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# RECENT DEVELOPMENTS IN NORTH CAROLINA TORT LAW

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## NEGLIGENCE

### *Res Ipsa Loquitur*

In *Greene v. Nichols*,[1] the North Carolina Supreme Court overruled a number of earlier decisions and applied *res ipsa loquitur* to an unexplained, single-car accident. Proof by the plaintiff, a passenger in the car, that the defendant's car suddenly and unaccountably had left the road and collided with a tree was held sufficient for submission to the jury. Although some extension of the holding in *Greene* was required, two decisions by the North Carolina Court of Appeals that applied *res ipsa* to similar unexplained mishaps seem correct.

While in *Greene* the plaintiff's evidence tended to eliminate possible causes of the accident other than the driver's negligence and unexpected illness, in *Cherry v. Smallwood*[2] the evidence showed only that the defendant's car suddenly had left the road.

> There was no evidence as to what road was involved or whether the road was wet or dry, paved or unpaved. Neither was there any evidence of defects in the road, mechanical defects in the vehicle, speed of the vehicle, or illness of the driver.[3]

In *Allen v. Schiller*,[4] the doctrine was applied when the defendant's automobile for unexplained reasons collided with the plaintiff's legally parked car. Athough two cars were involved in the collision, the court properly held this situation to be essentially the same as that in *Greene*.[5]

### *Imputed Negligence*

In *Freeze v. Congleton*,[6] a five-year-old child was injured when he

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[1] 274 N.C. 18, 161 S.E.2d 521 (1968).

[2] 7 N.C. App. 56, 171 S.E.2d 83 (1969).

[3] *Id.* at 58, 171 S.E.2d at 84.

[4] 6 N.C. App. 392, 169 S.E.2d 924 (1969).

[5] For a fuller discussion of these cases and *res ipsa loquitur* generally, see Byrd, *Proof of Negligence in North Carolina Part I. Res Ipsa Loquitur*, 48 N.C.L. REV. 452 (1970).

[6] 276 N.C. 178, 171 S.E.2d 424 (1970).

walked into a plate-glass door in the defendant's home where he was a social guest. The child had been playing outside and had entered and left the house through the door several times. During these trips the door had been open. A short time before he was injured, he had entered the house through the door to use the bathroom. After he was inside the house on this occasion, the defendant closed the door, and on returning to the yard the child walked into it. The door was to a room in which the defendant and the child's parents were sitting. In holding that the defendant was not liable for the child's injury, the court's major premise was taken from the following sentence in *Watson v. Nichols*:[7] "Ordinarily when parents are present, in charge of their children of tender years, the responsibility for their care and safety falls on the parents."[8]

The presence of a child's parents may be an important factor in determining whether a defendant is negligent. Thus, when a child is accompanied by his parent in the plant where the parent is employed, reasonable care may not require an employer to warn the child of the danger of plant machinery.[9] For the employer to rely on the parent to disclose the danger and to protect the child from it is reasonable. However, if the facts in *Freeze* fit within this principle, they seem sufficiently on its outer perimeter to preclude a finding of no negligence as a matter of law. The defendant by closing a door that was not easily discernible[10] clearly increased the hazards of the child's return trip to the out-of-doors.[11] To hold that the defendant who created this new risk was entitled up to the time that the child walked into the door to rely on the boy's parents, who were watching television, to warn him of the danger exceeds any appropriate limitation on duty and penalizes the child for his parents' negligence.

Both the decision in *Freeze* and the broad principle out of which it was spun are disturbingly similar to the long discredited[12] doctrine that imputed a parent's negligence to his child to bar the child's recovery

[7] 270 N.C. 733, 155 S.E.2d 154 (1967).

[8] Freeze v. Congleton, 276 N.C. 178, 181, 171 S.E.2d 424, 426 (1970), *quoting* Watson v. Nichols, 270 N.C. 733, 736, 155 S.E.2d 154, 157 (1967).

[9] Blossom Oil & Cotton Co. v. Poteet, 104 Tex. 230, 136 S.W. 432 (1911).

[10] There was evidence that other children and the defendant herself had run into the door. Freeze v. Congleton, 276 N.C. 178, 181, 171 S.E.2d 424, 426 (1970).

[11] The court of appeals, relying on this fact, had held that the evidence of negligence was sufficient for submission to the jury. Freeze v. Congleton, 5 N.C. App. 472, 168 S.E.2d 462 (1969).

[12] *E.g.*, Mullinax v. Hord, 174 N.C. 607, 94 S.E. 426 (1917); Bottoms v. Seaboard & Roanoke R.R., 114 N.C. 699, 19 S.E. 730 (1894).

against a third party. This expression of alarm may be premature, but, if it is, nothing is lost. In any event, it is worth noting that this decision goes substantially beyond *Watson* in giving effect to the notion that a parent's responsibility for his child's safety limits the duty of others toward the child when the parent is present. In *Watson* the presence of the parents was relied upon by the court in holding that a child's ten-year-old brother was not negligent in looking out for the child's safety.

### *Railroad-Crossing Collisions*

The North Carolina Supreme Court said in *Faircloth v. Coast Line Railroad*:[13] "For reasons readily apparent, the Court has encountered difficulty in laying down hard and fast rules governing liability in train-automobile grade crossing accidents."[14] Whether this caution is followed in North Carolina when a motorist drives his vehicle upon a railroad crossing of which he has knowledge seems doubtful. Not only do the decisions frequently hold such conduct to be negligence as a matter of law, but also they often seem to give it a significance beyond that normally given to contributory negligence. Three recent decisions illustrate how the state's appellate courts approach this situation.

In *Jernigan v. Atlantic Coast Line Railroad*,[15] the plaintiff, while driving at night, ran into the engine of a stationary train that projected five feet into his lane of travel. Although the plaintiff had an unobstructed view of the tracks for seventy-two feet, in approaching the crossing he could see traffic lights, street lights, and other lights on the far side of the crossing. The defendant customarily maintained a watchman or flagman at the crossing, and a short time earlier that same night the plaintiff had been stopped by one there. The plaintiff testified that his lights, which were in good condition, first picked up the train's engine

[13] 247 N.C. 190, 100 S.E.2d 328 (1957).

[14] *Id.* at 193, 100 S.E.2d at 331.

[15] 3 N.C. App. 408, 165 S.E.2d 62 (1969). This decision has now been reversed by the North Carolina Supreme Court, Jernigan v. Atlantic Coast Line R.R., 275 N.C. 277, 167 S.E.2d 269 (1969), with the supreme court's view of the facts differing greatly from that of the court of appeals. The supreme court held that the evidence permitted an inference that the beams of the plaintiff's headlights were not sufficiently elevated to disclose the engine because of his down-grade approach to the tracks. The court also held that the jury could further infer that the reflectorized strips on the engine were not illuminated by the headlights and that the black color of the engine blended with the street so that the engine could not be discovered in time to avoid a collision. The court in addition pointed out that the plaintiff had "the right to place some reliance" on the custom of maintaining a flagman at the crossing.

when he was about ten feet from the crossing. The only other testimony relating to whether the engine could be seen was that it was black and had reflectorized strips running its entire length. The court of appeals held that the plaintiff was contributorily negligent as a matter of law. Since the plaintiff was misled by both the appearance of an open crossing and by the absence of a flagman, and since the evidence does not compel—particularly under these circumstances—the conclusion that the engine could have been discovered by a reasonable lookout, the question of plaintiff's contributory negligence seems to have been one for the jury rather than the court.

In *Price v. Seaboard Air Line Railroad*,[16] the plaintiff had a clear view of a railroad crossing, but her view in the direction from which the train came was blocked by a bank of dirt and weeds so that she was unable to see the train until she was within forty feet of the crossing. At that point the plaintiff saw the top of the train and applied her brakes. The car did not stop until it was on the tracks. The plaintiff attempted to back it off, but, apparently because the wheels were in holes in the area between the tracks, the car choked. The plaintiff's evidence permitted a finding that these holes, four to six inches deep, existed because of the defendant's negligence. Although the supreme court held that this evidence was sufficient to permit a recovery by passengers in her car, the plaintiff's contributory negligence was held to bar any recovery by her. Perhaps under these facts a finding that the plaintiff was negligent as a matter of law can be justified; however, such a finding should not necessarily preclude inquiry into whether her right of recovery would be barred if, as appears from the facts, she could have extricated herself from the danger if the holes between the tracks had not existed. The evidence does not show that she knew of the holes and it does not seem obvious that this condition was a risk inherent in her failure to stop before she drove onto the tracks. But such a possibility was not discussed by the court.

In *Brown v. Atlantic Coast Line Railroad*,[17] buildings blocked a motorist's view of the railroad tracks so that he could not see them in the direction from which the train came until he was twenty-eight feet from the crossing. When the motorist reached that point, he discovered that a train was approaching and determined that he would be unable to stop before reaching the crossing. He therefore " 'swerved to the left [away from the train] and speeded up, trying to get across before the

[16] 274 N.C. 32, 161 S.E.2d 590 (1968).
[17] 4 N.C. App. 169, 166 S.E.2d 535, *cert. granted*, 275 N.C. 593 (1969).

train hit.' "[18] He was unsuccessful. Passengers in the car sued the railroad to recover for injuries received in the collision. The court of appeals held:

> If it is conceded that the defendant was negligent in not blowing a horn or sounding a whistle, it is nevertheless clear that the driver's negligence in trying to outrun the train by picking "up speed in an effort to go around the front of the train" could not have been reasonably foreseen by the defendant. This was such an intervening act of negligence as to be deemed the sole proximate cause of the collision.[19]

It is difficult to perceive how the evidence is sufficient even to raise an issue of insulating negligence for the jury. To hold as a matter of law that the motorist's negligence insulated that of the railroad seems indefensible.

## STATE TORT CLAIMS ACT

A limited waiver of governmental immunity in the North Carolina Tort Claims Act[20] permits an action against the state for injuries caused by a "negligent act" of a state employee. The Act has been construed not to permit actions against the state for intentional torts[21] or negligent "omissions"[22] of its employees. Although no question can now exist about the validity of the construction of the Act that excludes negligent omissions from its coverage, the crucial determination of when negligence is an act or an omission still rests with the courts. For example, when an employee fails to give a signal of his intention to turn, a narrow view of these facts suggests that his failure to signal was an omission; however, a more realistic approach is that his fault consisted of negligent driving.

*Mackey v. North Carolina State Highway Commission*,[23] decided by

[18] 4 N.C. App. at 172, 166 S.E.2d at 537.

[19] *Id.* at 176-77, 166 S.E.2d at 540.

[20] N.C. GEN. STAT. §§ 143-291 to -300.1 (1964).

[21] Davis v. North Carolina State Hwy. Comm'n, 271 N.C. 405, 156 S.E.2d 685 (1967) (intentional misrepresentation); Jenkins v. North Carolina Dep't of Motor Vehicles, 244 N.C. 560, 94 S.E.2d 577 (1956) (patrolman intentionally shot misdemeanant).

[22] Ayscue v. North Carolina State Hwy. Comm'n, 270 N.C. 100, 153 S.E.2d 823 (1967) (by implication) (failure to remove from highway intersection "an accumulation of gravel and loose stone" that had been brought there by water and cars); Midgett v. North Carolina State Hwy. Comm'n, 265 N.C. 373, 144 S.E.2d 121 (1965) (dictum) (failure "to keep the drains [under highway] clear of sand and debris"); Flynn v. North Carolina State Hwy. & Pub. Works Comm'n, 244 N.C. 617, 94 S.E.2d 571 (1956) (failure to repair "hole or break in . . . [r]oad caused by travel over it").

[23] 4 N.C. App. 630, 167 S.E.2d 524 (1969).

the court of appeals, is a refreshing departure from a line of decisions[24] in which the supreme court tended to take a fairly narrow view of the facts in making the act-omission determination. In *Mackey* large holes had been left uncovered after posts had been removed from the shoulder of a highway. The court of appeals, in affirming the finding of a negligent act, pointed out that the holes had been created when the posts had been removed. This fact distinguishes the case from earlier decisions of the supreme court in which the dangerous condition had arisen because of normal use rather than from an employee's action.

In another sensible decision arising under the Tort Claims Act, the court of appeals held that a claim for injury from a bullet fired into the ground by a security officer in an effort to disperse an unruly crowd came within the Act.[25] That the officer intentionally fired the bullet made it neither an intentional tort nor such wanton conduct as to be equated to intent so as to exclude it from the coverage of the Act.

Two other cases raised questions involving the Torts Claims Act that deserve brief attention. In *Crawford v. Wayne County Board of Education*,[26] the defendant, relying on the section of the Act providing that the contributory negligence of a claimant defeats his recovery, contended that the presumption that a young child is incapable of contributory negligence does not apply to a claim under the Act. The decision of the supreme court rejecting this contention is sound. Neither the language of the section[27] relied on by the defendant nor the basic policy of the statute suggests any reason for modifying the established rules for determining contributory negligence, and, in the absence of a clear mandate from the legislature, they should not be discarded. The rules for determining the contributory negligence of children represent an important and long-standing part of the state's law of negligence.

*Bailey v. North Carolina Department of Mental Health*[28] raised but left unresolved the question of whether *res ipsa loquitur* is an available mode of proof of negligence under the Tort Claims Act. Since the inference of negligence under the doctrine of *res ipsa* usually does not

[24] Cases cited note 22 *supra*.

[25] Braswell v. North Carolina A. & T. State Univ., 5 N.C. App. 1, 168 S.E.2d 24 (1969).

[26] 275 N.C. 354, 168 S.E.2d 33 (1969).

[27] N.C. GEN. STAT. § 143-291 (1964): "If the Commission finds . . . that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted . . . ."

[28] 2 N.C. App. 645, 163 S.E.2d 652, *rev'd on other grounds*, 272 N.C. 680, 159 S.E.2d 28 (1968).

identify any specific negligence and since negligent omissions are not covered by the statute, there may be cases in which *res ipsa* proof will fall short of establishing the requirements for recovery under the Act. On the other hand, an outright rejection of the application of *res ipsa* to claims under the Act is not justified since the inference in a *res ipsa* case may point to some specific act or acts of an employee as the likely cause of the injury. The only possible general conclusion is that the adequacy of *res ipsa* proof to establish an *act* of negligence will depend upon the facts of each particular case.

The significance of all of the above cases may extend beyond the individual problems with which they deal. The position advocated by the state in them, if adopted, would make practice under the Tort Claims Act a special area of tort law and would unduly restrict the coverage of the Act. Even if it is accepted that the Act, because it is in derogation of the common law, must be strictly construed, the foremost objective in construction of the Act should be to give effect to the legislature's intent to provide a remedy against the state for the negligence of its employees. Neither a highly technical construction of the language of the Act nor the denial to claimants of the benefit of established principles of negligence law would be consistent with this objective.

Another difficult question that arises under the Tort Claims Act was decided by the court of appeals in *Brotherton v. Paramore*.[29] The court held that a recovery under the Act barred a subsequent action against the negligent employee for the same injury. Although the state's liability under the Act is based on respondeat superior, two factors distinguish this situation from others in which the doctrine of respondeat superior is normally applied. First, the hearing on the claim is before an administrative agency, and a jury trial is not available. In *Brotherton*, the court rejected the plaintiff's contention that his action against the employee should be sustained because of the absence of a jury trial on his claim against the state. Second, the amount that may be recovered against the state under the Tort Claims Act is limited to fifteen thousand dollars.[30] This point was not raised in *Brotherton* since the plaintiff had been awarded only six thousand dollars in his claim against the state. What the court would have done if the plaintiff's claim had been for a greater amount than could have been recovered under the Act is not clear. Since the remedy under the Act is not an exclusive one and since plaintiff's

[29] 5 N.C. App. 657, 169 S.E.2d 36 (1969).
[30] N.C. GEN. STAT. § 143-291 (Supp. 1969).

recovery under the Act constitutes a satisfaction of his claim only in the most technical sense, no good reason exists to bar his action against an employee under these circumstances.[31] Of course, any recovery from the state should be available to the employee as an offset.

## DEFAMATION

Uncertainty has existed in North Carolina as to when allegation and proof of special damages are required to establish a cause of action in defamation. One uncertainty has been under what circumstances, if at all, special damages are essential to a libel action.[32] A second problem has been whether special damages must be shown to establish a cause of action for slander when the defamatory statement is brought within one of the three categories of slander per se only through aid of extrinsic facts.[33]

At common law, libel was actionable without proof of special damages, but slander, unless it fell within one of three special categories, required proof of special damages to be actionable.[34] In a libel action, whether the defamation was apparent on the face of the published statement or appeared only upon proof of additional facts made no difference;[35] that this same rule applied to slander per se seems generally to have been assumed, but the question may not have been squarely raised in any of the cases. Some jurisdictions have modified the common law rule relating to libel and hold that under some circumstances special damages are required.[36] This change has generally involved situations in which circumstances outside the writing are necessary to establish the defamatory meaning for which plaintiff seeks to recover. How widespread the change in the common law has been and exactly what modification of it has

[31] Wirth v. Bracey, 258 N.C. 505, 508-09, 128 S.E.2d 810, 813-14 (1962): There is no inconsistency in respect of plaintiff's [*sic*] claims against the Highway Commission and their actions against [the employee] . . . . The remedies available to plaintiffs are not inconsistent. On the contrary, they are cumulative and consistent.

. . . .

Of course, plaintiffs may not recover from all sources an amount in excess of the damages they sustained.

In this case neither action had proceeded to judgment.

[32] See Note, *Libel—Special Damages*, 33 N.C.L. REV. 674 (1955).

[33] See Note, *Torts—Extrinsic-Fact Test in the Law of Slander*, 48 N.C.L. REV. 405 (1970).

[34] W. PROSSER, LAW OF TORTS § 107, at 780 (3d ed. 1964) [hereinafter cited as PROSSER].

[35] *Id.* 780-83.

[36] *E.g.*, Ilitzky v. Goodman, 57 Ariz. 216, 112 P.2d 860 (1941).

been made are subject to debate.[37] In some jurisdictions that seem to have modified the common law rule, uncertainty apparently exists, just as in North Carolina, about the current status of the law,[38] and no meaningful characterization of these developments in terms of a trend or a general rule seems possible.

A recent supreme court decision, *Robinson v. Nationwide Insurance Co.*,[39] taken with an earlier leading case,[40] leaves little doubt that North Carolina does not follow the common law rule that all libel is actionable without proof of special damages. Although on their facts the result in these cases could probably be justified on several grounds, including the absence of proof that the statements involved were defamatory at all, the basis on which the court decided them clearly establishes a broad exception to the common law rule. The court's discussion[41] indicates that before a writing is actionable without proof of special damages (1) it must be susceptible to a defamatory meaning only, (2) that meaning must be an obvious one when the words are taken in their natural sense as ordinary persons would understand them, and (3) the meaning must be apparent without the aid of innuendo, inducement, or other circumstances that do not appear on the face of the statement. The court's language also suggests that special damages must be shown even though the defamatory meaning established by extrinsic facts comes within one of the slander-per-se categories.[42]

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[37] *Compare* Eldredge, *Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733 (1966) *with* Prosser, *Libel Per Quod*, 46 VA. L. REV. 839 (1960) *and* Prosser, *More Libel Per Quod*, 79 HARV. L. REV. 1629 (1966).

[38] *See* Henn, *Libel-by-Extrinsic-Fact*, 47 CORNELL L.Q. 14 (1961).

[39] 273 N.C. 391, 159 S.E.2d 896 (1968) (letter of insurer stated that the plaintiff's automobile insurance had been cancelled because of "unfavorable personal habits").

[40] Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938) (newspaper carried plaintiff's picture with a report that she was a member of the chorus of the Paree Follies).

[41] [D]efamatory words to be libelous *per se* must be susceptible of but one meaning and of such a nature that the court can presume as a matter of law that they tend to disgrace and degrade the party . . . .

The general rule is that publications are to be taken in the sense which is most obvious and natural and according to the ideas that they are calculated to convey to those who see them. . . .

In determining whether the article is libelous *per se* the article alone must be construed, stripped of all insinuations, innuendo, colloquium and explanatory circumstances. The article must be defamatory on its face "within the four corners thereof."

Robinson v. Nationwide Ins. Co., 273 N.C. 391, 394-95, 159 S.E.2d 896, 899 (1968) *quoting* Flake v. Greensboro News Co., 212 N.C. 780, 786-87, 195 S.E. 55, 60 (1938).

[42] The decisions in this jurisdiction, as well as others, clearly establish that

A recent court of appeals decision, *Beane v. Weiman Co.*,[43] following dictum in an earlier supreme court case,[44] indicates that these views may apply to slander as well as libel. Their application to slander would mean that if circumstances beyond the slanderous statement itself are needed to bring it within one of the slander-per-se categories, special damages are required to establish a cause of action. In *Beane* the defendants told the plaintiff's employer that the plaintiff had called their wives and told them that the defendants were running around with other women. The plaintiff alleged that this statement "was intended to convey and did convey . . . the impression that the plaintiff was an untrustworthy person, not fit to hold a job of confidence. . . ."[45] The court of appeals held that the words spoken by the defendant were not actionable per se:

> Where the injurious character of the words do not appear on their face as a matter of general acceptance, but only in consequence of extrinsic, explanatory facts showing their injurious effect, such utterance is actionable only *per quod*. Where the words spoken or written are actionable only *per quod*, the injurious character of the words and some special damage must be pleaded and proved.[46]

Any ultimate evaluation of the above cases depends upon a number of factors. Decisions on defamation by the North Carolina courts, as well as those in other jurisdictions, are frequently difficult to interpret, and a conclusion about what a case holds or implies is never free of uncertainty. Further, a judgment about the soundness of a decision may depend on whether it is considered in the context of precedent or of the appropriate balance that should be made between the conflicting objectives of free speech on the one hand and compensation for those injured by defamatory speech on the other.

The traditional basis for liability in defamation is an intent to publish; an intent to injure or to defame the person about whom the statement is

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a publication is libelous *per se*, or actionable *per se*, if, when considered alone without innuendo: (1) It charges that a person has committed an infamous crime; (2) it charges a person with having an infectious disease; (3) it tends to subject one to ridicule, contempt, or disgrace, or (4) it tends to impeach one in his trade or profession.

Flake v. Greensboro News Co., 212 N.C. 780, 787, 195 S.E. 55, 60 (1938).

[43] 5 N.C. App. 276, 168 S.E.2d 236 (1969), *noted in* Note, *Torts—Extrinsic-Fact Test in the Law of Slander*, 48 N.C.L. REV. 405 (1970).

[44] Badame v. Lampke, 242 N.C. 755, 89 S.E.2d 466 (1955).

[45] 5 N.C. App. at 278-79, 168 S.E.2d at 238.

[46] *Id.* at 278-79, 168 S.E.2d at 237-38.

made is not required.[47] In *Robinson v. Nationwide Insurance Co.*[48] the supreme court repeated a statement that had appeared in earlier cases and that is inconsistent with this traditional concept of liability:

> Where the words alleged to have been written and published by the defendant concerning the plaintiff are not, upon their face, susceptible only to a defamatory interpretation, the complaint states no cause of action unless it also alleges that a defamatory meaning was intended by the defendant and understood by those to whom the statement is alleged to have been published.[49]

Since the complaint in this case did not allege any publication of the alleged defamatory statement and did not allege that it was understood by anyone in a defamatory sense, the court's statement that the defendant must have intended the statement in its defamatory sense before any cause of action might be based upon it was clearly unnecessary for the holding.

In a recent statutory development in the law of slander, the 1969 General Assembly extended the statute of limitations applicable to actions for slander from six months to one year.[50]

### Wrongful Death Damages

Substantial changes in the law relating to damages that are recoverable in a wrongful death action were made by the 1969 General Assembly.[51] The effect of these changes is to enlarge considerably the losses for which recovery may be had under the wrongful death statutes. Although the consequence of some of the changes is clear, others create difficult problems that will have to be resolved by the courts.

The new statute[52] expressly provides for the recovery of nominal damages, punitive damages, and reasonable funeral expenses, none of which were allowed under the prior law.[53] The provision for recovery of

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[47] Prosser § 108, at 790.

[48] 273 N.C. 391, 159 S.E.2d 896 (1968). See p. 799 *supra.*

[49] *Id.* at 394, 159 S.E.2d at 899.

[50] N.C. Gen. Stat. § 1-54 (1969) was amended to include slander in the actions subject to the one-year statute of limitations, and N.C. Gen. Stat. § 1-55 (1969) was amended by deleting slander from the list of actions subject to a six-months statute of limitations.

[51] See generally Comment, *The New North Carolina Wrongful Death Statute,* 48 N.C.L. Rev. 594 (1970).

[52] N.C. Gen. Stat. § 28-174 (Supp. 1969).

[53] Hines v. Frink, 257 N.C. 723, 127 S.E.2d 509 (1962) (nominal damages); Martin v. Currie, 230 N.C. 511, 53 S.E.2d 447 (1949) (punitive damages); Davenport v. Patrick, 227 N.C. 686, 44 S.E.2d 203 (1947) (funeral expenses).

nominal damages, together with other provisions in the new law, will prevent the kind of situation that sometimes arose under the prior law whereby a claimant's efforts to get his case to the jury when the decedent had no demonstrable earning capacity were unsuccessful.[54] The new statute permits recovery of such punitive damages as the decedent could have recovered if he had survived and also permits recovery of punitive damages against defendant "for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence." This express recognition that punitive damages may be awarded for the injury and for the death seems to create the possibility of a double award for the same conduct of defendant.

When defendant's negligence causes injuries from which the injured person later dies, two separate causes of action arise—one under the wrongful death statute for the decedent's death and another under the survival statute[55] for damages occurring between the time of the injury and the date of death.[56] Prior to the 1969 amendment, the losses for which recovery could be had under each cause of action were distinct so that no overlap between the recoveries existed.[57] The 1969 amendment permits recovery under the wrongful death statute for several items that usually constitute a major part of a recovery in a survival action. The new statute provides for recovery of the "expenses for care, treatment and hospitalization incident to the injury resulting in death." The amendment also authorizes recovery for the pain and suffering of the decedent.

The overlap that exists between damages recoverable under the survival statute and those recoverable for wrongful death creates a number of serious problems. The beneficiaries of the two recoveries may be different persons. The proceeds of a wrongful death recovery go to the decedent's next of kin as provided under the intestacy law;[58] the recovery in a survival action becomes an asset of the decedent's estate.[59] The

[54] Stetson v. Easterling, 274 N.C. 152, 161 S.E.2d 531 (1968) (child who died a few months after birth); Greene v. Nichols, 274 N.C. 18, 161 S.E.2d 521 (1968) (fifteen-year-old housewife); Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966) (prenatal death); Scriven v. McDonald, 264 N.C. 727, 142 S.E.2d 585 (1965) (mentally retarded child). *See also* Armentrout v. Hughes, 247 N.C. 631, 101 S.E.2d 793 (1958) (verdict for defendant upheld in case involving eighty-year-old decedent).

[55] N.C. GEN. STAT. §§ 28-172, -175 (1966).

[56] *In re* Peacock, 261 N.C. 749, 136 S.E.2d 91 (1964); Hoke v. Atlantic Greyhound Corp., 226 N.C. 332, 38 S.E.2d 105 (1946).

[57] *See* cases cited note 56 *supra.*

[58] N.C. GEN. STAT. § 28-173 (1966).

[59] *In re* Peacock, 261 N.C. 749, 136 S.E.2d 91 (1964).

proceeds recovered for wrongful death are exempted by statute from the claims of creditors—except funeral expenses and up to five hundred dollars of medical and hospital expenses—and also from disposition under the decedent's will.[60] Neither exemption applies to amounts recovered in a survival action.[61] Finally, a beneficiary whose negligence has contributed in causing the decedent's death is barred from participating in wrongful death proceeds,[62] and any recovery against other tort-feasors is reduced by the amount of the share that such a beneficiary would otherwise have received.[63] Any generalization about the applicability of these principles to a survival action is difficult since the outcome in a particular case may be affected by the doctrines of family immunity and contribution among joint tort-feasors, by the provisions of Chapter 31A of the North Carolina General Statutes specifying acts of survivors that bar participation in the distribution of a decedent's estate, and by the principle that prohibits a wrongdoer from benefitting from his own wrongdoing. In addition to problems concerning the rights of beneficiaries and of creditors that will exist whether separate actions are maintained or the two causes are joined, problems of double compensation and res judicata will arise when separate actions are brought.

Perhaps the appropriate resolution of these problems is for the courts to hold that the legislature by allocating the overlapping items of loss to the wrongful death action intended to eliminate any recovery for them under the survival statute. An interpretation of the statute that would allocate to the wrongful death action the loss of income to the decedent between the date of injury and the date of death is also possible. By combining these two interpretations, the courts could hold that survival actions have been completely incorporated into wrongful death actions and thus may no longer be maintained. One difficulty with both interpretations is that either operates to prevent creditors from reaching funds recovered for these losses. For example, although the wrongful death recovery would include all medical expenses incurred before the decedent's death, no more than five hundred dollars of such a recovery would be subject to payment of these expenses.

The basic measure of recovery under the prior wrongful death statute was "fair and just compensation for the pecuniary injury resulting from

[60] N.C. GEN. STAT. § 28-173 (1966).
[61] *See In re* Peacock, 261 N.C. 749, 136 S.E.2d 91 (1964).
[62] Pearson v. National Manufacture & Stores Corp., 219 N.C. 717, 14 S.E.2d 811 (1941).
[63] First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965).

such death."[64] The statute was generally construed to permit recovery for "the present value of the net pecuniary worth of the deceased to be ascertained by deducting the cost of his living and expenditures from the gross income, based upon his life expectancy."[65] Under this measure of damages, no recovery was allowed for sentiment,[66] solatium,[67] mental anguish of survivors,[68] or the loss of the decedent's services.[69] Neither the number of the beneficiaries[70] nor the complete absence of beneficiaries was material.[71]

Little of this law, if any, remains in force under the new statute. The amendment provides that damages are recoverable for "the present monetary value of the decedent to the persons entitled to receive the damages recovered." It provides that the recovery shall include, but not be limited to, the reasonably expected (1) "net income of the decedent"; (2) "services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered"; and (3) "society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered." The substantial expansion of the kinds of losses compensable under the amended statute is obvious. The provision for recovery of the losses set out in (2) and (3) above is particularly significant in cases involving the wrongful death of housewives, elderly persons, the handicapped, and other decedents whose needs usually exceed their earnings.[72]

The ascertainment of losses based upon termination of the decedent's earnings may be significantly affected by the new statute. Although the statute identifies the "net income of the decedent" as an item to be included in a recovery for wrongful death, the basic measure of damages under which net income is included is "the present monetary value of the decedent to the persons entitled to receive the damages recovered." This basic measure of recovery, as well as some of the specific items in-

[64] Ch. 113, § 71 [1868] N.C. Sess. L. 276.

[65] The court in Mendenhall v. North Carolina R.R., 123 N.C. 275, 278, 31 S.E. 480 (1898), upheld an instruction that used this language.

[66] *See* Scriven v. McDonald, 264 N.C. 727, 142 S.E.2d 585 (1965).

[67] Collier v. Arrington, 61 N.C. 356 (1867).

[68] Ballinger v. Rader, 153 N.C. 488, 69 S.E. 497 (1910).

[69] Lamm v. Lorbacher, 235 N.C. 728, 71 S.E.2d 49 (1952) (services of mother and wife); Byrd v. Southern Express Co., 139 N.C. 273, 51 S.E. 851 (1905) (child's services); Bradley v. Ohio River & C.R.R., 122 N.C. 972, 30 S.E. 8 (1898) (intellectual and moral training).

[70] McCoy v. Atlantic Coast Line R.R., 229 N.C. 57, 47 S.E.2d 532 (1948).

[71] Warner v. Western North Carolina R.R., 94 N.C. 250 (1886).

[72] See cases cited note 54 *supra.*

cluded under it in the statute, seems to shift the focus for the determination of wrongful death damages from ascertaining the loss of net income to the decedent's estate to ascertaining all monetary losses to the beneficiaries. A reasonable interpretation of the statute might well hold that not only the present worth of the decedent's net income (the measure of recovery under the prior statute) but also the beneficiaries' life expectancies and expectations of gain from the decedent must be considered in determining the losses based upon termination of the decedent's earnings. Thus, if the decedent, a young man, was survived only by his elderly mother whose life expectancy at the time of his death was five years, the factors relevant to the determination of wrongful death damages arising from the loss of his net income would be the decedent's projected income for five years and the expected contributions to the mother out of that income. In this example, the amount of recovery would be substantially smaller than it would have been under the prior law.

Even in the more typical situation in which the decedent is survived by a spouse and children, proof of the net-income loss may become significantly more complex. Will the court presume that the decedent's immediate family would have been the sole beneficiaries of his future net income, or must affirmative proof be offered to show what benefits they would likely have received? Does evidence of the decedent's legal obligation of support, whether or not he had complied with it in the past, provide sufficient evidence of expectation of benefit? Will facts such as the decedent's consistent and heavy losses at the race track or in the stock market be considered in determining what benefits the beneficiaries would have derived from his future earnings? Must financial contributions by the decedent to persons other than the wrongful-death beneficiaries, such as the decedent's parents or grandparents, be projected over their life expectancies and be considered in determining the amount of recovery?

Some possibility exists that the courts could follow the method used under the prior law in determining the net-income loss. The apparent intent of the legislature to expand wrongful death recoveries and the provision for distribution of the proceeds to the beneficiaries on a basis that does not permit consideration of their individual losses could be argued in support of such a view. However, since the language of the statute seems specifically to provide that damages are to be measured by losses to the beneficiaries, adoption of this theory seems questionable.

The emphasis upon the loss to beneficiaries in the amended statute creates an additional problem. Since the identity of the beneficiaries and the share of the wrongful death proceeds that each takes is fixed by the intestate succession act, the possibility arises that the amount of the recovery attributable to the losses to a particular beneficiary and the share of the proceeds actually allocated to that beneficiary may differ. The logical inconsistency of using one standard for ascertaining the amount of the recovery and a different standard for apportioning the recovery among beneficiaries is apparent.