

THE SURVIVAL OF CAUSES OF ACTION.

Before the enactment of the *Law Reform (Miscellaneous Provisions) Act 1934* (24 and 25 Geo. V, c. 41)¹ few friends could be found for the rule of the common law by which the death of a wrongdoer or the person wronged put an end to a cause of action in tort. But out of a dozen years' experience of the operation of the reversal of the rule effected by sec. 1 of that statute there has grown almost as much dissatisfaction with the reform as there was with the rule.

Everywhere cases of negligence causing personal injuries far outnumber all other torts committed. The most frequent application of the reform has been to causes of action for the recovery of damages for personal injuries. Needless to say in almost all these cases it is the person injured, not the wrongdoer, who has died. But where death follows personal injuries the whole basis of compensation necessarily changes. A bare rule providing for the survival of the cause of action, the same cause of action as the deceased possessed at the time of his death, fastens on one element in the cause of action, the negligence or other wrongful act, and it overlooks the inevitable effect of death on the other, the damage.

The statute does not completely ignore the difference; for besides excluding exemplary damages, it provides that where the death of the person has been caused by the act or omission giving rise to the cause of action, the damages shall be calculated without reference to any loss or gain to his estate consequent upon his death, except that a sum in respect of funeral expenses may be included. Nevertheless it shows no real understanding of the impossibility of estimating damages for personal injuries resulting in death according to any standard that would apply to the living.

The report of the Law Revision Committee, of which the statute was the outcome, contains a passage expressly stating that the measure of damages is necessarily affected by the injured man's death. But curiously enough the recommendations do no more towards dealing with the difficulty than to say that Lord Campbell's Act should be retained.

No doubt the reformers might say that for some of the absurd and irrational results that have followed, the fault lies less with the legislation than with the Courts. The authors of the Statute might be pardoned for failing to anticipate that the Courts would decide that not only is a shortened expectation of life a head of damage in the case of personal injuries, but that it enures for the benefit of the injured

1. Transcribed in Queensland in the *Common Law Practice Act Amendment Act of 1940*, in Western Australia in the *Law Reform (Miscellaneous Provisions) Act 1941* with a modification, when death results from the wrong, excluding damages for the deceased's pain and suffering or curtailment of his expectation of life, in Victoria in the *Survival of Actions Act 1942* (No. 4918) with the same modification, in Tasmania in the *Administration and Probate Act 1943* with the same modification and in New South Wales in the *Law Reform (Miscellaneous Provisions) Act 1944* with the same modification.

In South Australia the *Wrongs Act 1936-1940*, sections 23 (a) and 23 (b), makes limited changes in the common law rule.

man's estate and must be taken into account after his death has supervened. Still less could they be blamed because they did not foresee the drawing of the distinctions between subjective and objective expectation of life and between deprivation of life and deprivation of expectation of life. Since the statute, not only has the importance been revealed judicially of expectation of life as a thing for the loss of which damages should be paid to the estates of dead men, but it has been discovered that in the loss of expectation of life two heads of damage may be distinguished. There is, first, the anxiety or distress of mind caused to the fatally injured man by the knowledge that his expectation of life has been lessened, a subjective element. But, second, there is the actual shortening of his expectation of life, whether he is aware of it or not, an objective element.

The distinction between loss of expectation of life in this latter sense and loss of life might defeat anyone. But under the statute the former constitutes a transmissible head of claim and the latter does not and must be excluded from the assessment of compensation.

Fantastic attempts have been made to discover some way of estimating the value to the dead man while living of his probable future existence, the abbreviation of which has been caused by the wrongdoer, and to reduce the value to a money sum. *Flint v. Lovell* ([1935] 1 K.B. 354) opened the gate to an *indepensus et irremeabilis error*. *Rose v. Ford* ([1937] A.C. 826) makes escape impossible except by a rescue, a thing done in *Benham v. Gambling* ([1941] A.C. 157) softly and deftly but, it must be confessed, under cover of darkness.

However it is not the purpose of this paper to examine the strange body of case law which so quickly arose out of the attempts to provide rational solutions to the irrational questions involved in estimating compensation for a dead man's loss of his expectation of life. It is enough to provide a list of the more important cases for those who may be drawn to their study.² The purpose is to put forward the view that when a wrongful act causes the death the situation is one falling entirely outside the principle now adopted that the benefit of a cause of action vesting in a living person survives on his death to his executors or administrators. It is a situation that should be the subject of distinct legal reform.

The further purpose is to suggest what that reform should be.

The general principle of the common law by which causes of action in tort died with the person necessarily covered wrongs causing death. But a reformer minded to reverse that rule has no ground for treating the question of the survival of wrongs causing death as governed by the same considerations as the survival of causes of action

2. *Flint v. Lovell*, [1935] 1 K.B. 354; *Slater v. Spreag*, [1936] 1 K.B. 83; *Rose v. Ford*, [1937] A.C. 826; *Roach v. Yates*, [1938] 1 K.B. 256; *Dransfield v. British Insulated Cables Ltd.*, [1937] 54 T.L.R. 11; *Turbyfield v. G.W.R.*, [1937] 158 L.T. 135; 54 T.L.R. 221; *Sorgan v. Scoulding*, [1938] 1 K.B. 786; *Feay v. Barnwell*, [1938] 1 All E.R. 31; *Berridge v. Everard*, [1938] 1 All E.R. 717; *Shepherd v. Hunter*, [1938] 2 All E.R. 587; *The Aizkarai Mendí*, [1938] P. 263; *Smith v. Cavdle Fen Commissioners*, [1938] 4 All E.R. 64; *Bailey v. Howard*, [1939] 1 K.B. 453; *Ellis v. Raine*, [1939] 1 All E.R. 104; *Chant v. Read*, [1939] 2 K.B. 346, [1939] 2 All E.R. 286; *Hall v. Wilson*, [1939] 4 All E.R. 85; *Mills v. Stanway Coaches Ltd.*, [1940] 2 K.B. 334, and *Cumper v. Potheary*, [1941] 2 All E.R. 516. In addition, the very acute paper by Dr. Kahn-Freund, [1941] 5 Mod. L.R. 81, should be read.

to which the deceased had become entitled, but which he had not enforced in his life time, his death occurring as an independent and unconnected event.

The chief considerations making it right to reverse the common law rule in the case of causes of action of the latter kind are that they are valuable rights of the deceased forming part of his assets or wealth and that their delictual origin is not a ground in logic or modern policy for depriving them of the transmissibility which is so important a characteristic of other choses in action.

The wrongful causing of personal injuries resulting in death can, of course, be fitted into the same category formally or dialectically, but every substantial consideration removes it into another. For the fact governing the whole situation is the death wrongfully caused. The death of a human being cannot in reason be made a subject of compensation to his estate. But it produces a profound effect upon the circle of people with whom he lives and among whom he moves. The question by which the law is really faced is whether survivors interested in his life should be compensated for the loss and injury they sustain from the wrongful act causing his death and, if so, in respect of what interests.

The common law answers the question by a flat and unqualified negative.

Lord Campbell's Act answers the question by taking dependency as the test of interest, by forming a limited category of dependants and by giving them a qualified right to compensation.

The *Law Reform (Miscellaneous Provisions) Act 1934*, or more correctly the operation given to it, answers the question by giving to the persons who in a due course of administration are entitled to participate in a distribution of the estate of the deceased, creditors, legatees or next-of-kin, such an amount as may be assessed on the footing of a just compensation to the deceased, as at the moment of his death, for the pain and suffering undergone by him and for the loss of his expectation of life. Could anything be more absurd ?

When the negligence or other wrongful act of one man causes the death of another, common experience shows that the instinctive moral feelings of the close relatives of the dead man turn them to the contemplation of legal redress. This, I think, is the experience of lawyers dealing with such matters and confirmation can be found in the law reports themselves.³ In doing so they are actuated by much more than a desire for gain. Men and women connected by ties of relationship or close association with a man or woman upon whom they depend for moral support, comfort and companionship almost uniformly regard the death of the latter by a wrongful act as a thing for which justice demands that they should have some redress.

I do not think that Courts would have been averse from giving effect to this demand, if it had been possible. Perhaps a vague searching

3. *E.g. Osborn v. Gillett*, [1873] L.R. 8 Ex. 88; *Clark v. London General Omnibus Co.*, [1906] 2 K.B. 648.

after it explains the development disclosed by the statute and the cases to which I have referred. At all events, I have long been of opinion that an attempt should be made at a bolder, broader and, if the word may be used, more scientific reform of the law relating to death by wrongful act. The reform that I believe would represent the moral view of the community and would provide a just and workable rule I shall proceed to describe.

It depends, of course, on first separating out the question of the survival of liabilities for torts committed by a man who afterwards dies from the question of the survival of causes of action in tort vested in a man who dies. That in any case is an obvious step.

But again from the general case of a person wronged dying the particular case must be separated out of the wrong causing the death. Upon that subject I suggest a new principle should be introduced. The leading provision of the reforming enactment should formulate the principle that when the death of a person is caused by an act or omission amounting to a civil wrong against him a person interested in the continuance of his life shall be entitled to compensation from the wrong doer.

For reasons which do not require explaining, it will be necessary to provide that for this purpose an act or omission amounts to a civil wrong against the person dying when, either without more or upon actual damage resulting to him therefrom, the act or omission would, if he had lived, given him a cause of action whether in contract or in tort or under a statute; and that every person who would have been liable to him upon the cause of action is a wrongdoer. Then, although this is not essential to the principle, I would on grounds of policy, limit the persons who are to be considered interested in the continuance of the life of the person dying to certain relationships. Those I would include are parent, child, adopted child (whether *de facto* or by order), person *in loco parentis* to an adopted child, stepchild, stepfather, stepmother, grand parent and grand child. I would also include a dependant though not related, that is to say a person who at the time of the death of the person so dying was wholly or partially dependent upon him for his maintenance or support. Presumably illegitimate relationships nowadays would be recognized in such a reform.

The critical thing comes next, namely an elucidation of the conceptions of an interest in the continuance of the life of the person dying. It would run thus—the interest in the continuance of the life of the person dying may be material or intangible or both. A material interest consists in the enjoyment of pecuniary benefits or material advantages having a value in money brought to an end by the death of the person dying or in a reasonable expectation of the enjoyment of such benefits or advantages in the future. An intangible interest consists in the natural ties of relationship or close association and the moral comfort and companionship arising thereout.

Having made this provision it would be enough in dealing with the measure of damages simply to state that the compensation to which a person interested in the continuance of the life of the person dying

is entitled shall be measured by reference to his interest therein and shall be a fair and just compensation in money for its destruction.

Whether it should include a solatium is a question the reformer should decide. I would say yes to the question and add that the compensation may include a solatium. But one thing the reformer should not do. He should not leave the question undecided. If he thinks a solatium should be included, he should say so expressly.

It would be wise to add a provision declaring that the rights to compensation of the persons interested in the continuance of the life of the person dying are separate.

The principle of the foregoing suggested reform raises for consideration a question of procedure. Should everyone with a claim be permitted to sue separately and should the question of the commission of the wrongful act be open to repeated litigation? I would provide that, though the rights to compensation are separate, they shall not be enforceable against a wrongdoer by separate action.

I would say that an action for the enforcement of the rights of all persons so interested against a wrongdoer may be brought by (a) the executor or administrator of the person so dying, or (b) any one or more of the persons so interested on behalf of him or themselves and all others, excepting only persons whose rights to compensation have been discharged by payment release accord and satisfaction or other means.

I would then make provision for the determination once for all in the proceedings of the question of liability before the question of interest of the plaintiff or of the persons on whose behalf he sues. The Court should then be authorized to entertain other claims and assess the amount of each. It should also be authorized, after appropriate steps for giving an opportunity for further claims, to pronounce a final judgment after which the defendant shall not be liable to any other person claiming to be interested in the continuance of the life of the person so dying.

The foregoing reforms would supersede the provisions of Lord Campbell's Act, which would therefore be repealed.

It remains to provide against any overlapping in the application of the general principle that causes of action in tort to which a person is entitled shall survive his death and in the application of the principles suggested for the particular situation of the wrongful act being the cause of death. This might be done by a provision qualifying the general enactment that on the death of any person all causes of action vested in him shall survive, that is subject to whatever exceptions may be made.⁴

The qualifying provision would be something as follows: Where the death of such person has been caused by the act or omission which

4. The exceptions made by the *Law Reform (Miscellaneous Provisions) Act 1934* cover breach of promise of marriage which though not a tort did not survive at common law save as to special damage, defamation, seduction and enticement of spouses and the statutory substitute for crim. con. It is not clear why defamation is excepted though malicious prosecution and false imprisonment are not. There is a point, too, whether actions for procuring breach of promise should not be excepted if breach of promise and enticement of spouses are not to survive. A qualification prevents the recovery by the executor or administrator of exemplary damages.

gives rise to the cause of action the damages recoverable shall include a sum in respect of funeral and burial expenses but otherwise shall be limited to the actual material loss suffered by the deceased before his death calculated without reference to any gain or loss to his estate by reason of his death and in particular shall not include a solatium for pain, suffering, distress of mind, or wounded feelings, or anything for loss of expectation of life.

The law would, of course, provide that on the death of any person all causes of action subsisting against him shall survive against his estate with whatever exceptions and qualifications are considered proper.⁵

Law reform is an extremely difficult and hazardous enterprise requiring much thought and care. The conservatism generally ascribed to lawyers is in some measure a lively sense of the dangers of change accompanied by shrewd misgivings about given reforms proposed. The suggestions I have made are of a kind likely to arouse all the traditional distrust. But they have this excuse, that they come after a not inconsiderable justification of the distrust has been given to lawyers by the operation of the *Law Reform (Miscellaneous Provisions) Act 1934*.

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5. When the wrongdoer dies there is no exception in the *Law Reform (Miscellaneous Provisions) Act 1934* of breach of promise of marriage and no exclusion of exemplary damages; otherwise the exceptions are the same as in the case of the death of the person wronged. There is a strong practical reason for excluding claims against a dead man for breach of promise; and it is hard to see why a dead man's estate should be punished. Exemplary damages are awarded by way of punishment. On the other hand, it is hard to see why a living defendant should escape punishment because of the death of the person he has wronged. The exception of defamation raises a special point. Should the death of a proprietor of a newspaper deprive a person defamed therein of his action? Further, why should not special damage be recovered against the estate of a person guilty of defamation? A point that seems to have been overlooked is the inclusion in the general words providing for the survival of actions of statutory actions for double and treble damages. Ought more than single damages to be recoverable against the estate? See as to other matters E. Wyndham White in (1939) 2 Mod. L.R. 278.