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Who May Sue for Wrongful Death Caused and Occurring Outside the State of the Forum Rose v. Phillips Packing Co., Inc.

[43] See cases collected in notes in: 32 A. L. R. 463; 92 A. L. R. 578; 14 R. C. L., Secs. 143-148, 152-154, 156-159, and the additional annotations at 5 R. C. L. Permanent Supplement.

[44] 212 Fed. 373 (C. C. A. Fourth Circuit 1914).

WHO MAY SUE FOR WRONGFUL DEATH CAUSED AND OCCURRING OUTSIDE THE STATE OF THE FORUM

Rose v. Phillips Packing Co., Inc.[1]

The plaintiff, a Virginia citizen, appointed as administratrix of the estate of her infant son in Virginia, sued the defendant, a Maryland corporation, in the United States District Court for Maryland, basing her claim on the Virginia wrongful death statute. The son's death was caused by eating canned herring, alleged to have been negligently prepared and sold by the defendant, the wrongful act taking effect and the death occurring in Virginia. The declaration (in several counts) was demurred to (among other grounds) on the arguments: "(1) that the Virginia statute should not be enforced in Maryland by reason of dissimilarity to the Maryland statutory form of Lord Campbell's Act; (2) that the suit in Maryland may not be maintained by a foreign administratrix; . . ." After the beginning of the suit, the Virginia administratrix took out ancillary letters in Maryland and asked leave to be made a party plaintiff in

[1] 21 Fed. Supp. 485 (D. C. Md. 1937).

the latter capacity. This amendment was opposed on the ground that the statute of limitations had run. *Held:* Demurrer (on the above grounds) overruled and the amendment allowed (although the court felt the ancillary letters unnecessary).

In answering the contention that the dissimilarity of the Virginia and Maryland statutes precluded recovery the Court held that no such dissimilarity existed as should preclude recovery. The opinion, while it adhered to the usual Federal way of stating the conflict of laws rule on the point as one of similarity of statutes, recognized the trend of modern authority toward enforcing the wrongful death claim as it arose in the foreign jurisdiction although no similar statute exists in the forum.[3] It might be observed that the liberal application of the similarity rule in this case wipes out most of the objections to it. The differences in the statutes were pointed out by the Court to be:

> "(a) In Maryland (Code, Art. 67 (Sec. 2)) the suit is brought in the name of the State for the use of the beneficiaries (husband, wife, parent or children of the decedent) while in Virginia the suit is brought by the personal representatives of decedent.
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> (b) In Maryland the recovery is for the benefit only of dependents of the classes above indicated, while under the Virginia statute if there are not dependents in the preferred classes mentioned in the statute, a recovery may be had for the benefit of the estate.
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> (c) In Maryland the amount of damages recoverable are not limited by statute but are by judicial decision to compensatory damages only, while in Virginia the statute limits the recovery to $10,000, but within that limit permits exemplary damages to be recovered.
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> (d) In Virginia a suit begun by a decedent before his death does not abate but can be revived by a personal representative; while in Maryland after the decedent's death a new suit would have to be brought under the statute."

On the right of the foreign administratrix to sue, the Court reasoned that she sues as statutory appointed trustee and accordingly is not precluded by the ordinary rules that limit foreign administrators and executors to actions in the

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[3] For a note dealing primarily with the rules on this point of general recognition of the claim for wrongful death caused and occurring in another jurisdiction, see (1937) 1 Maryland Law Rev. 162. See also the subsequent statute, Md. Acts, 1937, Ch. 495.

jurisdiction of their appointment. This seems to be clearly a correct juridical analysis of the situation and receives the support of considerable authority.[3] However, there have been cases that have raised the objection that a foreign administrator must take out ancillary letters before acting in any state other than that of his appointment.[4] The Restatement of Conflict of Laws seems to approve clearly of the view of the instant case only if the foreign statute names a particular administrator (such as that of the place of injury or the domicil of the decedent).[5]

It might be observed that the problem of suit in the name of an administrator can arise principally in two other ways: (1) When suit is brought by an administrator appointed at the forum;[6] (2) When suit is brought by an administrator appointed at the domicil of the deceased, which happens to be neither the place of wrong nor the forum.[7]

The first of these two possibilities raises the problem of whether the forum's administrator appropriately comes within the meaning (or needs to come within the meaning) of the statute of the place of wrong.[8] The second raises the same question for the domiciliary administrator and also the question of his right to sue outside of the state of his

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[3] Dickinson v. Jones, 309 Pa. 256, 163 Atl. 516, 85 A. L. R. 1226 and note, 1231 (1932). Reilly v. Antonio Pepe Co., 108 Conn. 436, 143 Atl. 568 (1928); Connor v. New York, N. H. & H. R. Co., 28 R. I. 560, 68 Atl. 481, 18 L. R. A. (N. S.) 1252 (1908); Rose, *Foreign Enforcement of Actions for Wrongful Death* (1935), 33 Mich. L. Rev. 545, 565-572. In the instant case (21 Fed. Supp. 485, 487), the Virginia statute allowed recovery for the benefit of the estate of the deceased in the absence of specially named beneficiaries. Accordingly, it might have presented for argument the situation in which the administrator sues most nearly in his capacity as such rather than as trustee. However, referring to the point in connection with whether the Statute was one for exemplary damages (and not as to whether recovery for creditors impaired the administrator's position as statutory trustee) the Court said the decision should be controlled by the actual facts which showed one of the named beneficiaries surviving. Cf. Lauria v. E. I. Du Pont De Nemours & Co., 241 F. 687, 690 (1917).

[4] Rose, op. cit. supra note 3; Cornell Co. v. Ward, 168 F. 51 (1909); Bruce v. Cincinnati R. R., 83 Ky. 174 (1885); II Beale, Conflict of Laws, Sec. 396.1; Note, 85 A. L. R. 1231, 1245.

[5] Secs. 394-396. It is section 396 which, in its general wording and Mr. Beale's interpretation of it, supra note 4, seems to call for ancillary letters in the forum.

[6] Dickinson v. Jones, supra note 3; Dennick v. Central R. R. Co., 103 U. S. 11, 26 L. Ed. 439 (1880).

[7] Pearson v. Norfolk & W. R. Co., 286 Fed. 429 (1923); Note, 85 A. L. R. 1231, 1250.

[8] The cases cited in footnote 6 and many others seem to hold in favor of allowing such representative to sue. Note, 85 A. L. R. 1231, 1232. Cf. Ash v. B. & O. R. R. Co., 72 Md. 144, 19 Atl. 643, 20 Am. St. Rep. 461 (1890). See Beale, op. cit. supra note 4, 1313, Sec. 396.1 A few cases deny suit to the administrator appointed at the forum, Battese v. Union P. R. R. Co., 102 Kan. 468, 170 P. 811 (1918); Vawter v. Ry., 84 Mo. 679, 54 A. R. 105 (1884); Note, 85 A. L. R. 1231, 1241.

appointment.[9] It would seem that a liberal forum should adopt the view that suit may be brought by any appropriately appointed administrator unless recovery has already been had elsewhere on the same cause of action, and that since he sues as a statutory trustee (or possibly as a trustee under the forum's conflict of laws rule) he need not have letters of administration from the forum.[10]

The problem of who may sue can arise, also, in situations where the foreign statute names someone other than the administrator or executor of the deceased as the person to bring the action (such as, the widow or some one of the named beneficiaries;[11] or, perhaps, the state, as under the Maryland statute).[12] It has generally been held that the person named in the statute of the place of wrong is the person who must bring the suit.[13] This does not seem to be an inevitable result;[14] but it need not work any great hardship in those cases where one of the beneficiaries is named. Also, an application of the views approved earlier in this note would remove most of the difficulties that have complicated recovery when the administrator is named. If the state is named in the foreign statute, more possibility of an *impasse* exists.[15] The Supreme Court, in such case, has allowed suit to stand in the name of an administrator appointed in the forum, and has said that the party designated to sue was merely *nominal*, and that the rights of the *real* parties in interest (the named beneficiaries) would be protected.[16] This decision would seem to be in accord with the fulfillment of the purpose of the Wrongful Death statutes generally, and as well with the modern spirit of Conflict of Laws.

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[9] Recognizing the right to sue, Pearson v. N. & W. R. Co., supra note 7; Note, 85 A. L. R. 1231, 1250. Denying the right to sue, Brooks v. Southern P. Co., 148 Fed. 986 (1906), affirmed on other grounds in 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141 (1905).

[10] Goodrich, Conflict of Laws, Sec. 101; Rose, op. cit. supra note 3.

[11] Powell v. Great Northern Ry., 102 Minn. 448, 113 N. W. 1017 (1907); Beale, op. cit. supra note 4; Sec. 395.

[12] Stewart v. B. & O. R. R. Co., 168 U. S. 445, 18 S. Ct. 105, 42 L. Ed. 537 (1897). Md. Code, Art. 67.

[13] Teti v. Consolidated Coal Co., 217 Fed. 443 (1914); Powell v. Great Northern Ry., supra note 11; Wooden v. Western N. Y. & P. R. R., 126 N. Y. 10, 26 N. E. 1050, 22 A. S. R. 803, 13 L. R. A. 468 (1891); Usher v. West Jersey R. R., 126 Pa. 206, 17 Atl. 597, 4 L. R. A. 261, 12 A. S. R. 863 (1889).

[14] Stewart v. B. & O. R. R., supra note 12; Bussey v. Charleston & W. C. Ry., 73 S. C. 215, 53 S. E. 165 (1906); Dodge v. North Hudson, 177 Fed. 986 (1910); Teti v. Consolidated Coal Co., supra note 13.

[15] According to Rose, op. cit. supra note 3, 587-89, Maryland seems to be the only State with such a statute.

[16] Stewart v. B. & O. R. R., supra note 12.

The problem of who may sue has not received very specific (or authoritative) treatment in the Maryland Court of Appeals because the cases that otherwise might have settled the point were resolved primarily under the doctrine that the suit could not be brought at all in Maryland because of the dissimilarity of the foreign wrongful death statutes. Under this approach, the naming of the person to sue was only one of the dissimilarities involved.[17] The recent Maryland statute,[18] passed to replace this narrow doctrine of the courts with the liberal policy of applying the foreign statute "as though such foreign law were the law of this state" says nothing specifically to help the Courts in facing the problem of who may sue. It is true that the liberal policy of enforcement adopted by the statute might be said to impel the Courts toward a liberal policy on the procedural point of who may sue. This could be said to be favored by the wording of the statute ". . . provided the rules of pleading and procedure effective in the Court of this State in which action is pending govern and be applied as to give effect to the rights and obligations created by and existing under the laws of the foreign jurisdiction in which the wrongful act neglect or default occurred."

However, it would seem that if the statute is to be complete, it should preclude the difficulty that may arise as to who is the proper person to bring the suit. It is suggested

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[17] Cf. Maryland Annotations to Restatement of Conflict of Laws, Secs. 391-397; Ash v. B. & O. R. R. Co., supra note 8; London Guarantee & Accident Co. v. Balgowan Steamship Co., 161 Md. 145, 147, 155 A. 334, 77 A. L. R. 1302 (1931); Davis v. Ruzicka, 170 Md. 112, 183 Atl. 569 (1936) (noted in (1937) 1 Md. Law Rev., 162); cf. Dronenberg v. Harris, 108 Md. 597, 71 A. 81 (1908).

[18] Md. Acts, 1937, Ch. 495, to be Md. Code Supp., Art. 67, Sec. 1-A. It was pointed out prior to the enactment of that statute, Note (1937) 1 Md. L. Rev. 162, 165, n. 19, that any statute to be passed should attempt to resolve problems of dissimilarly, in addition to permitting the local action. That suggestion endeavored (unsuccessfully, to be sure) to secure a statutory clarification of such points as the one discussed in this note. Another, which easily might cause difficulty (even under the present statute) would be with regard to the appropriate period of limitations to apply to such action. Another, which the present statute could be construed to preclude (although not necessarily so) would be as to the Maryland Court's power to recognize a defence based on the foreign statute's granting punitive damages as having some feature construed to be against the strong public policy of the forum.

One other phase of the present statute calls for comment. As it now stands it covers death caused by any "wrongful act, neglect or default . . . in another state, the District of Columbia, or territories of the United States". Should not its policy be definitely extended to causes of action arising in other civilized states of the world, subject to the recognized Conflict of Laws exceptions based on the strong public policy or procedural limitations of the forum and possibly an appropriate application of the doctrine of *"forum non conveniens"*?

that there should be added to Art. 67, Sec. 1A, a section to read:

Art. 67, Sec. 1B.

In all actions instituted in the Courts of this State under section 1A of this Article, any dispute as to the appropriate person to bring the suit shall be resolved by applying the following rules:

(a) If the wrongful death statute of the foreign jurisdiction provides for suit in the name of a particular administrator, or executor (i. e., of that jurisdiction, or of the domicil of the decedent), such administrator or executor, upon proof of his qualification under the laws of the state which appointed him, shall be allowed to sue in Maryland.

(b) If the wrongful death statute of the foreign jurisdiction provides for suit in the name of an administrator or executor, without naming any particular administrator or executor, then, any administrator or executor, upon proper proof of his qualification to act as such under the law of the state of his appointment, shall be allowed to sue in Maryland.

(c) If the wrongful death statute of the foreign jurisdiction provides for suit in the name of one of the persons to be benefited (as the widow of the deceased, his child, grandchild, etc.), such person may sue in Maryland.

(d) If the wrongful death statute of the foreign jurisdiction provides for suit in the name of the state, suit may be brought in the name of the State of Maryland for the benefit of the persons meant to be protected by the foreign statute.[19]

(e) In any case where the substantial rights of the parties entitled to benefit under an applicable foreign wrongful death statute stand to be defeated for lack of a proper party plaintiff, whether it be because the person named as the party to sue under the foreign statute cannot appropriately sue in Maryland, or because such person so named fails for any reason to sue in Maryland, or for any other reason, then suit may be brought in Maryland in the name of the State of Maryland for the benefit of the persons protected by the foreign law; and a suit previously brought may be amended to that effect.

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[19] Cf. supra note 15.