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Torts -- Damages -- Survival Statutes

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immediately preceding an injury, and the court by so doing, usurped the power of the jury to decide in such cases who was or was not at fault. If this decision is followed to any extent, Florida will have the rather dubious honor of being the only state allowing a negligent defendant to shield himself behind an emergency created by his own negligence.¹²

FRANK J. GREENE

TORTS—DAMAGES—SURVIVAL STATUTES

The plaintiff, suing under the Wrongful Death Act¹ for the negligent death of his wife, alleged as damages the loss of his wife's future earnings. The trial judge disallowed this item of damages on the theory that the husband had no legal right to the wife's earnings. The plaintiff then instituted this action, as administrator, under the Florida Survival Statute,² attempting to recover for the estate the pecuniary loss through impairment of earning power the deceased could have recovered had she lived. *Held*, there can be no recovery for prospective damage to the estate under the Florida Survival Statute. *Ellis v. Brown*, 77 So.2d 845 (Fla. 1955).

At common law a person damaged by the negligent death of another could maintain no action against the wrongdoer.³ In 1846, England passed a remedial statute under which specified beneficiaries could recover from a person whose "wrongful act, neglect, or default" caused the death of another.⁴ Most of the so-called wrongful death acts enacted in this country are patterned after the English statute and use similar language in fixing the grounds upon which such damages may be recovered.⁵ Predominantly,

12. *Lanier v. Johnson*, 186 Va. 191, 42 S.E.2d 319; *Saunders v. Temple*, 154 Va.714, 153 S.E. 691 (1930).

1. FLA. STAT. §§ 768.01-.02 (1953) "Whenever the death of any person in this State shall be caused by the wrongful act, negligence, carelessness or default of any individual . . . and is such as would, if the death had not ensued, have entitled the party injured thereby to maintain an action. . . . and to recover damages in respect thereof, then, and in every such case the person . . . who would have been liable in damages if death had not ensued . . . shall be liable in damages notwithstanding the death of the person injured. . . . Every action shall be brought by and in the name of the widow or husband . . . 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."

2. FLA. STAT. § 45.11 (1953). "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."

3. *Chamberlain v. Florida Power Co.* 144 Fla. 719, 198 So. 486 (1940); *Wilkie v. Roberts*, 91 Fla. 1064, 109 So. 225 (1926); *Mock v. Evans Light and Ice Co.*, 88 Fla. 113, 101 So. 203 (1924); *Marianna & B. Ry. v. May*, 83 Fla. 524, 91 So. 553 (1922); *Nolan v. Moore*, 81 Fla. 594, 88 So. 601 (1921).

4. Lord Campbell's Act, 1846, 9 & 10 Vict. c. 93.

5. *Bowden v. Jacksonville Electric Co.*, 51 Fla. 1952, 41 So. 400 (1906); *Florida C. & P. Ry. v. Foxworth*, 41 Fla. 1, 25 So. 338 (1899); *Raisor v. Chicago & A. Ry.*, 215 Ill. 47, 74 N.E. 69 (1905); *Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553 (1857); *Kelliher v. New York C. & H. R.R.*, 212 N.Y. 207, 105 N.E. 824 (1914); *Alfson v. Bush Co.*, 182 N.Y. 193, 75 N.E. 230 (1905).

American jurisdictions support the theory that such statutes create a new cause of action in the beneficiary, rather than effecting a revival of the action for injury to the decedant.⁶ However, it is essential that the wrong be one for which the decedant could have sued had he lived.⁷ The primary distinction between the wrongful death acts and the survival legislation is that the former creates a new cause of action for the benefit of an enumerated group, while the latter merely revives the cause of action that, at common law, died with the death of the injured party.⁸ In assessing damages under the survival statute or the wrongful death acts, the basis of computation is usually a matter of statutory construction.⁹ In jurisdictions which have both wrongful death acts and general survival statutes, as does Florida, damages for prospective injury to the estate are usually held to be recoverable under the wrongful death acts, which, to avoid double damages, necessarily precludes such recovery under the survival statutes. Where the remedy is not exclusive, therefore, the recovery under the survival statute is limited to the damages incurred by the decedant prior to death.¹⁰ The theory behind this award of damages is that the wrongful death act is the remedy of the beneficiary for the damage to *himself* by the death, while the survival legislation authorizes recovery only for the actual injury to the decedant, who upon death can be injured no further. This rationale was aptly stated in *Allen v. Burdette*,¹¹ wherein the court says, "Where death has actually occurred, the theory of prospective damages included in such survival claim has no place whatever What had been uncertain and speculative became definite and certain"

The decision in the case under note follows the majority holding in states where survival statutes and wrongful death acts are concurrent remedies. Having established in previous decisions¹² that prospective damages were recoverable under the Florida Wrongful Death Act, the Court

6. *Gulf C. & S.F. Ry. v. McGinnis*, 228 U.S. 173 (1913); *Fitzpatrick v. Owens*, 124 Ark. 167, 186 S.W. 832 (1916); *Burke v. Arcarta & M. River Ry.*, 125 Cal. 364, 57 Pac. 1065 (1899); *Greco v. Kresge Co.*, 277 N.Y. 26, 12 N.E.2d 557 (1938); *Regan v. Davis*, 290 Pa. 167, 138 Atl. 751 (1927).

7. *Stringfellow v. Atlantic Coast Line Ry.*, 64 F.2d 173 (5th Cir. 1933); *Obrion v. Standard Oil of Kentucky*, 38 F.2d 808 (5th Cir. 1930); *Collins v. Hall*, 117 Fla. 282, 157 So. 646 (1934); *Carter v. Ray Arnold Lumber Co.*, 83 Fla. 470, 91 So. 893 (1922).

8. *English v. United States*, 204 F.2d 808 (5th Cir. 1953); *Hooper Construction Co. v. Drake*, 73 So.2d 279 (Fla. 1954); *May Coal Co. v. Robinette*, 120 Ohio St. 110, 165 N.E. 576 (1929).

9. RESTATEMENT, TORTS 925, comment a (1939).

10. *Davis v. St. Louis, I.M. & S. Ry.*, 53 Ark. 117, 15 S.W. 801 (1891); *Stewart v. United Electric Light & Power Co.*, 104 Md. 332, 65 Atl. 49 (1906); *Mahoning Valley Ry. v. Van Alstine*, 77 Ohio St. 395, 83 N.E. 601 (1908); *St. Louis & S.F. Ry. v. Goode*, 42 Okla. 784, 142 Pac. 1185 (1914); *Rowe v. Richards*, 35 S.D. 201, 151 N.W. 1001 (1915); *Brown v. Chicago & N.W. Ry.*, 102 Wis. 137, 77 N.W. 748 (1898).

11. *Allen v. Burdette*, 139 Ohio 208, 39 N.E.2d 153 (1942).

12. *English v. United States*, 204 F.2d 808 (5th Cir. 1953); *Seaboard Airline Ry. v. Martin*, 56 So. 509 (Fla. 1952); *Ake v. Birnbaum*, 156 Fla. 735, 25 So.2d 213 (1946); *Miami Dairy Farms v. Tinsley*, 115 Fla. 650, 155 So. 850 (1934); *Cudahy Packing Co. v. Ellis*, 105 Fla. 186, 140 So. 918 (1932); *Marianna & B. Ry. v. May*, 83 Fla. 524, 91 So. 553 (1922).

followed other jurisdictions wherein the remedy is not exclusive, and ruled out such damage under the survival statute. The decision, though consistent with other jurisdictions, results in an anomaly in that it is cheaper to kill than to maim under the Florida statutes. This situation arises in Florida due to the peculiar wording of the Florida Wrongful Death Act which allows an action only to the beneficiary, himself, and limits damages to the amount that the party entitled to sue may have sustained by the death. Here, where the husband has no legal right to his wife's earnings, he cannot claim damages for impairment under the wrongful death act. This situation does not arise in jurisdictions which follow the English act more closely. Under these acts a representative sues for the benefit of all beneficiaries; therefore, the judgment is not limited to the amount recoverable by any one beneficiary.

The anomalous situations presented by this case is, as the court points out, a matter for legislative action rather than for judicial re-interpretation of the survival statute.

CHANDLER F. CULVER

WILLS—ILLEGAL CONDITIONS—JUDICIAL INTERPRETATION

Testator devised a portion of his estate to his wife for life, residue to a trustee to pay the income to the wife for life; both subject to the conditions that the wife not remarry or use the money for the support of their son. Held, in view of a Connecticut statute¹ requiring a parent to support his children if they become poor and unable to support themselves, the condition concerning the son is contrary to public policy, is uncertain, and therefore invalid. *Zdanowich v. Sherwood*, 19 Conn. Supp. 89, 110 A.2d 290 (1954).

It is generally held that a testator may impose any condition in his will so long as it is definite and does not impose an impossibility or involve illegality.² The test the courts seem to employ is to determine if the result would induce conduct detrimental to the public interest. For example, restrictions concerning family relationships that would involve a breach of parental duty are held to be void; such as a prohibition of social relations between mother and son,³ relinquishing control of a child to a stranger,⁴ or requiring the separation of father and son.⁵ However, a

1. CONN. GEN. STAT. § 2610 (1949), as amended by CONN. GEN. STAT. SUPP. § 1111c (1953).

2. *Clemenson v. Reshsamen*, 205 Ark. 123, 168 S.W.2d 195 (1943); *Thompson v. Thompson*, 175 S.W.2d 885 (Mo. 1943); *In re Houston's Estate*, 371 Pa. 396, 89 A.2d 525 (1952).

3. *In re Ranney's Estate*, 161 Misc. 626, 250 N.Y.Supp. 680 (Surr. Ct. 1936).

4. *In re Carples' Estate*, 140 Misc. 459, 250 N.Y.Supp. 603 (Surr. Ct. 1931).

5. *In re Forte's Will*, 149 Misc. 327, 267 N.Y.Supp. 603 (Surr. Ct. 1933).