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Wrongful Death and the Statute of Limitations

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Gary G. Broeder

INTRODUCTION

Statutes of limitations in general have been a constant source of difficulty for courts and lawyers. As legislative enactments designed to impose a reasonable time limit in which to institute legal actions, statutes of limitations have been susceptible to human error in composition and form. These inconsistencies have often resulted in illogical decisions and injustice to the parties involved. Montana has been no exception in this respect.¹ The purpose of this note is to discuss the unusual situation that currently exists with respect to the applicable statute of limitations governing wrongful death actions in Montana as interpreted by a trio of recent cases decided by the Supreme Court of Montana.

BACKGROUND

There were no legal problems with wrongful death at common law, simply because no such right of action existed. The rule was "actio personalis moritur cum persona."² That is, "the right of action for injury to the person ends with the death of the injured person."³ For a time it appeared that a third party might maintain an action for loss of services due to the death of another,⁴ but this possibility was quashed by the infamous case of *Baker v. Bolton*.⁵ In that decision Lord Ellenborough stated the proposition that "in a civil court the death of a human being could not be complained of as an injury."⁶ In spite of considerable dissent Lord Ellenborough's statement established the general rule. The rule was apparently motivated by the belief that private suits by personal representatives of the decedent were punitive and vindictive in nature, and not proper since the personal representative had no involvement in the tort.⁷

One can readily understand the consternation aroused by such a harsh rule. If one party injured another, the injured party could recover; yet, if one party killed another, there was no recovery. Since there was no question that the immediate family of the decedent had suffered in their own right due to the death, great sentiment developed in favor of changing the existing law. Thus, in 1846 in England, a statute was enacted to remedy this situation.⁸ This landmark piece

¹See, Note, *Disabilities Tolling the Statute of Limitations*, 31 MONT. L. REV. 263 (1970) for an excellent discussion of some of the problems created by statutes of limitation.

²F. TIFFANY, *DEATH BY WRONGFUL ACT*, 1 2d ed. 1913) [hereinafter cited as TIFFANY].

³*Id.*

⁴Winfield, *Death as Affecting Liability in Tort*, 29 COL. L. REV. 252 (1929).

⁵170 Eng. Rep. 1033 (Nisi Prius 1808).

⁶W. PROSSER, *LAW OF TORTS*, 901 (4th ed. 1971) [hereinafter cited as PROSSER].

⁷F. POLLOCK, *THE LAW OF TORTS*, 60 (12th ed. 1923).

⁸FATAL ACCIDENTS ACT, 9 & 10 Vict. ch. 93 (1846).

of legislation, commonly referred to as "Lord Campbell's Act," created an entirely new right of action in favor of the decedent's family, and was to serve as a model act for most of the states of this country.⁹

What was the nature of this newly created statutory right of action? Three discernible aspects of the new action were: (1) that an action could be maintained whenever death was caused by a wrongful act, neglect or default which would have entitled the injured person to maintain an action if death had not ensued; (2) that such action was for the benefit of certain designated members of the decedent's family or next of kin; (3) that the damages recoverable in such action were those suffered by such beneficiaries by reason of the death.¹⁰ Lord Blackburn eloquently expressed the nature of this new action in one of the first cases arising under "Lord Campbell's Act":

A totally new action is given against the person who would have been responsible to the deceased if the deceased had lived—an action which . . . is new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of the widow, parent, or child, who, under such circumstances, suffers pecuniary loss.¹¹

To express the nature of this newly created statutory right in simpler terms, the surviving family members of the decedent were granted a personal property right.

The importance of protecting the rights of surviving family members of an individual who had died due to the wrongful act of another was quickly recognized by the various state and territorial legislatures in the United States. However, the legislation which followed was often not drafted with a full appreciation or understanding of the historical development of such rights. Montana patterned much of its legislation after California statutes, including its wrongful death statutes. California had modeled its wrongful death statutes after "Lord Campbell's Act."¹² The end result was that Montana's wrongful death statutes were in substance a form of "Lord Campbell's Act."¹³

The first legislation enacted by Montana in the area of wrongful death granted a statutory right to parents or guardians to recover damages suffered by them as a result of the death of their minor child.¹⁴ The statute also granted relief to the parents or guardians of a minor child who was injured by the wrongful act of another.¹⁵ The significance of combining these two claims for relief stems from the distinct difference between the historical development of these two rights. The right of the parents or guardians to recover pecuniary damages they suffer as a

⁹PROSSEE, *supra* note 6 at 902.

¹⁰Hachman v. Mayo Clinic, 150 F. Supp. 468 (D. Minn. 1957).

¹¹Seward v. The Vera Cruz, 10 A. C. 70-71, 59 (H.L. 1884).

¹²TIFFANY, *supra* note 2 at 30.

¹³*Id.*

¹⁴BANNACK STATUTES, § 11, 44.

¹⁵*Id.*

result of the wrongful death of their minor child was created exclusively by statute, while the right to recover pecuniary damages suffered by the wrongful injury of their minor child was a common law right.¹⁶ At common law such an action was maintained by the parent on the basis of loss of services from the child due to the injury.¹⁷ Both actions are clearly personal property rights of the parent or guardian, and in this regard the combination of these two rights into one statute seems to be quite logical. The difficulty created later by such a combination grew out of the failure to mention the applicable statute of limitations governing actions to recover for either the wrongful death or injury of a minor child.

The next wrongful death statute was enacted in 1872, and concerned the death of an adult rather than a minor child.¹⁸ Again, the right created was purely statutory, and it was in the nature of a personal property right to the surviving family members of the decedent. However, the Act did vary in one very real way from the earlier legislation concerned with the wrongful death of minor children. One provision of the Act stated that all wrongful death actions involving adults must be commenced within three years. In 1895, the Act was divided and merged into the Code of Civil Procedure of 1895 as separate statutes. Section 1 which created the right now stood alone with no reference to the applicable statute of limitations,²⁰ and § 2 providing that all wrongful death actions must be commenced within three years became part of the general three year statute of limitations.²¹ Meanwhile, in 1893,²² the legislature had enacted a two year statute of limitations governing all personal property actions, and this statute was also incorporated into the Code of Civil Procedure of 1895.²³

To further complicate the situation an additional remedy, commonly referred to as a "survival action,"²⁴ had been granted in certain situations involving wrongful death. In essence a survival action provides that when one party is injured by the wrongful act of another and lives for an appreciable period of time before dying, the heirs of the decedent may maintain an action for the damages suffered by the decedent prior to his death.²⁵ This is a derivative right not to be confused with the totally new and independent right given to the heirs by wrongful death statutes.²⁶ At any rate, both wrongful death statutes, both statutes of

¹⁶Norton v. Jason, 82 Eng. Rep. 809 (K.B. 1653).

¹⁷PROSSER, *supra* note 6 at 888.

¹⁸CODIFIED STATUTES, § 1, 561 (1871) [hereinafter cited as Cod. Stat. 1871].

¹⁹COD. STAT. 1871, § 2, 561.

²⁰CODE OF CIVIL PROCEDURE, § 579 (1895) [hereinafter cited as C. CIV. PROC. 1895].

²¹C. CIV. PROC. 1895, § 514.

²²SESSION LAWS, § 1, 50 (1893).

²³C. CIV. PROC. 1895, § 524.

²⁴BANNACK STATUTES, § 16, 45.

²⁵PROSSER, *supra* note 6 at 900.

²⁶Dillon v. Great Northern Ry. Co., 38 Mont. 485, 100 P. 960 (1909), contains an excellent discussion of the historical development and distinctions between survival actions and wrongful death actions.

limitations, and the survival statute were reenacted by various legislative assemblies, and exist today substantially unchanged.²⁷

In retrospect it is clear that the legislature fully intended to protect the rights of surviving family members in cases of wrongful death. For the most part the statutes were copied from California, and neither the implications of the original enactments nor subsequent changes in the statutes were carefully thought out. By failing to understand the true nature of the statutory rights they were creating and by enacting the wrongful death statutes in piecemeal fashion, the legislature unknowingly placed two statutes of limitations in competition.

RECENT DECISIONS

While an historical analysis of the rights created by wrongful death statutes reveals the nature of such rights to be personal property rights of surviving family members, the Supreme Court of Montana was not asked to comment upon the basic nature of those rights until 1966, in *La Tray v. Mannix Electric*.²⁸ The plaintiff was the adoptive father of two minor children who were injured in an automobile-truck collision. The defendants were the truck driver and his employer. The plaintiff brought the action under *Revised Codes of Montana* 1947, § 93-2809, nearly three years after the accident had occurred.

In *La Tray* the supreme court was concerned with injury and not death, but the court's analysis of the basic rights involved included a reference to the nature of the rights created by wrongful death statutes. In deciding the nature of the rights created in favor of the parent or guardian by § 93-2809, the supreme court cited the position of the Indiana supreme court in *Thompson v. Town of Fort Branch*:²⁹

²⁷REVISED CODES OF MONTANA 1947, § 93-2809 [hereinafter cited as R.C.M. 1947]: "A father, or in case of his death or desertion of his family, the mother may maintain an action for the injury or death of a minor child, and a guardian for injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death, or if such person be employed by another person who is responsible for his conduct, also against such other person."

R.C.M. 1947, § 93-2810: "When the death of one person, not being a minor, 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"

R.C.M. 1947, § 93-2824: "An action, or cause of action, or defense, shall not abate by death, or other disability of a party, or by the transfer of any interest therein, but shall in all cases, where a cause of action or defense arose in favor of such party prior to his death or other disability, or transfer of interest therein, survive, and be maintained by his representatives or successors in interest, . . ."

R.C.M. 1947, § 93-2607: "Within two years:

1. An action upon liability created by statute other than a penalty or forfeiture.

2. An action for injury to or for waste or trespass on real or personal property"

R.C.M. 1947, § 93-2605: "Within three years:

2. An action to recover damages for the death of one caused by the wrongful act or neglect of another."

²⁸*La Tray v. Mannix Electric*, 148 Mont. 303, 419 P.2d 744 (1966). *Thompson v. Town of Fort Branch*, 204 Ind. 152, 178 N.E. 440, 443 (1931).

²⁹*Thompson v. Town of Fort Branch*, 204 Ind. 152, 178 N.E. 440, 443 (1931).

It is now well settled that section 274 [presently section 2-217] gives a parent, in his own right, a cause of action for loss of services or other pecuniary injury occasioned by either personal injuries to or death of the child. . . . [W]e hold that an action by a father to recover the value of lost services, or for other pecuniary loss, is not an action for injury to the person. . . . We further hold that such an action is an action for injury to property. . . .³⁰

While the central issue in *La Tray* was not the nature of the parent's right in wrongful death actions, that right had been defined as an action for injury to property.

The supreme court then proceeded to answer the second question presented by *La Tray*, namely, what statute of limitations applies to actions for wrongful injury to minor children brought under § 93-2809. The opinion cited § 93-2607(2) which provides that all actions for injury to real or personal property must be commenced within two years. Since the plaintiff had filed his complaint nearly three years after the accident, the supreme court ordered the district court to dismiss the action since it was barred by the statute of limitations.

The decision in *La Tray* laid the groundwork. The nature of the right given by wrongful death statutes had been defined. The next logical step would be to question which statute of limitations applied to wrongful death actions. In 1969, in *Smith v. Wiprud*,³¹ the supreme court was presented with an opportunity to answer that question.

The essential facts in *Smith* were quite similar to those in *La Tray*, except that in *Smith* the child died. The plaintiffs' minor son was thrown from a horse and injured, and the defendant, a licensed physician, cared for the injured child. The child died while under the defendant's care, and almost three years later the plaintiffs filed suit alleging the wrongful death of their son due to the negligence of the defendant. The plaintiffs based their claim for relief on § 93-2809 as the plaintiff in *La Tray* had done. The district court dismissed the wrongful death count of the complaint as being barred by the statute of limitations and the plaintiffs appealed.

The plaintiffs argued on appeal that their claim for relief had been framed as a wrongful death action. Section 93-2605(2) provides all actions for wrongful death must be brought within three years. They stated the similarity in language between § 93-2809 and § 93-2605(2) with respect to wrongful death was intentional, and therefore, that the three year limitation provided for in § 93-2605(2) was the controlling statute of limitations.

The defendant's argument on appeal hinged on the nature of the right being asserted. The damages claimed by the plaintiffs were pecuniary damages suffered as a result of the death of their minor son, and

³⁰*La Tray v. Mannix Electric*, *supra* note 28 at 745.

³¹*Smith v. Wiprud*, 154 Mont. 325, 463 P.2d 317 (1969).

thus they claimed an injury to a personal property right. Section 93-2607(2) provides that a two year statute of limitations applies to personal property actions.

The supreme court in deciding the issue had the precedent and logic of *La Tray*. The court concluded that the rights asserted by a parent or guardian under § 93-2809, irrespective of whether the child was injured or killed, were the same. There was no question that the rights were personal property rights, and from this it followed that the two year statute of limitations governing property actions applied.

Thus, the supreme court had decided the question on the basis of sound legal theory and logic. The court analyzed the nature of the rights involved, and then applied the statute of limitations which governs actions to enforce such rights. The rationale of the decision in *Smith* is exemplified by the following statement:

The only difference between this case and the *La Tray v. Mannix* case is that here the child died. It would seem incongruous to hold in one case where a child was injured but survived, a two year limitation applied; but where the child die, a three year limitation applied. The parent's right in a survivorship action to their own damages are the same in either situation, and we hold that the *La Tray v. Mannix* holding applies.³²

The question seemed resolved that in Montana the two year statute of limitations governing property actions applied to wrongful death actions. However, the supreme court had not answered the question of where the three year limitation provided for in § 93-2605(2) applies, if at all. The ink had scarcely dried on the opinion issued in *Smith*, when that very question was presented to the supreme court.

Since *Smith* had decided the issue of which statute of limitations applied to wrongful death actions involving minors, the next appeal considered was *Bryant v. Hall*, involving the death of an adult.³³ In *Bryant* the alleged wrongful death involved medical malpractice. The suit was commenced by Bruce Bryant, administrator of the estate of Sylvia Bryant, approximately one year after her death. The original complaint named three defendants and contained two counts. The first count was for damages sustained by the decedent prior to her death which, upon her death, survived in her favor under the provisions of the general survival statute.³⁴ The second count was a claim for damages suffered by decedent's husband and children as a result of the death.³⁵ Two years and nine months after the death of Sylvia Bryant, an amended complaint was filed naming three additional defendants. These three defendants moved for summary judgment on the second count claiming

³²*Id.* at 319.

³³*Bryant v. Hall*, 157 Mont. 28, 482 P.2d 147 (1971).

³⁴R.C.M. 1947, § 93-2824.

³⁵R.C.M. 1947, § 93-2810.

the wrongful death action was barred by the two year limitation provided for in § 93-2607(2). The district court granted the motion and the plaintiffs appealed.

On appeal the defendants presented the same basic argument that the defendants in *Smith* had presented. Wrongful death statutes grant independent property rights to the parents or heirs to recover damages they suffered as a result of the death. Property actions are governed by § 93-2607(2), a two year statute of limitations. The three year limitation mentioned in § 93-2605(2) applies to survival actions brought under § 93-2824.

The plaintiff's argument pointed up the basic dilemma which had been lurking in the background since the question of applicable statutes of limitations was raised in *La Tray*. If the three year statute of limitations did not apply to wrongful death actions involving adults, it was a meaningless appendage to the statute. Previous decisions of the supreme court had ruled out application of the three year limitation to either survival actions or wrongful death actions involving minors.³⁶

Finally, some eighty years after enactment, the basic inconsistency between § 93-2605(2) and § 93-2607(2) had been bared by a series of three cases. The supreme court concluded that since the three year statute of limitations was the more specific it had to apply to wrongful death actions involving adults, in spite of the fact that the actions were seeking to recover for injury to a property right. The court then reassessed their ruling in *Smith*, and concluded:

Thus, section 93-2810, R.C.M. 1947, granting a right of action in the instant case for wrongful death of an adult and section 93-2809 granting the right of action in *Smith* for the wrongful death of a minor differ only in respect to the persons who may bring the action. Other than this, the two statutes are alike, each providing an independent statutory right of action in designated kin for the damages they themselves sustain by reason of the wrongful death of their relative.³⁷

The court had no choice but to overrule directly the holding in *Smith*, and to hold that all wrongful death actions in Montana, whether brought under § 93-2809 or § 93-2810, are governed by a three year statute of limitations.

Bryant is the latest case in Montana concerning wrongful death actions and the applicable statute of limitations. Perhaps the present state of the law is best explained by a paragraph taken from the opinion in *Bryant*, in which the court said:

Thus, although it may appear incongruous that the two year statute of limitations applies to a parent's action for his damages by reason of injury to his surviving minor child in *La Tray*, while the three year statute of limitations applies if the child dies as in *Smith*,

³⁶*Bryant v. Hall*, *supra* note 33 at 148.

³⁷*Id.* at 149.

such incongruity is the result of legislative enactment which only the legislature can change. In *La Tray* the three year statute of limitations for wrongful death actions is clearly inapplicable because no death was involved, while in *Smith* and the instant case a conflict exists between two competing statutes, section 93-2607(2) and 93-2605(2), R.C.M. 1947.³⁸

CONCLUSION

There is no question that the legislature has the power to establish that a three year limitation applies to wrongful death actions. Rather, the question involved is one of policy in exercising the power to legislate. If uniformity is a desirable ingredient in the law, that ingredient is lacking under the present law. There is no apparent justification for providing a three year limitation on a parent's action if his child dies due to the wrongful act of another, while a two year limitation applies if his child is injured due to the wrongful act of another. The legal rights involved in both actions are identical.

The supreme court has quite clearly indicated it cannot make the required changes, because the inconsistencies are a result of legislative error. Therefore, any change must come from the legislature.³⁹

³⁸*Id.* at 150.

³⁹This note discusses only one of the problems existing in the present maze of statutes of limitation. While piecemeal legislation could correct some of the inconsistencies, serious consideration should be given to a complete revamping of the statutes.