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## Wrongful Death in Wyoming: Two Causes of Action

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## NOTES

### WRONGFUL DEATH IN WYOMING: TWO CAUSES OF ACTION?

A was injured as a result of B's actionable negligence. After an extended period of intense suffering, he died from the injuries thus sustained. A was not contributorily negligent; nor did he, at any time prior to his death, effectuate a release of his cause of action against B. Left surviving A were his four children. Two of the children were adults born to A's first marriage and two were minors born during his second marriage. The minor children lived with A and were dependent upon him for their support. They were the sole beneficiaries named in A's will. Neither of A's wives survived him. At the time of the accident B was carrying liability insurance. An executor was named and qualified and now wishes to settle all claims which he may have against the assured in that capacity.

In Wyoming it has been the common practice of attorneys and claims adjusters, when presented with a claim for wrongful death, to make a settlement with the executor of the estate by acquiring a release of the cause of action based on the wrongful death act. (Wyo. Stat. §§ 1-1065, 1-1066 [1957].) It has not been common for the adjuster or attorney

to make a settlement on the survival statute. (Wyo. Stat. § 1-28 (1957)). This practice should be examined to determine its adequacy in all instances. Does the above hypothetical case present a situation from which two causes of action can arise? If so, from whom must the adjuster or attorney obtain a release in order to protect his client company, the company's policy holder, and himself?

The Wrongful Death Act provides a remedy:<sup>1</sup>

Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof . . .

Two types of death acts are recognized. Some are said to be survival statutes.<sup>2</sup> Others, like Wyoming's, are said to create a new cause of action. In *Coliseum Motor Co. v. Hester*, the Wyoming Supreme Court said:<sup>3</sup>

It is a survival statute in the sense that damages may now be recovered for the wrongful act notwithstanding that death may result, whether instantaneously or otherwise. It gives a new cause of action for the same reason and for the further reason that the action is not one transferred from the decedent to the administrator but is one given directly to the administrator. . . .

The requirement that the decedent should have had a cause of action in order that the executor would be able to commence an action for wrongful death is a condition precedent to his right to bring the action. Its effect is to allow the tortfeasor any defense against the administrator which he would have had against the decedent. The statute was enacted to overcome the common law doctrine that the death of a human being is not a grounds for an action in the civil courts.<sup>4</sup>

The statute provides that damages recovered shall go to such persons as may be determined by the statute on intestate descent. The damages are not subject to claims of creditors.<sup>5</sup> Damages recoverable include those for:<sup>6</sup>

. . . the amount the survivors failed or will fail, by reason of the death, to receive out of the decedent's earnings, any other pecuniary loss directly or proximately sustained by the survivors by reason of such death including funeral expenses and further the court or jury may add, as an element of damages a reasonable sum for the loss of comfort, care, advice and society of the decedent.

The statute clearly provides only for those damages which are incurred subsequent to the death of the injured person. They include only those which were sustained by those persons entitled to the proceeds of the

1. Wyo. Stat. § 1-1065 (1957).

2. *Hale v. Fitzgerald*, 247 Iowa 1194, 78 N.W.2d 509 (1956).

3. 43 Wyo. 298, 3 P.2d 105, 107 (1931).

4. 16 Am. Jur. 65.

5. See *Tuttle v. Short et al.*, 42 Wyo. 1, 288 Pac. 524 (1930).

6. Wyo. Stat. § 1-1066 (1957).

settlement. It provides for none of the damages which the decedent could have recovered had he survived.

There are clear indications that only the executor or administrator has the capacity to maintain the action for wrongful death.<sup>7</sup> The statute need only be given its plain meaning to reach this conclusion. It provides that, "Every such action shall be brought by, and in the name of the personal representative of *such deceased person*; . . ." (Emphasis supplied.) The personal representative acts as trustee for those persons designated and not as an agent of the decedent's estate.<sup>8</sup> As trustee, the personal representative is in a fiduciary relation to the survivors. If the insurance company makes a settlement in good faith with an authorized personal representative, its responsibility under the wrongful death statute is at an end. It is not responsible for the proper distribution of the proceeds.<sup>9</sup> The application of this rule should work no hardship on the beneficiaries. If the personal representative should abscond with the proceeds or by mistake give them to the wrong person, the injured party should have a cause of action on the executor's bond.<sup>10</sup> A majority of the courts which have decided the question agree that even though the personal representative is acting as a trustee for designated beneficiaries, rather than the estate, his sureties may be rendered liable for his misfeasance or malfeasance.<sup>11</sup> The reasoning of these decisions is that the Wrongful Death Act created a new duty which became one of those which the executor had sworn by oath to perform. Further, that the executor must show that he has paid all sums of money due from him as personal representative of the deceased before he will be discharged from liability.<sup>12</sup> By saying that the money received in settlement of the wrongful death cause of action was part of the proceeds for which the personal representative must account, the courts have been able to reach his sureties. It would thus appear that the beneficiaries could protect themselves by petitioning for additional bond.<sup>13</sup> The executor, by requesting the court to make a determination of the beneficiaries, could protect himself from liability for mistake in distribution.<sup>14</sup>

To summarize, the personal representative is probably the only person to bring the wrongful death action. Even though he acts as a statutory delegate in maintaining the action, the beneficiaries are protected from any malfeasance or misfeasance or the executor's doing by his bond. The insurance company has fulfilled its responsibility. Therefore, the

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7. *Ashley v. Read Const. Co.*, 195 F. Supp. 727 (Wyo., 1961); c.f., *Massion v. Mt. Sanai*, 40 Wyo. 297, 276 Pac. 930 (1929).
  8. *Coliseum Motor Co. v. Hester*, 43 Wyo. 298, 3 P.2d 105 (1931).
  9. See Wyo. Stat. § 4-3 (1957).
  10. See Wyo. Stat. § 2-122 (1957), Wyo. R.C.P. 17 (a) (1957).
  11. *Sisk v. Pressley et al.*, 81 F. Supp. 16 (E.D. S.C., 1948); *United States Fidelity & G. Co. v. Decker*, 122 Ohio 285, 171 N.E. 333 (1931); *Aetna Casualty & S. Co. v. Young*, 107 Okla. 151, 231 Pac. 261 (1924).
  12. See Wyo. Stat. § 2-324 (1957).
  13. See Wyo. Stat. § 2-133 (1957).
  14. 2 Wyo. L.J. 109.

adjuster or attorney should be safe in obtaining only the executor's release *in respect to the Wrongful Death Act*.

If the Wrongful Death Act provides the only cause of action available, the release thereof by the executor ends the problem. However, we also have a survival statute which provides:<sup>15</sup>

In addition to causes of action which survive at common law, causes of action . . . for injuries to the person shall also survive . . . provided that in an action for personal injury damages, if the person otherwise entitled thereto dies, recovering (recovery) shall be limited to damages for wrongful death.

In general, a survival statute provides for damages to the deceased party suffered by him from the time of accident until his death. The injuries include pain and suffering of the decedent, the loss of wages up to the time of death, the loss of companionship of his wife and children, and expenses incurred, necessitated by the injuries, in the nature of hospital and medical expenses.<sup>16</sup> If any action is prosecuted to successful conclusion under the survival statute, the resultant proceeds may be of no benefit whatever to those persons who would take by virtue of the wrongful death settlement. This is because the survival statute allows the estate to maintain the same action which the decedent could have maintained. The cause of action passes from the decedent to the personal representative and it becomes one of the assets of the estate.<sup>17</sup> The action is commenced by the executor in his capacity as agent for the estate.

Do the Wrongful Death Act and the survival statute provide concurrent remedies? The importance of this question is twofold. First, it is important to the insurance company and those persons directly aligned with its interests. It is in the best interest of the company to settle all just claims and to close its files on the case as soon as possible with assurance that it will not be necessary to reopen it. Several situations are readily foreseeable, once it is assumed that there are concurrent remedies available, in which this interest will not have been satisfied by obtaining a release only of the wrongful death cause of action. There may be an instance where an action on the survived cause is commenced subsequent to a settlement on the Wrongful Death Act. The limitation on most torts in four years.<sup>18</sup> An action could thus be commenced on the survived cause of action after termination of the limitation on the Wrongful Death Act, which is two years. Another possibility is that the insurance company might pay all of the policy value in settlement of the Wrongful Death Act claim. Secondly, it is important to the personal representative to know what settlements he must make in order to fulfill his obligations as agent of the estate. If the survival statute provides a cause of action which he does not settle, he may be subjected, along with his sureties, to a suit for misfeasance in fiduciary capacity.

15. Wyo. Stat. § 1-28 (1957).

16. Mahoning Valley Ry. Co. v. Van Alstine, 77 Ohio St. 397, 83 N.E. 601 (1908).

17. Mahoning Valley Ry. Co. v. Van Alstine, supra note 16.

18. Wyo. Stat. § 1-18 (1957).

The question of concurrent remedies arises because of the present trend among courts to allow the plaintiff in a law action to recover on all possible grounds. A recent illustration of this is the Kansas case of *Prowant v. King X. Inc.*<sup>19</sup> where, on rehearing, the court overruled a construction of their survival statute which had been upheld for eighty-two years.

The courts have gotten around the doctrine of res judicata on the basis that all the beneficiaries of the two actions must be the same before it applies.<sup>20</sup> The Supreme Court of Ohio stated:<sup>21</sup>

This court, however, cannot agree that the real parties in interest are exactly the same, nor that the causes of action are identical. Under section 10772, the death action is to be prosecuted by the administrator, for exclusive benefit of the wife or husband and children, . . . The action prosecuted under section 11235 is for the benefit of the estate.

The damages recoverable under the two statutes are for different phases of the results of the Wrongful Death Act. In reference to a revived action, the Ohio Supreme Court said:<sup>22</sup>

. . . the revived action and the latter (for wrongful death) are not the same. They rest primarily upon the same alleged negligence of the defendant and the same absence of contributory negligence of the injured person; but in the revived action the damages are for the personal injuries to the injured person for which the action would lie if death had not ensued, and such damages to inure when recovered to the benefit of the estate, while in the latter action the suit is prosecuted in the interest of the other parties and the measure of damages is the pecuniary loss they have sustained.

In the same case the court said that the majority of the courts favored the recognition of two independent causes of action.

The problem of determining the availability of concurrent remedies under the Wyoming statutes must turn upon the construction which may be given to that part of the survival statute which provides that, ". . . in actions for personal injury damages, if the person otherwise entitled thereto, dies, recovering shall be limited to damage for wrongful death." No other court has had to construe the meaning of similar restriction on a survival statute. The provision is unique to the Wyoming statute. The true meaning of the words is so obscure as to defy confident construction. Upon casual reading, one might conclude that it allowed only the cause of action on the wrongful death statute to survive. There are two basic reasons for believing that the supreme court might apply a meaning which would also allow recovery on the survival statute. The legislature, in the same session that the above restriction was placed on the survival statute, amended the Death Act to give it a self-contained survival pro-

19. 185 Kan. 602, 347 P.2d 254 (1959).

20. Restatement, Judgments § 92(2) b (1942).

21. *May Coal Co. v. Robinette*, 120 Ohio St. 110, 165 N.E. 576, 577 (1929).

22. *Mahoning Valley Ry. Co. v. Van Alstine*, 77 Ohio St. 397, 83 N.E. 601, 607 (1908).

vision.<sup>23</sup> There would appear no reason to provide for the survival of personal injury causes of action and then to restrict them to one which would survive without the aid of the survival statute. Also, this construction would allow recovery only where the deceased person died of the injuries complained of. The wrongful death statute does not provide for recovery for damages to the survivors caused by injuries to the decedent not causing death.

If A injured B so seriously that he would never again be capable of supporting his family, and B then died from a natural cause before securing a final judgment on the cause thus arising, the Wrongful Death Act would give no remedy. If B had not died he could have recovered damages which would have provided for himself and his family. If this is the meaning, then by a quirk of fate the tortfeasor is freed from liability.

There are additional reasons for the belief that the above construction will not be given. The aforementioned trend to allow all possible actions is one. The provision of the Wyoming Constitution which provides that no person shall be denied justice for, "an injury done to the person," is another.<sup>24</sup> Further, the legislature has instructed the courts to construe the code of civil procedure liberally. The common law rule that statutes in derogation thereof be strictly construed has no application.<sup>25</sup> These points will not force a construction different from the one advanced above, which would limit the interested parties to one cause of action for wrongful death, but they could be strongly persuasive.

It is entirely possible that the court could conclude that the phrase in question operates to limit the personal representative to a wrongful death action only in situations where the injured party dies while an action is pending trial or during trial. This construction is no less apparent than the first when, upon examination of the survival statute, the shift from the clause "cause of action," which had been used exclusively in all of the preceding provisions of the statute, to the term "action," in the phrase upon which it has been stated the determination of the question of two causes of action must turn, is detected. This would be consistent with the ordinary distinction made between an "action" and a "cause of action." An "action" is the pursuit of right in court.<sup>26</sup> A "cause of action" is the right to institute an "action" in court.<sup>27</sup> This construction could easily be expanded to mean that only when the party dies of the injuries complained of in such suit shall his survivors be restricted to recovery on the Wrongful death statute. It is apparent that this construction will also result in inconsistencies. The injured party who dies before commencing any action will be in more favored position, in the eyes of the law, than

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23. Wyo. Stat. § 1-1065 (1957).

24. Wyo. Const. Art. 1, § 8.

25. Wyo. Stat. § 1-2 (1957).

26. *Ginzberg v. Wyman*, 272 Mass. 499, 172 N.E. 614 (1930).

27. *Viers v. Webb*, 76 Mont. 38, 245 Pac. 257 (1926).

his brother who institutes his action before he dies. In view of the fact that most injured parties have recovered to a point where death will not ordinarily come as a result of the injuries complained before starting any action, this approach might seem more appealing to the court. In effect, a cause of action for the tort would survive but an action therefor could not be revived.

What can be done to protect the insurance company until this question has been decided? The best approach would be to make two settlements with the executor or administrator. By acquiring a release of both possible grounds, adequate protection should be provided for all interested parties. By explaining to the personal representative that the settlement on the survival statute is necessitated by the ambiguous wording of it, and not as an admission that any action can be maintained under it, a small settlement should be agreeable. A single release instrument as to all possible causes of action could be employed with impunity if drafted with particularity in view of the problems alluded to above. This would leave to the personal representative the onerous task of distributing the award among the two groups of beneficiaries. In any event, it would seem proper to assume that all contingencies can be covered by dealing exclusively with the personal representative.

The legislature's problem is to determine what actions shall survive the death of the injured party. If only the Wrongful Death Act is to survive, this could be shown by changing the survival statute to read "provided that, in any action for personal injury damages, if the injured party dies, recovery shall be limited to an action on the Wrongful Death Act when it is applicable." If the legislature intended that all causes of action for personal injury should survive the injured party, as well as the tortfeasor, the restriction should be dropped altogether. A middle position might be taken by saying: "provided that, on a cause of action for personal injury damages, if the injured person dies, of the injuries complained, recovery shall be limited to an action on the Wrongful Death Act."

Clarification is needed to provide protection to all persons who deal with or are involved in wrongful death actions. Until such time as the needed amendment is made, the above suggestions as to settlements may be helpful in providing maximum protection.

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