

PROPOSED ACTS CONCERNING WRONGFUL DEATH AND SURVIVAL OF ACTIONS IN INDIANA

I

Approximately one hundred forty years ago, Lord Ellenborough ruled that death of a human being could not be complained of as an injury.¹ That such a decision was considered harsh, even in the comparatively docile 19th century English society, is evidenced by the legislative abrogation of this ruling a few years later. The resulting statute was the first wrongful death act, which became known as "Lord Campbell's Act."² Counterparts of this act were soon adopted by all of the American states.³

The Indiana Wrongful Death Act has not been revised since its enactment in 1852.⁴ Instead, it has been subjected to numerous piecemeal amendments; a few words and phrases have been changed, a sentence inserted here, and a proviso added there.⁵ When with this patchwork legislation there is

1. *Baker v. Bolton*, 1 Camp. 493 (N.P. 1808).

2. 9 & 10 Vict., c. 93 (1946).

3. See *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342 (1937); 44 HARV. L. REV. 980 (1931).

Those statutes patterned after "Lord Campbell's Act" create a new cause of action for the benefit of certain named beneficiaries. The purpose of this type of provision is to compensate these persons for the actual pecuniary loss suffered because of the wrongful death of the decedent. *Northern Indiana Power Co. v. West*, 218 Ind. 321, 32 N.E.2d 713 (1940); *Lindley v. Sink*, 218 Ind. 1, 30 N.E.2d 456 (1940).

A few states adopted statutes which in theory allow the personal representative to bring the action for personal injuries which the decedent could have brought if he had lived. This provision purports to compensate the decedents' estate for the loss occasioned by the decedent's wrongful death. *Mickel v. New England Coal & Coke Co.*, 132 Conn. 671, 47 A.2d 187 (1946); *Brown v. Perry*, 104 Vt. 66, 156 A. 910 (1931). See 15 Mo. L. REV. 315 (1950).

4. 2 IND. REV. STAT. § 784 (1852): "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed five thousand dollars and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

5. The 1852 Act was reenacted verbatim in 1881 except for an increase in the maximum damages allowed from \$5,000 to \$10,000. Ind. Acts 1881 (Spec. Session) c. 38, § 8. The act in its present form provides as follows:

"When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action had he [or she (as the case may be)] lived, against the latter for an injury for the same act or omission. *Provided the former or personal representative may maintain an action against an administrator of an estate if the said latter becomes deceased.* WHEN THE DEATH OF ONE IS CAUSED BY THE WRONGFUL ACTION OR OMISSION OF ANOTHER, the action shall be commenced BY THE PERSONAL REPRESENTATIVE OF THE DECEDENT within two years, AND the damages "shall be in such an amount as may be determined by the court or jury, but shall not" exceed "fifteen" thousand dollars, and subject to the provisions of this act, SHALL inure to the exclusive benefit of the widow [or widower, as the case may be,] and TO THE DEPENDENT children, if any, or

considered nearly one hundred years of judicial interpretation at various stages of the amending process, the statute becomes practically incapable of accurate application. In the belief that revision, rather than further amendment, is necessary in order to overcome the objectionable features and constructions of the present statute, an attempt has been made to draft a wrongful death act for Indiana which will better serve the needs of an ever-changing society. A copy of the proposed act follows:⁶

DEPENDENT next of kin, to be distributed in the same manner as THE personal property of the deceased. If such decedent depart this life leaving no such widow or widower, or dependent children or dependent next of kin, surviving her or him, THE DAMAGES shall inure to the exclusive benefit of the person or persons furnishing hospitalization or hospital services in connection with the last illness or injury of the decedent, not exceeding *one thousand* dollars; performing medical or surgical services in connection with the last illness or injury of the decedent, not exceeding *one thousand* dollars; to the undertaker for the funeral and burial expenses, not exceeding *one thousand* dollars; and to the personal representative, as such, for the costs and expenses of administering the estate and prosecuting or compromising the action, including a reasonable attorney's fee, not exceeding *one thousand* dollars; and in case of a death under such circumstances, and when such decedent leaves no such widow, or widower, or dependent children or dependent next of kin, surviving him or her, the measure of damages to be recovered shall be the total of the reasonable value of such hospitalization or hospital service, medical and surgical services, such funeral expenses, and such costs and expenses of administration, including attorney fees, not exceeding the total amount of *four thousand* dollars." IND. ACTS 1951, c. 140, § 1.

Since 1881, the act has been amended five times. (1) Prior to 1899 the statute was worded in the masculine in such a manner that the courts could reasonably construe it to apply only where the decedent was a male. This in itself is indicative of the poor quality of draftsmanship contained in the original act. The 1899 amendment added the phrases enclosed within brackets to cure this defect. IND. ACTS 1899, c. 177, § 1. (2) In 1933 the portion of the act in bold type was added creating a third class of claimants. The damages allowed each of these claimants were as follows: Hospital—\$200; Medical—\$100; Funeral—\$300; Administration—\$250. IND. ACTS 1933, c. 112, § 1. (3) In 1937, the portions of the act shown in large caps were added and the amount of damages allowed claimants of the third class were changed as follows: Hospital—\$300; Medical—\$300; Funeral—\$300; Administration—\$250. IND. ACTS 1937, c. 292, § 3. (4) In 1949 the portions of the act enclosed within quotation marks were added and the limitation on damages to first and second class claimants increased to \$15,000 and as to third class claimants increased to \$500 each. IND. ACTS 1949, c. 42, § 1. (5) In 1951 the proviso shown in italics was added and the limitation on damages to third class claimants increased to \$1,000 each. IND. ACTS 1951, c. 140, § 1.

6. Since the present wrongful death act is predicated upon the theory of compensation for the actual pecuniary loss of certain named beneficiaries, see note 3 *supra*, and since this theory is believed fundamentally sound, the proposed act proceeds upon the same theory, utilizing the extensive body of Indiana case law in support thereof. It should be noted, however, that certain elements of the policy in support of the survival theory of wrongful death were believed worthy of incorporation in the proposed act. Thus not only are named beneficiaries protected but also the estate of the decedent is allowed limited recovery for the loss occasioned by the wrongful death. In general the proposed act contemplates diminishing the legal effect of the decedent's death, eliminating dangers of double recovery against the wrongdoer, and protecting the basic interests of the decedent's family. See 33 MARQ. L. REV. 251 (1950).

PROPOSED WRONGFUL DEATH ACT

AN ACT concerning proceedings in civil cases involving death by wrongful act.
Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. DEFINITIONS. As used in this act:

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

"Wrongful Act" means any act or omission causing the death of a person whereby that person might have maintained a personal injury action therefor if death had not ensued.

"Wrongdoer" means a person who has committed a wrongful act.

"Personal Representative" means the executor or administrator of the decedent whether regularly appointed or appointed for the purpose of prosecuting an action under this act.

"Decedent" means the person whose death was caused by wrongful act.

"Class I Claimant" means the widow or widower of the decedent.

"Class II Claimant" means all children of the decedent except (1) non-dependent married children; and (2) nondependent children who have reached majority.

"Class III Claimant" means all other next of kin of the decedent who are wholly or partially dependent upon the decedent for support.

"Class IV Claimant" means the estate of the decedent.

"Class V Claimant" means a person including a governmental unit or agency who advances funds for or furnishes one or more of the following supplies or services required by injuries arising out of the wrongful act:

1. Hospitalization or hospital services in connection with the last injury or illness of the decedent.
2. Medical or surgical services in connection with the last injury or illness of the decedent.
3. Supplies and services for funeral and burial.

SECTION 2. This act may be cited as the "Wrongful Death Act."

SECTION 3. When the death of a person is caused by wrongful act the wrongdoer shall be liable to an action for damages as follows:

1. The action accrues only if the death of the decedent occurs within two years from the time of injury and shall be brought by the personal representative within two years after the death of the decedent.
2. The action survives the death of the wrongdoer whether the death of the wrongdoer occurred before or after the death of the decedent.
3. The cause of action shall include the claims of all classes of claimants and a finding or verdict for or against the personal representative with respect to a claimant of one class shall not prevent recovery for other claimants of the same class or other classes.

4. Action under this act is barred if the decedent has prosecuted to judgment, compromised, or at the time of death has pending an action for personal injuries arising out of the wrongful act.
5. The personal representative is barred from presenting a claim provided by this act which a claimant has prosecuted to judgment, compromised, or has pending an action therefor.
6. Upon death of the decedent this act shall, exclusive of pending actions, constitute the sole remedy for injury caused by the wrongful act, except this act shall not bar an action for damage to chattel or real property.
7. The court or jury, upon finding for the personal representative, shall award damages which are reasonable and just under the circumstances. Such damages may be awarded to all of the classes of claimants and shall include:
 - a. In the case of Class I, II, and III Claimants, the loss of benefits due to (1) loss of prospective earnings of the decedent; (2) and, in the case of a widower or parent of a minor child, in addition to prospective earnings, the loss of services of the decedent.
 - b. In the case of Class IV Claimant, (1) the loss of earnings by the decedent prior to death; (2) physical pain and suffering of the decedent resulting from the wrongful act; (3) costs and expenses of enforcing the action for wrongful death, including reasonable fees for the services of the personal representative and for legal services rendered by his attorneys in such action.
 - c. In the case of Class V Claimants, the reasonable value of the supplies and services furnished.
8. The court or jury in a finding or verdict for the plaintiff shall assess the amount of damages to each claimant. The sum of the damages to all claimants shall be the total damages awarded.
9. Distribution of the damages shall be in accordance with the finding or verdict and shall be free of claims of creditors of the decedent except damages to Class IV Claimant shall become a part of the general assets of the estate.

SECTION 4. If, after demand, the personal representative fails to prosecute the claim of any claimant, such claimant may intervene as an additional party plaintiff.

SECTION 5. Nothing contained in this act shall affect any cause of action if the wrongful act occurred prior to the effective date of this act.

SECTION 6. If any one or more sections, sentences, clauses, or phrases of this act shall be declared unconstitutional, such decision shall not invalidate any other part or parts of this act.

SECTION 7. Section 8 of Chapter 38 of the Acts of 1881 (Special Session), Section 1 of Chapter 177 of the Acts of 1899, Section 1 of Chapter 112 of the Acts of 1933, Section 3 of Chapter 292 of the Acts of 1937, Section 1 of Chapter 42 of the Acts of 1949, and Section 1 of Chapter 140 of the Acts of 1951 are repealed.

SECTION 8. Whereas an emergency exists for the immediate taking effect of this act, the same shall be in full force and effect from and after its passage.

DISCUSSION OF PROPOSED WRONGFUL DEATH ACT

Section I of the proposed act contains the definitions of important words and phrases. In general these definitions merely incorporate the judicial construction given to identical words and phrases used in the present statute. However, some changes and additions have been made. First, "Person" is defined broadly so as to prevent exclusion of claimants or escape from liability because of the operation of strict construction. Second, "Wrongful Act" is defined in the language of the present statute which enables a claimant under the act to bring the action if the decedent could have maintained a personal injury action had he lived;⁷ it is this language which also allows the wrongdoer to raise the defense of contributory negligence.⁸ Third, the definition of "Class II Claimant" constitutes a change from the present statute. When considering children as claimants, dependency and majority should not be the sole determining factors. A minor child may have considerable individual income, yet the death of a parent may constitute an actual pecuniary loss to the child. Also, a classification as to marital status or emancipation will not adequately designate those children who should be allowed to become claimants. Thus, in the proposed act "Class II Claimants" is defined so as to allow as claimants all dependent children, regardless of marital status, and nondependent minor children who are unmarried. This will still give the court or jury

7. This language, which is prevalent in all wrongful death statutes, provides the basis for establishment of the wrongful death action as a tort. As such the wrongdoer's liability is brought within the scope of an action for personal injuries and the causal relationship between the wrongful act and the decedent's death. See the discussion of causation in Harper, *Development in the Law of Torts*, 21 IND. L.J. 447, 453 (1946); Note 26 IND. L.J. 423 n. 21. See also *City of Indianapolis v. Willis, Admin.*, 208 Ind. 607, 194 N.E. 343 (1935); *Riesbeck Drug Co. v. Wray*, 111 Ind. App. 467, 39 N.E.2d 776 (1941).

8. The contributory negligence of the decedent is a defense which may be raised by the defendant in an action for wrongful death. *Indiana H.B. R.R. v. Jones*, 220 Ind. 139, 41 N.E.2d 361 (1941); *Lofton v. Vogles*, 17 Ind. 105 (1861).

In an action for wrongful death, the contributory negligence of one beneficiary may preclude his recovery but will not defeat the entire action and thereby deprive the innocent beneficiaries of the compensation provided by the statute. *Lindley v. Sink*, 218 Ind. 1, 30 N.E.2d 456 (1940); *Cleveland, C. C. & St. L. Ry. v. Bossert*, 44 Ind. App. 245, 87 N.E. 158 (1909). See Harper, *Development in the Law of Torts*, 21 IND. L.J. 447, 458 (1946). *But see* 19 TENN. L. REV. 977 (1950); 2 VAND. L. REV. 722 (1949).

some degree of latitude in which to consider the equities of the individual case. Fourth, the definition of "Class IV Claimant" is included to enable the estate of the decedent to qualify as a claimant for damages. Under the present statute the decedent's estate is not a claimant.⁹ Fifth, "Class V Claimant" is defined so as to allow all persons who have *advanced funds for or furnished* supplies and services because of the injury and death of the decedent to become claimants. In many instances the cost of hospital, medical and funeral expenses are advanced by some member of the decedent's family. Under the present statute this person has no claim for such advances, nor does the person performing the services have a claim since he has received payment. It should be noted also that governmental units and agencies are included in the term "Class V Claimant." This departs from the present statute which fails to provide that such units and agencies can recover for supplies and services paid for or furnished through public welfare programs.

Section 3 is the body of the proposed act. Section 3(1) constitutes a deviation from the present statute of limitations which provides that an action for wrongful death shall be commenced within two years.¹⁰ This has been construed as meaning within two years from the decedent's death rather than the time of injury.¹¹ Although this construction seems the better of the two alternatives presented, it is nevertheless, capable of imposing hardship.¹² Where the injured person fails to bring a personal injury action within the allotted time, the wrongdoer still faces a possible action for wrongful death for an unlimited number of years. This seems out of harmony with the purpose of a statute of limitations.¹³ Under the proposed act the cause of action does not accrue unless death occurs within two years from the time of injury. The decedent is forced to bring his action for personal injuries within the two-year limitation since it will not be possible for his survivors to institute a death action should he die after that time. If death does occur within two years from the time of injury, and if the decedent has not instituted a personal injury action, the personal representative will then have the usual two years in which to bring the wrongful death action. Thus, the proposed act will both

9. See note 5 *supra*.

10. See note 5 *supra*.

11. *N. O. Nelson Mfg. Corp. v. Dickson*, 114 Ind. App. 668, 53 N.E.2d 640 (1944); *Wilson v. Jackson Hill Coal Co.*, 48 Ind. App. 150, 95 N.E. 589 (1911). However, other jurisdictions have reached the opposite conclusion. *Street v. Consumer's Mining Corp.*, 185 Va. 561, 39 S.E.2d 271 (1946), 33 VA. L. REV. 381 (1947).

12. In *N. O. Nelson Mfg. Corp. v. Dickson*, *supra* note 11, the action for wrongful death was commenced eight years after the decedent had left the employment of the defendant and was based upon wrongful acts causing injury during such employment.

13. "To date, however, the primary principle of limitations is supported by the desire to compel the settlement of claims within a reasonable time while the evidence is still fresh and both evidence and witnesses are obtainable." Littell, *A Comparison of the Statutes of Limitations*, 21 IND. L.J. 23 (1945). For a discussion of death statute limitations see 42 ILL. L. REV. 688 (1947); 22 ST. JOHN'S L. REV. 221 (1948); 33 VA. L. REV. 381 (1947).

relieve the wrongdoer from the necessity of anticipating suit for an unlimited time and allow the decedent a reasonable time to determine the extent of his injuries.

Section 3(2) serves a dual purpose. First, it provides within the statute itself for the survival of the death action in the event the wrongdoer dies. Such survival is at present included in a separate statute with certain limitations as to damage.¹⁴ It is proposed to remove these limitations for reasons which are discussed later.¹⁵ Second, the provision that the action survives even though the wrongdoer predeceases the decedent is designed to meet a specific problem. In a few jurisdictions it has been held that when the wrongdoer dies prior to the death of the person he injured, the cause of action failed to accrue—at the time of the wrongdoer's death he was not subject to an action for wrongful death which might survive against his personal representative.¹⁶ Since this question has not yet been decided in Indiana, the provision is included in the proposed act to avoid such a construction.

Section 3(3) destroys the concept of exclusive classes of claimants. The present statute provides that an action may be brought by the personal representative of the person wrongfully killed for the exclusive benefit of certain named claimants. The Indiana Appellate Court, in 1938, construed the statute to mean that these claimants are of three *distinct* classes—first, the widow or widower and dependent children; second, dependent next of kin; and third, those persons who furnish hospital, medical, funeral, or legal services—and that the cause of action accrues at the instant of death for the benefit of but one of the classes of claimants in the order named in the statute.¹⁷ The logical

14. See note 46 *infra*. However, the 1951 amendment to the wrongful death act added a proviso which allows the personal representative of the decedent to maintain an action against the administrator of an estate if the wrongdoer dies. See note 5 *supra*. This proviso may reasonably be construed as allowing survival of the wrongful death action. If so, the question immediately arises whether this proviso impliedly repealed the survival of wrongful death actions under the general survival statute, note 46 *infra*, and thereby removed the limitation on the amount of damages which may be awarded against a deceased wrongdoer.

15. See p. 441 *infra*.

16. *Martinelli v. Burke*, 298 Mass. 390, 10 N.E.2d 113 (1937); *Beavers v. Putnam*, 110 Va. 713, 67 S.E. 353 (1910); *Hegel v. George*, 218 Wis. 327, 259 N.W. 862 (1935). For an excellent discussion of this problem and proposed statutory solution, see REPORT OF THE NEW YORK LAW REVISION COMMISSION 81 (1941).

The section in the proposed act conforms with the suggested solution to this problem contained in Section 1 of the draft of a uniform act relating to death by wrongful act. HANDBOOK, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 203 (1943).

17. "There is but one cause of action created by the statute, and . . . it accrues upon the death of the injured party, and inures for the benefit of those named in the statute in the order therein stated, as of the date of death, and not otherwise." *Shipley v. Daly*, 106 Ind. App. 443, 449, 20 N.E.2d 653, 655 (1938). Admittedly, the language of the present statute could reasonably be given this construction; however, it is believed that the court has placed excessive emphasis upon the word "exclusive" and ignored the purpose of the statute to compensate the loss of named persons. "Exclusive" as

implication of this construction was that if the decedent is survived by a widow or child, all other classes of claimants are left without remedy no matter how great the pecuniary loss suffered. This restriction in itself is questionable. However, the construction resulted in the further restriction that if a childless widow survives the death of her husband, but dies before proceeding under the wrongful death act, the entire cause of action dies with her and does not inure to the benefit of any other class of claimants.¹⁸ Thus, section 3(3) of the proposed act specifies that each claimant is to be included in the wrongful death action and that the finding or verdict as to one claimant shall not affect the rights of other claimants.

Section 3(4), (5), and (6) are designed to protect the defendant from duplicity of claims. Under common law rules, all causes of action arising out of a personal injury die with the death of the person injured. However, if certain actions are, by statute, allowed to survive the death of the injured party,¹⁹ and at the same time there is created a statutory cause of action for wrongful death, the possibility of overlapping claims arises. Possible claims against the wrongdoer are: a personal injury action by the decedent prior to death or by his personal representative after death; an action by a widower for loss of the services of his wife; if the decedent was a minor child, an action by a parent for loss of the child and his services;²⁰ and an action by the personal representative under the wrongful death act.

It seems unjust to require the wrongdoer to litigate separately several claims arising out of a single act with the consequent danger of double recovery.

used in the statute has also been construed to mean that the damages recovered would not be subject to the claims of creditors of the decedent. *Lese v. St. Joseph Valley Bank*, 81 Ind. App. 517, 142 N.E. 733 (1924); *Duzan v. Meyers*, 30 Ind. App. 227, 65 N.E. 1046 (1902).

In addition to the susceptibility of the present statute to the rigors of strict construction, it expressly provides that hospital, medical, funeral, and administration expenses may be awarded *only* if there are no claimants of the first and second classes. This provision may operate to indirectly reduce compensation which a claimant actually receives. Frequently the decedent may incur extensive hospital and medical expenses which, when paid either directly by the claimant or indirectly out of the decedent's estate, will substantially reduce the amount actually received by the claimant for the loss occasioned by the wrongful death.

18. "If there be no survivors of the first class, the right is for the benefit of those of the second class, if any, and if none, then for the benefit of those of the third class, but the right once it accrues does not pass upon the death of those of one class of persons to the next class. . . ." *Shiple v. Daly*, 106 Ind. App. 443, 449, 20 N.E.2d 653, 655 (1938). See also *Dillier v. Cleveland, C. C. & St. L. Ry.*, 34 Ind. App. 52, 72 N.E. 271 (1904).

Although in the *Shiple* case the widow survived her husband's wrongful death by five months, the reasoning of that decision seems to call for an identical result where the interval of time is only a matter of minutes. In view of the frequency of multiple accidental deaths, the injustice of precluding recovery by other claimants and absolving the wrongdoer of all liability for his act seems contrary to the policy underlying the statute.

19. See p. 443 *infra*.

20. IND. ANN. STAT. § 2-217 (Burns Repl. Supp. 1951).

Thus, section 3(4) provides that if the decedent has prosecuted to judgment, compromised, or at time of death has pending an action for personal injuries, it shall operate as a bar to any action whatsoever under the wrongful death act.²¹ However, this would not bar any other action which might have survived to the personal representative because of the survival statute. Section 3(5) will bar recovery by a claimant to the extent that he has enforced his claim but will not effect the right of other claimants to proceed under the act. And section 3(6) provides that except for pending actions, the proposed act shall be the sole remedy for the death caused by the wrongdoer.²² By incorporating into one statutory cause of action the several possible claims against the wrongdoer, and thus removing any overlap which may exist between various claims, a serious defect in the present statute is eliminated. However, a cause of action for damage to chattel or real property is not affected by the provisions of this section.

Section 3(7) provides for the damages to be awarded. Each claimant is to receive damages for his loss or compensation for supplies and services furnished. Certain factors are expressed which are to be considered in measuring damages. Section 3(7)(a)(1) provides for the loss of benefits due to the loss of prospective earnings of the decedent. Since loss of prospective earnings may be awarded in an action for personal injuries,²³ no new cause of action is created. Claimants under this section can recover only that portion of the decedent's prospective earnings which they can show as a reasonable expectation had the decedent lived. Theoretically the total of these claims

21. This provision is in conformity with decisions under the present statute. *Haskell & Barker Car Co. v. Logermann*, 71 Ind. App. 69, 123 N.E. 818 (1919); *Golding v. Town of Knox*, 56 Ind. App. 149, 104 N.E. 978 (1913). *But see* 18 U. OF CIN. L. REV. 548 (1949).

22. Rather than grant the personal representative discretion to elect to proceed under the proposed act or to bring the personal injury action surviving to him upon the decedent's death, the wrongful death action is made the sole remedy. This is believed desirable due to the difference in the distribution of damages provided by the two remedies. In the death action distribution is controlled while in the personal injury action the damages become a part of the general assets of the decedent's estate passing either by the decedent's will or the intestacy laws. If the estate is insolvent, the election by the personal representative might be influenced by the decedent's creditors. Also, the fact that if there are no next of kin, recovery under the wrongful death act would be small as compared to the personal injury action and again might influence the election. Only by making the proposed statute the sole remedy is it possible to adequately protect the interests of the designated beneficiaries. Where the decedent or a claimant has prosecuted to judgment, compromised, or has pending an action arising out of the wrongful act, it shall constitute an election by such person to preclude recovery under this act. Thus the right to election has not been destroyed, but placed within bounds. See 21 MISS. L. REV. 392 (1950) for an excellent discussion of the problems surrounding double recovery in wrongful death actions.

23. *Hamilton, Harris & Co. v. Larrimer*, 183 Ind. 429, 105 N.E. 43 (1915); *Evansville Hoop & Stave Co. v. Bailey*, 43 Ind. App. 153, 84 N.E. 549 (1908).

would not be as great as the total of the decedent's prospective earnings.²⁴ Section 3(7)(a)(2) brings within the statute the common-law action of a widower,²⁵ or the parent of a minor child,²⁶ for the loss of services of the decedent.

Sections 3(7)(b)(1) and (2) provide that the estate of the decedent may recover for the loss of earnings by the decedent and for physical pain and suffering prior to death.²⁷ Both types of damages are recoverable in a personal injury action.²⁸ It should be noted, however, that these damages are only for the period between time of injury and death; thus no overlap exists between the damages recovered by the estate and the prospective damages recovered by Class I, II, or III claimants under section 3(7)(a).

Section 3(7)(b)(3) also allows the estate of the decedent to recover the costs and expenses involved in enforcing the wrongful death action, including reasonable fees for the personal representative and his attorneys. Although recovery of attorneys' fees is not normally found in American jurisprudence,

24. In actions brought under the wrongful death act, the damages are limited to the pecuniary loss suffered by each claimant for whose benefit the action may be maintained. *Northern Indiana Power Co. v. West*, 218 Ind. 321, 32 N.E.2d 713 (1940); *Standard Forgings Co. v. Holstrom*, 58 Ind. App. 306, 104 N.E. 872 (1914). For an excellent discussion of pecuniary loss under death statutes, see 28 B.U.L. Rev. 268 (1948).

Since the decedent would apply a portion of his prospective earnings to his own benefit, the loss of benefits by the claimants due to the decedent's loss of prospective earnings plus the portion which would have been applied to the decedent's benefit should equal the total prospective earnings of the decedent.

25. *American Carloading Corp. v. Gary Trust & Savings Bank*, 216 Ind. 649, 25 N.E.2d 777 (1939); *Indianapolis Street Ry. v. Robinson*, 157 Ind. 414, 61 N.E. 936 (1901); *Citizens Street Ry. v. Twiname*, 121 Ind. 375, 23 N.E. 159 (1889). See McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930).

26. At common law a parent may recover from a wrongdoer for the loss of services of a child. *Jackson v. Pittsburgh, C. C. & St. L. Ry.*, 140 Ind. 241, 39 N.E. 663 (1894); *Indianapolis Traction & Terminal Co. v. Croly*, 55 Ind. App. 543, 104 N.E. 328 (1913).

In a wrongful death action, a parent may recover for personal services which decedent might have rendered had he lived. *Thompson v. Town of Fort Branch*, 204 Ind. 152, 178 N.E. 440 (1932); *Valparaiso Lighting Co. v. Tyler*, 177 Ind. 278, 96 N.E. 768 (1911).

See McCurdy, *Torts Between Persons in Domestic Relation*, *supra* note 25.

27. As to this provision, the proposed act exceeds the scope of the present theory of wrongful death and incorporates part of the theory of survival of personal injury action. See notes 3 and 6 *supra*.

28. Damages for personal injuries are not to be predicated alone upon the amount which the injured person could have earned if he had not been injured, but the jury is entitled to take into consideration his personal suffering. *Samuel E. Pentecost Construction Co. v. O'Donnell*, 112 Ind. App. 47, 39 N.E.2d 812 (1942); *Chicago, I. & L. Ry. v. Stierwalt*, 87 Ind. App. 478, 153 N.E. 807 (1928); *accord*, *Indianapolis Traction & Terminal Co. v. Hensley*, 186 Ind. 479, 115 N.E. 934 (1917); *Pittsburgh, C. C. & St. L. Ry. v. Sponier*, 85 Ind. 165, (1882); *Evansville Hoop & Stave Co. v. Bailey*, 43 Ind. App. 153, 84 N.E. 549 (1908).

For an excellent discussion of pain and suffering in death actions and suggested limitation of damages to those cases where the decedent is conscious during period between injury and death, see 54 DRCK. L. REV. 345 (1950).

in certain instances public policy has favored these awards.²⁹ Thus, the present Indiana wrongful death act provides for the recovery of attorneys' fees (not exceeding \$1000) when there are no surviving members of the decedent's family. However, the present rate of wrongful deaths seems to warrant some means of insuring that the high cost of enforcing the survivor's right to compensation shall not operate to preclude or substantially reduce recovery so as to defeat the very purpose of the wrongful death act.³⁰

Under Section 3(7)(c) a Class V claimant may be awarded the reasonable value of supplies and services furnished the decedent or his estate.³¹ This is a departure from the provisions of the present wrongful death statute which limits the amount to be awarded to each claimant. These limitations serve no useful purpose. The cost of supplies and services fluctuate with changes in economic conditions. The services furnished by one claimant may be disproportionate to those furnished by another. Any attempt to prorate the damages would tend only to create a race among claimants. Thus, the limitations should be removed. Computation by the judiciary of the "reasonable value" of supplies and services is a common practice.

29. The recovery of reasonable attorney's fees is frequently allowed by statute. Such recovery is motivated by the desire that the purpose of the statute be achieved and that claimants be encouraged to enforce the right of action which has been created. Among the numerous examples of legislation in Indiana where attorney's fees may be recovered are: the enforcement of an order for payment of money by railroads, IND. ANN. STAT. § 55-1406 (Burns Repl. 1951); a private action against combinations in restraint of trade, IND. ANN. STAT. § 23-122 (Burns Repl. 1950); an action for payment of wages, IND. ANN. STAT. § 40-102 (Burns Repl. 1940); an action for divorce, IND. ANN. STAT. §§ 3-1216, 3-1220 (Burns Repl. 1946); miner's liens, IND. ANN. STAT. §§ 46-1102, 46-1515 (Burns Repl. Supp. 1949); mechanic's liens, IND. ANN. STAT. § 43-707 (Burns Repl. 1940); horseshoer's lien, IND. ANN. STAT. § 43-405 (Burns Repl. 1940); transfer, moving and storage liens, IND. ANN. STAT. § 43-1005 (Burns Repl. 1940); and stallion & jack's service liens, IND. ANN. STAT. § 16-911 (Burns Repl. 1950).

30. Attorney's fees in most personal injury and wrongful death actions are computed on the contingent fee basis. The percentage of such fees is not fixed by law, although several local bar associations have attempted to prescribe recommended minimums. In Indiana, the normal minimum contingent fee is 25% if settlement is made and 33 1/3% if the claim is brought to trial. See, *e.g.*, Report of Committee on Minimum Fee Schedule, Indianapolis Bar Association (1945). These fees are not excessive in view of the unpredictability of such actions, but it can be readily seen that if the claimant must pay them, it will often be impractical to litigate a claim for wrongful death unless the damages are substantial. If the damages are large, for example the present \$15,000 maximum, the most the decedent's family can hope to actually receive is \$10,000. Since the judicial process is very slow, it may often be advisable to settle the claim at a substantially lesser figure than to undergo the trouble and delay of two or three years of litigation. Thus the attorney's fees plus the statutory maximum on damages give the defendant a tremendous advantage in bringing about a settlement at a fairly low figure even in cases where the wrongdoer was admittedly at fault. In view of the fact that the amount of recovery allowed is an attempt to provide for the decedent's family for several years, the statute, in its present form does not accomplish its purpose.

31. The inclusion of recovery of hospital, medical, funeral, and administration expenses does not create an entirely new type of recovery as hospital and medical expenses are normally elements of damage in an action for personal injury. See *Indianapolis & E. Ry. v. Bennett*, 39 Ind. App. 141, 79 N.E. 389 (1906); *Cincinnati, H. & I. R.R. v. Clair*, 6 Ind. App. 390, 33 N.E. 918 (1892).

Section 3(8) requires the finding or verdict to assess the amount of damages awarded to each claimant as well as state the total damages awarded. This is necessary to insure proper distribution by the personal representative.

Section 3(9) specifies that the distribution of damages to all except the Class IV claimant shall be free of claims of creditors of the decedent. This conforms with the provisions of the present statute as interpreted by the Indiana Supreme and Appellate Courts.³² The exception that damages to the Class IV claimant shall become a part of the general assets of the estate does not operate to deprive the personal representative, or his attorneys, of the amount recovered for their fees, as they have a prior claim by another statute.³³

Section 4 of the proposed act removes from the personal representative the power to decide whether or not a particular claim is worthy of inclusion in the action against the wrongdoer.

Section 5 is the savings clause. By saving an action when the wrongful act occurred prior to the effective date of the proposed act, the defendant is protected as to the possibility of retroactivity. This is especially true where the wrongful act occurs prior to the new act but death subsequent thereto; for in the absence of a savings clause, the courts could reasonably apply the new act on the ground that the cause of action did not accrue until death.³⁴ Thus, this section restricts liability to that provided for by the wrongful death act in force at the time of the wrongful act.

Sections 6 and 7 are self explanatory. Section 8, the emergency clause, is believed necessary for legislation of this type as the normal period between passage of the act and effective date is often considerable and can substantially affect the rights of the parties if death occurs by wrongful act during this period.

There remains only to note that the proposed wrongful death act contains no "maximum damage" provision. Legislative history discloses that in most

32. *Cincinnati, H. & D. R.R. v. McCullom*, 183 Ind. 556, 109 N.E. 206 (1915); *Lese v. St. Joseph Valley Bank*, 81 Ind. App. 517, 142 N.E. 733 (1924).

Claimants' recovery is made free of the claims of creditors of the decedent's estate so as to further the purpose of the statute itself. See notes 3 and 6 *supra*. Although the death of the decedent may constitute an actual pecuniary loss to his creditors, it is one of the accepted risks of the average debtor-creditor relationship which the creditor can and should insure against.

33. The expenses of administration have priority over other creditors in paying the debts of the decedent's estate. IND. ANN. STAT. § 6-1301 (Burns 1933). "Expenses of administration" as used in this statute include reasonable attorney's fees. *Taylor v. Wright*, 93 Ind. 121 (1883); *Chicago & E. R.R. v. Harshman*, 21 Ind. App. 27, 51 N.E. 343 (1898).

34. *Weber v. Third Avenue Ry.*, 12 App. Div. 512, 42 N.Y. Supp. 789 (1896); *Smith v. Metropolitan St. Ry.*, 15 Misc. Rep. 158, 35 N.Y. Supp. 1062 (1895). *Contra*, *Quinn v. Chicago, M. & St. P. Ry.*, 141 Wis. 497, 124 N.W. 653 (1910); *Slate v. City of Ft. Worth*, 193 S.W. 1143 (Tex. Civ. App. 1917).

jurisdictions "Lord Campbell's Act" was used as a blueprint;³⁵ but unlike the English act the wrongful death statutes of the states, almost without exception, contained a limitation on the amount of damages recoverable. Indiana began with a \$5,000 limitation in 1852,³⁶ which has recently been increased to \$15,000.³⁷ This departure is best explained by reference to the period in which most of these acts were adopted. The latter part of the 19th Century was witnessing the intense financial struggle of the railroads.³⁸ The animosity of the public because of land and investment losses resulting from this development is a matter of common knowledge.³⁹ Thus, it was but natural for the railroads to seek legislative protection from excessive awards by hostile juries in wrongful death actions. The limitation at that time may well have been justified.

However, that the conditions prevailing at the time of the passage of these acts are gone, is evidenced by the fact that all but fifteen states have removed the limitation.⁴⁰ The complexities of modern society have brought forth new interests to be protected—compensation for the slaughter on the highways has emerged as a primary legislative problem. The fact that a private citizen may hurl one or more tons of steel down a highway with reckless disregard of human life has resulted in the wrongful death act becoming of vital importance. Today, the fear of awards of excessive damages has to a great degree diminished. Improvements in our judicial system have provided a means of review of damages awarded.⁴¹ Also only a few instances of maximum damage awards have been found.⁴² Therefore if this limitation be

35. See note 3 *supra*.

36. See note 4 *supra*.

37. See note 5 *supra*.

38. For a discussion of the struggle in Indiana, see CLARK, *THE WEST IN AMERICAN HISTORY* 337 (1937). In general, see CLEVELAND AND POWELL, *RAILROAD FINANCE* (1912); Williams and Nehemkis, *Municipal Improvements as Affected by Constitutional Debt Limitations*, 37 *COL. L. REV.* 177 (1937).

39. See Clark, *op. cit. supra* note 38, at 339.

40. Only Colorado (\$5,000), Connecticut (\$20,000), Illinois (\$15,000), Indiana (\$15,000), Kansas (\$15,000), Maine (\$10,000), Massachusetts (\$10,000), Minnesota (\$10,000), Missouri (\$15,000), New Hampshire (\$7-10,000), Oregon (\$10,000), South Dakota (\$10,000), Virginia (\$15,000), West Virginia (\$10,000), and Wisconsin (\$15,000), still retain a limitation on damages.

41. The award of excessive damages is a ground for granting a new trial. *IND. ANN. STAT.* § 2-2401 (Burns Repl. 1946). The same is true in the case of an award of inadequate damages. *IND. ANN. STAT.* § 2-2406 (Burns Repl. 1946).

42. *Swanson v. Slagel*, 212 Ind. 394, 8 N.E.2d 993 (1937); *Watson v. Brady*, 205 Ind. 1, 185 N.E. 516 (1932); *Lavene v. Friedrichs*, 186 Ind. 333, 115 N.E. 324 (1917); *Wabash Ry. v. Gretzinger*, 182 Ind. 155, 104 N.E. 69 (1914); *Pittsburgh, C. C. & St. L. R.R. v. Staats*, 83 Ind. App. 680, 149 N.E. 912 (1925).

Undoubtedly maximum damages have been awarded in unreported cases and possibly in some reported cases in which the opinion does not mention damages. However, it is believed significant that only in a few cases was the award of maximum damages an issue before the reviewing court. If the early fear of abuse by the jury was well founded, it would seem logical that this issue would have been before the appellate courts with some degree of frequency.

justified today, it must be upon factors other than those prevalent at the time of its inception.

It is anticipated that insurance groups will object to the removal of the limitation on the amount of damages and the extension of the act to include the claims of all designated claimants. It will be argued that the public will be required to carry additional liability insurance. This is based on the fallacious assumption that the amount of insurance purchased is governed by the possible liability in case of wrongful death. This does not seem probable since there is no restriction on the amount of recovery in a personal injury action and it can hardly be contended that a wrongdoer is more likely to be subjected to a suit for wrongful death than for personal injury. Actually, the present limitation on recovery creates a windfall for insurance companies. Where the wrongdoer is insured for an amount in excess of \$15,000, the insurance company may be faced with a personal injury claim for the full amount of the policy; but should the injured person die the insurer's liability is immediately restricted to the extent of the limitation.

It may also be argued that the proposed act will result in a substantial increase in insurance rates. But while admitting that the cost of claims affects premium rates, so do a multitude of other factors.⁴³ In those states bordering Indiana which do not limit the amount of recovery in an action for wrongful death, it is not possible to attribute any difference in rates to the lack of such limitation. Thus, conclusions as to the effect of unlimited recovery in a wrongful death action upon liability insurance rates are at best conjectural.

Recovery for wrongful death in Indiana has since its inception, been justified on the ground that the loss suffered by those persons dependent upon the decedent for support should not be without compensation. It is believed that the proposed wrongful death act offers a more substantial fulfillment of this policy than the statute now in effect.

II

PROPOSED INDIANA SURVIVAL STATUTE

The first Indiana statute allowing certain actions to survive the death of either party excluded from its coverage actions for personal injury, wrongful death, seduction, false imprisonment, malicious prosecution, or promises to marry.⁴⁴ In 1937 this act was amended to allow all causes of action to survive

43. For a detailed discussion of rate making in casualty insurance and the factors involved therein, see MICHELBACHER, *CASUALTY INSURANCE PRINCIPLES* 193-230 (2d ed. 1942).

44. "SECTION 6. A cause of action arising out of an injury to the person, dies with the person of either party, except in cases in which an action is given for an injury causing the death of any person, and actions for seduction; false imprisonment, and malicious prosecution.

except actions for personal injury where the injured party dies and for breach of promises to marry.⁴⁵ The amendment also limited the damages to be awarded in a personal injury or wrongful death action, which survived because of the act, to reasonable hospital, medical and funeral expenses and \$1,000.⁴⁶ The purpose of this limitation—which in effect applies only to an action surviving the death of the wrongdoer—has never been revealed. Only one other state follows a similar procedure and in that instance the limitation conforms to the maximum damages allowed for wrongful death.⁴⁷

All causes of action should survive the death of either party and without limitation as to amount of recovery. The present Indiana survival statute results in considerable hardship. If a person is seriously injured by a wrongful act, but later dies from unrelated causes, the personal injury action dies with him. Hospital and medical expenses and loss of earnings, for which the wrongdoer would have been liable, had the injured party lived, and which would have become a part of the injured person's estate, must be borne by the latter's family, while the wrongdoer or his estate escapes all liability. Where the wrongdoer dies, but not the injured party, only limited recovery is allowed against the former's estate. Yet the loss borne by the injured party would seem entitled to at least the same recognition as the claim of a general creditor of the wrongdoer.

Combined operation of the present survival and wrongful death statutes of Indiana operate to produce absurd results. If both the injured person and the wrongdoer live, the latter or his insurer may be liable for \$50,000 or more. The moment the injured party dies, liability is reduced to the \$15,000 limitation of the present wrongful death statute. The moment the wrongdoer dies the liability of his estate or insurer is further reduced to the \$1,000 limitation of the present survival statute.

The proposed act, set out below eliminates the exceptions and limitations of the present survival statute. Section 1 is the body of the act; its wording has been taken from the first part of the first sentence of the present statute. Sections 2, 3, and 4 are self explanatory. Procedural provisions found in the

"SECTION 7. All other causes of action survive, and may be brought by or against the representatives of the deceased party, except actions for promises to marry." IND. ACTS 1881 (Spec. Session) c. 38, §§ 6, 7.

45. The exception as to an action for breach of promise to marry has since been abrogated by statute. See IND. ANN. STAT. § 2-508 (Burns Repl. 1946).

46. "All causes of action shall survive, and may be brought, notwithstanding the death of the person entitled or liable to such action, by or against the representative of the deceased party, except actions for personal injuries to the deceased party and for promises to marry. . . . In any action for personal injuries or wrongful death surviving because of this section, the damages, if any recovered, shall not exceed the reasonable medical, hospital or funeral expenses incurred, and a sum not to exceed one thousand dollars for any and all other loss, if sustained." IND. ACTS 1937, c. 292, § 2.

47. ORE. COMP. LAWS ANN. § 80904 (1940).

present statute have been omitted since they are merely repetitions of requirements of other statutes.⁴⁸

AN ACT concerning survival of actions.

Be it enacted by the General Assembly of the State of Indiana.

SECTION 1. All causes of action shall survive and may be brought, notwithstanding the death of the person entitled or liable to such action, by or against the representative of the deceased person.

SECTION 2. Section 7 of Chapter 38 of the Acts of 1881 (Special Session), and Section 2 of Chapter 292 of the Acts of 1937 are repealed.

SECTION 3. In addition to the sections specified in Section 2, all other acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

SECTION 4. Whereas an emergency exists for the immediate taking effect of this Act, the same shall be in full force and effect from and after its passage.

CHECK-OFF OF UNION DUES UNDER THE NLRA— A FEDERALLY PROTECTED BARGAINING ISSUE

A frequently inserted clause in collective bargaining agreements states that union membership dues shall be deducted from the wages of employees and remitted by the employer to designated union officers.¹ Although such an arrangement constitutes a convenient, efficient method for the collection of union dues, it may be unacceptable to an employer who assumes that this is a matter about which he has no duty to bargain. Moreover, the dues check-off is the subject of a considerable measure of state regulation²—much

48. IND. ANN. STAT. § 2-227 (Burns Repl. 1946).

1. See, e.g., the National Bituminous Coal Wage Agreement, 25 LAB. REL. REP. (Ref. Man.) 23 (1950). Such a provision is subject to the requirements of Taft-Hartley section 302. See note 3 *infra*.

2. The Supreme Court of Rhode Island has asserted that a dues check-off is prohibited by that state's weekly wage payment law, and statute regulating the assignment of future wages. *Chabot v. Prudential Ins. Co. of America*, 75 A.2d 317 (R.I. 1950); *Shine v. John Hancock Mutual Life Ins. Co.*, 68 A.2d 379 (R.I. 1949). See R.I. LAWS 1947, c. 1944, § 1. In Delaware check-off is by statute declared unlawful. DEL. LAWS 1947, c. 196, § 4(b). In Georgia it is prohibited except on the individual request of employees, revocable at will. GA. LAWS 1947, No. 140, § 6. And in Iowa it is permitted only on the employee's individual authorization, countersigned by his spouse, and revocable on thirty days notice. IOWA CODE ANN. § 736A.5 (1946). See also ARK. STAT. ANN. tit. 81, § 202 (1947); COLO. STAT. ANN. c. 97, § 94 (6) (1) (i) (Supp. 1950); N.H. LAWS 1947, c. 194, § 21; N.C. LAWS 1947, c. 328, § 5; PA. STAT. ANN. tit. 43, § 211.6(1) (f) (Supp. 1950); TENN. CODE ANN. § 11412.10 (Williams Supp. 1949); TEX. STAT., REV. CIV. art. 5154e (1948); VA. LAWS 1947, c. 2, § 5; WIS. STAT. § 111.06(1) (i) (1947).

The restriction on check-off is in most instances contained in a comprehensive code of labor regulation. Pervading much of this state legislation, and apparently influencing its character, is a design to elevate the rights and freedoms of the individual worker. *E.g.*, IOWA CODE ANN. § 736A.1 (1946), provides: "It is declared to be the policy of the state