Torts: Negligence of the Decedent's Agents Imputed to the Heirs in an Action for Wrongful Death

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reasonably can be expected to attempt escape if the opportunity arises. It was not suggested by the court that there was anything unusual in the fact that Kennedy did escape.

But every member of the court was satisfied that there was no duty to Williams. Since duty is perhaps the least precise element in the field of negligence, an element that continually raises problems for the courts, lawyers and students of law, it is somewhat remarkable that unanimity should exist here. The same court was widely split on another duty question—*Palsgraf v. Long Island R. Co.*—and it cannot be said that the law is any more settled today than it was when the *Palsgraf* case was decided in 1928. A finding or denial of duty is often dependent upon considerations that have no connection with the facts of the case. One of the most prevalent of these considerations is public policy. The court said by way of dictum that "... policy requires that the State not be held liable. To hold otherwise would impose a heavy responsibility upon the State. ..." It is a fair assumption that the court was more disposed to find duty wanting here than it would have been had it not been guided by this policy consideration.

It is submitted that the court was misguided. Public policy is the peculiar province of the legislature, and where it has spoken the judiciary is hardly in a position to declare a contrary policy, in the absence of constitutional questions. When the New York legislature consented to have the state's liability "determined in accordance with the same rules of law as applied ... against individuals and corporations ..." it established a policy that the state and private citizens should receive the same treatment in this field. Such a policy is basically inconsistent with a policy that shields the state from "heavy responsibility" in tort claims. In any event, it is difficult to see why public policy should lead to a denial of liability where an escaped convict has assaulted a member of the public and permit liability where an escaped mental patient has done the same thing.

Furthermore, the exercise of ordinary care is hardly a "heavy responsibility." It is not a question of the state abandoning its minimum security prisons but of operating them properly. Had the guard not been absent at the time of Kennedy's escape, there could not have been a finding of negligence. Costly claims against the state are without meaning if the state is not liable, and there can be no liability where ordinary care has been exercised.

—Robert L. Hughes.

TORTS: NEGLIGENCE OF THE DECEDENT'S AGENTS IMPUTED TO THE HEIRS IN AN ACTION FOR WRONGFUL DEATH.—At common law the right to recover for a tortious act was terminated upon the death of the injured party. Since it was often a pecuniary advantage to the tort-feasor if his victim died, the California Legislature in 1862 enacted a statute which allowed the personal representative of the deceased to maintain an action against the tort-feasor. In 1872 a new cause of action for wrongful death was enacted into the Code of Civil Procedure. It has been stated

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20 See note 1 supra at 557, 127 N.E.2d at 550.
1 Aetna Life Ins. Co. v. Moses, 287 U.S. 530 (1932); Bond v. United R. Co., 159 Cal. 270, 113 Pac. 366 (1911).
that since this code section was enacted, no member of the California bar had ever suggested to the Supreme or Appellate courts that contributory negligence of the deceased should not bar a recovery in a wrongful death action. In any case, this issue had not been discussed or analyzed by either the Supreme or Appellate courts since the enactment of section 377 of the Code of Civil Procedure in 1872, until the case of Buckley v. Chadwick was decided in 1955. In this case, after extensively exploring the reasons for its ruling, the court perpetuated the long established rule that contributory negligence of the decedent is a defense in wrongful death actions.

Why have the California courts adhered so faithfully to this rule without serious inquiry? Why has this defense gone unchallenged for almost 100 years? Perhaps the answer lies in the history of the Wrongful Death Statute.

In 1862 the California Legislature enacted a statute which substantially followed the philosophy of Lord Campbell's Act. The California Act provided:

Whenever 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, ... 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 person injured. Every such action shall be brought by and in the name of the personal representative of such deceased person. When this statute was enacted there could have been no doubt in anyone's mind that the decedent must have been free of negligence contributing to his injury, before his representative could maintain an action for wrongful death. The statute unequivocally states that the injured decedent, if death had not ensued, must have been entitled to maintain an action and recover damages before the tort-feasor would be liable to his personal representative. If the decedent had been contributorily negligent his representative would be barred from bringing an action since the decedent himself could not maintain an action had he lived. In addition to the clear language in the statute, it is presumed that the Legislature of California acted in the light of the English decisions that had interpreted Lord Campbell's Act. These decisions clearly held that there could be no recovery if the decedent was contributorily negligent.

In 1872, the statute of 1862 was repealed by the enactment of the Code of Civil Procedure, and replaced by section 377—the Wrongful Death Statute. This new section made some important changes in the law of wrongful death. So far as is pertinent here, section 377 provides:

When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death.

In comparing the Act of 1862 with section 377 one can notice two substantial changes: (1) It gave the right of action to the heirs or to the personal representatives of the decedent instead of giving it solely to the personal representatives; (2) It
deleted the provision that the deceased must be able to maintain an action and recover if death had not ensued.

"It is an established rule of statutory construction that when the Legislature, in enacting a statute which substitutes a new statute for a former one on the same subject, leaves out a substantive provision of the former statute, it discloses a clear intent that the matter omitted shall no longer be the law of the State. This rule of statutory construction has been specifically applied to changes in former statutes through the adoption of the Codes." 13

This rule had never been raised in a wrongful death action until the Buckley case was decided. It that case the decedent, Allen Buckley, entered into a partnership agreement with Mr. McDonald whereby they would furnish large quantities of earth for a construction job and share equally in the profits. On that same day, March 16, 1951, they obtained from the defendant a drag line crane on a "bare rental basis." It was further provided that the partnership would furnish an experienced crane operator and that McDonald would operate it. The defendant stated that the crane was in first class condition and had been worked on since it came off the last job.

On April 19, 1951, while McDonald was operating the crane, the boom cable broke, causing the boom to fall. It struck Buckley, who was standing on the running board of the dump truck. Buckley was instantly killed. An examination of the cable showed that the cable broke inside the cab of the crane at a place where the cable rolled on, around and off the drum as the boom was being raised and lowered while in operation.

At the trial, the judge instructed the jury that any negligence on the part of the deceased Buckley or his agents would bar the plaintiffs' recovery. He further charged that the evidence had established that McDonald and the oiler were agents of Buckley.

The jury returned a verdict for the defendant and the plaintiffs appealed. Upon this appeal, the Supreme Court of California stated,

"Since the origin, development and acceptance of the rule recognizing contributory negligence of the decedent as a defense in wrongful death actions has not heretofore been extensively explored by this court, we give it our attention." 14

But instead of changing the rule, the court intrenched it more firmly than ever before.

The court supports its decision by stating that contributory negligence of the decedent is a defense in most jurisdictions, 15 and that the California cases have consistently followed this rule 16 even though the legislature has amended section 377 three times since it was enacted in 1872. 17 If the court had ended its argument at this point, its opinion would have been practically impregnable. However, the court went on to discuss the most controversial argument in the case. It was this argument that exposed the weakness of the court's opinion. The court stated that since section 377 does not expressly or impliedly declare that contributory negligence is a defense, the legislature must have intended the courts to interpret the statute in the light of this common law defense. In California, the common law defense of contributory negligence has been codified into section 1714 of the Civil Code. This section reads:

"Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill . . . except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself . . . ."

13 Nourse, supra note 4, at 311.
14 See note 6 supra at —, 289 P.2d at 16.
On this vital point, the court summarily dismisses the issue by stating, "Clearly, the 'injury occasioned to another' which is spoken of in section 1714 is the injury to the person who is a victim of the actor's negligence" and not the heirs of the victim. (Emphasis added.)

Justice Carter, in his dissent, takes issue with the courts' interpretation of section 1714. His contention is that the heirs of the decedent are the injured parties, not the decedent himself. To support his contention, Justice Carter relies upon an article by Judge Paul Nourse, in which the learned judge stated that:

"Upon the grounds that the cause of action for wrongful death is a new cause of action and separate and distinct from any cause of action that the deceased might have had, it has been uniformly held that the admissions of the decedent against his interests and which might tend to establish his negligence, are not admissible against his heirs in an action brought under Section 377 of the Code of Civil Procedure. It seems anomalous to hold that the negligence of the decedent will defeat a cause of action for his death, and to hold that his own admissions may not be used as proof against him."

Justice Carter's principal objection to the majority opinion devolves from the question as to who was injured by the tort-feasor's actions, the decedent or his heirs? This question is of major importance, for unless the heirs can maintain an action in their own right, the decedent's negligence will be imputed to them.

In an attempt to resolve this difficult question the courts of the various states have laid down two principal theories. One theory is that the action survives the deceased and permits his representative to sue the tort-feasor if the deceased could have maintained an action for the same wrongful act if death had not ensued. This view gives the heirs a derivative right from the decedent. The other theory is that the wrongful death statute creates a new cause of action for the benefit of the heirs. This non-derivative view is supported by most courts in the country and by California in particular.

In conjunction with this latter theory it has been held that an action under section 377 is for damages caused to the plaintiffs as heirs, and not for injuries inflicted upon the decedent. The damages recoverable by the heirs include loss of support, society, comfort and protection. Since the rights of heirs are not derivative, a full release given by the decedent for consideration would not bar the heirs' cause of action. Also, any admissions of the decedent against his interests could not be used against his heirs.

These cases allowed the heirs to sue in their own right since the injury was personal as to them. Once this is established, then the "injury occasioned to another" under section 1714 of the Civil Code must refer to the heirs who have been injured and not to the decedent. Therefore, the defense of contributory negligence cannot be set up under section 1714 for an injury inflicted upon the heirs merely because the decedent was negligent. As Judge Nourse points out, the negligence of

See note 6 supra at ——, 228 P.2d at 17.

See note 4 supra.

16 Am. Jur., Death § 61.

Ibid.


Burk v. Arcata & M. River R. Co., 125 Cal. 364, 57 Pac. 1065 (1899); Morgan v. Southern P. Co., 95 Cal. 510, 80 Pac. 608 (1892).


See note 6 supra at ——, 228 P.2d at 25.


16 Hedge v. Williams, 131 Cal. 455, 63 Pac. 721 (1901).