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Death of the Abatement Doctrine - Murphy v. Martin Oil Co.

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NOTES

DEATH OF THE ABATEMENT DOCTRINE— *MURPHY v. MARTIN OIL CO.*

Jack R. Murphy, while having his truck filled with gasoline, was injured in a fire on the defendant's premises. Nine days later he died from the resulting injuries. Charryl Murphy, Administratrix of his Estate, filed suit against James Hocker and Martin Oil Company, the owners of the gas station. Count I of the complaint alleged a cause of action under the Illinois Wrongful Death Act.[1] Count II alleged a cause of action under the Illinois Survival Act[2] for pain and suffering, medical expenses and property damage sustained by the decedent before his death.

The trial court dismissed Count II of the complaint on the ground that it failed to state a cause of action. The Illinois appellate court affirmed the dismissal stating Illinois has traditionally taken the position that when the injuries to the victim result in death, no damages may be recovered for his pain and suffering; the remedy in such a case is the Wrongful Death Act and recovery is limited to pecuniary losses.[3] The court, relying on the so-called abatement rule (also known as the uni-

1. Illinois Wrongful Death Act, ILL. REV. STAT. ch. 70, § 1 (1973), which provides in part

> [w]henever 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 and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

2. Illinois Probate Act, ILL. REV. STAT. ch. 3, § 339 (1973), which states

> [i]n addition to the actions which survive by the common law, the following also survive: actions of replevin, actions to recover damages for an injury to the person (except slander and libel), actions to recover damages for an injury to real or personal property or for the detention or conversion of personal property, actions against officers for misfeasance, malfeasance, or nonfeasance of themselves or their deputies, actions for fraud or deceit, and actions provided in Section 14 Article VI of "An Act relating to alcoholic liquors," approved January 31, 1934, as amended.

3. Murphy v. Martin Oil Co., 4 Ill. App. 3d 1015, 283 N.E.2d 243 (1st Dist. 1972).

tary death concept)[4] acknowledged that a persuasive argument could be made for overturning this rule,[5] but declined to do so claiming that this was not the forum for such action.

The Illinois Supreme Court reversed, holding that the Wrongful Death Act is no longer the exclusive remedy available in Illinois when the injuries to the victim result in death; those decisions upholding the abatement rule and refusing recovery for conscious pain and suffering were overruled.[6]

The court in *Murphy* completely abandoned the long standing abatement rule and in so doing greatly expanded the remedies available to the representative of the deceased tort victim. Following a brief explanation of the nature of survival and wrongful death actions, this Note will examine the gradual erosion of the abatement rule as it took place in Illinois. Consideration will be given to the possible significance the final abandonment of this concept will have in Illinois litigation.

The common law did not allow a cause of action for bodily injuries to survive either the victim or tortfeasor. The cause of action was personal to the parties and abated with the death of either.[7]

Similarly, no cause of action arose when the decedent was killed by the wrongful act of another.[8] The common law rule denying recovery for

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4. If the plaintiff in an action for personal injuries dies before judgment from some cause other than his injuries the cause of action survives to his administrator, but if his death results from the injuries sued for, the suit abates and cannot be further prosecuted.

Pease v. Rockford City Traction Co., 279 Ill. 513, 514, 117 N.E. 83, 84 (1917). This rule has perhaps more properly been referred to as the unitary death concept, since technically, the better known meaning of abatement refers to the English common law rule refusing to allow a cause of action to survive the death of either of the parties. Similarly, some courts refer to this rule as the *Holton* rule from the case of its origin, Holton v. Daly, 106 Ill. 131 (1882). For purposes of consistency however, this rule will be referred to throughout this Note as the abatement rule.

5. Plaintiff argued that the rule of abatement was a product of common law. This rule is illogical and arbitrary and inasmuch as it no longer fits the needs of our present system or justice, it should be overruled. Brief for Plaintiff at 21, 22, Murphy v. Martin Oil Co., 4 Ill. App. 3d 1015, 283 N.E.2d 243 (1st Dist. 1972).

6. Murphy v. Martin Oil Co., 56 Ill. 2d 423, 308 N.E.2d 583 (1974).

7. Gemmill v. Smith, 274 Ill. 87, 113 N.E. 27 (1916). 3 W. BLACKSTONE, COMMENTARIES *302; 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 310-36 (3d ed. 1923).

8. Hall v. Gillens, 13 Ill. 2d 26, 147 N.E.2d 352 (1958). It has been suggested that this rule had its basis in the fact that at common law, most homicides were offenses to the crown and that the death of the victim caused the civil action to merge with the criminal one. Ross, *Foreign Enforcement of Actions For Wrongful Death*, 33 MICH. L. REV. 545 (1935); Winfield, *Death as Affecting Liability in Tort*, 29 COLUM. L. REV. 239 (1929).

wrongful death has been attributed to the English case of *Baker v. Bolton.*[9] Lord Ellenborough stated, without citation of authority,[10] that "[i]n a civil court the death of a human being could not be complained of as an injury."[11]

The rule of *Baker v. Bolton* persisted in England until 1846 and the passage of Lord Campbell's Fatal Accidents Act,[12] the first wrongful death statute and the prototype of most American statutes.[13] This statute allowed juries to award such damages to the victim's surviving spouse, parent or child as "they may think proportioned to the Injury resulting from such Death . . . ."[14]

Since Illinois has both a Wrongful Death Act and a Survival Act, much time and judicial expression has been devoted to keeping these remedies separate and distinct. These statutory remedies are not conceptually identical, each requires different elements of proof and measures of damages. The Survival Act allows an action for wrongs done to the *decedent* before his death to survive him and recovery includes property damages,[15] medical expenses,[16] loss of wages up to the time of death[17] and damages for conscious pain and suffering.[18] The Wrongful Death Act, in comparison, is a remedy for wrongs done to the decedent's family. The recovery is limited to pecuniary losses (usually measured

9. 1 Camp. 493, 170 Eng. Rep. 1033 (1808).

10. It is generally agreed among courts and scholars that Lord Ellenbourough's famous decision is without authority at common law. Scheilds v. Yonge, 15 Ga. 349 (1854); Saunders v. Schultz, 20 Ill. 2d 301, 170 N.E.2d 163 (1960); Rowe v. Richards, 151 N.W. 101 (S.D. 1915); 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 334 (3d ed. 1923); S. SPEISER, RECOVERY FOR WRONGFUL DEATH 6-7 (1966); Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and The Western Notion of Sovereignty*, 46 TEMP. L.Q. 169 (1973); Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. REV. 431 (1916); Smedley, *Wrongful Death—Basis of Common Law Rules*, 13 VAND. L. REV. 605 (1960); Winfield, *Death As Affecting Liability in Tort*, 29 COLUM. L. REV. 239 (1929).

11. 1 Camp. 493, 170 Eng. Rep. 1033 (1808).

12. Act for Compensating the Families of Persons Killed by Accidents of 1846, 9 & 10 Vict., c. 93.

13. Every state now has some provision for awarding damages in a wrongful death situation. For a comprehensive list of the relevant statutes in each state, *see* SPEISER, *supra* note 10, Appendix A, 773-905.

14. 9 & 10 Vict., c. 93 art. II. For a general discussion of the common law and legislation as it affected wrongful death see authorities cited at note 8 *supra.*

15. Northern Trust Co. v. Palmer, 171 Ill. 383, 49 N.E. 553 (1898).

16. Wetherell v. Chicago City R.R., 104 Ill. App. 357, 361 (1st Dist. 1902).

17. *Id.*

18. *Id.*

in terms of loss of decedent's future earnings) and no damages are allowed for decedent's conscious pain and suffering.[19]

The rule that an action for personal injuries abates when death results from the injuries sustained was first announced in Illinois in the case of *Holton v. Daly*.[20] In *Holton*, the court for the first time was asked to construe the remedies available under the Survival and Wrongful Death Acts. The decedent was injured as a result of defendant's negligence and subsequently died from those injuries. His administratrix brought suit under the then existing Survival Act.[21] The court dismissed the complaint holding that the Survival Act was not meant to embrace injuries resulting in death since those injuries were already compensible by virtue of the Wrongful Death Act. The court reasoned that since the Wrongful Death Act was passed nineteen years before the Survival Act, the logical inference was that the latter was not intended to provide an additional remedy, but rather to provide a remedy only for those situations not covered by the former.[22] Explaining what it thought was the intent of the legislature, the court stated "[i]t is not to be presumed it was intended there should be two causes of action, in distinct and different rights, by the same party plaintiff, for the same wrongful act, neglect or default."[23] Estimating the difficulty in allocating damages, the court went on to say:

> It would, obviously, be impossible to draw a line severing with accuracy the damages resulting from the permanent character of the injury, and its effect upon the capacity of the [decedent] for future usefulness . . . from the actual loss to the wife, parent or child, in consequence of being deprived of this same capacity, by reason of the same injury resulting in death.[24]

Thus, the court, basing its decision on what it thought was the legislators' intent, created the rule that the Wrongful Death Act is the *exclusive* remedy available when death results from the injuries complained of.

19. Welch v. Davis, 410 Ill. 130, 101 N.E. 2d 547 (1951).

20. 106 Ill. 131 (1882).

21. § 123 [1871-72] Pub. Laws of Ill. 27th Gen. Assembly 108. This act was substantially the same as the present Survival Act. ILL. ANN. STAT. ch. 3, § 339, Historical Note (Smith-Hurd 1961).

22. Prior to the passage of the Survival Act, a representative of an injured tort victim had no remedy unless the victim died from his injuries. Therefore, the court reasoned that the Survival Act was meant to embrace only those injuries not cognizable under the Wrongful Death Act. This reasoning has been used by other courts with different results. In Farrington v. Stoddard, 115 F.2d 96 (1st Cir. 1940) the court construed Maine's Survival and Wrongful Death Acts. Here, because the Survival Act was passed first, the court reasoned that the purpose of the Wrongful Death Act was to supplement the remedy existing under the Survival Act, and provide two concurrent remedies where previously only one existed.

23. 106 Ill. at 140.

24. *Id.*

This rule was steadfastly followed for many years.[25] In *Susemiehl v. Red River Lumber Co.*,[26] the Illinois Supreme Court was called upon to reconsider its position on the construction of the two acts. While acknowledging the fact that other jurisdictions have reached a different conclusion, the court held that the principal of *Holton* was too well ingrained in Illinois law; any change would have to come from the legislature.[27]

Faced with the rigidity of the holdings in *Holton* and *Susemiehl*, Illinois courts, without specifically overruling these cases, began to carve out exceptions to the abatement rule. For example, in *Saunders v. Schultz*,[28] the first departure from rigid *Holton* rule, the court allowed a widow, whose husband was killed in an automobile accident, to recover medical and funeral expenses.

Saunders, if narrowly read however, can be distinguished from *Holton*. In *Saunders*, the plaintiff was not suing under the Survival or Wrongful Death Acts, but rather on behalf of herself for damages she sustained as a result of being personally liable for medical and funeral expenses of her spouse under the Married Womens Act.[29]

The court, after examining similar cases from other jurisdictions,[30] stated, "we find that there is presently no legally cogent reason for denying a spouse the right to recover for medical or funeral expenses incurred on behalf of a mate who was wrongfully injured or killed."[31] Rather than limiting its discussion to the specific issue, the court, although it was not called on to do so, went on to discuss abatement and the Wrongful Death Act:

> [W]e believe that the common law should be construed to permit the recovery of [the] funeral and medical expenses in an action either by the decedent's estate, or, as in the instant case where no such claim was made, by the surviving spouse.[32]

25. Wilcox v. Bierd, 330 Ill. 571, 162 N.E. 170 (1928); Wilcox v. Int'l Harvester Co., 278 Ill. 465, 116 N.E. 151 (1917); Mooney v. City of Chicago, 239 Ill. 414, 88 N.E. 194 (1909); Chicago & E.I.R.R. v. O'Connor, 119 Ill. 586, 9 N.E. 263 (1886).

26. 376 Ill. 138, 33 N.E.2d 211 (1941).

27. *Id.* at 140, 33 N.E.2d at 212.

28. 20 Ill. 2d 301, 170 N.E.2d 163 (1960).

29. Married Womens Act of 1874, ILL. REV. STAT. ch. 68, § 15 (now the Husband and Wife Act, ILL. REV. STAT. ch. 68, § 15 (1973)).

30. Seymour v. Union News Co., 217 F.2d 168 (7th Cir. 1954); Follansbee v. Benzenberg, 122 Cal. App. 2d 466, 265 P.2d 183 (1954); Mattfeld v. Nester, 226 Minn. 106, 32 N.W.2d 291 (1948); McDaniel v. Trent Mills, Inc., 197 N.C. 342, 148 S.E. 440 (1929); Moss v. Hirzel Canning Co., 100 Ohio App. 509, 137 N.E.2d 440 (1955); Hansen v. Hayes, 175 Ore. 358, 154 P.2d 202 (1944).

31. 20 Ill. 2d at 309-10, 170 N.E.2d at 168.

32. *Id.* at 310, 170 N.E.2d at 168.

The court went on to say:

> The estate or the spouse, either or both as the circumstances indicate, are entitled to recover for pecuniary losses suffered by either or both which are not recoverable under the Wrongful Death Act, and all cases holding the contrary are overruled.[33]

This seemingly superfluous language provided subsequent courts with strong dicta, allowing recovery where it had been previously prohibited under the *Holton* and *Susemiehl* rulings.[34]

It was against this background, of what seems to be inconsistent rulings, that the court in *Murphy v. Martin Oil Co.*[35] decided to unequivocally abandon the abatement rule in Illinois. Noting the absence of legislative action in remedying the inequities of the *Holton* rule and acknowledging the general disapproval of abatement that courts since *Saunders* have expressed,[36] Justice Ward, speaking for the court, saw the need to overrule *Holton.*

Realizing that abandonment of this concept could not be supported by Illinois case law, the court took the position that the ruling in *Holton* was not necessarily correct:

> The holding in *Holton* was not compelled, we judge, by the language or the nature of the statutes examined.
>
> . . . .
>
> The remedy available under *Holton* will often be grievously incomplete. There may be a substantial loss of earnings, medical expenses, prolonged pain and suffering, as well as property damage sustained, before an injured person may succumb to his injuries. To say that there can be recovery only for his wrongful death is to provide an obviously inadequate justice.[37]

The court noted that since *Saunders*, the holding of *Holton* was of questionable authority. Citing the dicta in *Saunders* previously mentioned,[38] the court stated, "it has become obvious that the Wrongful Death Act is no longer regarded as the exclusive remedy available when the injuries cause death."[39]

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33. *Id.* at 311, 170 N.E.2d at 169.

34. Graul v. Adrian, 32 Ill. 2d 345, 205 N.E.2d 444 (1965), allowing parents of a child killed by a wrongful act to recover medical and funeral expenses; Chidester v. Cagwin, 76 Ill. App. 2d 477, 222 N.E.2d 274 (2d Dist. 1966), allowing administrator who had previously recovered under the Wrongful Death Act to recover in a common law suit for funeral expenses.

35. 56 Ill. 2d 423, 308 N.E.2d 583 (1974).

36. McDaniel v. Bullard, 34 Ill. 2d 487, 216 N.E.2d 140 (1966); Graul v. Adrian, 32 Ill. 2d 345, 205 N.E.2d 444 (1965); Chidester v. Cagwin, 76 Ill. App. 2d 477, 222 N.E.2d 274 (2d Dist. 1966).

37. 56 Ill. 2d at 431, 308 N.E.2d at 586-87.

38. 20 Ill. 2d at 309-10, 170 N.E.2d at 168.

39. 56 Ill. 2d at 428, 308 N.E.2d at 585.

Unlike *Holton*, the court in *Murphy* saw no great difficulty in allocating damages recoverable under each of the statutes:

> The usual method of dealing with the two causes of action . . . is to allocate conscious pain and suffering, expenses and loss of earnings of the decedent up to the date of death to the survival statute, and to allocate the loss of benefits of the survivors to the action for wrongful death.[40]

Finally, the court stated:

> We consider those decisions which allow an action for fatal injuries as well as for wrongful death are to be preferred to this court's holding in *Holton v. Daly* that the Wrongful Death Act was the only remedy available when injury resulted in death.[41]

Thus the court, realizing no sound reason for adhering to the abatement rule existed, rejected it.

While the decision in *Murphy* seems to be a logical approach to the problem, the court's discussion of this new theory of recovery was less than thorough. They used the term "conscious pain and suffering" without a full explanation of what it meant.

Where conscious pain and suffering is allowed in a death action, difficulty arises in defining the level of consciousness between the time of injury and the time of death: Does consciousness mean awareness, responsiveness or simply awake? Similarly the type of evidence that will support an inference of consciousness differs in various jurisdictions.

The court noted the fact that the Federal Employers Liability Act[42] allows recovery for conscious pain and suffering.[43] This has been interpreted to require a substantial time interval between the injury and death.[44] However, evidence that the victim merely groaned and raised his arm has been held sufficient to prove consciousness.[45] Still where

40. *Id.* at 429, 308 N.E.2d at 586, referring to W. PROSSER, HANDBOOK OF THE LAW OF TORTS 906 (4th ed. 1971).

41. 56 Ill. 2d at 430-31, 308 N.E.2d at 586.

42. 45 U.S.C. §§ 51 *et seq.* (1971).

43. Great Northern Ry. v. Capital Trust Co., 242 U.S. 144 (1916); St. Louis, Iron Mountain & Southern Ry. v. Craft, 237 U.S. 648 (1915); Renaldi v. New York, New Haven and Hartford R.R., 230 F.2d 841 (2d Cir. 1956); Wetherbee v. Elgin, Joliet & Eastern Ry., 191 F.2d 302 (7th Cir. 1951). Similarly, damages are allowed for conscious pain and suffering under the Jones Act, 46 U.S.C. § 688 (1971). Gillespie v. United States Steel Corp., 379 U.S. 148 (1964); Presley v. Upper Mississippi Towing Corp., 153 So. 2d 416 (La. App. 1963).

44. "[S]uch pain and suffering as are substantially contemporaneous with death or mere incidents to it . . . afford no basis for a separate estimation or award of damages under statutes like that which is controlling here." St. Louis, Iron Mountain & Southern Ry. v. Craft, 237 U.S. 648, 655 (1914). *See also* Southern Pacific Ry. v. Heavingham, 236 F.2d 406 (9th Cir. 1956).

45. St. Louis, Iron Mountain & Southern Ry. v. Craft, 237 U.S. 648, 655 (1914).

death is instantaneous or fairly contemporaneous with the injury, or where the victim is completely unconscious during the entire time, recovery will be denied.[46]

States may also have their own definition of the type of consciousness that will support a recovery. In *Nichols v. Marshall*,[47] an action under the Kansas Death Statute, the court indicated that the victim must be *conscious* of his pain.[48] There the court found that the victim was sufficiently conscious because the evidence disclosed the victim moved his toe in response to a direction.[49] Whatever avenue of approach Illinois takes to the issue of consciousness, problems will arise for the personal representatives of fatally injured victims that linger in a semi-conscious state between the time of the injury and the time of death.

The effect of the *Murphy* decision on Illinois tort litigation remains to be seen. Prior to *Murphy*, the personal representative of a fatally injured tort victim had only one remedy available, the Wrongful Death Act. Damages under this Act, because they are limited to the pecuniary loss of the beneficiaries, could be calculated with some mathematical consistency.[50]

Damages for pain and suffering, however, because they depend on no precise mathematical formula, but on a subjective determination by the jury, can often be arbitrary.[51] Juries' emotions are likely to be heightened when the victim's injuries result in death and further when the deceased victim leaves a dependent wife or children. In the highly emotional setting of a wrongful death trial, it is quite possible for a jury to ex-

46. New Orleans & Northeastern R.R. v. Harris, 247 U.S. 367 (1918); Norfolk & Western Ry. v. Holbrook, 235 U.S. 625 (1915); Moffett v. Baltimore & O.R.R., 220 F. 39 (4th Cir. 1914). For a discussion of conscious pain and suffering as it relates to federal statutes, *see* Annot., 13 L. Ed. 2d 1013 (1964).

47. 486 F.2d 791 (10th Cir. 1973).

48. "There is no question that pain and suffering must be realized by the injured before it is compensible. . . ." *Id.* at 793. *But see* Civil v. Waterman Steamship Corp., 217 F.2d 94 (2d Cir. 1954) where the court found conscious pain and suffering even though the victim was paralyzed and incapable of feeling any sensation.

49. *See also* Nimnicht v. Ostertag, 225 So. 2d 459 (Fla. App. 1969) where the victim was unconscious or semiconscious during the entire period but periodically squeezed another's hand, and recovery was allowed. Tri-State Poultry Cooperative, Inc. v. Carey, 190 Md. 116, 57 A.2d 812 (1948) where the victim, though not totally conscious and not responsive to questions, moaned and groaned several times. This was held to be sufficiently conscious to support recovery.

50. For a discussion of the various elements of damage for wrongful death in Illinois, see Radley, *The Value of a Breadwinner*, 59 ILL. B.J. 574 (1971). *See also* S. SPEISER, RECOVERY FOR WRONGFUL DEATH §§ 3, 4, 9 (1966); S. SPEISER, RECOVERY FOR WRONGFUL DEATH—ECONOMIC HANDBOOK (1970).

51. Lau v. West Towns Bus Co., 16 Ill. 2d 442, 158 N.E.2d 63 (1959).

aggerate the damages for pain and suffering. Unless these damages are so excessive as to indicate passion and prejudice on the part of the jury, they will not be overturned on review.[52]

In other jurisdictions, where recovery for pain and suffering is allowed in wrongful death actions, substantial amounts have been recovered. For example, in *Florida East Coast Ry. v. Stewart*[53] the court upheld an award of $300,000, $100,000 of which was for pain and suffering, even though the victim lived only nine days following the accident.

Similarly, in *Toczko v. Armentano*,[54] the Massachusetts Supreme Court allowed recovery of $7,500 for pain and suffering to stand, notwithstanding the fact that the victim lived for less than two hours after the accident. It is not difficult to foresee similar awards forthcoming in Illinois.[55]

Finally, because the decision of the court in *Murphy* represents a position new to Illinois tort law, many questions remain unanswered. In addition to the question of consciousness already discussed, questions as to type of evidence necessary to prove conscious pain and suffering, whether mental suffering alone will support a verdict and what damages are excessive, can only be answered by subsequent litigation. Unsuccessful defendants, faced with the prospect of paying large awards for pain and suffering, will no doubt be willing to test each of these questions in the courts of review.

Salvatore R. Marzullo

52. Greim v. Sharpe Motor Lines, 101 Ill. App. 2d 142, 242 N.E.2d 282 (3d Dist. 1968).

53. 140 So. 2d 880 (Fla. App. 1962).

54. 341 Mass. 474, 170 N.E.2d 703 (1960).

55. *See also* Nichols v. Marshall, 486 F.2d 791 (10th Cir. 1973), where the court upheld an award of $78,095 for pain and suffering since decedent lived for nine days following the accident. *But see* Illinois Central R.R. v. Nelson, 245 Miss. 395, 146 So. 2d 69 (1962), where the court held $150,000 for pain and suffering excessive even though decedent sustained severe first degree burns and lingered for fourteen days in great pain.