



1962

Torts--Suit by Administrator of Deceased Infant's Estate Against Parent for Wrongful Death

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Recommended Citation

Montague, William L. (1962) "Torts--Suit by Administrator of Deceased Infant's Estate Against Parent for Wrongful Death," *Kentucky Law Journal*: Vol. 51 : Iss. 1 , Article 15.

Available at: <https://uknowledge.uky.edu/klj/vol51/iss1/15>

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TORTS-SUIT BY ADMINISTRATOR OF DECEASED INFANT'S ESTATE AGAINST PARENT FOR WRONGFUL DEATH.—Administrator of the deceased infant's estate brought a wrongful death action against the infant's father to recover damages for injuries allegedly caused by the father's negligence in an automobile accident. The trial court held for the defendant; a wrongful death action in tort on behalf of an unemancipated infant cannot be maintained against his parent. *Held*: Reversed. The common law disability of a child to sue his parent in tort does not apply to wrongful death actions by the administrator of the infant's estate. The Kentucky constitutional¹ and statutory² provisions concerning wrongful death create a new cause of action which cannot be abridged or defeated by the common law rule. *Harlan National Bank v. Gross*, 346 S.W.2d 482 (Ky 1961).

This decision overrules *Harralson v. Thomas*³ in which recovery was denied on the grounds that the wrongful death statute merely extended the cause of action the injured party would have had if he survived, and since the child had no cause of action while living, it could not have been perpetuated after death. The *Gross* decision is a return to the view held by Kentucky prior to the *Harralson* case. In *Robinson Admr v. Robinson*,⁴ the court held that a wrongful death action could be maintained by a wife's administrator against her husband, who had murdered the wife.⁵ The opinion stated that the right of action was expressly provided by the constitution, and no common law rule could possibly defeat such an explicit and mandatory provision.⁶ By readopting the *Robinson* view, the court in the *Gross* decision has construed the wrongful death provisions of the constitution and statute as creating a new right of action in the heirs, which is independent of the cause of action the decedent would or would not have had, if he had lived.

The *Harralson* decision followed the majority view in the United States.⁷ Numerous cases deny recovery by the decedent's administrator

¹ Ky. Const. §241.

² Ky. Rev. Stat. §411.130(1) (1962).

³ 269 S.W.2d 276 (Ky. 1954).

⁴ 188 Ky. 49, 220 S.W. 1074 (1920).

⁵ At common law neither husband nor wife could sue the other for personal injuries resulting from negligence; thus, like the disability of a child to sue its parent, is based on the preservation of family harmony and domestic tranquility. Today the courts in a minority of the states, including Kentucky, hold that since the enactment of the various married women's statutes, one spouse may sue the other for tort. For a discussion of this see Note, 42 Ky. L.J. 497 (1954).

⁶ Ky. Const. §241 provides:

Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same.

⁷ Prosser, Torts §105 (2d ed. 1953).

because the decedent would have been barred by the common law disability had he lived.⁸ Unlike Kentucky, however, the majority of the states have wrongful death statutes which limit recovery by the personal representative to situations where the decedent could have recovered had he lived.⁹

Contrary to the general rule, "there is a strong minority view based upon the theory that death destroys the reason for the immunity. "¹⁰ In Illinois, an action by a wife's administrator was permitted against the husband's estate, where the husband had murdered his wife and committed suicide.¹¹ The court stated: "an immunity based upon the preservation of marital harmony can have no pertinence in this case, for here the marriage has been terminated, husband and wife are both dead, and the action is brought for the benefit of a third person."¹² This decision was handed down despite a wrongful death statute which limited recovery to situations where the injured party could maintain an action "if death had not ensued.

¹³ Another court,¹⁴ confronted with similar facts and statutory provisions,¹⁵ asserted: "we think it is unreasonable to imply that the Legislature intended to bar the right of action created by the Act on account of a disability to sue which is personal to a party having an entirely separate and distinct right of action "¹⁶

The personal disability of a child to sue his parent is based on the protection of the family relationship.¹⁷ The policy consideration underlying this disability is that to allow suits by children against their parents would only encourage intra-family friction and disharmony. The very relationship the disability is designed to protect, however, is no longer in existence after the child's death. As the Kentucky court pointed out in the principal case, the "potential evil is removed by the death of the child."¹⁸ The wrongful death statute as construed in the principal case creates a new cause of action for the benefit of the heirs. This cause of action, which is derived from the tortious act, and not from the person of the deceased,¹⁹ "is allowed upon the theory that the wrongful death of the ancestor works a

⁸ *E.g.*, *Strong v. Strong*, 70 Nev. 290, 267 P.2d 240 (1954); *Levlock v. Spanos*, 101 N.H. 22, 131 A.2d 319 (1957).

⁹ *Prosser*, *Torts* §105 (2d ed. 1953).

¹⁰ *Ibid.*

¹¹ *Welsh v. Davis*, 410 Ill. 130, 101 N.E.2d 547 (1951).

¹² *Id.* at 132, 101 N.E.2d at 549.

¹³ Ill. Rev. Stat. ch. 70, §1 (1961).

¹⁴ *Shiver v. Sessions*, 80 So. 2d 905 (Fla. 1955).

¹⁵ Fla. Stat. Ann. §768.01 (1961).

¹⁶ *Shiver v. Sessions*, 80 So. 2d 905, 908 (Fla. 1955).

¹⁷ *Prosser*, *Torts* §101 (2d ed. 1953).

¹⁸ *Harlan Nat'l Bank v. Gross*, 346 S.W.2d 482, 483 (Ky. 1961).

¹⁹ *Russell v. Cox*, 65 Idaho 534, 148 P.2d 221 (1944).

personal injury to his heirs, in that it deprives them of some pecuniary or other benefit which they would have received except for the death of the ancestor."²⁰ The disability of the decedent to sue should constitute no defense to this cause of action which is created by the legislature to compensate the heirs for the injury they receive as a result of the decedent's death.²¹

Normally, who pays the damages in these cases? Is it not safe to assume that insurance companies are involved? If there had been no automobile liability insurance in the principal case the parties surely would not have been interested in paying the attorney's fee for having a portion of the husband's estate transferred to the wife within the same family unit.²² Does this mean that a tortfeasor may benefit from his own wrong? Confronted with this problem, the Kentucky court has held that the recovery will be reduced by the amount of the defendant's distributive share of the damages.²³ In the principal case, the court indicated adherence to this view by stating: "Although the question is not before us, it may be noted that in the event of a recovery the parent held liable cannot receive the benefits of such recovery as a designated beneficiary under the statute."²⁴ Theoretically, the wrongdoer is not recovering; actually, he may indirectly benefit as a member of the family unit.

The purpose of the wrongful death statute is to compensate the heirs for the damage they sustain as a result of the decedent's death. Even though the defendant may indirectly benefit from the recovery, the other heirs should not be deprived of their rights, which the legislature has explicitly granted them.

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²⁰ *Whitley v. Spokane & I. Ry.*, 23 Idaho 642, 658, 132 Pac. 121, 126 (1913).

²¹ 2 Harper & James, Torts §24.5 (1956).

²² Brief for Appellee, p. 6, *Harlan Nat'l Bank v. Gross*, 346 S.W.2d 482 (Ky. 1961).

²³ *Hale v. Hale*, 312 Ky. 867, 230 S.W.2d 610 (1950); *Bays v. Cox's Adm'r.*, 312 Ky. 827, 229 S.W.2d 737 (1950).

²⁴ *Harlan Nat'l Bank v. Gross*, 346 S.W.2d 482, 484 (1961).