

PART I INTRODUCTION

This book is intended to introduce lawyers to the law of wrongful death and survival actions in New Jersey. It will provide an overview of the law, highlighting the important cases with emphasis on practical pointers. Our intention in writing this publication is to give lawyers an opportunity to consult a source that is easy to read, especially when they are in the midst of handling a wrongful death action, whether at the trial level or on appeal.

The success of a wrongful death action depends not only on the merits of your case, but also on an understanding of New Jersey's wrongful death law. A wrongful death action is a statutory cause of action. See *N.J.S.A. 2A:31-1 et seq.* The statute itself is rather straightforward and will be discussed in this publication.

Although in many instances a wrongful death action is similar to a personal injury action, a crucial difference lies in the types of recoverable damages. A wrongful death action permits recovery for pecuniary losses only. You cannot recover for emotional damages, pain and suffering, and other types of non-pecuniary losses. However, because the statute itself does not go into great detail in defining pecuniary losses, we must look to our courts for an interpretation of recoverable damages in a wrongful death action. Nevertheless, the courts have been very creative in defining what types of damages are compensable in a wrongful death action.

Moreover, New Jersey law also provides for a survival cause of action. This is an action to recover for the conscious pain and suffering of the decedent. In short, a survival action continues the right of action which the deceased would have had to recover for his own injuries had he not died.

Although actions pursuant to the Wrongful Death Act and the Survivor Act arise from the same event, that is, the death of the decedent, they serve different purposes and are designed to provide a remedy to different parties. Smith v. Whitaker, 160 N.J. 221 (1999).

After you understand what types of pecuniary losses are compensable, the next step will be to amass your proofs on damages. This publication will discuss the use of an economic expert to assist you in establishing your damages proofs. The retention of an economic expert and the preparation of an economic loss analysis are often useful methods towards successful resolution of the case outside the courtroom.

Whether you settle or try a wrongful death action, you must have a solid grasp of the many legal issues that arise. It is hoped that this book will assist you in this regard.

INTRODUCTION

PART II

HISTORICAL DEVELOPMENT OF THE WRONGFUL DEATH CAUSE OF ACTION¹

The common law principle denying recovery for wrongful death is derived from Lord Ellenborough's opinion in *Baker v. Bolton*, 1 Campb. 493 (1808). In that case, plaintiff's wife sustained serious injuries in a stagecoach accident. One month later, she died. Plaintiff then brought an action at *nisi prius* against the stagecoach owner, claiming that he had "been deprived of the comfort, fellowship, and assistance of his said wife, and had from thence hitherto suffered and undergone great grief, vexation, and anguish of mind."

At the trial, Lord Ellenborough instructed the jury that only damages for the plaintiff's loss of society and grief could be awarded, and these damages should be limited to the one month period between the accident and his wife's death. He stated further, in *dicta*, that "in a civil court, the death of a human being could not be complained of as an injury." This statement was adopted not only in England, but also in America, where it eventually became the generally accepted common law rule.²

In 1846, the English Parliament remedied the inherent unfairness of the common law principle when it adopted Lord Campbell's Act (Fatal Accidents Act), 9 & 10 Vict. Ch. 93 (Eng.). The Act created a cause of action for certain named beneficiaries, such as spouses and children. Under the Act, the beneficiaries could recover for death caused by the wrongful acts of the defendant. Specifically, the Act provided that when someone is killed as a result of wrongful acts, negligence, or default of another person, such that had the decedent lived he would have been entitled to bring an action himself, the administrator or executor of his estate may bring an action for the benefit of certain survivors to recover damages resulting from the death.

However, shortly after Lord Campbell's Act became effective, the English courts allowed some of the old common law "no recovery" principles to seep back into wrongful death actions by limiting damages to pecuniary injuries. *Blake v. Midland Co.*, 118 Eng. Rep. 35 (1852).

¹ The author attributes much of this first section to the interesting and in-depth analysis of Stuart M. Speiser, *Recovery for Wrongful Death* § 1 to 1:25 (2d ed. 1975).

² See, e.g., *Carey v. Berkshire R.R.*, 55 Mass. (1 Cush.) 475 (1848); *Eden v. Lexington & Frankfort R. Co.*, 53 Ky. 204 (1853); *Myers v. Holborn*, 58 N.J.L. 193 (1895).

HISTORICAL DOCUMENTS

Using Lord Campbell's Act as a model, the American states began to overrule the common law principle of "no recovery" in wrongful death actions. New York was the first state to enact such legislation in 1847. New Jersey followed in 1877. Interestingly, the initial section of New Jersey's current wrongful death statute, *N.J.S.A. 2A:31-1*, has never been amended. Thus, it still reflects the influence of Lord Campbell's Act. It provides:

[w]hen the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime.

N.J.S.A. 2A:31-1 (1987). (See Section XIV.)

Although subsequent sections of New Jersey's current wrongful death statute have been added or amended since 1877, they clearly show the influence of Lord Campbell's Act. Under the statute, all actions shall be brought in the name of the administrator or executor of the decedent's estate. *Id.* § 2A:31-2. There is a two-year statute of limitations from the date of death, although subsequent revisions have exempted deaths that result "from murder, aggravated manslaughter or manslaughter for which the defendant has been convicted, found not guilty by reason of insanity or adjudicated delinquent." *Id.* § 2A:31-3. Damages are for the exclusive benefit of "persons entitled to take any intestate personal property of the decedent." *Id.* § 2A:31-4. Priority will be given to the dependents of the decedent and the court may apportion the recovery as it deems equitable among them. *Id.* The jury may award such damages as it considers fair "with reference to the pecuniary injuries resulting from such death together with the hospital, medical and funeral expenses incurred for the deceased." *Id.* § 2A:31-5. Payment is made to the general administrator of the estate whether by settlement or judgment. *Id.* § 2A:31-6.

The New Jersey Supreme Court in *Negron v. Llarena*, 156 N.J. 296 (1998), provided an excellent historical review of wrongful death law. In his concurrence, Justice Handler (who incidentally also wrote the majority opinion), engaged in a lengthy recitation of the history of the wrongful death statute and the implications of its statute of limitations. In particular, Justice Handler stressed that the wrongful death statute of limitations should not be strictly applied to foreclose a wrongful death claim that was not technically timely filed. *Id.* at 307.

Higgins v. Butcher, 80 Eng. Rep. 61 (K.B. 1607), was the first reported case in England supporting the rule that no common law cause of action exists for wrongful death. *Negron*, 156 N.J. at 308. The court stated that when a battery results in a death, it becomes an offense to the Crown, thus being converted into a felony which drowns the particular offense, "and private wrong offered to the master before, and his action is thereby lost." This language established what was to become known as the "felony-murder rule." *Id.* This rule was later restated in *Smith v. Sykes*, 89 Eng. Rep. 160 (K.B. 1677), which provided, "[I]f A. beat the wife of B., so that she dies, B.