1896

Homicide as a Tort

Willard F. Smith
Cornell Law School

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Thesis presented by

Willard F. Smith

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Cornell University

School of Law.

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HOMICIDE AS A TORT.

In dealing with this subject we have one which has undergone almost every conceivable change, so far as a right of action at law is concerned. Under the early English Law no such thing was known as a civil action against a person who had wrongfully caused the death of another.

The historical origin of the common law rule denying a right of action to recover damages for wrongfully causing the death of a person, was a careless remark in an opinion of an early judge, in which he said that the tort was merged in the crime. Other reasons are ascribed for the rule. Some seem to be based on sound reasoning and others are more or less without depth. Homicide was punishable criminally by death and forfeiture of estate; therefore it would be useless to bring a civil action for money damages. Some also urged that it was contrary to good public policy and sound morals that a price should be placed on human life. This seems to be a rather weak argument, for because human life cannot be fully estimated in money, is that any reason why the personal representatives, heirs or next of kin to the deceased should receive no compensation whatever? A general rule of the common law was that all personal injury actions die with the person of either party, and it was within this rule that our

subject was placed by some of the early jurists. In all felonies except homicide the tort was said to merge in the crime and on the ground already mentioned,- forfeiture of estate. From time to time the courts have relaxed the rule as to felonies other than homicide. Actions have been allowed to survive against the estate of the deceased for trespass and other injuries to property, but this is beyond our subject and we will not consider it further.

Perhaps the barbarous rule of the common law may best be shown by the striking example of its application in the case of master and servant. If a servant was totally disabled for life, his master might sue for the loss of his services, but if the servant was killed outright, no action would lie. In either case the loss to the master was the same; in the one he could recover, but in the other not.

The last effort to overthrow the old rule of the common law was made by Judge Dillon in the United States Circuit Court in the case of Sullivan v. Union Pacific Railway Company, 3 Dill. 334. In this case an action was brought by the father of a boy seventeen years old, who had been in the employ of the defendant company and by their negligence was injured so that death followed in six hours. The damages asked for were (1) the value of the boy's services from the time of his injury till he would have been of age; (2) medical services; (3) nursing; and (4) burial expenses; the whole amounting to $3,412.00. The petition was demurred to as showing on its face no cause of action. The demurrer was over-

ruled and plaintiff allowed to recover. The learned judge in closing his opinion said: "In view of the tenor of the cases, some of which however are not well considered, and all of which rest upon Baker v. Bolton, it requires some courage to disregard them; but as the rule they assert is incapable of vindication, and cannot be shown to be deeply rooted in the common law, my judgment is that I am free to decide the rights of the parties without applying it."(a)

The earliest English case on the subject was Baker v. Bolton, 1 Campb. 493, decided in 1808. Lord Ellenborough, in his opinion, said that "in a civil court the death of a human being cannot be complained of as an injury." Another judge said there could be no action for damages, as death was an injury to the crown, thereby expressing the prevailing idea that the tort was merged in the crime. The later case of Osborn v. Gillett, 8 Exch. 88 (1873), held in accordance with Baker v. Bolton, that a master could not maintain an action for the tortious act which caused the immediate death of his servant. The majority of adjudicated cases on the subject have arisen under the head of master and servant. Some have held that the master could recover for loss of services up to the time of death, and others that there could be no recovery at all.

The early leading cases in America(b) decided that a father could not recover for the services of his infant son,

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(a) Sullivan v. U. P. Ry. Co., 3 Dill. 334.
(b) Carey v. Berkshire Ry. Co., and Skinner v. Housatonic Ry. Co., 1 Cush. 475,- 1848.

nor a wife for the services of her husband. Strange to say, both of these cases were considered on the same ground, while in reality a wife at common law was never supposed to be entitled to the services of her husband. Some of the American courts have also held that a master could recover for the services of his servant up to the time he died.(a) Several more recent cases are to be found, but none of them have passed upon the question. Some have passed it by un-noticed, or, as was done in one case, held without any apparent thought, that there could be a recovery for services of the infant until he would have been of age.(b) However, in Green v. Hudson River Ry., 2 Keyes 294, decided in 1866, the New York Court of Appeals held in accordance with Baker v. Bolton. In 1 Central Law Journal 622 is to be found a very able discussion of this subject, and of Judge Dillon's decision in Sullivan v. Railway. We learn from that article that the question arose long before Baker v. Bolton, and in fact is casually mentioned by Blackstone. Even in our own country we find a decision exactly the same as Judge Dillon's and fourteen years before Baker v. Bolton was decided.(c) In that case a husband was allowed to recover $200.00 expenses for a negligent operation, causing the death of his wife. Our judges today would do a lasting service to American jurisprudence if they would depart from the decisions of English courts which in fact are

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(a) Eden v. Lexington Ry. Co., 14 B. Monroe 204,- 1853.
(b) Pach v. New York, 3 Comst. 489, 493,- 1861.
Whitford v. Panama Ry., 23 N. Y. 465,- 1861.
(c) Cross v. Guthrie, 2 Root (Conn.) 90,- 1794.

not fixed principles of the common law,and follow the example of Judge Dillon, by rendering their decisions according to principle and ideas of right and justice.

In the year 1846 there was passed in England an act, 9 & IO Vict., Chap. 93, entitled "Lord Campbell's Act", which wrought an entire revolution in the law on this subject. The preamble of the act recites the inability to maintain an action at common law, for wrongfully causing death, and the conspicuous injustice resulting from such a state of the law. The statute then continues,- "Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the Lords, Spiritual, 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 a 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." Further provisions of the act prescribe that the action shall be brought by the executor or administrator, and in favor of the wife, husband, parent and child of the decedent. It must also be brought within twelve months from the date of the injury. No limit is placed on the amount of damages the jury

may award, and the amount so awarded is to be apportioned among the above named survivors of the decedent as the jury shall direct. It is plain from the very words of the statute that its originator considered the tort merged in the crime, under the common law.

The legislatures of the various states in this country were not slow to see the justice of such an act and to take up the line of advancement. The first one to take the step was that of New York, and we find in Chap. 450, Laws of 1847, provisions similar to those of 9 & 10 Vict. The statute provides for an action by an executor or administrator, on behalf of the wife, husband, parent and child of decedent, and the amount recovered to be distributed as unbequeathed assets. Under the New York State Constitution, as amended in 1894, Art. I, Sec. 18, the time limit was extended to two years and the amount limit entirely removed. The present laws in New York are to be found in Sections 1902 - 1905 of the Code of Civil Procedure: however, a careful consideration of them, and a comparison and examination of the statutory enactments of the other states of the Union, we will make later. We will therefore omit that for the present.

Items of Recovery:-

Probably no statutes in this country have caused more litigation that the ones which were enacted in the different states similar to Lord Campbell's Act. Now that an action may be maintained, a perplexing question has arisen as to what elements shall enter into the bill of damages, to be

assessed by the jury. (Perhaps the best way to consider the subject is to take up separately some of the items of damage which have been considered in adjudicated cases.)

In England it has been held that there can be no recovery under the statute unless actual damage is shown. The mere fact of a moral wrong is not sufficient to warrant a jury in awarding damages. But in this country, where the statute fixes a maximum sum of recovery, there can be a recovery without any special showing of loss.(a) In Kansas it was held that nominal damages might be recovered although the life of the deceased was of no pecuniary value to the next of kin.(b) However, in general, both in this country and in England, something more than an injury to affections and feelings, or loss of society, must be shown, to maintain an action. Exemplary damages are therefore not to be allowed unless the statute expressly, or by fair implication, so stipulates. Some statutes have such provisions, but they are not by any means common. These statutes are unquestionably made for the benefit of parents, and even though the life of a child until it would be of sufficient age to render services, is purely a matter of speculation, yet there may be a recovery in such an instance. In Monroe v. Pacific Co., 84 Cal. 514, the question of elements of damage was fully considered and discussed. That was an action brought by a mother for the death of her son. The

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(a) 7 Ohio 336; 35 Pa St. 60; 15 N. Y. 432.
(b) 33 Kans. 543.

original liability of the defendant was first discussed and is worthy of brief consideration. The defendants were blasting in a thickly settled portion of the city and as a result of such blasting the plaintiff's intestate was killed. The defendants attempted to excuse themselves by showing (1) that they used all care possible in such work, and (2) that the men employed were fully competent to carry on the work. The court held that this was no excuse; that if the work could not be carried on without the sacrifice of human life, it must not be done at all. It was also held that the mother of the deceased could recover (1) for all pecuniary loss sustained by her on account of her son's death, and (2) for the loss of his comfort, society and protection. In allowing comfort, support and protection as items of recovery it will be seen that the case still does not contradict the general rule that these elements of loss are not in themselves sufficient to warrant a jury in awarding damages.(a) It has been held in New York that it is proper for the jury to consider the funeral expenses in their judgment, where any of those for whom the action is brought are legally bound to pay such expenses.(b) The Arkansas court has decided that a mother can recover under the Arkansas statute for the death of an infant child, expenses of medical attendance, nursing, and burial, and reasonable compensation for the loss of probable services of the child during minority. But the statute gives no com-

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(a) Pollock on Torts, pp 45 - 6; Simmons v. McConnell, 86 Va. 494; Matthews v. Warner, 26 Am. Rep. 396; Louisville v. Orr, 91 Ala. 548.

(b) Murphy v. R. R., 88 N. Y. 445.

pensation for the loss of companionship and association of the child, or the grief of the mother at its death.(a) In New York, prior to 1895, and in other states where the jury are limited to a certain amount in making their award, the question has arisen whether maximum damages may be allowed for the death of an infant. In New York the Court of Appeals held that such an amount might be awarded in a case where a sufficient loss was proven, but in no case should vindictive damages be allowed.(b)

Another question of importance is that concerning the recovery for possible services of an infant after minority. In general we think it may be said to depend upon whether or not the child may be compelled to support a parent after reaching majority. In most states statutes are to be found providing that minor children and children of full age shall contribute to the support of their parents in case the latter are likely to become a public charge. In Maryland it has been decided that in estimating the damages in an action for causing the death of a minor, the pecuniary benefit to the parents, of the life of the deceased, after his minority, can be considered only after proof of the indigent and dependent condition of the parents.(c) On the contrary, the New York Court of Appeals held that in estimating the pecuniary value of the child, the jury are not bound to confine their

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(a) Little Rock Co. v. Barker, 33 Ark. 350.
(b) Bierbaur v. R. R., 15 Hun. 562-4; affirmed 77 N. Y. 558. See also Ross v. R. R., 44 Fed. 47-50; Potter v. R. R., 21 Wis. 372; Kansas Co. v. Daughty, 88 Tenn. 721.
(c) Age Co. v. State, 70 Md. 400.

considerations to the minority of the child, but they may consider all the probable or even possible benefits its life after minority, modified as in their estimation it should be by all the chances of failure or misfortune.(a)

Returning to the general subject of items of recovery, we have an important case in New York.(b) This was an action to recover damages for the death of the plaintiff's intestate, under Chap. 450 of the Laws of 1847. The defendant's counsel asked the court to charge the jury as follows:- "Where the children are of full age and living away from the home of the deceased and are supporting themselves, no such pecuniary loss has been sustained by them as can be recovered for in this action. If the jury find from the evidence that such a state of facts existed here they cannot include in their award any pecuniary damages resulting to them." The court refused so to charge, but said that if the damages awarded by the jury were excessive, the power of the courts to set aside such a verdict must be invoked. We think it is to be reasonably inferred from this remark of the court that unless parties plaintiff, who are children of the decedent and in independent circumstances, can clearly show special damage, their recovery will be nominal damages only. Attempts have been made to recover for the physical suffering of the deceased, and the mental suffering of the surviving members of the family, but we find no case in which the attempt was

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(a) Birkett v. Knickerbocker Co., 110 N. Y. 504.
(b) Lockwood v. N. Y. L. E. & W. Ry., 98 N. Y. 523.

successful.[a] There is a conflict of the decisions in the different states concerning comfort and society as items of recovery, but as that topic comes more properly under the analysis and construction of the various statutes, we will reserve it for later consideration.

The next two, and last, items of recovery to be considered, are medical attendance and funeral expenses. It seems to be the general holding that the expenses of medical attendance may be taken into account by the jury in making their award.[b] As to funeral expenses, however, there is again a conflict. The states of the Union seem to be uniform in holding that such expenses are allowed to go to the jury as items of damage.[c] In England, however, it is different. Funcral and mourning expenses are not to be compensated for, on the ground that they are not the loss of any benefit that could have been had by the deceased person's continuing in life.[d] In leaving this branch of the subject we may safely say that in general any actual definite loss and prospective general damages may be recovered for, under the statutes.

We next take up the matter of evidence. What evidence is admissible to show damages? To augment or reduce them? In general it may be said that evidence may be introduced to show such damage as may be recovered for; that is to say, actual loss and prospective benefits. It is clear that

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(a) Duckworth v. Johnson, 4 H. & N. (Eng.) 653; Monroe v. Pacific Co., 84 Cal. 514; Telfer v. Ry., 30 N. J. L. 209.
(b) Little Rock Co. v. Barker, 33 Ark. 350.
(c) Murphy v. R. R. Co., 88 N. Y. 445; Little Rock Co. v. Barker, 33 Ark. 350; Monroe v. Pacific Co., 84 Cal. 514.
(d) Pollock on Torts, p 46; Dalton v. S. E. R. Co., 4 C. B. N. S. 296; Franklin v. S. E. R. Co., 3 H. & N. 211.

evidence is not admissible to show that the defendant paid medical attendance.(a) It is to be noticed that the court gave as the reason for not admitting the evidence, that as the executor or administrator could not recover for such expenses, the defendant ought not to be allowed to show them in bar, or in mitigation, of damages. This is directly contrary to the doctrine of Murphy v. R. R., 88 N. Y. 445, but, of course, is merely dictum. On the other hand, the plaintiff may show that a grown-up son has been in the constant habit of making presents, or even has occasionally helped his parents in hard times.(b) Nor need a legal right to such benefits be shown.(c) Life expectancy tables are to be admitted in evidence for the purpose of showing the probable duration of life, upon judicial notice of their genuineness and authoritativeness.(d) No legal proof of these requisites is necessary, but it is proper for a court to inform itself in the premises by reference to books or other sources of information. Such tables are not conclusive, but their value in a given case is largely analogical.(e) They must speak for themselves and are not to be testified to as to their contents.(f) The action allowed to the executor or administrator by the statutes is merely in substitution of the right of action in favor of the decedent, had he not died, and is in no way cumulative. The words of

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(a) Murray v. Usher, 117 N. Y. 542.
(b) Pollock, p 46; Hetherington v. N.E.R.Co., 9 Q.B.D. 160.
(c) Franklin v. L. E. R. Co., 3 H. & N. 211.
(d) Sauter v. Ry., 66 N. Y. 50.
(e) Denman v. Johnson, 85 Mich. 387.
(f) Scheffler v. Ry., 32 Minn. 578.

the act are "...that the act, neglect or default is such as would (if death had not ensued) have enabled the party injured to maintain an action and recover damages" etc., and when examined carefully it is easy to see that they mean the right of action is merely transferred, and not a new right created. The statute expressly says the right of action will survive to the executor or administrator when the person injured is prevented from bringing the action by reason of death. When the person injured brings suit and accepts satisfaction for his injuries during his lifetime, no right of action will survive to his personal representatives. If a recovery before death were not a bar to further actions after death, the rights of the person injured would be prejudiced and ante-mortem settlements would be in a large measure prevented.(a) The general rule as to who is liable to such an action covers both natural persons who, and corporations which, wilfully or negligently cause the death of a person.(b) A city is liable for the death of a person killed by a mob.(c) The sheriff is also liable for negligently allowing a mob to kill a prisoner in his custody.(d) A state, however, cannot be sued except as the legislature so stipulates. In New York the state has agreed to be liable in damages for injuries received through the negligence of its officers on the canal works only.(e) Phy-

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(a) Pollock on Torts, pp 46-47; Read v. G. E. R. Co. (Eng.) L. R. 3 Q. B. 555; Littlewood v. Mayor of New York, 89 N. Y. 24; Hecht v. D. & M. R. R. Co., 32 N. E. 302; Cooley on Torts, pp 309-310.
(b) N. Y. Code of Civil Procedure, 1902-1904.
(c) Comitey v. Parkerson, 50 Fed. 170.
(d) Asher v. Cakell, 50 Fed. 818; N.Y. Gen. Mun. Law, Sec. 12.
(e) Bowen v. People, 108 N.Y. 166; Lewis v. State, 96 N.Y. 71.

sicians are liable civilly for death resulting from malpractice,[a] and a wilful murderer is likewise liable, and no act of the deceased which provoked the assault can be put in evidence so as to render applicable the doctrine of contributory negligence.[b] Dedendants have sometimes tried to give evidence to reduce the plaintiff's damages, by showing that the surviving relatives were benefited by the death of the decedent. They have attempted to show that the surviving relatives were benefited by coming sooner into their inheritance;[c] or by receiving insurance monies;[d] and they have sometimes gone so far as to try to show that the widow of the deceased married a better man, or that the husband's habits improved after his wife's death.[e] But in all such cases the judge has excluded such evidence as being disreppectful to the court.

We will now consider briefly, in conclusion, the statutes of the various state of the Union. They generally provide substantially the same as Lord Campbell's Act,- that is to say, they give a right of action in case of wrongful death, which did not exist at common law. Many slight variations exist, some of which it will be well to consider. Lord Campbell's Act provided for a civil action when death was caused by "the wrongful act, neglect or default" of the defendant, and such act, neglect or default is such as would

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(a) Gores v. Graff, 77 Wis. 174.
(b) Kain v. Larkin, 56 Hun. 79.
(c) Terry v. Jewett, 78 N. Y. 338.
(d) Carroll v. Ry., 88 Mo. 239.
(e) Davis v. Guarneri, 45 Ohio St. 470; Georgia Ry. v. Garr, 57 Ga. 277.

have entitled the injured person to maintain an action if death had not ensued. Most of the American states have followed the language of the English statute. Some, however, have in terms provided for the survival of the action of the party injured and some do not expressly provide that the act, neglect or default must be such as would have entitled the party injured to maintain an action. The language of the statutes varies, however, in the description of the act or default. New York, Massachusetts, and some other states have adopted the words of the English Act. In Indiana, Oregon, Kansas, Minnesota, Oklahoma and Washington the words used are, "wrongful act or omission"; in Mississippi, "wrongful or negligent act or omission"; in Texas and Arizona, "wrongful act, negligence, unskillfulness or default"; in Delaware and Pennsylvania, "unlawful violence and negligence"; and in Georgia action lies in case of "homicide", which includes all cases where death results from a crime or any negligence. The action is allowed for the benefit of the widow and next of kin, or other members of the family, and it therefore follows that unless there are some such beneficiaries the action will not lie; and they must be living at the commencement of the action. Some of the statutes provide that the action shall be brought by some member of the family or next of kin; others by the executor or administrator, and a few allow the beneficiaries to bring the action themselves, direct. Most of the states provide that the amount recovered shall be distributed among those for whose benefit the action is brought,

free from the claims of creditors of the decedent's estate. The act or neglect must have been such as would have entitled the party injured to maintain an action. This clause imposes a condition precedent to the maintenance of the statutory action. Most of the states have the condition clearly expressed, while others have not, but in every case where the question has arisen the condition has been implied. The condition has reference, of course, to the circumstances under which the injury arose, and to the nature of the act or default, rather than to the loss or injury sustained by the injured person.

Contributory negligence is always a defense to the statutory action, as it would have been a defense if the action had been brought by the deceased. But under Chap. 57 Sec. 3 of the general statutes of Kentucky, which provides for the recovery of damages where the life of the person is lost by "willful neglect", contributory negligence is no defense. When the statutory action is brought by the parents of the deceased person, direct, contributory negligence on their part is held to be a defense in some states,- Illinois, Texas, Pennsylvania, Missouri and Arkansas.(a) In Iowa, Virginia and Ohio it has been held that contributory negligence on the part of the parents, even when they are the sole beneficiaries, is no defense to an action brought by them.(b) Contributory negligence on the part of the personal representa-

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(a) Penn. Ry. Co. v. James, 81 Pa. St. 194; St. Louis etc. Ry. v. Freeman, 36 Ark. 41; Reilly v. Hannibal etc. Ry., 94 Mo. 600.

(b) Weymore v.Mahaska Co.78 Ia.396; Norfolk Ry. v.Groseclose 13 S.E.R.454; Cleveland v. Guaruieri, 45 Oh. St. 470.

tives is no defense.[a]

Must the death be instantaneous? Under the statutes which provide in terms substantially as Lord Campbell's Act, it makes no difference, but under some of the state statutes, notably that of Massachusetts, it has been repeatedly held that no action will lie if death is instantaneous. The Massachusetts statute provides for a survival of action and not for the creation of a new one. It reads,- "the action for trespass on the case for damages to the person shall hereafter survive; so that in the event of the death of the person entitled to bring such action or liable thereto, the same may be prosecuted or defended by or against the executor or administrator[b] in the same manner as if he were living. Under this rule it has been repeatedly held that no action can be maintained where the death was instantaneous. However, under the majority of such statutes it has been held that this question is immaterial.[c]

In regard to damages, the main feature of Lord Campbell's Act, and the state statutes, is that the damages to be recovered are solely such as result from the death to the persons for whose benefit the action is given. This feature is common to all the states, with the following exceptions:

(1) The acts of Iowa, Oregon and Washington, as construed by the courts, provide that the damages, except in

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(a) Indiana Mfg. Co. v. Millican, 87 Ind. 87.
(b) Moran v. Hollings, 125 Mass. 83; Riley v. Conn. Ry., 135 Mass. 282. Hollenbeck v. Berkshire Ry., 9 Cush. 478.
(c) Murphy v. Ry. Co., 30 Conn. 184; Nashvile Ry., v. Prince, 2 Heisk. 580.

actions by parents, shall be such as result from the death, to the estate.

(2) The acts of North Carolina, Virginia and West Virginia, as construed by the courts, provide for a recovery notwithstanding that there may be in existence no one of the relations for whose benefit the action is primarily given.

(3) The statute of Connecticut stands alone, in providing simply for a survival of the right of action, and consequently for the recovery of such damages as result to the person injured.

(4) The acts of Louisana, New Hampshire and Tennessee provide for the recovery, both of such damages as result to the person injured, and to the beneficiaries from the death.

(5) The act of Georgia provides that the measure of damages shall be the full value of the life, without deduction for the expenses of the deceased, had he lived.

(6) The acts of Maine and Massachusetts provide for a forfeiture, to be recovered by indictment. In Massachusetts a civil action may also be maintained under certain circumstances, in which damages are assessed with reference to the degree of culpability of the defendant.

We have now completed a brief history of the origin and evolution of our subject, and have glanced at the main features of the statutes appertaining thereto in the different states of the Union. For a more perfect idea of the manner in which these statutes are applied, and the interpretation of them, we must refer to the reports, which contain

cases extremely varied and almost without number.