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edies under the Act before this right may be exercised; deduct any compensation recovered under the Act from the judgment recovered in the common law suit,¹⁸ pay the balance to the injured employee. The employee would thus recover full damages for his injury without receiving a double recovery.¹⁹ The spirit of the Act would not be violated, for industry would be shouldering the burden of industrial accidents to the extent that the legislature contemplated.²⁰ The co-employee's common law liability would be relieved to the extent that the employer was liable for compensation. However, any attempted statutory amendments, unless drawn with extreme care, might foster inequitable situations.²¹

CHARLES F. LAMBETH, JR.

Wrongful Death Action—Recovery for Breach of Warranty— Ex Delicto-Ex Contractu Distinction

Plaintiff executrix brought an action for wrongful death based upon breach of warranty of fitness on the part of defendant retailer in the sale of a drug to plaintiff's intestate. In a 4 to 3 decision,¹ the Florida Supreme Court ruled that the wrongful death statute of that state²

¹⁸ In the present North Carolina Act, the amount of compensation paid by the employer, or the amount of compensation to which the injured employee or his dependents are entitled, shall not be admissible as evidence in any action against a third party. N. C. GEN. STAT. §97-10 (1950).

¹⁹ Double recoveries occur where employees receive compensation under the Act and also recover at common law for the same injury. See Behrendt, *The Rationale of the Election of Remedies Under Workmen's Compensation Acts*, 12 U. OF CHI. L. REV. 231, 238 (1945).

²⁰ Industry (through the employer) would pay the compensation required by law and would be unable to recover this amount by subrogation.

²¹ Suppose the following situation occurred: Employer and fellow employee (E₂) are each 50% negligent in causing the injury of plaintiff employee (E₁). E₁ receives \$8,000 under the Act from the employer. Total damages to E₁, as assessed by a jury in a suit by E₁ v. E₂, amount to \$50,000. As tortfeasors are jointly and severally liable for their torts in North Carolina (Cunningham v. Haynes, 214 N. C. 456, 199 S. E. 627 (1938)), E₁ could collect from E₂ full damages (\$50,000) minus the \$8,000 already received. E₂ could not have joined, nor would he have a right over against the employer, as would normally be true in the case of joint tortfeasors under N. C. GEN. STAT. §1-240 (1943). The injustice of this is apparent. To take care of this situation it would be necessary to enact a proviso to the effect that in cases of joint negligence on the part of a co-employee and an employer, the co-employee shall only be liable to the extent of his own negligence.

Again, suppose co-employees E₁ and E₂ are both injured in the course of their employment due to the negligence of E₂. Both receive \$8,000 under the Act. E₁ is damaged to the extent of \$16,000. Thereafter E₁ sues and recovers an additional \$8,000 from E₂. Here we have an injured employee who receives nothing under the Act because he was negligent, though the Act relieves negligence as a bar to compensation. Is this an unduly harsh result, quare?

¹ *Whiteley v. Webb's City, Inc.*, 55 So. 2d 730 (Fla. 1951) (defendant retailer sold to plaintiff's intestate a drug known as "Westsal" which was to be used as a salt substitute, and the complaint alleged the use of this drug caused the death of intestate).

² FLA. STAT. ANN. §768.01 (1949).

does not permit an action for death based upon breach of warranty of fitness.

Parallel to the sharp split of the Florida court is the split of other jurisdictions which have passed on this question. The New York statute has been construed as permitting such an action.³ New Hampshire⁴ and Mississippi⁵ are in accord with Florida in not allowing the action to be brought under their wrongful death statutes.

In the principal case, the argument of the majority was that the title of the death act when under consideration by the legislature contained the word "negligence"; that the statute, therefore, is limited to actions where death results from *tortious* acts of the defendant and has no application to the breach of a contractual obligation like warranty of fitness.⁶ The dissent was based upon the reasoning of the New York holding in *Greco v. S. S. Kresge Co.*⁷ That case did not hold that the wrongful death statute was designed to support both actions *ex delicto* and those *ex contractu*; but it allowed an action based on the breach of warranty of fitness to be brought under the statute upon the theory that the breach of such a warranty was *tortious* in nature.⁸

An analysis of these and other cases reveals that a court's decision on the question of allowing an action based upon breach of warranty of fitness to be brought under its death statute is likely to turn upon the following considerations: (1) the particular phraseology used in the statute under interpretation; (2) the character that the court attaches to a breach of warranty of fitness (*i.e.*, whether it regards the breach as in the nature of a *tortious* act or one purely contractual); (3) the over-all approach taken by the court to the death statute itself (*i.e.*, whether it thinks that the statute should be given a strict or a liberal construction).

³ *Greco v. S. S. Kresge Co.*, 277 N. Y. 26, 12 N. E. 2d 557, 115 A. L. R. 1020 (1938).

⁴ *Wadleigh v. Howson*, 88 N. H. 365, 189 Atl. 865 (1937); *Howson v. Foster Beef Co.*, 87 N. H. 200, 177 Atl. 656 (1935).

⁵ *Hasson Gro. Co. v. Cook*, 196 Miss. 452, 17 So. 2d 791 (1944).

⁶ The following seems to set out the theory giving rise to the distinction drawn by the principal case: "Since under the common law, contract actions survived in favor of the plaintiff's representative while tort actions did not, it seems reasonable to suppose that the wrongful death statutes were intended to refer only to torts." PROSSER, *LAW OF TORTS* 956 (1941). But does not this supposition overlook the fact that an action for *death*, though arising out of a contract, did *not* survive at common law any more than one arising out of a tort? With this in mind, why should the wrongful death statutes have been intended to refer to one kind of death and not to the other?

⁷ 277 N. Y. 26, 12 N. E. 2d 557 (1938).

⁸ "The inquiry here is whether the breach of the implied warranty as alleged in the complaint, negligence being disclaimed, was a 'wrongful act, neglect, or default' within the meaning of the statute. The answer depends wholly upon a solution of the question as to whether breach of the implied warranty, in a case such as this, where personal injury to the person to whom the warranty is made results from the breach, is *tortious* in nature and effect and is due to the wrongful act or neglect or default of the person making and breaching the warranty." *Greco v. S. S. Kresge Co.*, 277 N. Y. 26, 31, 12 N. E. 2d 557 (1938).

The words used in the original death statute, passed in England in 1846, are "Wrongful Act, Neglect, or Default."⁹ Where, as in about one half of the states in this country, the statute uses these same words,¹⁰ it would seem to be all inclusive, considering that "wrongful act" may be construed to mean crimes and intentional torts, "neglect" to mean passive torts, and "default" to mean breach of contract.¹¹ But where the statute, by using some of these words alone¹² or in connection with other words,¹³ or by using other and different words altogether,¹⁴ contains narrower phraseology (in the sense that it is more susceptible of being interpreted to refer to tortious acts only), then, obviously, a court will be more likely to decide that the statute applies to actions arising *ex delicto* and not to those arising *ex contractu*.

The cases illustrate how courts take into account this "narrow" phraseology. In New Hampshire the wrongful death statute contained the word "tort."¹⁵ The supreme court of that state held that it did

⁹ "Be it therefore enacted . . . That whensoever the Death of a Person shall be caused by wrongful Act, Neglect, or Default, and the Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an action and recover Damages in respect thereof, then and in every such Case the Person who would have been liable if death had not ensued shall be liable to an Action for Damages, notwithstanding the Death of the Person injured, and although the Death shall have been caused under such Circumstances as amount in Law to Felony." FATAL ACCIDENTS ACT OF 1846, 9 & 10 VICT., c. 93 (Lord Campbell's Act).

¹⁰ *E.g.*, N. C. GEN. STAT. §28-173 (Supp. 1951); N. Y. DECEDENT ESTATE LAW §130 (1949).

¹¹ In *Randle v. Birmingham Ry., Light & Power Co.*, 169 Ala. 314, 324, 53 So. 918, 921 (1910) an "act" or "wrongful act" was held to denote affirmative action or performance and an expression of will or purpose as distinguished from "omission" or "wrongful omission," which was held to denote inaction.

In *People v. Gaydica*, 122 Misc. 31, 49, 203 N. Y. Supp. 243, 259 (Kings County Ct., 1923) it was said: "To neglect means to omit. . . . It does not generally imply carelessness or imprudence, but simply an omission to do or perform some work, duty or act."

In *Grein v. Imperial Airway*, [1937] 1 K. B. 50, Green, L. J., said: "The word 'default' is a word of wide signification, and in its ordinary use does, I think, include a breach of contract."

¹² *E.g.*, IDAHO CODE §5-311 (1947); MONT. REV. CODES ANN. §93-2810 (1947): "wrongful act or neglect."

¹³ ALA. CODE tit. 7, §123 (1940): "wrongful act, omission, or negligence." FLA. STAT. ANN. §768.01 (1949): "wrongful act, negligence, carelessness or default." IND. ANN. STAT. §2-404 (Supp. 1951); MINN. STAT. ANN. §573.02 (Cum. Supp. 1951): "wrongful act or omission." KY. REV. STAT. §411.130 (1948): "negligence or wrongful act." TENN. CODE ANN. §8236 (Supp. 1951): "wrongful act, omission, or killing." TEX. STAT. REV., REV. CIV. ART. 4671 (1936): "wrongful act, neglect, carelessness, unskillfulness, or default."

¹⁴ DEL. REV. CODE §4638 (1935); PA. STAT. ANN. tit. 12, §1601 (1931): "unlawful violence or negligence." MASS. ANN. LAWS c. 299, §5 (1933): "negligence or . . . wilful, wanton or reckless act." MISS. CODE ANN. §1453 (1942): "real wrongful or negligent act, or omission."

The Georgia statute uses the word "homicide" and defines "homicide" to mean "all cases where death of a human being results from a crime or from criminal or other negligence." GA. CODE ANN. §§105-1301, 1302, 1307 (1935), 1306 (Cum. Supp. 1951).

The New Hampshire statute states: "Actions of tort for physical injuries to the person . . . shall survive." N. H. REV. LAWS c. 355 §9 (1942).

¹⁵ N. H. REV. LAWS c. 355 §9 (1942): "Actions of tort for physical injuries to the person . . . shall survive."

not apply to a breach of contract because "tort" had been defined as "a wrong apart from contract."¹⁶ Likewise, where the Mississippi statute peculiarly contained the additional adjective "real,"¹⁷ it was held not to apply to a breach of contract, the court saying, "We must impute some emphasis to the words 'real wrongful' in our statute as narrowing its meaning to an actual and not a nominal or constructive wrong."¹⁸ And where the wording used in the Rhode Island death statute was merely "wrongful act," the court in that state interpreted it to apply only to acts carelessly or negligently done and not to cases of mere passive neglect or omission of duty.¹⁹

In the principal case, the majority of the court did "not deem a detour into the field of semantics necessary,"²⁰ but based their holding upon the particular legislative treatment of the statute.²¹

Once it be determined that the wrongful death statute is to apply to actions arising ex delicto only and not to those arising ex contractu, the legal character of the breach of warranty of fitness (as interpreted by that court) becomes important. There is much authority to support the proposition that an action is within the death statute even though it may have arisen out of a contractual relation between the defendant and the decedent rather than out of a duty owed by the defendant to persons in general.²² Thus, as in *Greco v. S. S. Kresge Co.*, if the

¹⁶ *Howson v. Foster Beef Co.*, 87 N. H. 200, 206, 177 Atl. 656, 660 (1935).

¹⁷ MISS. CODE ANN. §1453 (1942): "real wrongful or negligent act, or omission."

¹⁸ *Hasson Gro. Co. v. Cook*, 196 Miss. 452, 462, 17 So. 2d 791, 793 (1944).

¹⁹ *Bradbury v. Furlong*, 13 R. I. 15, 43 Am. Rep. 1 (1880). The present Rhode Island death statute is R. I. GEN. LAWS c. 477 §1 (1938), and uses all three words: "wrongful act, neglect, or default."

²⁰ *Whiteley v. Webb's City, Inc.*, 55 So. 2d 730, 731 (Fla. 1951).

²¹ It should be noted that in Florida the wrongful death statute, FLA. STAT. ANN. §768.01 (1949), is placed in the consolidated statutes under the main title "Torts," thus emphasizing its *tort* aspect. It appears in Chapter 768 (entitled "Negligence") of Title XLIII (entitled "Torts").

In the great majority of the other states the wrongful death statute appears in that part of the consolidated statutes which pertains to subjects like decedents' estates, actions by and against personal representatives, civil actions, survival and abatement of actions, etc. *E.g.*, the North Carolina wrongful death statute, N. C. GEN. STAT. §28-173 (Supp. 1951), appears under Art. 19 (entitled "Actions by and against Representatives") of Chapter 28 (entitled "Administration") of Division VI (entitled "Decedents' Estates").

²² *Carrier and passenger*: *Earley v. Pacific Electric Ry. Co.*, 176 Cal. 79, 167 Pac. 513 (1917) (collision); *Rodwell v. Camel City Coach Co.*, 205 N. C. 292, 171 S. E. 100 (negligence in operating bus); *Grein v. Imperial Airway* [1937] 1 K. B. 50 (negligence in operating airplane).

Employer and employee: *American Tin-Plate Co. v. Guy*, 25 Ind. App. 588, 58 N. E. 738 (1900); *Mueller v. Winston Bros. Co.*, 165 Wash. 130, 4 P. 2d 854 (1931): negligence in failing to comply with contract to provide medical services.

Landlord and tenant: *Keiper v. Anderson*, 138 Minn. 392, 165 N. W. 237 (1917) (negligence in performing contract to keep leased premises heated).

Utility and customer: *Coy v. Indianapolis Gas. Co.*, 146 Ind. 655, 46 N. E. 17 (1897) (failure to supply gas for heating dwelling); *Hoehler v. Allegheny Heating Co.*, 5 Pa. Super. Ct. 21 (1897) (negligence in turning off gas with which home was heated).

breach of warranty of fitness be regarded as tortious in nature, it will still be within the statute notwithstanding an adherence to the doctrine that wrongful death actions must arise *ex delicto*.

And there does not seem to be any good reason why the warranty of fitness should not be so regarded. Indeed, the action against a vendor for breach of warranty was originally a pure action of tort.²³ Even today the tort character of the action is recognized by the courts. Some hold that one having a right of action for breach of warranty may sue in tort as well as contract.²⁴ Others have applied a tort measure of damages²⁵ or the tort statute of limitations²⁶ to the action.

Finally, some correlation appears to exist between the result a court will reach on the issue of the principal case and the general rule of construction adopted by it for the wrongful death statute. The liberal rule of construction states that the statute is remedial and should be liberally construed.²⁷ The strict rule is that the statute being in derogation of the common law must be strictly construed.²⁸ The New York court, which adheres to the liberal rule, allowed the breach of warranty to come within its statute.²⁹ The Mississippi court, on the other hand, has adopted the strict rule, and declined to allow the breach of warranty to be brought within its statute.³⁰

The North Carolina Supreme Court up to the present time has not passed directly on the issue of whether an action for wrongful death may be grounded on the breach of a warranty of fitness. If and when the issue is presented squarely to the court, all circumstances appear favorable to the allowance of such an action. First, the wording of the North Carolina statute is sufficiently broad,³¹ and it is not limited

Physician and patient: Thaggard v. Vafes, 218 Ala. 609, 119 So. 647 (1928); Peck v. Henderson, 218 Ala. 233, 118 So. 262 (1928); Randolph v. Snyder, 139 Ky. 159, 129 S. W. 562 (1910); negligence in treating.

Vendor and vendee: Cake v. Ligon, 115 S. C. 376, 105 S. E. 739 (1921) (negligence in selling defective oil).

²³ Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 8 (1888).

²⁴ McLachlan v. Wilmington Dry Goods Co., 41 Del. 378, 22 A. 2d 851 (1941); Spillane v. Corey, 323 Mass. 673, 84 N. E. 2d 5 (1949); Simone v. Felin and Co., 35 D. & C. 645 (Pa., 1939); Burgess v. Sanitary Meat Market, 121 W. Va. 605, 611 S. E. 2d 785, 787 (1939); "While an implied warranty in the sale of food for immediate consumption is, in its nature, contractual, its violation savours of tort."

²⁵ Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N. W. 309 (1939).

²⁶ Schlick v. N. Y. Dugan Bros., 175 Misc. 182, 22 N. Y. S. 2d 238 (N. Y. City Ct., 1940).

²⁷ Cibulla v. Pennsylvania-Reading Seashore Lines, 25 N. J. Misc. 98, 50 A. 2d 461 (1946); Low Moor Iron Co. v. La Blanca's Adm'r, 196 Va. 83, 55 S. E. 532 (1906); Richards v. Riverside Ironworks, 56 W. Va. 510, 49 S. E. 437 (1904).

²⁸ Cain v. Bowley, 114 F. 2d 519 (10th Cir. 1940); Rhoads v. Chicago & A. R. Co., 227 Ill. 328, 81 N. E. 371 (1907); Carrigan v. Cole, 35 R. I. 162, 85 Atl. 934 (1913).

²⁹ Greco v. S. S. Kresge Co., 277 N. Y. 26, 12 N. E. 2d 557 (1938).

³⁰ Hasson Gro. Co. v. Cook, 196 Miss. 452, 17 So. 2d 791 (1944).

³¹ N. C. GEN. STAT. §28-173 (Supp. 1951); "wrongful act, neglect, or default."

by any special treatment like that given to the Florida statute.³² Second, the North Carolina court is not bound like the New Hampshire court by old decisions drawing a sharp line between contract and tort, placing breach of warranty squarely on the contract side.³³ Third, the North Carolina court has adopted the liberal rule of construction.³⁴ Moreover, it must be noted that the North Carolina Supreme Court has had before it facts similar to those in the principal case.³⁵

Of the situation as it was before the wrongful death statutes were enacted, it has been said that it was more profitable to kill a man than

³² See note 21 *supra*.

³³ In *Mahurin v. Harding*, 28 N. H. 128, 130 (1853) (cited in *Howson v. Foster Beef Co.*, 87 N. H. 200, 207, 177 Atl. 656, 661, 1935), it was said: "The distinction between the two classes of action [deceit and breach of warranty], as being founded respectively on tort and on contract, is nowhere neglected or disregarded. There are substantial differences at common law, and . . . the distinction is not merely formal, but in the present state of our law there is a substantial difference, which must not be overlooked."

In contrast is *Ashe v. Gray*, 89 N. C. 190, 193 (1883) (holding that there may be recovery in tort for breach of warranty if the complaint contains a cause of action for deceit also even though *scienter* be not proved and no issue as to deceit be submitted to the jury) where Smith, C. J., said: "But the complaint is for tort, to which is annexed a cause of action based on false warranty according to the former usage and practice, which did not change the character of the action as still one *ex delicto*, for the reason perhaps, that a false warranty was also a false representation, and partook of the nature of deceit."

But where the complaint alleges only a cause of action for breach of warranty, the action, for the purposes of determining jurisdiction, is treated in North Carolina as one in contract. *Hill v. Snider*, 217 N. C. 437, 8 S. E. 2d 202 (1940).

However, even though it could be said that North Carolina treats the breach of warranty generally as a contract action, still, the court might in a proper case declare that breach of warranty or fitness for human consumption is tortious in nature, distinguishing such a warranty from warranties in general. Such a distinction would be in line with *Poovey v. Sugar Co.*, 191 N. C. 722, 133 S. E. 12 (1926), which held that a warranty of fitness would be implied in the sale of foodstuff for human consumption but would not be implied in a sale of foodstuff for cattle, the difference being made for reasons of public policy, for the preservation of life and health.

³⁴ *Hall v. Southern R.R.*, 149 N. C. 108, 62 S. E. 899 (1908); *Vance v. Southern R.R.*, 138 N. C. 460, 50 S. E. 860 (1950).

³⁵ *Davis v. Radford*, 233 N. C. 283, 63 S. E. 2d 822 (1951), 30 N. C. L. Rev. 191 (sale of "Westsal" as in principal case). In the *Davis v. Radford* case, the complaint alleged two causes of action, one for personal injuries prior to death and one for wrongful death, both of which were based on breach of warranty of fitness on the part of defendant retailer in the sale of a drug to plaintiff's intestate. On defendant's motion, his wholesaler was joined as a party-defendant, and it was on a demurrer by the wholesaler that the case came before the supreme court. The supreme court sustained the overruling of the demurrer on the grounds that it was proper to join one who would be liable over to the original defendant if the latter were found liable on the causes of action alleged in the complaint. No mention was made of the possibility that the action for wrongful death was unauthorized because of its being based upon the breach of warranty of fitness. However, the holding of the case would seem to be an indirect recognition that such a cause of action may validly exist under the North Carolina wrongful death statute.

Of sidelight interest is the fact that after *Davis v. Radford* was sent back to the trial court judgment by consent was rendered against the wholesaler for \$1,000; all claim for personal injuries or wrongful death for the breach of warranty was released as against the retailer. Letter from Mr. J. E. Swain, Clerk of Superior Court, Buncombe County, April 16, 1952.

to scratch him.³⁶ Of those jurisdictions which do not allow a personal representative to recover under the wrongful death statute for a death caused by the breach of warranty of fitness of food for human consumption, it can now be said that it is more profitable to kill a man than to make him sick on an unwholesome food product.

ARNED L. HINSHAW.

³⁶ PROSSER, *LAW OF TORTS* 955 (1941).