

LEGISLATION

THE NEW BRUNSWICK SURVIVAL OF ACTIONS ACT, 1939

New Brunswick's survival statute,¹ broadly speaking, follows the English Law Reform (Miscellaneous Provisions) Act, 1934,² and its enactment brings that province into line with most of the other provinces³ of Canada, in respect of their attitude to the rule generally expressed by the maxim *actio personalis moritur cum persona*.⁴

Section 1 provides: "Subject to the provisions of this Act, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate; provided that this section shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery." By s. 6, "where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed for the purposes of this Act, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered." The causes of action excepted by s. 1 are those excepted in the English Act and, as has been previously pointed out, their selection cannot be justified logically or practically.⁵ Sec. 1, following what is apparently the position under the English Act, does not affect the rule in *Baker v. Bolton*:⁶ the causing of death is not, as such, a tort.⁷ The same may be said of the New Brunswick Act as was said of Ontario's survival provision, viz., that it

¹ 1939, N.B., c. 46.

² 24 & 25 Geo. V, c. 41.

³ The Administration Act, R.S.B.C. 1936, c. 5, s. 71; The Trustee Act, R.S.A. 1922, c. 220, s.s 28, 29, 30; The Trustee Act, R.S.S. 1930, c. 92, ss. 51, 52, 53; The Trustee Act, 1931 (Man.); c. 52, s. 48, amended 1935, c. 54, ss. 1, 2; The Trustee Act, R.S.O. 1937, c. 165, s. 37, amended 1938, c. 44, s. 3.

⁴ *Baker v. Bolton* (1808), 1 Camp. 493; *Admiralty Commrs. v. S.S. Amerika*, [1917] A.C. 38.

⁵ Winfield, *Recent Legislation on the English Law of Tort* (1936), 14 Can. Bar Rev. 639, 649. See, also, Winfield, *Death as Affecting Liability in Tort* (1929), 29 Col. L. Rev. 239.

⁶ *Supra*, note 4.

⁷ Winfield, *op. cit.*, *supra*, note 5, at 650.

was passed to prevent wrongdoers from escaping liability by reason of the death of the person injured and not for the purpose of creating a new right of action.⁸

By s. 1, a cause of action to survive for the benefit of his estate must, on a person's death, be vested in him. If death is instantaneous upon impact, for example, can it be said that a cause of action was vested in the deceased person so that by virtue of the statute, it will survive? A Manitoba decision, *Barr v. Miller, Canada v. Miller*,⁹ goes quite far in this connection, for it holds that the fact that death is almost instantaneous does not affect the injured man's rights; he will be assumed to have lived long enough after the injury to acquire a cause of action which, by virtue of a survival statute, will pass to his personal representative. What of the situation where the tortfeasor dies before or at the same time as damages are sustained? At common law there was no redress where injury occurred after the wrongdoer's death.¹⁰ And, it has been said, recovery for posthumous wrongs seems outside the letter of the broadest survival statutes, *i.e.* those applying to "all causes of action", because technically no cause of action ever arose.¹¹ The New Brunswick and English Acts have sought to avoid this result by specific enactment: the provision for the survival of causes of action subsisting against a person must be read with s. 6 of the New Brunswick Act, referred to above, which is identical with s. 1(4) of the English Act. This takes care of the situation where the death of the tortfeasor is simultaneous with his tort to the injured party, (for were it not for s. 6, the injured person's cause of action would not be one subsisting at the tortfeasor's death); and it covers the case of damage resulting after the wrongdoer's death.¹² It has been suggested elsewhere that the coincidence of death of both parties should be immaterial; since compensation is the purpose of tort recovery it should accrue not only to a living person but to his estate.¹³

⁸ *England v. Lamb* (1918), 42 O.L.R. 60 (deceased if living could not maintain an action for funeral expenses and for damages for his death and so his administrator could not claim these items of damage for deceased's death caused by defendant's negligence); *McHugh v. G.T.R.* (1901), 2 O.L.R. 600, 607 (the fact that death may have resulted from the tort forms no element of damages in action under survival statute).

⁹ [1938] 2 W.W.R. 563, 46 Man. R. 260, [1938] 4 D.L.R. 278.

¹⁰ *Beaver's Administratrix v. Putnam's Curator* (1910), 110 Va. 713, 67 S.E. 353.

¹¹ Note, *Inadequacies of English and State Survival Legislation* (1935), 48 Harv. L. Rev. 1008, 1011.

¹² *Winfield, op. cit., supra*, note 5, at 652.

¹³ *Supra*, note 11, at 1012 - 13.

It is well established that on a person's death from injuries caused by another's negligent actions can be brought (and both can go on) under a survival statute and under the Fatal Accidents Act.¹⁴ What is the effect, however, under a survival statute where the sole beneficiary who has a cause of action under the Fatal Accidents Act dies? And does a survival statute have any effect upon a cause of action under the Fatal Accidents Act where the wrongdoer dies? The first question is answered, and it is submitted, wrongly, in an Ontario Case, *McHugh v. G.T.R.*,¹⁵ which held that where the sole beneficiary for whose benefit an action was brought under the Fatal Accidents Act died before judgment the action terminated and could not be continued for the benefit of the beneficiary's estate nor could a new action be brought by the beneficiary's personal representative. It would seem as if the beneficiary had a cause of action vested in him at the time of his death and it should have survived unless, by employing a strict construction, it be said that the survival statute applied only to common law actions or, as the Ontario Court said, the Fatal Accidents Act contemplated an action for a living person's benefit and the survival statute was not properly applicable to a claim thereunder. There appears to be no Canadian authority in respect of the second question. In the United States there are authorities both ways. On the one hand it has been held that death statutes, being in derogation of the common law, should be strictly construed and that survival statutes should be interpreted as referring to causes of action arising at common law, with the result that a cause of action under the Fatal Accidents Act will not survive the wrongdoer's death.¹⁶ On the other hand, the view has been taken that survival statutes are remedial and should be liberally construed, and that therefore it can properly be held that a cause of action under the Fatal Accidents Act survives the wrongdoer's death.¹⁷ It is perhaps needless to point out that the language of the survival statute may be decisive on the question.

By s. 2 of the New Brunswick Act, except as in the Act otherwise provided, where a cause of action survives for the benefit of the estate of a deceased person the damages recoverable for the benefit of the estate of that person must be calculated in the same manner as if such deceased person were living and

¹⁴ E.g. *Brady v. C.P.R.*, [1933] 1 W.W.R. 83 (Alta.)

¹⁵ (1901), 2 O.L.R. 600.

¹⁶ *Claussen v. Brothers* (1928), 145 S.E. 539 (S.C.)

¹⁷ *Devine v. Healy*, 241 Ill. 34, 89 N.E. 251; *Putnam v. Savage*, 244 Mass. 83, 138 N.E. 808.

the action had been brought by him. Further, by s. 3, the damages recoverable for the benefit of the estate must not include any exemplary damages or any damages for loss of expectation of life (thus avoiding *Rose v. Ford*¹⁸) and in breach of promise cases must be limited to damages to the estate which flow from the breach of promise. Apparently, the deceased person's personal representative can recover for pain and suffering, (for example, the deceased may remain unconscious following the injury until his death and damages under this head would be nominal), for medical and nursing services and other items of expense necessarily and legitimately incurred by the deceased person and for loss of income (presumably up to the time of death only for all these heads of damage).¹⁹ The English and Manitoba Acts allow the recovery of funeral expenses. It seems to be inconsistent to allow the recovery of damages by a living person for pain and suffering of a deceased person and yet to prevent the living person from recovering for the deceased person's loss of expectation of life.²⁰

Sections 4 and 5 curtail the ordinary period of limitation for tort actions. Proceedings in respect of a cause of action surviving against a person's estate are not maintainable unless (1) proceedings against him were pending at the date of his death or (2) the cause of action arose within six months before his death and proceedings are taken in respect thereof not later than six months after his personal representative took out representation. It would seem to be unduly harsh to deprive an injured party of a right against the wrongdoer's estate when he is otherwise within the normal limitation period but failed to discover the injury or excusably delayed suit for more than six months. Where a cause of action survives for the benefit of a deceased person's estate proceedings must be taken within six months after his personal representative takes out repre-

¹⁸ [1937] A.C. 826.

¹⁹ *Balog v. Mundy*, [1939] 2 W.W.R. 1 (Alta.). But cf. *Fraser v. Children's Aid Society*, [1935] 1 W.W.R. 667, 43 Man. R. 102, where it was held that the concluding words of s. 48 (1) of The Trustee Act, 1931 (Man.), c. 52, "but no such action shall be brought or continued under authority of this section by the personal representative of a deceased person for a tort causing the death of such person" operated to bar recovery by the executors of a person who died from injuries caused by a tortfeasor's negligence of damages for medical, nursing and hospital expenses. Quære? (S. 48 (1) was amended in 1935 to accord with provisions as to damages in the English Act).

²⁰ C. A. Wright, *The Abolition of Claims for Shortened Expectation of Life by a Deceased's Estate* (1938), 16 Can. Bar Rev. 193, 200.

sentation and in any event, (lest the personal representative delay unduly in taking out representation, for example,) within two years after the death of such deceased person.

Finally, s. 7 provides that the rights conferred by this Act for the benefit of deceased persons' estates shall be in addition to and not in derogation of any rights conferred on deceased persons' relatives by a Fatal Accidents Act.²¹ The problem left by this section is the working out of the damages to be awarded.²²

²¹ R.S.N.B. 1927, c. 81.

²² *Barr v. Miller, Canada v. Miller*, [1938] 2 W.W.R. 563, 46 Man. R. 260, [1938] 4 D.L.R. 278 (s. 48 (4) of the Manitoba survival statute, enacted in 1935, *supra*, note 3, leaves no alternative but to award damages under both Acts, although the same person will be benefited, where the widow sues under the survival statute); *Sershall v. Toronto Transportation Comm.*, [1939] S.C.R. 287, reversing [1938] O.R. 694 (question of damages where actions brought under survival statute and under Fatal Accidents Act); *Dellaert v. C.N.R.*, [1939] 2 W.W.R. 166, 47 Man. R. 160.