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Wrongful Death Damages in Virginia

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WRONGFUL DEATH DAMAGES IN VIRGINIA

The concern of this discussion is the problem of fixing adequate damages for the loss of human life in a wrongful death action, and Virginia's past and present attempt at offering a solution to that problem. The discussion does not deal with the requirements of proof of the alleged wrongful death but assumes, instead, that the requisite degree of negligence on the part of the tortfeasor has been established.[1]

Historical Perspective

No right of recovery existed for the wrongful death of another in England or America until Lord Campbell's Act was passed in England in 1846. The Act declared that it was proper for the jury to allow the qualified parties to recover "such damages as they may think proportioned to the injury resulting from such death." [2] But the Act was subsequently restricted, by the English courts, to the "pecuniary loss" of the beneficiaries. Most American jurisdictions that adopted wrongful death acts patterned their statutes after the English statute and took a similar judicial approach.[3] Virginia's judicial interpretation, however, did not limit the jury to a consideration of pecuniary damages although the Commonwealth had also patterned its wrongful death statute after Lord Campbell's Act.[4] In awarding "such damages as to it may seem fair and just . . .," [5] the jury was allowed to consider, in addition to the pecuniary loss sustained by the statutory beneficiaries, the loss of deceased's care, attention and society. The jury was instructed that they could award such sum as they deemed fair and just as a solatium to the beneficiaries for sorrow and mental anguish.[6] Even though damages

1. The tortfeasor is liable under Virginia's wrongful death statute whenever his wrongful act, neglect, or default, which has caused the death of another, is such that if death had not ensued the party injured would have been entitled to maintain an action for personal injuries. Va. Code Ann. § 8-633 (Repl. Vol. 1957).

2. 9 & 10 Vict., c. 93 (1846). *See* Cummins v. Kansas City Pub. Serv. Co., 334 Mo. 672, 66 S.W.2d 920 (1933).

3. *See* Lambert, *Wrongful Death of a Child*, 30 NACCA L.J. 188 (1964).

4. Virginia Elec. & Power Co. v. Decatur, 173 Va. 153, 159, 3 S.E.2d 172, 174 (1939). For an examination of the history of Virginia's Wrongful Death Act see Hudson Motor Car Co. v. Hertz, 121 F.2d 326 (6th Cir. 1941), *cert. denied*, 314 U.S. 696 (1941).

5. Va. Code Ann. § 8-636 (Repl. Vol. 1957).

6. Matthews v. Hicks, 197 Va. 112, 119, 87 S.E.2d 629, 633 (1955).

could not be recovered for the mental anguish and physical pain suffered by the decedent from the time of his injury to the time of his death, nor for any hospital, medical, or funeral expenses, they nevertheless were allowed to be considered as elements of "fair and just" damages.[7]

Virginia possessed one of the broadest views of wrongful death damages found among American jurisdictions.[8] Limited only by a statutory maximum amount recoverable,[9] the amount of damages in a wrongful death case was left almost exclusively to the discretion of the jury. The verdict could not be reversed because damages were excessive, unless they were so large as, under the circumstances, to shock one's sense of justice, or to indicate that they were clearly the result of passion or prejudice on the part of the jury.[10] Thus, the jury in Virginia, prior to 1968, had virtual "free rein," up to a statutory limit, to consider all aspects of the case and render an adequate verdict accordingly. Neither the death of the wrongdoer[11] nor the death of the statutory beneficiaries abated the cause of action.[12] In summary, until 1968, the Virginia statute offered more elements of recovery than most jurisdictions, but set a relatively conservative limit on the total amount recoverable. The seriousness of this limitation was illustrated in the 1954 case of *United States v. Guyer*,[13] in which the court, while considering the justification of an $87,000 wrongful death award in Maryland, pointed out that had the tragic death occurred twenty-five miles to the south (in Virginia), the award would have been limited to $25,000. Indeed, the maximum recovery is such a questionable aspect of both the past and present Virginia statute, that the final section of this article is devoted to a discus-

7. Wilson v. Whittaker, 207 Va. 1032, 1036, 154 S.E.2d 124, 127 (1967).

8. As of 1964 only four states, Arkansas, Florida, Kansas, and West Virginia had statutes which specifically allowed survivors to recover for mental suffering, sorrow and bereavement. S. SPEISER, RECOVERY FOR WRONGFUL DEATH 230 (1966). In several other states, such as Louisiana, South Carolina, and Virginia, whose death statutes contain general language as to the measure of damages, a similar result has been reached.

9. In VA. CODE ANN. § 8-636 (1950) the damages recoverable were limited to $15,000. By ch. 60, [1952] Va. Acts, section 8-636 was amended to increase the maximum amount recoverable to $25,000, and by ch. 387, [1958] Va. Acts, the section was further amended to increase the maximum to $30,000. By ch. 430, [1962] Va. Acts the maximum was further increased to $35,000, and ch. 583, [1966] Va. Acts apparently increased the maximum to $40,000, although the last sentence in the amended section implies the maximum figure to be $50,000.

10. Matthews v. Hicks, 197 Va. 112, 119, 87 S.E.2d 629, 633 (1955).

11. *See* VA. CODE ANN. § 8-633 (Repl. Vol. 1957).

12. *See Id.* § 8-638.

13. 218 F.2d 266, 268 (4th Cir. 1954).

sion advocating the abolition of a limitation upon the maximum recovery.

With a few exceptions,[14] Virginia's original wrongful death statute, enacted by the General Assembly in 1871, remained unchanged until 1968. The 1968 legislature made extensive changes in the statute,[15] and although an initial reading of the new provisions indicate that they are perhaps unambiguous, a more careful examination reveals that there exist problems in obtaining fair and just recoveries in certain situations. Since only a few cases decided under the new statute have reached the Supreme Court of Appeals of Virginia, in order to resolve some of these problems it will be necessary to analyze various decisions under the old statute and to examine some decisions from other jurisdictions in light of the 1968 statute.

SOLACE

Even though the 1968 statute increased Virginia's traditional limit on damages from forty thousand dollars to seventy-five thousand, five hundred dollars and actual hospital, medical and ambulance service expenses, it restricted the amount awardable by the jury in each of three areas of compensation. The jury may now award up to twenty-five thousand dollars exclusively for *solace* and, if it chooses to do so, may apportion that amount among designated classes of beneficiaries.[16] The measure of damages is fixed, but the definition of solace is open to speculation. Webster defines solace as: "the easing of grief; loneliness and discomfort." The comparable phrase in the four other states which specifically allow survivors to recover for mental suffering, sorrow and bereavement is "mental anguish." [17] The North Carolina Supreme Court in *Hancock*

14. The exceptions include:
(1) Increasing the statute of limitations from one to two years (1958);
(2) slight changes in the class beneficiaries;
(3) successive increases in the maximum amounts recoverable, *see* note 9 *supra*.

15. *See* VA. CODE ANN. § 8-636 (Repl. Vol. 1957).

16. Before the 1968 amendment, section 8-636 classified beneficiaries into two classes: the first included the surviving spouse, children and grandchildren of the deceased; the second was comprised of the parents, brothers and sisters of the deceased. No member of the second class could recover if a member of the first survived, and the jury was given discretion to distribute damages among members of the same class. The 1968 amendment retains this classification for purposes of distributing damages for solace. If the jury chooses not to apportion the recovery for solace among the class beneficiaries, this apportionment is made by the trial judge. He may hear evidence for this purpose if deemed necessary. VA. CODE ANN. § 8-638 (Repl. Vol. 1957).

17. *See* Page, *Damages for Wrongful Death—Broadening View of Pecuniary Loss*, 30 NACCA L. J. 217 (1964).

v. Western Union Tel. Co.,[18] stated that there is a material difference between disappointment, regret, and the keen mental suffering signified by the words "mental anguish." In an Arkansas case, the court held that mental anguish meant something more than the normal grief occasioned by the loss of a loved one. The court believed that to be grieved or shocked by the death of a loved one is natural, but in order to recover for mental anguish, one must suffer more than the "normal" grief.[19]

Legally, there is a fine but significant line that divides the emotional response, or mental anguish and hurt, of the survivors from the actual loss by the beneficiaries of the decedent's companionship and society. Only the former is compensated in a recovery for solace.[20] In fact, the loss of companionship and society is actually considered an element of pecuniary loss in many states.[21] Much the same proof would be used for both areas, but where, as in Virginia, the statute limits the amount recoverable for solace, the jury can conceivably increase the proven pecuniary loss by compensating for loss of companionship and society where the projected pecuniary loss is below the statutory maximum.

It is the emotional response or mental anguish of the beneficiaries which the statute is seeking to compensate. But unlike personal injury cases there can be no recovery under the wrongful death statute for the pain and mental anguish of the decedent between the time of his fatal injury and the time of his death. The mental anguish of the beneficiaries may be increased by the mental and physical suffering of the decedent, but it is *their* mental anguish and not the physical pain and mental anguish of the decedent for which recovery is allowed.[22]

After establishing the meaning of solace, the next question involves proving it. A 1967 Virginia case held that suffering and sorrow by the decedent's beneficiaries need not be proved, the jury having a right to infer such suffering and sorrow as a result of the death.[23] But this was prior to the 1968 statute, and there was no way of knowing for what reason or for which category the jury was actually awarding the dam-

18. 137 N.C. 497, 498, 49 S.E. 952, 953 (1905).

19. Peugh v. Oliger, 233 Ark. 281, 290, 345 S.W.2d 610, 617 (1961).

20. *See* Address by Charles F. Krause, Virginia Trial Lawyers' Association, Tenth Annual Seminar (March 15, 1969), in VIRGINIA TRIAL LAWYERS ASSOCIATION, PROCEEDINGS OF THE TENTH ANNUAL SEMINAR 114-126 (1969).

21. There is a definite trend in many states, whose wrongful death acts call for a pecuniary loss test, to permit recovery for loss of such items as society and companionship, albeit on a "pecuniary" basis. Page, *supra* note 17.

22. Virginia Iron Co. v. Odle, 128 Va. 280, 309-10, 105 S.E. 107, 116 (1920).

23. Gamble v. Hill, 208 Va. 171, 179, 156 S.E.2d 888, 894 (1967).

ages. With the express provision in the present statute that up to twenty-five thousand dollars may be awarded for solace,[24] there appears to be a requirement of some evidence, such as proof of close emotional ties, before a jury might award damages purportedly for the express purpose of compensating mental anguish and grief on the part of the statutory beneficiaries.[25] This evidence would be necessary to prevent windfalls in certain situations, or circumvention of the purpose of the statute through punitive awards against an aggravated wrongdoer in accordance with the degree of his culpability.[26] Of course, "the extent of the distress and sorrow may not be susceptible of direct or exact measurement, but enough certainty and knowledge of the situation can be established through the introduction of testimony in order to furnish a basis for the verdict or judgment." [27]

The need for such a control[28] might be illustrated by a situation in which the decedent and beneficiary were a childless married couple who had fought constantly and developed a deep hatred toward one another. There was no longer any love or affection between them, and at the time of decedent's death they had irreconcilably separated, although they were not yet divorced.[29] No matter how negligent the defendant had acted, the surviving spouse certainly should not be able to recover for solace.

Once the proper evidence is determined, the problem becomes the practical one of bringing these facts to the jury's attention. In *Basham v. Terry*,[30] the court agreed that, if the plaintiff offers testimony as to the decedent's good conduct and happy relations with his family in order to enhance a solace award, the defendant can refute this testimony with

24. VA. CODE ANN. § 8-636 (Supp. 1970).

25. It should not be presumed that one person is aggrieved by the death of another in the absence of proof that in fact, that is the case. S. SPEISER, *supra* note 8, at 232.

26. Punitive or exemplary damages may not be recovered in an action brought under the Virginia wrongful death act. Wilson v. Whittaker, 207 Va. 1032, 1038, 154 S.E.2d 124, 129 (1967).

27. Graham v. Western Union Tel. Co., 109 La. 1069, – , 34 So. 91, 93 (1903).

28. The statute seeks to control jury speculation, false claims, and verdicts based on passion by limiting recovery to certain class beneficiaries and setting a maximum value on an otherwise immeasurable element. *See* VA. CODE ANN. § 8-636 (Supp. 1970).

29. *See* Porter v. Virginia Elec. & Power Co., 183 Va. 108, 31 S.E.2d 337 (1944). Regardless of desertion, abandonment, or adultery, as long as the surviving consort was decedent's lawful husband or wife at the time of decedent's death, the surviving consort may recover for wrongful death. *But see* Matthews v. Hicks, 197 Va. 112, 87 S.E.2d 629 (1955). Evidence of desertion and adultery of the surviving spouse are admissible on the issue of quantum of damages, unless the evidence clearly shows that a reconciliation has been entered into, in good faith.

30. 199 Va. 817, 824-25, 102 S.E.2d 285, 290 (1958).

evidence of the decedent's bad habits and unhappy relationship with his family. If, on the other hand, the plaintiff offers no evidence of good relations, the court may determine that an award for solace would be without basis,[31] or it may follow the precedent set by decisions under the old statute that suffering and sorrow may be inferred from the death.[32] In all probability, however, the court will allow the jury to infer sorrow and suffering in the absence of any evidence to the contrary.[33] In view of the fact that such a presumption of sorrow and suffering may exist, *Gamble v. Hill*[34] would seem to indicate that the defendant, even in the absence of any positive evidence by the plaintiff, may offer evidence of the decedent's moral delinquencies, bad conduct, or unhappy relations with his family. But *Gamble* suggests this may only be done if defendant can go further and show that, because of such characteristics and conduct, the statutory beneficiaries lacked affection for him or that decedent's death brought them no sorrow or mental anguish. Thus, unless the defendant can show a lack of love and affection, evidence other than rebuttal evidence of decedent's character and conduct is not relevant to solace damages.[35]

No Recovery for Decedent's Estate

Under the old statute, the action for "fair and just damages" did not abate upon the death of the last beneficiary member of the class for the personal representative could still initiate or continue the action.[36] According to the Virginia Code, the amounts received were "assets in the hands of the personal representative to be disposed of according to law." [37] Presumably, this meant that recovery by the personal represen-

31. *See* note 25 *supra.*

32. Gamble v. Hill, 208 Va. 171, 179, 156 S.E.2d 888, 894 (1967).

33. Graham v. Western Union Tel. Co., 109 La. 1069, 34 So. 91 (1903). The mental suffering by a parent upon the loss of a child may be assumed in the absence of facts and circumstances tending to disprove the same.

34. 208 Va. 171, 179, 156 S.E.2d 888, 894 (1967). The gist of the proferred evidence showed that this girl had been guilty of immoral conduct and illicit relations, was the mother of one illegitimate child and was about to become the mother of another. But such evidence was not allowed since it fell short of proving or tending to prove that the decedent's beneficiaries had lost affection for her or had suffered no sorrow or mental anguish by reason of her death.

35. There is a conflict of authority on the question in other jurisdictions. *Id.* at 178, 156 S.E.2d at 893.

36. Johns v. Blue Ridge Transfer Co., 199 Va. 63, 65, 97 S.E.2d 723, 725 (1957).

37. Va. Code Ann. § 8-638 (Repl. Vol. 1957).

tative in the absence of statutory beneficiaries was for the benefit of the decedent's general estate.[38]

The 1968 amendment to section 8-636 provides that "no recovery hereunder shall be deemed to be assets of the estate of the decedent ...." [39] In all probability this provision refers only to the sums recovered by the beneficiaries or dependents pursuant to section 8-636, insuring that such awards go directly to these beneficiaries or dependents untouched by the decedent's creditors.[40] If this is the extent of the provision, then it is merely an incorporation of the clause in section 8-638 protecting any recovery by the statutory beneficiaries from "all debts and liabilities of the deceased." However, if the provision is also applicable to the situation where there are no beneficiaries or dependents, it appears to prevent the personal representative from recovering more than five hundred dollars plus the decedent's actual immediate hospital, medical and ambulance expenses. This interpretation, however, creates a conflict with section 8-638 which allows the personal representative to recover in the absence of statutory beneficiaries. Under Virginia law, however, where the legislature amends a statute by adding a new provision, the presumption is that it was intended to make some change in existing law.[41] It is also settled in Virginia that where inconsistent and irreconcilable provisions are found in statutes, effect must be given "to the latest expression of the legislative intent." [42] Hence, this new provision, if applicable to such a situation, means that, regardless of a showing of extreme grief by some distant relatives of the decedent, the death of the last class beneficiary before recovery terminates the right of recovery for solace. If there are also no surviving dependents, there can be no recovery for pecuniary loss, thus limiting the personal representative in such cases to a recovery of five hundred dollars and the decedent's actual hospital, medical and ambulance expenses. This conclusion appears justified since the statute bases recovery on solace and pecuniary loss as elements of recovery which are not entirely consistent with a recovery by the personal representative where there are no beneficiaries or dependents. Nevertheless, even in the absence of statutory beneficiaries and dependents, an action would still lie in every wrongful

38. *See generally* Johns v. Blue Ridge Transfer Co., 199 Va. 63, 97 S.E.2d 723 (1957).
39. VA. CODE ANN. § 8-636 (Supp. 1970).
40. *See* Grady v. Irvine, 254 F.2d 224, 228 (4th Cir. 1958).
41. City of Richmond v. Sutherland, 114 Va. 688, 77 S.E. 470 (1913).
42. Williamson v. Wellman, 156 Va. 417, 430, 158 S.E. 777, 781 (1931); *accord*, Adkins v. Arnold, 235 U.S. 417, 421 (1914).

death case,[43] because the cause of action and the right to enforce it are bestowed upon the personal representative and not upon a beneficiary or any class of beneficiaries.[44]

If the above interpretation of this provision is correct, two objections, both favoring the defendant, immediately become apparent. Since finding an attorney to take the plaintiff's case on a contingency basis will necessarily be more difficult when there is no hope of recovery beyond five hundred dollars for funeral expenses and actual hospital, medical and ambulance expenses, the result will be a decrease in the number of negligent defendants who are civilly prosecuted under the statute. Further, a defendant, whose wrongful act has eliminated an entire family, will be in a better position than one, who, through negligence or criminal inclination, has killed a single member of the family and left surviving dependents and beneficiaries. On the other hand, to allow additional recovery in the absence of statutory beneficiaries would invite false claims by distant relatives, create additional problems of measurement of damages, and facilitate the temptation to punish the defendant by assessing punitive damages.

Funeral, Medical and Ambulance Expenses

To abolish one harsh rule which resulted from judicial interpretation of the old statute,[45] the new act now allows the personal representative of the deceased person "to recover the actual funeral expenses of the decedent, not exceeding five hundred dollars, and the actual hospital, medical and ambulance service expenses incurred by the decedent as a result of the wrongful act." [46] Practicing attorneys will welcome the addition of funeral, medical and hospital expenses as an available element of damages, but may find it somewhat puzzling that the funeral expenses are limited to five hundred dollars. There are, however, several reasons

43. Va. Code Ann. § 8-633 (Repl. Vol. 1957) states that
> whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person . . . and the act . . . is such as would, if death had not ensued, have entitled the party injured to maintain an action . . . *then, and in every case,* the person who . . . would have been liable, if death had not ensued, shall be liable to an action for damages. . . . [Emphasis added].

44. Va. Code Ann. § 8-634 (Repl.Vol. 1957).

45. Prior to the 1968 amendment, hospital, medical and funeral expenses were held not to be recoverable in an action for wrongful death. Conrad v. Thompson, 195 Va. 714, 721, 80 S.E.2d 561, 566 (1964).

46. Va. Code Ann. § 8-636 (Supp. 1970).

why the legislature may have set the limit at a figure which scarcely approaches today's funeral expenses. First, there is the argument that the defendant's wrongful act merely advanced the time when payment of funeral expenses would be due, and did not create a new expense since death is inevitable.[47] The five hundred dollars could merely be intended to compensate for the extra expense of having to pay for the funeral prematurely.[48] Also, the legislature may have desired to guard against the expense of unnecessarily elaborate funerals without forcing the courts to consider time consuming proof of the reasonableness of the burial expenses or whether the funeral was in keeping with the social position or standing of the deceased in the community. Nevertheless, funeral expenses are a direct result of the wrongful death and, as a matter of justice, should be considered an item of damages suffered by the person liable to pay them.[49]

The remainder of this provision provides that the personal representative is entitled to recover the actual hospital, medical and ambulance service expenses incident to the decedent's fatal injury.[50] In other words, upon putting the bills for these expenses into evidence and proving their validity, the jury, upon finding defendant liable, must award the personal representative a recovery equal to the total of these expenses. If the evidence is sufficient and the jury does not award an amount equal to these expenses, the personal representative would seem to have grounds for setting aside the verdict as contrary to the law and evidence. If, however, the personal representative, through oversight or inability, is unable to adequately prove the full extent of these expenses, any award received for the three expenses is distributed pro rata among the creditors to whom these expenses are owed, without regard to the fact that only five hundred dollars was recovered for the funeral expenses. As with all of the damages which may be recovered under this act, the jury should not consider any benefits that may have been received from collateral sources, such as insurance policies.[51]

Pecuniary Loss

Finally, the "jury may award such further damages, not exceeding fifty thousand dollars, as shall equal the financial or pecuniary loss sus-

47. Consolidated Traction Co. v. Hone, 60 N.J.L. 444, 38 A. 759 (1897).
48. *See generally* Florida East Coast Ry. Co. v. Hayes, 67 Fla. 101, 64 So. 504 (1914).
49. S. Speiser, *supra* note 8, at 241.
50. Va. Code Ann. § 8-636 (Supp. 1970).
51. Walthew v. Davis, 201 Va. 557, 111 S.E.2d 784 (1960).

tained by the dependent or dependents of such decedent and shall further direct in what proportions such damages shall be distributed to such dependents, regardless of class." [52] It is significant that the compensation to be awarded under this provision is to the *dependents* rather than to the class beneficiaries designated in the solatium provision.[53] However, in the great majority of cases, a dependent of the decedent would also be one of those persons designated in the solatium provision. Where this is the case, the rule as to exclusion of the deferred class in favor of the preferred class that was binding on the jury in the awarding of damages for solace is not applicable in the financial or pecuniary loss provision. The jury is allowed to apportion the pecuniary loss award to whomever it believes has suffered the greatest financial loss by deprivation of the decedent's continued existence. This should be true even if the recipient of part or all of the award is a dependent who is a distant relative or no relation at all. The validity of this conclusion depends upon the interpretation of the provision allowing dependents to recover "regardless of class." These words could mean that such dependents may recover regardless of whether they are in the preferred or deferred class of designated beneficiaries, or regardless of whether they are in a class or not. This matter, and indeed the extent of the entire provision, ultimately depends on the interpretation given to the word "dependents" as used in section 8-636.

In most wrongful death statutes allowing recovery for pecuniary loss, dependency is not expressly required but is merely "an evidentiary fact from which, with other circumstances of the case, the question of pecuniary injury and its extent is to be ascertained." [54] But where, as in the Virginia statute, only dependents may recover for pecuniary loss, substantially different results depend on whether the definition of the word "dependent" includes actual financial dependency or dependency of an emotional, psychological or companionship nature as well. In general, all that the word implies is a need on the part of the beneficiary and a recognition of that need on the part of the decedent.[55] It is not neces-

52. VA. CODE ANN. § 8-636 (Supp. 1970).

53. *See* note 16 *supra*.

54. Faulkner v. Faulkner, 186 Ark. 1082, — , 57 S.W.2d 818, 822 (1933). Except for Massachusetts and Alabama, which base their wrongful death statutes on punitive awards, all states base recovery on compensation to the surviving beneficiaries, basically for pecuniary loss. The only other states which require a beneficiary to be a dependent are Alaska, Florida, Hawaii, Indiana, New Hampshire, New Jersey, Oregon, and Washington. S. SPEISER, *supra* note 8, at 583 n.14.

55. Wente v. Shaver, 350 Mo. 1143, 169 S.W.2d 947 (1943).

sary, in order to render one "dependent" within the meaning of the usual statute, that he or she be totally dependent upon the deceased for support.[56] A partial dependency is sufficient, as where a child contributes materially and substantially to the support of a parent.[57] Dependency may also be established through the services rendered by decedent for the claimant's maintenance even in the absence of actual monetary contributions.[58] Therefore, the majority of jurisdictions dealing with dependency as a statutory requisite hold that the test is not whether the alleged dependent could maintain himself without decedent's help. The test, rather, is whether the decedent actually contributed substantially, by money or services, to support of the claimant's standard of living or standard of maintenance in respect to "necessaries and conveniences" before his, the decedent's, death.[59]

If Virginia is to follow the majority rule among the states requiring dependency for recovery, the following conclusions must be drawn from the pecuniary loss provision of the Virginia statute. First, the recovery of pecuniary loss is not patently restricted to the dependents that decedent claimed on his last income tax return nor to the statutory beneficiaries eligible to recover for solace. Secondly, since maintenance, dependency and support are obviously matters of degree, it will be for the jury in difficult cases[60] to draw the line separating surviving relatives of

56. Kirpatrick v. Bowyer, 131 Ind. App. 86, 169 N.E.2d 409 (1960).

57. *See* Correia v. Van Camp Sea Food Co., 113 Cal. App. 2d 71, – , 248 P.2d 81, 91 (1952) where the court held that the word "dependent" is broader in scope than actual dependency when referring to those eligible for a recovery for wrongful death under the Jones Act. A right of recovery is not dependent upon reliance for necessaries, but a person is "dependent" upon another when he has the moral right to rely and does rely upon such other person for support, whether in whole or in part.

58. Carianni v. Schwenker, 38 N.J. Super. 350, 118 A.2d 847 (1955). *See also* Cleveland, C., C. & St. L. Ry. v. Lutz, 64 Ind. App. 663, 116 N.E. 429 (1917) where the decedent mother kept house for the claimant, cooked for him and looked after his clothes.

59. *See* Carianni v. Schwenker, 38 N.J. Super. 350, 118 A.2d 847 (1955) (the fact that a mother washed clothes, fixed meals, did the dishes, housework and shopping for her husband and three adult daughters should be submitted to the jury for their determination as to whether or not the husband and daughters were dependents of their deceased mother); Wells-Dickey Trust Co. v. Chicago, B. & Q. Ry, 166 Minn. 79, 207 N.W. 186 (1926), *rev'd on other grounds*, 275 U.S. 161 (1927) (adopted as the test of dependency actual support rather than inability on the part of the alleged dependent to earn a livelihood). *Contra*, Duval v. Hunt, 34 Fla. 85, 15 So. 876 (1894) holding that dependency implies an actual inability to support oneself and an actual dependence upon decedent for support.

60. *See* Carianni v. Schwenker, 38 N.J. Super. 350, 359, 118 A.2d 847, 853 (1955). It is for the jury to take into consideration the extent to which the claimant's standard

the decedent who are dependents from those who may sustain "pecuniary injuries" as a result of the death but who are, nevertheless, not dependent, in whole or in part. And, thirdly, recovery for pecuniary loss upon the death of a child or an elderly person will rarely be allowed because of the difficulty in proving that a person was substantially dependent upon that child or elderly person for his standard of living.

The facts which will be admissible to calculate the financial or pecuniary loss to the dependents must be determined by an examination of allowable elements of proof under the old statute. This may cause difficulty because the old statute allowed "fair and just" damages, and pecuniary loss was only one element, according to the courts' interpretation of the statute. Naturally, the courts were not overly concerned with delineating the boundaries of pecuniary loss since anything that remotely resembled a financial loss could be termed a fair and just damage under the broad and permissive language of the statute.[61]

The general rule under the old statute was that pecuniary loss sustained by the statutory beneficiaries included the probable earnings of the deceased for the duration of his life expectancy in view of his health, age, business capacity and experience.[62] Cases have added as elements of jury consideration the deceased's physical and mental capacity,[63] habits,[64] and energy and perseverance.[65] With these considerations in mind, the jury could receive evidence of the amount of decedent's annual salary or wages,[66] and use, as a multiplier, the probable number of years that deceased would have lived.[67] Instructions under the old statute did not compel the jury to take into account the number of years that the deceased would have earned a diminished salary or no salary at all, or the sum that should be deducted from his salary for his own personal expenses, or the probable life span of the beneficiaries.[68] Though

of living may have declined consequent upon the decedent's death. This kind of factual issue is not to be determined by the court unless the alleged dependency is so insignificant in degree that reasonable men could not fairly disagree as to its insubstantiality.

61. *Cf.* Gough v. Shaner, 197 Va. 572, 578, 90 S.E.2d 171, 175 (1955).

62. Wilson v. Whittaker, 207 Va. 1032, 1037, 154 S.E.2d 124, 128 (1967).

63. Whitaker v. Blidberg Rothchild Co., 296 F.2d 554 (4th Cir. 1961), *aff'g* 195 F. Supp. 420 (E.D. Va. 1961).

64. *Cf.* Norfolk & W. Ry. v. Lumpkins, 151 Va. 173, 144 S.E. 485 (1928).

65. Jones v. Richmond, 118 Va. 612, 88 S.E. 82 (1916).

66. Baltimore & Ohio R. R. Co. v. Wrightman's Adm'r, 70 Va. (29 Gratt.) 431 (1877).

67. *See generally* Colonial Coal Co. v. Gass, 144 Va. 24, 75 S.E. 775 (1912).

68. In ascertaining damages for the death of a son, upon whom the mother was dependent, the jury might consider what would probably have been the lifespan of the

it was not essential to introduce mortality tables to show the probable duration of the life of the deceased,[69] introduction of such scientific tables was permissible.[70]

These are considerations that the Virginia courts have held to be relevant in proving the direct financial loss sustained by dependents in the usual case where the deceased was the family breadwinner.[71] For the most part, these rules will remain the same, since there is no doubt that the loss of his financial support is a pecuniary loss to the dependents. A problem arises, though, upon considering whether or not compensation can be recovered for such collateral areas of pecuniary loss as deprivation of guidance, advice, assistance, comfort, and protection.

Prior to 1968, the stereotype jury instructions in Virginia allowed a recovery for "fair and just" damages to include loss of deceased's care, attention and society *in addition* to any pecuniary loss.[72] This indicates that loss of society and companionship, less "sentimental" [73] than grief and sorrow, and which has been shown to be distinguishable from what is being compensated in the award for solace, was not considered an element of pecuniary loss prior to the enactment of the 1968 statute. An analysis of Virginia cases prior to 1968, however, indicates that the phrase "pecuniary loss," when used in a jury instruction was to be given a liberal interpretation.[74] A 1928 Virginia case,[75] cited with approval the United States Supreme Court's opinion, in *Norfolk & W. Ry. v.*

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mother if her son had not been killed. Baltimore & Ohio R.R. v. Noell's Adm'r, 73 Va. (32 Gratt.) 394 (1879).

69. Eisenhower v. Jeter, 205 Va. 159, 135 S.E.2d 786 (1964). *See also* Gough v. Shaner, 197 Va. 572, 90 S.E.2d 171 (1955). The age, sex, health and mental capacity of a decedent being proved, the jury is entitled to judge his life expectancy without the aid of mortality tables.

70. Norfolk & W. Ry. Co. v. Cheatwood, 103 Va. 356, 49 S.E. 489 (1905).

71. Other factors to be taken into consideration include the difference in receiving the money in one lump sum as opposed to it being earned over many years, and the earning power of that lump sum of money. Also, evidence of earnings usually comes in the form of gross figures which do not reflect the ordinary payroll deductions. Kent, *Damages in Wrongful Death Actions*, 17 CLEV-MAR. L. REV. 233, 238 (1968). For a detailed discussion of the techniques and elements of proof in such cases, and the theories of plaintiffs' and defendants' attorneys in the use of expert economists to project a family's financial loss, see Address by Edward J. Simarski, Virginia Trial Lawyers' Association Tenth Annual Seminar (March 15, 1969), in VIRGINIA TRIAL LAWYERS ASSOCIATION, PROCEEDINGS OF THE TENTH ANNUAL SEMINAR 126-140 (1969).

72. Breeding v. Johnson, 208 Va. 652, 159 S.E.2d 836 (1968).

73. Page, *supra* note 17.

74. Eisenhower v. Jeter, 205 Va. 159, 135 S.E.2d 786 (1964).

75. Norfolk & W. Ry. v. Lumpkins, 151 Va. 173, 144 S.E. 485 (1928).

Holbrook,[76] that the jury might take into consideration "the care, attention, instruction, training, advice, and guidance . . . which the evidence showed the deceased reasonably might be expected to give his children during their minority" in considering pecuniary loss. In 1955, *Gough v. Shaner* defined the phrase "pecuniary loss" as not only financial loss, present and prospective loss of services, nurture and care, and other advantages but also benefits of a pecuniary nature which had been cut off or would probably be lost in the future by reason of the death.[77]

It is imperative to remember that, in the pre-1968 cases, the phrase "pecuniary loss" was created by the court to assist the jury in assessing "fair and just damages"; it was not a statutory limitation. Now that "financial or pecuniary loss" is a statutory limitation on damages, the meaning of the phrase calls for further delineation by the courts in order that the statutory criteria may be uniformly applied. The courts must decide whether pecuniary loss, as used in section 8-636, includes compensation for those peripheral areas which are not, perhaps, strictly pecuniary, but yet do not fall under the heading of grief and sorrow. To allow recovery for such losses would be in line with a definite trend in many jurisdictions to interpret pecuniary loss statutes more liberally, thereby allowing recovery not only for actual pecuniary loss of contributions and services but also "for loss of advice, comfort, assistance and protection which the jury might find to be of pecuniary value and which the survivor could reasonably have expected if the decedent had lived." [78] This trend, however, to liberalize the definition of pecuniary loss is occurring in jurisdictions where pecuniary loss to the survivors is the only basis for recovery. It has been utilized, almost exclusively, in cases where the decedent was so old or so young that there was little or no reliable evidence of loss when strictly applying the pecuniary standard, yet justice seemed to demand at least some recovery.

In practice, it is seldom necessary in the usual case of the deceased breadwinner to argue that parental guidance and advice, or marital assistance and protection, are proper elements of pecuniary loss under the Virginia statute. Where a thirty or forty year old man with two or three children and a ten thousand dollar annual income is killed, one would not have to stretch the definition of pecuniary injury in order to project a direct and acute pecuniary loss of over fifty thousand dollars

76. 235 U.S. 625, 628 (1914) (concerned the Federal Employers' Liability Act of 1908, 35 Stat. 65, which allowed recovery only for pecuniary loss).

77. 197 Va. 572, 579, 90 S.E.2d 171, 176 (1955).

78. Fussner v. Andert, 261 Minn. 347, — , 113 N.W.2d 355, 363 (1961).

to his family.[79] But in the case of the wrongful death of a child or a housewife and mother, the definition of pecuniary loss becomes very pertinent in determining if more than solace damages can be recovered. The main obstacle, in recovering for the pecuniary injury suffered in such a death, is the existence of a statutory dependent who is eligible to recover. As was pointed out earlier, authorities considering the question have supported the conclusion that dependency in this type of statute is the support, contributions, or even services[80] upon which that dependent had come to rely.[81]

Assuming that the dependency requirement can be satisfied, it appears that more than the mere twenty-five thousand dollars for solace could certainly be recovered for the death of a wife. Where she is survived by children, the expense to the surviving spouse of providing the children with a home, the services of a suitable person to manage the home and minister to the children's needs, or render domestic help, would certainly be direct pecuniary losses.[82] Even where there are no children, courts have held that the pecuniary loss should not be limited to the cost of a menial servant, or to what the wife would have earned working for another, or to a combination of the two. On the contrary, there should be recovery for the value of her services in counseling, advising, inspiring, comforting, and otherwise serving her husband based on the type of person she is shown to have been.[83] But an early Virginia case seemed to discount consideration of the loss of these latter "services" as pecuniary injuries suffered by the husband, referring to them as a "proper element . . . to be considered by the jury in fixing the *solatium* to be awarded to the husband."[84] Certainly the pecuniary value of the services rendered in the maintenance of a home and family,[85] however, ought not only to qualify her surviving husband and children as dependents but also to entitle them to substantial damages under the pecuniary loss provision, in addition to whatever they may recover for solace.

79. Krause, *supra* note 20, at 124.

80. *See* Atlanta & C. Air-Line Ry. v. Gravitt, 93 Ga. 369, 20 S.E. 550 (1893).

81. *See* note 59 *supra.*

82. Legare v. United States, 195 F. Supp. 557 (S.D. Fla. 1961). *See* Spence, *Demonstrative Evidence, Wrongful Death and Survivorship,* NACCA SIXTH CIRCUIT SEMINAR (Beall ed. 1958) discussing in detail trial preparation of action for death of devoted twenty-five year old housewife with two young children; $155,000 award.

83. Continental Bus Sys., Inc. v. Toombs, 325 S.W.2d 153, 164 (Tex. Civ. App. 1959).

84. Simmons v. McConnell, 86 Va. 494, 497, 10 S.E. 838, 839 (1890).

85. *See* THE AMERICAN HOME Jan. 11, 1959 containing an article documenting and evaluating the total weekly value of the housewife's services at $193.95.

The problem of finding a basis for pecuniary damages has been especially controversial in cases concerning the wrongful death of a child. Formerly, many courts, after looking at the statistics concerning a child's earning capacity and the cost of raising him,[86] have decided rather matter-of-factly that a child's death was actually a financial gain to the family not a loss, and consequently have allowed only a nominal recovery to the deceased child's parents. Gradually, the harshness of this rule, which made wrongful death statutes almost nugatory in the case of children, was eased as the courts either broadened the meaning of pecuniary loss[87] or created presumptions of pecuniary loss[88] in an attempt to allow meaningful recoveries. Ultimately, a Michigan court not only held loss of companionship to be an element of pecuniary loss to the parents, but suggested further that the parents could recover for their "lost investment" in the child.[89]

Even in Virginia, where the statute provided for other elements of compensable loss, the courts were prone to formulate a broad and inclusive definition of pecuniary loss in these cases. The jury was allowed to consider any pecuniary loss sustained by the statutory beneficiaries in the wrongful death of a child, "fixing such sum with reference to the probable earnings of the deceased child, taking into consideration his age, intelligence, and health, during what would have been his probable life time, if he had not been killed." [90] This was the approved jury instruction even if it was not shown the amount of money the child had earned or how much he contributed to the support of his family.[91]

Since no inflexible mathematical rule has been laid down by the 1968 statute for determining pecuniary loss, the elements which the jury may consider in computing pecuniary loss are still within the discretion of

86. For a discussion showing that a child uses more money than he makes during minority, see L. DUBLIN & A. LOTKA, THE MONEY VALUE OF A MAN (1946).

87. *See* Fussner v. Andert, 261 Minn. 347, 113 N.W.2d 355 (1961), where the court held that the word "pecuniary" should be extended to embrace elements of the child's society or companionship, not those of a purely sentimental significance, but the child's advice, comfort, assistance and protection which the fact finder might conclude were of pecuniary value.

88. *See* Immel v. Richards, 154 Ohio St. 52, 93 N.E.2d 474 (1950), where the court upheld a five thousand dollar verdict for the death of a nine month old infant on the presumption of pecuniary injury, since it would be impractical to offer direct evidence of any specific loss occasioned by the death of a child of such tender years.

89. Wycko v. Gnodtke, 361 Mich. 331, 105 N.W.2d 118 (1960).

90. Gough v. Shaner, 197 Va. 572, 577, 90 S.E.2d 171, 175 (1955).

91. Cooke v. Griggs, 183 Va. 851, 33 S.E.2d 764 (1945).

the Virginia courts. Although there is nothing to indicate that the definition of pecuniary loss is to be less comprehensive than previously defined by the courts, the restriction on the remedy is in the requirement that recovery be had only by the dependents. This will eliminate any recovery for the death of a child, or an elderly person, under the pecuniary loss provision except in the unusual situation where the decedent's parents are actually dependent on him within the meaning of the statute.[92]

The Virginia statute, through the solace provision, takes a realistic approach to the problem of finding an equitable means of compensating the parents of a deceased child. Rather than manufacture formulae or legal fictions to determine a basis for pecuniary injury recovery, the statute recognizes the truth that the loss through the death of such persons is one of love and affection rather than of money.

An Argument for Abolishing Maximum Recovery

Virginia belongs to a dwindling minority of states which still limit recovery in wrongful death actions to a statutory maximum.[93] A recognition of the trend toward abolishing such arbitrary limitations, and the consideration of the fact that the constitutions of nine states now emphatically forbid any such limitation,[94] should indicate to the General Assembly the growing resentment towards such limitations. A subsequent examination of the rationale behind a statutory limitation leads to the conclusion that the maximum recovery limitation should be abolished in Virginia.

First, in the group which opposes removal of limitations on the amount recoverable, there are the insurance companies who warn that this would result in excessive jury verdicts and a resulting increase in insurance rates. Of course, insurance rates probably would increase upon removal of the limitation, but it is not the purpose of the law to keep insurance premiums to a minimum. "The function of insurance is

92. *See* Correia v. Van Camp Sea Food, 113 Cal. App. 2d 71, – , 248 P.2d 81, 91 (1952).

93. In 1913, twenty states had limitations on the amount that could be recovered in wrongful death actions. In 1965, only twelve states still had such restrictions. S. Speiser, *supra* note 8, at 490. In 1967, Illinois, Oregon and South Dakota dropped their limitations leaving only nine states with statutory maximums. *Id.* at 56 (Supp. 1969).

94. Ariz. Const. art. 18, § 6; Ark. Const. art. 5, § 32; Ky. Const. § 54; N. Y. Const. art. 1, § 18; Ohio Const. art. 1, § 19a; Okla. Const. art. 23, § 7; Pa. Const. art. 3, § 21; Utah Const. art. 16, § 5; Wyo. Const. art. 10, § 4.

to shift the risk of loss and if it is necessary to raise insurance rates to protect the public adequately from such serious consequences, then the public should insist that such protection be provided." [95] Furthermore, such increase in rates is certain to be minimal, based upon experience in the great majority of states which have no limitations on recovery.[96]

The danger of strong feelings of sympathy by the jury in death actions accounts in part for the legislature's imposition of maximum limitations on allowable damages. But since the arbitrary limitation may in some situations prevent a plaintiff from receiving damages which he has adequately proved, it appears that there must be better ways of controlling the awards. Restricting recovery to dependents, a control employed by the new Virginia statute,[97] is one of the better means. The statute should also require proof of close emotional ties and suffering of more than "ordinary grief" in order to allow recovery for solace.

Another way to limit excessive jury verdicts would be a stricter exercise of judicial review of jury verdicts in light of the facts of each individual case.[98] This approach has been used effectively in the personal injury area, and proponents of the limitation on recoveries under the wrongful death act are hard pressed to find any logical differences between wrongful death recoveries and personal injury recoveries which would warrant a limitation on the recovery in the former but not the latter. No limitations are placed on recoveries for personal injuries or for property damage, yet a damage estimation is often quite speculative. This disparity could result in a situation in which more could be recovered for the negligent killing of an animal, such as a valuable race horse, than for the death of a man caused by the same act of negligence.[99] In personal injury cases, the danger of jury sympathy is often just as prevalent, and it cannot logically be argued that an award for pain and suffering of the injured person is any less conjectural than an award for solace or mental anguish suffered by the decedent's family.

There are many other reasons for abolishing an arbitrary ceiling for wrongful death damages. It is completely illogical for the beneficiaries to be denied adequate recovery merely because of the place in which

95. Note, *Wrongful Death Limitations in Oregon—A Rational Result or a Historical Mistake*, 1 WILLAMETTE L.J. 616, 624-25 (1961).

96. S. SPEISER, *supra* note 8, at 491.

97. *See* VA. CODE ANN. § 8-636 (Supp. 1970).

98. *See* United States v. Guyer, 218 F.2d 266 (4th Cir. 1954).

99. Note, *supra* note 95, at 620 n.28.

their decedent's death occurred.[100] Also, this ceiling gives the defendant an advantage in settlement negotiations. If the defendants did not know that plaintiffs in wrongful death cases were shackled by limited recoveries, there would be more defendants willing to settle out of court, thus eliminating much court congestion.[101] In the face of all these arguments, the maximum limitation remains the most criticized aspect in the 1968 amendment. At least for now, the old adage that it is often cheaper for the tortfeasor to kill his victim than to maim him, remains substantially true in Virginia.

Conclusion

The wrongful death statutes of most states provide for unlimited recoveries and allow damages to be assessed on the basis of a showing of loss of money and support by the decedent's beneficiaries. This theory insures an adequate recovery whenever the financial supporter of a family is killed by the wrongful act of another, but leaves no grounds upon which to base recovery for the wrongful death of others. The courts have been forced to broaden the meaning of pecuniary loss in order to find a basis for recoveries in such cases.

Virginia, conversely, in its solace provision, insures the possibility of a substantial recovery in all wrongful death cases through its solace provision, but places a limitation on the amount recoverable for pecuniary loss which could easily result in an inadequate recovery where the decedent is the family breadwinner. The jury's latitude and discretion in awarding recoveries for solace are almost unbounded considering the degree of speculation inherent in such an award. For this reason and because the solace provision is becoming the "backbone" of recovery in a majority of wrongful death cases, there should be further requirements of proof imposed upon the claimant, such as proof of close emotional ties or a showing of more than an ordinary amount of grief, imposed upon the claimant. Otherwise the probable result is that the jury will give this award a punitive aspect and increase the recovery commensurate with the defendant's degree of culpability.

All logic suggests the abolition of a limitation on the amount of pecuniary loss damage which can be recovered. Even if the amount awarded is a net recovery, which it seldom is, there are many cases in which the

100. *See* Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

101. Chapman, *Should Compensation in Wrongful Death Actions Be Limited?*, 50 Ill. B.J. 782 (1962).

limited amount is insufficient to sustain the surviving family. The pecuniary loss recovery is already protected from false claims by the dependency requirement. Thus it would seem that dependents should be able to recover the damages which they can prove with reasonable certainty. In addition to financial support, this should include any loss of training and guidance of which a child can reasonably prove he has been deprived by the death of a parent, and any loss of domestic services including care of his home and children of which a husband can reasonably prove he has been deprived by the death of his wife.