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THE VICTIM'S FAULT IN WRONGFUL DEATH ACTIONS IN FRENCH LAW

At common law liability for causing a wrongful death of another was unknown, it being held that the cause of action for injuring or killing someone did not survive the death of the victim or of the tortfeasor.¹ As far as personal injuries are concerned, in most jurisdictions the common law rule was changed by "survival statutes" within the last 130 years; if the victim should die, the administrator of his estate is permitted to recover for damages suffered by the deceased, and in particular for his medical and hospital expenses, loss of earnings, and pain and suffering. There is no new cause of action, but the old one, which vested in the victim during his lifetime, is permitted to survive.

A new cause of action was established in England by the "Lord Campbell's Act" of 1846: for wrongfully causing the death of someone. The new "wrongful death" action may be brought independently from, and parallel to, the "survival" action. It never vested in the deceased; it cannot exist before the death of the victim, as its purpose is to compensate the survivors for pecuniary losses occasioned by the disappearance of the deceased. Lord Campbell's Act limited the class of people who are permitted to bring the suit to spouses, children, and parents.

This reform of the common law met with fast approval in the United States. Today, there is no state which denies liability in cases of wrongful death. In most states, this result has been achieved by the enactment of statutes modeled after the English one. However, there are many variations (e.g., the group of persons entitled to benefit from the provisions of the statute is broader). In some states, the survival and wrongful death statutes have been combined into one. Contrary to survival actions, those based on wrongful death are brought to recover financial damages suffered by the survivors rather than the victim, and the most important item is loss of support or contribution they were receiving from the deceased.

In France, recovery is based on the sweeping Art. 1382 of the Civil Code, which is the basis of every tort liability, and "makes the person by whose fault the damage occurred liable to make reparation." While in Anglo-Saxon law recovery is limited to pecuniary losses (though they may be broadly understood by the courts), French decisions grant also "moral damages" (*dommages moraux*) for mental pain and suffering occasioned by the loss of the deceased. There is no clear-cut distinction between survival and wrongful death actions; the plaintiffs recover damages either in their own name or as successors of the victim.

Among the problems of administering the rules pertaining to wrongful death actions, that of possible defenses is most important. The usual question is the contributory or concurring negligence of the plaintiff or of the victim. In the former situation, the plaintiff's fault can be advanced against him in French law, and should his negligence be the only cause of the dam-

¹ See, e.g., *Huggins v. Butcher* (1607), 1 Brownl. & Golds. 205, 123 Eng. Rep. 756; *Baker v. Bolton* (1808), 1 Camp. 493, 170 Eng. Rep. 1033.

ages, the defendant will necessarily be free from liability.² In the United States, most jurisdictions apply the same rule in cases where there is just one plaintiff. If, however, the action is brought on behalf of more beneficiaries, which is a frequent situation in cases of wrongful death, there is a split of authority among the American courts. While some of them permit whole recovery,³ derogating from the general rule on contributory negligence, others hold that the fault of one of the beneficiaries is a good defense as against all of them; the third view (which is the majority rule), best supported by logic and traditional legal reasoning, permits this defense only as against the negligent beneficiary, but not against the others. Of course, it must be kept in mind that the scope of the defense of contributory negligence will be different in the French and Anglo-Saxon laws. In the latter (except as modified by statute, including England and a few states in the United States), it will act as a complete defense, and the defendant will escape any liability. In France (and under the statutory rule in some common law countries) damages will be split in proportion to the degree of the fault.

The most frequent situation is that in which the victim himself was contributorily negligent. Lord Campbell's Act dealt expressly with such a contingency; it provided for the recovery of the beneficiaries only in case the victim would be entitled to recover damages if death had not ensued. In most states of the United States, this provision of the Act has been repeated; in others, however, the fault of the victim is not a good defense (unless, of course, it was the only cause of his death.) Thus, there is a split. The latter rule is possibly more logical, the wrongful death action being a new one which could not be born before the death of the victim, and therefore it could be argued that the victim and the defendant, who both brought about the death and the resulting damages to the survivors, should be treated as a kind of joint tortfeasors with several and joint liability attaching to the defendant. However, the cause of action is so strictly connected with the victim and his reciprocal behavior with the defendant, that in most states the law (which is "not logic but experience") follows the pattern set in 1846.

In France, there has been much preoccupation with this problem in recent years, and the decisions rendered in different civil and criminal cases are in conflict with each other. The Criminal Chamber of the Court of Cassation, which previously upheld the defense of the victim's contributory negligence, decided recently to reverse itself on this point,⁴ and grants full recovery to the plaintiff.⁵ However, the reaction of the courts was, in general, unfavorable to the new rule, and in most recent decisions the fault of the victim was permitted to be advanced by the defendant as a partial defense to his liability.⁶ Likewise, legal commentators did not accept the new ap-

² Trib. civ. Meaux, Dec. 23, 1948, *Gaz. Pal.* 1948. 2. 177; Trib. civ. Peronne, Oct. 16, 1952, *D.* 1952. 736.

³ In a few states this is true even if there is only one beneficiary of the action, and he was contributorily negligent.

⁴ Meurisse, note in *D.* 1963. 11-12.

⁵ *Ibid.*, *Crim. Mar.* 31, 1960, *Bull. Crim.* No. 392; Dec. 26, 1960, *ibid.*, No. 608; June 15, 1961, *ibid.*, No. 300; Mar. 8, 1962, *J.C.P.* 1962. IV. 57, *Gaz. Pal.* 1962. 1. 416.

⁶ Meurisse, *ibid.*

proach without criticism. Meurisse⁷ advanced the following arguments in favor of recognizing as good those defenses which would be available against the victim: familial solidarity which requires the same treatment of the victim and of those who stand in his rights; the rule of common sense that it would be surprising to treat the latter better than the victim, in spite of the fact that their damages, while being direct indeed, were inflicted by ricochet only; the legal principle that the victim and the third person responsible for the accident are not liable jointly and severally as to prospective plaintiffs.

Two significant decisions along these lines are *Min. publ. v. Delaire*⁸ and *Min. publ. v. Lacoche*.⁹

From the statement of facts by the court in the first case it appears that the deceased was killed by a car negligently driven by defendant, and that he was contributorily negligent. The defendant's share of responsibility in the accident was fixed by the court below at fifty per cent.

As against the contention of the plaintiffs that they should not bear any consequences of the fault of the victim, the court of appeal held that the claimants were not entitled to ask defendant for reparation of that part of the damage which was chargeable to the victim, and affirmed the judgment. There were three items in the recovery: expenses occasioned by the death (990 NF), material (compensatory) damages (10,000 NF), and "moral damages," which were granted to the surviving spouse (10,000 NF), the father of the victim (1,200 NF) and his son and daughter (1,000 NF each).

The opinion in the second case was more elaborate than most French decisions. The defendant was held guilty of involuntarily having caused the death of a certain Deville Adrien as well as injuries which resulted in complete inability to work of a certain Thibault Alain, by "awkwardness, imprudence, inattention, negligence or disregard of regulations," and of having omitted to give the right of way to a person who had priority, coming from a different road to the right. However, Deville was found not to be free from blame, as—although entitled to have the right of way—he "should not have dispensed with the observance of the rules of prudence which are necessary at the moment when one enters a crossing without visibility." The victim's negligence was fixed at the proportion of one fourth, and his fault was held to exonerate the defendant of civil liability to that degree. Alain Thibault, who was a passenger in Deville's car, was held to be entitled to a complete reparation of his damages from the defendant, as one of the tortfeasors, as the split of responsibility could not be advanced against him.

The court recognized that there was a conflict of authorities on the question of whether the split of responsibility could be advanced against those who stand in the victim's rights (*les ayants cause*).¹⁰ It went on by stating that the defense of contributory negligence is good as against the surviving

⁷ "Les ayants cause à titre personnel peuvent-ils se voir opposer la faute de la victime?" D. Chronique, 1962. 93.

⁸ D. 1963. 9 (Cour d'appel de Douai, Jan. 31, 1962).

⁹ D. 1963. 9, 10 (Trib. de Grande Instance d'Avesnes, May 22, 1962).

¹⁰ In most American jurisdictions this approach would be wrong, the plaintiffs bringing the suit in their own right, the cause of action having been born at the time of the victim's death.

victim "who cannot take advantage of his own fault in order to receive an integral reparation of his damages," and continued:

[W]hen he dies as a consequence of the accident, judicial opinions and writers brand damages of those who stand in his rights as damages "by ricochet" or "by repercussion," terms which mean that their damages are not different from those of the victim, but to the contrary, come because of his disappearance, by "explosion," in consequence of the death, and by a partial extension (projection) on each of the plaintiffs; . . . such a concept explains that those who stand in the rights of the victim can be active beneficiaries of the reparation of their personal damages, but possibly . . . subjected to all reasons for the decrease or exoneration which would be available against the victim . . . [T]o admit a contrary rule would amount to the creation of "joint and several" liability of the defendant and the victim to redress in full the damages of the latter, in disregard of the rule *nemo propriam turpitudinem auditur allegans*; . . . in case of the death of a victim recognized . . . wholly responsible, it would be necessary to admit likewise that the third person being sued would be required to redress wholly the damages of those suing in the rights of the victim . . . this solution, the extreme consequences of which had never been accepted, leads, in fact, to establish a liability without fault (and without legal text); and that, therefore, it must be rejected . . .

Meurisse¹¹ greeted the two recent decisions with satisfaction, agreeing with the statement that another approach would amount to recognition of liability without fault, as the defendant would have to redress the totality of the damage, even if it has not been brought about by him.

In American law, such a statement would clearly be incorrect. Liability for car accidents is based on negligence, and nobody can be held responsible without fault.¹² If the defendant is not to be blamed in any way, he escapes liability, and the careful or negligent behavior of the victim is of no significance whatsoever. On the other hand, in France responsibility for car accidents is based on the fiction of the act of the thing under the defendant's guard, and the practically irrebuttable presumption of the fault of the latter results, in effect, in absolute liability of the guardian. However, the assertion that not to recognize the defense of the victim's negligence in wrongful death actions would necessarily result in absolute liability of the defendant even if the victim should be "wholly responsible" for the accident does not seem to be correct. An act of God or of a third person, as well as the exclusive negligence of the victim exonerates the careful defendant in an action brought by the victim, and there is no reason for insisting that the same defenses should not be available in an action brought by his survivors.

It is impossible, of course, to disagree with the statement that "everyone should be bound to redress only the consequences of his own act."¹³ The

¹¹ Note cited *supra*, n. 4.

¹² There are exceptions, like the family car doctrine in some jurisdictions, or the car owner legislation in a few states.

¹³ Meurisse, note cited *supra*, n. 4.

interpretation and application of this principle, however, is by no means clear. Every act of a human being brings about more than one consequence (not necessarily, it is true, having legal bearing), which results in complicated problems of liability along the lines often referred to as those of "proximate cause." On the other hand, hardly anything that happens is a consequence of a single act of only one person. Some persons may be blameless, some others at fault, but our lives, successes, failures, and damages are a result of the behavior of ourselves as well as of our relatives, friends, neighbors, and strangers. In torts occasioned by a concurring negligence of the defendant and victim, the totality of damages are a consequence of the fault of the former as well as of that of the latter. This seems logical, but resulted in the unfortunate, harsh rule of contributory negligence. In French law, it may be argued that the seemingly indivisible result is partially a consequence of an act of the defendant and partially of an act of the victim, and that therefore "the author of damages, which may be traced to his fault and the fault of the victim," is liable "only to the extent he is responsible"¹⁴ (in the sense of being blamed for the accident). Coupled with the lack of recognition that the survivors have a new cause of action, this approach results in the rule that in wrongful death actions damages are recoverable only in the proportion of the defendant's fault as compared with that of the victim. However, the last word of the plenary Assembly (or of the United Chambers) of the Court of Cassation has not been said as yet, and the final (if anything is final) French rule has not been established.

It may be added that in the Lacoche case the court had to rule on an additional point: a claim for "moral damages" was also filed by the surviving concubine of the deceased, who lived with him for the last few years. Denying redress, the court said that "a relationship of concubinage cannot, by reason of its irregularity, present a value of legitimate interests judicially protected; . . . it is the more so when the parties to the concubinage were both parties to undissolved marriages, as appears in the present case," and concluded that the claimant "cannot establish any damages legally entitled to be compensated, and must therefore be declared as having no standing in her suit."

Although no identical question could arise in American law, in which only pecuniary damages are recoverable, the French approach would certainly meet with approval by American courts, which deny legal protection to any illicit relationship, holding, e.g., as invalid a contract in which immoral relationship is a consideration.

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¹⁴ *Ibid.*

* Member of the Board of Editors.