Cleveland State Law Review

Volume 4 | Issue 1 Article

1955

Law and Logic: Conflict in Ohio's Wrongful Death Statute

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THE DOCTRINES OF RES JUDICATA AND ESTOPPEL by judgment are fundamental rules of the law which in both theory and practice fit into rather well defined situations, with one significant exception. An attempt to apply these doctrines to actions for wrongful death points out a serious vacuum in the law. A consideration of whether an injured person's release during his lifetime of a claim for personal injuries bars later claim of his administrator for wrongful death and pain and suffering of decedent will bring the problem into clear perspective.

The solution, and there appears to be none short of statutory enactment, would be no boon to either plaintiffs or defendants for as a result of the present state of Ohio law while defendants may be required to sustain their innocence twice, plaintiffs may be required to establish the liability of the defendant twice.

This legal anomaly is rationalized in diverse ways. The solution appears finally as a statutory one, for as will be seen, the answer to this anomaly under present statutory law would effect merely a substitution rather than a cure.

ORIGIN OF THE RIGHT.

The right to maintain an action for death wrongfully caused was unknown at common law and first arose in Lord Campbell's Act, 9 & 10 Vict., p. 63, enacted by Parliament in 1847. Substantially adopted by the Ohio Legislature in 1851, it has remained almost unchanged and is known today as Section 2125.01, .02 of the Revised Code.

The upsurge in recent years of actions founded on this statutory right has naturally brought into focus considerable dispute over the rights and liabilities of the litigants.

Genetically, sociological pressures were the paramount forces establishing the right of action for death wrongfully caused and

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abolishing the harsh common law rule. A not unusual phenomenon, the expansion and growth of the right should normally be expected to follow medico-legal lines, particularly in the treatment of the substance of the right. The only logical exception being that the amount of compensation, until such time as a maximum recovery is discarded, may be, and should be determined by reference to the social need.

The "interference" of social considerations in settling the law in Ohio cannot be said to be per se undesirable. On the contrary, it may be that the social consciousness of our courts, has answered the need of the wronged party and justly penalized the wrongdoer. In applying the statutes on the subject of the recovery of damages for death by wrongful act, the courts should give effect to the sound and wholesome humanitarian policies designed to be promoted by their enactment.[1]

Nevertheless the student of the law must recognize in the decisions of our courts that the practical "protection" offered has created a vacuum between a fundamental axiom of our system of jurisprudence and the social protection created by statute. The sociological impact has caused the development of rules of law which except for sociological considerations would be untenable. Decisions of our courts have laid to rest many years ago that a man must have his day in court, that issues of fact once litigated are decided forever, that the parties ought not be permitted to litigate the same issues more than once,[2] that circuity of actions should yield to the repose of litigation.[3] The soundness of this policy of the law is unquestioned. The spirit of this policy has been sacrificed, however, to an unyielding formula, the courts refusing to extend beyond the bounds of this formula because of the injustices which would develop under the present state of our statutes.

To avoid the injustices feared by the courts if the doctrine of res judicata or estoppel by judgment was followed it is suggested that the nature of the right be changed. The Legislature could give the courts a workable statute free from the compromised justice under which there is substantial danger of injustice to the litigants no matter whether the courts apply the

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[1] *Ransom v. Railway,* 93 Ohio St. 223, 112 N. E. 586.

[2] *C. & C. Bridge Co. v. Sargent,* 27 Ohio St. 233.

[3] *Ibid.*

doctrines or not. We shall see the rationale of the courts in dealing with the wrongful death statute and some practical problems raised in connection with the statutory right to bring an action for wrongful death. Finally we will briefly consider a solution by statutory enactment.

JUDGMENTS AND THE NATURE OF THE RIGHT UNDER WRONGFUL DEATH STATUTE.

After establishing the right of action in R. C. 2125.01 the Ohio Legislature continued in 2125.02:

> "An action for wrongful death must be brought in the name of the personal representative of the deceased person . . . for exclusive benefit of surviving spouse, the children, and other next of kin of the decedent."

The wording of the statute granting the right sets out clearly the defenses available to a person sued under the statute when it states:

> "When the death of a person is caused by wrongful act, neglect, or default WHICH WOULD HAVE ENTITLED THE PARTY INJURED TO MAINTAIN AN ACTION AND RECOVER DAMAGES . . ."[4]

then the person who would have been liable for the injury will be liable for death also.

Whether the statutory right to maintain an action for wrongful death merely extends the decedent's right to recover for personal injuries, or whether it sets up an entirely new cause of action separate and distinct from any which the decedent had prior to his death, is a question decided in this state many years ago.[5]

Several early Ohio cases pointed to the distinction between the cause of action possessed by the injured person for personal injuries, where the recovery inures to the benefit of the estate and all the creditors thereof, and the cause of action conferred on the personal representative of the decedent as trustee for the surviving next of kin, where the recovery compensates them for pecuniary loss occasioned by the death of the decedent.[6] The court in the *Russell* case went to length in drawing the distinction

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[4] Revised Code 2125.01 (emphasis added).

[5] *Grotenkemper v. Harris*, 25 Ohio St. 510 (1874).

[6] *Pittsburgh, Cincinnati and St. Louis Railway Co. v. Hine*, 25 Ohio St. 629, and *Russell v. Subury*, 37 Ohio St. 372 (1881).

between the injury to decedent being an injury to his estate, whereas the death of the decedent is historically not an injury to his estate, or at least not an actionable injury, but statutorily an injury to the next of kin.

The rationale of this distinction is statutory. The extremes to which the courts go in emphasizing this distinction can be found in the *Van Alstine* case decided in 1908. The court held:

> "1. Section 5144, revised statutes, gives to the personal representative of a deceased person the right to prosecute an action for injuries to the person began by such deceased to recover in the interest of the estate such damages as were suffered by the deceased because of the wrongful act of another, even though the death was the direct consequence of the injuries inflicted.
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> "2. Sections 6134 and 6135, revised statutes, give an independent right of action for the benefit of the persons named in section 6135, where death has resulted from the injuries, to recover for such pecuniary loss as they have sustained by the decease of the injured person . . .
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> "3. The two sections, although prosecuted by the same personal representative, are not in the same right, and hence a recovery and satisfaction in one case is not a bar to a recovery in the other." [7]

In the *Van Alstine* case the injured person commenced an action for personal injuries but died from such injuries before the case was reached for trial. His administrator revived the action under revivor statutes and recovered a favorable judgment. The administrator then brought an action for wrongful death against the same defendant. It was held that the judgment in the first action did not bar prosecution of the second, for the two actions were separate and distinct, founded upon different rights and for the benefit of different beneficiaries.

The *Van Alstine* rule was extended in the *Robinette* case decided in 1929 where a judgment for the defendant in the administrator's action for pain and suffering was held not to bar an action by the administrator against the same defendant for wrongful death.[8]

Here the court posed the question: Is a judgment adverse to the administrator of a decedent in his action to recover damages for the benefit of the estate of his decedent, arising out of

[7] *Mahoning Valley Railway Co. v. Van Alstine,* 77 Ohio St. 395.

[8] *May Coal Co. v. Robinette,* 120 Ohio St. 110 (1929).

personal injury, a bar to the subsequent prosecution by the administrator of an action for wrongful death to the benefit of the spouse and children, or parents and next of kin of the decedent? The case reveals the defendant had shown that the issues of negligence and contributory negligence raised by the pleadings were identical and the real parties at interest, the de facto beneficiaries under both actions, were the same, although not so in contemplation of the law. The court concluded that the two actions were not in the same right; further, the beneficiaries, although by accident the same persons, in the law they were separate and distinct.[9] While the personal representative is the named plaintiff in both the survivor action and in a wrongful death action the "supreme test as to whether a party is affected by a cause of action" so as to effect an identity in the law is whether he has a legal interest in rights which are subject matter of the cause and is invested to some degree with the right which is the subject matter of such cause.[10] The decisions in the *Robinette* and *Van Alstine* cases continue to clearly state the law of Ohio.[11]

The courts go to great length in the course of their decisions to indicate the independent and distinct nature of the right under wrongful death acts and the merely nominal identity of beneficiaries in the one personal representative and the real distinction between the beneficiaries of each cause of action.

In the *Robinette* case an objection was raised by the defendant that the clause in the wrongful death statute, "such as would have entitled the party injured to maintain an action and recover damages in respect thereof, if death had not ensued," imposes a condition precedent to the maintenance of a death action, that if the injured party or his administrator prosecutes his personal injury action first there must be a recovery. The court answers that the result of such a construction of the statute would be an "anomaly":

> that if the administrator prosecuted the death action first, and lost, he could still prosecute the survivor action, while failure in the survivor action, if it were tried first and decided adversely, would be a complete bar to the prosecution of the death action. In other words, they would let the

[9] *Ibid.*

[10] 35 *A. L. R.* 2nd 1384.

[11] *Fielder v. Ohio Edison Co.*, 158 Ohio St. 375, 35 A. L. R. 2nd 1365.

order in which the cases were tried decide whether a statutory cause of action exists.[12]

Indeed an anomaly is the result of such a construction of this clause. The solution of the court, however, makes inexplicable the doctrine of estoppel by judgment.

Under a factual situation such as in the *Robinette* case the expected perspicacity of a court should have decided not upon abstractions but upon logical justice. Here we have an injury alleged to have been caused by the defendant Coal Company. The basis for the action was negligence. The plaintiff would have to prove the defendant guilty of actionable negligence which was the proximate cause of the injury. The defendant would prevail, if negligent, by proving the plaintiff guilty of contributory negligence. A general verdict for the defendant would normally establish (1) the defendant was not negligent, or (2) the plaintiff was contributorily negligent. In either case the plaintiff would not be entitled to recover. It is impossible to avoid the strong argument that according to traditional measures as to the applicability of res judicata or estoppel by judgment the cause of action must be the same and the parties the same before such judgment would be a bar. Admitting that in attempting to apply the judgment for the Coal Company in the injury action to the action for wrongful death we have neither identity of causes of action or of parties, the simple fact remains that these distinctions are nominal and artificial.

Even in the cases where the injured person prosecutes the injury case, and not the administrator, and even where the de facto beneficiaries are not only legally distinguishable as "estate" and "next of kin" but where separate and distinct persons stand to be beneficiaries of the separate actions, can there be any reason for allowing an action for wrongful death to be maintained which is based upon allegations of defendant's negligence when the issues of fact which form the basis for establishing the liability have already been resolved in favor of the defendant?

It would be a perversion of logic if a party could predicate a right of recovery and have judgment awarded against him and

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[12] *Robinette, op. cit.*, p. 117. This problem can be easily resolved:

"Under the Federal Employers' Liability Act as amended (U. S. C. A. Title 45, Para. 59) to provide a survival action in addition to a new cause of action for death, and under some state statutes as well, all damage, both to decedent by reason of injury and to beneficiaries by reason of death, may and must be recovered in one action." 25 *Corp. Juris Secundum* 1081.

die and his widow thereafter upon allegations of negligence, institute a proceeding based upon the same act of negligence, and be permitted to relitigate the same facts.[13]

The court in the *Robinette* case calls the view of the defendant an anomaly, yet itself interprets the words "such as would have entitled the party injured to maintain an action and recover damages in respect thereof," in the following manner:

> "The phrase means that the party injured must have had a cause of action; it does not mean that that cause of action must have been maintained successfully in a totally different action brought for the benefit of different parties in interest." [14]

The court concludes:

> "Any other conclusion . . . logically would result in a holding that an adjudication against the defendant in a personal injury action, where it is tried first by the administrator, must be a conclusive adjudication upon the issues of negligence against the defendant in the death action." [15]

This is substantially the view of the Appellate court in the *Robinette* case wherein the court rejected as foolish the defendant's argument. The Court of Appeals said such a view would suggest "that a husband's right of action for loss of service . . . occasioned by negligence of a third party would be barred by an adverse verdict and judgment in an action by wife for damages for personal injuries alleged to have been sustained because of such negligence." [16]

The apparent inflection in the court's pronouncement is that this would be an undesirable, although logical result.

The courts appear to ignore the fact that the conclusiveness of the issue of negligence would not in itself be decisive of a case. There are many reasons under the presnt law why a judgment may not in fact have been founded on the single issue of negligence. In an injury action no compensable injury may have been found. In an action under the survivor or revivor statutes the judgment may have been decided on the sole question of conscious pain and suffering. In a death action there may be no statutory beneficiaries, no pecuniary loss, or the injury may not have been a proximate cause of death.

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[13] *Frescoln v. Puget Sound Traction Light and Power Co.*, 225 Fed. 441, 443.

[14] *Robinette, op. cit.*, p. 117.

[15] *Ibid.*, p. 118.

[16] 31 Ohio App. 113 (116).

Conversely, a full realization of the many issues which could decide a case may account for the court's reluctance to apply the doctrines of res judicata and estoppel by judgment. Remedial of this problem, a statutory requirement that judgments be special on the question of negligence should suffice. This, however, would serve to remedy an effect, rather than the cause of the defect.

Estoppel by Judgment.

As is often the case when analyzing a statutory right historical, rather than logical, motivations predominate. The decisive characteristic of estoppel by judgment as we attempt to apply the doctrine to the wrongful death action is privity of parties. A consideration of this classical characteristic will indicate this subordination of logic.

In *Mansker v. Dealers Transport,* 160 Ohio St. 255, which was decided in 1953, the plaintiff brought an action for property damage which resulted in a verdict and final judgment for the defendant. Thereafter the same plaintiff commenced an action against the same defendant for personal injuries. The Supreme Court held:

> "1. In a second action between the same parties on a claim, demand or cause of action different from that involved in the first action, a final judgment in the first action does not constitute a bar to the prosecution of the second, but does operate as an estoppel with regard to the relitigation of controlling points or questions determined in the first action.
>
> "2. The final adjudication of a material issue by a court of competent jurisdiction binds the parties in any subsequent proceedings between or among them, irrespective of a difference in forms or causes of action."

Judge Zimmerman, speaking for a unanimous court, quoted with approval the first paragraph of the syllabus in the *Ross* case:

> "1. A point or a fact which was actually and directly an issue in an action or in a branch of the same action and was there passed upon and finally determined . . . may not be drawn in question in any future action or litigation between the same parties *or their privies,* whether the causes of action in the two actions or branches of the same action be identical or different." [17]

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[17] *Ross, an Infant v. Stucker,* 153 Ohio St. 153 (1950).

Clearly under this pronouncement a judgment in an injury action would effect an estoppel as to the issues litigated if raised in a subsequent wrongful death action if identity of the parties or privity between the parties can be established. This is, of course, a question of law.

It has been held that the personal representative in an action for wrongful death is merely a nominal party.[18] He sues simply in the capacity of a trustee for the statutory beneficiaries.[19] The latter are the real parties in interest.[20] Consequently, if the estoppel by judgment argument is put forth in an action for wrongful death, the courts are likely to hold that for the purposes of determining whether privity can be considered to exist between the present party plaintiff and the plaintiff in a personal injury action, the statutory beneficiaries are to be considered the present party plaintiffs.

In most cases the statutory beneficiaries are the surviving spouse and children, or the natural parents and brothers and sisters of the decedent. The question therefore is: Does privity exist between the decedent and the surviving statutory beneficiaries within the meaning of the doctrine of estoppel by judgment, so as to make res judicata in the action for wrongful death any issue finally decided in the decedent's action for personal injuries?

Bouvier defines privity as "the mutual or successive relationship to the same rights of property." Further defined it is said:

> "It is well settled that . . . the doctrine of res judicata does not operate to . . . affect the rights of those who are neither parties nor in privity with a party therein. The judgment is not available as an adjudication either against or in favor of such other persons . . . used . . . in connection with particular issues determined therein. A party to the principal case is regarded as a stranger to the judgment rendered in the previous action where he was not directly interested in the subject matter thereof, and had no right to make defense, adduce testimony, cross-examine witnesses, control the proceedings, or appeal from the judgment . . ." [21]

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[18] *Gibson v. Solomon,* 136 Ohio St. 101 (1939).

[19] *Ibid.*

[20] *Ibid.*

[21] 30 *Amer. Jur.* 951-953.

Under this definition there would be no privity since the beneficiaries were not directly interested in the subject matter, since no right of theirs had been invaded by the defendant and no right of theirs could be concluded by the judgment.

Under the Bouvier definition there would seem to be no privity either, since the cause of action for personal injuries was not mutually shared by the decedent and members of his family, for only the injured person could bring the action. There could be no succession to the same right for the injured person never had the right to bring an action for wrongful death to which his statutory beneficiaries could succeed.

Privity has been held to exist between joint defendants, joint obligors on a promissory note, tenants in common and joint tenants, trustee and cestui que trust, bailor and bailee, mortgagor and mortgagee, grantor and grantee, donor and donee, and ancestor and heir.[22] The privity between ancestor and heir is limited to situations involving real or personal property owned by the ancestor and devised to or inherited by the heir, thus limited to privity of estate and relating to successive rights in land or personalty. In the instant problem the ancestor's right was the right to recover damages for injury. The right of the heirs as statutory beneficiaries is a right created by statute to recover pecuniary loss for wrongful death of the ancestor. It is evident that there is not only no sharing of a common right and no concurrent but dissimilar interests in the same thing; there is no successive enjoyment of a complete right in the same thing.

There being no cases on the subject in Ohio, it would nevertheless appear that our courts, under this analysis of privity would probably conclude that no privity exists between the decedent and the statutory beneficiaries. While there may be no quarrel with a definition, logic yet appears on the side of extending the concept of privity in the *Ross* case to include a relationship more intimate and identified in interest than any noted above. Such an extension by our courts has its undesirable, and probably controlling defections. In view of the present state of Ohio case law and the interpretation given to our statutes any change in the courts' holding on this subject would amount to a judicial change in the statutory right. Also the expedient, though logical, extension of privity could set a pattern which would

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[22] *U. S. v. Stall*, D. C. Conn., 105 F. Supp. 568, 571.

soon distort this fundamental concept and effect a substitution rather than a remedy of the weakness.

By way of summary, we see the established Ohio law to be that a judgment in an injury action either for or against the injured person or his administrator who later prosecutes such injury claim on behalf of the estate under survivor statute is not res judicata, nor is there an estoppel to an action for wrongful death brought by the administrator for the statutory beneficiaries.

A corollary of the views of the Ohio courts in the *Robinette* and *Van Alstine* cases is the effect of a release, a compromise and settlement, upon the right of action for pain and suffering and particularly for wrongful death.

Settlement by Injured Party or Administrator.

It is well established in Ohio that settlement by an injured person of an action for personal injuries will be a bar to an action brought by the administrator for the same pain and suffering after decedent's death.[23]

Conversely, however, it is no bar to an action for wrongful death that the decedent signed a release for his injuries during his lifetime. There is no distinction seen in the reasoning of the court in the judgment cases and in the release cases.

In 1946 the Supreme Court held:

> "1. Section 10509-166, General Code, authorizing the bringing of an action for wrongful death, creates a new cause or right of action distinct and apart from the right of action which the injured person might have had and upon the existence of which such new right is conditioned." [24]

In a Huron County case decided in 1948 plaintiff's decedent brought a prior action for injuries. Judgment was rendered for the defendant. The judgment was pleaded as a bar in a wrongful death action commenced after decedent's death. The court held:

> "2. The rights of the next of kin in an action for wrongful death begin where those of the decedent end, are rights over which decedent can have no control and are not affected by what may have happened to decedent's right of action.
>
> "3. A judgment denying recovery for personal injuries is not a bar to an action, under Sections 10509-166 and 10509-

[23] *Maguire v. Cincinnati Traction Co.*, 23 Cir. Dec. 24, 14 C. C. (N. S.) 431.

[24] *Karr v. Sixt*, 146 Ohio St. 527.

167, General Code, for the benefit of the next of kin of the injured person who died as a result of such injuries." [25]

In the *Maguire* case the court held that a release given by the injured person before his death of "all damages growing out of such accident which he or anyone by, through, or under him might have or assert against said defendant" would not bar an action for wrongful death but would operate to bar the administrator in a claim for pain and suffering.[26]

Again in *Phillips, Administratrix v. Community Traction Co.*, at 46 Ohio App. 483, 189 N. E. 444, the court had before it a death claim where the decedent had settled with the defendant for her damages and this did not bar the cause of her children. The rights of the next of kin begin where those of the injured person end, and are rights over which he could have no control.[27]

In the *DeHart* case the court stated in the course of its opinion:

". . . In jurisdictions where the statute is like ours, which follows closely the original Lord Campbell's Act, there are two distinct lines followed in the decisions. One of these is to the effect that the death action is but a continuation of the decedent's right of action for conscious pain and suffering, and settlement or adjudication (either favorable or unfavorable) of the personal action or its bar by lapse of time defeats the death action. The other line is that the death action is an entirely new right of action which does not arise until the death and is for the benefit of decedent's dependents and is not affected by what he may have done, or what may have happened to his right of action."

". . . The courts of Ohio . . . have adopted the latter line in the application of the statute. It is indeed a realistic viewpoint of the problem which the courts . . . have followed with increasing clarity as time has developed adjudications of varying fact situations." [28]

The contrary view is set out in a Georgia case decided in 1900, where, holding that while the action for wrongful death is a new and distinct cause of action, the settlement for injuries made by the decedent in his lifetime was a bar to any action after his death by the beneficiaries, the court said:

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[25] *DeHart, Admx. v. Ohio Fuel Gas Co.*, 84 Ohio App. 62.

[26] *Maguire, op. cit.*, Affirmed by Supreme Court in memorandum opinion at 87 Ohio St. 512 (1913).

[27] *DeHart, op. cit.*, p. 68.

[28] *Ibid.*, pp. 66-67.

> "The settlement also operates as a bar upon considerations of public policy . . . for if the settlement is not a bar, there is practically no Statute of Limitations . . . In the nature of things, one who claims as a wife is bound by the husband's conduct . . . she may recover the full value of his life, but that value depends on what he was, and what he did, in his lifetime, and, if before his death he has settled with the defendant, he has by his own act transmuted the value of a cause of action into dollars and cents, and deprived his family of any further value growing out of the negligence complained of." [29]

There is considerable appeal in the argument of the Georgia case, which states the view of a majority of the jurisdictions. However, in analyzing the right of action for wrongful death under our present statute as being in nature new, distinct and independent of the decedent's right we must consider the contract nature of the release. As a contract it binds the parties and their privies. Thus it has been held in the *Maguire* case that the decedent could by contract (release) bar his administrator from maintaining an action for pain and suffering on behalf of the estate.[30] There is such privity between decedent and the administrator of his estate that an estoppel by reason of the deceased's conduct may be asserted against his representative.[31]

In attempting to establish contract privity between the decedent and his statutory beneficiaries we are faced with the same legal entanglements encountered in the judgment cases. Ohio has adjudicated that there is no privity.

Settlement by Beneficiary.

We have seen that an adverse judgment rendered in an action for personal injuries is conclusive against the administrator who attempts to prosecute an action for pain and suffering under a survivor statute. It is clear that in practice there would be little likelihood that the beneficiaries would be called upon to give a release for a future pain and suffering claim. This is true since the decedent's release would be a complete bar; also the right is in the estate not the beneficiaries.

The more difficult problem is found in a release given by the beneficiaries for a wrongful death claim.

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[29] 39 *A. L. R.*, 588-589.

[30] *Maguire, op. cit.*

[31] 21 *Am. Jur.*, 371.

The basic legal character of a release as a contract demands that the investigation of this question be dual.

Adult Beneficiary.

To briefly consider a release given by an adult beneficiary after the death of the injured party it is observed that the Ohio statute gives the right to the personal representative for the benefit of the statutory beneficiaries. The beneficiaries possess no cause of action which can be released to the tort-feasor, though they may give such a release as to create an estoppel.[32] Thus:

> "A widow who is the sole and only heir to her husband's estate, and is the only beneficiary, has a right to make a release or compromise of a claim for damages by reason of her husband's death, and having done so she is estopped from afterwards recovering damages as administratrix." [33]

The more important problem is that concerned with a settlement of a future wrongful death action.

The Supreme Court of Ohio has not considered the question; however, the Lucas County Court of Appeals has held that separate releases given by the husband and wife for personal injuries sustained by the wife and executed before her death were not a bar to an action for wrongful death brought by the administratrix for the benefit of the surviving children.[34]

This is unlike the case in which all the beneficiaries who would be entitled to recover under the wrongful death statute give a release for any claims under the statute.

The only Ohio case in point was decided by the Franklin County Court of Appeals which held:

> "2. A release executed by an injured person during his lifetime discharging the wrongdoer from all claims for damages on account of the injuries received is not a bar to an action brought by the personal representative of the injured person for the next of kin under the Wrongful Death Statute.
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> "3. A settlement made by the wrongdoer with the next of kin and a release executed and delivered by the next of kin to the wrongdoer during the lifetime of the decedent constitutes a bar to an action by the administrator of the de-

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[32] 13 *Ohio Jur.*, par. 133.

[33] 7 Ohio S. & C. P. Dec. 269, 35 L. R. A. (N. S.) 207.

[34] *Phillips Adm., op. cit.*, Motion to certify overruled Dec. 13, 1933.

cedent's estate for the benefit of the next of kin under the Wrongful Death Statute." [35]

In the course of its opinion the court said:

"Under the allegations of the petition it appears that the mother of the injured boy made the settlement, received payment and signed, executed and delivered a receipt releasing the defendant from all claims, past and future, as sole and only next of kin . . . This (release) being a full and complete defense and a bar to the plaintiff's action, requires us to affirm the judgment of the trial court [which overruled plaintiff's demurrer to the release which was pleaded in defendant's answer]." [36]

INFANT BENEFICIARY.

There are no cases in Ohio which would give any direction on the mode by which an infant beneficiary can release the tort-feasor from liability which may arise in the future under R. C. 2125.01, .02.

In practice in order to effect a "settlement" of an infant's claim for injury a so-called "indemnifying release" is at times employed. This procedure is not uncommon in the relatively small case. Such a "release" however is no legal bar to an action filed on behalf of the minor but merely serves as a psychological deterrent, though giving the tort-feasor the right to indemnification as to any subsequent recovery on behalf of the infant.

A full and complete release of a minor's claim must be in accord with the requirements of section 2111.18 of the Revised Code which in part states:

"When personal injury, damage to tangible or intangible property, or damage or loss on account of personal injuries or damage . . . to property is caused to a ward . . . which would have entitled the ward to maintain an action and recover damages therefor, the guardian of the estate of the ward"

may maintain such action and recover damages with approval of the Probate Court.

The powers of a guardian to settle a claim of his ward under a strict interpretation of the statute would not appear to extend to settlement of a wrongful death action which has not yet arisen. Once the right of action for wrongful death has been perfected by death of the ward's principal the right to settle would be in

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[35] *Pilkington v. Saas*, 25 Abs. 667 (1937).

[36] *Ibid.*, p. 669.

the administrator. If, however, as in the *Pilkington* case a guardian does settle, *with Probate Court approval*, then the child's rights are extinguished. This is unlikely since a probate court would probably require appointment of an administrator before approving such settlement.

Nothing appears in R. C. 2111.07, Power of Guardian, or in R. C. 2111.18, Settlement of Claims, which would warrant extending the guardian's powers to settle wrongful death action whether before or after death of the injured person of whom the ward is a beneficiary.

It is true that a guardian is endowed with the general power given in R. C. 2111.07 to deal with and manage the ward's estate subject to statutory limitations.[37] He is the "person" of the ward and on authority of the *Pilkington* case may be such a person as can, by release, and with Probate Court approval, conclusively bar the future rights of the ward under the death statute.

Such an interpretation is necessary to understand the action of the Cuyahoga County Probate Court which has approved settlement of such future interest of the minor in a death claim.[38]

Conclusion—Statutory Remedy.

We have thus seen the several problems which confront Ohio courts in view of the present wrongful death statute. As was indicated at the outset statutory amendment emerges as the only logical solution. The Ohio Bar has recognized this fact and its committee on Negligence Law has taken the matter under consideration and advanced several amendments to meet the legal anomalies which we have touched upon.

In October, 1953, the committee suggested an amendment to Section 2125.01, the pertinent paragraphs of which read:

> ". . . Provided, however, that no action shall be commenced or maintained under this act . . . for death caused by wrongful act, neglect or default by the personal representative of one who, after having been injured has been compensated for such injury by compromise and settlement and has accepted satisfaction therefor previous to his death, and has executed a valid written release therefor which release re-

[37] See, for instance, R. C. 2109.37.

[38] Case No. 487485, Probate Court, Cuyahoga County, October, 1953. *In re* Minor of Tony Mantarro and Sophia S. Mantarro, Guardianship. It has come to the attention of the writer that at least one court in Ohio has refused to give its approval to such a settlement on the ground it has no authority to so act.

> cites that it shall constitute a bar to an action for wrongful death, or by the personal representative of one who after having been injured has recovered a judgment for such injuries previous to his death, or by the personal representative of one who, after having been injured has filed action to recover for such injuries which action has resulted in a final judgment adverse to such injured party . . ." [39]

This amendment also provided that death must ensue within five years after the injury.

This same committee in March 1954, proposed a bill "to release claims for wrongful death":

> "No action shall be commenced or maintained . . . for death caused by wrongful act, neglect or default by the personal representative of one who, after having been injured has been compensated for such injury by compromise and settlement and has accepted satisfaction therefor previous to his death, and has executed a valid written release therefor which release recites that it shall constitute a bar to an action for wrongful death, or by the personal representative of one who, after having been injured has recovered a judgment for such injuries previous to his death, or by the personal representative of one who after having been injured has filed action to recover for such injuries which action has resulted in a final judgment adverse to such injured party." [40]

These suggested statutory revisions would appear as a complete answer to the bulk of our problem, that is, the decedent could by release or judgment bar his administrator from maintaining an action for wrongful death. Although admittedly there is no unanimity on the proposition most of those who object to the enactment do so not in the premise but from a not wholly altruistic contention that the injured party be represented by counsel before his release is a bar to a subsequent wrongful death action.

These amendments do not, however, relieve the courts of the type of legal gymnastics the court was forced into in the *Robinette* case (*op. cit.*). The personal representative could, if unsuccessful in an action for pain and suffering, still require a relitigation of the issue of negligence in a wrongful death action; and, conversely, if successful must again demonstrate the defendant's negligence. While there are many fundamental legal

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[39] *Ohio Bar*, "Report of Negligence Law Committee," Vol. 26, No. 45, Nov. 23, 1953, p. 812.

[40] *Ohio Bar*, "Report of Negligence Law Committee," Vol. 27, No. 18, May 3, 1954, p. 308.

principles which would sustain a contention that the law should not be otherwise, the fact remains that the criticisms are valid and there is a remedy which would in no way subvert either legal principle or sound logic.

The remedy, again statutory, would be a requirement that there be a joinder of a yet unreleased injury action with the action for wrongful death. Recognizing the technical diversity of beneficiaries under revivor and survivor statutes on the one hand, and under the wrongful death statute on the other, a specializing of the verdict would be a necessary adjunct of such enactment.

With the addition of such a procedural device to the statutory revisions recommended by the Bar Committee there would be a rational realignment of social, legal and logical principles. There would be neither subordination of the logical and utilitarian, nor subversion of legal and social concept.