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COMMENT

TREATMENT OF DAMAGES FOR DEATH BY WRONGFUL ACT IN SUITS AGAINST COMMON-CARRIERS IN CONFLICT OF LAWS: THE PLACE OF INJURY RULE

Suppose Chris Passenger, a citizen of State X, bought an airplane ticket in that state for transportation to State Y. He boarded the airship in State X and while enroute to his destination he was killed when the plane in which he was riding crashed and burned in State Y. Suppose further that State Y has a maximum limitation on the amount of damages recoverable for wrongful death but there is no such limitation found upon the statutes in State X.

The above hypothetical presents many problems for the attorney representing the dependents of Mr. Passenger or the administrator or executor of his estate in a suit against the common-carrier. Wanting the highest money-judgment possible the lawyer is primarily concerned with the procedure he must follow in order to achieve this end. There would be no difficulty if both the contract and the injury which resulted in death occurred in one state and the action were brought in that state. The forum would apply its own law because it was the only state which housed all the contacts with the parties involved.

However, the facts presented in the above hypothetical pose a problem involving two jurisdictions, each having some contact with the parties involved; State X being the place where the ticket was purchased, and State Y, the place of injury. Under this situation there would seem to be two avenues of approach for recovery: (1) An action for breach of contract of safe carriage, and (2) A suit in tort under the proper wrongful death statute. Which road presents the smallest number of pitfalls? Which road is more profitable so far as recovery is concerned? This comment will explore these questions.

**Contract Action Considered**

As to the first avenue of approach—the sufficiency of the contract action of safe carriage—it might be well to begin with an old English case in which Lord Ellenborough stated, by way of dictum, that "in a civil court the death of a human being cannot be complained of as an injury." That noted jurist based his reasoning on the fact that at common law there was no right of recovery for negligently causing the death of another. The rule, though considered unjust by

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many,2 prevailed in England and this country until the enactment of Lord Campbell's Act3 in 1846. The recovery of any damages arising from death through negligence depended upon the existence of some statute. Lord Campbell's Act, which made this type of recovery possible for the first time, is the predecessor of our modern wrongful death statutes. Prior to its enactment, however, to recover for a wrongful death involving a common-carrier the action would have to be based upon contract for breach of safe carriage rather than upon tort.4

Where death is caused by the breach of a carrier's implied contract of safe carriage, the executor or administrator, although he could not sue in tort [could] sue in contract, and recover damages suffered by the decedent's estate.6

In Dyke v. Erie Railway,6 the plaintiff purchased a ticket in New York from the defendant. He was injured while passing through Pennsylvania enroute from Attica, New York, to New York City. Suit was brought in New York. A Pennsylvania statute limited recovery to $3,000 in actions against common-carriers for personal injuries. The court of appeals refused to apply the limitation on the ground that the contract of safe carriage was made in New York and was not divisible. Its dependence was not upon the law of the place of injury but rather upon the place where it was made. Therefore, the law of the forum governed.

In 1907 an action was brought to recover damages for defendant's failure to properly transport plaintiff.7 The action stemmed from an alleged assault upon the plaintiff by one of defendant's employees. The sole issue upon which the decision was rendered, was whether the action was one in tort or contract. The court affirming the decision below, in effect held that it was the latter, and in a general way distinguished a tort from a breach of contract:

... [T]he latter [contract] arises under an agreement of the parties; whereas the tort ordinarily is a violation of a duty fixed by law, independent of contract or the will of the parties, although it may sometimes have relation to obligations growing out of or coincident with a contract and frequently the same facts will sustain either class of action.6

The court further stated:

And so while it may be conceded that, independent of any express promise or agreement, the defendant would have been subject to duties and obligations in favor of plaintiff, the violation of which by the acts complained of in this

2 PROSSER, TORTS 710 (2d ed. 1955); 3 HOLDsworth, HISTORY OF ENGLISH LAW 336 (3d ed. 1923); see also Winfield, Death as Affecting Liability in Tort, 29 COLUM. L. REV. 239 (1929).
3 STAT. 9 and 10 VICT. c. 93 (1846).
4 TIFFANY, DEATH BY WRONGFUL ACT 21 (2d ed. 1913).
5 Id. at 21.
6 45 N.Y. 113, 6 Am. Rep. 43 (1871). The court in its opinion, per Allen, J., reasoned that since the contracts were made in New York and the obligations were created there it could not be assumed that the parties intended to subject the contract to the laws of any other state. The act of transportation was one act which commenced and was completed in the state of New York, although intermittently crossed state lines into Pennsylvania and New Jersey. The injury in Pennsylvania constituted a breach but since the contract was indivisible the laws of New York i.e., the place where the contract was made, applied.
8 Id. at 198.
case would have amounted to a tort, that is not at all decisive that this action was not and could not be brought in contract.9

The breach of contract actions brought in the Dyke case and the Busch case resulted from personal injuries sustained by the plaintiffs. The injuries caused in both cases did not result in death. This is where the distinction lies and is material when determining whether a contract action may be maintained in an injury-resulting-in-death case.

In Maynard v. Eastern Air Lines,10 plaintiff, as administratrix brought an action in New York to recover for the death of her husband who had purchased a ticket in New York for passage to Boston on defendant airlines. Plaintiff's decedent was killed in an airplane crash in Connecticut. The lower court in applying the Connecticut wrongful death statute, limited recovery to $20,000, the maximum allowed under that statute.11 Denial of plaintiff's motion to add certain interest to the judgment prompted an appeal. Plaintiff argued that:

... [A]n action to recover more than $20,000 will lie since the decedent purchased his ticket in New York and there arose an implied contract safely to transport, governed by the law of the place where the contract was made.12

The court ruled that the action was one based upon tort and therefore the law of place where the injury governed. As to the addition of interest the court held:

The same reasoning that requires the application of the Connecticut law limiting recovery to $20,000 makes it impossible to allow interest on the verdict from the date of decedent's death. ... There is no similar provision allowing interest in the Connecticut Act and that Act completely governs the recovery and limits it to $20,000.13

The court cited the decision of the New York Supreme Court in Faron v. Eastern Air Lines,14 which dealt with the same accident involved in the Maynard case. In Faron, the executrix sued in both contract and tort and sought to recover under the New York law, though the accident occurred in Connecticut. The Court, speaking through Justice Hofstadter held that:

As to the first and second causes of action, although they are 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.15 (Italics added.)

9 Id. at 198.
10 178 F.2d 139 (1949).
11 Connecticut has since abolished the maximum limitation of $20,000 and now has unlimited liability. CONN. GEN. STAT. REV. § 52-555 (1958).
It would perhaps be more profitable for plaintiff to sue in contract, if such were permissible under the circumstances, where to sue in tort would subject the plaintiff to the limitations of the foreign law under its wrongful death statute. It seems, however, that under the great weight of authority a contract action would not be available in the hypothetical situation presented at the outset of this paper.

**Tort Action Considered**

In a wrongful death suit there is no rule that gives a right of action for breach of contract of safe carriage and allowing the law of the forum to govern. A reason for this may be that the executor or dependents of the decedent were not parties to the contract of carriage and therefore do not have an actionable right under such contract as they would have under a tort action. The tort action is not derived from the person of the decedent but is born from the tortious act itself. It is suggested that had the decedent survived, the contract action would then be available. Death terminates the contract action.

"Death by wrongful act" denotes neglect or default on the part of the defendant. The gravamen of the cause of action is tort since the defendant's duty was breached through negligence. It is a well settled rule that the *lex loci delicti* governs such a case. It is equally well settled that the right to maintain an action for wrongful death is dependent upon the existence of a statute creating that right at the place where the injury occurred. Each state gives a remedy for wrongful death. Some state statutes have a maximum limitation of damages recoverable, and others have unlimited liability.

In the hypothetical above, the decedent was killed in a jurisdiction having a maximum limitation under its wrongful death statute. Under the weight of authority the application of the *lex loci delicti* is the only approach. However, this may not be desirable to the plaintiff especially when it is obvious that the limitation would make recovery inadequate. This is the problem.

Perhaps modern conditions have made it difficult and to some extent unjust and anomalous to subject the citizens of a state to the various laws of other states while traveling through or over them. Perhaps one who engages in such modern and convenient travel at least impliedly consents to subjection of the laws of the

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17 Compare list in TIFFANY, DEATH BY WRONGFUL ACT xvii (1st ed. 1893), with the data found in IV MARTENDALE-HUBBELL, LAW DIGESTS (1960 ed.). See also Dennick v. Railroad Co., 103 U.S. 11, 21 (1881). Query: Do all states provide at least some statutory remedy for wrongful death? See Van Beeck v. Sabine Towing Co., 300 U.S. 342 (1937).

18 See 28 FORDHAM L. REV. 141 (1959); Wein Alaska Airlines, Inc. v. Simmonds, 241 F.2d 57 (9 Cir. 1957).

19 Massachusetts now has a maximum of $20,000; Illinois limits liability to $30,000.

20 E.g., Connecticut and New York are among those states which have unlimited liability.
states in which the accident occurs. But generally, the place of injury in transportation cases is entirely fortuitous.\textsuperscript{21}

Today it is not the statutory right of action, but the statutory remedy as to its limitations which causes concern. Courts in states with unlimited liability have the troublesome problem of enforcing foreign wrongful death statutes with maximum limitations. In some instances to apply the foreign law would be offensive to the public policy of the forum. Consequently some courts have not adhered to the place of injury rule in its entirety.\textsuperscript{22} Recently a New York court held that to apply that part of the Massachusetts statute limiting the extent of recovery to $15,000 was against the public policy of New York and thereby refused to do so.\textsuperscript{23} Defendant, in that case, was a common-carrier. Plaintiff's intestate was a passenger on one of defendant's airplanes and was killed when the plane crashed and burned in Massachusetts enroute from a New York airport. Plaintiff's first cause of action was a suit under the Massachusetts wrongful death statute which subjected the plaintiff to the $15,000 limitation. The court unanimously agreed that Massachusetts was the place where the wrong was committed and that the law of Massachusetts governed. However, the majority reasoned that to apply the limitation of that state was against New York public policy and therefore refused to apply that portion of the statute.

Plaintiff's second cause of action was one based upon contract. The court dismissed this cause holding that the plaintiff acting as administrator had no separate right to sue the carrier in contract for causing the death of his (plaintiff's) intestate.\textsuperscript{24} Had this cause been upheld, the law of the forum i.e. New York (the place where the contract was made) would have applied and recovery would have been unlimited. Needless to say however, since the court refused to apply the Massachusetts limitation plaintiff had not become a victim of subjection.

At common law, in an action at law before the trial court, death of a party resulted in absolute abatement without right of substitution of decedent's representative.\textsuperscript{25} In equity it signified a present suspension of all proceedings in the

\textsuperscript{21} Mike v. Lian, 322 Pa. 353, 185 A. 775 (1936) impliedly demonstrates the fortuitous nature of the place of injury.

\textsuperscript{22} Ciampittielo v. Campitello, 134 Conn. 51, 54 A.2d 669 (1947); Kyle v. Kyle, 210 Minn. 204, 297 N.W. 744 (1941); See e.g. Loucks v. Standard Oil Co. of New York, 224 N.Y. 99, 120 N.E. 198 (1918), involving a wrongful death claim wherein Justice Cardozo stated: "The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."

\textsuperscript{23} Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526 (1961). At the time of the accident, Massachusetts law limited to $15,000 the amount of damages that could be collected for negligence contributing to a person's death. The limit has since been raised to $20,000.

\textsuperscript{24} Webber v. Herkimer, 109 N.Y. 311, 16 N.E. 358 (1888).

event of the death of one of the parties. But, whether the cause of action survives is a matter governed by the law of the place where the wrong was committed.

The decision in the Kilberg case may well open the door to an abandonment of the maximum limitations that are present in some of the wrongful death statutes. Professor J. H. C. Morris, a well-known English authority on conflict of laws, has written, that "To a foreign observer, it seems extraordinary that there should be so much uncertainty in the United States as to what law governs the validity of a contract, and so much uncritical acceptance of the rule that tort liability is governed by the law of the place of the wrong." This "uncritical acceptance of the rule" has recently been criticized, and perhaps with justification.

According to the Restatement of Conflict of Laws, the proper law to govern torts is the place of injury. The Restatement rule is supported by much authority. Presumably in a tort action a forum should apply the *lex loci delicti* in its entirety. But apparently strong public policy can and has limited the application of the rule in New York. Some jurisdictions have held the foreign law to be penal, while others, finding it to be remedial, have applied the law of the forum.

In Slater v. Mexican National R.R. Co., suit was brought in a federal court in Texas for the wrongful death of plaintiff's decedent, an American citizen working as a brakeman. The injury occurred in Mexico. Under Mexican law the plaintiffs were entitled to support. The trial court authorized the jury to assess these rights to support, and entered judgment for a lump sum. After reversal by the circuit court of appeals, the Supreme Court of the United States, speaking through Mr. Justice Holmes held that the common law afforded no machinery for assessing the present value of the plaintiffs' claims under Mexican law.

But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on

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28 Mr. Morris is a Fellow and Tutor of Magdalen College, Oxford, and All Souls Lecturer in Private International Law at Oxford. He was a visiting professor at Harvard Law School in 1950-51.
31 RESTATEMENT, CONFLICT OF LAWS § 377 et seq., (1934).
32 See BEALE, CONFLICT OF LAWS, chapter 9 (1935); GOODRICH, CONFLICT OF LAWS, chapter 6 (3d ed. 1949).
35 194 U.S. 120 (1904).
his liability that law would improve. . . . Therefore we may lay on one side the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught.\footnote{Id. at 126.}

Decedent's widow could have sued successfully in Mexico under Mexican law and received annuities for life. A decree for similar relief could not be entered by a federal court sitting in Texas. To enter a judgment for a lump sum based upon the value of what the widow would ultimately receive from the Mexican court would be to award her something other than she would get under Mexican law. Therefore no action could be allowed. The Court adhered to the conflict of laws rule so strictly that the "uncritical acceptance of the rule" which Morris speaks about is certainly without exaggeration. The Court apparently did not find that the "foreign law" was either offensive to the public policy of Texas, penal, or remedial in nature.

Conceding the premise that the rule should be applied in its entirety there is a possible solution to the problem. The creation of a uniform wrongful death law would undoubtedly expunge the burdensome restrictions and limitations in the various existing wrongful death acts.\footnote{Because of the great diversity of damage awards under similar facts but different jurisdictions, several writers have advocated uniform wrongful death law among the several states. See McCormick, Damages 364 (1953); Prosser, Torts § 105 (1955); Tiffany, Death by Wrongful Act IV (2d ed. 1913); Meyer, A New Death Act, 43 Dick. L. Rev. 83 (1939).} It would perhaps abate the attempts made by plaintiffs to circumvent the "limited liability" statutes by pleading a contract cause of action. One writer is of the opinion that "The courts could then give articulate interpretation to the wrongful death in interstate and international aviation acts and arrive at a sounder reason for allowing breach of contract to be actionable (under a 'neglect' theory)."\footnote{Prominski, Wrongful Death In Aviation: State, Federal, and Warsaw, 15 Miami L. Rev. 59, 66 (Fall, 1960).} A uniform wrongful death act should include a minimum limitation to provide for the loss which is invariably suffered by death to the remaining survivors where there has been no actual proof that the survivors have sustained any financial loss but where justice demands some recovery. The initial concern is in dealing with the death of minor children and elderly decedents who are for all practical purposes either too young or too old to render any financial assistance to the family. On the other hand a greater problem is in dealing with persons whose financial capabilities or potentials are immeasurable. For instance a young executive of a large manufacturing organization whose income may well be in excess of $75,000 per year and whose earning
capacity, had he lived, would have netted him well over a million dollars. Today it is conceivable that a man may earn a very large sum in his executive or professional capacity. The jury should be allowed to assess the damages according to the circumstances regarding the earning capacity and potentials of the decedent being hampered by a limited liability statute. This is not the problem in states with unlimited liability statutes. Fortunately these states are in the majority. A uniform wrongful death act should give unlimited liability so as not to subject the plaintiff to the barrier of a limitation.

A state should provide protection, whenever possible, to its citizens. When the application of a foreign law results in depriving local citizens of just benefits, the forum should refuse application of such a law on the ground of its being repugnant to public policy.

At the present the only approach recognized by the courts and which presents the smallest number of pitfalls is the tort action. However, in many instances it is not the most profitable, nor the most just. Unless a court is willing to refuse to apply the limitation portion of the foreign law on the grounds of a public policy prohibition or that the statute is in some way penal or remedial, plaintiff will be saddled with the lex loci delicti.

The issue to be determined in a legal controversy concerning the law of the state which is to govern has been answered by the application of the principles of conflict of laws. This answer is not always thought to be the correct or just one. The final determination of the case regarding the amount of money damages recoverable depends chiefly on the state law which governs. In a wrongful death case the place of injury may be entirely fortuitous and consequently subject the plaintiff to many undesirable limitations. Pleading a breach of contract of safe carriage where the issue is negligence has failed. A contract action in this kind of case does not survive the decedent.

States which impose maximum limitations on wrongful death actions present the greatest problem and are not always followed. It is submitted that a uniform wrongful death act may be the answer to the problem confronting the forum when application of the lex loci delicti and its limitations is necessary. In some instances strong public policy has precluded the courts from applying the foreign law. It seems however, that under the weight of authority the only avenue of approach for wrongful death is the tort action which leaves the plaintiff subject to the law of the place of injury.

David J. Papallo

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89 In O'Toole v. U.S., 242 F.2d 308 (3d Cir. 1957), the decedent had an earning capacity of $250,000 a year. Recovery of $400,000 for the widow was not considered excessive.

40 See note 17 supra.