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5-1932

## Pleading-Actions for Death of Minor Child-Damages

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### Recommended Citation

(1932) "Pleading-Actions for Death of Minor Child-Damages," *Indiana Law Journal*: Vol. 7 : Iss. 8 , Article 6.  
Available at: <https://www.repository.law.indiana.edu/ilj/vol7/iss8/6>

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Maurer School of Law  
Bloomington

PLEADING—ACTIONS FOR DEATH OF MINOR CHILD—DAMAGES—Action to recover for loss of services and funeral expenses, occasioned by the death of the appellant's minor son, alleged to have been caused by the negligence of the appellee. The jury returned a verdict in favor of the plaintiff and assessed damages to the amount of \$1. The appellant in his appeal contended that the damages were too small to be sustained by the evidence, and based his appeal on clause 5, *Sec. 610—Burns 1926*, which allows a new trial in cases of "error in assessment of the amount of recovery, whether too large or too small, where the action is upon a contract or for the injury or detention of property". The appellee contended that a new trial was barred by *Sec. 611—Burns 1926*, which provides that "a new trial may not be granted on account of the smallness of the damages in actions for injury to the person or reputation, \* \* \*". *Held*, the action is based on an injury to a property right. Damages erroneous.<sup>1</sup>

The doctrine that there are two causes of action in cases of injury or death of a minor child, one in favor of the child or his representative and the other by the parent of the child, has been recognized under both the common law and under the statutes. This is now well established doctrine in Indiana,<sup>2</sup> and is widely accepted in the majority of other states.<sup>3</sup>

The child's or representative's action is based upon the injuries personal to the child, such as pain, suffering, permanent injury and impairment

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<sup>1</sup> 169 Fed. 766 (1909).

<sup>2</sup> *Thompson v. Fort Branch*, Supreme Court of Indiana, Nov. 20, 1931, 178 N. E. 440.

<sup>3</sup> *Long v. Morrison*, (1860) 14 Ind. 595, 77 Am. Dec. 72; *Rogers v. Smith*, (1861) 17 Ind. 323, 79 Am. Dec. 483; *Ohio & Mississippi R. R. Co. v. Tindall*, (1859) 13 Ind. 366, 74 Am. Dec. 259; *Pennsylvania Co. v. Lilly*, (1881) 73 Ind. 252; *Pittsburgh, etc. Ry. Co. v. Vining's Admr.*, (1867) 27 Ind. 513, 92 Am. Dec. 269; *Louisville, etc. Ry. Co. v. Goodykoontz*, (1888) 119 Ind. 111, 21 N. E. 472; *Mayhew v. Burns*, (1885) 103 Ind. 328, 2 N. E. 793; *Public Utilities Co. v. Whitehead*, (1921) 78 Ind. App. 85, 134 N. E. 894; *Boyd v. Blaisdell*, (1860) 15 Ind. 73.

<sup>4</sup> *Tidd v. Skinner*, (1919) 225 N. Y. 422, 122 N. E. 247; *Cowden v. Wright*, (1841) 24 Wend. (N. Y.) 429, 35 Am. Dec. 633; *King v. Viscoloid*, (1914) 219 Mass. 420, 106 N. E. 988; *McGreevey v. Boston Elev. Co.*, (1919) 232 Mass. 347, 122 N. E. 278; *McGarr v. Natl. and Providence Worsted Mills*, (1902) 24 R. I. 447, 53 Atl. 320; *Windle v. Davis*, (1922) 275 Pa. 23, 118 Atl. 503; *McClellan v. L. F. Dow Co.*, (1911) 114 Minn. 418, 131 N. W. 485; *Lascher v. Venus*, (1922) 177 Wis. 558, 188 N. W. 613; *Snyder v. Klink*, (1922) 273 Pa. 234, 116 Atl. 811; *Nolan v. Moore*, (1921) 81 Fla. 594, 88 So. 601; *Netherland v. Hollander*, (1894) 59 Fed. 417, 8 C. C. A. 169.

of earning capacity.<sup>4</sup> The parent's action is based upon his right to the services of the minor child, and is for the loss of service, and the expenses caused the parent as a result of the injury or death of the child.<sup>5</sup> This right of action is based upon the parent's right to the minor child's services, and the duty of care and maintenance. The actual rendition of the service is immaterial to this right of action.<sup>6</sup> There have been some cases that have held that the parent must prove some dependency upon these services,<sup>7</sup> but doubtless the great majority favor the rule that such is immaterial.<sup>8</sup>

Since the father is primarily entitled to the services of his minor child, the right of action in these cases rests in him,<sup>9</sup> and can only be enforced by the mother where the right has developed upon her through the father's death, desertion, or for other causes.<sup>10</sup> In order for another to enforce this right to recover, that person has to show that the parents have relinquished their rights to the action, or that they are dead and that the person suing is entitled to the custody and services of the child.<sup>11</sup>

These actions are distinct and separate, the only thing common to them is the injury of the minor child. The wrongs are separate injuries, one for personal injuries to the child, and the other for injury to the parent's property right in the services of the child.<sup>12</sup> Damages for one injury cannot be recovered in an action for the other injury.<sup>13</sup> Also recovery under one action does not bar suit and recovery by the other

<sup>4</sup> *Rogers v. Smith*, *supra*, note 2; *Boyd v. Blaisdell*, *supra*, note 2; *McGreevey v. Boston Elev. Co.*, *supra*, note 3; *Plummer v. Webb*, (1825) 19 Fed. Cas. No. 11, 234, 1 Ware (75) 69.

<sup>5</sup> *Louisville, etc. Ry. Co. v. Goodykoontz*, *supra*, note 2; *Public Utilities Co. v. Whitehead*, *supra*, note 2; *Citizens Street Ry. Co. v. Willooby*, (1895) 15 Ind. App. 312, 43 N. E. 1058; *Kennedy v. Woolworth Co.*, (1923) 200 N. Y. S. 121, 205 App. Div. 648.

<sup>6</sup> *Tornroos v. R. H. White Co.*, (1915) 220 Mass. 326, 107 N. E. 1015; *Yost v. Grand Trunk R. Co.*, (1910) 163 Mich. 564, 128 N. W. 784.

<sup>7</sup> *Savannah Elec. Co. v. Thomas*, (1923) 30 Ga. App. 405, 118 S. E. 481; *Owen v. Anchor Duck Mills*, (1925) 34 Ga. App. 315, 129 S. E. 301; *Central of Ga. Ry. Co. v. Swann*, (1917) 19 Ga. App. 691, 91 S. E. 1068.

<sup>8</sup> *Williams v. Hines*, (1921) 229 S. W. 414; *Louisville, etc. Ry. Co. v. Goodykoontz*, *supra*, note 2; *Mayhew v. Burns*, *supra*, note 2; *McCarr v. Natl. Providence*, *supra*, note 3; *Kennedy v. Woolworth Co.*, *supra*, note 5; *North Pennsylvania R. Co. v. Kirk*, (1879) 55 Pa. 15.

<sup>9</sup> *Louisville, etc. Ry. Co. v. Goodykoontz*, *supra*, note 2; *Citizens Street Ry. Co. v. Willooby*, *supra*, note 5; *Snyder v. Klink*, *supra*, note 3; *McGreevey v. Boston Elev. Co.*, *supra*, note 3.

<sup>10</sup> *Louisville, etc. Ry. Co. v. Goodykoontz*, *supra*, note 2; *Ohio, etc. R. Co. v. Tindall*, *supra*, note 2; *Citizens Street Ry. Co. v. Willooby*, *supra*, note 5; *The Joshua W. Rhodes*, (1919) 259 Fed. 604; *Furman v. Van Sise*, (1847) 56 N. Y. 435, 15 Am. Rep. 44; *Horgan v. Pacific Mills*, (1893), 158 Mass. 402, 33 N. E. 581; *Commissioners v. Hamilton*, (1883) 60 Md. 340, 45 Am. Rep. 739; *McGarr v. National and Providence Mills*, *supra*, note 3; *Tidd v. Skinner*, *supra*, note 3.

<sup>11</sup> *Citizens Street Ry. Co. v. Willooby*, *supra*, note 5; *Walters v. Chicago, etc. Ry. Co.*, (1873) 36 Iowa 458.

<sup>12</sup> *Louisville, etc. Ry. Co. v. Goodykoontz*, *supra*, note 2; *Public Utilities Co. v. Whitehead*, *supra*, note 2; *Boyd v. Blaisdell*, *supra*, note 2; *Kennedy v. Woolworth Co.*, *supra*, note 5; *Nolan v. Moore*, *supra*, note 3; *McGreevey v. Boston Elev. Co.*, *supra*, note 3.

<sup>13</sup> *Public Utilities Co. v. Whitehead*, *supra*, note 2; *Binford v. Johnston*, (1882) 83 Ind. 426, 42 Am. Rep. 508; *Walters v. Chicago, etc. Ry. Co.*, *supra*, note 11; *Pittsburgh, etc. Ry. Co. v. Vinings*, *supra*, note 2.

party in his own right.<sup>14</sup> Under this rule cases have allowed the father to recover in an action as representative for the personal injuries and death of a minor child, and then in another action as father for the loss of services and expenses.<sup>15</sup>

Under this doctrine it is evident that *Sec. 611—Burns 1926* would not bar the granting of a new trial to the appellant. The appellant's right of action is for an injury to a property right, and should not in any way be limited by a statute concerning personal injuries.

The question of what damages are recoverable in each case has been the point of severe controversy and conflict. The rule of *actio personalis moritur cum persona* governed under the common law, and allowed no recovery for damages occasioned by death of the person. This rule would only allow the parent to recover for loss of services from time of injury until death, and the expenses that were caused by the injury, but not for funeral expenses.<sup>16</sup> The rule also barred the administrator from recovering for loss occasioned by death. This common law rule has been changed by statute,<sup>17</sup> and now almost universally, in this country, the parent is allowed to recover for all his pecuniary loss, and the administrator of the parent as representative is given the same right.

The child or his representative can recover for all the personal injuries and losses that were sustained by him due to the injury or death.<sup>18</sup>

The parent can universally recover for the loss of services, both past and prospective, for the period of the child's minority, but cannot recover for loss of services after majority; also for the expenses of care and attention and medical services made necessary by the injury, and for appropriate funeral expenses.<sup>19</sup> But the parent cannot recover loss of society, mental suffering and anguish, or for injuries personal to the child.<sup>20</sup>

The principal case is undoubtedly in accord with the great weight of authority on both questions, and is a complete and accurate statement of the law on those questions.

A. C. J.

**SALES—CONDITIONAL SALE—ACCESSION**—Plaintiff sold two truck tires to one Cornett under a conditional sales contract retaining title to itself until full payment had been made therefor. These tires were placed upon the truck the defendant had sold to Cornett under a conditional sales contract retaining title in itself and also giving defendant the right to

<sup>14</sup> *Rogers v. Smith*, *supra*, note 2; *McGovern v. N. Y. C., etc. Ry. Co.*, (1876) 67 N. Y. 417.

<sup>15</sup> *McGovern v. N. Y. C., etc. Ry. Co.*, *supra*, note 14; *Pennsylvania Co. v. Lilly*, *supra*, note 2.

<sup>16</sup> *Louisville v. Goodykoontz*, *supra*, note 2; *Long v. Morrison*, *supra*, note 2.

<sup>17</sup> *Long v. Morrison*, *supra*, note 2; *Sec. 274—Burns 1926*.

<sup>18</sup> Cases as cited under (4) *supra*.

<sup>19</sup> *Cowden v. Wright*, *supra*, note 3; *Pennsylvania Co. v. Lilly*, *supra*, note 2; *Boyd v. Blaisdell*, *supra*, note 2; *Public Utilities Co. v. Whitehead*, *supra*, note 2; *Indianapolis Traction Co. v. Croly*, (1914) 65 Ind. App. 543, 104 N. E. 329; *Rains v. St. Louis, etc. Ry. Co.*, (1879) 71 Mo. 164; *Oakland R. Co. v. Feilding*, (1864) 28 Pa. 326.

<sup>20</sup> *McGarr v. Natl. and Providence Mills*, *supra*, note 3; *Pyle v. Waechter*, (1926) 202 Iowa 695, 210 N. W. 926; *Pennsylvania Co. v. Lilly*, *supra*, note 2.