

Restatement of the Law, Second, Torts

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§ 925 Actions for Causing Death

The measure of damages for causing the death of another depends upon the wording of the statute creating the right of action and its interpretation.

COMMENTS & ILLUSTRATIONS: **Comment:**

a. Following the holding in *Baker v. Bolton*, (1808) 1 Camp. 493, 170 Eng.Rep. 1033, it was generally agreed that at common law, a person who had suffered pecuniary or other harm from the death of another had no cause of action against the person who caused the death. Thus a spouse, parent or master who had a cause of action against a tortfeasor who physically harmed a spouse, child or servant, for expenditures and for loss of services or society resulting from the harm, was denied a right of action for similar loss caused by the death of the wife, child or servant. Although the cause of action of the spouse, parent or master was not terminated by the death of the injured person (as was that of the injured person by his own death), the damages did not include anything for the immediate harm caused by the death, such as funeral expenses, or any other element of damages, such as the loss of consortium or support for which, if the person had been hurt but not killed, there could have been recovery.

This legal situation was remedied in England in 1846 by a statute commonly known as "Lord Campbell's Act," which provided that for the benefit of certain near relatives who had suffered pecuniary loss from the death of a person, the personal representatives should have a cause of action against the one who tortiously caused the death, provided that the deceased would have had a cause of action if he had been merely injured and not killed. Under the provisions of this statute, the amount recoverable depends upon proof of the probable contributions to the beneficiaries by the deceased during the life expectancy. This total amount is divided among the beneficiaries in proportion to the amount of loss suffered by each.

In the United States also, the omission of the common law has been corrected in every state by statutes colloquially known as "wrongful death acts." Most of these are modeled more or less closely on the English Act. In a few states a single statutory provision by express terms or by interpretation performs both the function of survival statutes (see § 926), which preserve to the estate of the deceased the right of action that had accrued before death, and the function of death statutes, which give a new action for damages for causing death.

Although the death statutes create a new cause of action, both they and the survival statutes are dependent upon the rights of the deceased. Hence if no action could have been brought by the deceased if still alive, no right of action exists. Likewise a release by the deceased or a judgment either in his favor or, if won on the merits, in favor of the defendant, bars an action after the death. Again, as stated in § 494, there can be no recovery if the contributory negligence of the deceased would have barred him from maintaining an action. Also the contributory negligence of a beneficiary of the action may be a bar to an action for negligently causing death or may decrease the amount of recovery. (See § 493).

b. *Types of statutes.* The American statutes creating a cause of action for death are not uniform in their provisions with regard to the method by which the chief elements of damages are determined. Omitting minor differences, the statutes may be grouped into four types.

1. *Damages based on contributions.* In the majority of states, the English model has been followed, and damages are determined by the present worth of the contributions and aid that the deceased probably would have made to the survivors had he lived. Under this rule a widow and child of the deceased can recover the value at the time of trial of that portion of the sum the decedent probably would have earned but for his death, and which he probably would have devoted to them or for their benefit. This is determined in accordance with the rules stated in § 924, Comments *c*, *d* and *e*. To this amount is added an amount to compensate them for the loss of the advice, assistance, training and companionship that they probably would have received, so far as those things would have had pecuniary value. The total represents the worth of the decedent's life in a pecuniary way to his family. In diminution is considered any fact tending to show that the deceased would not have made the contributions normally expected from one in his position. Thus it is relevant that the deceased did not live at home, or that he had not supported his family and probably would not have done so. On other elements of damages, see Comments *c* to *e*.

2. *Damages based on loss to the estate.* In some states, the death statutes, by specific words or by interpretation, measure the damages by the diminution in the estate of the one killed.

In some of these states, the damages are fixed as the present value of the probable earnings of the deceased, less probable personal expenses. These damages closely approximate those given under the rule applied in the first group of states, in the case of the death of a husband who has lived with and supported his wife. There may, however, be a wide variance between the results of the two rules, as when a parent sues for the death of a minor child from whom there would ordinarily be little expectation of support, and whose death, therefore, under the rule applied in the first group, would be the basis for only small damages.

In some states the damages are determined by the amount that it is estimated the deceased would have accumulated out of earnings during the period by which the life expectancy was shortened.

In other states the damages are based upon the total probable earnings of the deceased, reduced to present value. This is the same measure of damages as that which could have been recovered if the deceased had been permanently disabled but not killed, and is more than compensatory since, if he had remained alive, he would have had to provide for his own living expenses.

3. **Combined death and survival statutes.** In some states the survival or revival statutes are interpreted to permit a complete recovery not only for the elements of damage for harm before death but also for the elements of damage created by the death itself. In these states the tendency is to give to the beneficiary an amount corresponding to the economic value of the life of the deceased as it would have been but for the defendant's act. Thus the damages include both the losses sustained by the deceased on account of the harm during his lifetime and the value at the time of death of what would have been the net earnings of the deceased, less living expenses during the period of his life expectancy. These statutes avoid the expense of two actions and the difficulties that frequently arise when there is a separate death statute and a survival statute.

4. **Punitive statutes.** In two states the amount of damages is determined without reference to the necessities of the family of the deceased or of the amount of his earnings, but is wholly dependent upon the degree of fault on the part of the defendant.

*c. Punitive damages.* Aside from the states in which the degree of culpability of the defendant is the sole basis for compensation, most of the states do not permit punitive damages. In some, because of express language in a statute or by interpretation of general provisions, the courts have held that these damages are recoverable.

*d. Nominal damages.* In a majority of the states, nominal damages may be awarded, although there are no compensatory damages.

*e. Harm to feelings.* Damages for harm to the feelings of the survivors and compensation for mere loss of association or membership in the family are not granted, although, as stated in Comment *b*, damages for loss of advice, care, attention, guidance, or even companionship that has pecuniary value may be given. Normally, under a death statute that is not combined with a survival statute, recovery is not permitted for the suffering of the deceased or for medical and other expenses caused by the injury unless these are borne by the survivor.

*f. Certainty.* In determining the amount of recovery under death statutes, the rules stated in § 924, respecting the determination of the amount of earnings that the deceased probably would have received and the determination of his life expectancy are observed. In other respects, as in ascertaining the value of a parent's care, training and guidance, the standard of certainty is necessarily relaxed, and the amount of the ultimate award is thus largely within the discretion of the jury, subject to the ordinary powers of the court to set aside a verdict that is excessive or inadequate.

*g. Limitation for amount and time.* Under the statutes of some states, the total amount recoverable is limited to a fixed maximum amount.

Most statutes require suit to be brought within a specified time after the death or after the appointment of a representative. Unlike the ordinary statutes of limitations, these time-limits are usually held to go to the nature and extent of the right and not merely to the remedy. (See Restatement, Second, Conflict of Laws, § 143). There is difference of opinion on whether a limitation on amount will be followed in another state. (See Restatement, Second, Conflict of Laws, § 178).

*h. Mitigation.* The fact that one or more of the beneficiaries receives insurance payable on the death of the deceased or inherits property from the deceased does not diminish the damages recoverable. Likewise the fact that support, education or other gratuities have been received from third persons,

although induced by the death, or that the survivors will be cared for by third persons, does not mitigate the damages. (See § 920A).

*i. Interaction of claims for harms before and after death.* Except when there is a combined survival and death statute (see Comment *b*), a judgment under a survival statute has no effect upon the damages given under a death statute, since the damages in the one case are based upon events preceding death, while the damages under the other statute are based upon harm caused by the death. On the other hand, a release of his claim by the injured person bars an action after his death for causing the death; this is also true of a judgment either for, or if on the merits, against him given in an action brought by him for the tort. If an action brought by the deceased was pending at his death, the terms of a separate revival statute distinct from the general survival statute may determine whether the existing action should be continued or a new action for the death should be brought.

*j. Recovery by husband or parent for expenses before death of spouse or child.* The amount recoverable by a spouse or a parent for injury to a spouse or child, aside from the death statutes, includes an amount for the expenses and loss of services or society of the spouse or loss of services of the child to the time of death, and neither the death nor a survival statute impairs this right of the spouse or parent to recover for those items since they are not included within the provisions of any of the types of death statute.

*k. Common law action for wrongful death.* The prevalence of the wrongful death statutes, which are to be found in all jurisdictions, and their existence for substantially more than a hundred years have given rise to some decisions holding that the principle of a right of action for wrongful death has now become a part of the common law itself. In view of the "lack of any discernible basis" for the 1808 holding in *Baker v. Bolton* and its "harsh result" and of the scholarly criticism of the holding, it has been concluded that "there is no present public policy against allowing recovery for wrongful death," so that the right of action can now be regarded as arising under the common law. Most of the details of the right may be controlled by an existing statute or taken by analogy from one. When recognized, this common law right has been utilized to fill in unintended gaps in present statutes or to allow ameliorating common law principles to apply.

REPORTERS NOTES: Comment *k* has been added.

*Comment b:* Types of statutes.

(1) Damages based on contributions. See *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59, 33 S.Ct. 192, 57 L.Ed. 417 (1913); *Southern R. Co. v. Miller*, 285 F. 2d 202 (6th Cir. 1960); *McLaughlin v. United R. Co.*, 169 Cal. 494, 147 P. 149 (1915); *McKeown v. Argetsinger*, 202 Minn. 595, 279 N.W. 402 (1938); *Tenore v. Nu Car Carriers Inc.*, 67 N.J. 466, 341 A.2d 613 (1975); *Meekin v. Brooklyn Heights R. Co.*, 164 N.Y. 145, 58 N.E. 50 (1900); *Dooley v. Seaboard Air Line R. Co.*, 163 N.C. 454, 79 S.E. 970 (1913); *Youngblood v. Southern R. Co.*, 152 S.C. 265, 149 S.E. 742 (1929).

(2) Damages based on loss to the estate. See *De Toskey v. Ruan Transp. Corp.*, 241 Iowa 45, 40 N.W.2d 4 (1949); *Phelps Roofing Co. v. Johnson*, 368 S.W. 2d 320 (Ky.1963).

(3) Combined death and survival statutes. See *Texarkana Gas & Elec. Light Co. v. Orr*, 59 Ark. 215, 27 S.W. 66 (1894); *Prowant v. Kings-X Inc.*, 185 Kan. 602, 347 P.2d 254 (1959); *Stewart v. United Elec. Light & Power Co.*, 104 Md. 332, 65 A. 49 (1906); *Bates v. Sylvester*, 205 Mo. 493, 104 S.W. 73 (1907);

*Lahoma Oil Co. v. State Industrial Comm'n*, 71 Okl. 160, 175 P. 836 (1918); *Lubrano v. Atlantic Mills*, 19 R.I. 129, 32 A. 205 (1895); *Ellenberg v. Arthur*, 178 S.C. 490, 183 S.E. 306 (1936); *Memphis St. Ry. Co. v. Cooper*, 203 Tenn. 425, 313 S.W.2d 444 (1958); *Mesher v. Osborne*, 75 Wash. 439, 134 P. 1092 (1913).

(4) Punitive Statutes. See *Richmond & D. R. Co. v. Freeman*, 97 Ala. 289, 11 So. 800 (1892); *Oulighan v. Butler*, 189 Mass. 287, 75 N.E. 726 (1905).

Comment c: Punitive damages are ordinarily not allowed. *Rochester v. Wells, Fargo & Co. Express*, 87 Kan. 164, 123 P. 729 (1912); *Atchison, T. & S. F. R. Co. v. Townsend*, 71 Kan. 524, 81 P. 205 (1905); *London Guarantee & Acc. Co. v. Balgowan S. S. Co.*, 161 Md. 145, 155 A. 334 (1931); *Crossett v. Andrews*, 277 P.2d 117 (Okl.1954).

Some wrongful death statutes specifically provide for punitive damages, and some states construe the statute to allow them. See, e.g., *Boroughs v. Oliver*, 226 Miss. 609, 85 So.2d 191 (1956).

Comment d: Nominal damages are allowed. *Fordyce v. McCants*, 51 Ark. 509, 11 S.W. 694 (1889); *Bolen v. Howard*, 452 S.W.2d 401 (Ky.1970); *Van Cleave v. Lynch*, 109 Utah 149, 166 P.2d 244 (1946).

The leading state declining to allow the damages -- see *Stetson v. Easterling*, 274 N.C. 152, 161 S. E.2d 531 (1968) -- has recently changed its position by statutory amendment. N.C.Gen.Stat. § 28-174(a)(6).

Comment e: Harm to feelings. See *In re Riccomi*, 185 Cal. 458, 197 P. 97 (1921); *Thompson v. Fort Branch*, 204 Ind. 152, 178 N.E. 440 (1931); *Graffam v. Saco Grange*, 112 Me. 508, 92 A. 649 (1914); *Davis v. Guarnieri*, 45 Ohio St. 470, 15 N.E. 350 (1887); *Tex-Jersey Oil Corp. v. Beck*, 157 Tex. 541, 305 S.W.2d 162 (1957); *Evans v. Oregon Short Line R. Co.*, 37 Utah 431, 108 P. 638 (1910); *O'Connor v. United States*, 269 F.2d 578 (2d Cir. 1959) (Okl. law).

In some states compensation is given the survivors for sorrow and anguish. *Matthews v. Hicks*, 197 Va. 112, 87 S.E.2d 629 (1955).

Loss of services. *Vines v. Arkansas Power & Light Co.*, 232 Ark. 173, 337 S.W.2d 722 (1960); *Kroeger v. Safranek*, 165 Neb. 636, 87 N.W.2d 221 (1957); *Dahl v. North American Creamers, Inc.*, 61 N.W.2d 916 (N.D.1953).

Loss of nurture, education and guidance. *Baltimore & O. R. Co. v. Plews*, 262 Md. 442, 278 A.2d 287 (1971); *Boyd Constr. Co. v. Bilbro*, 210 So.2d 637 (Miss. 1968); *Arrow Transp. Co. v. Northwest Groc. Co.*, 258 Or. 363, 482 P.2d 519 (1971).

Loss of companionship. *Kurdziel v. Van Es Elec. Co.*, 180 Kan. 627, 306 P.2d 159 (1957); *Smith v. Wells*, 258 S.C. 316, 188 S.E.2d 470 (1972); *Breeding v. Johnson*, 208 Va. 652, 159 S.E.2d 836 (1968).

Comment g: Limitations on amount and time. See *Hammond v. Lewiston, A. & W. St. R. Co.*, 106 Me. 209, 76 A. 672 (1909); *Swope v. Keystone Coal & Coke Co.*, 78 W.Va. 517, 89 S.E. 284 (1916).

Comment h: Mitigation. Remarriage of a surviving spouse does not reduce her recovery. *Groesbeck v. Napier*, 275 N.W.2d 388 (Iowa 1979); *Lofton v. Cade*, 359 So.2d 1074 (La.App.1978), writ denied, 360 So.2d 1177 (La. 1978).

Comment i: See *Martin v. Baltimore & O. R. Co.*, 151 U.S. 673, 14 S.Ct. 533, 38 L.Ed. 311 (1893); *St. Louis & S. F. R. Co. v. Goode*, 42 Okl. 784, 142 P. 1185 (1914); *Brown v. Chicago & N. W. R. Co.*, 102 Wis. 137, 77 N.W. 748 (1898), reh'g denied, 102 Wis. 137, 78 N.W. 771 (1899).

*Comment k:* Common law action. The two significant cases are *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), on remand, 446 F.2d 906 (5th Cir. 1971) (maritime law and a gap in the applicable statutes); *Gaudette v. Webb*, 362 Mass. 60, 284 N.E.2d 222 (1972) (tolling a statute of limitations allowed).

The quoted language is taken from them.

See generally, S. Speiser, *Recovery for Wrongful Death* (2d ed. 1975) (2 vols.); S. Speiser, *Recovery for Wrongful Death: Economic Handbook* (2d ed. 1979); Tiffany, *Death by Wrongful Act* (2d ed. 1913); Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. Rev. 431 (1916); Malone, *Genesis of Wrongful Death*, 17 Stan. L.Rev. 1043 (1965); Smedley, *Wrongful Death -- Bases of the Common Law Rules*, 13 Vand.L. Rev. 609 (1960); Page, "Pecuniary" Damages for Wrongful Death, 7 Trial Law. Guide [No. 4] 124 (1963).

#### CROSS REFERENCES: ALR Annotations:

Admissibility of evidence of, or propriety of comment as to, plaintiff spouse's remarriage, or possibility thereof, in action for damages for death of other spouse. 88 A.L.R.3d 926.  
Action against parent by or on behalf of unemancipated minor child for wrongful death of other parent. 87 A.L.R.3d 849.  
Right to maintain action or to recover damages for death of unborn child. 84 A.L.R.3d 411.  
Admissibility and sufficiency of proof of value of housewife's services, in wrongful death action. 77 A.L.R.3d 1175.  
Recovery for mental or emotional distress resulting from injury to, or death of, member of plaintiff's family arising from physician's or hospital's wrongful conduct. 77 A.L.R.3d 447.  
Excessiveness and adequacy of damages for personal injuries resulting in death of minor. 49 A.L.R.3d 934.  
Profits of business as factor in determining loss of earning capacity in action for personal injury or death. 45 A.L.R.3d 345.  
Admissibility, in personal injury or death action, of evidence as to injured party's intention to enter occupation other than that engaged in at time of injury or death. 23 A.L.R.3d 1189.  
Necessity and manner, in personal injury or death action, of pleading special damages in the nature of medical, nursing, and hospital expenses. 98 A.L.R.2d 746.  
Damages for wrongful death of husband or father as affected by receipt of social security benefits. 84 A.L.R.2d 764.  
Pension, retirement income, social security payments, and the like, of deceased, as affecting recovery in wrongful death action. 81 A.L.R.2d 949.  
Admissibility in wrongful death action of testimony of actuary or mathematician for purpose of establishing present worth of pecuniary loss. 79 A.L.R.2d 259.  
Action against spouse or estate for causing death of other spouse. 28 A.L.R.2d 662.  
Proof of prospective earning capacity of student or trainee, or of its loss, in action for personal injury or death. 15 A.L.R.2d 418.  
Measure and elements of damages for personal injury resulting in death of infant. 14 A.L.R.2d 485.  
Changes in cost of living or in purchasing power of money as affecting damages for personal injuries or death. 12 A.L.R.2d 611.  
Marriage of child, or probability of marriage, as affecting right or measure of recovery by parents in death action. 7 A.L.R.2d 1380.

Digest System Key Numbers:

C.J.S. Death § § 95, 96, 98 et seq., 106, 110.  
West's Key No. Digests, Death 78 et seq.