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Employee Life Insurance Furnished by the Employer as Mitigating Damages against the Employer in an Action for Wrongful Death

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from the nature of the testator's interest, such a provisiion should operate to produce the desired effect. While it is necessary to the establishment of survivorship in this manner that the will be probated, the general purpose is accomplished in regard to savings on administration and for purposes of utilizing the marital deduction. The one remaining point would be to draft a presumption of surviorship clause which is sufficiently specific that a court would have no doubt as to the testator's intention.

In the light of the above it would seem that despite the provisions of the Uniform Simultaneous Death Act and the nature of joint tenancies and tenancies by the entireties, a presumption of survivorship clause in a will presuming the survival of the other joint owner to have survived would operate to place all of such property in one estate.

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EMPLOYEE LIFE INSURANCE FURNISHED BY THE EMPLOYER AS MITIGATING DAMAGES AGAINST THE EMPLOYER IN AN ACTION FOR WRONGFUL DEATH

At the outset, it should be noted that the subject discussed by this paper, as reflected by the title, concerns the effect, if any, life insurance proceeds may have upon the ascertainment of damages in an action for wrongful death. Because of the very strong weight of authority in the United States to the effect that such proceeds may not be considered to mitigate damages in a death action by recipients thereof,[1] this discussion concerns only a very narrow possible exception to this general rule.

Since any exception to a general rule must logically circumvent the reasons therefor, these reasons should be considered. The stated reasoning behind the general rule is that since the party effectuating the insurance policy had paid in consideration the full value of the premiums for compelte protection under the policy, there cannot be any equity in the claim of a defendant in the contract for which he has no concern or gave no consideration.[2] It must be conceded that in most cases it is a sound underlying policy that wrongdoers should not be protected to the extent that an untimely death has been contemplated by the decedent and provided for by a separate contract of insurance, however, the situation to which the possible exception would be applicable, simply stated, would arise in the case when the wrongdoer, who is a defendant in an action for wrongful death, has furnished the consideration for the life insurance policy. At this point it can be seen that the reasons for the rule, as stated above, fail to be appropriate.

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1. Brabham v. Baltimore and O. R. Co. (C.C.A. 4th), 220 F. 35 (1914); Thompson v. Ft. Branch, 204 Ind. 152, 178 N.E. 440, 82 A.L.R. 1413 (1931); Annotation: 18 A.L.R. 686, s. 95 A.L.R. 579 (1935).
2. Baltimore and O. R. Co. v. Wightman, 29 Gratt. (Va.) 431, 26 Am. Rep. 384 (1877), reversed on other grounds in 104 U.S. 5, 26 L.Ed. 643 (1877).

Before continuing, it should be pointed out that any practical workability of the proposed exception discussed by this paper would be further limited from use by virute of workman's compensation statutes which restrict actions of wrongful death by employee's representatives in certain specified occupations.[3]

In industry today, it is not an uncommon practice for employers to provide life insurance policies as partial remuneration to their employees. This is particularly true in situations involving extra-hazardous employment. Allowing the amount of the insurance collected by the beneficiaries to be admitted into evidence in mitigation of damages could be rationalized by the fact that the wrongdoer is the one furnishing the consideration for the insurance contract, and by that fact alone he should benefit by that amount in an action by the beneficiaries for wrongful death. Possibly the more common situation in which the employer contributes for a life insurance policy in favor of his employees is in the case of group insurance, whereby an employer insures his entire employee staff by the use of one overall policy. Typically, however, the employee contributes something toward the protection offered by this type of contract. Applying the reasons given for the exclusionary evidence rule it will be noted that since the employer does have an interest in the insurance contract and at least partially pays for it, the reasons given for the rule are not absolutely accurate. If the exception to the exclusionary rule is assumed to be applicable in this situation, the employer should either get full advantage of the amount paid in insurance, or some pro rata amount based upon his participation in the plan.

The exclusionary evidence rule as it appears in the United States was not always the rule under Lord Campbell's Act which was the original survivorship act out of which the rule grew. In a very early unreported Enblish case,[4] which has been referred to in a later case,[5] the court quotes a charge made to the jury in which Lord Campbell instructs the jury to adjust the damages by the amount of insurance received by the beneficiaries accordingly, and to allow the beneficiaries the benefit of those premiums which the decedent would have had to pay had he lived. Lord Campbell's charge, if nothing else, is certainly prima facie evidence of legislative intent with regard to this matter. The basic reason for the above principal was apparently first stated in the case of *Franklin v. South Eastern R.W. Co.*,[6] stating that under Lord Campbell's Act, "the damages were to be a compensation equivalent to the pecuniary benefits which might reasonably be expected from the continuance of life." Following this line of reasoning, the court stated that what is gained as well as lost as a result of a wrongful death must be considered in determining the total loss.

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3. Sec. 27-50, W.S. (1957).
4. Hicks v. The Newport A. and H.R. Co. (Unreported).
5. Pym v. The Great Northern Railway Co., 4 Best and S. 403, 122 Eng. Reprint 508 (1863).
6. 3 Hulst. and N. 211, 157 Eng. Reprint, 448, 4 Jur. N.S. 565, 6 Week. Rep. 573, 8 Eng. Rul. Cas. 419 (1858).

The proposition in the *Franklin* case, supra, reflected by Lord Campbell's charge was specifically changed by statute in 1908.[7] This statute specifically refers to insurance and makes no mention of pensions to be received by the employee's widow in the event of his death. As a result, the rule with regard to widow's pensions (normally Crown pensions), i.e., admitted in evidence for the purpose of diminishing damages in an action for wrongful death, still prevails in England and Canada.[8] The prevailing reason for the retention of this rule is that since the beneficiaries receipt of pensions would not have occurred but for the same event which gave rise to the action gainst the wrongdoer, the amount of such pensions should be set off against any damages as the result of the wrongful act.[9] It should be especially noted here that the declared purpose of the original death act is to allow survivors to recoup, in a pecuniary fashion, that which they lost at the hand of a person committing a negligent or wrongful act, and not to allow such beneficiaries to make a profit. To distinguish the English rule as it applies to widow's pensions from its counterpart regarding insurance in terms of the stated reasons for the exclusionary evidence rule in the United States, the only logical explanation would be that the wrongdoer has furnished the consideration for the pension plan. In other words, had the wrongdoer been a third person not connected with the pension plan, it would not follow, under the basic reasons for the rule in the United States, that the amount of the pension should offset the damages. This distinction is not clear, however, and the English Courts apply the rule to mitigate the defendant's liability regardless of whether he was also the employer. Indeed, the English courts have indicated that without the statute changing the rule with regard to insurance, the law would not have changed from Lord Campbell's original charge.

In further support of the possibility of an exception to the exclusionary insurance rule in the above mentioned cases, the following interpretations under various death acts might be considered.

The more general view is that statutes of the nature of Lord Campbell's Act are not survival statutes, but create a new cause of action distinct from any the deceased might have had, had he survived.[10] However, by weight of authority, where the statute gives a remedy to recover damages when the death of a person is caused by the negligent or wrongful act of another, such remedy repends upon the existence in the decendent, at the time of death, of a right of action to recover damages for such injury;[11] hence, if by a recovery of a judgment for damages due to the injury, or by a settlement with the wrongdoer, or by virtue of a contract of release after injury, the injured person releases his cause of action, such release, in the absence of fraud or mistake will preclude a recovery by his personal

7. 8 Edw. VII Chap. 7—Fatal Accidents Act (1908).
8. Annotation: 95 A.L.R. 580.
9. Baker v. Dalgleish Steam Shipping Co., 1 K.B. 361—C.A. (1922); Millard v. Toronto R. Co., 31 Ont. L. Dep. 526, 9 B.R.C. 539, 6 Ont. Week. N. 519 (1914).
10. 16 Am. Jr., Death, 61 (1925).
11. Annotation: 39 A.L.R. 585.

representatives of damages based upon the same negligent or wrongful act.[12] Such a contract of release could reasonably include an insurance policy. It would then appear that such a contract, if express, will bar an action by his personal representative after his death to recover damages for his wrongful death. The authority on this point seems to be clear, however, that a person has no power, in advance of an injury to bargain away a right of action for his death created by statute for the benefit of other persons.[13] Getting back to the assumed exception to the exclusionary evidence rule, it could possibly be justified by the above rules of law on some theory of implied contract—that is, when an employee accepts the free insurance policy on his life there is an implied stipulation that such amount recovered by his beneficiaries should be set off against the total damages assessed against the employer who was negligently or wrongly responsible for the insured's death. It could be further reasoned that such an implied contract is not a "bargaining away of future tort liability," but is in actuality a liability protection to the employer in the form of a life insurance policy on the employee's life in consideration for the assured protection of the insured's beneficiaries regardless of how he may meet his death. In other words, if the insured met his death at the hand of a third party wrongdoer, the policy recepits would in no way affect that persons tort liability, but if the employer who buys the insurance contract is the wrongdoer, by virtue of that fact, he should be allowed the amount received by the beneficiaries in mitigation of his total liability because he has paid for protection on his liability to that extent; the consideration being a full coverage in the amount of the face value of the policy for the protection of the deceased's employee's beneficiaries.

Assuming the above to be a possible exception to the exclusionary insurance rule, several other possibilities deserve consideration.

For instance, if the hazard insured against is one in which the insured's normal or existing policies would not cover, such as with the aviation exclusion clause, it could then be said that the employer's policy covering the hazard is merely an exchange for the loss of protection by the insured of his original coverage and not supplemental. If this were the case, it is obvious that the reasons for the proposed exception fail.

Another consideration which has been widely discussed and written about is the various methods in which damages under a survivorship act are distributed.[14] Under Lord Campbell's Act, the distribution of damages among the various beneficiaries is to be divided in such shares as the jury by their verdict shall find and direct, and similar provisions have been adopted by several state statutes in the United States.[15] Other states have statutes to which they are entitled to take as beneficiaries to the damages under the Act.[16] Numerous other methods have been devised by the

12. Northern P. R. Co. v. Adams, 192 U.S. 440, 48 L.Ed. 513, 24 S.Ct. 408 (1904), Annotation: 39 A.L.R. 585.
13. Wyo. Const. Art. 10, § 4; Annotation: 67 L.R.A. 96, 27 L.R.A. (N.S.) 177; 1915E, 1171.
14. 16 Am. Jur., Death, § 251 (1938).
15. Coliseum Motor Co. v. Hester, 43 Wyo. 298, 3 P.2d 105 (1931), supra note 13.
16. Ibid.

several state legislatures, but most of the statutes provide that the damages recovered in such an action shall be distributed to the statutory beneficiaries provided by law in relation to the distribution of personal property left by persons dying intestate, even though the amount of damages assessed for the unlawful killing is required to be based upon, and limited to the actual pecuniary loss of certain designated persons.[17] This is the type of statute on the books in Wyoming.[18]

The obvious anomally which results from the latter type statute has been recognized by the Wyoming Supreme Court in at least one case,[19] and discussed by Judge Tidball, once a Wyoming District Court Judge, in an article published in the Wyoming Law Journal. Judge Tidball recommended that the statute be amended so as to "provide that only those close relatives of (the) deceased who actually suffer a loss may be beneficiaries in such an action; and the manner in which the amount recovered shall be distributed so as to reimburse those who have been put to expense on account of doctor, hospital and funeral bills, and to reimburse the named beneficiaries in proportion to their loss."[20] It may readily be seen at this point, that Judge Tidball's criticism is valid, and it is also equally valid concerning the workability of the assumed exception to the exclusionary insurance rule. It would appear, however, that merely because there is an obvious injustice created by the distribution statute—that injustice should not be multiplied by allowing plaintiff's in wrongful death actions to benefit over and above their actual pecuniary loss, which is the declared purpose of this type of remedy. Presently in Wyoming, those who may suffer the most as a result of a wrongful death, may be forced to share part of their pecuniary loss with others who have not lost at all. Accordingly, if the exception to the exclusionary insurance rule is applied, those who have suffered the most may be forced to accept less than their actual pecuniary share in the damages because of the fact that a person who did not suffer any loss may have been the beneficiary of an insurance policy on the life of the deceased. It would seem, however, as a matter of reality, that those who actually lose as a result of an untimely death, would normally be those named as beneficiaries under such a policy. This is because life insurance is normally purchased in order to protect those who are dependent upon that person's continued life in assuring their future support.

The next possibility under the assumed exception to the exclusionary rule concerns the type of insurance policy involved. The simplest consideration would be the term policy under which no cash value is ever accrued. This type of policy presents no particular problem, other than the determination of the deduction of those premiums which would have been paid had the deceased lived. Other policies, however, involve accrued

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17. Supra note 13.
18. § 1-1066, W.S. (1957).
19. Supra note 14 at 320, 3 P.2d at 112.
20. Tidball, Probate Jurisdiction in Wrongful Death Claims, 2 Wyo. L.J. 109 (Dec. 1946 Aug. 1948).

cash values, which have a present value. Since then, the decedent had a present value, under Lord Campbell's original thinking regarding the treatment of premiums, this value should be deducted from that amount which would be considered in mitigating the wrongdoer's liability.

The foregoing is a purely theoretical outlook involving a special type of case under wrongful death statutes, and so far as the writer has been able to determine, has not been specifically decided by any tribunal in the United States. The basic rule, that evidence to the effect that the beneficiary in a wrongful death action was also the recipient of an insurance policy on the life of the decedent is inadmissable to mitigate damages, is universal in its general application in this country.[21] This should not, however, preclude the possibility that in peculiar situations, such as the one outlined in this paper, an exception should be formulated in order that complete justice, without over-compensation or penalty, be carried forward.

Dean Frank Trelease, in a book review, commenting on Mr. Belli's work, *Modern Trials,* had this to say:

> . . . Perhaps the rules of damages need an overhaul. Maybe there will be a shift toward attempting to determine what actual dismemberment causes a fixed percentage drop in earning the loss of a lawyers' leg or arm, rather than assuming that any disemembernent causes a fixed percentage drop in earning power. . . .[22]

Dean Trelease was referring specifically to personal injury cases rather than damages as a result of wrongful death, but it should also be kept in mind that this remedy was purposely formulated in order that survivors may recoup, in a pecuniary fashion, that which they lost at the hand of a person committing a negligent or wrongful act, *and no more.* The Death Act was not designed to impose a penalty on the wrongdoer, but if the beneficiary of the action receives more than what he has lost, pecuniarily speaking, the result may very well be said to act as imposing such a penalty.

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RECORDING FEDERAL OIL AND GAS LEASES

The United States owns 48.4%[1] of the land in the State of Wyoming including both the surface and the minerals. In addition, the United States owns, by reason of patent reservations, the minerals in some patented lands as well as the minerals in other acquired lands. Thus, approximately one-half of the land within the State available for oil and gas leasing is federally owned and administered.

21. 18 A.L.R. 686 s. 95 A.L.R. 579.
22. Trelease, Book Review, 10 Wyo. L.J. 91 (Fall 1954 to Spring 1956).

1. Statistical Abstract of the United States 1960.