CHAPTER 573

PERSONAL REPRESENTATIVES, HEIRS; ACTIONS

573.01 SURVIVAL OF CAUSES

Right to recover damages for libel contained in a will. 31 MLR 171, 33 MLR 171.

Applicability of state law and the doctrine of abatement and revival to a cause of action created by federal statutes and litigated in state courts 31 MLR 371.

A cause of action based upon a contract survives the death of the defendant therein. In such cases the court on motion may substitute the representative of the decedent as defendant, and the action may thereupon be prosecuted to final judgment as provided in sections 540.12, 525.43. Milner v First Nat'l Bank, 228 M 324, 37 NW(2d) 450.

An action brought solely under the statute imposing strict liability in damages, irrespective of negligence, upon a dog owner for injuries which the dog without provocation inflicts upon a person who is peacefully and lawfully conducting himself while in an urban area, was not founded on negligence and did not survive the death of the defendant. LaValle v Kaupp, ... M ....., 61 NW(2d) 228.

No cause of action for personal injuries survives the person against whom it exists unless such injuries are caused by decedent's negligence. LaValle v Kaupp, ... M ....., 61 NW(2d) 228.

In the absence of an authorizing statute, where a motorist attempted service of process upon the administrator of the estate of a nonresident automobile owner, who had died as a result of a collision in Minnesota, service under section 170.55 upon such administrator did not give the federal district court jurisdiction over the administrator. Wittman v Hanson, 100 F Supp 747.

573.02 ACTION FOR DEATH BY WRONGFUL ACT

HISTORY. Amended, 1951 c 697 s 1.

Effect of award of workmen's compensation board on an action for wrongful death; possible double liability. 32 MLR 849.

Right to recover for death resulting from pre-natal injuries. 34 MLR 65.

Illegality of contracts restricting venue under the Federal Employers Liability Act. 34 MLR 342.

Right to a deposition on allegation of statutory ground. 34 MLR 562.

Forum non conveniens; claims instituted in state courts under the Federal Employers Liability Act. 35 MLR 496.

Applicability of the federal statute of limitations when the liability is measured by the state law. 35 MLR 590.

Federal Tort Claims Act; impleader of the United States as a third-party defendant. 35 MLR 593.

Death by wrongful act; admissibility of evidence of domestic relations. 36 MLR 165.

Foreign wrongful death action not barred in federal court by state statute. 36 MLR 972.

Application of forum non conveniens to foreign FELA action. 37 MLR 67.

Municipal immunity from tort liability is confined to acts performed in a sovereign capacity, as distinguished from liability attaching to acts performed in an individual corporate or proprietary role; and in the instant case where the city owned and operated a small boat harbor for primary benefit of boat owners, and operation of the harbor involved not only substantial charges for certain services but also certain special corporate benefits, such operation was "proprietary" for the purposes of tort liability. Heitman v Lake City, 225 M 117, 30 NW(2d) 18.

In assessing the amount of damage, it is permissible for the jury to consider the present low value of money and the high cost of living. The $10,000 recovery ceiling in the wrongful death statute is not a yard stick for the measurement of damages, but merely a limitation upon the amount that may be recovered. Heitman v Lake City, 225 M 117, 30 NW(2d) 19.

In an action for wrongful death arising out of an automobile accident, testimony of defendant driver made his negligence an issue of fact for the jury. Kordiak v Holmgren, 225 M 134, 30 NW(2d) 16.

The trial court was in error in its instructions to the jury imputing contributory negligence to plaintiff's decedent for alleged insufficient admonition of and to the driver relating to the speed at which he was driving. Kordiak v Holmgren, 225 M 134, 30 NW(2d) 17.

Where a motorist skidded only 36 feet on an icy surface in stopping, was uninjured and his motor car only slightly damaged following a head-on collision with a tractor whose driver was killed on a one-way bridge which was dangerous because of curved blind approaches, the evidence was insufficient to sustain a conviction for criminal negligence in operation of an automobile with respect to speed and lookout. State v Homme, 226 M 83, 32 NW(2d) 151.

Where upon over-objection the court permitted the plaintiff to proceed on condition that he later show the appointment of a special administrator and where he failed to produce such proof, the court could in its discretion reopen the case and permit the plaintiff by introducing less of special administration. Mattfeld v Nester, 226 M 106, 32 NW(2d) 291.

An automobile collision is the proximate cause of death where disease intervened when it is shown, as it was in the instant case, that the injuries sustained in the accident caused the disease from which the death resulted. Mattfeld v Nester, 226 M 106, 32 NW(2d) 291.

Where a wrongful death action in which defendant contends that the recovery, if any, should be reduced by the amount of the beneficiary's share thereof because the beneficiary's contributory negligence was a cause of death, and an individual action by the beneficiary against the same defendant based upon the same alleged negligence, in which defendant contends that the beneficiary is not entitled to recover because of his contributory negligence, are tried together, defendant is not prejudiced by the trial court's refusal to submit in the wrongful death action the question whether the beneficiary was guilty of contributory negligence and by its adoption, in lieu of such submission, the general verdict in the beneficiary's individual action as a special finding with respect to the question. Mattfeld v Nester, 226 M 107, 32 NW(2d) 291.

A distributor of electric power was not negligent in failing to anticipate that a customer in a rural area would take down a guy wire supporting a pole on his land on which there was a transformer where high-tension electric wires from the company's power lines and wires to the customer's farmhouse were connected and, after taking down the guy wire, would permit it to come in contact with the high-tension wires, as a consequence of which he received an electric shock causing his death, Greenwald v Northern States Power Co., 226 M 216, 32 NW(2d) 320.

An automobile collision is the proximate cause of death where disease intervened, when it is shown, as it was here, that injury sustained in the accident caused the disease from which death resulted. The introduction in evidence of letters of special administration establishes the plaintiff's capacity to maintain a wrongful death action. Mattfeld v Nester, 226 M 106, 32 NW(2d) 291.

In an action for damages for death by wrongful act resulting from an abortion, it is not necessary to negative in the complaint consent to or participation in the abortion. True v Older, 227 M 154, 34 NW(2d) 700.

A complaint alleging that after the performance of an abortion the woman became unconscious, that those responsible for her care failed to provide proper care, and that as a result she died states a cause of action for wrongful death. True v Older, 227 M 154, 34 NW(2d) 700.

When a married couple die in a common disaster and there is no proof available that one survived the other, the rights to recovery under M.S.A., Section 573.02 are to be determined as if death occurred to both at the same instant. The damages awarded are not so excessive as to require either reduction or a new trial. That a child has married does not annul the liability under section 261.01, nor relieve the wrongdoer under section 573.02. Moore v Palen, 228 M 148, 36 NW(2d) 540.

The period fixing the time within which a right of action for wrongful death under section 573.02 may be exercised is not an ordinary statute of limitations; it conditions the right. The statutory two-year period expired on April 14, 1948. The summons and complaint were delivered to the sheriff on April 8, 1948. If the sheriff served the papers on the defendant within the 60 days allowed by section 541.12 the service was good and the action properly commenced. If the service was not made as provided in section 541.12 the action was barred. Berghuis v Korthuis, 228 M 534, 37 NW(2d) 809.

A child en ventre sa mere is not only regarded as a human being but as such from the moment of conception. In the instant case there being no question of the viability of the unborn child, or its capacity for a separate and independent existence, action may be brought by a legally appointed representative of the unborn child under the wrongful-death statute. Verkennes v Corniea, 229 M 365, 38 NW(2d) 838.

In an action against the driver and the owner for death of a pedestrian struck by an automobile traveling 50 miles an hour, on gray, misty morning on wet pavement, when pedestrian crossed the highway after alighting from a bus, the question of the driver's negligence was for the jury, as was also the question of contributory negligence on the part of the pedestrian. Holz v Pearson, 229 M 395, 39 NW(2d) 867.

In actions for death by wrongful act against a railroad company and its engineer arising out of a grade crossing collision at night, there was no evidence from which a jury could reasonably infer negligent failure to maintain a proper lookout, or wilful or wanton negligence on the part of the defendants. The crossing was not sufficiently extra hazardous to make it the duty of the railroad company to provide warning signals in addition to the signs and signals prescribed by statute or regulations of the railroad and warehouse commission. The statute requiring railroad companies to keep their grade crossings "free from snow or other obstruction" contemplates the removal of only such substances which if left on the crossing or approaches thereto would form a barrier or obstruction to passage. Before question of train speed at a railroad crossing can be submitted to the jury, evidence either that the speed was greater than usual at that place, or that special circumstances existed which should have been known to the railroad company, which made a lower speed necessary. Cameron v Northern Pacific, 234 M 355, 48 NW(2d) 540.

Where the record is devoid of evidence of excessive speed and where it appears that the speed of a truck under the situation involved was not the proximate cause of the accident, it was not error to refuse to submit the question of speed. Where there is no evidence to sustain a finding that defendant did not have his truck under proper control, the question was properly not submitted. The court was justified in submitting only the question of failure to maintain a proper lookout.

Where children are known or may reasonably be expected to be in a vicinity at play, a degree of vigilance commensurate with the greater hazard created by their

presence or probable presence is required of a driver of a motor vehicle to measure up to the standard of what the law regards as ordinary care. The trial court did not err in its instruction in connection with that point. O'Neill v Mund, 235 M 112, 49 NW(2d) 812.

In an action growing out of a collision between a car operated by plaintiff's decedent traveling south on a paved highway, and defendant's car going north, the finding of the jury that the accident was caused by the negligent act of decedent in operating his car over the center line of the highway directly into the path of him, is supported by the evidence. Behnken v Smolnik, 235 M 315, 50 NW(2d) 696.

Where attendant circumstances allowed a jury to find that a contract in itself does not express the true relationship of the parties thereto, the jury may determine from the facts presented relative to the conduct of the parties, whether an independent-contractor relationship existed as to a party thereto. Barnes v Northwest Airlines, 235 M 410, 47 NW(2d) 180.

The enactment of the Workmen's Compensation Act neither created a new remedy for the death of an employee by the negligent act of a third party tortfeasor nor amended the Wrongful Death Act, and any rights acquired under the latter Act by the deceased employee's dependents, as his spouse or next of kin, stand unimpaired. Nyquist v Batcher, 235 M 491, 51 NW(2d) 566.

Without determining whether the defense of the employer's contributory negligence may be asserted by a third-party defendant under section 176.06, subdivision 2, when the facts clearly show that the employer will necessarily become entitled to all damages recoverable against such defendant, it is clear that such defense is not available to the third-party defendant, irrespective of which party commences and maintains the action, as long as the beneficiaries of the compensation award have any real interest in the proceeds of the judgment which may be entered against the third-party defendant. Nyquist v Batcher, 235 M 491, 51 NW(2d) 566.

If the driver on the right may have the right-of-way, this does not relieve him from exercising due care as he approaches an intersection. The issue of contributory negligence of such driver is for the jury to determine. Webber v Seymour, 236 M 10, 51 NW(2d) 825.

A motion for judgment notwithstanding the verdict whether made with respect to negligence or contributory negligence, accepts the view of the evidence most favorable to the verdict and admits every inference reasonably to be drawn from such evidence, as well as the credibility of the testimony for the adverse party; and if the application of this rule, in the light of the evidence as a whole, discloses a reasonable basis for the verdict, the motion must be denied. Truthful testimony may come from a bad source, and there is no arbitrary rule for measuring its credibility or persuasive weight. Although a formal exception need not be taken to an inadvertent omission or error in a trial court's instruction to the jury, such omission or error is no ground for granting a new trial unless the trial court's attention has been seasonably directed thereto in some manner. The adequacy of evidence required to establish that a photograph accurately portrays actual conditions in issue, as a foundation for its admission into evidence, rests in the sound discretion of the trial court. In the exercise of a sound discretion, the trial court may, by reason of passion and prejudice exhibited in the award of excessive (or inadequate) damages, grant a new trial upon the sole issue of damages when it appears upon the evidence that the other issues, wholly unaffected by passion and prejudice, have been thoroughly litigated and justly determined, so that a right of recovery has been clearly established. La Combe v Minneapolis Street Ry. Co., 236 M 86, 51 NW(2d) 839.

In an action to recover damages for the death of plaintiff's decedent from the wrongful acts of defendant's agent, when an automobile transport, driven by the agent, collided with a meeting automobile driven by a decedent on a cement-paved trunk highway at night, the issues of defendant's negligence and decedent's contributory negligence were for the jury, and defendant was not entitled to a directed verdict or to judgments notwithstanding the verdict. Lewerenz v Wylie, 236 M 94, 51 NW(2d) 834.

Negligence and its casual relation to the injuries upon which the right to recover rests must be proved by that degree of proof established by law. It may be proved by substantial evidence, but the evidence sustaining the hypothesis contended for must preponderate against another hypothesis where there is no evidence to establish negligence, mere proof that plaintiff's intestate in some manner met his death by being hit or run over leaves the verdict for plaintiff based on conjecture and speculation, and it cannot stand. Hagsten v Simberg, 232 M 160, 44 NW(2d) 611.

The danger of electric energy is a matter of common knowledge among persons of ordinary intelligence and experience. Where a well-educated person who had made a study of electric circuits and had had practical experience working with such circuits, tied a rope to a high-voltage wire so as to change the location of the wire to facilitate the topping of a tree and was electrocuted when he reached with his bare hand to remove the rope from the wire, contributory negligence barred recovery. Beery v Northern States Power Co., ... M ....., 57 NW(2d) 838.

Where a railroad car consigned to an out-of-state consignee had been removed from an interstate train and placed on a repair track, which was separate from other tracks, the railroad car had been withdrawn from use and the Federal Safety Appliance Act had no application in determining whether railroad was liable to repairman injured when defective handbrake caused him to fall from the car. Netzer v Northern Pacific Ry. Co., ... M ....., 57 NW(2d) 247.

In an action by a locomotive fireman under the Federal Employers' Liability Act for blindness allegedly resulting from a blow on the head wherein the defendant denied the fact of injury and contended that the blindness was caused by retinitis resulting from uncontrolled diabetes mellitus, evidence presented questions for the jury. Briggs v Chicago, Great Western Ry. Co., ... M .....', 57 NW(2d) 572.

Where a beer manufacturer supplied a neon sign and transformer to a beer distributor, and reimbursed the distributor for the expense of partial installation in plaintiff's establishment, but the manufacturer did not exercise detailed control over the installation, nor know the condition in which the sign and transformer were left until after the fatal fire, and plaintiffs had not relied upon manufacturer as principal distributor, the distributor was not a manufacturer's agent for the purpose of making such installation and, therefore, the manufacturer would not be liable for any negligent installation. Hippe v Duluth Brewing & Malting Co., ... M ....., 59 NW(2d) 665.

The nature and feasibility of safeguards and precautions that could have been taken with respect to a potentially dangerous condition are proper subjects for expert testimony provided that they are not of such common knowledge that the jury is equally capable of judging them. Testimony of this nature given by plaintiff's expert witness over a defendant's objection of insufficient foundation considered and is not grounds for reversal. Whether a witness qualifies as an expert ordinarily is a question to be decided by the trial court, and its ruling thereon will not be reversed on appeal unless it is based on some erroneous view of the law or is clearly not justified by the evidence. Rulings of trial court rejecting certain testimony offered by defendant considered and found to present no grounds for reversal. Hartmon v National Heater Co., ... M ....., 60 NW(2d) 804.

Where an uncle lived with his niece for 20 years doing work around the house and assisting in raising the children, enabling her to earn money from employment, the niece has an insurable interest in his life. Clayton v Industrial Life, 56 At(2d) 292.

The validity of a release relied on as a defense in an action under the Federal Employers' Liability Act is a question of federal law. In order to establish mutual mistake as to the extent of plaintiff's injury in execution of a release fatal to its validity it was sufficient that plaintiff produced evidence which, read in a light most favorable to her, support a finding that at the time of the release plaintiff was suffering from a substantial and severe injury from which at best recovery was doubtful, and that the release was given in a mistaken belief on the part of the plaintiff and defendant honestly but erroneously held that plaintiff's injury was of a minor character from which his complete and early recovery was certain. Chicago & Northwestern Ry. Co. v Curl, 178 F(2d) 497.

There is no room for the application of the doctrine of the Erie v Tompkins in determining the carriers' liability for ordinary negligence in view of the long-established judicial interpretation of the Hepburn Act. Francis v Southern Pacific, 68 SC 611.

The death by wrongful act statute is for the benefit of surviving spouse and next of kin. It does not provide a remedy under which the county may recover funeral expenses of a person injured and dying as a result of an automobile accident. OAG March 15, 1948 (521-G).

The proceeds of a claim for damages for death by wrongful act were divided between the widow and four minor children. The children's money was deposited in a savings bank for the children. The mother having exhausted her funds has applied for relief under the Aid to Dependent Children Act. The money arising from the claim for wrongful death is not a part of the estate of the deceased. It belongs to the surviving spouse and next of kin. The district court having authority to order the money deposited in a savings account for the children would have power to modify his order. The mother or the county agency or both of them may apply to the court for an order for payment, or all of the money for the children's support. If the court refuses to make such an order, and without such money, the children are actually dependent and would be eligible for aid to dependent children. OAG Nov. 3, 1949 (540).

573.04 EXECUTOR DE SON TORT, TO WHOM LIABLE

Good faith as a defense to application of a statute authorizing an award of double damages if any person embezzles, alienates, or converts to his own use any of the personal assets of a decedent or ward before the appointment of a representative. 36 MLR 277.

573.05 ACTION BY FOREIGN EXECUTOR

HISTORY. 1858 c 12 s 1; PS 1858 c 68 s 34; GS 1866 c 77 s 6; GS 1878 c 77 s 6; GS 1894 s 5917; RL 1905 s 4506; GS 1913 s 8178.

573.20 DEVISEES, WHEN LIABLE; LIMITATIONS

In a death case arising out of a collision at night between an automobile and a truck parked partly upon the pavement and partly upon the shoulder of a 20-foot concrete highway, plaintiff's decedent was a guest passenger riding in the right front seat of the automobile when it collided with the left rear corner of the parked truck. He was asleep at the time of the collision. Under the circumstances disclosed by the record, the trial court rightly refused to submit the question of the passenger's contributory negligence to the jury. There was no evidence whatever which would have supported a verdict that he was guilty of negligence. Defendant driver of the automobile which collided with the truck was guilty of negligence as a matter of law where, on a clear night, with good lights, he was driving on a dry concrete road, 20 feet wide, and straight for half a mile before reaching the parked truck, and where there was no traffic or other circumstance to divert his attention from the parked vehicle. Where a verdict for plaintiff was right as a matter of law, an error, if any, in the charge relating to liability of the defendant was not ground for a new trial. A verdict of $8,500 in behalf of plaintiff under the death by wrongful act statute is not excessive, in view of the decreased purchasing power of the dollar, where the boy who was killed was 21 years of age, in good health, and his father and mother, to whose support he contributed, were respectively 67 and 64 years of age. Trial court did not err in ruling out as not proper cross-examination a matter upon which the witness had not testified in her examination in chief. Gordon v Pappas, 227 M 95, 34 NW(2d) 293.