Cleveland State Law Review

Volume 10
Issue 3 *Tort Defense Problems (A Symposium)*

Article

1961

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AT COMMON LAW, as Lord Ellenborough stiffly declared, no right of action existed for wrongful death.[1] Since the adoption of the Fatal Accidents Act of 1846[2] in the United Kingdom, each of the fifty United States has created by statute[3] a similar right of action which pertains to the survivors or to the estate of the decedent whose death resulted from the wrongful acts of another. During recent years, fourteen states have incorporated within their wrongful death statutes a maximum limitation on the amount of damages recoverable.[4] These restrictions consistently trouble the courts when a wrongful death occurs in one of these limiting states and the suit is brought elsewhere. However, the courts have, with a few exceptions, held steadfastly to the principle that in an action for wrongful death "the law of the place of wrong governs the right of action

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[1] Baker v. Bolton, 1 Campb. 493, 495 (1808): "In a civil court the death of a human being cannot be complained of as an injury." This pronouncement by Lord Ellenborough was unanimously accepted by the American courts.

[2] St. 9 and 10 Vict. c. 93, commonly known as Lord Campbell's Act, which provided in part:

> That whensoever 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 would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of a person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

[3] See, e.g., Ohio Rev. Code Ann., sec. 2125.01 (1953); N. Y. Dec. Est. L., sec. 130 (1949); Mich. Stat. Ann., sec. 27.711 (1935). See, Oleck, Damages to Persons and Property, ch. 18 (1961 revision).

[4] Colorado, $25,000, Colo. Rev. Stat. Ann., sec. 41-1-3 (1953); Connecticut, $25,000, Conn. Gen. Stat., rev. sec. 52-555 (supp. 1958); Illinois, $30,000, Ill. Rev. Stat., ch. 70, sec. 1, 2 (1959); Kansas, $25,000, Kan. Gen. Stat. Ann., sec. 60-3203 (1949); Maine, $20,000, Me. Rev. Stat. Ann., ch. 165, sec. 10 (1954); Massachusetts, $20,000, Mass. Ann. Laws, ch. 229, sec. 6E (1955); Minnesota, $25,000, Minn. Stat. Ann. sec. 573.02 (1947); Missouri, $25,000, Vernon's Ann. Mo. Stat., sec. 537.090 (1949); New Hampshire, $25,000, N. H. Rev. Stat. Ann., sec. 556.13 (1955); Oregon, $20,000, Ore. Rev. Stat., sec. 30.020 (1959); South Dakota, $20,000, S. D. Code, sec. 37.2203 (1939); Virginia, $30,000, Va. Code Ann., sec. 8-636 (1950); West Virginia, $20,000, W. Va. Code Ann., sec. 5475 (1955); Wisconsin, $25,000, Wis. Stat. Ann., sec. 331.04 (1958). See, Oleck, Damages To Persons & Property, § 198A (1961 revision).

. . .," and that "the place of wrong is in the state where the last event necessary to make an actor liable takes place." [5]

The Majority Proposition: A Substantive Approach

In an action for wrongful death occurring in Montana, the United States Supreme Court proclaimed that the foreign law governs not only the definition of the tort, but also the assessment of damages. Consequently a limitation on the amount recoverable, imposed by the Minnesota forum, was inapplicable.[6]

In 1918, Judge Cardozo, speaking for the court in the landmark case of *Loucks v. Standard Oil Co.*,[7] clearly established New York as accepting the majority proposition that in an action for wrongful death arising in a foreign state, the lex delicti governs as to the cause of action and the remedy. Concluding that the remedy is firmly implanted within the substantive right of action, he said, "Although the sovereign in its discretion may refuse its aid to a right created by foreign statute, the courts of the state have no such power . . .," and "similarity of legislation shows beyond question that the foreign statute does not offend the public policy of the forum, but its absence does not prove the contrary . . .", and "mere differences of remedy do not count."

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[5] Restatement, Conflict of Laws, secs. 391, 377 (1934).

[6] Northern P. R. Co. v. Babcock, 154 U. S. 190 (1894); Slater v. Mexican Natl. R. Co., 194 U. S. 120 (1904). For controlling state cases, see: Caine v. St. Louis & S. F. R. Co., 209 Ala. 181, 95 S. 876 (1923); St. Louis v. Hesterly, 98 Ark. 240, 135 S. W. 874 (1911); Stoltz v. Burlington, 178 F. 2d 514 (10th Cir., Colo., 1949); Reilly v. Antonio, 108 Conn. 436, 143 A. 568 (1928); Southern R. Co. v. Decker, 5 Ga. 21, 62 S. E. 678 (1908); Barnes v. Union Pac. R. Co., 139 F. Supp. 198 (D. C., Idaho, 1956); Hanna v. Grand Trunk R. Co., 41 Ill. App. 116 (1891); Laprelle v. Cessna Aircraft Co., 85 F. Supp. 182 (D. C., Kan., 1949); Louisville v. Bryant, 215 Ky. 401, 285 S. W. 245 (1926); Riley v. Lukens, 4 F. Supp. 144 (D. C., Md., 1933); Jackson v. Anthony, 282 Mass. 540, 185 N. E. 389 (1933); Hupp Motor Car Co. v. Wadsworth, 113 F. 2d 827 (6th Cir., Mich., 1940); Powell v. Great Northern R. Co., 102 Minn. 448, 113 N. W. 1017 (1907); Jackson v. St. Louis, 224 Mo. App. 601, 31 S. W. 2d 250 (1930); Whitney v. Penrod, 149 Neb. 636, 32 N. W. 2d 131 (1948); Robinson v. Dixon, 91 N. H. 29, 13 A. 2d 163 (1940); Giardini v. McAdoo, 93 N. J. L. 138, 107 A. 437 (1919); Christensen v. Floriston, 29 Nev. 552, 92 P. 210 (1907); Wise v. Hollowell, 205 N. C. 286, 171 S. E. 82 (1933); Caldwell v. Abernathy, 231 N. C. 692, 58 S. E. 2d 763 (1950); Louisville R. Co. v. Greene, 26 Ohio App. 392, 160 N. E. 495 (1927); Dusek v. United Airlines, Inc., 9 F. R. D. 326 (D. C., Ohio, 1949), where, in an action in Ohio for wrongful death occurring in Utah, where funeral expenses were not recoverable, paragraph of complaint seeking recovery of funeral expenses was stricken; Curtiss v. Campbell, 76 F. 2d 84 (3d Cir., Pa., 1935); Nealy v. Magnolia Petroleum Co., 121 S. W. 2d 425 (Tex. Civ. App., 1938); Brown v. Perry, 104 Vt. 66, 156 A. 910 (1931); Withrow v. Edwards, 181 Va. 344, 25 S. E. 2d 348 (1943); Anderson v. Miller, 176 Wis. 528, 187 N. W. 746 (1922).

[7] 224 N. Y. 99 at 110, 111, 120 N. E. 198 at 201, 202 (1918).

The court in *Maynard v. Eastern Airlines, Inc.*[8] followed the holding in *Faron v. Eastern Airlines, Inc.*[9] Both cases involved an action brought by a widow to recover for injuries to and death of her husband, who purchased a ticket at New York for a flight to Boston, and was killed as a result of a crash in Connecticut. The *Maynard* case confirmed New York's stand with the majority ruling, by upholding a judgment entered on a verdict returned by a jury instructed to limit damages to $20,000, on the ground that the action was governed by the lex loci delicti and not by the place where the contract was made.

The Minority Proposition: A Procedural Approach

Cases abound which declare that the law of the forum determines the procedure of the courts and the remedies which are available to suitors.[10] To date, however, only two states[11]

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[8] 178 F. 2d 139 (2d Cir., N. Y., 1949).

[9] 193 Misc. 395 at 397, 84 N. Y. S. 2d 568 at 570 (Sup. Ct., N. Y. County, 1948). The court, concluding that the plaintiff failed to establish a cause of action in contract, explained that "although couched in contract language, it is obvious that liability, if any, will be predicated upon proof of negligence. Where, as here, the gravamen of the cause of action is an alleged breach of a duty through negligence, the action is governed by the applicable law of torts, even though the allegations refer to a breach of contract." Further explanation of this point is made in Pittsburgh, C. C. & St. L. R. Co. v. Grom, 142 Ky. 51, 133 S. W. 977 (1911), which determined that liability of a carrier in tort, for personal injuries suffered by a passenger while being carried under a contract for transportation from Kentucky to New Jersey, must be governed by the law of Pennsylvania, where the injury occurred, as against the contention that this rule should not be applied, for the reason that the contract of carriage was made in another state—the forum. The court based its decision on the ground that while the tort was traceable to the contractual relation which existed between the carrier and the passenger, yet the duty of a carrier to carry a passenger safely arises not primarily from the contract, but from the law, and that, therefore, the law of the place where the injury took place governed the liability of the carrier.

[10] For typical cases, see: Nelson v. American Employers Ins. Co., 258 Wis. 252, 45 N. W. 2d 681 (1951)—lex fori, in a separate property state, did not preclude wife from bringing action against her husband for injuries to her person occurring in New Mexico, a community property state; First Natl. Bank in Greensburgh v. M. & G. Convoy, Inc., 102 F. Supp. 494 (D. C., Pa., 1952)—lex fori determined, as a procedural matter, that subrogation of parties was permissive; Metropolitan Life Ins. Co. v. Kendall, 225 Ark. 731, 284 S. W. 2d 863 (1955)—lex fori determined admissibility of evidence in contract action arising in foreign state; Bernkrant v. Fowler, 8 Cal. Rptr. 326, 185 A. C. A. 436 (1960)—lex fori determined effect of oral agreement in contract arising in foreign state; Kipp v. International Harvester Co., 23 Misc. 2d 649, 200 N. Y. S. 2d 977 (1959)—lex fori determined joint or several liability of master and servant in action arising in foreign state; Ley v. Simmons, 249 S. W. 2d 808 (Ky. App., 1952)—action in Kentucky to enforce 1930 Florida judgment was barred by Kentucky 15 year statute of limita-

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follow the proposition that in an action for wrongful death occurring in a foreign state, the remedy and extent of recovery is a procedural matter and consequently is governed by the lex fori.

In the recent case of *Kilberg v. Northeast Airlines, Inc.*, the court, disposing of the plaintiff's complaint ex contractu, declared, "it is law long settled that wrongful death actions, being unknown to the common law, derive from statutes only and that the statute which governs such an action is that of the place of the wrong."[12]

The court then commenced, against the pointed dissents of two Justices, to brush aside the cobwebs which had gathered on the forty-two year extinct ruling established in *Wooden v. Western N. Y. & Pa. R. Co.*, and from the opinion delivered by Judge Finch therein, declared that the "restriction pertains to the remedy rather than the right . . ." and "does not strictly affect the rule of damages, but rather the extent of damages; and that extent, as limited or unlimited, does not enter into any definition of the right enforced, or the cause of action permitted to be prosecuted."[13]

Along with the *Wooden* case holding, the *Kilberg* majority proffered five cases in support of the contention that remedial and substantive "shade into each other constantly . . ." and that "the law of the forum normally determines for itself"[14] whether a given question is one of substance or procedure.

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tions, though such action would not have been barred under Florida statute of limitations.

[11] Kilberg v. Northeast Airlines, Inc., 9 N. Y. 2d 34, 172 N. E. 2d 526 (1961). Armbruster v. Chicago R. I. & P. R. Co., 166 Iowa 155, 147, N. W. 337 (1914), held that the amount of damages recoverable pertains to the remedy and is controlled by the lex fori, since they do not involve any substantive right. Here, the lex delicti permitted compensatory and punitive damages, but the lex fori, allowing only compensation, ruled against punitive recovery. Other than to this extent, no Iowa case has ruled that a 'monetary' limitation imposed by a foreign lex delicti is inapplicable in an Iowa forum.

[12] 9 N. Y. 2d at 38, 172 N. E. 2d at 527.

[13] 126 N. Y. at 16, 26 N. E. at 1051 (1891). The court raised a very good point in dicta; query: were the defendant a corporation chartered under Pennsylvania law and not, as here, chartered under New York law, would the New York court apply the Pennsylvania law and not allow the foreign corporation the benefit of the New York remedial limitation (which at that time was $5,000)?

[14] Leflar, Conflict of Laws, sec. 60 (1959).

1. *Murray v. N. Y. O. & W. R. Co.*[15] held that in transitory actions of this nature, the general rule is that matters of substantive law are controlled by the lex loci delicti, while procedural matters are governed by the lex fori. However, the *Murray* court did in no measure determine that in an action for wrongful death the amount recoverable is a procedural matter, but only that the forum would permit, as a procedural determination, the subrogation of a new plaintiff for the deceased plaintiff, since the deceased plaintiff had initiated the action within the time limitation required by the forum in tort claims.

2. Referring to *Franklin Sugar Refining Co. v. Lipowicz,*[16] the *Kilberg* majority declared that "as to conflict of law rules it is of course settled that the law of the forum is usually in control as to procedures, including remedies."[17] Establishing that whatever goes to the substance of an obligation is governed by the lex loci, the *Franklin* court determined that the lex loci governs as to the applicable statute of frauds. We must assume then, that the *Kilberg* majority would deem a statute of frauds to go more to the substance of an obligation, in contract, than does the issue of damages for wrongful death, in tort.

3. *Mertz v. Mertz*[18] involved an action brought in New York by a wife against her husband for personal injuries inflicted upon her in Connecticut. Dismissing the complaint, the court explained that although the forum recognizes the wrong, it denies remedy for such wrong by attaching to the person of the spouse a disability to sue, and the court will not enforce a foreign remedy which is contrary to the strong public policy of New York.

4. *Walton School of Commerce v. Stroud*[19] held that damages for a breach of contract pertain to remedy and are not a matter of substantive right.

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[15] 242 App. Div. 374, 275 N. Y. S. 10 (1934).

[16] 247 N. Y. 465, 160 N. E. 916 (1928).

[17] Kilberg v. Northeast Airlines, Inc., 9 N. Y. 2d at 41, 172 N. E. 2d at 529.

[18] 271 N. Y. 466, 3 N. E. 2d 597 (1936). Query, whether the ruling on this issue is applicable to cases for wrongful death and conflicts of laws wherein every American jurisdiction affords a right of recovery?

[19] 248 Mich. 85, 226 N. W. 883 (1929). The issue did not involve a determination based on tort law, and thus is clearly not in point re an action for wrongful death. For the controlling Michigan case in point, see, Hupp Motor Car Co. v. Wadsworth, 113 F. 2d 827 (6 Cir., Mich., 1940).

5. *Conklin v. Canadian-Colonial Airways, Inc.*[20] merely involved the validity of a contractual limitation upon a carrier's common law liability and thus has no applicability to the question presented in the *Kilberg* case.

The legal effect of these supposedly supporting cases may clearly be controlling regarding the issues determined therein. It appears, however, that the *Kilberg* court bent slightly backwards to extend these cases to the issue at hand.

A Contractual Approach

In *Patterson v. American Airlines, Inc.*,[21] the court held that a breach of contract action could be maintained although the basis of the action was a breach of duty through negligence. Neither the New York forum, where the flight originated, nor New Jersey, where the fatal crash occurred, imposed a limitation on damages recoverable. The court relied on two cases for support of its decision.

Grein v. Imperial Airways, Ltd.,[22] determined that the air travel tickets purchased by the deceased were in the nature of a single contract, though there were separate flights involved, and consequently the contract fell within a classification of *international carriage*, as defined by the *Warsaw Convention* of 1929 and given the force of law in the United Kingdom by the *Carriage by Air Act* of 1932.[23] Under this aspect, *Lord Campbell's Act* was found inapplicable and recovery was limited to the provisions of the *Warsaw Convention*, 125,000 French francs (£1670). A minority of the court discussed in the affirmative whether an action would lie for wrongful death under the provisions of *Lord Campbell's Act* where an act, neglect or default causing the death was a breach of duty imposed by contract. The *Patterson* court, relying on this distinction, failed to recognize the vast authority which cements the rule that in wrongful death actions arising from a breach of contract due to negligence, the action is governed, not by the lex loci contracti, but rather by the lex loci delicti.

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[20] 266 N. Y. 2d 244, 194 N. E. 692 (1935).

[21] 3 Avi. 18, 214 (S. D. N. Y., 1953).

[22] I Avi. 622 (Ct. of App. Eng. 1936).

[23] Halsbury's Stat. of Eng. (2d ed., 1948).

Greco v. Kresge Co.[24] was an action for wrongful death caused by unfit pork purchased and consumed by the plaintiff's decedent. The court held that though the action may be maintained solely for the breach of the implied warranty of fitness, the breach is a wrongful act and, in its essential nature, a tort. The *Greco* case is clearly a distinction from the cases in point which must determine whether the lex delicti or the lex fori governs the damages recoverable in an action for wrongful death.

Death on the High Seas

In 1920, Congress enacted the *Federal Death on the High Seas Act*,[25] the primary purpose of which was to resolve the confusion inherent in conflicting state wrongful death statutes. It was not firmly established, however, until *Wilson v. Transocean Airlines*,[26] that the *FDHSA* supersedes the state wrongful death statutes as to actions for death occurring on the high seas.

Full Faith and Credit

In an action for wrongful death occurring in Illinois, the Wisconsin forum dismissed the complaint on the ground that the Wisconsin death statute provided that such action may be brought for a death caused in Wisconsin only, and that a local public policy had been established against entertaining suits brought under the wrongful death acts of other states. On appeal, the United States Supreme Court declared that local policy must yield to the constitutional requirement that full faith and credit must be given in each state to the public acts of any other state.[27]

Query, whether the *Kilberg* case,[28] on appeal to the highest court, would be reversed on similar grounds, ergo, that full faith and credit must be given to the Connecticut death statute in toto, including its limitation on recovery?

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[24] 277 N. Y. 26, 12 N. E. 2d 557 (1938).

[25] 41 Stat. 537, 538 (1920), 46 U. S. C. secs. 761-767 (1952). The FDHSA has no limitation on damages recoverable; recovery is for loss of support.

[26] 121 F. Supp. 85 (D. C., Cal., 1954).

[27] Hughes v. Fetter, 257 Wis. 35, 42 N. W. 2d 452 (1950), rev'd 341 U. S. 609 (1951).

[28] Kilberg v. Northeast Airlines, Inc., supra, n. 11.

Conclusion

The wisdom of the courts is to be found in the effectiveness of their decisions, which must necessarily follow the basic concepts of law and justice. Any departure from these, however slight, has an effect upon that steady progress that derives from continued compliance by every jurisdiction with these basic concepts.

An act of negligence resulting in a breach of duty imposed by law is a tort. An act of negligence resulting in a breach of duty imposed by contract is also a tort. The *Patterson* court would have us depart from these principles.

"Procedural rules should be classified as those which concern methods of presenting to a court the operative facts upon which legal relations depend; substantive rules, those which concern the legal effect of those facts after they have been established."[29] By concluding that the remedy in a tort action is a procedural matter, and consequently governed by the law of the forum, the *Kilberg* court has, for the sake of its own public policy, impaired the steady pace of progress. This could have a contagious effect upon other jurisdictions, similar to Lord Ellenborough's pronouncement in 1808.[30]

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[29] Stumberg, Conflict of Laws, sec. 134 (2d ed., 1951).

[30] Baker v. Bolton, *supra*, n. 1