

March 2021

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Recommended Citation

Allen Crouch, *Actions Under the Death Statute and Survival of Actions for Personal Injuries*, 1 Fla. L. Rev. 260 (2021).

Available at: <https://scholarship.law.ufl.edu/flr/vol1/iss2/5>

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NOTES

ACTIONS UNDER THE DEATH STATUTE AND SURVIVAL OF ACTIONS FOR PERSONAL INJURIES

I. THE ACTIONS INVOLVED

The bases of survival actions and wrongful death actions require careful distinction. Survival adds, or rather substitutes, a party by continuing a cause of action already existing, but terminated by the death of either the injured party or the tort-feasor in the absence of survival provisions; wrongful death gives rise to a separate and distinct cause of action. The former rests upon the cause of action originally accruing to the injured party, and logically should be limited to the redress that would have been available to him had he lived or had the tort-feasor lived; the latter ignores the rights of the deceased and regards solely the loss occasioned by his death to the class of statutory beneficiaries entitled to bring action. The concept of survival is further bisected into the rights of the injured party as contrasted with the liabilities of the tort-feasor; the cause of action is identical in either case, but the problem remains as to whether it survives either to the successor to the right of the injured party or against the successor to the liability of the tort-feasor, or in both instances. These distinctions are preserved throughout the discussion that follows, and a clear conception of them is essential to any successful analysis of this branch of the law.

II. THE COMMON-LAW RULE

At common law there is available no redress for personal injuries following the death of either the injured party or the tort-feasor.¹ Although this rule has been criticized,² it is usually followed in the absence of

¹CRANDALL, FLORIDA COMMON LAW PRACTICE §10 (1928); *Waller v. First Savings & Trust Co.*, 103 Fla. 1025, 138 So. 780 (1931); *Moor v. Bullock*, 65 Idaho 594, 151 P.2d 765 (1944); *Hyatt v. Adams*, 3 Mich. 180 (1867); *In re Grainger's Estate*, 121 Neb. 338, 237 N. W. 153 (1931); *Musso v. Miller*, 269 App. Div. 5, 54 N. Y. S.2d (1945).

²PROSSER, HANDBOOK OF THE LAW OF TORTS §103 (1941) states, "The origin of the rule that personal tort actions die with the plaintiff is rather obscure—the more

statute.³ The first statute to change the common law in this respect was Lord Campbell's Act,⁴ passed in England in 1864, which created in the beneficial heir a cause of action for the wrongful death of the injured party but failed to provide for any survival. Indeed, there was no provision for survival until 1934.⁵ All American states have passed statutes similar to Lord Campbell's Act,⁶ and most states have also passed survival statutes,⁷ which usually permit the representative to maintain an action for personal injuries sustained by the deceased but normally omit provision for survival against the representative of the tort-feasor.

III. FLORIDA LAW, PAST AND PRESENT

Florida has both a Survival Statute⁸ and a Death by Wrongful Act Statute,⁹ but the former was rendered nugatory at the outset. The Florida

so as contracts which were equally 'personal' were held to survive the death of either"; *Hyatt v. Adams*, 16 Mich. 180 (1867), in which the court said, "The rule rests more on an artificial distinction than real principle, and savors more of the logic of the schoolmen than of common sense"; *Harris v. Nashville Trust Co.*, 128 Tenn. 573, 162 S. W. 584 (1914), where the court said that the maxim *actio personalis moritur cum persona* was by no means a favorite with the courts, and that no judge or law writer had risen to defend it for two hundred years past. For the origin and history of the rule see 32 L. Q. REV. 431 (1916).

³*De La Torre v. Johnson*, 200 Cal. 754, 254 Pac. 1105 (1927); *Indianapolis v. Willis*, 208 Ind. 607, 194 N. E. 343 (1935).

⁴9 & 10 VICT., c. 93 (1846).

⁵LAW REFORM (MISCELLANEOUS PROVISIONS) ACT, 1934, 24 & 25 GEO. V, c. 41.

⁶PROSSER, *op. cit. supra* note 2, §103.

⁷*Evans, A Comparative Study of the Statutory Survival of Tort Claims for and against Executors and Administrators*, 29 MICH. L. REV. 969 (1930). Some courts treat such statutes as being in derogation of the common law and, therefore, construe them strictly: *McNeely v. Natchez*, 148 Miss. 268, 114 So. 484 (1927); *Strottmann v. St. Louis I. M. & S. Ry.*, 211 Mo. 227, 109 S. W. 769 (1908); *Lubrano v. Atlantic Mills*, 19 R. I. 129, 32 Atl. 205 (1895). But other courts consider the statutes as remedial in nature and say they should be liberally construed: *Barnes Coal Co. v. Retail Coal Merchants' Ass'n*, 128 F.2d 645 (1942); *Blakely v. Shortal's Estate*, 336 Iowa 787, 20 N. W.2d 28 (1945); *Albrecht v. Potthoff*, 192 Minn. 557, 257 N. W. 377 (1934); *Mattison v. Palmetto State Life Ins. Co.*, 197 S. C. 256, 15 S. E.2d 117 (1941).

⁸FLA. STAT. 1941, §45.11, "Abatement by death or change of parties: Personal Injuries. All actions for personal injuries shall die with the person, to wit: assault and battery, slander, false imprisonment, and malicious prosecution; all other actions shall and may be maintained in the name of the representatives of the deceased."

⁹FLA. STAT. 1941, §768.01.

Supreme Court early held that the action did not survive, but died with the injured party.¹⁰ The enumeration in the Survival Statute of four personal actions, namely, assault and battery, slander, false imprisonment, and malicious prosecution, was construed as a mere list of descriptive examples, and the statute was accordingly interpreted as effecting no change in the common law rule. This interpretation was certainly justified by the language of the statute; the surprising factor is that the court was able to find any meaning at all in this careless draftmanship.

A similar interpretation appeared in *Close v. Cunningham*,¹¹ in which the plaintiff brought an action for injuries sustained because of defendant's negligent operation of a truck. During the action defendant died. The court held that under the Survival Statute the cause of action terminated upon the death of the defendant and did not survive against his personal representative. Justice Terrell in a strong dissent argued that the legislature intended only the four actions enumerated in the statute to die with the person, and that the very purpose of the statute was to enlarge the common-law rule so as to permit survival of the non-enumerated actions.

Under the construction of the *Cunningham* case the court was bound sooner or later to encounter situations in which the application of the rule would result in grave injustice. Such a case arose in *Waller v. First Savings and Trust Co.*¹² The deceased, by having intentionally exploded a bomb near a house, injured the plaintiff's wife to such an extent that her leg had to be amputated,¹³ but unfortunately he died before institution of suit. Survival of the action against the estate of the tort-feasor was allowed on the ground that the English common-law rule in this instance did not apply in Florida.¹⁴ The reasoning of the court was hampered

¹⁰*Jacksonville St. Ry. v. Chappell*, 22 Fla. 616, 1 So. 10 (1886); *Jones v. Townsend*, 23 Fla. 355, 2 So. 612 (1887), holding that the right of action for libel dies with the plaintiff and that the action cannot be maintained in favor of his personal representative. However, if a defendant libels the plaintiff in his will, actions against the estate have been allowed in other jurisdictions. *Hendricks v. Citizens' & Sou. Natl. Bank*, 43 Ga. App. 408, 158 S. E. 915 (1931); *Harris v. Nashville Trust Co.*, 128 Tenn. 573, 162 S. W. 584 (1914). These are not properly cases of survival, since the libel does not take place until after the decedent's death.

¹¹99 Fla. 1099, 128 So. 429 (1930).

¹²103 Fla. 1025, 138 So. 780 (1931).

¹³There was no doubt that the plaintiff could recover for the injury to the property.

¹⁴The court stated that the English rule was changed in Florida, by the intend-

by the erroneous assumption¹⁵ in the majority opinion that under the English rule tort actions were based on vengeance¹⁶ and consequently should no more survive the death of the tort-feasor than would a criminal prosecution. The opinion reached the correct decision, however, by disregarding this difficulty, historically non-existent, and holding that the old common-law rule did not apply in jurisdictions such as Florida, where tort actions are primarily compensatory. In a later case an action brought under the Death by Wrongful Act Statute against a tort-feasor was allowed to survive his death.¹⁷ The *Waller* case, which dealt with the Survival Statute, virtually overruled the *Cunningham* case by permitting survival after the death of the tort-feasor. In a sweeping shift of position, the court further made it clear in a dictum that the dissent in the *Cunningham* case—that only the four enumerated actions die with the injured person—was thereafter to be the law.

Under the Survival Statute today it is, accordingly, immaterial that

ment of our Declaration of Rights (Sec. 4), which recognizes not only the punitive nature of a tortious wrong done, but also recognizes and preserves in organic language a legal remedy for that wrong, and which provides that the courts shall always be open to afford it. The State of Nebraska puts a similar construction on its statute, *In re Estate of Granger*, 121 Neb. 338, 237 N. W. 153 (1931). That the decision could have been reached on another ground is brought out in 8 U. or PA. L. REV. 1018 (1932), which states, "That a desirable result was achieved in the narrow interpretation of the statute is evident when we recognize the growing doctrine that a tort action is essentially compensatory rather than punitive. However, it would appear that the court would have reached the same conclusions through admitting that the statute intended to abate all actions for personal injuries, by subscribing to the proposition that the husband's action for loss of marital services is not an action for 'injuries to the person,' within the meaning of the statute, an interpretation accorded similar statutes by other courts." In some jurisdictions having survival statutes, no recovery is allowed against the personal representatives of a deceased tort-feasor. *Burford v. Evans*, 191 Okla. 555, 132 P.2d 653 (1942); *Claussen v. Brothers*, 148 S. C. 1, 145 S. E. 539 (1938).

¹⁵8 HOLDSWORTH, HISTORY OF ENGLISH LAW 447-48 (2d ed. 1937).

¹⁶*Waller v. First Savings and Trust Co.*, 103 Fla. 1025, 1037, 138 So. 780, 786 (1931).

¹⁷*International Shoe Co. v. Hewitt*, 123 Fla. 587, 167 So. 7 (1936). In this case the tort-feasor was killed in the same accident. In other jurisdictions, unless the statute provides for survival against the tort-feasor, the common law rule still prevails and the action dies with the tort-feasor. *Wright v. Smith*, 136 Kan. 205, 14 P.2d 640 (1932); *Moe v. Smiley*, 125 Pa. 94, 17 Atl. 228 (1889); *Carrigan v. Cole*, 35 R. I. 162, 85 Atl. 934 (1913); *Layton v. Rowland*, 197 Wis. 535, 222 N. W. 811 (1929); *Tuttle v. Short*, 42 Wyo. 1, 288 Pac. 524 (1930).

the death of a tort-feasor precedes the institution of suit.¹⁸ It is likewise immaterial that the plaintiff dies before trial. For example, in *State v. Parks*,¹⁹ the plaintiff was injured in an automobile accident through the negligence of the defendant. Issue was joined, but the plaintiff died before trial. The court stated that the action could be maintained in the name of his administrator, and followed in its decision the dictum in the *Waller* case that only the four enumerated actions die with the injured person.²⁰ In another case,²¹ however, in which the injured person died before suit was instituted, the court denied his administratrix the right to bring an action. The reasoning of the court was that actions survive only when pending at the death of the injured person.

The conclusion could accordingly be drawn that if the plaintiff institutes his action before death his personal representative can continue the action, but that if he dies before institution of the suit the result is just the opposite, leaving only a cause of action under the Death Statute. Any such interpretation, however, which results from failure to distinguish between the parties and the cause of action, was overruled in the latest case²² in this field. Decedent was injured in an automobile accident and died before suit. The Florida Supreme Court held that the action could be maintained by the personal representative, even though not instituted before the death of the injured person and regardless of the cause of death. Furthermore, the court laid down another and distinct proposition, namely, that two rights are violated when physical injury ultimately resulting in death is inflicted by tortious acts.²³ The one cause of action results from

¹⁸*Kahn v. Wolf*, 151 Fla. 863, 10 So.2d 553 (1942).

¹⁹129 Fla. 50, 175 So. 786 (1937).

²⁰Justice Brown concurred specially. He disagreed as to the construction of the statute, stating that the legislature had met twenty-five times since the court first interpreted the survival statute, and that if any change in the construction of the statute were made the legislature should do the job.

²¹*In re Moore's Estate*, 153 Fla. 480, 15 So.2d 55 (1943).

²²*Ake v. Birnbaum*, 156 Fla. 735, 25 So.2d 213 (1945).

²³In other jurisdictions having both types of statutes there is a conflict as to whether one is a bar to the other. The majority of courts hold that two causes of action exist. *Mageau v. Great Northern Ry.*, 103 Minn. 290, 115 N. W. 651 (1908); *Hamel v. Southern Ry.*, 108 Miss. 172, 66 So. 426 (1914), holding that the Death by Wrongful Act statute is "a post mortem statute" and applies to actions which could not have been brought by the deceased; *Vicksburg & M. R. R. v. Phillips*, 64 Miss. 693, 2 So. 537 (1887); *Soden v. Trenton & Mercer County Traction Co.*, 101 N. J. L. 393, 127 Atl. 558 (1925); *Mahoning Valley Ry. v. Van Alstine*, 77 Ohio St. 395, 83 N. E. 601 (1908); *Belding v. Black Hills & Ft. P. R. R.*, 3 S. D. 669, 53 N. W. 750

the common law right of the injured person to be secure in his person and property; the other, from the right of the deceased's family to his companionship, services, or support, together with their expectancy of participation in the estate he might have accumulated had he lived. When the injured person dies from causes other than the injury inflicted, the only remedy is, of course, the action under the Survival Statute.

IV. DAMAGES

Under the Survival Statute. In jurisdictions recognizing two distinct causes of action it is most important in order to avoid duplication of damages that a line be drawn between those recoverable under the Death Statute and those recoverable under the Survival Statute. Outside Florida the damages allowed in a survival action are limited to those that the deceased might have recovered had he lived; damages are not permitted for losses extending beyond his death.²⁴ Now that Florida

(1892); *Kochler v. Waukesha Co.*, 190 Wis. 52, 208 N. W. 901 (1926). Kentucky holds that an election must be made between the two actions. *Chesapeake & Ohio Ry. v. Bauks*, 142 Ky. 746, 135 S. W. 285 (1911), holding that the acts constituting the wrong are inseparable. But in Rhode Island, in cases where death results from the injury, the Death Act is exclusive on the theory that no new cause of action arises. The Death Act gives a new right of recovery in substitution for the right of action which the deceased would have had if he had survived. *Slavin v. Hellenic Baking Co.*, 50 R. I. 217, 146 Atl. 488 (1929); *Lubrano v. Atlantic Mills*, 19 R. I. 129, 32 Atl. 205 (1895). To add to the general confusion, in some jurisdictions the Death Act is limited to cases of instantaneous death, while all other cases fall under the Survival Statute. *Renaldi v. New York Cent. Ry.*, 256 Mass. 337, 152 N. E. 373 (1926); *Sawyer v. Perry*, 88 Me. 42, 33 Atl. 660 (1895). *Contra*: *Walkup v. Covington*, 18 Tenn. App. 117, 73 S. W.2d 718 (1934); *Coliseum Motor Co. v. Hester*, 43 Wyo. 298, 3 P.2d 105 (1931). Some courts hold that the survival action may be brought only when death results from causes other than the injuries inflicted by the tort-feasor. *Bruce v. Collier*, 221 Ala. 22, 127 So. 553 (1930); *Sewell v. Atchison, T. & S. F. Ry.*, 78 Kan. 1, 96 Pac. 1007 (1907). The principal reason given in the cases denying two causes of action is that a double recovery would result. This objection is logically invalid, as those jurisdictions which permit two causes of action draw a line between damages which may be recovered under the Death Statute and those recoverable under the Survival Statute.

²⁴*Berryhill v. Nichols*, 171 Miss. 769, 158 So. 470 (1935); *Hamel v. Southern Ry.*, 108 Miss. 172, 66 So. 809 (1915); *Mahoning Valley Ry. v. Van Alstine*, 77 Ohio St. 395, 83 N. E. 601 (1908); *St. Louis & S. F. R. R. v. Goode*, 42 Okla. 784, 142 Pac.

recognizes the two causes of action, this rule is the logical one to follow. Previous to the *Waller* case the court had not allowed any damages at all under the Survival Statute, and since that time no cases have been reported indicating any confusion of the damages accruing under the Survival Statute with those arising under the Death by Wrongful Act Statute. Since both causes of action are now permitted, damages in the proper case should be recoverable under each statute to the extent permitted by each of the two separate causes of action. Inasmuch as the personal representative maintains the same action under the Survival Statute that the deceased could have brought, the damages should be confined to the same elements that govern when the deceased lives and brings the action himself. These elements include pain and suffering,²⁵ medical attendance,²⁶ loss of time and earnings,²⁷ mental anguish,²⁸ and hospitalization.²⁹ The damages recoverable are limited to those purely compensatory.³⁰

Under the Death by Wrongful Act Statute. Under the Death by Wrongful Act Statute, the factors to be taken into consideration in determining damages have to a degree been settled by the Florida court. These damages must be confined to pecuniary loss resulting to the statu-

1185 (1914); *Smith v. Chicago R. I. & P. Ry.*, 42 Okla. 577, 142 Pac. 398 (1914); *Mayher v. Philadelphia Traction Co.*, 181 Pa. 617, 37 Atl. 571 (1897); *Nemecsek v. Filer & Stowell Co.*, 126 Wis. 71, 105 N. W. 225 (1905); *Brown v. Chicago & N. W. Ry.*, 102 Wis. 137, 77 N. W. 748 (1898).

²⁵*Toll v. Waters*, 138 Fla. 349, 189 So. 393 (1939); *Rosenberg v. Coman*, 134 Fla. 768, 184 So. 238 (1938); *Warner v. Ware*, 136 Fla. 466, 182 So. 605 (1938); *Roy v. Oregon Short Line Ry.*, 55 Idaho 404, 42 P.2d 476 (1935); *Iseman v. Hayes*, 242 Ky. 302, 46 S. W.2d 110 (1932).

²⁶*Coca-Cola Bottling Co. of Arkansas v. Adcox*, 189 Ark. 610, 74 S. W.2d 771 (1934); *Smith v. Red Top Taxicab Corp.*, 111 N. J. L. 439, 168 Atl. 796 (1933).

²⁷*United Verde Extension Mining Co. v. Littlejohn*, 279 Fed. 223 (1922); *Fabbro v. Soderstrom*, 252 Mich. 455, 233 N. W. 378 (1930); *Perlman v. Shanck*, 192 App. Div. 179, 182 N. Y. Supp. 767 (1920).

²⁸*Southern Exp. Co. v. Platten*, 93 Fed. 936 (1899); *Whitsel v. Watts*, 98 Kan. 508, 159 Pac. 401 (1916); *McGowan v. Tayman*, 144 Va. 358, 132 S. E. 316 (1926).

²⁹*Seeing Denver Co. v. Morgan*, 66 Colo. 565, 185 Pac. 339 (1919); *Atlantic Coast Line Ry. v. Holliday*, 73 Fla. 269, 74 So. 479 (1917); *Adelsberger v. Sheehy*, 336 Mo. 497, 79 S. W.2d 109 (1934).

³⁰*Ake v. Birnbaum*, 156 Fla. 735, 21 So.2d 213 (1945); *Waller v. First Savings and Trust Co.*, 103 Fla. 1025, 138 So. 780 (1931).

tory beneficiaries from the death of the deceased.³¹ In a widow's action³² the jury may take into consideration her loss of comfort, of the protection and society of her husband, of his services in assisting her in the care of the family, and of the support that her husband was legally bound to give her.³³ She is also entitled to compensation for loss of whatever she might reasonably have expected to receive in the way of dower or legacies from her husband's estate, in case her life expectancy is greater than his,³⁴ but not for either her distress occasioned by his death or for his mental or physical suffering from the injury.³⁵

Children bringing an action under this statute must be under the age of twenty-one,³⁶ and may recover for the loss of support during minority, as well as for the loss of attention, care, comfort, companionship, protection, education, and moral training normally supplied by the father.³⁷

³¹W. B. Harbeson Lumber Co. v. Anderson, 102 Fla. 731, 136 So. 557 (1931), which gives the test for pecuniary loss as "... what sum will compensate the plaintiff for the pecuniary loss sustained by him by the death of the deceased, or in other words, what in view of all the facts and circumstances in evidence, was the probable pecuniary interest of the plaintiff in the continuance of the life of the deceased?"

³²FLA. STAT. 1941, §768.02, lists the parties who may maintain an action under this statute in the following order: (1) Widow or husband, as the case may be; (2) minor child or children; (3) any person or persons dependent on such person killed for support; (4) executor or administrator of the person killed.

³³Southern Utilities Co. v. Davis, 83 Fla. 366, 92 So. 683 (1922); Florida Cent. & P. R. R. v. Foxworth, 41 Fla. 1, 25 So. 338 (1899).

³⁴*Id.*

³⁵St. Johns Electric Co. v. Lawler, 90 Fla. 188, 105 So. 818 (1925); Southern Utilities Co. v. Davis, 83 Fla. 366, 92 So. 683 (1922); Florida Cent. & P. R. R. v. Foxworth, 41 Fla. 1, 25 So. 338 (1899) FLA. STAT. 1941, §768.03, provides for the parents' recovery for the death of a minor, and it is to be noted that not only may recovery be had for the loss of services but, in addition, recovery may be had for the mental pain and suffering of the parents if they survive. The damages under this statute are considered compensatory. Florida Dairies Co. v. Rogers, 119 Fla. 451, 161 So. 85 (1935). The loss of services sustained by a parent in the death of a minor child is that which such parent would be entitled to receive between the death and the majority of such minor. Nolan v. Moore, 81 Fla. 594, 600, 88 So. 601 (1921). An adoptive parent may maintain an action under this statute. St. Petersburg v. Jaeck, 79 Fla. 186, 53 So. 718 (1910). Mental pain and suffering of the parents naturally result from the wrongful death of their minor child. Seaboard Air Line Ry. v. Moseley, 60 Fla. 186, 53 So. 718 (1910).

³⁶Florida Power & Light Co. v. Bridgeman, 133 Fla. 195, 182 So. 911 (1938), which also holds that the minor may still maintain the action, even if married, although the damages in such case may be slight.

³⁷Triay v. Seals, 92 Fla. 310, 109 So. 427 (1926).

When the administrator brings the action, the amount of recovery is not the value of the decedent's life, but rather the present value of the estate that the decedent might reasonably have been expected to earn and to save had he lived.³⁸ Punitive or exemplary damages are not recoverable under the Death Statute.³⁹ A claim for funeral expenses that shall be charged against the estate of a deceased wife is not recoverable by her husband in a Wrongful Death action, unless the husband becomes obligated therefor before an administrator or executor is appointed.⁴⁰ Similarly, a widow sustains no liability for the funeral expenses of her husband, which should be recovered by his personal representative.⁴¹ In all actions funeral expenses recoverable must be claimed as special damages.⁴²

In determining the amount of damages under this statute, the deceased's age, health, business capacity, habits, experience, energy, present and future prospects for business success at the time of death, probable duration of life at such time, means, earnings, skill, and future expectations are the elements to be considered by the jury.⁴³ These damages are confined to the loss suffered by the statutory beneficiaries and do not embrace damages accruing to the deceased or his personal representative in a Survival Statute action.⁴⁴

V. DEFENSES

Under the Survival Statute. Since the Survival Statute provides the precise action that the deceased could have maintained had he lived, the defenses thereto should also logically be available against his personal representative. These include contributory negligence,⁴⁵ imputed negli-

³⁸Florida East Coast Ry. v. Hayes, 67 Fla. 101, 64 So. 504 (1914).

³⁹Florida East Coast Ry. v. McRoberts, 111 Fla. 278, 149 So. 631 (1933).

⁴⁰Potts v. Mulligan, 141 Fla. 685, 193 So. 767 (1940).

⁴¹*Ibid.*

⁴²Coral Gables v. Neill, 133 Fla. 4, 182 So. 432 (1938); International Shoe Co. v. Hewitt, 123 Fla. 587, 167 So. 7 (1936).

⁴³Marianna & B. R. R. v. May, 83 Fla. 524, 91 So. 553 (1922); Florida Cent. & P. R. R. v. Foxworth, 41 Fla. 1, 25 So. 338 (1899). The habits of the deceased's friends would not be admissible in determining life expectancy. International Shoe Co. v. Hewitt, 123 Fla. 587, 167 So. 7 (1936).

⁴⁴Potts v. Mulligan, 141 Fla. 685, 193 So. 767 (1940); Florida East Coast Ry. v. McRoberts, 111 Fla. 278, 149 So. 631 (1933).

⁴⁵Motor Transit Co. v. Hutchinson, 154 Fla. 798, 19 So.2d 57 (1944); Cornell v.

gence,⁴⁶ and release.⁴⁷

The Statute of Limitations normally begins to run from the date of the injury.⁴⁸ Actions purely in tort must be brought within four years⁴⁹ unless based on a tort, such as malpractice,⁵⁰ growing out of contract, in which event the period is three years.⁵¹ In actions of libel, slander, assault and battery, or false imprisonment, a period of two years only is permitted.⁵²

Under the Death by Wrongful Act Statute. Under this statute the same defenses that could have been used against the deceased or his representative in a Survival Statute action are available against the plaintiff,⁵³ the only possible exception occurring when the injured person or his representative has allowed the Statute of Limitations to run against the action for personal injuries.⁵⁴ As the causes of action, however, are distinct, most courts will not permit a bar as a result of the Statute of Limitations to become, ipso facto, a bar to the death action.⁵⁵

First Natl. Bank of Miami, 121 Fla. 192, 163 So. 482 (1935); Jacksonville Beach v. Jones, 101 Fla. 95, 131 So. 369 (1930); Carter v. J. Ray Arnold Lumber Co., 83 Fla. 470, 91 So. 893 (1922); Louisville & N. R. R. v. Yarrowborough, 61 Fla. 307, 54 So. 462 (1911).

⁴⁶Potter v. Florida Motor Lines, Inc., Caraker v. Same, 57 F.2d 313 (1932).

⁴⁷Florida East Coast Ry. v. Thompson, 93 Fla. 30, 111 So. 525 (1927).

⁴⁸Williams v. Alabama Great So. R. R., 158 Ala. 396, 48 So. 485 (1909); Douglas v. Orth, 44 Cal. App. 95, 185 Pac. 1005 (1919); Brown v. Emerson Brick Co., 15 Ga. App. 332, 83 S. E. 160 (1914); Ogg v. Robb, 181 Iowa 145, 162 N. W. 217 (1917); Decosta v. Ye Craftsman Studio, 278 Mass. 315, 180 N. E. 151 (1932).

⁴⁹FLA. STAT. 1941, §95.11(4); Warner v. Ware, 136 Fla. 466, 182 So. 605 (1938).

⁵⁰Palmer v. Jackson, 62 Fla. 249, 57 So. 240 (1911). But in another jurisdiction it was held that under the common law an action for malpractice of a physician is essentially an action based upon a personal tort and abates with the death of the physician. Speer v. Brown, 28 Cal. App.2d, 79 P.2d 179 (1938).

⁵¹FLA. STAT. 1941, §95.11(5).

⁵²FLA. STAT. 1941, §95.11(6). As actions of slander, assault and battery, and false imprisonment immediately abate on the death of the plaintiff, actually the two-year statute is applicable only in libel, when the plaintiff brings an action under the survival statute.

⁵³O'Brien v. Standard Oil Co. of Ky., 38 F.2d 808 (1930); Cline v. Powell, 141 Fla. 119, 192 So. 628 (1940).

⁵⁴Williams v. Alabama Great So. R. R., 158 Ala. 396, 48 So. 485 (1908); Sachs v. Sioux City, 109 Iowa 224, 80 N. W. 336 (1899); Howard v. Bell Tel. Co., 306 Pa. 518, 160 Atl. 613 (1932).

⁵⁵Homiewicz v. Orlowski, 4 Harr. 66, 143 Atl. 250 (1928); German American

The defendant may bar the action by establishing the existence of a person in being with a right of action superior to that of plaintiff.⁵⁶

As regards the Statute of Limitations,⁵⁷ the court originally took the position in *Collins v. Hall*⁵⁸ that time begins to run from the commission of the act causing the wrongful death. In a recent case,⁵⁹ however, this view was discarded, and the law today is that the material date is that of the death itself.

VI. SUMMARY

From this discussion the following principles may be drawn:

A. No action for personal injuries under the Survival Statute or for death under the Wrongful Death Statute dies with the tort-feasor.

B. The only personal actions that die with the injured person are the actions of assault and battery, slander, false imprisonment, and malicious prosecution.

C. The foregoing two rules apply even though both the injured party and the tort-feasor die before action is instituted.

D. If the injured person dies as a result of the injuries inflicted by the tort-feasor, two distinct causes of actions arise: the personal representative of the injured person may bring an action for the personal injuries (if the injured person has not already recovered damages for this action); and the statutory beneficiaries may bring an action for their pecuniary loss resulting from the wrongful death.

E. Damages recoverable under the Survival Statute are those that the injured person could have recovered had he lived; damages recoverable under the Death By Wrongful Act Statute are those accruing to the statutory beneficiaries as a result of the death. Such

Trust Co. v. Lafayette Box, Board & Paper Co., 52 Ind. App. 211, 98 N. E. 874 (1912); *Senecal v. West St. Paul*, 111 Minn. 253, 126 N. W. 826 (1910); *Causey v. Seaboard Air Line Ry.*, 165 N. C. 5, 81 S. E. 917 (1914). As Florida also recognizes two distinct causes of action, the logical rule would be to follow these holdings, though the question has not yet been the subject of reported litigation.

⁵⁶*Louisville & N. R. R. v. Jones*, 45 Fla. 407, 34 So. 246 (1903).

⁵⁷FLA. STAT. 1941, §95.11(6), "WITHIN TWO YEARS. . . . An action arising upon account of an act causing wrongful death." An action brought by a parent for the wrongful death of a minor is barred within two years. FLA. STAT. 1941, §768.04.

⁵⁸117 Fla. 282, 157 So. 646 (1934).

⁵⁹*St. Francis Hospital, Inc., v. Thompson*, 31 So.2d 710 (Fla. 1947).