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MAXIMUM LIMITATION ON DAMAGES —
VIRGINIA'S DEATH BY
WRONGFUL ACT STATUTE

SHEPPARD MCKENNEY

It has long been the settled rule, both in this country and in England, that the judiciary may not independently hear an action for wrongful death.¹ Whatever the reasons for the rule (there seems to be some doubt as to whether there are any reasons), it may be abrogated only by statute.²

The first such abrogation was the passage of the Fatal Accidents Act (Lord Campbell's Act) in England, in 1846.³ Subsequently, every state in the United States has enacted some type of wrongful death statute⁴—Virginia's statute, patterned after Lord Campbell's Act, was enacted in 1871.⁵

Unfortunately, many state legislatures, including the legislature of Virginia, were not content merely to abolish the old rule, but rather found it necessary to place certain special limitations on death actions.⁶ From the beginning, one of these limitations—a maximum limitation on damages recoverable—has been a feature of the Virginia statute.⁷ This inquiry is an attempt to evaluate the theoretical validity and practical value of this limitation within the framework of the Virginia statute.

At the outset, it is significant to note that Lord Campbell's Act, the prototype of the Virginia statute, has never had a

¹ PROSSER, TORTS § 105 (2d Ed. 1955) The rule is said to be founded on the ancient maxim, *actio personalis moritur cum persona*. It was first enunciated in the case of *Baker v. Bolton*, 1 Camp 493; 10 R. R. 734 (1808). See generally, Holdsworth *The Origin Of The Rule In Baker v. Bolton*.

² See POLLOCK, TORTS pp. 52-56 (1st Ed. 1887); Smedley, *Wrongful Death—Bases of the Common Law Rules*, 13 Vand. L. Rev. 605.

³ Stat. 9, 10 Vict. c. 93 (1846).

⁴ *Op. Cit. Supra* Note 1.

⁵ VA. CODE ANN. § 8-633-640 (1950).

⁶ "Death statutes have their roots in dissatisfaction with the archaisms of the law . . . It would be a misfortune if a narrow or grudging process . . . were to perpetuate the very evils to be remedied." *Van Beech v. Sabine Towing Co.*, 300 U. S. 342, 350 (1936).

⁷ VA. CODE ANN. § 8-636 (1950).

maximum limitation on damages.⁸ Today, we may only conjecture on the reasons which prompted the Virginia legislature to incorporate such a curious feature into its statute. In modern times, two reasons are advanced in support of a maximum limitation on recovery in death actions: (1) that the uncertainty of damages arising out of the death of a person requires that the jury be limited in their verdict, and (2) that a jury is prone to render an excessive verdict in death actions due to the strong feelings of sympathy aroused in such cases.

Uncertainty of Damages

The premise of the argument itself deserves consideration. It is more difficult to arrive at damages in death actions⁹ than in certain other personal injury actions? At least in regard to compensatory damages it would seem that the answer must be "no". For example, in the case of a personal injury resulting in permanent (or "possible" permanent) disability, the jury is faced with virtually the same questions in regard to damages that are raised in a death action. These are: (1) what is the life expectancy of the plaintiff, and (2) what are the plaintiff's probable future earnings? The one consideration that is necessary in a death action, but not necessary in an action for a disabling injury, is the statutory beneficiaries interest in the income of the deceased.¹⁰ While this question admittedly presents some difficulty it is hardly as perplexing as the multitude of problems peculiar to the case of a disabling personal injury, as follows: (1) What are the probable future medical expenses of the plaintiff? (2) To what extent will his future income production be impaired? (3) What are the possibilities of a future recovery? (4) If future recovery is possible, what is the probable date and extent of same? (5) What is the possibility that the injuries sustained may result in a shortened life

⁸ Stat. 9, 10 Vict. c. 93 § 11 (1846).

⁹ The term "death action" is not used in its technical sense. Strictly speaking, a death action is one brought under a Lord Campbell type statute in which there is a new cause of action in favor of the decedent's personal representative for the benefit of certain designated persons. There are also survival statutes (to be found in a minority of states) which are designed to preserve the cause of action vested in the decedent at the moment of his death and enlarging it to include the damages resulting from his death. Prosser, Torts § 105 p. 710 (2d Ed. 1955). Here the term death action is used to include both types of statutes for purposes of convenience.

¹⁰ See generally *Gough v. Shaner*, 197 Va. 572, 90 S.E. 2d 171 (1955).

span? With the advent of new medical techniques, these questions become increasingly relevant. Thus, in many cases, the death of the would-be plaintiff simplifies—rather than complicates—the task of arriving at compensatory damages. True enough, the illustration of a permanent disabling personal injury covers only a small fraction of personal injury cases at the bar, but it does demonstrate the fact that, in principle, there is no reason to segregate death action damages from other types of personal injury damages, thereby justifying special treatment. An example in another area of torts might be the difficulty of measuring compensatory damages in libel actions.

There certainly can be no logical separation insofar as punitive damages are concerned. Whatever the type of tort action involved, the question is not the injury to the plaintiff, but rather the culpability of the defendant.

The only remaining issue of damages under the Virginia statute is that of "solatium".¹¹ Solatium may be defined as compensation for the injury done to the feelings of a person, or, in other words, damages for mental anguish.¹² Since damages for mental anguish are a proper element of damages in ordinary personal injury actions, the question is raised as to whether these same damages possess some unique character in death actions so as to make them more uncertain. The only possible basis for distinction is that in a death action the mental anguish is not that of the person physically injured. Indeed, it is generally held that one may not recover for mental anguish suffered as a result of a physical injury to another.¹³ This rule is based upon the premise that the defendant owes no duty to the person suffering mental anguish.¹⁴ In death actions, however, the legislature has said that there is a duty, simply by providing for recovery by the beneficiaries for mental suffering. The real question is this: Does the fact that a person has physical injuries make a determination of the extent of mental

¹¹ Most wrongful death statutes do not provide for damages for solatium. Virginia's statute while not expressly authorizing such damages has been held to include them. *Mathews v. Warner*, 70 Va. 570 (1877); *Ratcliffe v. McDonald*, 123 Va. 781, 97 S.E. 307 (1918).

¹² *Black*, Law Dictionary p. 1563 (4th Ed. 1951).

¹³ *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935); *Curry v. Journal Pub. Co.*, 41 N. M. 318, 68 P. 2d 168 (1937).

¹⁴ See *ibid.*

suffering more easily ascertainable? While the extent of physical injuries may be a convenient yardstick to determine damages for mental suffering, this approach is hardly realistic.¹⁵ It would be just as sensible to measure the mental anguish in a death action by the relationship of the deceased to the beneficiary. The simple fact is that each case must be decided on the basis of the individuals involved and in no case is substantial certainty possible, physical injuries or no.

For the moment, let us assume for the sake of analysis that damages in a death action are more difficult to arrive at than damages in an ordinary personal injury action. Is a maximum limitation on damages the proper solution? Because damages are uncertain, are they necessarily small? Obviously not! If liability is found the limitation on damages is nothing short of a presumption in favor of the wrongdoer.

The only conceivable line of reasoning in the uncertainty of damages theory must be as follows: Since damages are uncertain, the jury may award damages in excess of the defendant's true liability. If a maximum limitation is placed on damages, it would prevent the jury from straying too far afield. Thus the detrimental effects of the uncertainty as to the measure of damages will at least be limited. However, if we are to accept this argument, we must accept the logical corollary—that is that the jury may also make an inadequate estimation as to damages. Thus, a minimum limitation of damages would be just as reasonable under this theory as a maximum limitation. If it be said that the plaintiff is entitled only to the damages he has proved, this is perfectly true. At the same time, the plaintiff is entitled to the damages he does prove, and a maximum limitation on damages may prevent him from receiving this. In other words, the defendant's right not to pay damages which have not been proved is no greater than the plaintiff's right to receive damages which have been proved. The point is that the idea of a minimum limitation on damages is no less sound than that of a maximum limitation; and the idea of a minimum limitation is, of course, absurd. An arbitrary limitation on damages, bearing no relationship to the facts of any individual case, does not tend to *solve* the problem of uncertainty as to damages; rather, it *ignores* the problem.

¹⁵ *Russ v. Western Union Tel. Co.*, 222 N. C. 504, 23 S.E.2d 681 (1943).

Sympathy Damages

There can be no doubt that the sympathetic feelings of jurors in death actions may be reflected in the size of the verdict. It should be noted, in passing, that in certain personal injury cases the plaintiff's injuries may be so grievous that the sympathy aroused would be equal to that in a death action.¹⁶ There are, after all, some things worse than death; yet no one suggests a maximum limitation on damages in such cases. More significant, however, is the fact that a maximum limitation on damages represents an unintelligent approach to the sympathy damages problem. In one case, the limitation may curtail sympathy damages, but, in another, it may only serve to reduce the true damages, and, in still another, it may not reduce sympathy damages at all. For example, if the true damages should be one hundred thousand dollars, the principle effect of the limitation is to eliminate sixty-five thousand dollars from a just verdict. True enough, there are no sympathy damages in this verdict, but this solution is similar to cutting off your head to prevent headaches. On the other hand, if the true damages are only five thousand dollars the jury may award thirty thousand dollars worth of sympathy damages and the maximum limitation is of little or no value.

The Maximum Limitations as Applied in the Virginia Statute

In any case, the sympathy damages theory could hardly be used as an argument for a maximum limitation on damages under the Virginia death statute. The Virginia Supreme Court of Appeals has all but sanctioned such damages under the present statute. It was laid down in the earliest Virginia cases on the subject that the definition of damages under the Virginia statute should be given a liberal interpretation.¹⁷ The words of the statute are, "The jury in any such action may award such

¹⁶ It would seem that there is little basis for the view that death actions are particularly susceptible to sympathy verdicts—or excessive verdicts alone for that matter. For example, of the 107 personal injury and death verdicts given in New York State Courts over the last 15 years in excess of 100,000 dollars only 37 were death actions (New York has no limitation on damages). Most of the personal injuries involved either paralysis or amputation of limbs. Thus death actions accounted for 35.5% of the 100,000 dollars plus verdicts. It is significant to note that of the 166 verdicts in the 25,000 dollars to 100,000 dollars range, 60 death actions were involved or 36.1%. Abstracted from Belli, *Modern Trials*, Vol. 4, p. 708—758 (1st Ed. 1955).

¹⁷ *Gough v. Shaner*, *supra* Note 10.

damages as it may seem fair and just, not exceeding thirty-five thousand dollars . . ."¹⁸ Note that the "fair and just" test is directly applied by the jury. It is accordingly held that the jury is limited only to those damages which it considers "fair and just" and that any other limiting instruction is not permissible.¹⁹ It is difficult to see how the jury could be given a freer hand in the matter. In the leading Virginia case on the subject of damages under the Death by Wrongful Act Statute, *Mathews v. Warner's Administrator*,²⁰ the court made the following observation:

It was argued very earnestly by the learned counsel for the appellant that such a construction of the statute ["fair and just" as the sole measure of damages] as we have here given would result in great injustice, if juries are to be turned loose to assess damages according to their own notions, as to the compensation for the mental sufferings and agony of a mother losing her child, or of a wife losing her husband, unrestrained by statutory enactment confining them to the actual pecuniary injury resulting from death. There are two answers to such arguments—one is *ita est scripta lex*. The other is—we must presume the legislature knew the force and effect of their own enactments. They must, with such knowledge, have known the force and effect of the language they used. It may be they intended, as they must have intended to make no distinction in a case where a man of full vigor, devoting his whole life and service to the support of his family, was killed by wrongful act, negligence or default, and an aged man or woman, or a child or cripple who was utterly dependent, whose death is caused in the same way. In either case, as the law is written, the person or corporation by whose wrongful act, default or negligence the death is caused, is liable in damages, and in such damages "as to the jury may seem fair and just". But if the law as it is written is unjust and oppressive and contrary to the laws of most of the other states of the union, it is for the legislature to change the law.²¹

¹⁸ VA. CODE ANN. § 8—636 (1950).

¹⁹ *Wolf v. Lockhart*, 195 Va. 479, 78 S.E. 2d 654 (1953); *Gough v. Shaner*, *supra* Note 10.

²⁰ *Mathews v. Warner*, 29 Gratt (70 Va.) 570 (1877).

²¹ *Id.* at 577, 578.

Virginia is thus placed in the peculiar position of being one of the few states which has a maximum limitation on damages and, at the same time, is one of the most liberal in awarding damages.²²

As if this contradiction were not enough, the Virginia statute also has been held to mean that the jury's assessment of damages is final, and neither the Supreme Court of Appeals nor the trial court has the power to disturb it. In *Harris v. Royer*,²³ the court said:

Our decisions go to the effect that the jury, in such cases, [death actions] is under the statute giving the action absolutely [sic] the judge of the amount of damages, and its findings cannot be disturbed unless the court can see that the jury was actuated by passion, prejudice, or corruption . . . There is no appearance of passion, prejudice, or corruption on the part of the jury unless we can assert the presence thereof from the mere amount of the verdict. No evidence of passion, prejudice, or corruption is given. We cannot assume their presence.²⁴

In other words, no matter how ridiculous the size of the verdict is, direct evidence of passion, prejudice, or corruption is necessary to have the verdict set aside. Thus, in a case in which the true damages should be nominal, the jury may bring in a verdict for thirty-five thousand dollars, and that verdict could not be disturbed. This presents an interesting situation. We cannot assume passion from the size of the verdict in order to set it aside, but, at the same time, we maintain a maximum limitation on damages which assumes that true damages can only be thirty-five thousand dollars, or less, in any case.

Can it be less than obvious that a sensible method of keeping damages reasonable would include clear and definite instructions to the jury on proper elements of damages (not just a vague "fair and just" test), combined with the power of the trial judge and the Supreme Court of Appeals to set aside a clearly unjust award? There can be no comparison between

²² 25 C.J.S. *Death* § 107 (1941).

²³ 165 Va. 461, 182 S.E. 276 (1935).

²⁴ *Id.* at 468, 182 S.E. at 283.

this method (which, after all, is not exactly radical) and the present method involving an arbitrary standard bearing no relationship to the circumstances of any particular case. If we assume that the jury will be plagued by uncertainty and passion in a death action, then there is all the more justification for invoking the traditional safeguards which guide and check the juries' judgment.

Conclusion

It is impossible, of course, to make the determination of damages in death actions completely simple or completely just. At least, however, nothing should be done affirmatively to make the task more difficult or more unjust. Maintaining a maximum limitation on damages is just such an affirmative act. If the Virginia Legislature were to remove the maximum limitation on damages from its death statute, it would not be the first state to have effected such a removal. In 1893, there were twenty-six states with maximum limitations on damages in their death statutes.²⁵ Today, there are only thirteen states with such limitations.²⁶ It is significant to note that during this seventy-year period not a single state adopted the maximum limitation. The workings of the maximum limitation in practice are apparently not very impressive to other states. In the already famous case of *Kilberg v. Northeast Airlines, Inc.*,²⁷ the

²⁵ Colorado, Connecticut, District of Columbia, Illinois, Indiana, Kansas, Maine, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Oregon, South Dakota, Utah, Virginia, West Virginia, Wisconsin, Wyoming.

²⁶ The states, statutes, and maximum limitations are as follows:

<i>State</i>	<i>Statute</i>	<i>Maximum Limitation</i>
Colorado	§41-1-3	\$25,000
Illinois	§70-1-2	\$30,000
Kansas	§§60-3203, 3204	\$25,000
Maine	ch. 165, §§9, 10; ch. 188	\$20,000
Massachusetts	ch. 238	\$20,000
Minnesota	§573.02	\$25,000
Missouri	§537.090	\$25,000
New Hampshire	ch. 556, §§ 11-13; ch. 91	\$25,000
Oregon	§§30.020, 121.020	\$20,000
South Dakota	§37.22	\$20,000
Virginia	§8-633-640	\$30,000
West Virginia	ch. 55, Art. 7 § 6	\$20,000
Wisconsin	§331-03-04	\$22,500

³⁸ Dicta 237, 238 n. 17 (1961).

²⁷ 9 N. Y. 2d 34, 172 N. E. 2d 526.

New York court expressed its opinion of a maximum limitation on damages in the following manner:

Our courts should if possible provide protection for our own State's people against unfair and anachronistic treatment of the lawsuits which result from these disasters [airplane crashes in other states which have a maximum limitation on damages]. New York's original Wrongful Death law . . . had no restriction as to damages. The legislature later imposed such limits but the Convention which drew the 1894 Constitution rejected and forbade them. "The argument which evidently controlled the convention in its action consisted of the claim that the arbitrary limitation was absurd and unjust, in measuring the pecuniary value of all lives to the next of kin, by some arbitrary standard". The absurdity and injustice have become increasingly apparent in the six decades that have followed.²⁸

The maximum limitation on damages under the Virginia Death by Wrongful Act Statute has no foundation in logic; it is not just, and it has been found to be undesirable in practice. It is one anachronism which the State of Virginia can afford to do without.

²⁸ *Id.* at 35, 36, 172 N. E. 2d at 527, 528.