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STATUTORY NOTE

TORTS—TEXAS WRONGFUL DEATH ACT—IS AN ACTION FOR BREACH OF AN IMPLIED WARRANTY RECOVERABLE UNDER THE TEXAS WRONGFUL DEATH ACT? TEX. REV. CIV. STAT. ANN. art. 4671-78 (1952).

During the 110-year history of the Texas Wrongful Death Act,¹ the Texas courts have never squarely faced the issue of whether or not a breach of an implied warranty is recoverable under such act. However, other jurisdictions, in deciding this issue, have cited Texas as a jurisdiction disallowing recovery.

The very reason for the adoption of the Texas Wrongful Death Act was to provide a recovery for death. At common law, there was no right of action for the death of an individual.² Lord Ellenborough, in 1808, stated "In a civil court, the death of a human being could not be complained of as an injury . . ."³ Upon examination of this common law doctrine, it becomes obvious that, as far as liability is concerned, it would be more advantageous for the defendant if the injuries incurred result in death, instead of some lesser injury. The defendant would be liable to the injured person for any injuries less than death, but if the injured person died, so would the defendant's liability. Although Lord Ellenborough cited no authority for pronouncing this principle of no recovery,⁴ it became the generally accepted law in England⁵ and the United States.⁶

Due to the harshness of the common law principle, whereby any cause of action for the death of an individual died with the decedent, England adopted the Fatal Accidents Act, commonly referred to as Lord Campbell's Act:

Whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then

¹ The Texas Wrongful Death Act is composed of TEX. REV. CIV. STAT. ANN. art. 4671-78 (1952).

² *Baker v. Bolton*, 170 Eng. Rep. 1033 (N.P. 1808). The plaintiff's wife was killed when the stagecoach upon which she was riding overturned.

³ *Id.* For a thorough discussion see Smedley, *Wrongful Death—Basis of the Common Law Rules*, 13 VAND. L. REV. 605 (1960), which discusses another common law principle of *actio personalis moritur cum persona*—a personal action dies with the person.

⁴ *Baker v. Bolton*, 170 Eng. Rep. 1033 (N.P. 1808).

⁵ *See, e.g.*, *Clark v. London Gen. Omnibus Co.*, [1906] 2 K.B. 648; *Osborn v. Gillett*, L.R. 8 Ex. 88 (1873).

⁶ *See, e.g.*, *Braun v. Riel*, 40 S.W.2d 621, 622 (Mo. 1931); *Howson v. Foster Beef Co.*, 177 A. 656, 660 (N.H. 1935); *Farmers' & Mechanics' Nat'l Bank v. Hanks*, 104 Tex. 320, 323, 137 S.W. 1120, 1122 (1911). *Contra*, *Cross v. Guthery*, 2 Root 90, 92 (Conn. 1794), where the plaintiff husband was allowed to recover for the loss of his wife's services due to her death caused by a surgeon's unskillfulness.

and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured⁷

Subsequently, each state in the United States enacted a wrongful death act.⁸ The Texas Death Act reads:

When an injury causing the death of any person is caused by the wrongful act, neglect, carelessness, unskillfulness, or default of another person . . . such person . . . shall be liable in damages for the injuries causing such death.⁹

These statutes, modeled after Lord Campbell's Act, create a cause of action in favor of the deceased's statutory beneficiaries.

Texas,¹⁰ along with several other states,¹¹ has also adopted "survival statutes," which further abrogate the harsh common law doctrine. These statutes bestow immortality upon all causes of action to which the deceased would have been entitled, had he not died, by conveying the cause of action to the deceased's statutory beneficiaries.¹²

Texas has often been cited as being a jurisdiction where recovery is not allowed for a breach of implied warranty.¹³ However, a majority of the states have either allowed recovery or indicated that they would.¹⁴

⁷ Lord Campbell's Act, 9 & 10 Vict. c. 93 (1846).

⁸ 39 IOWA L. REV. 494, 495 n.5 (1954) gives a listing of each state's wrongful death acts.

⁹ Compare TEX. REV. CIV. STAT. ANN. art. 4671(1) (1952): "When an injury causing the death of any person is caused by the wrongful act, neglect, carelessness, unskillfulness, or default of another" with Lord Campbell's Act, 9 & 10 Vict. c. 93 (1846): "Whosoever the death of a person shall be caused by a wrongful act, neglect, or default"

¹⁰ TEX. REV. CIV. STAT. ANN. art. 5525 (1958) ("Survival Statute"): "All causes of action upon which suit has been or may hereafter be brought for personal injuries, or for injuries resulting in death, whether such injuries be to the health or to the reputation, or to the person of the injured party, shall not abate by reason of the death"

¹¹ E.g., ARK. STAT. ANN. § 27-906 (1962); CONN. GEN. STAT. ANN. § 52-599 (1958); N.H. REV. STAT. ANN. § 556.9 (1955).

¹² TEX. REV. CIV. STAT. ANN. art. 5525 (1958). However, the cause of action for the injuries to the beneficiaries, due to the death, arises from TEX. REV. CIV. STAT. ANN. art. 4671 (1952): "When an injury causing the death of any person is caused by the wrongful act, neglect, carelessness, unskillfulness, or default of another" What causes of action should be encompassed by the preceding statement? Should it encompass both actions *ex delicto*, which means tortious in nature, and *ex contractu*, or is it confined only to actions *ex delicto*?

¹³ E.g., DiBelardino v. Lemmon Pharmacal Co., 208 A.2d 283, 285 (Pa. 1965); Schnabl v. Ford Motor Co., 195 N.W.2d 602, 608 (Wis. 1972); 25A C.J.S. *Death* § 23, n.53.5 (1966).

¹⁴ See Thaggard v. Vafes, 119 So. 647, 649 (Ala. 1928); Greenman v. Yuba Power Prod., Inc., 377 P.2d 897, 900 (Cal. 1962); Foran v. Carangelo, 216 A.2d 638, 641 (Conn. 1966) (dictum); Zostautas v. St. Anthony De Padua Hosp., 178 N.E.2d 303, 308 (Ill. 1961); Kelley v. Volkswagenwerk Aktiengesellschaft, 268 A.2d 837, 838 (N.H. 1970), *overruling* Wadleigh v. Howson, 189 A. 865 (N.H. 1937) and Howson v. Foster Beef Co., 177 A. 656 (N.H. 1935); Santor v. Karagheusian, Inc., 207 A.2d 305, 311 (N.J. 1965); Goldberg v. Killman Instr. Corp., 191 N.E.2d 81, 82 (N.Y. 1963); Greco v. S.S. Kresge Co., 12 N.E.2d 557, 561 (N.Y. 1938); Schnabl v. Ford Motor Co., 195 N.W.2d 602, 609 (Wis. 1972). *Contra*, Gott v. Newark Motors, Inc., 267 A.2d 596, 599 (Del. 1970) was based upon the Delaware Wrongful Death Act, which is markedly different from the Texas Wrongful Death Act in that it reads: "Whenever death is occasioned by unlawful violence or negligence" The Delaware Death Act makes no mention of "wrongful act," "carelessness," "unskillness," or "de-

The Texas authority cited in support of no recovery is *Goelz v. J.K. & Susie L. Wadley Research Institute & Blood Bank*.¹⁵ The sources¹⁶ citing *Goelz* for the proposition that Texas does not allow recovery rely upon this statement: "It has been held that under such statutes recovery cannot be had for an implied warranty on the theory of breach of contract."¹⁷ The preceding statement by the court was nothing more than *dictum*. The court disallowed recovery in the decision based on its determination that "the supplying of blood for a fee is in its essence the rendition of a service, not a commercial sale of property."¹⁸ After making this determination, the issue of breach of implied warranty was no longer before the court.¹⁹

There is no Texas case directly concerning recovery for breach of implied warranty under the Texas Death Act. However, the Texas Supreme Court has allowed recovery under the Death Act for death resulting from the unseaworthiness of a vessel,²⁰ which is similar, if not synonymous, to a breach of an implied warranty.²¹ Seaworthiness means "that there was, as it is often put, a 'warranty,' or more precisely stated, an obligation, a duty owed to certain persons, that the vessel and its

fault," as does the Texas Death Act. *Whiteley v. Webb's City, Inc.*, 55 So. 2d 730, 731 (Fla. 1951) (Chapman, Roberts, and Mathews, JJ., dissenting). The Florida Legislature, two years later, amended the Death Act to include actions *ex contractu* and *ex delicto*. *Lovett v. Emory Univ., Inc.*, 156 S.E.2d 923, 925 (Ga. 1967). The Georgia Death Act gives a cause of action when death results "from a crime or from criminal or other negligence . . ." However, the court did say that an action would lie under the Death Act for death resulting from the breach of an implied warranty with respect to certain enumerated articles "intended for human consumption or use, where either knowledge of the defect or negligence by the seller is an essential element." *Necktas v. General Motors Corp., Pontiac Div.*, 259 N.E.2d 234, 236 (Mass. 1970) (Speigel and Kirk, JJ., dissenting), in which, the statutory language restricted the causes of action to negligence or willful, wanton, or reckless acts. *Hasson Grocery Co. v. Cook*, 17 So. 2d 791, 792 (Miss. 1944) in which the Mississippi Death Act only extends a cause of action when the death has been "caused by any real wrongful or negligent act, or omission, or by unsafe machinery, way or appliances . . ." *DiBelardino v. Lemmon Pharmacal Co.*, 208 A.2d 283, 285 (Pa. 1965) (Roberts and Musmanno, JJ., dissenting). The Pennsylvania Death Statute limits the causes of action to those occasioned by "unlawful violence or negligence . . ."

¹⁵ 350 S.W.2d 573, 577 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.) (*dictum*). The suit in this case was brought seeking recovery for death which resulted from the deceased's having been transfused with the wrong type of blood.

¹⁶ *E.g.*, *DiBelardino v. Lemmon Pharmacal Co.*, 208 A.2d 283, 285 (Pa. 1965); *Schnabl v. Ford Motor Co.*, 195 N.W.2d 602, 608 (Wis. 1972); 25A C.J.S. *Death* § 23 n.53.5 (1966).

¹⁷ *Goelz v. J.K. & Susie L. Wadley Research Inst. & Blood Bank*, 350 S.W.2d 573, 577 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.) (*dictum*).

¹⁸ *Id.* at 577.

¹⁹ The defendant in this case, a research institute and blood bank, was a charitable institution. Since charitable immunity was alive at the time this case was decided, had the court granted recovery under breach of implied warranty, it would have, in effect, recognized a means of circumventing charitable immunity.

Through *dictum*, the court said: "It is true that a breach of contract may also constitute a tort, in which case a cause of action may ordinarily arise under our death statute on the grounds of tort, not a breach of contract as such." *Id.* at 577.

²⁰ *Vassallo v. Nederl-Amerik Stoomv Maats Holland*, 162 Tex. 52, 344 S.W.2d 421 (1961).

²¹ *E.g.*, *The Tungus v. Skovgaard*, 358 U.S. 588, 598, 79 S. Ct. 503, 509, 3 L. Ed.2d 524, 531 (1959) (concurring opinion).

equipment, appurtenances and crew met a certain standard."²² Within the context of this case, the Texas Supreme Court said the purpose of the Death Act is to permit the plaintiff to assert any basis for recovery which the deceased would have had if he were alive.²³

Since the purpose of the wrongful death acts was to remedy the harsh common law principle which barred recovery for the death of an individual,²⁴ the weight of authority, as indicated by Justice Cardozo, urges a liberal construction of the death acts.

Death statutes have their roots in dissatisfaction with the archaisms of the law. . . . It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied.²⁵

Through a liberal construction, courts of other jurisdictions have held that a breach of an implied warranty is embraced by their wrongful death acts.²⁶ According to the Supreme Court of Texas, the purpose "was never meant to freeze the statute as of 1925, thereby rendering it necessary for the legislature to constantly adopt amendments to cover new rights as they are recognized by statute or court decisions."²⁷

Although there is no dispute that death acts apply to actions *ex delicto*,²⁸ meaning tortious in nature, some jurisdictions have balked at construing the death acts so liberally as to include actions *ex contractu*.²⁹ In Texas, the question of whether or not an action *ex contractu* lies under the Death Act was decided in the negative in *Eubanks v.*

²² *Id.* at 598, 70 S. Ct. at 509, 3 L. Ed.2d at 531. The Supreme Court allowed recovery for unseaworthiness based upon the New Jersey Death Statute, which reads: "When the death of a person is caused by a wrongful act, neglect or default . . ." N.J. STAT. ANN. 2A:31-1 (1952).

²³ *Vassallo v. Nederl-Amerik Stoomv Maats Holland*, 162 Tex. 52, 57, 344 S.W.2d 421, 424 (1961).

²⁴ *Baker v. Bolton*, 170 Eng. Rep. 1033 (N.P. 1808).

²⁵ *Van Beek v. Sabine Towing Co.*, 300 U.S. 342, 350, 57 S. Ct. 452, 456, 81 L. Ed. 685, 690 (1937) (Cardozo, J.).

²⁶ *E.g.*, *Greco v. S.S. Kresge Co.*, 12 N.E.2d 557, 562 (N.Y. 1938). "The statute was enacted to remedy partially that evil, not to perpetuate it by leaving the statute open to narrow construction." *Schnabl v. Ford Motor Co.*, 195 N.W.2d 602, 606 (Wis. 1972). "The statute is a remedial one, and should be construed, not strictly, but so as to advance the remedy, and suppress the supposed wrong and injustice existing under the former condition of the law."

²⁷ *Vassallo v. Nederl-Amerik Stoomv Maats Holland*, 162 Tex. 52, 59, 344 S.W.2d 421, 426 (1961). *Contra*, an opponent of liberal construction might attempt to limit the construction with the doctrine of *Ejusdem Generis*, which means: "[W]here words of a particular description in a statute are followed by general words that are not so specific and limited, unless there be a clear manifestation of a contrary purpose, the general words are to be construed as applicable to persons or things or cases of like kind to those designated by the particular words." *Farmers' & Mechanics' Nat'l Bank v. Hanks*, 104 Tex. 320, 327, 137 S.W. 1120, 1124 (1911).

²⁸ *E.g.*, *Whiteley v. Webb's City*, 55 So. 2d 730, 731 (Fla. 1951); *Greco v. S.S. Kresge Co.*, 12 N.E.2d 557, 561 (N.Y. 1938).

²⁹ *E.g.*, *Thaggard v. Vafes*, 119 So. 647, 649 (Ala. 1929); *Braun v. Riel*, 40 S.W.2d 621, 623 (Mo. 1931). *Contra, e.g.*, *Foran v. Carangelo*, 216 A.2d 638, 641 (Conn. 1966) (dictum); *Zostautas v. St. Anthony De Padua Hosp.*, 178 N.E.2d 303, 307 (Ill. 1961).

Schwalbe.³⁰ Although the court in *Eubanks*³¹ held that actions *ex contractu* were not encompassed by the Death Act, the court did allow recovery under the Death Act based upon the principle that a *tortious breach of duty arising from a contractual relationship* is recoverable.³² However, in a later case, *Vassallo v. Nederl-Amerik Stoomv Maats Holland*,³³ the Supreme Court of Texas voiced its intention to allow recovery under the Death Act with no restrictions as to the basis of the claim asserted—except that it be one to which the deceased would have been entitled if he had not died.³⁴ If this broad statement, which was made in the context of allowing recovery for unseaworthiness, can be taken to mean the Texas Supreme Court will allow recovery for actions *ex contractu*, then all doubts will be resolved in favor of recovery for a breach of an implied warranty.

However, assume *arguendo* that the Death Act is to be narrowly construed to encompass only actions *ex delicto*. Temporarily laying aside the argument for liberal construction, is a breach of an implied warranty, which causes the death of an individual, an action *ex delicto*?

"The seller's warranty is a curious hybrid, born of the illicit intercourse of tort and contract, unique in the law."³⁵ Although many, if not most, lawyers think of the word "warranty" as being contractual, "in many cases, at least, to hold that a warranty 'is a contract is to speak the language of pure fiction.'"³⁶ As a matter of public policy,³⁷ the law has imposed a warranty on manufacturers for the purpose of protecting the public health.³⁸ This warranty is not contractual in nature,³⁹ but "bespeaks a *sui generis* cause of action."⁴⁰

³⁰ 55 S.W.2d 906, 907 (Tex. Civ. App.—Amarillo 1932) (*semble*), *aff'd in part and rev'd in part sub nom.*, United States Fidelity & Guar. Co. v. Eubanks, 126 Tex. 405, 87 S.W.2d 248 (1935).

³¹ *Id.*

³² *Id.* at 907 (*semble*). The court cited several cases which mentioned this statement, but never expressly stated whether it was to be adopted. However, due to the court's disposition of the case, it is logical to assume the adoption.

³³ 162 Tex. 52, 344 S.W.2d 421 (1961).

³⁴ *Id.* at 57, 344 S.W.2d at 424: "It is our opinion that under the express provisions of the Wrongful Death Act, the plaintiff is permitted to assert any basis for recovery that the decedent could have asserted if he were alive . . ." This statement was made in the context of allowing recovery for unseaworthiness, which resulted in death, notwithstanding the fact that the deceased had been contributorily negligent.

In supporting this judgment, the court quoted from *Holley v. The Manfred Stansfield*, 269 F.2d 317, 321 (4th Cir. 1959):

[T]his statute was intended not only to take away from the wrongdoer the common law immunity resulting from the death of an injured party, but to grant recovery in all instances where a decedent would have recovered. The statute appears not to concern itself with which law, local or maritime, would have supported the recovery, but only whether there would have been a recovery.

³⁵ W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 95, at 634 (4th ed. 1971).

³⁶ *Id.* at 635.

³⁷ *Griggs Canning Co. v. Josey*, 139 Tex. 623, 625, 164 S.W.2d 835, 836 (1942).

³⁸ *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 616, 164 S.W.2d 828, 833 (1942).

³⁹ *Id.* at 616, 164 S.W.2d at 833.

⁴⁰ *Santor v. A & M Karagheusian, Inc.*, 207 A.2d 305, 311 (N.J. 1965).

The gravamen of a cause of action for breach of an implied warranty that food is fit for human consumption is the personal injury which results, and the action "sounds in tort." The cause of action is not *ex contractu*.⁴¹

This dual role of the word "warranty" flourished during the growth of strict liability as applied to defective products.⁴² The birth of strict liability was through the conception that an implied warranty either ran with the goods to the consumer or was made directly to the consumer.⁴³ These theories arose through the need to get away from the intricacies of sales law and the obstacles it posed to a recovery.⁴⁴ The law of sales imposed several obstacles in the way of recovery—privity,⁴⁵ reliance upon the skill or judgment of the seller,⁴⁶ and exclusion or disclaimer of warranties.⁴⁷

The tortious aspect of warranty, "an implied warranty imposed by law,"⁴⁸ was codified in the *Restatement (Second) of Torts*⁴⁹ under the name of "strict liability" in tort:

One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property⁵⁰

This rule applies even though:

- (a) the seller has exercised all possible care in the preparation and sale of his product, and
- (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.⁵¹

⁴¹ *Gosling v. Nichols*, 139 P.2d 86, 87 (Cal. 1943). This was a death case based upon a breach of implied warranty that food was fit for consumption, wherein recovery was allowed.

⁴² W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 95, at 635 (4th ed. 1971).

⁴³ Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 *YALE L.J.* 1099, 1125 (1960). Dean Prosser discusses a number of other theories which had been devised to allow recovery.

⁴⁴ *E.g.*, *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 81 (N.J. 1960); *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 620, 164 S.W.2d 828, 833 (1942). "The policy of the law to protect the health and life of the public would only be half served if it were to make liability depend on the ordinary contractual warranty. Privity of contract and reliance on the skill and judgment of the manufacturer or other vendor would be necessary to a recovery in such a case."

⁴⁵ *See Baxter v. Ford Motor Co.*, 12 P.2d 409, 412 (Wash. 1932). However, *TEX. BUS. & COMM. CODE ANN.* § 2.318 (1968) leaves the question of the privity requirement neutral for the courts' determination.

⁴⁶ *TEX. BUS. & COMM. CODE ANN.* § 2.315 (1968).

⁴⁷ *TEX. BUS. & COMM. CODE ANN.* § 2.316 (1968).

⁴⁸ *Griggs Canning Co. v. Josey*, 139 Tex. 623, 634, 164 S.W.2d 835, 840 (1942).

⁴⁹ *RESTATEMENT (SECOND) OF TORTS* § 402A (1965).

⁵⁰ *Id.* § 402A.

⁵¹ *Id.* § 402A.

Although there was no mention of the word "warranty" in this rule of "strict liability" in tort, the authors commented:

There is nothing in this Section which would prevent any court from treating the rule stated as a matter of "warranty" to the user or consumer. But if this is done, it should be recognized and understood that the "warranty" is a very different kind of warranty from those usually found in the sale of goods, and that it is not subject to the various contract rules which have grown up to surround such sales.⁵²

These two separate and distinct remedies, breach of an *implied contractual warranty* and breach of an *implied tortious warranty imposed by law*, may coexist and recovery may be obtained under either one.⁵³ The Supreme Court of Texas, in *Jacob E. Decker & Sons v. Capps*,⁵⁴ declared:

The fact, however, that the liability may be sustained in some cases because of a breach of a contractual warranty does not argue against the sustaining of liability on the ground herein adhered to—warranty imposed by law as a matter of public policy.⁵⁵

The *Decker* decision recognized strict liability in tort for foodstuffs.⁵⁶ In a later decision, *McKisson v. Sales Affiliates, Inc.*,⁵⁷ the Texas Supreme Court adopted the strict tort liability proposed by the *Restatement (Second) of Torts*.⁵⁸ In doing so, the court supported its opinion with a quotation from the *Decker* case:⁵⁹

While a right of action in such a case is said to spring from a "warranty," it should be noted that the warranty here referred to is not the more modern contractual warranty, but is an obligation imposed by law to protect public health.⁶⁰

As previously discussed, there are two theories offered whereby recovery could and should be allowed under the Death Act for breach of an implied warranty. One theory accentuates the remedial nature of the act and proposes liberal construction to allow recovery for any cause of action, whether *ex contractu* or *ex delicto*. Liberal construction is urged because the very reason for adopting the statute was to

⁵² *Id.* § 402A, comment *m* at 356.

⁵³ *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 618, 164 S.W.2d 828, 832 (1942).

⁵⁴ *Id.*

⁵⁵ *Id.* at 618, 164 S.W.2d at 832.

⁵⁶ *Id.* at 612, 164 S.W.2d at 829.

⁵⁷ 416 S.W.2d 787 (Tex. Sup. 1967).

⁵⁸ RESTATEMENT (SECOND) OF TORTS § 402A (1965).

⁵⁹ *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942).

⁶⁰ *McKisson v. Sales Affiliates*, 416 S.W.2d 787, 789 (Tex. Sup. 1967).

alleviate the harshness of the common law doctrine that death gave rise to no civil action. To disallow recovery because an action does not sound in tort is to defeat the purpose of the Death Act. The other theory supporting recovery is that an action for breach of an implied warranty, which results in death, is not *ex contractu*, but is *ex delicto*. This author finds it hard, if not impossible, to understand how such an action could be *ex contractu*. The word "warranty" has caused the mass of confusion in the decisions of other jurisdictions, due to the failure to distinguish between an *implied contractual warranty* and an *implied warranty imposed by law*, which sounds in tort. Texas courts have paved the way for recovery by making the distinction between the tort arm and the contract arm of an implied warranty.

Notwithstanding the often cited *Goelz* case⁶¹ as being indicative of Texas law, it is probable that Texas courts will allow recovery under the Death Act for breach of an implied warranty. Courts of other jurisdictions "are now swinging to the affirmative, as to whether the tort character of a breach of warranty is sufficient to include such an action under the wrongful death acts."⁶²

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⁶¹ 350 S.W.2d 573 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.) (dictum).

⁶² W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 127, at 903 (4th ed. 1971).