

Volume 5 | Issue 4

1954

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Recommended Citation

Fred Siegel, *Wrongful Death--Actions after the Death of the Sole Beneficiary*, 5 W. Res. L. Rev. 426 (1954)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol5/iss4/12>

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giving the states an opportunity to enact their own laws and creating greater certainty in the application of the Due Process Clause.

FRANK H. HARVEY, JR.

WRONGFUL DEATH — ACTIONS AFTER THE DEATH OF THE SOLE BENEFICIARY

Recently the Ohio Supreme Court reaffirmed its previous holding that when the only eligible beneficiary who sustained pecuniary damage by reason of decedent's death dies during a wrongful death action,¹ the trial court may direct a verdict for the defendant on the ground that there remains no statutory beneficiary for whom the action can be maintained.²

In the instant case the court followed its earlier decision in *Doyle v. Baltimore & O. R.R.*,³ wherein it was held that the sole beneficiary dies possessed of a right of action only, which, unlike a judgment, is not a property right that would pass to his heirs or next of kin. There was no contention in the *Doyle* case that the death of the sole beneficiary abated the action.⁴ The court held that since there was no living statutory beneficiary, the action could no longer be maintained;⁵ that the wrongful death statute did not allow the beneficiaries' rights to descend to others not expressly nominated by the statute; and that the purpose of the statute was to compensate the beneficiary only for the pecuniary injury sustained because of the alleged wrongful death.

The dissent found the instant case an opportunity to overrule the *Doyle* case and to adopt a more liberal construction of the wrongful death statute found in other jurisdictions,⁶ as exemplified by the rationale of the case of *Van Beeck v. Sabine Towing Co., Inc.*⁷ That case held that the death of the sole beneficiary does not abate the suit, but that the administrator may continue it for the recovery of the beneficiary's loss up to the moment of his death, although not for anything thereafter. The dissent concluded that the result reached by the majority makes "the beneficiary's right to recover dependent on her ability to outlive extended litigation."⁸

If the sole beneficiary of a wrongful death action dies while the suit is pending, the personal representative of the person wrongfully killed does not continue the action for the benefit of the mother or the collateral heirs but for the estate of the deceased beneficiary. Although the beneficiary is not alive to benefit from a judgment, should not *his estate* be enriched at least to the extent of the amount of loss suffered by the decedent-beneficiary during his lifetime?⁹

Any policy whereby the defendant is discharged from liability would seemingly defeat the legislative purpose of requiring the wrongdoer to compensate the beneficiary for the pecuniary injury sustained by him. As stated by the New Jersey Supreme Court: "... the death of the beneficiary pending suit cannot be made available to abrogate the liability of the

wrongdoer incurred for pecuniary injury already sustained."¹⁰ By reading the Ohio wrongful death statutes¹¹ it is seen that the legislature contemplated that there could be a settlement. The decision of the instant case, however, disfavors settlement and encourages defendants to refuse to settle and to delay suit in the hope that the sole beneficiary will fail to survive the litigation. This is particularly true when the beneficiary is elderly or in bad health.

The majority opinion in the instant case frankly admits that if it were

¹ OHIO REV. CODE § 2125.01 (OHIO GEN. CODE § 10509-166). This section gives an independent right of action for the death of a person by reason of the wrongful act, neglect or default of another. Ohio Revised Code Section 2125.02 (Ohio General Code Section 10509-167) provides that such an action shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children and other next of kin of the decedent who have suffered pecuniary injury as a result of such death.

² *Danis v. New York Cent. R.R.*, 160 Ohio St. 474, 117 N.E.2d 39 (1954).

³ 81 Ohio St. 184, 90 N.E. 165 (1909).

⁴ See OHIO REV. CODE § 2311.21 (OHIO GEN. CODE § 11397). See *Simons v. Kidd*, 41 N.W.2d 840, 846 (S.D. 1950). This case is cited in the majority opinion in the instant case as upholding the *Doyle* case. But the basis of the decision in the *Simons* case was that the property right formerly held by the beneficiary abated by reason of its failure to come within the survival statute in that state. In the *Doyle* case, however, it was expressly contended that the action did not abate but that there was no statutory beneficiary for whom to continue the action.

⁵ See OHIO REV. CODE § 2125.02 (OHIO GEN. CODE § 10509-167).

⁶ *Waldo v. Goodsell*, 33 Conn. 432 (1866); *Frazier v. Georgia R.R. & Banking Co.*, 101 Ga. 77, 28 S.E. 662 (1897); *Kentucky Utilities Co. v. McCarty's Adm'r*, 169 Ky. 38, 183 S.W. 237 (1916); *DeMarco v. Pease*, 253 Mass. 499, 149 N.E. 208 (1925); *Johnston v. Bay State St. Ry. Co.*, 22 Mass. 583, 111 N.E. 391 (1916); *Cooper v. Shore Elec. Co.*, 63 N.J.L. 558, 44 Atl. 633 (1899); *Matter of Meekin v. B.H.R.R.*, 164 N.Y. 145, 58 N.E. 50 (1900); *Sider v. Gen. Elec. Co.*, 238 N.Y. 64, 143 N.E. 792 (1924); *Shawnee v. Cheek*, 41 Okl. 227, 137 Pac. 724 (1913); *Fitzgerald v. Edison Elec. Illuminating Co.*, 207 Pa. 118, 56 Atl. 350 (1903).

⁷ 300 U.S. 342, 57 Sup. Ct. 452 (1937).

⁸ *Danis v. New York Cent. R.R.*, 160 Ohio St. 474, 480, 117 N.E.2d 39, 42 (1954). One reason given in the *Van Beeck* case for contrary opinions which hold that the action does abate is that at times the interval between the wrongful death and the death of the beneficiary was so short that the courts overlooked that there had been a pecuniary loss during that interval. In the principal case the alleged wrongful death occurred eight years before the death of the beneficiary and in the *Doyle* case there was an interval of twenty-one years.

⁹ See *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 57 Sup. Ct. 452 (1937); *Odlivak v. Elliott*, 82 F. Supp. 609 (D. Del. 1949); *Dotsie v. Lewiston Crushed Stone Co.*, 136 Me. 284, 8 A.2d 393 (1939); *Sider v. Gen. Elec. Co.*, 238 N.Y. 64, 143 N.E. 792 (1924).

¹⁰ *Cooper v. Shore Elec. Co.*, 63 N.J.L. 558, 566, 44 Atl. 633, 636 (1899).

¹¹ OHIO REV. CODE § 2125.02 (OHIO GEN. CODE § 10509-167): ". . . Such personal representative, if he was appointed in this state, with consent of the court making such appointment may . . . settle with the defendant the amount to be paid."

¹² The *Doyle* case was decided in 1909.