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Beneficiaries under the Federal Employers' Liability Act

BENEFICIARIES UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT

Under section 1 of the Federal Employers' Liability Act[1] an employee has a cause of action against his employer for injuries incurred while engaged in interstate commerce. If the employee dies from his injuries, section 1[2] of the act gives a right of action to the decedent's personal representative for the benefit of beneficiaries named in the statute. When death is instantaneous, recovery can only be had under section 1 for the wrongful death,[3] but where the death is not instantaneous section 9[4] provides for the survival of the decedent's cause of action for the pain and suffering sustained as a result of the injury. The beneficiaries named under both sections 1 and 9 are the same,[5] there being three distinct groups named in the alternate in order of preference.[6]

It is well settled that pecuniary loss is a prerequisite for the vesting of a cause of action under section 1,[7] but it is not so clear whether the same requirement applies to section 9. The recent case of *Jensen v. Elgin, Joliet & E. Ry.*[8] from the Appellate Court of Illinois is the first case clearly posing the question whether the pecuniary loss requirement of section 1 also applies under section 9.

The decedent was injured while in the employment of the defendant railroad and sued under section 1. Judgment for $50,000 was

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[1]This section reads as follows: "Every common carrier by railroad while engaging in commerce ... shall be liable in damages to any person suffering injury while ... employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting...." 35 Stat. 65 (1908), 45 U.S.C. § 51 (1958).

[2]Ibid.

[3]Birmingham Belt R.R. v. Hendrix, 215 Ala. 285, 110 So. 312 (1926), cert. denied, 273 U.S. (1927); Fries v. Chicago, R.I. & P. Ry., 159 Minn. 328, 198 N.W. 998 (1924); Cobia v. Atlantic Coast Line R.R., 188 N.C. 487, 125 S.E. 18 (1924).

[4]This section reads as follows: "Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee...." 36 Stat. 291 (1910), 45 U.S.C. § 59 (1958).

[5]See notes 1 and 4 supra.

[6]Poff v. Pennsylvania R.R., 327 U.S. 399 (1946); Chicago, B. & Q. R.R. v. Wells-Dickey Trust Co., 275 U.S. 161, 163 (1927); Hopps' Estate v. Chestnut, 324 Mich. 256, 36 N.W.2d 908 (1949).

[7]Michigan Cent. R.R. v. Vreeland, 227 U.S. 59 (1912); Chicago, B. & Q. R.R. v. Kelly, 74 F.2d 80 (8th Cir. 1934).

[8]31 Ill. App. 2d 198, 175 N.E.2d 564 (1961).

awarded, but reversed on appeal as excessive. Since the defendant's liability had been established, the cause was remanded for a new determination of the amount of damages.[9] Before the second trial the employee died of other causes and his administratrix was substituted as plaintiff. The complaint was amended so as to limit the action to a determination of the amount of damages that the decedent might have recovered in his lifetime. A judgment was awarded under the survival provision of the FELA for $10,000 for the benefit of decedent's adult nondependent daughter, who was also the administratrix.

The principal question presented on appeal to the Appellate Court of Illinois was whether the right of action of an injured employee under the FELA may be prosecuted for the benefit of an adult nondependent child.

In a two-to-one decision the court answered in the negative and denied recovery. The majority of the court ruled that the identical wording of the classes of beneficiaries in sections 1 and 9 should receive the same interpretation.[10] Since federal precedents applying section 1 require children to be both minor[11] and dependent[12] in order to qualify under the act, the court concluded that the same requirements apply under section 9.

The dissent took the view that the subject matter to which the sections refer is not the same, consequently decisions under section 1 are not controlling.[13]

The original FELA did not provide for survival of a decedent's cause of action, although section 1 did provide a cause of action for the benefit of dependent relatives for the wrongful death caused by the employer's negligence.

In the light of decisions limiting the act to wrongful death re-

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[9]Jensen v. Elgin, Joliet & E. Ry., 15 Ill. App.2d 559, 147 N.E.2d 204 (1958).

[10]"By the recognized rule of statutory interpretation, identical language in different sections of the same statute must receive the same construction." 175 N.E.2d at 566.

[11]Gulf, Colo. & Santa Fe Ry. v. McGinnis, 228 U.S. 173 (1912); But cf. Bowen v. New York Cent. R.R., 179 F. Supp. 225 (D. Mass. 1959); Meisenhelder v. Chicago & N.W. Ry., 170 Minn. 317, 213 N.W. 32 (1927). See also Redfield v. Oakland Consol. St. Ry. 110 Cal. 277, 42 Pac. 822 (1895).

[12]See note 7 supra. For purposes of simplification dependent beneficiaries and those beneficiaries having sustained pecuniary loss are used by this writer interchangeably. The distinction is not significant except that where dependency exists pecuniary loss is present also, whereas the converse may not always be true.

[13]"It hardly needs to be argued that the subject matter of the survival statute [section 9], the claim of the injured employee for his personal loss and suffering before he died, is quite different from the subject matter of the wrongful death action [section 1], the claim of the beneficiaries for the pecuniary loss sustained by his death." 175 N.E.2d at 570.

covery[14] the FELA was amended in 1910 to provide for the survival of a decedent's cause of action. Shortly thereafter the United States Supreme Court in *Michigan Cent. R.R. v. Vreeland*,[15] a case arising under section 1, said of the wrongful death provision: "The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employé wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death."[16] The same court in *Gulf, Colo. & Santa Fe Ry. v. McGinnis*[17] held that a married daughter could not recover in a wrongful death action without allegations of dependency or pecuniary loss.

The interpretation of the statute by the Supreme Court of the United States in *St. Louis, Iron Mt. & So. Ry. v. Craft*[18] suggests that sections 1 and 9 were intended to relate to the invasions of two distinct interests:

> "One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong but a single recovery for a double wrong."[19]

The *Craft* case does not suggest that pecuniary loss is a necessary prerequisite to the continued prosecution of the injured employee's cause of action after the employee has died.

The majority in *Jensen* also decided that children in section 9 means only minor children, finding persuasive the decision of the United States Supreme Court in *McGinnis* wherein an adult daughter was denied recovery under section 1. A fair interpretation of the *McGinnis* case is that the Supreme Court precluded recovery because of the absence of pecuniary loss by the adult daughter, irrespective of any adult-minor differentiation. The fact of adulthood or minority is incidental except as it may bear on the extent of pecuniary loss. In *Haidacker v. Central R.R.*[20] a federal district court in New York

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[14]Walsh v. New York, N.H. & H. R.R., 173 Fed. 494 (C.C.D. Mass. 1909), aff'd. 223 U.S. 1 (1912); Fulgham v. Midland R.R., 167 Fed. 660 (C.C.W.D. Ark. 1909).

[15]227 U.S. 59 (1912).

[16]Id. at 68.

[17]228 U.S. 173 (1912).

[18]237 U.S. 648 (1914).

[19]Id. at 658.

[20]52 F. Supp. 713, 715 (E.D.N.Y. 1943). In Illinois the doctrine is asserted that the same presumption of pecuniary loss exists in favor of an adult child as exists in the case of a minor, that in all cases of lineal kindred there is a presumption of actual pecuniary loss. See, e.g., Howlett v. Doglio, 402 Ill. 311, 83 N.E.2d 708 (1949); Wilcox v. Bierd, 330 Ill. 571, 162 N.E. 170 (1928).

indicated that an adult child could recover in an action under section 1 if in fact the child had sustained pecuniary loss.

As a matter of first recourse the statute does not indicate either a qualification of dependency or minority for children under section 9. Since the statute is incomplete in this respect and the Supreme Court has only decided that pecuniary loss is a necessary prerequisite to beneficiaries under section 1, the intention of Congress in drafting section 9 seems important as a matter of second recourse.

The legislative history of section 9 indicates that Congress intended this survival provision to be "as broad, as comprehensive, and as inclusive in its terms as any of the states. . . ."[21] Committee reports indicate that section 9 should not be narrowly or restrictively interpreted.[22] This suggests that section 9 should afford the same type of recovery as comparable state acts, which generally do not require pecuniary loss as a prerequisite for the vesting of a survival action.[23] Since the decedent's daughter would have recovered under Illinois law,[24] and since a suit under FELA is her only recourse due to federal preemption[25] the result in *Jensen* does not seem consistent with the manifest intention of Congress.[26]

Since the United States Supreme Court looked for guidance to comparable wrongful death legislation while interpreting section 1,[27]

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[21]See S. Rep. No. 432, 61st Cong., 2d Sess. 12-15 (1910).

[22]237 U.S. at 661.

[23]Note, 44 Harv. L. Rev. 980 (1931). Approximately half of the states have statutes which deal specifically with the survival of actions for personal injury in addition to statutes granting a right of action for wrongful death. A typical survival statute reads as follows: "All causes of action shall survive and may be brought notwithstanding the death of the person entitled to or liable to the same." Iowa Code § 611.20 (1954).

[24]Ill. Rev. Stat. Ch. 3, § 494 (1951). In Illinois the action or cause of action for injury to person survives if decedent's death results from other causes. Wilcox v. International Harvester Co. of America, 278 Ill. 465, 116 N.E. 151 (1917); Ohnesorge v. Chicago City Ry., 259 Ill. 424, 102 N.E. 819 (1913); See also Susemiehl v. Red River Lumber Co., 305 Ill. App. 473, 27 N.E.2d 285 (1940).

[25]If an employee is engaged in interstate commerce when injured his only recourse is under the federal act. New York Cent. R.R. v. Winfield, 244 U.S. 147(1917); See Southern Ry. v. Gray, 241 U.S. 333 (1916); Seaboard Air Line Ry. v. Horton, 233 U.S. 492 (1914); Bement v. Grand Rapids & Indiana Ry., 194 Mich. 64, 160 N.W. 424 (1916). Although not within the scope of this article it is interesting to note that federal preemption has resulted in the exclusion of injured railroad workmen from their respective state compensation coverage when injured while engaged in intrastate commerce.

For a discussion of the gap left between FELA and State Workmen's Compensation Laws, see Miller, Workmen's Compensation for Railroad Employees, 2 Loyola L. Rev. 138, 155 (1944).

[26]See note 21 supra.

[27]See note 15 supra. The U. S. Supreme Court looked to the original Lord Campbell's Act, 1846, 9 & 10 Vict. c. 93.

it could similarly refer to comparable survival legislation if called upon to determine whether pecuniary loss is a necessary prerequisite for beneficiaries under section 9. The court could either adopt a uniform rule negating the requirement of pecuniary loss under section 9, or, to the extent that the states vary as to this requirement, allow the rule to vary with state law.

The latter view is suggested in *Seaboard Air Line Ry. v. Kenney*[28] where the United States Supreme Court affirmed the application of state law by the Supreme Court of North Carolina[29] in determining who was within the designated class of next of kin under the federal act. The Supreme Court of the United States said:

> "[U]nder our dual system of government, who are next of kin is determined, by the legislation of the various states to whose authority that subject is normally committed, it would seem to be clear that the absence of a definition in the act of Congress plainly indicates the purpose of Congress to leave the determination of that question to state law."[30]

Section 9 of the FELA preempts the application of state survival provisions where an employee is injured in interstate commerce.[31] Neither the statute nor the United States Supreme Court has decided that children must be minor and dependent to recover as beneficiaries under section 9. The legislative history of section 9 and the decisions of the state courts[32] interpreting this section in suits under FELA strongly suggest that the rule of statutory interpretation employed by the majority in *Jensen* may be unwarranted both from the standpoint of incorrect application of law and undesirable implications of social justice.[33]

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[28]240 U.S. 489 (1916).

[29]Kenney v. Seaboard Air Line Ry., 167 N.C. 14, 82 S.E. 968 (1914).

[30]See note 28 supra at 493-91.

[31]See note 25 supra.

[32]Hopps' Estate v. Chestnut, 324 Mich. 3356, 36 N.W.2d 908 (1949). Decedent's dependent widow received $9,400 in a cash settlement from the defendant railroad, part of which was recovered for decedent's pain and suffering. The probate court held that she, as widow and sole dependent, was entitled to the entire proceeds. The Supreme Court of Michigan reversed, allowing an adult nondependent daughter to share in that segment of the proceeds recovered for the pain and suffering of deceased. Id. at 911-12. "In our opinion the reasonable and acceptable interpretation is that in a proceeding under section 9 all those persons who are within the class of beneficiaries named are entitled to share in the proceeds of the settlement, irrespective of whether they were dependent upon the deceased for support and maintenance."

[33]It is clear that the result in Jensen absolves the defendant railroad from its negligence and places a premium on further delays in litigation. Since three years elapsed from the time liability was ascertained to the termination of the suit it is