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Torts -- Wrongful Death Statute -- Breach of Implied Warranty

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therefore" only and that the husband should not be deprived of a right without compensation except by specific statutory wording.28

Workmen's compensation is primarily intended "to provide residents . . . with a practical and expeditious remedy for their industrial accidents and to place on . . . employers a limited and determinate liability."29 The majority rule, followed in the instant case and in a recent Ohio case30 also inspired by the Hitaffer case, accomplishes the second end of compensation but offers no solution to the problem of maintaining adequate relief to the employee in the face of inflation.31 Admitting that the Hitaffer theory is a haphazard and possibly unintended answer to the inflationary difficulties, prompt legislative relief32 still seems essential in order that judicial pity33 may not be further tempted to warp the structure of workmen's compensation law.34

TORTS—WRONGFUL DEATH STATUTE—BREACH OF IMPLIED WARRANTY

Decedent purchased and used a branded salt substitute from the defendant. In a suit by decedent's administratrix under the wrongful death statute for breach of implied warranty of fitness, held, the statute will be

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28. Id. at 70, 87 A.2d at 8.
31. "... most legislatures have failed to keep such compensation acts abreast of the times and rising cost of living, ... ." Horovitz, The Injured Worker's Plight, 2 N.A.C.C.A.L.J. 11, 16 (1948).
32. One legislative remedy is simply repeated adjustment of the compensation rates. By the English statute, the employee retains his common law right of action but cannot receive both damages and compensation. Workmen's Compensation Act, 1925, 15 & 16 Geo. 5, c. 84, § 29(1). Under a more recent British statute, the damages in a tort action are reduced by one-half the probable compensation, if any. Law Reform (Personal Injuries) Act, 1948, 11 & 12 Geo. 6, c. 41, § 2. In the United States, compensation acts benefit employers in that they provide for a limited and determinable liability. See note 29 supra. The English act seems to have a different approach. Russell-Jones, Workmen's Compensation: Common Law Remedies and the Beveridge Report, 7 Modern Law Review 13, 23-25 (1944).
33. There is good and frequent opportunity for judicial pity. There are 2,000,000 employees injured annually, 18,000 deaths annually, and over 100,000 permanently injured. Horovitz, The Injured Worker's Plight, 2 N.A.C.C.A.L.J. 11 (1948).
34. "I should suppose that, like so many other questions, this was one of degree, dependent as I have already suggested upon how far compensation, considering its certainty, could possibly be thought to be the equivalent of indemnity." See United States Fidelity & Guaranty Co. v. R. H. Macy & Co., 156 F.2d 204 (2d Cir. 1946) (dissenting opinion by L. Hand, J.) (employee limited to trivial compensation by majority holding).

interpreted to support actions ex delicto exclusively. Whitely v. Webb's City Inc., 55 So.2d 730 (Fla. 1951).

Historically, no civil action could be maintained for the death of one human being caused by the wrongful act or negligence of another. This injustice was first corrected in England by the enactment of the Fatal Accidents Act of 1846 which created a special right of action for a limited class of the decedent's relatives. The content of this act has a counterpart in most jurisdictions of the United States today. Usually these statutes demand that the cause of action rest upon the wrongful act, negligence or default of the defendant. This compels the plaintiff to show a duty owed to the deceased and a breach of that duty by the defendant. The mere fact that a contract sets out the duty does not prevent suit under the statute.

A conflict exists when courts are asked to consider whether a breach of warranty is an actionable wrong per se within the statute. Prior to the development of the action of assumpsit an action for breach of warranty was an action on the case for deceit. Recognized authority today holds that warranty actions are not based on negligence. Since the statute gen-

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erally supports actions *ex delicto*\(^2\) a strict interpretation would preclude warranty actions. An exceptional New York case looked beyond the procedural formula in the allegation, and held that recovery is not conditioned upon definition but upon a clear legislative intent to effect a remedy if the facts warranted it.\(^3\)

Commenting that a detour into the field of semantics was unnecessary, the court in the instant case deemed the wording of the statute plain and gave it strict interpretation. The dissent relied upon *Greco v. Kresge*, where a breach of warranty of a pork product was held to be such a “default or wrongful act” within the statute.\(^4\) Significantly, the instant case finds the majority speculative as to whether there was a warranty of fitness of the salt substitute for general usage: the *Greco* case presented no such doubt.

The majority of holdings on this issue strictly apply the statute, thus excluding warranty actions under wrongful death statutes.\(^5\) It would appear that the problem is really an examination of the nature and purpose of these statutes. If the breach of warranty has the same legal effect as a breach of tort duty, in those activities where absolute liability is imposed, then there is little reason to deny recovery under the death statutes. The use of warranty actions to circumvent the allegations and proof of negligence may be of excellent tactical content, but the result may be tragic. When one has elected to follow the comparatively open path of implied warranty we are compelled to conclude that it leads outside the statute.\(^6\)

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3. *Braun v. Reil*, 40 S.W.2d 621 (Mo. 1931); “Since under the common law contract actions survived in favor of the plaintiff’s representative while tort actions did not, it seems reasonable to suppose that the wrongful death statutes were intended to refer only to torts.” *Prosser, Torts* § 103 (1941).