Washington Law Review

Volume 4 | Number 2

5-1-1929

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Bryant Brady

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Recommended Citation
Bryant Brady, *The Action for Wrongful Death in Washington*, 4 Wash. L. Rev. 61 (1929).
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THE ACTION FOR WRONGFUL DEATH IN WASHINGTON

I. Introduction

1. The Common Law.

It is elementary that at common law no action would lie for the death of a human being. This view originated with the decision of Lord Ellenborough in *Baker v. Bolton*[1] and was consistently adhered to in England prior to the adoption of Lord Campbell's Act.[2] A few of the early American cases permitted such an action to be maintained,[3] but with these few exceptions the American courts have uniformly followed *Baker v. Bolton*.[4] A discussion of the reasons for the common law view lies outside the scope of this paper.[5]

2. The Statutes.

The first statute giving a right of action for the death of a human being, Lord Campbell's Act[6] was adopted in England in 1846. New York adopted a similar statute, a year later. At the present time all American jurisdictions have statutes conferring a right of action for wrongful death.[7] These statutes differ widely in their terms, particularly as to the person authorized to bring the action, and as to those for whose benefit the action is prosecuted. The statutes, however, fall into two distinct classes. Statutes of the

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[1] 1 Campb. 493 (1808).

[2] 9 & 10 Vict. c. 93 (1846).

[3] *Cross v. Guthery*, 2 Root (Conn.) 90, 1 Am. Dec. 61 (1794) *Ford v. Monroe*, 20 Wend. (N. Y.) 210 (1838) *Sullivan v. Union Pac. Ry. Co.*, 3 Dill. 334, Fed. Cas. No. 13,599 (1874) All of which have since been overruled. Georgia from the beginning, and in the absence of statute, has permitted a father to maintain an action for loss of services arising from the death of a minor son. *Shields v. Younge*, 15 Ga. 349, 60 Am. Dec. 698 (1854). *Chick v. Southwestern R. Co.* 57 Ga. 357 (1876)

[4] *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358 (1886) and cases cited in notes 22-32 incl. of chapt. 1, Tiffany, Death By Wrongful Act (2nd ed., 1913).

[5] See Tiffany, *ibid.*, pp. 16-20, for a discussion and criticism of the reasons generally given in support of the view that an action for wrongful death should not lie.

[6] Note 2, *supra.*

[7] These statutes as they existed in November, 1912, are set forth in an appendix to Tiffany. *ibid.*

first and by far the larger group, following Lord Campbell's Act, create a new and independent cause of action for the death of the deceased in favor of the specified beneficiaries. These are the true death statutes. The second group comprehends the so-called "survival statutes," that is statutes which merely keep alive the right of action which the deceased himself would have had, had he lived. A number of jurisdictions, including Washington, have adopted statutes of both types.

The Washington statutes as they existed prior to 1927, and as amended by the legislative session of that year are set forth below

> Rem. Comp. Stat. 183. *Right of Action for Wrongful Death.*
>
> When the death of a person is caused by the wrongful act, neglect or default of another his personal representative may maintain an action for damages against the person causing the death, and although the death may have been caused under such circumstances as amount in law to a felony

> Rem. Comp. Stat. 183-1. *Beneficiaries of Action for Wrongful Death.*
>
> Every such action shall be for the benefit of the wife, husband, child or children of the person whose death shall have been so caused. If there be no wife or husband or child or children, such action may be maintained for the benefit of the parents, sisters or minor brothers who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his death. In every such action the jury may give such damages as, under all the circumstances of the case, may to them seem just.

> Rem. Comp. Stat. 183-2. *Application of Terms.*
>
> Words in this act denoting the singular shall be understood as belonging to a plurality of persons or things. The masculine shall apply also to the feminine, and the word person shall also apply to bodies politic and corporate.[8]

> Rem. Comp. Stat. 184. *Action for Injury or Death of Child or Ward.*
>
> A father, or in case of the death or desertion of his family, the mother may maintain an action as plaintiff for the injury or death of a child, and a guardian for the injury or death of his ward.[9]

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[8] P C. secs. 8259-8261. Adopted in its present form in 1917.
[9] P C. sec. 8264. Adopted 1869.

The foregoing section was amended in 1927 to read as follows.

L. '27, p. 241, sec. 1. (Rem. 1927 Sup. sec. 184.)

A father, or in case of his death or desertion of his family, the mother may maintain an action as plaintiff for the injury or death of a minor child, or a child on whom either is dependent for support, and the mother for the injury or death of an illegitimate minor child, or an illegitimate child on whom she is dependent for support.

Rem. Comp. Stat. 194. *Action for Personal Injury Survives to Wife, Child or Heirs.*

No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, if he have a wife or child living, or leaving no wife or issue, if he have dependent upon him for support and resident within the United States at the time of his death, parents, sisters or minor brothers; but such action may be prosecuted, or commenced and prosecuted, in favor of such wife or in favor of the wife and children, or if no wife, in favor of such child or children, or if no wife or child or children, then in favor of his parents, sisters or minor brothers who may be dependent upon him for support, and resident in the United States at the time of his death.[10]

The foregoing section was amended in 1927, to read as follows:

L. '27, p. 143, sec 1. (Rem. 1927 Sup. sec. 194)

No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, if he have a wife or child living, or leaving no wife or issue, if he have dependent upon him for support and resident within the United States at the time of his death, parents, sisters, or minor brothers, but such action may be prosecuted or commenced and prosecuted, *by the executor or administrator of the deceased,* in favor of such wife, or in favor of the wife or children, or if no wife, in favor of such child or children, or if no wife or child or children, then in favor of his parents, sisters or minor brothers who may be dependent upon him for support, and resident within the United States at the time of his death.[11]

There is considerable conflict in other jurisdictions as to the proper rule of construction to be adopted in applying these statutes.

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[10] P. C. sec. 8275. Adopted in this form in 1909.

[11] It will be noted that the insertion of the italicized words constitute the only change made by this amendment.

One line of authority has taken the position that since this legislation is remedial in character, a liberal rule of construction should be adopted,[12] while other courts apply the familiar principle that statutes in derogation of the common law are to be strictly construed.[13] In construing the Washington statutes, the Supreme Court of this state has taken the position that since sections 183 and 184 of Rem. Comp. Stat.[14] create a cause of action unknown to the common law, they are to be strictly construed in determining the persons entitled to sue, but liberally in applying the statute in their favor.[15] On the other hand in construing section 194, a liberal construction as to all questions is adopted on the theory that that statute does not create a new cause of action but only keeps alive the deceased's common law right of action for personal injuries.[16]

II. Action Under the Washington Death Statutes (Rem. Comp. Stat. sections 183 and 184)

It will be noted that sections 183 and 184 as above set forth are true death statutes in that they create a new and independent cause of action in favor of the named beneficiaries. On the other hand section 194 is a survival statute.

1. Action for the Benefit of Wife or Child for Death of Husband or Father.

The action in favor of a wife or child for the death of the husband or father is given by that language of section 183-1, which provides that "every such action shall be for the benefit of the wife, husband, child or children of the person whose death shall have been so caused."

As originally enacted, this section read simply, "his heirs or per

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[12] *Merkle v. Bennington Tp.*, 58 Mich. 156, 24 N. W 776, 55 Am. Rep. 666 (1885).

[13] *Jackson v. Ry. Co.*, 87 Mo. 422, 56 Am. Rep. 460 (1885).

[14] For purposes of brevity sections 183, 184, and 194 of Rem. Comp. Stat. will hereinafter be referred to simply as sections 183, 184 and 194, respectively.

[15] *Whittlesey v. Seattle*, 94 Wash. 645, 163 Pac. 193, L. R. A. 1917D, 1084 (1917) But cf. *Brunner v. Little*, 97 Wash. 319, 166 Pac. 1166 (1917) where a liberal construction was adopted as to the parties entitled to sue under a statute (Rem. Comp. Stat. secs. 6382 *et seq.*) giving a right of action against the surety for the wrongful death of a person killed by or in jitney busses.

[16] *Whittlesey v. Seattle*, note 15, *supra*, *Thompson v. Seattle, Renton & S. R. Co.*, 71 Wash. 436, 128 Pac. 1070 (1912).

sonal representative may maintain an action.'"[17] Under the statute as it then read the action could be brought either by the wife and children, or by the administrator. If brought by the wife and children, they had to join in one action, separate actions not being permitted.[18] If on the other hand the action was brought by the administrator it was necessary to show that the wife and children knew of the action, and consented to its being brought by the administrator.[19] The widow, however, could consent for the minor children under the age of 14 years.[20] In the event that the action was brought by the administrator, the recovery if any did not form part of the assets of the estate but enured immediately to the wife and children by operation of law.[21]

Under our present statute, however, the action is vested solely in the administrator, and while the action is for the benefit of the wife and children, they cannot personally maintain the action.[22] Although no decisions on the question have arisen since the enactment of the present statute in 1917, it would seem that the recovery still enures to the wife and children by operation of law and does not belong to the estate of the deceased.[23]

In case of the death of the husband and father the present statute clearly provides that the action is to be maintained primarily for the benefit of the wife and children of the deceased. There is no requirement that the wife or children be dependent upon the deceased for support.[24] Nor is it required that they be residents or citizens of the United States.[25] The fact that the deceased may have abandoned his wife and children and was contributing nothing to their support prior to his death does not bar an action for his death by the administrator for their benefit,[26] as his legal liability to fur-

[17] Bal. Code sec. 4828.

[18] *Riggs v. Northern Pac. Ry. Co.*, 60 Wash. 292, 111 Pac. 162 (1910).

[19] *Copeland v. Seattle*, 33 Wash. 415, 74 Pac. 582, 65 L. R. A. 333 (1903), *Koloff v. Chicago, M. & S. P Ry. Co.*, 71 Wash. 543, 129 Pac. 398 (1913).

[20] *Koloff v. Chicago, M. & St. P R. Co.*, note 19, *supra.*

[21] *Archibald v. Lincoln County*, 50 Wash. 55, 96 Pac. 831 (1908)

[22] *Rentenick v. Gibson Packing Co.*, 132 Wash. 108, 231 Pac. 773, 37 A. L. R. 830 (1924).

[23] *Archibald v. Lincoln County*, note 21, *supra.*

[24] *Jensen v. Culbert*, 134 Wash. 599, 236 Pac. 101 (1925).

[25] *Anastasakas v. International Contract Co.*, 51 Wash. 119, 98 Pac. 93, 21 L. R. A. (n. s.) 67, 130 Am. St. Rep. 1089 (1908). An early federal case construing the Washington statute reached a contrary conclusion. *Roberts v. Great Northern Ry. Co.*, 161 Fed. 239 (D. C. Wash., 1904). The later federal cases have, however, adopted the view of the Washington Court. *Salvelich v. Lytle Logging & Mercantile Co.*, 173 Fed. 277 (C. C. A. 9th, 1909).

[26] *Fogarty v. Northern Pac. Ry. Co.*, 85 Wash. 90, 147 Pac. 652, L. R. A. 1916C, 803 (1915), (action under Federal Employer's Liability Act.)

nish such support still continued, and presumably has some pecuniary value. The fact of such abandonment may be shown, however, in mitigation of damages.[27]

The statute provides that, "in every such action the jury may give such damages as, under all the circumstances of the case, may to them seem just." The court, in a long line of cases, has held this provision to mean only the actual pecuniary loss to the wife and children arising from the death.[28] Pecuniary loss, however, in addition to the deprivation of support, includes the loss of the society, comfort and protection of the husband, and such loss is a proper item of damage.[29] Similarly an allowance may be made for the loss to the children of the society and comfort of their father, and of that mental, moral, physical training that he alone could give,[30] such a loss being a pecuniary one. Nor is a child limited to such pecuniary loss as he will sustain during his minority When the evidence is such as to indicate that the child will continue to suffer a pecuniary loss after attaining his majority, it is proper to instruct that damages may be allowed for such prospective loss.[31]

A difficult and, unfortunately, as yet unsettled question arises as to the mode of distribution of the recovery as between the beneficiaries. The statutes of many states expressly provide some mode for apportioning the recovery, but ours is silent on this point. The Supreme Court has in one case suggested by way of dictum that "it could be argued with plausibility" that the surviving widow and children are to share equally in the recovery [32] It is difficult to see how a "plausible argument" could be made for such a view, in the light of our repeated holdings that the measure of the defendant's

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[27] *Fogarty v. Northern Pacific Ry. Co.*, note 26, *supra*, *Creamer v. Moran Bros. Co.*, 41 Wash. 636, 84 Pac. 592 (1906).

[28] *Klepsch v. McDonald*, 4 Wash. 436, 30 Pac. 991, 31 Am. St. Rep. 936 (1892) *Walker v. McNeil*, 17 Wash. 582, 50 Pac. 518 (1897) *Halverson v. Seattle Electric Co.*, 35 Wash. 600, 77 Pac. 1058 (1904) *Rochester v. Seattle, Renton & S. R. Co.*, 75 Wash. 559, 135 Pac. 209 (1913) *Castner v. Tacoma Gas & Fuel Co.*, 123 Wash. 236, 212 Pac. 283 (1923) *Felt v. Puget Sound Electric Ry.*, 175 Fed. 477 (D. C. Wash., 1909).

[29] *Walker v. McNeil*, note 28, *supra*, *Halverson v. Seattle Electric Co.*, note 28, *supra*, *Felt v. Puget Sound Electric Ry. Co.*, note 28, *supra*. *Northern Pac. Ry. Co. v. Freeman*, 83 Fed. 82 (C. C. A. 9th, 1897) reversed on other grounds, 174 U. S. 379 (1899).

[30] *Walker v. McNeil*, note 28, *supra*, *Northern Pac. Ry. Co. v. Freeman*, note 29, *supra*.

[31] *Rochester v. Seattle, Renton & S. R. Co.*, 67 Wash. 545, 122 Pac. 23, 39 L. R. A. (n. s.) 1156 (1912) (child mentally defective; deceased had been in good health and was a provident father.)

[32] *Schultz v. Western Farm Tractor Co.*, 111 Wash. 351, 190 Pac. 1007, 14 A. L. R. 514 (1920).

liability is the pecuniary loss to the beneficiaries. When there is more than one beneficiary then the sum total of the pecuniary losses incurred by them is the measure of the defendant's liability [33] To hold that the pecuniary losses incurred by the various beneficiaries should fix the defendant's liability, but as between themselves they should all share equally regardless of their loss, would hardly seen justifiable. Certainly it would not tend to accomplish the primary end of awarding damages in any case, namely, that of compensation. The Supreme Court has twice refused to pass on the question on the ground that it was not properly presented.[34] In the first of these cases error was predicated on the fact that the jury was instructed to, and returned a verdict segregating the damages of the various beneficiaries. In the second, error was predicated on the failure to so segregate the damages. In both cases the court refused to decide the question raised on the ground that the defendant had failed to assign as error the excessiveness of the verdict. In the former case, however, the court indicated that they did not approve the practice of having the jury apportion the damages, and they repeated this language in the later case. It would seem that whatever machinery for apportionment the court ultimately adopts, the basis of such apportionment should be the pecuniary loss incurred by the various beneficiaries.

2. Action for the Benefit of Husband or Child for Death of Wife or Mother.

Prior to 1917 a husband under what is now section 183, could not maintain an action for the wrongful death of his wife.[35] Although it seems to have been assumed in an early case[36] that a child could maintain an action for the death of its mother, the court when the question was first brought to their attention, held that under the then existing statue, no such action could be maintained.[37] The court in conclusion recommended that the legislature reword the statute so as to permit an action for the benefit of the husband and children for the death of the wife and mother.

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[33] See cases cited in notes 28, 29 and 30, *supra.*

[34] *Stephenson v. Parton*, 89 Wash. 653, 155 Pac. 147 (1916) *Heath v. Stephens*, 144 Wash. 440, 258 Pac. 321 (1927).

[35] *Johnson v. Seattle Electric Co.*, 39 Wash. 211, 81 Pac. 705 (1905)

[36] *Hamlin v. Columbia & Puget S. Ry. Co.*, 37 Wash. 448, 79 Pac. 99 (1905).

[37] *Whittlesey v. Seattle*, note 15, *supra.*

This decision was followed by the present statute which permits an action to be maintained by the administrator for the benefit of the surviving husband and children of the deceased. The general rules as to recovery and as to the amount thereof are the same as in the case of an action for the death of the husband. Thus the measure of damages is the pecuniary loss to the beneficiaries.[38] But as in the case of the death of the husband, pecuniary loss includes the loss to the children of the mental, moral and physical training that only their mother could give them.[39] There is an intimation in the case of *Castner v. Tacoma Gas & Fuel Co.*,[40] that where the action is brought for the benefit of adult children, it is necessary to plead and prove dependency of such children on their mother in order to permit a recovery Such a rule is obviously incorrect in the light of the language of our statute, and it is probable that all the court intended to mean by the language used was that the child in that case had failed to show a pecuniary loss. In any event the doctrine that dependency is required was shortly afterwards repudiated, the court pointing out that the only condition to a recovery was a showing of pecuniary loss.[41]

An interesting question arises as to whether the husband may recover funeral expenses incident to the wife's death. The question first arose in this state at a time when no action could be maintained by the husband for the death itself. The court nevertheless held as a matter of common law, and in the absence of statute that such a recovery might be had.[42] While the authorities on this question as a matter of common law are somewhat meager, the weight of authority is in accord with the Washington view.[43] Somewhat singularly, the court in *Castner v. Tacoma Gas & Fuel Co.*,[44] without discussion, held that funeral expenses could not be recovered by the husband although the statutes had then been amended so as to permit an action for the death itself. The court, however, immediately reversed itself on this point on re-hearing,[45] permitting the husband to recover the expenses incident to his wife's funeral.

[38] *Castner v. Tacoma Gas & Fuel Co.*, 128 Wash. 236, 212 Pac. 283 (1923) *Jensen v. Culbert*, 134 Wash. 599, 236 Pac. 101 (1925) *Woodbury v. Hoquiam Water Co.*, 138 Wash. 254, 244 Pac. 565 (1926).

[39] *Aronson v. Everett*, 136 Wash. 312, 239 Pac. 1011 (1925).

[40] Note 38, *supra.*

[41] *Jensen v. Culbert*, note 38, *supra.*

[42] *Philby v. Northern Pac. Ry. Co.*, 46 Wash. 173, 89 Pac. 468, 9 L. R. A. (n. s.) 1193, 123 Am. St. Rep. 926, 13 Ann. Cas. 742 (1907).

[43] See annotation on this question 9 L. R. A. (n. s.) 1193.

[44] Note 38, *supra.*

[45] *Castner v. Tacoma Gas & Fuel Co.*, 126 Wash. 657, 219 Pac. 12 (1923).

3. ACTION BY OR FOR BENEFIT OF PARENT FOR DEATH OF CHILD.

From an examination of the statutes it is apparent that they give a parent two separate rights of action for the death of a child, one under section 183, and one under section 184. When section 184 is mentioned, it is used to refer to that section of Remington Compiled Statutes as it stood prior to its amendment in 1927 That amendment will be discussed separately

(a) Action by Administrator for Benefit of Parent for the Wrongful Death of a Child. (Rem. Comp Stat. sections 183, 183-1.)

Prior to 1909, when the section which is now section 183 read that "his heirs" could maintain an action for the death of a deceased person, the court consistently held that no action could be maintained by a parent thereunder for the death of a child[46] on the theory that a parent was not an "heir" within the meaning of the statute.

Under the present statute (sec. 183-1) it is clear from a mere reading of the statute that no action for the benefit of the parents may be maintained if there is a husband, wife or child of the deceased living. Further the action cannot be brought personally by the parents, but must be brought by the administrator.[47] In addition the parent must have been dependent on the deceased at the time of his death.[48] Where the action is brought under section 183, it is not necessary that the child be a minor if the parent is dependent on him for support.[49] The court has consistently held that a substantial degree of dependency is required, arising from necessitous want, and a recognition of that necessity on

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[46] *Noble v. Seattle*, 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822 (1898) *Nesbit v. Northern Pac. Ry. Co.*, 22 Wash. 698, 61 Pac. 141 (1900) *Manning v. Tacoma R. & Power Co.*, 34 Wash. 406, 75 Pac. 994 (1904) *Deuber v. Northern Pac. Ry. Co.*, 100 Fed. 424 (D. C. Wash., 1900).

[47] *Broughton v. Ore.-Wash. R. and Nav. Co.*, 137 Wash. 135, 241 Pac. 963 (1925).

[48] *Kanton v. Kelley*, 65 Wash 614, 118 Pac. 890 (1911) *Mesher v. Osborne*, 75 Wash. 439, 134 Pac. 1092, 48 L. R. A. (n. s.) 917 (1913) *Machek v. Seattle*, 118 Wash. 42, 203 Pac. 25 (1921) *Grant v. Libby, McNeill & Libby*, 145 Wash. 31, 258 Pac. 842 (1927). And see comment on the latter case, 3 WASH. LAW REV. 54.

[49] *Machek v. Seattle*, note 48, *supra*.

the part of the child.[50] Thus mere occasional contributions by the deceased to his parents in the nature of gifts, who support themselves is not sufficient.[51] Nor is the fact that the deceased gave all his earnings to his parents sufficient where they are able to support themselves.[52] The fact that the deceased may have promised to support his parents in the event that they should become dependent in their old age will not support an action for his death under this section[53] as actual dependency at the time of his death is required. The dependency apparently, however, may be partial and still support the action, the court having stated by way of dictum in a recent case that where a person was dependent on several sources of support and one of those sources was removed by the wrongful act of another, that recovery might be had against the wrongdoer to the extent which the deceased contributed to his support.[54] The sole measure of recovery is the monetary value of the support of which the parent has been deprived.[55] It should be noted that there is the further requirement that the parents be residents of the United States at the time of the death in order to be entitled to the benefits of this section.

This section permits the administrator also to maintain the action for the benefit of the sisters and *minor* brothers of the deceased who may be dependent upon him for support. But one case has as yet arisen under this provision. The same rules govern a recovery on their behalf as govern a recovery on behalf of the parents.[55a]

(b) Action by Parent for the Wrongful Death of a Child Under Section 184.

This statute (section 184) differs from both section 183 and 194 in that it provides that the beneficiary may personally maintain the action. The action is primarily vested in the father, but in case of his death or desertion it may be maintained by the

[50] *Bortle v. North. Pac. Ry. Co.*, 60 Wash. 552, 111 Pac. 780, Ann. Cas. 1812B, 731 (1910), (action under dependency provision of section 194, but rule would be same under section 183). *Kanton v. Kelley*, note 48, *supra*, *Grant v. Libby, McNeill & Libby*, note 48, *supra*, 3 WASH. LAW REV. 54.

[51] *Bortle v. North. Pac. Ry. Co.*, note 40, *supra*.

[52] *Kanton v. Kelley*, note 48, *supra*.

[53] *Kanton v. Kelley*, note 48, *supra*.

[54] *Grant v. Libby, McNeill & Libby*, note 48, *supra*. See also *Estes v. Schulte*, 146 Wash. 688, 264 Pac. 990 (1928).

[55] *Machek v. Seattle*, note 48, *supra*.

[55a] *Estes v. Schulte*, note 54, *supra*.

mother. The court has given liberal interpretation to the provision permitting the mother to maintain the action in case of the death or desertion of the husband. Thus where the parents had been divorced and the custody of the deceased was awarded to the father but he had later returned him to the mother and then abandoned him, contributing nothing to his support, it was held that the mother was entitled to sue.[56] Where, however, the mother has re-married, the step-father would be a necessary party plaintiff, since the recovery which is based on loss of services, will under our system be community property.[57] In case of the death of an illegitimate child the action under this section is vested primarily in the mother.[58]

This section of the statute merely provides that the parents may maintain an action for the "injury or death" of a child and is silent as to what the basis of the action is or what the measure of damages shall be. The effect of the statute as construed by our court, is not nearly so broad as the language used would seem to indicate. In an early case[59] the court held that the basis of the action granted by this statute was the loss of the services of a minor child to which the father is legally entitled. It will be noticed that the language of the statute is "injury or death." Since a parent at common law had a right of action for the loss of services of his minor child arising from an injury, the court construed that portion of this statute giving a right of action to the parent for "injury" to the child as merely declaratory of the common law right of action for loss of services, and then construed the statute as extending the common law rule so as to permit a recovery for loss of services arising from death. It is now too late to question the merits of this construction of the statute, as it has been consistently adhered to[60] and, indeed, has practically been embodied in the statute by the 1927 amendment thereto.[61] Since the action is one based on loss of services it may only be maintained for the death of

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[56] *Clark v. Northern Pac. Ry. Co.*, 29 Wash. 139, 69 Pac. 636 (1902).

[57] *Magnuson v. O'Dea*, 75 Wash. 574, 134 Pac. 640, Ann. Cas. 1915D, 1230 (1913).

[58] *Goldmeyer v. VanBibber*, 130 Wash. 8, 225 Pac. 821 (1924), L. 1927 p. 241, sec. 1.

[59] *Hedrick v. Ilwaco R. & Nav. Co.*, 4 Wash. 400, 30 Pac. 714 (1892).

[60] *Atrops v. Costello*, 8 Wash. 149, 35 Pac. 620 (1894) *Dean v. Ore. R. & Nav. Co.*, 44 Wash. 564, 87 Pac. 824 (1906) *Mesher v. Osborne*, 75 Wash. 439, 134 Pac. 1092, 8 L. R. A. (n. s.) 917 (1913) *Machek v. Seattle*, note 48, *supra*, *Penoza v. Southern Pac. Ry. Co.*, 215 Fed. 200 (D. C. Wash., 1914).

[61] See discussion of this amendment, *infra*, herein.

a minor child.[62] Dependency of the parent, however, is not necessary.[63] Once the child's minority is established, all that will defeat the action is proof of contributory negligence or of emancipation.[64]

The measure of damages in an action by the parent under this section is the monetary value of the lost services and in addition such medical and funeral expenses incurred by the parent by reason of the injury and death.[65] While the plaintiff may, if he sees fit, offer evidence of the child's earning power[66] such evidence is not essential to a recovery, but since the value of such services are incapable of exact ascertainment, such value is to be determined by the jury, taking into consideration the child's age, health, habits, character and the station in life of the parents.[67] The court has repeatedly announced that the damages to be so ascertained are substantial in amount.[68] Substantial damages may be recovered even where the parents are in comfortable circumstances and it had been their intention to continue the child's education until it attained its majority.[69] The defendant may, however, show the cost of maintaining and educating the child in mitigation of damages.[69a]

It is important to note that a father of a minor child on whom he is dependent for support may recover both under section 183 and section 184. The court has held that an action under one section does not bar an action under the other[70] since the basis of the

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[62] *Mesher v. Osborne*, note 60, *supra*, *Machek v. Seattle*, note 48, *supra*, *Broughton v. Ore.-Wash. R. & N. Co.*, note 47, *supra*. In the latter case recovery was denied the parents for the funeral expenses of an adult son. Compare *Philby v. Northern Pac. Ry. Co.*, note 42, *supra*.

[63] *Mesher v. Osborne*, note 60, *supra*, *Machek v. Seattle*, note 48, *supra*.

[64] *Kanton v. Kelley*, note 48, *supra*. Had cases such as *Kanton v. Kelley* and *Grant v. Libby, McNeill & Libby*, note 48, *supra*, been brought under section 184 instead of section 183, a recovery could have been had. See 3 WASH. LAW REV. 54.

[65] *Hedrick v. Ilwaco R. & N. Co.*, note 59, *supra*, *Dean v. Ore. R. & N. Co.*, note 60, *supra*, *Skidmore v. Seattle*, 138 Wash. 340, 244 Pac. 545 (1926).

[66] *Kranzusch v. Trustee Co.*, 93 Wash. 629, 161 Pac. 492 (1916).

[67] *Atrops v. Costello*, note 60, *supra*, *Kranzusch v. Trustee Co.*, note 66, *supra*, *Sweeten v. Pacific Power and Light Co.*, 88 Wash. 679, 153 Pac. 1054 (1915).

[68] See cases cited in note 67, *supra*. See also, *St. Germain v. Potlach Lbr Co.*, 76 Wash. 102, 135 Pac. 804 (1913) *Skidmore v. Seattle*, note 65, *supra*.

[69] *Atkeson v. Jackson Estate*, 72 Wash. 233, 130 Pac. 102, 44 L. R. A. (n. s.) 349 (1913)

[69a] *Tecker v. Seattle, Renton & S. R. Co.*, 60 Wash. 570, 111 Pac. 791, Ann. Cas. 1912B, 842 (1910) *Atrops v. Costello*, note 60, *supra*.

[70] *Hedrick v. Ilwaco R. & N. Co.*, note 49, *supra*, *Machek v. Seattle*, note 48, *supra*.

two actions and the measure of recovery is entirely different.

There remains to be considered the effect of the 1927 amendment[71] on section 184. It will be noted that the former statute has been kept intact as the first part of the new statute with the exception that the word "minor" has been inserted in front of the word child. This change does not affect the existing law as our court, as pointed out above, has consistently held that the action under section 184 may only be maintained for the death of a minor child. In addition thereto the legislature has added an entirely new clause the effect of which is that the father may maintain an action for the wrongful death of a child on whom either he or the mother is dependent for support. It would seem that this addition gives exactly the same right of action as that given by section 183, and that the measure of damages, namely, the loss of support, would be the same in both instances. However, the action under section 183 may only be brought by the administrator while the amendment provides that it may be brought by the parent directly Under the present amendment, therefore, a dependent father may sue the wrongdoer directly for the death of his child for the resultant loss of support. A difficult question arises as to whether the new section impliedly repeals that part of section 183 which provides that the administrator of the deceased's estate shall bring an action for the benefit of the dependent parent. Since our court does not favor implied repeals in this class of cases[72] it would seem that the action may now be brought either by the administrator or by the father. Where, however, it is brought by the administrator, it would seem by analogy to the cases which arose at the time when either the wife, or the administrator could sue for the death of the husband, that the consent of the parent to the administrator's bringing the suit would have to be sworn.[73]

III. Action Under the Survivorship Statute (Rem. Comp. Stat. Sec. 194)

As has already been pointed out, the so-called death statutes are of two kinds, namely those which give a new and independent cause of action arising out of the death, and those which merely continue or keep alive the cause of action which the deceased would have had,

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[71] L. '27, p. 241, Sec. 1.

[72] *St. Germain v. Potlach Lbr. Co.*, note 68, *supra.*

[73] See cases cited in note 19, *supra.*

had he lived. These latter are more properly called survival statutes. Remington's Compiled Statutes section 194 is of this latter type.

Prior to 1927 there was some doubt as to who was the proper person to maintain the action. The 1927 amendment,[74] however, removed all doubts by providing that the action should be maintained by the administrator of the deceased's estate.[75] This is the only change effected by this amendment.

It should be noted that the beneficiaries named are not the same as under section 183, the word "husband" being omitted from the beneficiaries. At first blush since the statute constantly uses the masculine pronoun it would seem that the action could only be maintained where the deceased was a male person. Such, however, has not been the construction placed upon it by our court. Following the liberal rule of construction adopted by our court in interpreting this statute, the court has held that an action may be maintained thereunder for the benefit of the children, for the death of their mother.[76] It is doubtful, however, if an action could be maintained for the benefit of a husband since his name is entirely omitted from the list of beneficiaries. If there are no wife and children then the action is to be prosecuted in favor of the dependent parents, minor brothers and sisters. The degree of dependency required is the same as in an action on their behalf under section 184[77] It is not necessary that the deceased be a minor child[78]

The sole measure of damages under this statute is the pain and suffering of the deceased between the time of injury and the time of death, and the medical expenses incurred by him prior to death.[79] The loss sustained by the beneficiaries by reason of the death is immaterial.[80]

Since the action under the survival statute is an entirely separate and independent cause of action[81] from that given by section 183, it

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[74] L. '27, p. 143, sec. 1.

[75] Since the enactment of the amendment the court has intimated that the administrator was the proper person to maintain the action under the statute, before the amendment. *Whiting v. Seattle*, 144 Wash. 668, 258 Pac. 824 (1927).

[76] *Thompson v. Seattle, Renton & S. R. Co.*, 71 Wash. 436, 128 Pac. 1070 (1912).

[77] *Bortle v. Northern Pac. Ry. Co.*, note 50, *supra.*

[78] *Machek v. Seattle*, note 48, *supra.*

[79] *Thompson v. Seattle, Renton & S. R. Co.*, note 76, *supra. Machek v. Seattle*, note 48, *supra.*

[80] *Seattle Electric Co. v. Hartless*, 144 Fed. 379, (C. C. A. 9th, 1906).

[81] *Swanson v. Pacific Shipping Co.*, 60 Wash. 87, 110 Pac. 795 (1910)

follows that one is not a bar to the other and both may be maintained for the benefit of the named beneficiaries.[82] Further where both causes of action are brought by the administrator they may be joined in one suit.[83]

IV The Defense of Contributory Negligence.

1. Contributory Negligence of the Deceased.

The general rule followed in practically all jurisdictions is that the contributory negligence of the deceased will bar an action either under a death statute[84] or under a survival statute.[85] That it should bar an action under the survival statute is obvious since all that is given by such a statute is the right of action which the deceased himself would have had, had he lived. That it would bar the action for wrongful death proper is not quite so clear in the light of the universally recognized principle that the death statutes create an entirely new and independent cause of action. The reasoning generally advanced to sustain the view that the contributory negligence of the deceased will bar a recovery even under the death statutes is that while such statutes create a new cause of action, this new cause of action is dependent upon the existence of a cause of action in the deceased for his injuries had he lived.[86] The Supreme Court of this state in a number of early cases held without discussion that the deceased's contributory negligence would bar a recovery [87] The question was first discussed in 1919, and the court after a review of the authorities adhered to its earlier cases, assigning the same reason for the rule as outlined above.[88]

2. Contributory Negligence of the Beneficiaries.

Where the sole beneficiary of the action for wrongful death is guilty of contributory negligence proximately contributing to the

[82] *Machek v. Seattle*, note 48, *supra*, *Puget Sound T. L. & P Co., v. Frescoln*, 245 Fed. 301 (C. C. A. 9th, 1917).

[83] *Whiting v. Seattle*, note 75, *supra*, overruling *Howe v. Whitman County*, 120 Wash. 247, 206 Pac. 968 (1922) *contra*.

[84] *Gay v. Winter*, 34 Cal. 153 (1867).

[85] *Brown v. West Riverside Coal Co.*, 143 Iowa 662, 120 N. W 732, 28 L. R. A. (n. s.) 1260 (1909).

[86] See Tiffany, *ibid*, sections 66 and 124.

[87] *Morgan v. Carbon Hill Coal Co.*, 6 Wash. 577, 34 Pac. 152 (1893) *Brennan v. Front St. Cable Ry. Co.*, 8 Wash. 363, 36 Pac. 272 (1894) *Hamlin v. Columbia, P S. R. Co.*, 37 Wash. 449, 79 Pac. 991 (1905).

[88] *Ostheller v. Spokane & Inland Empire Ry. Co.*, 107 Wash. 678, 182 Pac. 630 (1919), *Heath v. Wylie*, 109 Wash. 86, 186 Pac. 313 (1919) accord.

injury, there can be no recovery[89] on the theory that to permit such a recovery would violate the maxim that no man shall profit by his own negligence.[90] This is the general rule elsewhere.

A difficult question arises in cases where one of several joint beneficiaries has been guilty of contributory negligence. In Washington the question has been further complicated by the community property system. It is the settled law of this state that a recovery for personal injuries to the person of either the husband or the wife is community property [91] On similar reasoning a recovery by the parent under section 184 has been held to be community property [92] So it has been held that contributory negligence of the father will bar an action for the death of a child by the mother, since any recovery had by her would be community property, and to permit a recovery under such circumstances would indirectly be permitting the father to profit by his own wrong.[93] Where the joint beneficiaries are other than husband and wife it would seem that the contributory negligence of one would not bar an action on behalf of the others to the extent that they have been injured by reason of the death, as to hold otherwise would in effect be to impute the negligence of one beneficiary to all the others. No cases on this point have as yet arisen in this state, but the prevailing opinion elsewhere is in accord with this suggestion, although there is a conflict of authority [94]

3. Contributory Negligence of the Husband as Affecting the Right of Action for Death of the Wife.

It is the rule in Washington that the contributory negligence of the husband will bar an action by the children for the death of the wife.[95] This rule is an anomalous one and is based upon our community property system. The theory of this holding is, that the existence of a cause of action in the deceased, had he lived, is a condition precedent to any right of action for the death

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[89] *Vinette v. Northern Pac. Ry Co.*, 47 Wash. 320, 91 Pac. 975, 18 L. R. A. (n. s.) 328 (1907) *Crivelli v. Chicago, M. & St. P R. Co.*, 98 Wash. 42, 167 Pac. 66, L. R. A. 1918A, 206 (1917).

[90] *Crivelli v. Chicago M. & St. P R. Co.*, note 89, *supra.*

[91] *Hawkins v. Front St. C. Ry. Co.*, 3 Wash. 592, 28 Pac. 1021, 28 Am. St. Rep. 72, 16, L. R. A. 808 (1892).

[92] *Crivelli v. Chicago, M. & St. P R. Co.*, note 89, *supra.*

[93] *Crivelli v. Chicago M. & St. P R. Co.*, note 89, *supra.*

[94] Tiffany, *ibid*, section 72.

[95] *Ostheller v. Spokane & Inland Empire R. Co.*, note 88, *supra*, *Heath v. Wylie*, note 88, *supra.*

on behalf of the beneficiaries.[96] It is then argued that the wife has no cause of action for personal injuries where the husband was guilty of contributory negligence since such recovery under the rule of *Hawkins v. Front St. Cable R. Co.*,[97] would be community property and to permit a recovery by the wife would be to indirectly allow the husband to profit by his own wrong. Therefore, the argument concludes, since the wife had no cause of action for the injuries had she lived, no action for the death may be maintained on behalf of the children or other beneficiaries. This chain of argument is not open to attack once the correctness of the decision in the *Hawkins* case to the effect that a recovery for personal injuries to the wife is community property, is conceded. Any analysis or criticism of the decision in that case lies outside the scope of this paper. Suffice it to say that the *Hawkins* case is now so firmly established in the jurisprudence of this state that any attempt to change the rule there announced must come from the legislature.

BRYANT BRADY.*

[96] See discussion under paragraph 1, above.
[97] Note 91, *supra*.
*Of the Seattle, Washington, Bar.