death of Minors Act, deals specifically with the wrongful death of a minor:

"768.03 Parties in actions for death of child; damages. — Whenever the death of any minor child shall be caused by the wrongful act, negligence, carelessness or default of any individual, or by the wrongful act, negligence, carelessness or default of any private association or persons, or by the wrongful act, negligence, carelessness or default of any officer, agent or employee of any private association of persons, acting in his capacity as such officer, agent or employee, or by the wrongful act, negligence, carelessness or default of any corporation, or by the wrongful act, negligence, carelessness or default of any officer or agent, or employee of any corporation acting in his capacity as such officer, agent or employee, the father of such minor child, or if the father be not living, the mother may maintain an action against such individual, private association of persons, or corporation, and may recover, not only for the loss of services of such minor child, but in addition thereto, such sum for the mental pain and suffering of the parent (or both parents) if they survive, as the jury may assess."

The third act, hereinafter referred to as the Survival Act, was originally enacted in 1828 and amended in 1951 to read:

"45.11 Actions; surviving death of a party. — No action for personal injuries and no other action shall die with the person, and all actions shall survive and may be instituted, maintained, prosecuted and defended in the name of the personal representative of the deceased, or in the name of such other person as may be provided by law."

These statutes caused the Florida Supreme Court to throw up

its collective hands and cry for mercy. Said Justice Roberts in 1955, speaking for a unanimous Court in *Ellis v. Brown*:[9]

> "Our conclusion, after consideration of all the above-mentioned matters, is that there can be no recovery under the Survival Statute of damages for impairment of earning capacity beyond the death of the injured person. We are cognizant of the anomaly that results from this ruling, in that the wrongdoer will be required to respond in a less amount of damages if the injured person dies, than if the injured persons [*sic*] survives the injury. We must conclude, however, that the problem is essentially a legislative one – and one which, as a matter of fact, arises out of the peculiar provisions of our Wrongful Death Act, rather than the Survival Statute. Thus, contrary to the provisions of Lord Campbell's Act, the prototype of our Wrongful Death Act, under our Act the exclusive right of action inures to the persons named therein, in the order named, and limits the damages recoverable to such 'as the party . . . entitled to sue may have sustained by reason of the death of the party killed,' Section 768.02 Fla. Stat., F.S.A.; whereas, under Lord Campbell's Act, and those of many other states, the right of action is given to the administrator of the deceased person, who sues for the benefit of all the beneficiaries of the estate of the deceased person. . . . As further evidence of the peculiarity of our Wrongful Death Act, it might be noted that where the deceased person left neither spouse nor child or other person dependent upon him for support, so that the cause of action devolves upon the administrator of his estate, such administrator can recover the full value of the loss of prospective estate of the decedent, reduced to present worth. . . . So, again, it might be said that it is cheaper to kill a person who leaves a spouse or child or other person dependent upon him for support, than it is to kill a person who is survived by no one in the designated classes.
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> "But, as noted, the inequalities of the Act should be resolved by legislation and not by judicial pronouncement."

There are inequities in the Death Act in addition to those mentioned by Justice Roberts.

[9] 77 So.2d 845, 849 (Fla. 1955).

First, the Act gives the first right of action to the surviving spouse, regardless of the existence of children. Frequently there are children of the deceased by a previous marriage who are not legal dependents of the surviving spouse. Those children are cut out. If Lord Campbell's Act be read at this point it will be seen that it covers such an eventuality, for the dependents of the deceased recover in their respective statuses and the jury makes the allocation of the award.

Second, in placing the first right of action in the hands of the surviving spouse, the act subjects the children to the mercy of a careless spouse in at least two respects: the surviving spouse may disappear or not care to sue; and the surviving spouse who does sue and collect may deem the award his or her own to do with as he or she may see fit, regardless of the children. Again, Lord Campbell's Act covers these points.

Third, in giving the next right of action to the children of the deceased the Act excludes other dependents. The hazards and partialities of that exclusion are obvious.

Fourth, the Act provides that when there are no dependents the action may be maintained by the executor or administrator of the person killed. This provision is peculiar because the purpose of the Act is to compensate dependents of the deceased for their loss. Therefore, the right given to the executor or administrator does not jibe with the purpose. If there are no dependents, how can there be a person entitled to sue?

Fifth, the Act does not specify the kinds of damage that are recoverable for the wrongful death of adults, simply saying "damages," thus raising a number of vexing questions, difficult to answer because of the absence of legislative expression on what is essentially a matter for legislative policy. The Death of Minors Act, be it noted, does specify the kinds of damages compensable.

In at least one respect, however, the Florida Wrongful Death Act is superior to the original Lord Campbell's Act. The latter limits recovery to the surviving spouse, parents, stepparents, grandparents, children, stepchildren, and grandchildren. But there may be persons dependent upon the deceased who do not fall within those classes. The Florida Act encompasses any person dependent on the deceased, thus providing for a determination of dependency in fact rather than a class limited by law.

It is plain that some of the inequities and flaws in the Death Act can be corrected only by legislation. Nonetheless it is a very real question whether the matters mentioned by Justice Roberts have been

brought upon the Supreme Court by itself. It therefore becomes apposite to consider the decisions of the Supreme Court under the death and survival acts for that reason as well as for the reason that the acts will surely be changed[10] and the existing law is a standard against which the changes can best be measured. The decisions hereinafter considered, however, are limited to those in the automobile accident field, except when a decision outside that field is necessary for an understanding of the case law. There are well over a hundred cases dealing with the death and survival acts, and the following discussion is not intended to be all-inclusive but merely reasonably comprehensive.

WRONGFUL DEATH OF ADULT

a. Suit Under the Death Act

Surviving Wife

In an early case, not involving an automobile, the Supreme Court laid down the standard for damages recoverable by a wife for the wrongful death of her husband:[11]

> "[T]he jury may properly take into consideration her loss of the comfort, protection and society of the husband in the light of all the evidence in the case relating to the character, habits and conduct of the husband as husband, and to the marital relations between the parties at the time of and prior to his death; and they may also consider his services in assisting her in the care of the family, if any, but the widow is not entitled to recover for her mental anxiety or distress over the death of her husband, nor for his mental or physical suffering from the result of the injury. She is also entitled to recover reasonable compensation for the loss of support which her husband was legally bound to give her, based upon his probable future earnings and other acquisitions, and the station or condition in society which he would probably have occupied according to his past history in that respect, and his reasonable expectations in the future;

[10]In 1957 an attempt was made to alleviate some of the inequities by amending §768.02, but the proposed bill was not approved by the Legislature. H.B. 946, Fla. Leg., Reg. Sess., 1957.

[11]Florida Cent. & P.R.R. v. Foxworth, 41 Fla. 1, 76, 25 So. 338, 348 (1899).

> his earnings and acquisitions to be estimated upon the basis of the deceased's age, health, business capacity, habits, experience, energy and his present and future prospects for business success at the time of his death. All these elements to be based upon the probable joint lives of herself and husband. She is also entitled to compensation for loss of whatever she might reasonably have expected to receive in the way of dower or legacies from her husband's estate, in case her life expectancy be greater than his. The sum total of all these elements to be reduced to a money value, and its present worth to be given as damages. . . . Within these limits the jury exercise a reasonable discretion as to the amount to be awarded, based upon the facts in evidence and the knowledge and experience possessed by them in matters of common knowledge and information."

The standard thus enunciated has become the settled law of Florida.[12]

If the Death Act be read at this point it will become apparent that it lays down no such elements of damage. The Act provides that the tort-feasor, who would have been liable in "damages," shall remain liable despite the death and that the jury shall award such "damages" as the party entitled to sue may have sustained by reason of the death.

Thus the Supreme Court, in so far as widows are concerned, eliminated mental pain from the coverage of the Act and allowed loss of consortium, family services, support, and probable prospective estate.

To say that not all states so hold,[13] and to say, further, that Lord Campbell's Act has been steadfastly construed as allowing "pecuniary losses only,"[14] is not to criticize the Florida construction or the interpretative process invoked — for such was necessary — but only to place the Florida law in its proper perspective. In Florida a wife is allowed to recover for the loss of consortium if her husband is killed but not if he is injured.[15] Again, this is not stated in criticism, for the

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[12]Frazier v. Ewell Engr. & Contr. Co., 62 So.2d 51 (Fla. 1952); Stanford Fruit Growers, Inc. v. Frazier, 158 Fla. 135, 27 So.2d 906 (1946); Thrift Cabs, Inc. v. Owens, 156 Fla. 17, 22 So.2d 259 (1945); Southern Util. Co. v. Davis, 83 Fla. 366, 92 So. 683 (1922).

[13]See McCORMICK, DAMAGES §98 (1935); 5 SUTHERLAND, DAMAGES §1265 (4th ed. 1916).

[14]KEMP and KEMP, THE QUANTUM OF DAMAGES IN PERSONAL INJURY CLAIMS 9-10 (1954).

[15]Ripley v. Ewell, 61 So.2d 420 (Fla. 1952).

problem has more facets than it seems; it is brought out because the Court in so ruling said that loss of consortium on death of the husband was allowed because the Legislature so provided in the Death Act,[16] which of course it did not. The allowance was entirely a judicial construction.

Surviving Husband

The surviving husband is entitled to recover for the loss of consortium of the wife, for her services in caring for the family, for the financial contributions made by the wife to the household, and for reasonable funeral expenses.[17] He probably will not be allowed recovery for loss of the prospective estate of the wife, though there are no cases on the point, because the theory of the allowance to the wife is based on her right of dower and there is no curtesy in Florida. The question must be considered open, however, because the wife's right to recover is also stated to be based in part on what she might reasonably expect to receive in legacies from her husband; and the converse here sounds equitable, if it is applicable at all to either, as will later be questioned.[18] But note again that the Court has done all this as a matter of judicial interpretation, for on this point the statute speaks only of "damages."

Minor Child

The elements of a minor child's claim under the Act, when there is no parent surviving, are thus stated by the Supreme Court:[19]

> "(1) The loss of support which the father is in duty bound to give his child during its minority, based on the evidence of his probable future earnings and other acquisitions, such earnings and acquisitions to be estimated upon the basis of father's earnings in the past, his age, health, business capacity, habits, experience and energy, and his present and future prospects for business success at the time of his death; and (2) the loss of attention, care, comfort, companionship, protection, education and moral training of the father which might reason-

[16] *Id.* at 423.

[17] Lithgow v. Hamilton, 69 So.2d 776 (Fla. 1954); see also Potts v. Mulligan, 141 Fla. 685, 193 So. 767 (1940) (funeral expenses).

[18] See p. 173 *infra.*

[19] Triay v. Seals, 92 Fla. 310, 317, 109 So. 427, 430 (1926).

ably have been anticipated in the light of the evidence relating to the character and conduct of the father as such. The sum total of all these elements to be reduced to a money value and its present worth to be given as damages. Within these limits the jury exercises a reasonable discretion as to the amount to be awarded, based upon the facts in evidence and the knowledge and experience possessed by them in relation to matters of common knowledge and information."

Again it is to be noted that the second element stated is a judicial interpretation of the Florida act and that the item of loss of probable prospective estate allowed to the surviving wife is disallowed to the minor child, also as a matter of judicial interpretation.

Other Dependent Person

In so far as a dependent other than a child or spouse is concerned, the item of loss of support needs no authority for inclusion as an element of damages. There would seem to be no reason to deny inclusion of loss of attention, care, and training if in fact they are established by the evidence to have been given by the deceased to the dependent. There do not appear to be any Florida cases on the point.

b. Suit by Administrator Under Combined Death and Survival Acts

The Death Act states that when there are none of the specified classes of persons entitled to sue, no spouse, no minor child, no dependent, the action may be maintained by the administrator or executor of the person killed. This is a peculiar provision. There is no corresponding provision in the Death of Minors Act or in Lord Campbell's Act.

Under the theory of compensating the family or dependents of a deceased for loss caused by wrongful death, the provision allowing action by an administrator when there are no family and no dependents is out of place. If, in fact, no one is hurt by the loss, there is no reason to allow a suit by an administrator.

Lord Campbell's Act and the Florida Wrongful Death Act are both construed to create a new cause of action — not to keep alive an existing one — in favor of the dependents of the deceased.[20] That

[20]There is no doubt of this; all the cases say so. See Ake v. Birnbaum, 156 Fla.

being so, if there is no dependent there should be no suit.

When section 768.02 was enacted in 1883 there was on the books the forerunner of section 45.11, the Survival Act, passed in 1828.[21] The existence of the two statutes should have been a red flag warning the bench and bar that the administrator's suit provision under section 768.02 had to be thoughtfully scrutinized — especially because it was so out of place in a statute aimed at providing for dependents.

Several possibilities were thus presented for judicial interpretation. One was that the administrator's suit provision was intended to tie section 768.02 into section 45.11 to make it plain that when there were no dependents the cause of action would be the one under section 45.11. A second possible interpretation was that the administrator's suit provision was intended to allow recovery for the estate of the deceased.

In *Florida East Coast Ry. v. Hayes*,[22] decided in 1914, the Supreme Court adopted the second possibility, saying that the Legislature intended the administrator to recover "the present worth of the decedent's life to an estimated prospective estate that he probably would have earned and saved . . . to be left at his death."[23] The elements of this recovery were set forth in a later case in this fashion:[24]

> "The jury . . . may consider evidence as to the age, probable duration of life, habits of industry, means, business, earnings, health and skill of the deceased, and his reasonable future expectations. If the evidence shows the deceased's health, habits or other conditions of life to be such that he had no reasonable future expectations of an estate, the recovery would of course be merely nominal.
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> ". . . .
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> "[T]he amount of recovery is not the value of the decedent's life to any one or the public, but the recovery is limited to the present value of an estate which the proofs show the decedent

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735, 25 So.2d 213 (1945), *modified on rehearing, id.* at 745, 25 So.2d at 218 (1946).

[21]The 1828 act, appearing as FLA. STAT. §45.11 (1949), reads: "All actions for personal injuries shall die with the person, to-wit: Assault and battery, slander, false imprisonment, and malicious prosecution; all other actions shall and may be maintained in the name of the representatives of the deceased."

[22]67 Fla. 101, 64 So. 504, 7 A.L.R. 1310 (1914).

[23]*Id.* at 105, 64 So. at 505.

[24]Marianna & B.R.R. v. May, 83 Fla. 524, 527-28, 91 So. 553, 554-55 (1922). Note text discrepancies between Florida and Southern Reports.

> may reasonably have been expected to earn and save had he lived, where the accumulation of an estate by the decedent may reasonably have been expected, and the present value thereof can be ascertained with reasonable certainty from trustworthy evidence upon all matters affecting the probabilities as to life expectancy, physical condition, earning capacity, and opportunities, habits of life and of accumulation and other pertinent circumstances."

Thirty-two years after the *Hayes* case the Supreme Court reaffirmed it in *Ake v. Birnbaum*,[25] with the addition that the administrator, under section 45.11, could also recover for the mental pain and suffering of the deceased and of course for the expenses incurred by reason of the injury. Since that time there has been chaos added to confusion, and the late admission of defeat in the *Ellis* case.

It is unfortunate that *Ake v. Birnbaum* must be picked as the case adding the chaos because the opinion is truly well reasoned and expressed up to the final conclusion. The suit, involving an ordinary death by auto accident, was filed by the executrix of the estate of the decedent, there being no surviving spouse, child, or dependent. The declaration first alleged the items of damage recoverable by the administrator or executor under section 768.02, based on the previous decisions of the Court. Then two additional counts were added based on the "survival of the original action," that is, that the deceased had a cause of action which survived under section 45.11. Finally, after a series of amendments, the suit wound up as a survival of action case alone, claiming damages for loss of services, loss of value in the estate, hospital expenses, medical expenses, pain and suffering, and the like.

Justice Sebring, speaking for a divided Court on rehearing, put the question this way:[26]

> "Where a person sustains physical injuries occasioned by the negligent act of another, and such injured person ultimately dies from the injuries inflicted, without having in the meantime instituted suit against the tortfeasor, may the personal representative of the deceased institute and maintain suit against

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[25]156 Fla. 735, 25 So.2d 213 (1945), *modified on rehearing, id.* at 745, 25 So.2d at 218 (1946).

[26]*Id.* at 748, 25 So.2d at 220.

> the tortfeasor for damages to the decedent, or does the original cause of action die with the injured person or become merged in the action which our wrongful death statute authorizes to be instituted by certain expressly enumerated classes of persons for the recovery of damages for the wrongful death of the person killed?"

The issue, said the Court, had never been squarely presented to it before. The original opinion had been that the Death Act afforded the only remedy, and that the Survival Act could not be applicable because there had been no suit pending at the time of death. Justice Sebring pointed out in incisive fashion, however, the fact that two rights were violated when an injury resulted in death: the right of the deceased to be secure in his person and the right of his family to support. The Wrongful Death Statute, he continued, did not and was not intended to provide for the recovery of damages by the person physically injured. On the contrary, the statute created a new cause of action for the dependents of the deceased, unrelated to the injury to the deceased himself.

As to the Survival Act, Justice Sebring remarked that it could not be said that the Act was intended only to keep alive a suit pending at the time of the death, because of the obviously absurd consequences that would follow.

Then came the conclusion: the cause of action of the deceased survived to her personal representative, who could recover for physical and mental pain and suffering of the deceased, expenses, and the like. That conclusion is good but not good enough, because it did not clarify the matter of the administrator suing under the Death Act for the loss of estate of the deceased, based on the previous decisions. The result was the distinction drawn by the Court in later cases that the administrator could recover under section 45.11 for pain, suffering, and similar damages; and under section 768.02 for loss of estate. The climax of this line of interpretation was that a widow or child or dependent might recover less than a distant uncle who never saw the deceased but who came in as heir under the administrator's recovery for the estate.

But is that a fair or necessary interpretation of the statute?

The Legislature was faced with the problem of what to do on the death of dependents. Suppose the wife dies before she recovers? or the children? or the dependents? In the instance of the surviving spouse the Legislature explicitly provided that the cause of action go

to the next class and that such class recover in their own right irrespective of the damages recoverable by the class ahead. In the instance of the death of the children, the same provision was made as to the dependents. Suppose the dependents die? What then?

If no provision had been made in the Death Act for that contingency, the action would die. There would be no suit whatever, and there would be nothing to survive under section 45.11. But if a provision for an administrator's suit were inserted it would become plain that the Legislature intended an administrator to recover — and that the administrator would not recover more than a dependent might, or have greater or less rights under section 768.02 than under section 45.11, but the administrator's rights as administrator. This interpretation is strongly borne out by the explicit direction in the statute that on death of one class the next class recovers "in their own right," not in the right of those ahead of them.

The interpretation, therefore, that the Legislature did not intend an administrator under section 45.11 to be different from one under section 768.02 is as equally tenable a construction as the one adopted by the Court — and a sounder one because it would relieve the frustration of purpose now complained of. To effect this change from the present law would require nothing more than a change of interpretation.

WRONGFUL DEATH OF MINOR

Suit by Parents Under Death of Minors Act

In *Nolan v. Moore*[27] a twelve-year-old boy had been killed by an individual defendant's employee. The defendant set up two defenses to the action under the Death of Minors Act, one of which came perilously close to success. The first contention was that the act made associations and corporations liable for the acts of their employees but did not so provide as to individuals. Hence individuals could be held liable only for their own acts, because the statute itself made that distinction and the statute, being in derogation of the common law, had to be strictly construed. Only on rehearing did the Florida Court deny the defendant's contention. We may now smile at that "technicality," but there is some feeling among the bar today that a

[27]81 Fla. 594, 88 So. 601 (1920), *modified on rehearing*, 81 Fla. 600, 88 So. 604 (1921).

municipal corporation is not liable under the death acts because "corporation" does not include a municipal corporation.

The defendant's second contention dealt with the "loss of services" clause in the statute. The Court ruled the loss of services to be those to which the parent would have been entitled from the time of death to the time the infant would have reached majority. The sum of $5,000 had been recovered for loss of services and $5,000 for the mental pain and suffering of the parents. A remittitur of $2,500 had been noted by the plaintiff's attorney. The Supreme Court felt that the evidence of earning capacity was meager, for the boy had been a newspaper carrier earning from $2.75 to $3.00 a week, and ordered the loss of services verdict reduced to $1,000.

In *Miami Dairy Farms, Inc. v. Tinsley* the Court made this statement on the standard of damages:[28]

> "The amount of the recovery should be reasonable recompense for parental mental pain and suffering and the value at the date of the trial of fair compensation for services which in reasonable probability the child would have rendered to the parents during the period from the wrongful death to the date when the child would have become twenty-one years of age."

On second appeal it was held that the father could recover for the mental pain and suffering of the mother, even though he alone had instituted the action, and a verdict of $8,000 was allowed to stand.[29]

Damages awarded under the Death of Minors Act are not punitive and must bear a reasonable relation to the facts, the status of the parties, and the "philosophy and general trend of the decisions."[30] A very recent case, however, allowed a verdict of $35,000 to the father of a five-year-old boy, hurt in an automobile accident, who lingered in a semi-comatose condition for some months before he died.[31]

In connection with the action by parents for the wrongful death

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[28]115 Fla. 164, 165, 155 So. 852 (1934).

[29]121 Fla. 774, 164 So. 528 (1935).

[30]Florida Dairies Co. v. Rogers, 119 Fla. 451, 161 So. 85 (1935); see also Florida E.C. Ry. v. McRoberts, 111 Fla. 278, 149 So. 631 (1933).

[31]Hooper Constr. Co. v. Drake, 73 So.2d 281 (Fla. 1954).

of a minor, there would not appear to be any particular problems. The statute is understandable, construable, and the standards of compensation set by the statute are workable.

Suit by Administrator Under Death and Survival Acts

The Death of Minors Act does not contain a provision authorizing suit by an administrator. There is no reason for such a provision because the object of the statute is to give to the parents a right to recover for loss of services and for their mental pain and suffering. Suit by an administrator, therefore, must be founded on another statute, assuming the common law *actio personalis* maxim to be correct.

Here arises a curious thing. Section 45.11 of Florida Statutes 1955 provides that an action for personal injuries does not die with the person and may be maintained in the name of the personal representative. It would therefore be assumed that the right of the administrator to sue for what the child himself could have sued for, had he lived, would be founded on section 45.11. But the language of sections 768.01 and 768.02 covers the death of "any person," whether a minor or not, and provides that, in the absence of surviving spouse, children, or dependents, the administrator of the deceased may sue. There are thus raised, as a matter for judicial construction, three possibilities for suit by an administrator. He can proceed under section 45.11 or under section 768.02, or he can file two suits — one under each section.

In *Miami Dairy Farms, Inc. v. Tinsley,*[32] a companion case to the case of the same name discussed above, the Court stated that the administrator was entitled to recover reasonable compensation for the loss of the probable prospective estate of the deceased minor and, on second appeal, ruled that an award of $1,000 was not excessive.[33] Leaving aside for the moment the question of what is meant by the probable prospective estate of the deceased, what the Court specifically held was that the administrator's suit was founded on section 768.02.

In *Hooper Construction Co. v. Drake,* however, the Supreme Court said:[34]

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[32]115 Fla. 650, 155 So. 850 (1934).
[33]121 Fla. 780, 164 So. 530 (1935).
[34]73 So.2d 279, 281 (Fla. 1954).

> "It might also be noted, parenthetically, that the Administrator claimed damages for the loss of the prospective earnings and savings of the deceased after he reached his maturity, although such damages are recoverable only in a suit by an Administrator under the Wrongful Death Act, Sections 768.01 and 768.02 Florida Statutes, F.S.A. The Administrator's suit was apparently prosecuted under the Survival after Death Statute, Section 45.11, Florida Statutes, F.S.A., in which the Administrator is entitled to recover for the pain and suffering of the deceased, but not for the loss of the decedent's prospective estate. Ake v. Birnbaum, 156 Fla. 735, 25 So.2d 213."

What the Supreme Court was there adopting was the third possibility mentioned above rather than the first. The Court was saying that when a minor is killed the administrator has two actions: one under section 45.11 to recover for the pain and suffering of the deceased and one under section 768.02 to recover for loss of prospective earnings.

With all respect it is suggested that the decision is unsound and unwarranted. It is this type of decision that has created the confusion and frustration finally complained of by the Court in *Ellis v. Brown.*[35]

In the first place, it was a minor who was involved in the *Drake* case. The case of *Ake v. Birnbaum* cited by the Court as authority for the distinction between the two causes of action did not deal with a minor. In the second place, section 768.02 is concerned with compensating the dependents of a deceased, not with the death of a minor. In the third place, section 768.03 is specifically directed toward the wrongful death of minors and hence would seem logically to overrule any application to it of the general wrongful death statute. In the fourth place, as long as an administrator has sued, what basis can there be for denying him damages in one capacity and allowing him damages in another when all the while he has only one capacity — that of administrator. In the fifth place, it is going all around the barn to talk of two suits when the Survival Act, in and of itself, supplies the answer. The *Drake* case is the best proof of this; for in that case the suits were pending when the boy died, and the father amended both suits.

[35]See note 9 *supra* and accompanying text.

According to *Drake,* however, the father should have filed a third suit by himself as administrator to recover for the loss of probable prospective estate. The two-suit administrator theory of *Drake* can also be examined in still another light – that thrown by the fact that a deceased minor might have left a dependent.

Suit by Dependents Under Death of Minors Act

It may be difficult to conceive of a minor having dependents. Dependency is generally thought to be the distinguishing characteristic of minority, and when a minor is no longer dependent he is generally considered to be emancipated. On the other hand, it does not necessarily follow that because a minor has a dependent he is no longer a minor; the minor might, for example, have an illegitimate child but still be a dependent. At any rate, assume that situation to be possible in law in order to develop the analysis; and assume further that the minor is wrongfully killed. In that situation there should be three causes of action and three separate suits: one by the parents under the Death of Minors Act, the next by the dependent illegitimate child under the Death Act, and the last by the administrator of the minor's estate. The elements of damage in each suit are nonduplicating. In the action by the parents their mental pain and suffering is a nonduplicating item; their loss of services would depend upon what services the deceased was actually rendering his parents or would render to majority. In the action by the dependent child the actual fact of dependency and amount of support would determine the loss, so the recovery there would be nonduplicating. In the action by the administrator, the pain and suffering of the deceased and loss of estate[36] would be nonduplicating if the administrator were allowed to sue under section 45.11.

Under the *Drake* decision, however, the action by the administrator is not allowed under section 45.11 except to recover for pain and suffering. To recover for loss of estate he must sue under section 768.02 and can do so only if there are none of the classes of persons named prior to him in that statute. Thus in the case posed for analysis the *Drake* and *Tinsley* decisions bar a right of action

[36]The phrase "loss of estate" or "loss of probable prospective estate" is used by the cases and is here repeated only to stay on the same level. The question of whether loss of estate is a proper element of damage is discussed on p. 173 *infra.*

and a recovery that is essential to full compensation. And — what is of startling moment — this is not a legislative but a judicial bar, created solely by judicial interpretation of the statutes. That interpretation, as it should now be seen, could equally as well have been otherwise.

SOME PARTICULAR ITEMS OF DAMAGE

Loss of Estate

The concept of loss of probable prospective estate has been read into the Florida Wrongful Death Act by the Court,[37] the Act itself providing only for "damages." There is no doubt that Florida has followed a large number of states in allowing loss of probable prospective estate to a widow or an administrator.[38] There is also no doubt that textwriters use that phrase or its equivalent and talk of the savings a deceased might have accumulated had it not been for his untimely death.[39] It is therefore with the greatest diffidence that the suggestion is made that the concept is erroneous, that it accounts in part for the difficulty in making the Death Act workable, and that the idea of "loss of estate" may have resulted from an unthinking inversion of the phrase "loss to estate."[40]

Nowhere else in the law of damages is there any idea of increasing or decreasing compensation to an injured person because he might or might not use the money wisely. A defendant cannot minimize damages by urging that the plaintiff, if awarded $10,000, would fritter it away in a week of riotous living. A plaintiff cannot increase damages by urging that had he been able to work he would have saved his salary or wages, invested the money, and made $10,000 on the $10,000. The plaintiff's qualities of wisdom, industry, thrift, and financial acumen are weighed in assessing the loss of his earning capacity when he has been permanently in-

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[37]See note 12 *supra* and accompanying text.

[38]See MCCORMICK, DAMAGES §99 (1935); RESTATEMENT, TORTS §925 (1939); 5 SUTHERLAND, DAMAGES §1265 (4th ed. 1916).

[39]Even RESTATEMENT, TORTS §925, comment *b* (1939).

[40]"Loss of estate" may be equated with the additional amount which a wife would have received if her husband had not been killed and she had survived him. "Loss to estate" may be equated with the additional amount that would have eventually fallen into the personal representative's hands if the husband had not been killed.

jured, together with his future expectations of bettering himself, and he is awarded compensation accordingly.

The damages are not increased by an amount the plaintiff would have saved because he is frugal; his frugality is taken into account, or should be, when his damages are estimated by the jury in the light of his habits, his attributes of character, and in the light of the jury's experience as men of affairs themselves. Similarly the plaintiff's laziness is taken into account. The compensation is the once-and-for-all and in-full award based on impairment of earning capacity, which does not mean what a plaintiff may be earning at a particular time but does mean the capacity to earn over a lifetime. It is the capacity to earn that is compensated – nothing else. Out-of-pocket expenses are obviously another matter.

Is there an operative difference between a plaintiff permanently and totally disabled and a plaintiff "permanently" killed? Between a partial loss of earning capacity and a total loss of earning capacity?

The object of the case and statutory law is to compensate for the loss caused by death. Omitting for the moment the question of who gets what and how; omitting the out-of-pocket losses and debts incurred; and omitting the elements of damage not recognized in Florida cases – in order to remain with the Florida law as it now is – there is the pain and suffering of the deceased; the entire loss of his earning capacity; and the support, financial and spiritual, given dependents or spouse or children as the case may be. Whence comes the probable prospective estate and on what ground?

Taking the Florida statutes as they now exist, it is a relatively simple matter and one of judicial interpretation to hold that the right of action vested in the administrator by the Survival Act and by the Death Act are one and the same – a right to sue for the pain and suffering of the deceased, the expenses incurred by reason of the injury, and the loss of earning capacity, which is what the deceased could have sued for had he lived. These would be, as they in actuality are, the elements of damage compensable to the administrator. They would be the same whether the deceased was a minor or an adult; they would be nonduplicating and would not cause confusion; they would remain the same whether the deceased had instituted suit and then died before trial, or whether the suit had been instituted only after death. A minor point is that of funeral expenses, which might well be cast into the administration expenses

of the estate and so also recovered by the administrator.

As to the surviving spouse, he or she would recover for loss of support and for loss of consortium. The loss of support is a factual matter that has nothing to do with an estate. The proof of this particular pudding is the eating that the wife or husband would get, for there is a flaw in loss of support that no doubt impelled the Florida Court and others to talk of "loss of estate." That flaw is the obvious inadequacy of damages based on loss of support when the deceased was a miser who stinted himself and his family for mammon. In such an event "loss of estate" seems required for fair compensation. But it is precisely because of this intermingling of concepts that the difficulties have arisen; and, if loss of estate be relied on, the same flaw appears — the inadequacy of damages based on loss of estate when the deceased stinted at nothing for his family.

The flaws at both ends would disappear, however, if loss of earning capacity were recovered and distributed in this wise: to the dependents, the loss of the actual support received; to the estate, the balance. Thus the dependents would recover what they lost by the death, and the heirs of the deceased, including in many instances the dependents, would also get their share of the estate. In this way the problems might well be resolved and at the same time the peculiar "loss to estate" notion, which has created difficulties of moment, would disappear.

For example, McCormick states that different courts adopt different tests for "loss to estate": (1) the present worth of probable net earnings over the lifetime, that is, gross earnings less individual living expenses; or (2) the present worth of savings over the lifetime; or (3) aggregate gross earnings.[41] He indicates that Florida has adopted the second test.[42] But actually savings have very little effect on the computation of "the money value of a man," and the view here advanced as a resolution of the problem can be stated to be in accord with the economics of the situation as Messrs. Dublin and Lotka calculate them in their pioneering work bearing that title.[43] The test of earning capacity, it is suggested, ought to be treated just as it is in the ordinary injury case.

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[41]McCormick, Damages §96 (1935).

[42]*Id.* at 342, n.34.

[43]Dublin & Lotka, The Money Value of a Man (rev. ed. 1946), particularly Appendix D, Table 51.

Punitive Damages

In *Florida Dairies Co. v. Rogers,*[44] dealing with the death of a minor, and *Florida East Coast Ry. v. McRoberts,*[45] dealing with the death of an adult, punitive damages were held not allowable under the Death Acts. The theory of these holdings was that the statutes created a new cause of action and therefore the right was to recover only what the statutes specifically granted.

May punitive damages be recovered under the Survival Act? Logically, if the deceased had filed suit claiming punitive damages and then died, his personal representative should recover the punitive damages that the deceased could have recovered had he lived. If that be so, should the punitive damage suit be barred because the injured person did not live long enough to file it? Again the answer would seem to be in the negative. Both answers are fortified by the new shape given the Survival Act in 1951. The fact that the Survival Act makes no provision for punitive damages is irrelevant — the suit is not by dependents for support but by the personal representative, who is, conceptually, the deceased.

Suppose the tort-feasor dies? Under our Survival Act that death should make no difference, although the *Restatement of Torts*[46] suggests that the liability for punitive damages dies with the tort-feasor.

LEGAL DEFENSES

Estoppel by Judgment

If the deceased had prosecuted and lost an action for his injuries prior to his death, is a subsequent suit under the Death Acts or Survival Act barred? Does loss of suit under one of the Death Acts bar suit under the Survival Statute and vice versa? The answer is yes in both cases. In *Collins v. Hall*[47] an injured husband had sued and lost the case. His widow later sued under the Death Act and a plea of estoppel by judgment was sustained. In a more recent case[48] the widow instituted the action under the Death Act and lost. She

[44]119 Fla. 451, 161 So. 85 (1935).
[45]111 Fla. 278, 149 So. 631 (1933).
[46]§926 (1939).
[47]117 Fla. 282, 157 So. 646, 99 A.L.R. 1086 (1934).
[48]Epps v. Railway Express Agency, 40 So.2d 131 (Fla. 1949).

then had herself appointed administratrix of her husband's estate and sued under the Survival Act. A plea of estoppel by judgment was again sustained. The Court readily acknowledged that "the rights of both the personal representative and the widow or other statutory beneficiary to recover damages against the alleged tort-feasor were separate, distinct and independent rights" but went on to state that these rights "nevertheless were necessarily dependent upon the existence of an original right of recovery in the injured person in the first instance."[49] Justice Sebring, speaking for a unanimous Court, said that although the separate suits were for the recovery of different items of damage, they were based on the same alleged act of negligence, and once it was determined that there was no negligence, any such further suits would be barred by the adverse judgment. The same ruling has been applied to a suit under the Death of Minors Act.[50] Thus the principle, based on sound reasoning, seems to be well established in Florida.

The Immunity Problem

If the deceased could not have sued for the tort, does suit lie nonetheless under the Death Acts and the Survival Act? One aspect of this question was considered and answered by the Court in the fascinating case of *Shiver v. Sessions*,[51] which was not, however, an automobile case. The four minor children of Martha Sessions sued the estate of their stepfather, who had shot and killed their mother, his wife, and had then killed himself. The defendant contended that the Death Act required the wrongful act to be such as would have entitled the deceased to sue had she lived, which is correct of course. From that, the defendant then argued that a husband is immune from tort liability to his wife, which again is correct. The syllogistic conclusion is that therefore the minor children had no right to sue.

But, said Justice Roberts speaking for a unanimous Court, the wife's disability to sue her husband for his tort is personal to her, for the tortious act still remains a wrong, though the law exempts the husband from liability to the wife. The Death Act creates a new cause of action in the statutorily-named beneficiaries for re-

[49] *Id.* at 133.
[50] Rehe v. Airport U-Drive, Inc., 63 So.2d 66 (Fla. 1953).
[51] 80 So.2d 905 (Fla. 1955).

covery of the wrongful invasion of *their* rights as distinguished from the rights of the deceased. Hence, the stepchildren could recover. Two additional reasons were added: the immunity based on preserving marital harmony disappears when the spouse is killed; and the Legislature could not be said to have intended that the wife's disability to sue her husband should be a bar to suit by the wife's surviving children.

This Florida view, says a commentator,[52] is that of a recently growing minority and is sound. The case, however, involves not merely a weighing of one logic or one interpretation against another. There are other and deeper facets.

The crushing weight of authority is that a minor child has no right to sue his parent in tort,[53] and there does not appear to be any Florida decision to the contrary. It is true that there is some conflict over whether a minor child can sue, in tort, a stepparent or one standing in loco parentis; and it is indicated that all such cases that have allowed recovery have been based on a deliberate or malicious wrong.[54] In *Shiver* – a murder case – there was no discussion of this parental immunity. The case turned on the marital immunity point alone. The immediate question therefore is whether the fact that the children were stepchildren of the tort-feasor had any operative significance. A question of equal consequence is whether the fact that the tort was a murder had any operative significance. From the opinion alone, neither of these two questions can be answered.

Shiver, therefore, cannot be quoted as authority for holding that the children of a deceased parent killed by the negligence of the other parent can recover under the Death Act. *Shiver* is authority only for the proposition that the *marital immunity alone* will not bar a suit under the Death Act. Thus, should a case arise in which the husband and wife, driving in the husband's car, are killed by the negligence of the husband and the wife leaves no children but only a dependent – say a distant cousin whom she supported – that dependent could certainly recover under the *Shiver* doctrine. Should that assumed case involve children of the husband *and* wife suing to recover, the conclusion is questionable.

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52 9 U. FLA. L. REV. 110 (1956).

53 39 AM. JUR., *Parent and Child* §90 (1942); 67 C.J.S., *Parent and Child* §61 (b) (2) (1950).

54 39 AM. JUR., *Parent and Child* §90 (1942).

Now change the assumed case by having the wife leave no children and no dependents, with the suit brought by the wife's administrator. Can the administrator recover? It happens that to *Shiver* there was a companion case, *Sullivan v. Sessions*,[55] in which the same wife's administratrix brought suit against the husband's administrator under the Survival Act. That suit failed, because, said Justice Roberts again speaking for a unanimous Court:[56]

> "There [in *Shiver v. Sessions*], we were concerned with a suit based on a right of action entirely distinct from that which the wife could have maintained during her lifetime, except for her disability to suit [*sic*] her husband; here, we are concerned with precisely the same right of action, brought 'in the name of the personal representative of the deceased,' Section 45.11, to recover 'the damages which deceased could have recovered had he lived and maintained the action.' Ake v. Birnbaum, 156 Fla. 735, 25 So.2d 213, 220. See also Ellis v. Brown, Fla. 1955, 77 So.2d 845. The wife during her lifetime would have no right of action against her husband on account of his tortious act, under the common-law rule referred to above; her personal representative simply 'stands in her shoes' and can have no greater rights than she should have had during her lifetime. The action cannot, therefore, be maintained."

Does that ruling also apply to a similar suit by an administrator under section 768.02? The Florida cases have drawn a distinction between an administrator under section 45.11 and under section 768.02. If that distinction be followed, it would seem that an administrator under section 768.02 can recover. Now *Shiver v. Sessions* is placed in proper perspective for examination. That marital immunity alone should not bar an action under the Death Act is the view now adopted in Florida. One cannot quarrel with that view, for it is an expression of policy reached through judicial interpretation by those whose responsibility it is to enunciate such views by that process; and counter policy reasons are not of appreciably greater force. On the matter of parental immunity, however, other policy considerations arise that cannot and should not be taken as foreclosed by *Shiver*.

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[55]80 So.2d 706 (Fla. 1955).
[56]*Ibid.*

CORRECTIVE LEGISLATION

The 1957 Legislature saw introduced but killed in committee (it is said that plaintiffs' lawyers objected) House Bill 946 by Messrs. Sweeny and Karl of Volusia County, a workmanlike effort to correct the appalling Florida situation. The bill would not have changed the Death of Minors Act nor the Survival Act, nor even the confusing but understandable section 768.01. Section 768.02 would have been completely rewritten; and it is fruitful to set out the pertinent provisions of the bill, together with comment.

The Bill	*Comment*
Section 768.02 (1). "Every such action shall be brought by and in the name of the personal representative for the use and benefit of the following: (a) the surviving spouse and children of the person killed and the estate of the person killed; or, (b) if there be neither surviving spouse nor children, then the surviving parent or parents, if any, and such persons as may be dependent for support on such person killed, and the estate of the person killed."	This is certainly a step in the right direction. Instead of fixed priorities, however, would it not be better to allow the actual factual loss to be ascertained by this type of statute: Every such action shall be brought by and in the name of the personal representative for the use and benefit of the following, there being no priority intended in the enumeration: surviving spouse, child or children, parent or parents, such persons as may be dependent for support on the person killed, and the estate of the person killed.
Section 768.02 (2). "The jury, or the court, if there by no jury, shall award such damages to each of the persons for whose use and benefit the action is prosecuted as such person may have sustained by reason of the death of the person killed and shall award such damages to the personal	This paragraph is excellent. The only change that might be suggested is that the word "person" where it last appears be followed by the phrase "or the estate." This paragraph together with the preceding paragraph now establish a loss to be determined factually: What did

representative for the use and benefit of the estate, as the estate may have sustained by reason of such death. In every such case the jury or the court, if there be no jury, shall specify the amount apportioned to each person for whose use and benefit the action is prosecuted."

each dependent person and the estate actually lose by the death?

Section 768.02 (3). This paragraph provides for approval by the court of a compromise settlement, and for the court to apportion the proceeds of such an approved compromise settlement.

The only suggestion here is that both the probate court and the court in which the action may be pending approve the compromise.

Section 768.02 (4). This paragraph provides that the amount recovered for the use and benefit of others than the estate not be assets in the hands of the estate. The paragraph further provides that priorities be had if the amount collected is insufficient to pay the awards in full.

It is suggested that there be no priorities in law; that there be a pro rata distribution on insufficiency.

Section 768.02 (5). "Nothing herein contained shall be taken to impair the rights of any parent to maintain an action for the death of his or her minor child under the provisions of section 768.03, Florida Statutes, 1955, which rights are expressly preserved, provided, however, that no recovery may be had under the provisions hereof for the use and benefit of any parent who shall have recovered or on whose behalf a recovery has been had

This again is an excellent step; but it is suggested that the paragraph make explicit the losses arising from death of minors by this language: Nothing herein contained shall be taken to impair the rights of any parent to maintain an action for the death of his or her minor child under the provisions of section 768.03, Florida Statutes, 1955, which rights are expressly preserved. Only a dependent of a minor, if such exists, can re-

under the provisions of said section 768.03."

Section 768.02 (6). "Nor shall anything herein contained be taken to limit or impair any right which the personal representative would otherwise have to institute, maintain or prosecute an action for personal injuries which shall have been sustained by the person killed and which shall survive under other provisions of law. And such other action as shall survive may be joined with any action maintained under the provisions of this section."

cover under this act, save as mentioned in section 768.02 (6).

Again an excellent step. The Survival Act is untouched. One sentence might be added to make the application clear, namely: The object and purpose of this act is to preserve and limit to parents their rights under section 768.03, to preserve and limit to dependents their rights under section 768.02 as now amended, and to preserve and limit to the personal representative of the deceased, whether or not a minor, those rights for which the deceased might have sued had he or she survived.

It is to be noted, however, that the bill does not contain the elements or any standards for the measure of the various damages. From all that has been previously discussed in this rather lengthy article, it is hoped that the problems of the elements of damage have been made sufficiently plain to be handled legislatively.

The truly appalling situation in Florida arising out of our Death Acts cannot be overemphasized. The grief, misery and travail, loss and destitution, are unnecessary. The Death Acts must be changed. Our Supreme Court has itself asked that.

TABLE OF HEADINGS AND SUBHEADINGS