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INDIANA UNIVERSITY
Maurer School of Law
Bloomington

INTANGIBLE INTERESTS UNDER THE PERSONAL INJURY EXCEPTION TO THE INDIANA SURVIVAL ACT

Under the prior Indiana survival act actions for personal injuries did not survive the death of the plaintiff, and in the event of the defendant's death the damages in actions for personal injuries were limited in

51. A provision for a credit of this type is now being studied by the Ind. Comm'n on State Tax and Financing Policy.

52. INDIANA TAX STUDY COMM'N, *op. cit. supra* note 44, at 165.

53. Indiana could pattern its statute after that of Minnesota, by taking the revenue derived from sales to customers within the state and dividing this by total sales revenue, thus arriving at the percentage of sales subject to taxation in Indiana. MINN. STAT. ANN. § 92-3113 (1950).

kind and amount.¹ The 1959 Indiana legislature passed an amendment to the survival act² which further modifies the common law rule that all personal rights of action are terminated by the death of either party.³ This amendment removes the damage limitation in the event of the defendant's death, and allows personal injury actions to survive the plaintiff's death but only to the extent that the plaintiff had incurred medical expenses and losses of income prior to his death.⁴ This limitation on survival clearly is applicable when the injuries in question are physical; it is questionable, however, whether injuries to the intangible interests of the decedent, represented in actions such as libel, slander, malicious prosecution, false imprisonment and invasion of privacy, will be subject to the limitation. If the term "personal injuries" in the statute is interpreted to exclude injuries to the intangible interests of the decedent, actions for such injuries will survive in full. If the term is interpreted broadly to include injuries to the decedent's intangible interests, these actions will be subject to the limitation on survival. If those actions named are subject to the survival limitation, the greatest sources of recovery—mental anguish, shame and humiliation, as well as any punitive damages⁵ will die

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 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 five thousand dollars [\$5,000] for any and all other loss, if sustained." Ind. Acts 1955, ch. 257, § 1.

2. IND. ANN. STAT. § 2-403 (Burns Supp. 1959).

3. Those instances in which a person's death is caused by the defendant's wrongful act give rise to a new cause of action in favor of the decedent's beneficiaries under the Indiana wrongful death act. IND. ANN. STAT. § 2-404 (Burns Supp. 1959). The survival act is applicable only to those causes of action existing in favor of or against the decedent at the time of his death, without regard to the cause of his death.

4. "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 representatives of the deceased party, except actions for personal injuries to the deceased party, which shall survive only to the extent provided herein. . . . Provided, however, That when the person receives personal injuries caused by the wrongful act or omission of another and thereafter dies from causes other than said personal injuries so received, the personal representative of the person so injured may maintain an action against the wrongdoer to recover damages resulting from such injuries, if the person so injured might have maintained such action had he or she lived; but provided further that the personal representative of said injured party shall be permitted to recover only the reasonable medical, hospital and nursing expense and loss of income of said injured person, resulting from such injury, from the date of the injury to the date of his death." IND. ANN. STAT. § 2-403 (Burns Supp. 1959).

5. *Fairfield v. American Photocopy Co.*, 138 Cal. App. 2d 82, 291 P.2d 194 (1955) (invasion of right of privacy); *Harness v. Steele*, 159 Ind. 286, 64 N.E. 875 (1902) (false imprisonment); *Felkner v. Scarlet*, 29 Ind. 154 (1867) (seduction); *Pontius v. Kimbel*, 56 Ind. App. 144, 104 N.E. 981 (1914) (malicious prosecution). See generally McCORMICK, DAMAGES 375-92, 415-47 (1935).

with the plaintiff. Although medical expenses⁶ or losses of income⁷ might be regarded as elements of damage in some of these actions, they generally form only a small part of the recovery.

Whether a term such as "personal injuries" will be given a broad or a limited interpretation will depend upon the prior common law, the surrounding language of the present survival act, the language of earlier survival acts, as well as the context in which the problem arises, that of the survival of actions.

The English common law rule allowing survival of actions *ex contractu* and not those *ex delicto*⁸ was modified in 1330 by an act which gave executors an action for the goods and chattels of their testator "carried away" in his lifetime.⁹ This exception did not apply against a personal representative of a deceased tort-feasor until the decision in *Hambly v. Trott*¹⁰ which allowed an action of conversion to survive the tort-feasor's death because "so far as the act of the offender is beneficial his assets ought to be answerable. . . ." The common law distinction between *ex contractu* and *ex delicto* was modified further by *Chamberlain v. Williamson*¹¹ in which an action for breach of promise to marry, although *ex contractu* rather than *ex delicto*, was not allowed to survive the plaintiff's death because the injury was purely personal and there was no damage to decedent's estate. This examination of the type of damage incurred rather than the form of action was continued in an 1833 statute which provided that executors could bring actions for injuries to the real estate of their decedents, and made the personal representative liable for injury to real or personal property caused by his decedent.¹² The emphasis on injury to property was followed in *Bradshaw v. Lancashire and Y. Ry.*¹³ which allowed recovery of decedent's medical expenses and loss of income arising from physical injuries received while a passenger on de-

6. Damages for physical injury may be an element of recovery in false imprisonment. 22 AM. JUR. *False Imprisonment* § 129 (1939). There is a split of authority as to allowance of damages for physical illness in actions for libel or slander. 33 AM. JUR. *Libel and Slander* § 206 (1941); Annot., 90 A.L.R. 1175 (1934).

7. In an action for publication of false statements concerning the plaintiff's financial condition, the general nature of his business and the injury likely to result were considered on the question of damages. *Wayne Works v. Hicks Body Co.*, 115 Ind. App. 10, 55 N.E.2d 382 (1944).

8. The rule appears to have arisen from the fact that causing physical injury was a felony, and any civil remedy for damages was unknown. The reasoning behind not allowing a felony action to survive is obvious. See Winfield, *Death as Affecting Liability in Tort*, 29 COLUM. L. REV. 239, 241 (1929).

9. 4 Edw. III, c. 7 (1330).

10. 1 Cowp. 373, 376, 98 Eng. Rep. 1136, 1139 (K.B. 1776).

11. 2 M.&S. 408, 105 Eng. Rep. 433 (K.B. 1814).

12. 3 & 4 Will. IV, c. 42 (1833).

13. L.R. 10 C.P. 189 (1875).

defendant's railroad. The court, relying on the fact that there was pecuniary loss to the decedent's estate, allowed recovery although the action was of a personal nature.

It was in the background of these cases and statutes that the Indiana case of *Boor v. Lowery*¹⁴ was decided. The defendant doctor died after plaintiff had commenced an action for improper treatment of his shoulder. Among other damages, the plaintiff specifically alleged that he had incurred additional medical expenses in treating the disability arising from the defendant's improper treatment. Instead of allowing recovery for this pecuniary loss as was done in the *Bradshaw* case¹⁵ the Indiana court devised a rule denying any recovery where the action is based "primarily"¹⁶ on injury to the person and pecuniary loss is merely an "incident"¹⁷ of the personal injury. In support of this *primary-incident* test, the court cited a number of cases involving the survival of actions for breach of promise to marry including *Chamberlain v. Williamson* and did not distinguish them from the principal case even though breach of promise to marry deals with injuries which are purely intangible and involve no pecuniary loss, either "primary" or "incidental."¹⁸ The test was further refined in a case where the plaintiff sought recovery for injuries to the person resulting from a landlord's breach of a covenant to repair.¹⁹ Although the plaintiff specifically alleged pecuniary loss in the form of medical expenses and loss of income, the court held against survival on the ground that there would have been no pecuniary loss had no physical injury occurred. Thus, the test for determining what injuries were "primary" and what were "incidental" for purposes of survival became analogous to the *sine qua non* test of causation.

At the time these Indiana cases were decided, the survival act provided: "A cause of action arising out of an injury to the person, dies with the person of either party All other causes of action sur-

14. 103 Ind. 468, 3 N.E. 151 (1885).

15. "Another argument for the defendants was, that inasmuch as the remedy for the personal injury died with the person, the damages to the estate being consequential on the personal injury, died also. I do not at all see that that follows as a necessary or logical consequence. The two sorts of damage are separable: the one is pecuniary loss to the estate immediately and naturally arising out of the accident; the other is personal to the party injured and as such dies with the person." *Bradshaw v. Lancashire and Y. Ry.*, L.R. 10 C. P. 189, 192 (1875).

16. *Boor v. Lowery*, 103 Ind. App. 468, 471, 3 N.E. 151, 152 (1885).

17. *Id.* at 475, 3 N.E. at 151.

18. Lord Ellenborough said, "Where the damage done to the personal estate can be stated on the record that involves a different question." *Chamberlain v. Williamson*, 2 M.&S. 408, 416, 105 Eng. Rep. 433, 436 (K.B. 1814).

19. *Feary v. Hamilton*, 140 Ind. 45, 39 N.E. 516 (1894).

vive”²⁰ If the Indiana court had correctly interpreted the English precedents under the original acts it would have distinguished between damages for pain and suffering, which are personal and would not survive, and damages such as medical expenses and loss of income which cause injury to the estate and which would survive; and no need would have existed for the 1959 amendment specifically providing for the survival of medical expenses and loss of income.

Basing survival on the type of damage, whether to the estate or to the person, rather than on the “primary” cause of action, appears sound. Under this test, the injuries to intangible interests involved in humiliation and mental anguish, would be regarded as personal and would not survive. The use of any such test, however, would have to be warranted by the language of the present statute.

The language of the proviso which contains the only exception to complete survival, could be regarded as limited to physical injuries alone.²¹ The proviso refers to the plaintiff dying from causes “other than said personal injuries so received” Not only is it difficult to conceive of an injury to the reputation resulting in death, but the word *received* seems to connote the transfer of some sort of physical force. The terms “medical, hospital and nursing expense” are also appropriate to physical injury. In a District of Columbia case,²² the court allowed an action for slander to survive under a statute which stated that any cause of action survived the death of either party “Provided, however, that in tort actions, the said right of action shall be limited to damages for physical injury except for pain and suffering resulting therefrom.”²³ The court relied on the maxim of interpretation *noscitur a sociis* in holding that since the term “tort actions” was used in connection with terms of physical injury, its import should be limited to actions for physical injuries and should not apply to tort actions generally. The very same argument could be made to limit the import of the survival limitation of the Indiana act to physical injuries alone.

Although the language of the present Indiana act tends to support the limited interpretation, the language of earlier survival acts suggests a more inclusive meaning of “personal injuries.” The 1881 act specifically excluded actions for seduction, false imprisonment and malicious prosecution from the rule that “a cause of action for injury to the person dies

20. Actions excepted from this rule were seduction, false imprisonment and malicious prosecution. Ind. Acts 1881, ch. 38, §§ 6-7. See note 24 *infra*.

21. See statute cited note 4 *supra*.

22. *Soroka v. Beloff*, 93 F. Supp. 642 (D.D.C. 1950).

23. D.C. CODE ANN. § 12-101 (1951).

with the person of either party.”²⁴ Since most of the interests invaded in seduction and false imprisonment, and the sole interest invaded in malicious prosecution, are nonphysical, it may be concluded that the legislature regarded the term “injury to the person” as including nonphysical injuries.

By amendment in 1937, “injury to the person” was replaced by the present term “personal injuries.”²⁵ This change in phraseology could hardly be regarded as evidencing an intention to limit the term to physical injuries, since the term “personal injuries” has been regarded as a broader term than “injury to the person” whenever the question has been raised.²⁶ Therefore, if “personal injuries” is examined in light of the language in prior statutes, as well as the limiting language of the present statute, the argument of *noscitur a sociis* is not nearly so persuasive.

The cases on survival of actions in other jurisdictions are of little aid in interpreting the Indiana statute, since every state has its own distinctive survival statute. An examination of these statutes reveals that all are distinguishable in important respects from the Indiana statute. For that reason the interpretation given the phrases “personal injury” or “injury to person” as used in these statutes should not be regarded as authoritative by the Indiana courts.²⁷ For instance, the result under some

24. “Sec. 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.

“Sec. 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, ch. 38, §§ 6-7.

25. Ind. Acts 1937, ch. 292, § 2. The only change made by the 1955 amendment was to increase the amount of damages from \$1,000 to \$5,000. See statute cited note 1 *supra*.

26. “We think the courts have generally failed to take into consideration that the expression ‘injuries to the person’ and ‘personal injuries’ are not synonymous. . . . In the former the noun ‘person’ indicates a natural body, or perhaps a body corporate, and the injuries contemplated are injuries to that body. In the latter phrase the noun employed is ‘injury,’ and the word ‘personal’ is merely adjective, and, therefore, of far less significance than when used substantively.” *Reed v. Real Detective Publishing Co.*, 63 Ariz. 294, 300, 162 P.2d 133, 137 (1945). In light of the result in this case, the distinction drawn appears superficial. Invasion of right of privacy resulting in mental anguish was regarded as an “injury to the person” which survived, while an action for libel was a “personal injury” to character or reputation which did not survive.

If any weight is to be given to this distinction it might be significant that the phrase “injuries to the person or character” is used in the joinder of actions statute, IND. ANN. STAT. § 2-301 (Burns 1946), the statute of limitations, IND. ANN. STAT. § 2-602 (Burns Supp. 1959), and the married woman’s rights act, IND. ANN. STAT. § 38-115 (Burns 1949).

27. In the following cases the phrases were not limited to physical injury: *Johnson v. Bradstreet*, 87 Ga. 79, 13 S.E. 250 (1891) (libel an “injury to the person” which survives); *Houston Printing Co. v. Dement*, 18 Tex. Civ. App. 30, 44 S.W. 558 (1898) (libel among “personal injuries” which survive).

statutes of finding "personal injury" limited to physical injuries is that actions for injury to an intangible interest would not survive.²⁸ A similar interpretation of the Indiana act would result in complete survival of these same actions.

Since it appears that either the broad or limited interpretation is consistent with the language of the Indiana statute, it becomes necessary to examine the area of policy as expressed through legislative intent. If the survival act is to be regarded as an expression of policy, as all legislative actions are ideally regarded, then the broad interpretation should be adopted. The act would then express the policy that only those injuries which cause a diminution of the decedent's estate should survive²⁹—the policy correctly stated, but incorrectly applied, in the early Indiana cases.³⁰ The limited interpretation would produce an anomaly in that subjective damages for mental anguish, shame and humiliation would be fully recoverable in actions for libel, slander or invasion of privacy, while non-physical damages for pain and suffering resulting from physical injuries would not survive. Unfortunately anomalies such as these are not new in the Indiana law of survival; the original survival act permitted recovery of the nonphysical damages in malicious prosecution, seduction

28. *Ward v. Blackwood*, 41 Ark. 296 (1883) (malicious prosecution not surviving as a "wrong done to the person"); *Shedd v. Patterson* 230 Ill. App. 553 (1923) (malicious prosecution not surviving as "an injury to the person"); *Denslow v. Hutchinson*, 152 Ill. App. 502 (1910); *Catchings v. Hartman*, 178 Miss. 672, 174 So. 553 (1937) (slander not surviving as a "personal action"); *Young v. Aylesworth*, 35 R. I. 259, 86 Atl. 555 (1913) (conspiracy to deprive decedent of membership in an organization not surviving as "trespass on the case for damages to the person"); *Carver v. Morrow*, 213 S. C. 199, 48 S.E.2d 814 (1948) (libel by will not surviving as "injury to the person").

29. This is the policy which has been expressed by the California court in the light of statutory language much more restrictive than that of the Indiana statute. In *Moffat v. Smith*, 33 Cal. 2d 905, 206 P.2d 353 (1949) the plaintiff, injured in an automobile accident, was permitted to recover under a statute which provided that: "Any person or his personal representative may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of such person." CAL. PROB. CODE § 574 (1956). The property damage found here was plaintiff's inability to carry on and advance in his occupation. In *Vallindras v. Massachusetts Bonding & Ins. Co.*, 255 P.2d 457 (Cal. App. 1953), *rev'd on other grounds*, 42 Cal. 2d 149, 265 P.2d 907 (1954), an action for false imprisonment was held to survive to the extent that there had been injury to property in the form of loss of income and attorneys' fees.

30. *Feary v. Hamilton*, 140 Ind. 45, 39 N.E. 516 (1894); *Boor v. Lowery*, 103 Ind. App. 468, 3 N.E. 151 (1885). By virtue of IND. ANN. STAT. § 2-405 (Burns 1946) a personal injury action survives the plaintiff who dies subsequent to a judgment in his favor in the trial court, but prior to the reversal of the judgment by the Supreme or Appellate Court. In *Cincinnati H. & D. Ry. Co. v. McCullough*, 183 Ind. 556, 109 N.E. 206 (1915) the court said that this statute created a logical exception to the general rule that personal injury actions did not survive, because once a claim is reduced to judgment it becomes an asset of the decedent's estate. The court regarded the protection of a decedent's estate as a proper grounds for allowing survival even of a personal injury action.

and false imprisonment while all other injuries to the person, even those involving pecuniary loss, died with the person.³¹

Considering the policy of excepting all nonphysical damages from survival apart from the context of statutory construction, one finds that the only other policy which has received any substantial support is that favoring complete survival of all actions.³² The basic difference between the proponents of these policies is their view of the nature of damages. Those favoring complete survival regard all damages as compensatory and thus affecting the estate.³³ This argument is circuitous since the basic question—for what type of loss is the plaintiff being compensated—remains. If the loss was not actual, pecuniary and measurable, then the decedent's estate cannot be said to have been diminished and his heirs have not been injured. It is the pecuniary loss to the decedent's heirs which forms the damages under the Indiana wrongful death act.³⁴

Certain revisions are required if the language of the Indiana act is to invoke explicitly the policy that all subjective elements of damage die with the person, while damage resulting in pecuniary loss to the estate remains recoverable. Some states have attempted to invoke this policy by specifically excluding certain forms of action, such as libel and malicious prosecution, from survival.³⁵ This approach not only falls within the statutory interpretation problem created by the maxim *expressio unius*

31. The removal of any limitation on the damages that survive the death of the tort-feasor has produced another anomalous situation in regard to the recovery of punitive or exemplary damages under the present survival act. Since the purpose of these damages is to punish the tort-feasor for being "reckless" or "malicious," there is no logical reason for allowing these damages to survive when the tort-feasor dies. This fact was recognized in *Evans v. Gibson*, 220 Cal. 476, 486, 31 P.2d 388, 395 (1934) where it was said: "Since the purpose of punitive damages is to punish the wrongdoer for his acts accompanied by evil motive, and to deter him from the commission of like wrongs in the future, the reason for such damages ceases to exist with his death."

32. See *Evans, A Comparative Study of the Survival of Tort Claims For and Against Executors and Administrators*, 31 MICH. L. REV. 969, 986 (1929).

33. "Since compensation is the purpose of modern tort recovery it should accrue not only to a living person but also to his estate. On this analysis, the coincidence of the deaths of both parties is immaterial. The wisdom of excepting from survival such causes as defamation, seduction, and breach of promise of marriage seems questionable. As civil actions, they are not primarily punitive; moreover, while the interest invaded may not be a pecuniary one, compensation necessarily takes the form of money damages." Note, *Inadequacies of English and State Survival Statutes*, 48 HARV. L. REV. 1008, 1012 (1935).

34. *Northern Power Co. v. West*, 218 Ind. 321, 32 N.E.2d 713 (1941); *Consolidated Stone Co. v. Staggs*, 164 Ind. 331, 73 N.E. 695 (1905).

35. COLO. REV. STAT. ANN. § 152-1-9 (Supp. 1957) (slander or libel); KY. REV. STAT. § 411.140 (1959) (slander, libel and criminal conversation); OKLA. STAT. ANN. tit. 12, § 1052 (1951) (libel, slander, malicious prosecution, nuisance); WIS. STAT. ANN. § 287.01 (1958) (slander or libel).

est exclusio alterius,³⁶ but it is not satisfactory where there is a pecuniary loss to the estate arising out of one of these forms of action. A more logical revision would be to eliminate any reference to survival based on the form of the action, but to refer instead to the type of injury in question. The present Indiana act names "medical, hospital and nursing expense and loss of income" as injuries to be recovered, but this list does not exhaust the type of injuries which could cause diminution of the decedent's estate. Attorneys' fees arising from false imprisonment or malicious prosecution, or a damage to a property interest arising from an invasion of privacy³⁷ are examples of such injuries not provided for by the terminology in the present statute. Rather than enumerate various types of injuries which diminish the decedent's estate and which should thus survive, the statute should merely state that only those injuries causing pecuniary loss to the estate should survive.

ADMISSIBILITY IN INDIANA OF DECLARATIONS MADE BEFORE OR AFTER EXECUTION OF A WILL

An exception to the hearsay rule permits a declaration by a declarant concerning his then-existent state of mind to be admitted into evidence as proof of his mental state at the time of the declaration.¹ This exception has been extended, under certain circumstances to allow such declarations into evidence as a basis for the inference that the then-existent state of mind produced subsequent conduct in accordance with that state of mind;² declarations also have been admitted, but to a much lesser extent, to infer previous conduct.³ Even though the courts have been reluctant to expand this exception, declarations by a testator uttered before and after the ex-

36. In *Gray v. Wallace*, 319 S.W.2d 582 (Mo. Sup. Ct. 1958) the action was for malicious prosecution. Under the Missouri survival act, Mo. REV. STAT. §§ 537.020-030 (1953), actions for slander, libel, assault and battery and false imprisonment were specifically excluded from survival. Nevertheless, the action for malicious prosecution was held to survive due to the legislature's failure to specifically name it in the statute.

37. *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 86 N.E.2d 306 (1949).

1. A brief discussion of declarations of mental state is found in McCormick, *Evidence* 567-578 (1954).

2. *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892); *Atherton v. Gaslin*, 194 Ky. 460, 239 S.W. 771 (1922).

3. *Whitlow v. Durst*, 20 Cal. 2d 523, 127 P.2d 530 (1942); *Moyer v. Moyer*, 64 Utah 260, 228 Pac. 911 (1924); *Atherton v. Gaslin*, 194 Ky. 460, 239 S.W. 771 (1922). But most courts would probably argue as Justice Cardozo did in *Shepard v. United States*, 290 U.S. 96, 105, 106 (1933), where he said: "Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored."