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## RECOVERY OF FUNERAL EXPENSES IN A SURVIVAL ACTION

The plaintiff, administratrix of the decedent's estate, brought suit pursuant to Florida Statute section 45.11<sup>1</sup> for injuries to the decedent which resulted in his death.<sup>2</sup> The trial court instructed the jury that in awarding damages they might take into account the funeral expenses of the decedent. The Third District Court of Appeal affirmed the instruction.<sup>3</sup> On appeal, *held*, affirmed: A personal representative may recover for funeral expenses in a survival action brought under Florida Statute section 45.11. The power to recover is inherent in an administrator since he is legally bound to pay funeral expenses out of estate funds. *Sinclair Ref. Co. v. Butler*, 190 So.2d 313 (Fla. 1966).

At common law a cause of action in tort abated upon the death of either party thereby precluding any recovery.<sup>4</sup> The origin of this rule is obscure,<sup>5</sup> but the maxim was *actio personalis moritur cum persona*, a personal right of action dies with the person.<sup>6</sup> One of the more reasonable theories advanced for the rule was that, since damages at common law for bodily harm were punitive in nature, where the wrongful act amounted to a felony, the civil wrong was merged with the crime and the Crown exacted the penalty from the wrongdoer.<sup>7</sup>

In addition to the abatement of the cause of action, survivors of the decedent were also barred from recovering for their own losses as a result of the decedent's death. This result is usually attributed to the statement by Lord Ellenborough that "the death of a human being could not be complained of as an injury."<sup>8</sup>

1. 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.

FLA. STAT. § 45.11 (1965).

2. The facts of this case are set forth in *Sinclair Ref. Co. v. Butler*, 172 So.2d 499 (Fla. 3d Dist. 1965).

3. *Ibid.* This put the Third District Court of Appeal in conflict with the Second District Court of Appeal which had held that funeral expenses were not recoverable in a survival action. See *Doby v. Griffin*, 171 So.2d 404 (Fla. 2d Dist. 1965). This conflict was the basis of the supreme court's jurisdiction in the instant case.

4. See generally PROSSER, *TORTS* 920-37 (3d ed. 1964); Alpert, *The Florida Death Acts*, 10 U. FLA. L. REV. 153-56 (1957); Rose, *Foreign Enforcement of Actions for Wrongful Death*, 33 MICH. L. REV. 545-51 (1935); Smedley, *Wrongful Death Actions in Tennessee*, 27 TENN. L. REV. 447-48 (1960); Smedley, *Wrongful Death—Bases of the Common Law Rules*, 13 VAND. L. REV. 605 (1960).

5. PROSSER, *op. cit. supra* note 4, at 920.

6. *Ibid.*; Smedley, *supra* note 4, at 606-09.

7. PROSSER, *op. cit. supra* note 4, at 920; Alpert, *supra* note 4, at 153; Smedley, *supra* note 4, at 607-08.

8. *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808). See Alpert, *supra* note 4, at 154.

It is interesting to note that no authority was cited in support of the statement nor any reason given, and the husband of the deceased woman was permitted a recovery of £100 from the tortfeasor to compensate him for the loss of her services from the time of her injury until the time of her death. *Baker v. Bolton*, *supra*. Prosser, in discussing this case,

These rules have been changed by statute in every jurisdiction.<sup>9</sup> Unfortunately, most of these statutes have failed to draw a clear dichotomy between the two separate causes of action sought to be preserved and, as a result, the area of wrongful death acts and survival statutes has been clouded.<sup>10</sup>

While a survival statute should preserve a cause of action for all damages which the decedent could have recovered had he lived, a wrongful death act gives a new cause of action to the decedent's beneficiaries for the loss they have sustained by reason of the wrongful death of their provider.<sup>11</sup>

Notwithstanding the type of statute or statutes within a given jurisdiction,<sup>12</sup> the majority have allowed recovery of funeral expenses under their various wrongful death acts.<sup>13</sup> However, the question presented in the instant case, *who* may recover, would be of little importance in most jurisdictions since only one recovery is generally permitted. But, where, as in Florida, a jurisdiction has maintained the true dichotomy of the two statutes and two actions may be maintained,<sup>14</sup> the question of whether recovery should be had under the survival act, thereby designating funeral expenses as a loss to the decedent, or whether the named beneficiaries should recover under the wrongful death act arises.

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speaks of "Lord Ellenborough, whose forte was never common sense . . ." PROSSER, *op. cit. supra* note 4, at 924.

9. See Alpert, *supra* note 4; Oppenheim, *The Survival of Tort Actions and the Action for Wrongful Death—A Survey and a Proposal*, 16 TUL. L. REV. 386-87 (1942); Comment, 44 HARV. L. REV. 980 (1931).

The majority of the legislation is modeled after the English Fatal Accidents Act, more commonly known as Lord Campbell's Act, 1846, 9 & 10 Vict. c. 93. The various statutes are enumerated and classified in Oppenheim, *supra* at 386-419; Rose, *supra* note 4, at 587-96; Comment, 44 HARV. L. REV. 980 (1931).

10. "There is probably no field of tort law in which confusion is more apparent than [that of] wrongful death and survival of tort actions." Oppenheim, *supra* note 9, at 386.

"[T]he general failure . . . to segregate the various interests involved has precluded any just or consistent body of law in this field." *Id.* at 387, citing Note, 35 ILL. L. REV. 479, 480 (1940).

"The result [of these acts] has been confusion compounded across the several states of the United States . . ." Alpert, *supra* note 4, at 156.

11. *Ake v. Birnbaum*, 156 Fla. 735, 25 So.2d 213 (1945), *modified on rehearing*, 156 Fla. 745, 25 So.2d 218 (1946).

When physical injury has been done a person by the tortious acts of another person and the injury ultimately causes death two rights have been violated. One is the common-law right of the injured person to be secure in his person and his property—a right which has been invaded by compelling such a person to endure pain and suffering and to submit to loss of earnings and other pecuniary losses. The other right violated is the right which the family of the deceased had to the companionship, services or support of the decedent, coupled with the expectancy of a participation in the estate which such person might have accumulated had his life not been brought to an untimely end by the infliction of the injury. *Two separate and distinct rights or interests have thus been infringed upon . . .*

*Id.* at 750, 25 So.2d at 220. (Emphasis added.) *Accord*, PROSSER, *op. cit. supra* note 4, at 928-29.

12. See authorities cited note 9 *supra*.

13. Oppenheim, *supra* note 9, at 392.

14. *Ake v. Birnbaum*, *supra* note 11.

At this point it might be profitable to pause and ask, should funeral expenses be recoverable at all? One jurisdiction, Iowa, has answered in the negative.<sup>15</sup>

The logic of the Iowa courts would seem irrefutable. Are the funeral expenses an item of damage which would not have occurred but for the wrongful act of the tortfeasor? Every man must eventually die, and it is a valid assumption that he will be buried and that his estate will incur the expense.<sup>16</sup> The real damage which is occasioned is that the estate will have to make these expenditures now, compelling an expense which might not have been incurred for years to come.<sup>17</sup> Therefore, compensation is allowed, in the form of interest, for the loss of the use of the money from the time of the tortious death until the probable time of natural death,<sup>18</sup> but not to exceed the amount of the funeral expense.<sup>19</sup> This is the only jurisdiction which takes this position.<sup>20</sup>

A recent case in a jurisdiction which distinguishes the two actions, has stated that:

The simplest logic dictates that there can be no recovery for funeral expenses in an action under the survival statute because one cannot sue and recover for *his own* funeral expenses.<sup>21</sup>

This case adds, however, that funeral expenses would be recoverable, if paid, as an item of damage in a wrongful death action.<sup>22</sup> The legal obligation of the party who has paid is often given as the reason for permitting recovery in the wrongful death action.<sup>23</sup>

Other jurisdictions have permitted recovery in a wrongful death action, while denying it in a survival action, because funeral expenses

15. *Brady v. Haw*, 187 Iowa 501, 174 N.W. 331 (1919). This is the original decision. *Accord*, *Hurtig v. Bjork*, 138 N.W.2d 62 (Iowa 1965).

16. *Brady v. Haw*, *supra* note 15, at 504, 174 N.W. at 332.

[I]t is in the law of nature that all must die, and we assume that, in all Christian countries the dead receive decent burial . . . with some expense to the estate.

17. *Id.* at 505, 174 N.W. at 332.

18. *Ibid.*

19. *Hurtig v. Bjork*, *supra* note 15, at 63.

20. In two other jurisdictions, funeral expenses, along with all the other usual elements of damage occurring in a wrongful death are not considered because the statutes are punitive. It is the culpability of the defendant's acts which is considered in awarding damages. See *Board of Trustees v. Harrell*, 188 So.2d 555 (Ala. 1965); *O'Conner v. Benson Coal Co.*, 301 Mass. 145, 16 N.E.2d 636 (1938).

21. *Gowan v. Thomas*, 237 S.C. 223, 225, 116 S.E.2d 761 (1960). (Emphasis added.) *Noted*, 14 S.C.L.Q. 147 (1961). The court added that "the situation is reminiscent of the old gag, 'Can a man legally marry his widow's sister?'" *Id.* at 225, 116 S.E.2d at 761.

22. *Ibid.*

23. *Lithgow v. Hamilton*, 69 So.2d 776, 778 (Fla. 1954); *Potts v. Mulligan*, 141 Fla. 685, 690-91, 193 So. 767, 769-70 (1940). This has sometimes had the effect of precluding a wife's recovery where she has no duty to bury her husband. *Id.* at 690, 193 So. at 769; *cf.* *Caen v. Feld*, 371 S.W.2d 209 (Mo. 1963) (beneficiary under wrongful death act permitted recovery even though she had no legal duty to pay for funeral because she paid to prevent her father's burial at public expense or the possibility of his body being donated to a medical institution as provided by state statute).

accrue "from and after the death, while the cutoff point under the survival statute is the death itself."<sup>24</sup>

In some instances, where funeral expenses were sought to be recovered, no distinction was made between the two statutes and recovery was allowed under either.<sup>25</sup> A widow was permitted to recover funeral expenses she had paid for her husband on the theory that she could have demanded reimbursement of these expenses from the estate and the estate, in turn, would have been able to recover them from the tortfeasor, although no authority was given for the latter proposition.<sup>26</sup> Of course, once the widow recovered, the administrator could no longer claim the funeral expenses in a separate suit. A Texas court has stated that where the statutory beneficiaries under the wrongful death act have paid the funeral expenses, or are liable for them, then these expenses are a proper element of damage under the wrongful death act.<sup>27</sup> However, because the expense of a funeral constitutes a charge against the decedent's estate and "is part of the expense which must be incurred as a result of the injuries," an administrator would also be qualified to recover the cost of the funeral in a survival action, provided, of course, that there was no double recovery.<sup>28</sup>

Other jurisdictions, while refusing to permit recovery under the survival statute, have permitted recovery in a separate suit brought by an administrator or a party legally obligated to pay for the funeral.<sup>29</sup> This is a separate cause of action from one brought under a survival statute. The courts have held, under this theory, that the defendant's acts amount to a tort against the administrator or obligor since they must pay for the funeral because of his wrongful act.<sup>30</sup>

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24. Mathies v. Kittrell, 354 P.2d 413 (Okla. 1960).

Since the damages recoverable in a survivor action are limited to the damages which accrued to the deceased . . . up to the time of . . . death, it follows that funeral expenses cannot be recovered in a survivor action. Funeral expenses accrue from and after the death and are properly a part of the damages to be recovered in a wrongful death action.

*Id.* at 415.

25. Reynolds v. Willis, 209 A.2d 760 (Del. 1965); Landers v. B. F. Goodrich Co., 369 S.W.2d 33 (Tex. 1963); *cf.* Schwab v. Nelson, 249 Wis. 563, 25 N.W.2d 445 (1946).

26. Reynolds v. Willis, *supra* note 25.

27. Smith v. Farrington, 117 Tex. 459, 463, 6 S.W.2d 736, 738 (1928).

28. Landers v. B. F. Goodrich Co., *supra* note 25, at 35; *cf.* Schwab v. Nelson, *supra* note 25. The court said that where there is an estate and a cause of action survives under the survival statute, then the estate, being primarily liable for funeral expenses, is the proper party to recover. When there is no estate (for instance, a child) then the wrongful death act, by implication, creates a liability in the statutory beneficiaries since they have the benefit of a right of recovery because of the decedent's death, and thus, they have a right to recover these expenses from the tortfeasor in the wrongful death action. This somewhat unusual reasoning has since been adopted by the legislature. WIS. STAT. ANN. § 331.04(5) (Supp. 1966).

29. Graul v. Adrian, 32 Ill. App. 2d 345, 347-48, 205 N.E.2d 444, 446 (1965); Eggimann v. Wise, 56 Ill. App. 2d 385, 392-93, 206 N.E.2d 472, 476 (1964); Moss v. Hirzel Canning Co., 100 Ohio App. 509, 511, 137 N.E.2d 440, 442 (1955).

30. Moss v. Hirzel Canning Co., *supra* note 29, at 511, 137 N.E.2d at 442:

Prior to the decision in the instant case, the rule in Florida was that only the husband could recover funeral expenses since he was under a duty to pay them.<sup>31</sup> The recovery was permitted in suits brought under the wrongful death act<sup>32</sup> if pleaded as special damages.<sup>33</sup>

In *Doby v. Griffin*<sup>34</sup> a Florida court considered for the first time whether funeral expenses could be recovered under the survival statute. Taking the strict construction of the survival act,<sup>35</sup> that the only damages recoverable were those which the decedent could have recovered had he lived,<sup>36</sup> and that, therefore, death was the cutoff point in considering damages, the Second District Court of Appeal concluded that funeral expenses were not an element of damage in a survival action.

In the instant case, the supreme court considered the strict construction of the statute<sup>37</sup> but said:

Common logic dictates that a tortfeasor should be held answerable to someone for the funeral expense of the person fatally injured by his tortious act . . . .<sup>38</sup>

The court noted, however, that while a husband was permitted recovery in a wrongful death action, the wife was not.<sup>39</sup> But, since the administrator was bound to pay funeral expenses out of the estate, then he should recover in the name of the estate.<sup>40</sup>

The basic premise that funeral expenses are recoverable *at all* is a difficult one to support; the logic of the Iowa courts, mentioned previously, would seem to be unassailable.

It is this writer's opinion that Florida is one of the few states which, legislatively and judicially, has shown a true understanding of the survival statute, the wrongful death act, and the differences between them. What the court, in effect, has said in *Sinclair* is, "If funeral expenses are an item of damage which result from a wrongful death, then let them be recoverable without discrimination." This has been accomplished.

STEVEN J. ROSE

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Plaintiff's right of action for funeral expenses is one not existing by virtue of the survival statute. It is a direct action under the common law, and it arises by reason of . . . the duty to provide for . . . [the wife's] . . . funeral services and a decent burial.

31. *Lithgow v. Hamilton*, *supra* note 23, at 778; *Potts v. Mulligan*, *supra* note 23, at 690-91, 193 So. at 769-70.

32. *Ibid.*; see FLA. STAT. §§ 768.01-.02 (1965).

33. *Lithgow v. Hamilton*, *supra* note 23, at 778.

34. 171 So.2d 404 (Fla. 2d Dist. 1965).

35. *Ake v. Birnbaum*, *supra* note 11.

36. *Doby v. Griffin*, *supra* note 34, at 406-07; *accord*, *Spillman v. Weimaster*, 275 Mich. 93, 99, 265 N.W. 787, 790 (1936); *Radobersky v. Imperial Volunteer Fire Dept.*, 368 Pa. 235, 243, 81 A.2d 865, 869 (1951).

37. *Sinclair Ref. Co. v. Butler*, 190 So.2d 313 (Fla. 1966).

38. *Id.* at 316.

39. *Ibid.*; see *Potts v. Mulligan*, *supra* note 23, at 690, 193 So. at 769.

40. *Sinclair Ref. Co. v. Butler*, *supra* note 39, at 317, 319.