

THE
AMERICAN LAW REGISTER.

JULY, 1889.

STATUTORY LIABILITY FOR CAUSING DEATH.

The question regarding the right to maintain an action, independently of statute, for damages, for causing the death of a person, may be considered as finally set at rest, since the decisions of the United States Supreme Court in *Insurance Company v. Brame* (1877), 95 U. S. 754, holding, in accordance with the English decisions and the almost uniform decisions of our own courts, that such an action is not maintainable at law, and in the case of *The Harrisburg* (1886), 119 U. S. 199, holding the rule to be the same in admiralty. We may reasonably expect that that question will not be much mooted hereafter. But in place of it, Lord Campbell's Act, and our various State statutes modeled upon it, which have been designed to supply the defect of the common law, have raised not one, but many difficult questions, which seem likely to prove an inexhaustible source of litigation.

The principal questions raised, and those which alone we propose to inquire about, involve, if they are not always considered to turn upon, the nature of the right conferred, or intended to be conferred, by the Act. Does it give an entirely new right of action, or merely provide for the survival of the right of action for injury to the person, which at common law does not survive?

Blake v. Midland R'y Co., 18 Q. B. 93, a leading English case decided in 1852, involved the question of the measure of damages under the Act, and it was held (the action being by an

administratrix, who was also the widow of the deceased), that the jury should not be allowed to take into consideration the mental sufferings or bereavement of the plaintiff for the loss of her husband, but must give compensation for pecuniary loss only. Mr. Justice COLERIDGE said therein :

The title of this Act may be some guide to its meaning; and it is "An Act for compensating the families of persons killed," not for solacing their wounded feelings. Reliance was placed upon the first section, which states in what cases the newly-given action may be maintained, although death has ensued; the argument being that the party injured, if he had recovered, would have been entitled to a solatium, and therefore so shall his representatives on his death. But it will be evident that this Act does not transfer this right of action to his representative, but gives to the representative a totally new right of action, on different principles. Section Two enacts that "in every such action, the jury may give such damages as they may think proportioned to the injury resulting from such death, to the parties respectively for whom and for whose benefit such action shall be brought." The measure of damage is not the loss or suffering of the deceased, but the injury resulting from his death to his family.

In *Franklin v. Southeastern R'y Co.* (1858), 3 H. & N. 211, and in *Dalton v. Same* (1858), 4 C. B. (N.S.) 296, suits were maintained on account of the death of sons, for the benefit of parents, and damages allowed to be assessed on the basis of reasonable expectation on the part of the latter, of pecuniary benefit to be derived from the continuance of their sons' lives; but in the latter case the expenses of funeral and mourning were disallowed, Mr. Justice WILES saying, that "the subject matter of the statute is compensation for injury by reason of the relative not being alive."

It has been held, too, in England, that some actual damage must be shown, or the action cannot be maintained; that the recovery of nominal damages is not permissible: *Duckworth v. Johnson* (1859), 4 H. & N. 653; *Boulter v. Webster* (1865), 13 W. R. 289; s. c., 11 L. T. (N. S.) 598.

In *Pym v. Great Northern R'y Co.* (1862), 2 B. & S. 759; affirmed in the Exchequer Chamber (1863), 4 B. & S. 396, it was held that damages were recoverable on account of a change in the mode of distribution of property among the members of a family, produced by the death complained of, although no pecuniary loss to the family, in the aggregate, would result. COCKBURN, C. J., said, in his opinion in the lower court:

It was contended that, inasmuch as if death had not ensued from the effects of the accident, the deceased could have had no right of action against the company, in respect of a pecuniary loss arising only on his death, this action could not be maintained by his representative, inasmuch as the right of action is given only

where the deceased could have maintained an action, if death had not ensued. We were at first struck by this argument, but on consideration we are of opinion that the condition that the action could have been maintained by the deceased, if death had not ensued, has reference not to the nature of the loss or injury sustained, but to the circumstances under which the bodily injury arose, and the nature of the wrongful act, neglect or default complained of. Thus, if the deceased had, by his own negligence, materially contributed to the accident whereby he lost his life, as he, if still living, could not have an action in respect of any bodily injury, notwithstanding there might have been negligence on the part of the defendants, the present action could not have been supported. But supposing the circumstances of the negligence to have been such that, if death had not ensued, the deceased might have brought his action in respect of any injury arising to him from it, we are of opinion that his representative may maintain an action in respect of an injury arising from a pecuniary loss occasioned by the death, although that pecuniary loss would not have resulted from the accident to the deceased, had he lived.

Although the statute, and these decisions applying it, make the injury resulting to third parties from the death, the sole ground of recovery; excluding from the computation of damages the loss or suffering of the deceased; and notwithstanding the language of the court in *Blake v. Midland Railway Company* (1852), 18 Q. B. 93, to the effect that the Act does not transfer the decedent's right of action to his representative, but gives a totally new right of action; the Court of Queen's Bench (in which also the latter case arose), held in *Read v. Great Eastern Ry Co.* (1868), L. R. 3 Q. B. 555, that a settlement made by the decedent in his lifetime, with the company responsible for the injury, was a bar to an action under the statute, after his death. None of the judges constituting the court when *Blake v. Midland Ry Co.*, *supra*, was decided, were on the bench at this time. The language of Justices BLACKBURN and LUSH, who alone delivered opinions, indicates quite a different theory of the statute, from that advanced in the cases heretofore cited, and deserves attention. Said Mr. Justice BLACKBURN:

Before that statute, the person who received a personal injury and survived its consequences, could bring an action and recover damages for the injury, but, if he died from its effects, then no action could be brought. To meet this state of the law, the 9 & 10 Vict. c. 73, was passed, and whenever the death of a person is caused by a wrongful act, and the act 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 would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the party injured. Here, taking the plea to be true, the

party injured could not maintain an action in respect thereof, because he had already received satisfaction. Then comes section two, which regulates the amount of damages and provides for its apportionment in a manner different to that which would have been awarded to a man in his lifetime. This section may provide a new principle as to the assessment of damages, but it does not give any new right of action. Mr. *Codd* was driven to argue that the executor could bring a fresh action, even if the deceased had recovered damages in an action; but to hold this would be to strain the words of the section. The intention of the enactment was, that the death of the person injured should not free the wrong-doer from an action, and in those cases where the person injured could maintain an action his personal representative might sue.

Mr. Justice LUSH said :

The intention of the statute is not to make the wrong-doer pay damages twice for the same wrongful act, but to enable the representatives of the person injured, to recover in a case where the maxim, *actio personalis moritur cum persona*, would have applied. It only points to a case where the party injured has not received compensation against the wrong-doer. It is true, section two provides a different mode of assessing damages, but that does not give a fresh cause of action.

Barnett v. Lucas (1872), Irish Rep. 6 C. L. 247, was an action by a widow, as administratrix of her husband, to recover for damage to personal property of the intestate, caused by the explosion of a boiler supplied by the defendants. The intestate had himself been killed by the explosion and the plaintiff had, in a former action, recovered for his death. It was held by the majority of the court of the Irish exchequer chamber that such recovery was no bar to this action, on the ground that the statute gives a new right of action, as decided in *Blake v. Midland R'y Co.* (1852), 18 Q. B. 93, and *Pym v. Great Northern R'y Co.* (1862), 2 B. & S. 759, although it may be, as held in *Read v. Great Eastern R'y Co.* (1868), L. R. 3 Q. B. 555, that two actions cannot be brought for the same injury to the person.

FITZGERALD, B., dissented, holding that damages could not, by reason of the statute, be twice recovered in respect to the same wrongful act, relying on the last named case; and saying, with regard to the statement, that the Act gives a totally new right of action, that, while that is true in a sense, "this new right is given by preserving the cause of action which was in the deceased, so as to be available, notwithstanding the death."

Notwithstanding the well settled principle of the common law, that an action for tort to the person dies with the person

and will not survive to the representatives of the injured party, it was held in 1875, in *Bradshaw v. Lancashire & Yorkshire Ry Co.* (1875), L. R. 10 C. P. 189, that the right of action for pecuniary injury, consequent upon injury to the person, that is, the expense of medical aid and the injury to the person's business resulting from his being disabled from attending to it, will survive; the latter being regarded as separable from the personal injury, that is, the bodily pain and suffering. It was also held that this principle was not affected by Lord Campbell's Act, and that an executrix could maintain an action to recover for the pecuniary damage resulting to her testator from a personal injury, or, as it was termed, the damage to his personal estate, notwithstanding his death resulted from the injury. The defendant in the action was a common carrier, on whose road the testator was riding as a passenger when the injury was received, and the action was brought in contract.

Said Mr. Justice GROVE :

Does the fact that in this case, besides the injury to the estate, the testator's death has likewise resulted from the breach of contract, make any difference, or does the fact that provision has been made in such cases for compensation in respect of the death to certain relatives, by Lord Campbell's Act, take away any right of action that the executrix would have had but for the Act? It does not seem to me that the Act has that effect, either expressly or by necessary implication. The intention of the Act was to give the personal representative a right to recover compensation as a trustee for children or other relatives left in a worse pecuniary position by reason of the injured person's death, not to affect any existing right belonging to the personal estate in general. There is no reason why the statute should interfere with any right of action an executor would have had at common law. In the case of such right of action, he sues as legal owner of the general personal estate, which has descended to him in course of law; under the Act he sues as trustee, in respect of a different right altogether, on behalf of particular persons designated in the Act.

The following year, 1876, a case arose in the Queen's Bench (*Leggott v. Great Northern Ry Co.*, 1 Q. B. Div. 599), where an administratrix brought an action like that in *Bradshaw v. Lancashire & Yorkshire Ry Co.* (1875), L. R. 10 C. P. 189, after a prior suit and recovery under Lord Campbell's Act. As to the survival of the right of action for pecuniary loss suffered by the intestate in his life-time as a result of the personal injury, the judges felt bound by the last named case, though they doubted the correctness of the decision. It was assumed,

apparently, that the prior suit and recovery were no bar to the present action (though whether some question might not have been made on that point, as in the Bradshaw case, there appears to have been no prior recovery), and it was claimed by the plaintiff that the finding of negligence, etc., on the part of the defendant in the prior suit, estopped it to deny such negligence, etc., in this suit. The plaintiff's contention was overruled, on the ground that the two actions were not brought by the administratrix in the same right, Mr. Justice MELLOR saying :

It seems that though nominally, the machinery of the action in the one case is the same as the machinery in the other, yet the action in which the verdict has been recovered, was an action of a very special and limited description. It was an action given expressly by the statute, and must be confined within the limits of the statute. It was to provide for what the law had not before provided for, namely, the right of an administrator or executor to sue for the benefit of the family, in respect of the death of the deceased, occasioned by the negligence of other persons. * * * It is to be observed that the executrix, in a case under the Act, does not sue in respect of anything which belonged to the deceased, but by force of the statute, which enacts that the deceased's death is to be made the subject of an action, just as if he had lived ;

and Mr. Justice QUAIN saying :

Lord Campbell's Act enables an action to be brought in a case where it could not have been brought before that Act, namely, when the man has suffered a personal injury, and dies in consequence. After his death, before Lord Campbell's Act, no such action could have been maintained, because the death destroyed it. It fell with the life of the individual injured. Now Lord Campbell's Act gives an entirely new action, not an action connected with the estate of the deceased in the slightest degree, and the damages recoverable in it would be no part of the estate of the deceased.

As to the correctness or incorrectness of the holding in the Bradshaw case, as to the survival of a right of action for pecuniary loss, distinct from the personal injury, we need not concern ourselves ; but, independently of that question, the Bradshaw and Leggott cases and *Barnett v. Lucas* (1872), Irish Rep. 6 C. L. 247, have an important bearing on the question as to the true theory of Lord Campbell's Act. They certainly all favor the view that the right of action given by the Act, is a new right and not merely a continuance in the personal representatives of a right vested in the decedent in his lifetime.

It may be thought that the statute was not necessarily in-

volved in *Barnett v. Lucas* (1872), Irish Rep. 6 C. L. 247, as a recovery was only sought therein for damage done to personal property, and that the decision must have been the same, whatever view was entertained regarding it; but the fact that one of the judges who differed from the others in his views regarding Lord Campbell's Act, dissented also from their conclusions, perhaps disposes of this suggestion. At least, it shows in a pointed manner, that the question which we are investigating, was supposed to be necessarily involved, and gives corresponding weight to the decision of the majority of the Court, who would naturally have taken narrower ground, and so have avoided the troublesome question on which the dissenting members differed from them, if it had been, in their view, possible to so dispose of the case. The *Barnett*, *Bradshaw* and *Leggott* cases may be said to establish, that rights which would otherwise survive to the personal representatives of an injured person, are not cut off or merged, in case death ensues from the injury, and a consequent right of action arises under Lord Campbell's Act. It will be important to recall this, in connection with certain American cases, to be considered presently, and arising in States where Acts of two descriptions existed: one simply providing for the survival of rights of action for injury to the person, and thus in terms repealing the common law doctrine on that subject; the other modeled after Lord Campbell's Act.

Statutes resembling more or less closely Lord Campbell's Act, have been enacted in most of our States and Territories, and it has been almost uniformly held that the damages recoverable under them are exclusive of any loss or damage to the injured party during his life, and include only the loss caused, to the persons specified by the Act, by his death. (See cases cited in 2 *Thompson on Negligence*, p. 1289, §90; *Cooley on Torts*, *271.) It has sometimes been held, too, and it serves to emphasize the last point, that the declaration must allege that the deceased left a widow, husband, or next of kin surviving him or her. (See 2 *Thompson on Negligence*, p. 1287, §89.)

In an early New York case of the latter character, (*Safford v. Drew*, 3 *Duer* (N. Y.), 627, decided in 1854, it was said in the opinion, that the damages are "not given for a cause of action,

which by force of the statute survives the death, but entirely for a new cause which the death itself originates": per DUER, J., p. 633. An Illinois case, decided a few years later, *Chicago v. Major* (1857), 18 Ill. 349, involved the question of damages generally, and the question was raised whether the death of one leaving next of kin, but not leaving a widow, was actionable, the statute making the damages recoverable for the benefit of widow and next of kin. The latter point was resolved in the affirmative; but the Court said, "This is a new cause of action given by this statute and unknown to the common law." In a later Illinois case (*Chicago & Rock Is. R. R. Co. v. Morris* (1861), 26 Ill. 400, holding a complaint defective, even after verdict, for not alleging that deceased left a widow or next of kin surviving him, the Court said:

The statute evidently intends to give no damages for the injury received by the deceased, but refers wholly to the pecuniary loss which his wife and next of kin may be proved to have sustained, and the damages are not assets, to be applied to the general necessities of the estate, but belong exclusively to the widow and next of kin, to whom they are to be distributed. The statute makes this pecuniary loss, the sole measure of damages. The satisfaction of that loss is, therefore, the sole purpose for which an action can be instituted, there being nothing to be allowed for the bereavement, for *solatium*. This being so, the facts that there are persons entitled by law to claim this indemnity, and that they have sustained a loss justifying their claim, must be proved * * * and therefore must be averred. * * * We are satisfied there is no right of action under this statute, except upon the basis of a pecuniary damage sustained by the widow and next of kin of the deceased, [and cited approvingly *Safford v. Drew* and *Chicago v. Major*, just referred to, and the English case of *Blake v. Midland R'y Co.*]

In *Quincy Coal Co. v. Hood*, 77 Ill. 68, decided in 1875, the same Court went so far as to hold, that when the complaint only alleged the existence of a father of the deceased, it could not be shown that other relatives, viz., a mother, brothers, and sisters, also survived him.

Said Mr. Justice HOAR, in a Massachusetts case, decided in 1867 (*Richardson v. N. Y. Central R. R. Co.*, 98 Mass. 85): "It is not the injury to the deceased which is to be estimated at all." It is generally held in this country, contrary to the English cases which we have cited, that, where there is a widow or next of kin surviving, nominal damages may be recovered, although no substantial pecuniary loss to them be shown: 2 Thompson on Negligence, p. 1293. In *Dickens v. N. Y. Cen-*

tral R. R. Co. (1858), 28 Barb. (N. Y.) 41, it was held, that an action was maintainable by the representatives of a married woman, and it was said that the damages are not limited to the pecuniary loss, the word "may" being used in the statute: See *Dimmey v. R. R. Co.* (1885), 27 W. Va. 32, and cases there cited to the same effect.

In Tennessee, under a statute which provides that—

The right of action which a person, who dies from injuries received from another, or whose death is caused by the wrongful act or omission of another, would have had against the wrong-doer, in case death had not ensued, shall not abate or be extinguished by his death; but shall pass to his personal representatives, for the benefit of his widow and next of kin, free from the claims of his creditors.

It was held that those damages were recoverable which the injured person could himself have recovered if he had lived: *Louisville & Nashville R. R. Co. v. Burke* (1868), 6 Cold. (Tenn.) 45; *Nashville & C. R. R. Co. v. Prince* (1871), 2 Heisk. (Tenn.) 580. In the former of these two cases, it was held that only such damages were recoverable; in the latter, that damages resulting to third persons from the death, were also recoverable. These Tennessee cases have no significance in respect to the subject under discussion, as they merely involve the construction of a peculiar statute, which is unlike Lord Campbell's Act. The statement alluded to, as contained in the case in Barbour, is not supported by any other authority. It has always been assumed, when not expressly decided, that the damages which the statute provides the jury "may" give, include all which they can be allowed to give.

It is said in Cooley on Torts (p. 264), that "a question has also been made in some States, whether suit could be maintained where the death was instantaneous; and in Massachusetts, under a somewhat nice and technical construction of the statute, it was decided that the action would not lie in such a case. But, probably, under no existing statute would it be so held now." With all respect for the learned author, it is submitted that this criticism of the Massachusetts case cited by him is not well founded.

That case (*Kearney Adm'r v. Boston & Worcester R. R. Co.* (1851), 9 Cush. (Mass.) 108, did not involve the construction

of an act like Lord Campbell's Act, but, as appears by a note to the second edition of Judge Cooley's work, of a statute merely providing, in so many words, for the survival of rights of action for injury to the person. The Court held that no action was maintainable by the administrator under *such* a statute, where the injury complained of produced instant death, because in such case, no right of action vested in the injured person so as to pass to his representatives.

"The statute," said Chief Justice SHAW, "supposes the party deceased to have been once entitled to bring an action for damages for the injury. * * * A distinction is to be taken between cases thus brought by executors and administrators of the person injured, and cases where persons sue who claim that their own rights have been infringed."

This decision has been affirmed again and again, in Massachusetts, and the doctrine laid down is well settled law there; the principal controversy in the subsequent cases has been as to in what cases the death is to be considered immediate, so as to prevent the vesting of a right of action, and as to the right to recover substantial damages where the injured person, though surviving the accident for a short period, remains unconscious until death: *Hollenbeck v. Berkshire R. R. Co.* (1852), 9 Cush. (Mass.) 478; *Bancroft v. Boston & Worcester R. R. Co.* (1865), 11 Allen (Mass.) 34; *Moran v. Hollings* (1878), 125 Mass. 93; *Kennedy v. Standard Sugar Refinery* (1878), 125 Id. 90; *Corcoran v. Boston & Albany R. R. Co.* (1882), 133 Id. 507; *Tully v. Fitchburg R. R. Co.* (1883), 134 Id. 499; *Riley v. Connecticut River R. R. Co.* (1883), 135 Id. 292; see note to second edition of Cooley on Torts, *265; *Nourse v. Packard* (1885), 138 Id. 307; *Mulchahey v. Washburn Car Wheel Co.* (1887), 145 Id. 281.

So, it would certainly be absurd to hold that Lord Campbell's Act does not apply to cases of instantaneous death, and the Massachusetts court has not committed that absurdity. Until recently there has been no statute in Massachusetts, giving a right of action, such as is given by Lord Campbell's Act, but there has long been an act giving a similar remedy, in a limited class of cases; except that it is pursued by indictment, instead of by private action. The defendant, under the proceeding described, is mulcted in damages, if found guilty, and the damages are distributed to the relatives, as if recovered by

civil suit. It has never been claimed that this statute does not apply to cases of instantaneous death, but it has been claimed, both with regard to this Massachusetts statute and a similar one in Maine, that they apply *only* to cases of instantaneous death; a much more reasonable contention. That position was sustained by the Maine, though not by the Massachusetts court: *Commonwealth v. Metropolitan R. R. Co.* (1871), 107 Mass. 236; *State v. Maine Central R. R. Co.* (1872), 60 Me. 490; *State v. Grand Trunk R'y* (1873), 61 Id. 114. The argument, in those cases, for limiting the application of the statute, to cases of instant death, was, that in case the injured person survived the accident, a right of action would vest in him, which, by virtue of the statute making injuries to the person survive (Maine as well as Massachusetts has such an act), would pass to his personal representative, and that a double remedy should not be allowed. The Massachusetts' court (per COLT, J.), answered this argument as follows—

A common law action, surviving under the statute to the administrator, and an indictment under the statute, do not cover the same ground. In the former, damages for the personal injury to the deceased are alone recovered; in the latter, the purpose is to secure to the relatives some compensation for the loss to them, as well as to inflict some punishment for the offence. In one, damages are recovered, which in due settlement of the estate may never come to the relatives. * * * It is not important to consider now what effect, if any, proof of a judgment in a civil action, or a settlement with the party injured, or his representatives, would have upon the prosecution of an indictment for the same act of negligence.

Taking the opposite view, the Maine court said, through Mr. Justice WALTON, in the first-named Maine case—

If he does not die immediately, a right of action accrues to him which will survive to his personal representatives, and no other remedy is needed: R. S., C. 87, § 8. But, if he does die immediately, no right of action will accrue to him, and of course none will survive to his heirs, or to his personal representatives for their benefit. * * * We think the remedy, by indictment, was intended to apply to the latter class of cases alone. To hold otherwise would involve the Legislature in the absurdity of creating two independent, and to some extent conflicting, remedies for one and the same injury. We think the remedy, by indictment, was intended to apply to a class of cases where none would otherwise exist. * * * The remedy by indictment ends where the remedy by civil suit begins. Thus construed, the statutes are in harmony and the absurdity of supposing that the Legislature intended to create two independent and conflicting remedies, for one and the same injury, is avoided.