

Recovery for Wrongful Death

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Recommended Citation

James W. Carpenter, *Recovery for Wrongful Death*, 53 Cornell L. Rev. 171 (1967)
Available at: <http://scholarship.law.cornell.edu/clr/vol53/iss1/11>

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Recovery for Wrongful Death. STUART M. SPEISER. New York: Lawyers Co-Operative Publishing Company. 1966. Pp. 1094.

Wrongful death statutes vary from state to state. Any descriptive effort must, therefore, be general in nature, with specific examples framed to illustrate the law's development. Speiser undertakes to describe the anatomy of wrongful death law in this way, and succeeds in identifying its outlines and significant markers without obscuring them with an overabundance of detail. The book reflects his broad experience as plaintiff's counsel in wrongful death cases and contains many apt illustrations taken from his firm's own files. His actuarial charts on life expectancy and his suggestions concerning proof of facts are particularly helpful to the trial practitioner. Nonetheless, Speiser perpetuates the fuzzy language which obscures much of tort law, and fails to appraise sufficiently the law he undertakes to survey. His book, while useful as a case finder and an outline, does not meet the need for a thorough re-examination of the theory, purpose, and statutory expression of the law allowing recovery for wrongful death.

Development of the Action for Wrongful Death

The early common law provided no cause of action to the estate or surviving relatives of a decedent because of the doctrine that a tort action dies with the victim.¹ Although a distinct action for the death of a relative should not have been barred on this theory, Lord Ellenborough, "whose forte," says Prosser, "was never common sense,"² held that the wrongful death of another afforded no basis for recovery in civil actions.³ The decision was accepted and followed in England and the United States.⁴

Dissatisfaction both with the denial of any action for wrongful death and with the general doctrine that personal tort actions die with the person led to the development of two different types of statutes. The first, enacted in England as Lord Campbell's Act in 1846,⁵ and subsequently enacted in all of the United States, provides the survivors with a distinct cause of action for the death of a person killed by the wrongful act, neglect, or default of another. The measure of damages is most commonly the present value of services the deceased would have rendered and of contributions he would have made to the sur-

1 W. PROSSER, TORTS §§ 120-21, at 920-24 (3d ed. 1964).

2 *Id.* § 121, at 924.

3 *Baker v. Bolton*, 170 Eng. Rep. 1033 (K.B. 1808).

4 W. PROSSER, *supra* note 1, § 121, at 924.

5 9 & 10 Vict., c. 93.

vivors if he had lived.⁶ Although many courts allow recovery for non-pecuniary damages such as the loss of love, affection, and protection caused the survivors, a substantial number do not.⁷

Many states have enacted survival statutes in addition to their wrongful death acts. Whereas wrongful death acts are designed to compensate the survivors for their losses, survival statutes permit the estate to recover damages to which the deceased would have been entitled had he lived.⁸ Accordingly, under the survival statutes damages are recoverable for the conscious pain and suffering of the deceased and for loss of earnings from the time of injury to the time of death, but not ordinarily for prospective loss of earnings or contributions beyond the date of death.⁹

Since wrongful death and survival statutes provide remedies for different losses, they do not necessarily conflict. However, several state legislatures have enacted laws containing elements of both kinds of statutes, despite the precise theoretical differences between them.¹⁰ When such statutes measure damages by the loss to the decedent's estate but provide for the award to be paid directly to the survivors,¹¹ the confusion of theory deprives creditors of assets which would normally be subject to their claims.

Proposed Revision of the Law of Wrongful Death

The uneven growth of the law of wrongful death suggests the need for reconsideration of the theory and purpose of such legislation, with

⁶ SPEISER § 3.1, at 60.

⁷ § 3.42, at 213.

⁸ § 14.1, at 744.

⁹ § 14.4, at 750-51.

¹⁰ Such statutes are of 4 general types:

(a) The enlarged survival-death statute under which damages for both the fatal injury and the death may be recovered in a single action; (b) the wrongful death statute which, by judicial construction, measures recovery by loss to estate; (c) the wrongful death statute which authorizes decedent's personal representative to recover either all losses or certain losses to the estate in cases where the decedent is not survived by any statutory beneficiary; and (d) the wrongful death statute which measures damages by loss to the survivors but, in addition, allows decedent's personal representative to recover certain specified losses to the estate.

§ 3.2, at 63.

There are 3 different theories for measuring damages under these loss-to-estate statutes. Recovery can be measured according to: (1) the deceased's probable future earnings, diminished by the amount he would have spent for his own living expenses had he survived, and reduced to present value; (2) the amount which the deceased would have earned, saved, and left at his death as part of his estate, reduced to present value; or (3) the total probable future earnings of the deceased reduced to present value with no deduction for the amount deceased would have expended for his own expenses had he lived. § 3.2, at 67-70.

¹¹ See, e.g., N.H. REV. STAT. ANN. §§ 556.12, 556.14 (1955); TENN. CODE ANN. §§ 20-607 (Supp. 1966), 20-614 (1955).

a view towards meaningful reform. McCormick suggested in 1935 that a Uniform Death and Survival Act be drafted. At that time he outlined certain problems for the consideration of the draftsmen:

(1) How shall we eliminate the wasteful confusion which results from the theory that two causes of action spring from the same injury, one accruing to the deceased while he lived, and another accruing to his relatives or his estate upon his death? The sensible provisions of the New Hampshire, Tennessee, and Mississippi statutes, which in effect provide that all the damage which the deceased suffered in his lifetime, as well as all the allowable damage resulting from his death, shall be recovered in one action by the personal representative, offer one solution.

(2) Is it desirable, in measuring injury after death, to use as a general standard either "loss to the survivors" or "loss to the estate," and, if so, which of these?

(3) How should provision be made for enabling creditors to share in the recovery, where it exceeds the amount necessary to support those relatives of the deceased who were actually dependent upon him?

(4) To what extent, if at all, should the sufferings of the victim in his lifetime be the basis of an award of money to his relatives or creditors?

(5) Should compensation (as under the Workmen's Compensation Laws) be limited to economic loss of the more tangible sort, such as expenses of sickness and death, and loss of earning power by the deceased or loss of contributions and support sustained by the survivors? Or should it be extended (a) to those losses which have both economic and sentimental aspects, but are not readily measurable in money, such as loss of the husband's protection, or of the social standing given to the family by the father, or of the mother's care and training of her children; or (b) to frankly sentimental injuries, such as the deprivation of the husband's affection and companionship, or the sorrow of the surviving members of the family over their bereavement?¹²

Speiser asserts that the practical confusion between survival and wrongful death statutes is attributable to poor draftsmanship, but while he indirectly answers some of McCormick's questions, he offers neither a critical appraisal of the law as it stands nor a comprehensive proposal for its change.

The most comprehensive suggestion for reform to date is the Uniform Death and Survival Act proposed in 1942.¹³ Under its provisions,

¹² C. McCORMICK, DAMAGES § 106, at 364 (1935).

¹³ The proposal was presented to the National Conference of Commissioners on Uniform State Laws, which apparently took no action. It is discussed in Oppenheim, *The Survival of Tort Actions and the Action for Wrongful Death—A Survey and a Proposal*, 16 TUL. L. REV. 386 (1942).

a tort action survives both the death of the deceased and the death of the tortfeasor.¹⁴ Recovery is limited to those damages which accrue before death, and does not include damages resulting from the death.¹⁵ The damages recovered form part of the deceased's estate and are treated in the same manner as other assets of the estate.¹⁶ The proposed act creates a right of action for wrongful death and provides that the measure of recovery will be the pecuniary loss suffered by the estate because of the decedent's death.¹⁷ The damages recovered, which are kept in a fund separate from the other assets of the estate, are distributed according to the rules of intestate succession, free from creditors' claims except those for funeral expenses and attorney's fees.¹⁸

Since the survival action and the action for wrongful death are separate and distinct, a settlement or recovery under one does not constitute a bar to prosecuting the other. The two actions may be consolidated where appropriate.¹⁹ On these points, Oppenheim comments:

This section is one of the most important of the entire act because it not only recognizes that two causes of action exist where the injured party dies from the injury but also that the actions stand independent of each other, as entirely different interests are invaded in each case.

The next three paragraphs of Section 5 provide for the joining of the survival action and the action for wrongful death where both may be brought against the same defendant. It is important to note that in each instance of joinder provision is made for a separate verdict or decision for each cause of action. The reasons for such a segregation are, first, that different elements of damage are considered as to each action and, second, that recoveries under the survival section and under the wrongful death section are distributed in entirely different ways.²⁰

Under the proposal, creditors with otherwise valid claims against the estate would not be thwarted, since the damages owing to the estate would not be mixed with those recoverable directly by the beneficiaries.

Pain and Suffering

Speiser's analysis of the problem of compensation for emotional harm reflects his bias as plaintiff's counsel. A decedent's estate should

¹⁴ *Id.* at 421.

¹⁵ *Id.* at 422.

¹⁶ *Id.*

¹⁷ *Id.* at 425-27.

¹⁸ *Id.* at 429.

¹⁹ *Id.* at 424.

²⁰ *Id.* at 425.

not be enriched by an award for pain and suffering, since only the sufferer should be compensated, and he can't take it with him.²¹ But Speiser's approval of such awards is implicit in his treatment of the subject. For example, he delineates circumstances giving rise to an inference of deceased's pain and offers sample testimony to be elicited in support of such a claim.²² The samples merely underscore the problems of proof that arise when the best qualified witness is dead.

A good argument can be made for allowing recovery by the survivors for their own pain and suffering and for loss of the affection and society of the deceased. Such damages are not a proper element of recovery under a survival statute, because the losses are to the beneficiaries and not the estate. But recovery is often denied under wrongful death statutes as well, usually because the losses are not considered "pecuniary." This seems unreasonable in light of the common-law action for loss of consortium, which includes damages for loss of society and companionship.

Courts refuse to include these items as elements of recovery in wrongful death actions ostensibly because of an inability to measure the damages.²³ Whereas the problem is a real one when the claim is based on deceased's pain and suffering, the difficulties are illusory in wrongful death actions. The claimant is available to testify concerning his own emotional distress, and one closely related to the deceased is quite likely to suffer genuine emotional harm as a result of the death.²⁴

Moreover, courts have been willing to award damages in wrongful death actions for loss of the services of a deceased child, even though it is extremely rare today for a child to contribute to the support of his parents; indeed, during minority a child represents a large expense to parents. One court has even allowed recovery for lost companionship, concluding that it has a pecuniary value.²⁵ Such awards as these may camouflage damage awards for emotional hurt.

Other Problems

Under the prevailing view, the statute of limitations for a wrongful death action does not begin to run until the death of the injured

²¹ See 2 F. HARPER & F. JAMES, TORTS § 25.16 (1956).

²² SPEISER § 14.6, at 758-70.

²³ § 3.42, at 210.

²⁴ See *Legare v. United States*, 195 F. Supp. 557, 561 (S.D. Fla. 1961) (award of \$25,000 for loss of consortium in action for wrongful death of mother of 6 children). Speiser approves of the *Legare* result and indicates that the loss of a wife as an economic unit can also be a severe one. § 4.3, at 268, 269, 273 n.9 (valuing a housewife's services in 1959 at \$193.95 per week).

²⁵ *Wycko v. Gnodtke*, 361 Mich. 331, 340, 105 N.W.2d 118, 122-23 (1960).

party, since the death creates a new action in the survivors.²⁶ Thus, the cause of action may accrue even after the statute has run on the action the deceased might have maintained during his lifetime. Speiser approves this result, since the alternative is to bar an action before it accrues.²⁷ Whereas Oppenheim proposed a three-year limitation period to commence at the date of death,²⁸ Speiser prefers a one-year period.²⁹ The latter position is more reasonable in cases where the death is remote in time from the injury.

Many courts have held that, where the deceased has compromised his claim before death, there is no right of action for wrongful death.³⁰ Speiser approves the minority position that, since the right of action does not accrue until after death, the deceased could not have compromised it during his lifetime.³¹ But the settlement may represent a fair estimation of all compensable damages expected to result from the injury, including loss of future earnings. Therefore, the majority position seems satisfactory to the extent that damages for wrongful death include the element of future earnings. Speiser's view is the more appropriate for the elements of pain and suffering of the survivors and loss of companionship.

Despite the importance of warranty theories in modern tort law, Speiser pays them scant attention.³² The language of many wrongful death statutes suggests that only culpable defendants are meant to be held liable. Speiser contends, however, that statutes requiring a "wrongful act, neglect, or default" may be construed to permit warranty actions.³³ This accords with modern theories of "enterprise liability" for losses caused by products.³⁴

Speiser's book will probably replace Tiffany's³⁵ as the standard reference work on wrongful death law. But it will undoubtedly perpetuate the present status of the law and impede its growth. The real need is for a thorough reappraisal of the theory and purposes of the

²⁶ § 11.5, at 621.

²⁷ § 11.5, at 621-22.

²⁸ Oppenheim, *supra* note 13, at 432.

²⁹ § 11.5, at 622. This is the Pennsylvania solution. See PA. STAT. ANN. tit. 12, § 1603 (1953).

³⁰ § 5.13, at 436.

³¹ § 5.13, at 437-38.

³² § 2.11, at 48-50.

³³ § 2.11, at 49.

³⁴ See generally Note, 28 OHIO ST. L.J. 159 (1967).

³⁵ F. TIFFANY, DEATH BY WRONGFUL ACT (2d ed. 1913).

action for wrongful death and a comprehensive proposal for statutory revision. Oppenheim's proposed statute remains as the most important step in this direction. Amendments to it must await the pen of a future writer.

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