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## **Contributory Negligence of a Statutory Plaintiff as a Bar to Recovery for Wrongful Death in Pennsylvania Where One or More of the Other Beneficiaries are Innocent**

Myron D. Hockenbury

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## NOTES

### CONTRIBUTORY NEGLIGENCE OF A STATUTORY PLAINTIFF AS A BAR TO RECOVERY FOR WRONGFUL DEATH IN PENN- SYLVANIA WHERE ONE OR MORE OF THE OTHER BENEFICIARIES ARE INNOCENT

In a case where a wife and mother of several children is killed as a result of the negligence of the defendant, and where the negligence of the husband and father contributed to the accident, is the fault of the father, he being the statutory plaintiff, a bar to recovery for the innocent children, whose lives perhaps have been blasted by the defendant's act?

The Pennsylvania Act of Assembly under date of April 26, 1855,<sup>1</sup> prescribes that where death has occurred at the hands of a negligent defendant,

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<sup>1</sup>P. L. 309, Sec. 1.

the "persons entitled to recover damages . . . shall be the husband, widow, children, or parents of the deceased and no other relative." This act has been construed as giving the cause of action in the order named,<sup>2</sup> and as denying to the children the right to sue in their own names unless the spouse of the deceased is also dead.<sup>3</sup>

To recover damages under the act of 1855 it is not sufficient to show the mental suffering of the plaintiff or the physical distress of the deceased.<sup>4</sup> The measure of damages is "the pecuniary loss without any solatium for mental suffering or grief, and the pecuniary loss is what the deceased would probably have earned by his labor, physical or intellectual, if the injury that caused his death had not befallen him, and which would have gone to the support of his family."<sup>5</sup>

An anomaly is presented in our wrongful death act in the provision that, while pecuniary loss must be proved in the first instance, "the sum recovered shall go to them( the beneficiaries for whom the action is brought) in the proportion that they would take his or her personal estate in case of intestacy . . .,"<sup>6</sup> regardless of the varying merits and the pecuniary losses of the beneficiaries. There is no machinery in Pennsylvania for a more equitable division of the proceeds.

It is to be noted that the negligence of the husband is not imputed to the deceased wife from their marital relationship in the absence of agency or common enterprise.<sup>7</sup> Similarly, the negligence of the father is not imputed to the innocent children.<sup>8</sup>

Our problem might broadly be stated as whether the contributory negligence of one of several beneficiaries to a death action is a defense against those innocent of negligence. The general tendency is to permit recovery in such a case, at least as to the innocent beneficiaries.<sup>9</sup> Even a sole beneficiary has

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<sup>2</sup>Haughey v. Pittsburgh R. R. Co., 210 Pa. 367, 59 Atl. 1112, (1904); Huntington, etc. Coal Co., v. Decker, 84 Pa. 419 (1877); Marsh v. Western New York and Pennsylvania R. R. Co., 204 Pa. 229, 53 Atl. 1001, (1903).

<sup>3</sup>Tomlinson v. Northwestern Electric Co., 301 Pa. 72, 151 Atl. 680 (1930).

<sup>4</sup>Gaydos v. Domabyl, 301 Pa. 523, 152 Atl. 549 (1930); Pennsylvania R. R. v. Kelly, 31 Pa. 372 (1858); Pennsylvania R. R. Co. v. Vandever, 36 Pa. 298 (1860).

<sup>5</sup>McHugh v. Schlosser, 159 Pa. 480, 28 Atl. 291, 23 L. R. A. 574, 39 Am. St. Rep. 699 (1894). Quoted with approval in Philipovich v. Pittsburgh Coal Co., 314 Pa. 585, 172 Atl. 136 (1934).

<sup>6</sup>Act of 1855, P. L. 309, Sec. 1.

<sup>7</sup>Rodgers v. Saxton, 305 Pa. 479, 158 Atl. 166 (1932); Alperdt v. Paige, (dictum) 292 Pa. 1, 140 Atl. 555 (1928).

<sup>8</sup>Erie City Pass. R. R. Co. v. Schuster, 113 Pa. 412, 6 Atl. 269, 57 Am. R. 471 (1886); Smith v. O'Connor, 48 Pa. 218, 86 Am. D. 582 (1864).

<sup>9</sup>Kekosh v. Price, 136 Minn. 403, 161 N. W. 715, 23 A. L. R. 643, 16 N. C. C. A. 1050 (1917).

been allowed to recover when the action is in the name of and for the benefit of the estate of the decedent, although the negligence of that sole beneficiary contributed to the death, the theory being that the right of the estate "insulates" the wrong of the beneficiary.<sup>10</sup> On the other hand some courts look through the estate to the party in interest and deny him recovery.<sup>11</sup>

More specifically our problem arises when the beneficiary whose negligence contributed to the death is placed by statute in the role of plaintiff. Should the fact that the one at fault is a party to the record make a difference? The courts have a natural repugnance to allowing a plaintiff who is contributorily negligent to use legal machinery against one who is perhaps no more at fault than himself. On the other hand, the rule seems to be harsh where it bars recovery for slight negligence against one whose negligence was gross. But the position of the innocent beneficiaries is the same regardless of the degree of negligence or of who brings the action.

The Restatement of Torts, still fresh with the smell of printer's ink, is not very helpful. Section 493 makes the lucid observation that the "effect of contributory negligence under a death statute depends upon the provisions of the statute." In explanation it points out three types of statutes: first, those which distribute the sum recovered among the survivors who would have benefited by the decedent's earning power; second, statutes fixing the amount of recovery by the gravity of the defendant's fault; and third, statutes which treat the sum recovered as an asset of the decedent's estate. The Pennsylvania statute approximates this third class, using the measure of the Intestate Act for affecting distribution but excluding any creditors of the decedent. Section 492 of the Restatement answers a problem kindred to ours, where the person entitled to damages is required to bring his action in the name of or in conjunction with another whose negligence contributed to the accident. The fault of this "nominal plaintiff" is no bar to the real plaintiff's action; but the further step, where the plaintiff must share in the proceeds of the recovery, the Restatement does not take. Incidentally, the statutory plaintiff in Pennsylvania, is more than a "nominal plaintiff," for he is empowered to make a settlement for the other beneficiaries. The amount recovered is held by the one entitled to bring the action in the capacity of trustee.<sup>12</sup>

Militating against recovery by the plaintiff in our supposed case is the

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<sup>10</sup>Nashville Lumber Co. v. Busbee, 100 Ark. 76 (1911); Southern R. R. Co. v. Ship, 169 Ala. 327 (1910).

<sup>11</sup>Harton v. Tel. Co., 151 N. C. 455 (1906); Illinois Central R. R. v. Warriner, 229 Ill. 91 (1907).

<sup>12</sup>Conover v. The Pennsylvania Co., 176 Fed. 638 (1910).

doctrine of *Hazel v. Hopeton-Danville Motor Bus Company*.<sup>13</sup> In this case the Illinois court held that the contributory negligence of one of several beneficiaries will bar recovery for wrongful death through negligence where the statute provides for a *single assessment of damages in a gross amount*. Certainly the italicized words describe our act of 1855, and the *Hazel* case presents a strongly analogous advisory precedent. The Illinois court distinguishes the seemingly contra holding of *Wolf v. Lake Erie, etc., R. R. Co.*<sup>14</sup> Here an administrator was allowed to recover for the beneficiaries, one of them being negligent. This decision is explained by the Ohio statute which provides for distribution among beneficiaries according to their individual pecuniary losses, the person whose negligence contributed to the accident not sharing in the recovery. In this regard the Ohio statute differs from the Illinois and the Pennsylvania law.

The so-called parent-child cases can be argued as limiting recovery in Pennsylvania. In *Darbrinsky v. The Pennsylvania Co.*<sup>15</sup> a father and child were killed, the mother bringing actions for their deaths. It was held that the negligence of the father which contributed to the accident barred any recovery for the tort causing his death. As to the death of the child, too young to be chargeable with negligence, recovery was denied the mother on the grounds that the negligence of the one parent was imputed to the other. Justice Mestrezat filed a vigorous dissent, insisting that the negligence of the father should not be imputed to the mother, that the mother "claims through the child, not through her husband, and sues in her own right and for a cause of action conferred on her by statute. She is not in privity with her husband as to the right conferred by the statute and is not chargeable with his dereliction of duty."<sup>16</sup> Justice Mestrezat scores the argument that because where both parents are living, a joint action being brought for the death of the child, the contributory negligence of one will bar recovery,<sup>17</sup> recovery should be denied the mother suing alone and in her own right. In *Senft v. Western Maryland R. R. Co.*<sup>18</sup> negligence of the husband was not imputed to the wife, even though riding in the car at the time of the accident. It is at least doubtful whether in view of this dissenting argument in the *Darbrinsky* case the con-

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<sup>13</sup>310 Ill. 38, 141 N. E. 392, 30 A. L. R. 491 (1923).

<sup>14</sup>55 Ohio St. 517, 45 N. E. 708, 36 L. R. A. 812 (1896).

<sup>15</sup>248 Pa. 503, 94 Atl. 269, (1915).

<sup>16</sup>Supporting Justice Mestrezat: Atlantic and Charlotte Air R. R. Co. v. Gravitt, 93 Ga. 369, 20 S. E. 550 (1894); Louisville, Albany, and Chicago R. R. Co. v. Creek, 130 Ind. 139, 29 N. E. 481 (1892).

<sup>17</sup>McDonald v. Sincox, 98 Pa. 619 (1880).

<sup>18</sup>246 Pa. 446, 92 Atl. 553 (1914).

tributory negligence of the father in our supposed case should bar recovery.

But there is another interesting argument in favor of the plaintiff's recovery. There are two methods of giving a remedy for death by wrongful act, none existing at common law. One is to create a right in the survivors of the deceased person to recover damages to compensate for their loss. The other is to let the right of action in the decedent "survive" in favor of the estate. In the latter case the usual procedure is to govern the right of the survivors by looking at the cause of action as it existed in the decedent. In the case of *McKay v. Syracuse Rapid Transit Company*<sup>19</sup> the plaintiff, although contributorily negligent and the sole next of kin, was allowed to recover for the wrongful death of his wife. The New York court said that since the husband's negligence would not have defeated recovery by the wife if she had lived, and since their Code<sup>20</sup> provided for recovery in every case which would have been proper "in favor of the decedent had death not ensued," the husband-plaintiff, although negligent, could recover. A very considerable number of authorities have followed this theory in allowing recovery.<sup>21</sup>

New Jersey, which has a statute<sup>22</sup> similar to the New York Code provision, has recently reaffirmed its stand in accord with the New York view. A husband whose negligence contributed to the death of his wife was allowed to recover as administrator of his wife's estate, although he was the sole next of kin.<sup>23</sup> There is, however, considerable authority to the effect that contributory negligence is a bar to recovery where the personal representative sues in the right of the deceased person.<sup>24</sup>

It can be argued in favor of the plaintiff in our hypothetical case: first, that the New York and New Jersey rule should be adopted where the law of the jurisdiction prescribes that in actions for wrongful death the cause of action springs from the right of the decedent; and second, that in Pennsylvania the cause of action does depend upon the right of the deceased person. Justice Von Moschzisker, writing the majority opinion in the *Darbrinsky* case, states:

<sup>19</sup>208 N. Y. 359, 101 N. E. 885 (1913).

<sup>20</sup>New York Code of Civil Procedure, Sec. 902.

<sup>21</sup>*Bastedo v. Frailey*, 109 N. J. L. 390, 162 Atl. 621, 87 A. L. R. 857 (1932); *Consolidated Traction v. Hone*, 69 N. J. L. 275, 35 Atl. 899 (1896); *Warren v. Manchester St. R. R. Co.*, 70 N. H. 352, 47 Atl. 735 (1900); *Wymore v. Mahaska County*, 78 Iowa 396, 43 N. W. 264, 6 L. R. A. 545, 16 Am. St. Reports 545 (1889).

<sup>22</sup>2 Comp. St. 1910, pp. 1907, 1911, Sec. 7, 9; and Comp. St. Supp., Sec. 55-8 55-10.

<sup>23</sup>*Bastedo v. Frailey*, supra. Also see 18 Iowa Law Review 387.

<sup>24</sup>*Bamberger v. R. R. Co.*, 55 Tenn. 18, 31 S. W. 163 (1895); *Reid v. Medley*, 118 Va. 462, 87 S. E. 616 (1916); *Richmond, etc. R. R. Co. v. Martin's Adm'r*, 102 Va. 201, 45 S. E. 894 (1903); *Crevelli v. R. R. Co.*, 98 Wash. 42, 167 Pac. 66 (1917).

"While the statutes in question give the right to pursue the wrongdoer after the death of the person injured, and designate who may bring suit and how the money recovered shall be divided, yet in each instance, the foundation of the claim and the defenses which may be imposed, are the same as though the victim of the trespass has not died."

This statement of the law has been supported in several Pennsylvania cases.<sup>25</sup> In *Howard v. Bell Telephone Company* it was held that the Act of 1851 created a new right of action, but that this right is derived from and depends upon the existence of the right of action in the decedent had he lived. In our supposed case the wife and mother could undoubtedly have recovered for the injury had she lived regardless of any fault in her husband. The above quotation from the *Darbrinsky* case and the holdings of our neighboring states furnish one plausible solution to our problem.

Our courts have not spoken. Until they do, this moot question will remain a perplexing knot in a highly entangled chapter of our law. It has been said that no field of law is so contradictory, illogical, and unjust as the jurisprudence growing from our death statutes. As an instant example, there can be no completely just answer to our problem. The negligent father is forced into the position of plaintiff if there is to be any recovery under the statute; the statute gives him an absolute right to share in any recovery. An injustice must inevitably be done, either to the defendant, who may have been no more to blame for the accident than the plaintiff, or to the innocent beneficiaries. We can only hope that the legislature will come to our aid with some intelligent and intelligible revisions.

Myron D. Hockenbury.

## ADOPTION AS AFFECTING INHERITANCE IN PENNSYLVANIA

### I.

A recent case<sup>1</sup> brings up the question of the interpretation of section 16 (a) and (b) of the Intestate Act of June 7, 1917,<sup>2</sup> relative to the rights of an

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<sup>25</sup>*Howard v. Bell Telephone Company*, 306 Pa. 518, 160 Atl. 613, (1932); *Staggers v. Dunn Marr Oil and Gas Co.*, 312 Pa. 269, 176 Atl. 785 (1933); *Centofanti v. Pennsylvania R. R. Co.*, 244 Pa. 255, 90 Atl. 558, (1914).

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<sup>1</sup>*Reamer's Estate*, 315 Pa. 148, 172 Atl. 655 (1934).

<sup>2</sup>P. L. 429.