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Walter E. Hoffman

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## RECOVERY IN WRONGFUL DEATH ACTIONS IN VIRGINIA

WALTER E. HOFFMAN\*

The ancient axiom "*actio personalis moritur cum persona*" is gradually becoming obsolete by the passage of statutes in many states and the liberal interpretation of such statutes. At common law the "action died with the person" and no recovery was permitted for a wrongful death, but in 1846, England abrogated the rule with the enactment of "Lord Campbell's Act."<sup>1</sup> Since that date the several states throughout this country have similarly passed statutes dealing with the subject and, in Virginia, Section 8-633 of the 1950 Code of Virginia is now effective, having been revised on numerous occasions since its passage in 1871.

As this article may be of greatest interest to students and practitioners of the laws of Virginia, particular reference will be made to decided cases and statutes of this state, although it is submitted that many states have like statutes and similar interpretations.

In Virginia it is strange that so few attorneys have endeavored to recover in tort actions for medical and hospital expenses preceding death. Such expenses, as well as funeral expenses, are not provable in an action for wrongful death. The Virginia statute creates a cause of action for the benefit of those kin mentioned in the statute, free from the claims of creditors of the decedent's estate,<sup>2</sup> but no damages to the estate of the decedent are provable under a count alleging and seeking a recovery under the death by wrongful act statute. We all recognize that, in the present age of rapidly moving motor vehicles and increasing recklessness, many persons are seriously injured, lingering for many days and months, and some ultimately die as a result of the injuries received in such an "accident." With the tremendous increase of medical and hospital expenses, it is not unusual to hear of instances involving required expenditures aggregating several thousands of dollars. Yet when the action is instituted following the death, we invariably are faced with the limitation of \$15,000,<sup>3</sup> which, until 1942 was \$10,000, and with the further realization that, in the trial of such an action,

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\*Member of the Norfolk, Va., Bar.

<sup>1</sup>9 & 10 Vict., c. 93 (1846).

<sup>2</sup>The statute goes further and provides that if there be no designated beneficiary entitled to the recovery, the same shall be assets in the hands of personal representative, to be disposed of according to law.

<sup>3</sup>Va. Code Ann. (Michie, 1950) § 8-636.

the medical and hospital expense cannot be introduced in evidence.

During the year 1950, the General Assembly of Virginia enacted what is now Section 8-628.1 of the Code of Virginia. This section reads as follows:

*"No cause of action for injuries to person or property shall be lost because of the death of the person liable for the injury. No cause of action for injuries to person or property shall be lost because of the death of the person in whose favor the cause of action existed, provided, however, in such action no recovery can be had for mental anguish, pain or suffering."*<sup>4</sup>

Insufficient time has elapsed for the Supreme Court of Appeals of Virginia to have before it the interpretation of this statute. It is submitted, however, that reason and precedent will now permit the recovery of medical, nursing and hospital expenses preceding death, and it may be effectively argued that funeral expenses are likewise recoverable within reasonable limitations. No doubt the pleadings in such actions will require separate counts or allegations in order to advise the court and opposing counsel of the several claims, but this is of little moment, and until the Section is interpreted by a court of last resort, we may expect an influx of such actions.

By dicta, Virginia's highest court has heretofore inferred that a recovery for medical expense, etc., preceding the death can be obtained. In *Stevenson v. Ritter Lumber Co.*<sup>5</sup> a parent instituted an action to recover for the loss of services of his deceased son, alleging that he was entitled to recover for such services for a period of five years following the death of the infant, or until he would have attained his majority. The court denied the right of recovery but said in its opinion:

*"The statute, however, does not affect the right of action for damages existing at common law in favor of a personal representative or a parent, to recover for losses between the time of an injury and the resulting death of the person injured; nor, as it would seem clear from the authorities, the right of the personal representative of a person dying as a result of an injury caused by a breach of a contractual duty on the part of the person, or corporation, inflicting the injury, to recover in an action for breach of contract, the damages to the deceased's personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business; nor the right of a parent to recover in a proper case made for loss of the services of his minor child to the date of the child's death by wrongful act."*<sup>6</sup>

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<sup>4</sup>Va. Code Ann. (Michie, 1950) § 8-628.1 [italics supplied].

<sup>5</sup>108 Va. 575, 62 S. E. 351 (1908).

<sup>6</sup>*Stevenson v. Ritter Lumber Co.*, 108 Va. 575, 581, 62 S. E. 353 (1908) [italics supplied].

Strange though it may seem, the foregoing case has apparently been cited or commented upon by the Supreme Court of Appeals of Virginia on only two occasions since the opinion of 1908 and one of the references was on a point entirely dissimilar from that now under consideration.<sup>7</sup>

The other Virginia cases casting light upon this problem are *Anderson v. Hygeia Hotel Co.*<sup>8</sup> and *Watson v. Daniel*.<sup>9</sup> The *Anderson* case discusses the period of limitation for bringing an action of tort and, while death did not ensue, the decision of the case turned upon the inquiry as to what actions terminated with the life of a person. There is language in the opinion from which it may be argued that *all* right of action respecting personal injuries resulting in death expire with the death of the injured person, but conversely the opinion mentions the common law right to sue for an injury done to the *property* or *estate* of the decedent. In *Watson v. Daniel*, a father instituted an action against a negligent defendant for medical expenses and loss of services in connection with injuries sustained by an infant son. The court permitted a recovery and overruled a plea of the one year statute of limitations, holding that this constituted a claim for an injury to the father's personal estate. The language of the opinion clearly indicates that a claim for medical expense and loss of services would survive in the event of the death of the father. With the enactment of Section 8-628.1 of the Code of Virginia, is it not equally clear that a claim for medical, nursing and hospital expenses in behalf of an adult decedent will survive and constitute a right of action which is in addition to the right of action granted under the death by wrongful act statute?

#### *The Effect of Lien Statutes*

It may be strenuously argued that the existence of certain lien statutes in favor of physicians, nurses and hospitals in death cases, has the effect of precluding a recovery in an independent action by a personal representative against a negligent third party. The pertinent portions of these statutes are as follows:

"Whenever any person sustains personal injuries caused by the alleged negligence of another and receives treatment in any hospital, public or private, or receives medical attention or treatment from any physician, or receives nursing service or care from any registered nurse in this State, such hospital, physician or nurse shall each have a lien for the amount of a just and reason-

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<sup>7</sup>See *Mercer v. City of Richmond*, 152 Va. 736, 148 S. E. 803 (1929).

<sup>8</sup>92 Va. 687, 24 S. E. 269 (1896).

<sup>9</sup>165 Va. 564, 183 S. E. 183 (1936).

able charge for the service rendered, but not exceeding five hundred dollars in the case of a hospital, one hundred dollars for all physicians and one hundred dollars in the case of all nurses, on the claim of such injured person or of *his personal representative*, against the person, firm or corporation whose negligence is alleged to have caused such injuries, unless the injured person, his personal representative or members of his family, is paid under the provisions of the Workmen's Compensation Act."<sup>10</sup>

"In cases of personal injuries resulting in death and settlement therefor by compromise or suit under the provisions of Sec. 8-633 to 8-640, the liens herein provided for may be asserted against the recovery, or against the general estate of the decedent, but not both. If asserted against the recovery and paid, such liens shall attach prorata to the amounts received respectively by such beneficiaries as are designated to receive the moneys distributed and in their respective amounts; and such beneficiaries, or the personal representative for their benefit, shall be subrogated to the liens against the estate of such decedent provided for by Sec. 64-147."<sup>11</sup>

Thus, while the death by wrongful act statute provides for the payment of any recovery to designated beneficiaries "free from all debts and liabilities of the deceased . . ." <sup>12</sup> the corresponding lien statutes do create a method of payment to hospitals, physicians and nurses which in effect make any recovery subject to the limitations set forth in the statute for such claims. The late O. L. Shackelford, Judge of the Court of Law and Chancery of the City of Norfolk, in a case from which no appeal was taken, made this comment in discussing the effect of these lien statutes:

"The only effect of the statute is to protect pro tanto the rights of those who have rendered services to the injured person pending his demise. In other words, it in effect adds their particular condition to the extent specified in the statute, to those other beneficiaries mentioned in the statutes creating the cause of action and regulating the distribution of the recovery."

It is submitted that the reasoning of this learned trial judge is sound, and it is now better fortified since the passage of Section 8-628.1 of the Code of Virginia.

When medical expenses, etc., are rendered necessary by reason of the negligent act of a third party, an injury is caused to the property of the injured party and, under the provisions of Section 8-628.1, it

<sup>10</sup>Va. Code Ann. (Michie, 1950) § 32-138 [italics supplied].

<sup>11</sup>Va. Code Ann. (Michie, 1950) § 32-141.

<sup>12</sup>Va. Code Ann. (Michie, 1950) § 8-638.

would appear that the right of action survives to the personal representative in the event of death. In fact, the lien statutes quoted above give a right of subrogation against the general estate of the decedent; does this not constitute an injury to the property of the decedent?

#### *Funeral Expenses*

The right of recovery of funeral expenses has never been determined by the Supreme Court of Appeals of Virginia. Whether the newly enacted statute is sufficient to sustain the argument that such a recovery was within the contemplation of the General Assembly of Virginia is admittedly debatable. In cases involving the death of an infant it would appear, by the greater weight of authority, that a parent could maintain such an action. While funeral expenses were not involved in the case of *Watson v. Daniel*,<sup>13</sup> the loss is none the less direct and would constitute a pecuniary loss to the personal estate of the parent, as the parent is entitled to the services of the child and, as an incident to this right, became liable for the infant's support, including the medical care and, upon death, the funeral expenses. Such a claim would be a damage to the estate of the parent and not to the parent's person. If the parent is admittedly entitled to a claim for loss of services to the date of death, it would seem to follow that the same unconditional right to reimbursement existed for funeral expenses, subject only to the reasonableness and necessity of such expenses. By reasoning we must observe that if any infant attains the age of majority, it would no longer be the legal duty of the parent to pay for such burial expenses; hence, the loss, in cases involving death of an infant, rests upon the parent.

The authorities denying a recovery for funeral expenses justify their ruling upon the theory that the time of payment of such expenses is merely accelerated by the wrongful death. In infant cases resulting in death this rule should not be applied.<sup>14</sup> Under the same reasoning a husband has been permitted to recover funeral expenses incurred in connection with his wife's death, he being legally obligated to bury his wife in a suitable manner if he possessed the means to do so.<sup>15</sup>

When an adult is killed and no member of the family is legally obligated to incur the burial expenses, we are met with the old adage that no person can escape "death and taxes." It follows that the wrongful death has merely accelerated the payment of funeral expenses. We

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<sup>13</sup>165 Va. 564, 183 S. E. 183 (1936).

<sup>14</sup>*Marshall v. Miller*, 112 Kan. 706, 42 Pac. 883 (1923).

<sup>15</sup>*Philly v. Northern Pac. Ry. Co.*, 46 Wash. 173, 89 Pac. 468 (1907).

see some elements of danger in permitting the recovery of funeral expenses in such cases which has sometimes been extended to include the cost of a tombstone. While the reasonableness of such expense remains with the court and jury, in the absence of a statutory limitation, the matter of the station-in-life occupied by the decedent may well justify expenses which are prohibitive, thereby increasing insurance rates and adversely affecting the public in general. It may be argued that the same problem exists with respect to burial expenses of an infant but, as has been suggested, the theory of recovery is entirely different.

Several cases outside of Virginia have been heretofore cited. The general rule has been stated as follows:

"So, too, without the aid of any statute there may be a recovery for medical and other expenses up to the time of death, and in some jurisdictions, but not others, this right has been extended even to the recovery of funeral expenses."<sup>16</sup>

It would be meaningless to discuss the cited cases as it is apparent that there is a sharp conflict of authority. Under the English, Canadian and some American cases, it is held that acceleration of burial expenses is insufficient to justify a recovery. However it appears that a majority of the cases from this country permit a recovery for medical, hospital and nursing services, and also permit a recovery for funeral expenses under the theory that a wrongdoer is responsible for his own acts and cannot be permitted to take advantage of the theory of accelerated payment of burial expenses.

#### *Conclusion*

As the writer analyzes Section 8-628.1 of the Code of Virginia there should no longer be any real dispute with respect to the recovery for loss of services, medical, hospital and nursing expenses. The death statute should not have the effect of limiting the operation of the survival statute to cases where death occurred from causes other than the injuries on which the action is grounded. The two causes of action are complementary and not repugnant to each other. They may be maintained independently of each other or, as under the system prevailing in Virginia to avoid multiplicity of suits, should be instituted under separate counts under the Virginia Notice of Motion Statute.<sup>17</sup>

Summarizing the foregoing, it is the writer's conclusion that:

- (1) In cases involving the death of an infant, the personal

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<sup>16</sup>25 C. J. S., Death § 13; 25 C. J. S., Death § 108 deals more fully with the subject matter. Other authorities are collected in Notes (1920) 7 A. L. R. 1334, (1935) 94 A. L. R. 438, and (1946) 163 A. L. R. 260.

<sup>17</sup>Va. Code Ann. (Michie, 1950) § 8-715 et seq.

representative may maintain the action for wrongful death, and the injured parent may bring a separate suit for loss of services to the time of death, plus medical, hospital, nursing and burial expenses within the limits of the rule of reasonableness which should exclude the cost of a tombstone.

(2) In cases involving the death of an adult, the personal representative may maintain in one action under separate counts, a suit to recover for the wrongful death, and the medical, hospital and nursing expenses preceding death. As to the funeral expenses in such cases, the matter is an open question.

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