Notre Dame Law Review

Volume 4 | Issue 2 Article 3

11-1-1928

# Actions for Death by Wrongful Act

Charles A. Haskell

# ACTIONS FOR DEATH BY WRONGFUL ACT

By CHARLES A. HASKELL

The general rule as to tort obligations is that the law governing the creation and extent of tort liability is that of the place where the tort was committed, the *lex locus delicti*; and, in order that such liability may be enforced in another forum, the act which is the foundation of the action must at least be actionable or punishable by the law of the place in which it is done. If this prerequisite is satisfied, the courts of the states generally will, if they have jurisdiction of the necessary parties and can do substantial justice between them in accordance with their own forms of procedure, enforce the foreign law if it is not contrary to the public policy of the forum, to abstract justice or pure morals, or such as may injure the state or its citizens. With these principles recognized throughout most of the states of this country, there is but little difficulty in making application thereof to common law torts.

A formidable difficulty arises, however, when we enter the field of statutory torts. Perhaps the majority of the decisions involving the right to sue in another state on a statutory cause of action for tort arise under statutes conferring a right of recovery for death by wrongful act. It is too well settled to demand citation of authority that at common law, in conformance with the maxim, "actio personalis moritur cum persona", no action will lie to recover damages for the wrongful death of another. Except in those jurisdictions where the rule has been changed by statutory enactment, it is still the law that actions or causes of action for personal injuries resulting in death do not survive.

Lord Campbell's Act, passed in England in the year 1846, marks the initial legislation giving the right of action to recover damages for death by wrongful act, "for compensating the families of persons killed in accidents". Almost concurrently, in an endeavor to relax the apparent injustice and harshness of the common law rule, New York enacted legislation for the same purpose in 1847. Thus was commenced a philanthropic parade

which enlisted the following of all the states, and such statutes have now been everywhere adopted. Substantially, they all conduce to effect the same relief; yet as to the phraseelogy and mode of remedy they differ greatly, and it is from these differences that Conflict of Laws questions develop, a review and summary of which comprise the tenor of this article.

Invoking the settled doctrine that tort liability is to be governed by the *lex locus delicti,* the states concur in the holding that no action may be brought in one state for injuries resulting in death which were inflicted in another state, unless an action is given by the laws of the state where the injury occurred.[1] It is not enough that there is such a statute at the forum, for, as to the creation of the right, that statute can have no extraterritorial effect. Again, where the injury is inflicted in one state and the death results in another state, it is the law of the former place which governs as to the creation of the right.[2] Thus, we see, a general harmony exists as to what law is to govern the creation of the right. It has never been contended—nor could it be with any basis of reason—that the creation of the right is merely formal or procedural, and this accounts for the general agreement that the right, and its creation, evolve solely from the *lex locus delicti.*

But the moment we approach the formal or procedural provisions of these statutes—where the action may be brought, who may bring the action, the amount and distribution of damages—then we are confronted with a merry array of conflicting opinion and reasoning. Much of this diversity arises out of the different beliefs as to the nature of the questions involved. Some hold them to be purely procedural questions to be governed by the *lex fori;* others, that they are inseparable, substantial elements of the right of action, inasmuch as all are created and initially provided for in the same piece of legislation, and hence to be governed by the *lex locus delicti.*

## THE PLACE OF BRINGING THE ACTION

Due to the fact that a claim for personal tort is transitory in its nature, it would seem a logical consequence that the action for death for wrongful act could be brought where-ever jurisdiction could be had of the defendant. This is the general rule today,

1 See 56 L. R. A. 194, note.
2 See 56 L. R. A. 218, note; and 9 L. R. A. (N. S.) 1078, note.

but a historical development up to that point discloses a complete reversal of judicial opinion. Among the earlier cases there are many which deny the possibility of recovery under a foreign statute for death by wrongful act. In the case of *Texas & Pacific RR. Co. v. Richards,* 4 S. W. (Tex.) 627, it is stated, "We know of no rule of law which would authorize a court of this state to give effect to the laws of another state conferring such right as is claimed in this case, when the laws of this state declare that the same facts, transpiring here . . . could confer no right whatever to the relief sought. The most liberal state comity cannot, in reference to such a matter as that before us, require our state to enforce the laws of another when in conflict with its own." And, as expressed by J. Hoar, "There is great difficulty in ascertaining what cause of action this plaintiff has . . By the common law, and by the laws of this Commonwealth, no action could be brought for negligently causing the death of the plaintiff's intestate. If this be a penal statute, it cannot be enforced beyond the territory in and for which it was enacted. If it gives a new and peculiar system of remedy . . . which is not in conformity with the laws or practice of this Commonwealth, there is an equally insuperable objection to pursuing such a remedy in our courts . . . The right of action which the New York statute gives to the personal representative of the deceased in that state is not a right of property passing as assets of the deceased, but is a specific power to sue created by their local law, and it does not pass to the plaintiff as personal representative in Massachusetts." *Richardson v. New York Central RR. Co.,* 98 Mass. 85.

Next followed a yielding modulation, allowing of a recovery in such a case providing that there was a law in the forum similar to that of the *locus delicti.*[3] This was a most vicious viewpoint, in that it opened the door to unlimited contention in efforts to show the similarities and dissimilarities existing between the death statutes of the different states.

With the sound and just reasoning of Cardozo, J. in an important New York case, the "about face" was completed. This case takes up and reviews and explains the earlier decisions on the question, and announces the modern doctrine. In the language of the court, "They say that jurisdiction will be refused un-

3 See 56 L. R. A. 202, 203, note.

less the statutes of the two states are substantially the same . . . We must determine whether the difference is a sufficient reason for declining jurisdiction . . . . The suggestion sounds like an echo of the statute personal, a body of national law which the citizen carries about with him. A foreign law is not law in this state, but it gives rise to an obligation which, if transitory, follows the person and may be enforced wherever the person may be found. It is a principle of every civilized law that vested rights shall be protected. The plaintiff owns something and we will help him to get it . . . If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. For many years the courts have been feeling their way in the enforcement of these statutes. A civil remedy for another's death was something new and strange, and it did not find at once the fitting niche, the proper category, in the legal scheme. We need not be surprised, therefore, if some of the things said, as distinguished from those decided, must be rejected today. But the truth, of course, is that there is nothing *sui generis* about these death statutes in their relation to the general body of private international law . . We must apply the same rules that are applicable to other torts; and the tendency of those rules today is toward a larger comity, if we must cling to the traditional term." *Loucks v. Standard Oil Co. of New York,* 120 N. E. 198. This case, which is a light-house of good sense and reason, paved the road for what is now the prevailing view, that the action may be maintained at the forum, although the injury from which death resulted was inflicted in another jurisdiction. *Weissengoff v. Davis,* 260 Fed. 16, 7 A.L.R. 307; *Rochester v. Wells Fargo & Co.,* 87 Kan. 164, 40 L.R.A. (NS) 1095.

## PROPER PARTIES PLAINTIFF

"As the right of action for injuries resulting in death is entirely statutory, such action must be brough in the name of the person or persons to whom the right of action is given by the statute under which the action is brought. Where there is both a general death statute and a statute giving a remedy for wrongful death limited to particular classes of cases, the latter governs in respect to the proper party plaintiff in cases where it controls the right of recovery. And where a preference is given to certain

persons by the statute, the action must be brought by the person entitled in the order of preference." 17 C. J., 1262, (115). As will be seen by reference to the copious citations of authority in support of the above stated principles, they do constitute the general rule on the subject. Yet there is much conflict, depending largely on the status of the person in whom the right is vested to maintain the action. As such parties, the various statutes name; personal representatives, beneficiaries generally, husband or wife, parents, guardians, children, heirs or next of kin, the state, and some provide for a joinder of these parties.

The common form of statute, following the English precedent in Lord Campbell's act, allows an action to be prosecuted by the decedent's administrator for the benefit of designated surviving relatives. This procedure is simple and effective where the suit is brought in the same jurisdiction as the *lex locus delicti,* and when the deceased was domiciled in the said place. But suppose a case where the suit is brought in a forum other than that wherein the administrator is appointed. Then we are confronted with the well settled principle of law, that in the absence of statute, an administrator or executor, appointed in one state, cannot bring an action in his representative capacity in the courts of another state. *Johnson v. Powers,* 139 U. S. 156, 35 L. Ed. 112; *Mansfield v. McFaland,* 202 Pa. 173, 51 A. 763; *Hobart v. Connecticut Turnpike Co.,* 15 Conn. 145; *Chapman v. Fish,* 6 Hill (N. Y.) 554. Following out this rule and applying it to the statutory action by the administrator or executor for the death of his decedent, many jurisdictions have come to the conclusion that the foreign administrator cannot maintain the action, unless he has taken out ancillary letters of administration. In other jurisdictions it is held that a foreign personal representative may maintain the action upon the ground that he sues as a statutory trustee deriving his authority from the statute creating the cause of action, and not by virtue of his appointment as administrator or executor. In the language of Evans, J, in the case of *Knight v. Moline,* E. M. & W. Ry. (La.) 140 N. W. 839, "It is the general rule that a foreign administrator cannot maintain an action in this state to recover the assets of the estate until he qualify as such in accord with the provision of . . the Code . . . . This is a general rule which is recognized in practically all jurisdictions. The underlying

reason for it is that no state will allow property within its jurisdiction to be so appropriated by a foregn administrator as to destroy the opportunity of its own citizens to enforce their claims against it. To this rule some exceptions are recognized by some courts. It has been quite frequently held, that where a foreign administrator has a right of action as a mere trustee for the benefit of particular beneficiaries, he may maintain such action in such capacity. This exception rests in part upon the theory that the cause of action in such a case is not a part of the assets of the estate, and that therefore the resident creditors are in no wise affected."[4] And such is the general holding where the statutes provide that the money recovered does not go into the general estate of the decedent but is a special fund for the named beneficiaries.

But if the recovery is sought under a statute of the *lex loci delicti* which provides for survival of actions for injuries despite the resulting death therefrom, so that the administrator sues as personal representative of the deceased, the damages becoming part of the estate, it seems that such a suit is one brought by the administrator in his representative capacity and could only be maintained by one who had qualified as adminstrator at the forum. *Higgins v. Central N. E. & W .R.* 155 Mass. 176.

The cases on this point cannot be reconciled and, due to the great diversity in the various statutes, they result in much hardship. If the defendant once pays to an authorized plaintiff he is discharged from further liability and it should be immaterial to him by whom the suit is brought. As to him there can be no substantial preference as to whether the suit shall be brought by the personal representative at the *lex locus delicti,* at the *forum,* or at the *domicile* of the decedent. In view of the trend of present day judicial opinion towards a uniformity of law begetting substantial justice, it seems to the writer that greater justice could be effected with less hardship by a universal adoption of the rule that the proper party plaintiff is a procedural matter to be governed by the *lex fori.* This opinion finds support in the case of *Teti et al v. Consolidated Coal Co. of Maryland,* 217 Fed. 443, "But it is by comity alone . . that New York permits the enforcement in New York

4 *Brown v. Chicago & N. W. R.* 152 N. W. (Minn.) 729. *Connor v. New York N. H. & H. R. Co.* 28 R. I. 560, 18 L. R. A. (N. S.) 1252 and note, 13 Ann. Cas. 1033.

of the cause of action given by the statutes of the state of Pennsylvania in these death cases. The policy of New York is that such cases of action shall be brought and prosecuted by executors or administrators for the benefit of all entitled to recovery. The policy is one action and one trial . . . It seems to this court to be the better and more sensible doctrine and holding that, when under and by the statute of another state giving or preserving a right of action to the widow or children, or parents, or other next of kin, in case of death by wrongful act, such statute provides that suit shall be commenced and prosecuted by one of the number, or by administrators, for the benefit of all, that in New York its statutory form of representation shall, or at least, may be followed when the action to enforce the statute is brought in that state."

This difficulty only arises where the right of action is vested in the personal representative of the decedent. If the statute under which the suit is brought vests the action in beneficiaries in their own right—as widow—or parents—such named beneficiary, and only that person, may maintain the action in another state, even though by the law of the forum such an action is given to the personal representative of the decedent. *Teti v. Consolidated Coal Co. (supra).*

In all, considering the many views as to this division of the action, the only safe course to pursue is this: follow explicitly the words of the statute upon which the action is based and if said statute vests the action in certain parties individually, then they may properly maintain the action in any forum; but if the right is placed in one in his representative capacity for the benefit of others, he must first qualify under the law of the *locus delicti,* and then, by procuring letters of ancillary administration, qualify in the law of the forum. In some states, as California, it is provided by statute that foreign administrators or executors cannot litigate any matter in the local courts, unless the laws of the foreign jurisdiction accord a like privilege to citizens of the state or the forum. In such cases a local representative of the decedent must be appointed and qualify. This is a reversion to the old principle or rule of comity.

## AMOUNT AND DISTRIBUTION OF DAMAGES

When the action is brought under a foreign death by wrong-

ful act statute, and said statute places a different limitation as to the amount of damages recoverable than that allowed in the similar statute of the forum, the question arises as to which statute is to govern as to the damages. Here we are presented with the same conflict that exists as to the creation of the right and the right to sue under the foreign statute.

There is a view that the amount of damages recoverable pertains only to the remedy, is a purely procedural question, and is to be governed by the *lex fori.* In support of this view it was said in the case of *Wooden v. Western New York, etc., R. Co.,* 126 N. Y. 10; 13 L.R.A. 458, "that the restrictions as to the amount of recovery fixed by the laws of the state where the action was brought indicates the public policy of the state as to the extent of the remedy, and the party who chooses to avail himself of the remedial procedure of that state must submit to its remedial limitations and be content with a judgment beyond which the courts of that state cannot go."

The weight of authority is to the effect that inasmuch as the amount of damages recoverable is prescribed in the same act which creates the right, the matter is a substantial element of the right and goes with it hand in hand wherever the right is sought to be enforced, nor is it to be divorced from the cause of action itself because the law of the forum differs in that regard. In the case of *Lauria v. E. I. Du Pont De Nemours & Co.* 241 F. 687, the court upholds this view after discussing the *contra* holding in the case of *Wooden v. Western New York, etc., R. Co., (supra),* and discounting it as being contrary to sound legal construction and reasoning. Mr. Justice Holmes also upholds this rule, stating: "When a person recovers in one jurisdiction for a tort committed in another, he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground but the measure of the maximum recovery." *Western Union Tel. Co. v. Brown,* 234 U. S. 542, Lorenzen Cas. Conflict of Laws (2 Ed.) 270.

As to the distribution of the funds so recovered there is practical unanimity in the holding that this is a matter to be governed by the *lex locus delicti.* When these statutes provide specifically the beneficiaries and their share of the recovery this rule is applicable sans difficulty. But several of the statutes declare that the

damages shall be distributed to the beneficiaries in the proportion in which they would share in the decedent's estate in case of intestacy, or similar clause. Now the question arises whether this refers to the statutes of distribution of the *locus delicti* or of the decedent's domicile. There are cases in support of each view, but the prevailing rule governs the distribution according to the *lex locus delicti,* on the theory that such law vests in the beneficiaries rights according to its own policy in matters of descent and distribution, and cannot be considered—by any sound construction—to have contemplated a distribution according to foreign laws. See *Pennsylvania R. Co. v. Levine,* 263 F. 557.