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limited to only the economically privileged. Because of the shortage in qualified instructors and the staggering costs of facilities necessary to maintain an adequate standard for contemporary education, the religious institutions will not be able to further compete with the public schools for its survival. It is inherent in the notion of shared-time that the two school systems will not have to compete, but rather will have to supplement each other while allowing the sectarian school to continue in its functional capacity. While the inclusion of shared-time programs is certain to result in increased costs in maintaining the public schools, it is manifestly clear that this is more economically prudent than embracing all the sectarian students on a full-time basis because the sectarian schools might well close due to a lack of funds, and indeed this is the alternative to shared-time. The opponents of shared-time may inquire: What has happened to the inviolable wall of separation between church and state? In answer, it should be replied: "[T]he wall of separation is permeable Time, place, circumstances and subject matter determine what degree of separation there shall be."⁵³

Alan Sobel

⁵³ Weclaw, *Church and State: How Much Separation*, 10 DEPAUL L. REV. 1, 26 (1960).

WRONGFUL DEATH RECOVERY LIMITATIONS—R.I.P.

In recent years, the controversy over the necessity of placing statutory limitations on recovery for wrongful death has become more pronounced. This controversy centers upon the issue of whether or not an inflexible recovery limitation can adequately compensate for the wrong which was intended to be rectified by the enactment of wrongful death statutes. Since Illinois has recently amended its statute removing the restriction on recovery for wrongful death,¹ thus aligning itself with the majority of states which do not place a restriction on recovery, it will be the purpose of this comment to discuss and examine the advantages and disadvantages of retaining or removing the limitations and the ramifications of limitless recovery. In order to do this, it is necessary to trace the development of the cause of action for wrongful death and the means by which a recovery is derived.

At common law, the wrongful death of an individual did not give rise to a cause of action.² The basis for this view was derived from dicta by Lord

¹ Ill. Laws, 75th Gen. Ass. (1967), H.B. 626, § 2, approved Aug. 18, 1967 (hereinafter cited as Ill. H.B. 626).

² *Higgins v. Butcher*, 80 Eng. Rep. 61 (K.B. 1607), wherein the plaintiff was denied recovery for the death of his wife after she had been beaten by the defendant.

Ellenborough in the case of *Baker v. Bolton*.³ In this case, the plaintiff was suing the proprietors of a stage coach on which he and his wife had been passengers. The coach had overturned, causing the death of the wife. In concluding that the husband had no cause of action for the loss of his wife's services, Lord Ellenborough stated that, "in a civil court, the death of a human being could not be complained of as an injury."⁴ This ruling was accepted and followed in England,⁵ and was also adopted in the United States.⁶

The rationale for denying recovery for wrongful death may be attributed to the conditions that prevailed at that time, inasmuch as most deaths were the consequences of deliberate acts. If the person causing the death was apprehended, he would be hanged, "and such lands and goods as he possessed were forfeited to the state."⁷ This rule also was justified on two other theories: first, that death merged the civil injury into the felony;⁸ and second, that when the person died, his cause of action for damages resulting from the wrongful act died with him.⁹

Denying the beneficiaries of the deceased recovery for the wrongful death of the decedent caused great hardships. "The result was that it was more profitable for the defendant to kill the plaintiff than to scratch him, and that the most grievous of all injuries left the bereaved family of the victim, who frequently were destitute, without a remedy."¹⁰ This problem was intensified by the changes that took place in society. With the coming of the industrial revolution, people had swarmed from the country to the city and deliberate acts as the main cause of unnatural deaths were replaced by the industrial and transportation accidents.¹¹

The inequities resulting from the absence of a cause of action for wrongful death were resolved in England by the enactment of Lord Campbell's Act¹² in 1846, which created the first cause of action for wrongful death. It provided that whenever the death of any person results from the wrongful,

³ 170 Eng. Rep. 1033 (K.B. 1808).

⁴ *Id.*

⁵ *Osborn v. Gillet*, [1873] 8 Ex. 88; *Wells v. Abrahams*, [1872] 7 Q.B. 554.

⁶ *Connecticut Mutual Life Ins. Co. v. New York & N.H.R.R.*, 25 Conn. 265 (1856); *Carey v. Berkshire R.R.*, 55 Mass. 475 (1848).

⁷ Malone, *American Fatal Accident Statutes—Part 1: The Legislative Birth Pains*, 4 DUKE L.J. 673 (1965).

⁸ Comment, *Wrongful Death Damages in Iowa*, 48 IOWA L. REV. 666 (1963).

⁹ *Id.*

¹⁰ PROSSER, TORTS 924 (3rd ed. 1964).

¹¹ Malone, *supra* note 7, at 674.

¹² Lord Campbell's Act, 9 & 10 Vict., c. 93 (1846).

negligent, or deliberate act of another in such a manner as would have entitled the injured party to recover for damages had death not ensued, an action may be maintained by his executor or administrator for the benefit of a wife, husband, parent or child, if brought within twelve months after the death of the decedent.¹³

Lord Campbell's Act contained no limitation upon the amount of the recovery, and allowed the jury to award compensation for such damages as they determined resulted to the persons upon whose behalf the action was brought.¹⁴ However, the first wrongful death statute in the United States, enacted in New York in 1847, did contain such a limitation,¹⁵ and thereafter, many states followed with a statute similar to Lord Campbell's Act but with a limitation on recovery.¹⁶ By 1893, twenty-two states had imposed damage restrictions.¹⁷

Today, nearly all the states have enacted a wrongful death statute substantially embodying the provisions of Lord Campbell's Act. Nevertheless, the provisions of these statutes differ widely "in respect to the persons for whose benefit the action may be maintained, and the measure, elements, and distribution of damages recoverable."¹⁸ Inasmuch as a majority of states have frowned upon recovery limitations,¹⁹ it is necessary to explore what elements have been considered in determining awards.

STATUTORY RECOVERY

Lord Campbell's Act provided that in every action for wrongful death "the jury may give such damages as they think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought."²⁰ The courts, being alarmed at the difficulty of determining the injuries to sentiments and affections resulting from death, placed a strict interpretation on the original act. In 1852, in the case of *Blake v. Midland Railway Co.*,²¹ the plaintiff sued the defendant railway company for negligence resulting in the wrongful death of her husband who

¹³ Lord Campbell's Act, 9 & 10 Vict., c. 93 (1846).

¹⁴ Lord Campbell's Act, 9 & 10 Vict., c. 93 (1846).

¹⁵ SPEISER, RECOVERY FOR WRONGFUL DEATH 13 (1966); 26 IND. L.J. 428, 439-40 (1951).

¹⁶ SPEISER, *supra* note 15.

¹⁷ SPEISER, *supra* note 15, at 489.

¹⁸ SPEISER, *supra* note 15, at 13.

¹⁹ SPEISER, *supra* note 15, at 490.

²⁰ Lord Campbell's Act, 9 & 10 Vict., c. 93 (1846).

²¹ 118 Eng. Rep. 35 (Q.B. 1852).

was a passenger on one of defendant's trains. No question was raised as to liability; the only issue was as to the amount of damages. The court refused to allow the plaintiff recovery for wounded feelings caused by the wrongful death, stating: "It seems to us that, if the Legislature had intended to go to the extreme length of giving, not only compensation for pecuniary loss, but a solatium to all the relations . . . language more clear and appropriate for this purpose would have been employed."²²

Since the recovery for a wrongful death is based upon legislative enactment, the court, in ascertaining the damages to be awarded, must look primarily to the statute.²³ In drafting their statutes, a few of the United States jurisdictions followed Lord Campbell's Act allowing the jury to award such damages as are deemed fair and just. Most state statutes base the major portion of recovery on the pecuniary loss sustained by the beneficiaries.²⁴ The result has been that the courts have rejected the argument that no human life is without value,²⁵ and have denied recovery to beneficiaries who have failed to show any pecuniary loss resulting from the decedent's death.²⁶

Pecuniary loss has been defined as the pecuniary worth of life of deceased measured by his personal characteristics, prospects, habits and earnings.²⁷ Because pecuniary loss caused by an untimely death is prospective, the recovery for such loss is usually reduced to what is called its "present value."²⁸ This has been defined as the reasonable expectation of pecuniary gain that has been lost by the dependents of the deceased as a result of the wrongful death.²⁹ In determining the present value of the decedent's expected future earnings, the jury uses that rate of interest it considers just and reasonable. It determines this by taking into account the circumstances, the evidence

²² *Id.* at 41.

²³ *Bond v. United R.R. of S.F.*, 159 Cal. 270, 113 P. 366 (1911); *St. Louis & S.F.R.R. v. Moore*, 101 Miss. 768, 58 So. 471 (1912); *Armentrout v. Hughes*, 247 N.C. 631, 101 S.E.2d 793 (1958).

²⁴ *Karr v. Sixt*, 146 Ohio St. 527, 67 N.E.2d 331 (1946); *Gaydos v. Domabyl*, 301 Pa. 523, 152 A. 549 (1930).

²⁵ *Courtney v. Apple*, 345 Mich. 223, 76 N.W.2d 80 (1956); *Armentrout v. Hughes*, *supra* note 23, at 632, 101 S.E.2d at 794, wherein the court quoted: "Du Parcq, L.J., in 1941, said: 'If they bring an action and prove no loss, actual or prospective, the defendant is entitled to the verdict. . . .'"

²⁶ *Courtney v. Apple*, *supra* note 25; *Armentrout v. Hughes*, *supra* note 23; *San Antonio & A.P. Ry. v. Long*, 87 Tex. 148, 27 S.W. 113 (1894).

²⁷ *Zostautas v. St. Anthony De Pauda Hosp.*, 23 Ill. 2d 326, 178 N.E.2d 303 (1961); *Wilcox v. Bierd*, 330 Ill. 571, 162 N.E. 170 (1928).

²⁸ *Gulf, Colo. & Santa Fe Ry. v. Moser*, 275 U.S. 133 (1927); *Downs v. Sulphur Springs Valley Elec. Co-op*, 80 Ariz. 286, 297 P.2d 339 (1956).

²⁹ *Swift & Co. v. Johnson*, 138 F. 867 (8th Cir. 1905); *Turcol v. Jenkins*, 49 Del. 596, 122 A.2d 224 (1956).

presented, the current interest rates, the limits prescribed by law, and what rate of interest could fairly be expected from safe investments by a man of ordinary prudence.³⁰

The pecuniary loss suffered by the beneficiaries usually consists of the loss of financial assistance.³¹ This has been interpreted as including the loss of such sums as the decedent might reasonably have been expected to spend for the support and maintenance of the beneficiaries.³² It also includes other financial aid that the beneficiaries might reasonably have expected to secure from the decedent during his life.³³

However, pecuniary loss has not been limited to financial assistance. An award for damages to compensate for burial expenses has in many cases been granted.³⁴ On the other hand, burial expenses have also been held to be an improper element of damages.³⁵ Another element that has been considered a proper subject of damages in a wrongful death action is the amount the decedent reasonably could have been expected to save during his lifetime in conjunction with the amount to be left to the beneficiaries in the form of an inheritance.³⁶ In the instance of wrongful death proceedings designed to compensate beneficiaries other than the decedent's estate, some decisions have taken into account the pecuniary value of the services the beneficiaries might reasonably have expected to receive from the decedent during his natural lifetime.³⁷ Loss of guidance a child would reasonably have expected to receive from a wrongfully killed parent,³⁸ and loss of advice resulting from the wrongful death of a spouse,³⁹ have both been held to be a proper element of dam-

³⁰ Kellerher v. Porter, 29 Wash. 2d 650, 189 P.2d 223 (1948).

³¹ Bond v. United R.R., *supra* note 23.

³² W. B. Harbeson Lumber Co. v. Anderson, 102 Fla. 731, 136 So. 557 (1931); Hahn v. Moore, 127 Ind. App. 149, 133 N.E.2d 900 (1956); Francis v. Atchinson Topeka & Santa Fe Ry., 113 Tex. 202, 253 S.W. 819 (1923).

³³ Francis v. Atchinson Topeka & Santa Fe Ry., *supra* note 32.

³⁴ Swift & Co. v. Johnson, *supra* note 29; Thompson v. Town of Ft. Branch, 204 Ind. 152, 178 N.E. 440 (1931).

³⁵ Ware v. Cia de Navegacion Andes, S.A., 180 F. Supp. 939 (E.D. Va. 1960); State v. Cohen, 166 Md. 682, 172 A. 274 (1934); Jackson v. Cockill, 149 W. Va. 78, 138 S.E.2d 710 (1964).

³⁶ Martin v. Atlantic Coast Line R.R., 268 F.2d 397 (5th Cir. 1959); O'Toole v. United States, 242 F.2d 308 (3d Cir. 1957).

³⁷ Alden v. Norwood Arena, Inc., 332 Mass. 267, 124 N.E.2d 505 (1955); Gorton v. Harmon, 152 Mich. 473, 116 N.W. 443 (1908); Moses v. Mathews, 95 Neb. 672, 146 N.W. 920 (1914).

³⁸ McLaughlin v. United R.R. of S.F., 169 Cal. 494, 147 P. 149 (1915); Butler v. Williams, 133 So. 2d 109 (Fla. 1961); Brabeck v. Chicago & No. W. Ry., 264 Minn. 160, 117 N.W.2d 921 (1962).

³⁹ *In Re Behm's Estate*, 117 Utah 151, 213 P.2d 657 (1950).

ages. Awards for decedent's pain and suffering,⁴⁰ for medical expenses,⁴¹ or for the loss of companionship⁴² have usually been held to be an improper element of damages unless the statute specifically provides for such recovery.

In addition to pecuniary damages, the majority of jurisdictions recognize "that nominal damages are recoverable where a cause of action for wrongful death has been established."⁴³ Nominal damages are those granted in recognition of the existence of a cause of action for the violation of a right, even though the particular violation does not give rise to any significant injury.⁴⁴ In the case of *Rockford, Rhode Island & St. Louis Railroad v. Delaney*,⁴⁵ plaintiff's intestate, a boy of nine years of age, was killed as a result of defendant's negligence at a street crossing. The Illinois court, in deciding this case, recognized that at least nominal damages are recoverable if any of the class of beneficiaries entitled to recover under the wrongful death statute survives. Illinois courts have since continued to award nominal damages in wrongful death actions.⁴⁶

Exemplary damages have also been awarded by a minority of jurisdictions in wrongful death actions. Alabama⁴⁷ and Massachusetts⁴⁸ provide that damages awarded in a wrongful death action are only punitive and not compensatory, and should be measured by the quality of the wrongful act and the degree of culpability involved. Thus, in these two states a defendant who is grossly culpable will be liable for greater damages than a slightly culpable defendant, and no consideration is given to the pecuniary loss suffered by the beneficiaries. The statutes of six other states authorize the awarding of exemplary damages in addition to pecuniary and nominal damages.⁴⁹ The Texas constitution specifically secures to the "surviving husband,

⁴⁰ *Mobile Electric Co. v. Sanges*, 169 Ala. 341, 53 So. 176 (1910).

⁴¹ *Hildreth v. Key*, 341 S.W.2d 601 (Mo. 1960); *Hansen v. Hayes*, 175 Ore. 358, 154 P.2d 202 (1944).

⁴² *Reynolds v. Willis*, 209 A.2d 760 (Del. 1965); *Hahn v. Moore*, *supra* note 31; *Karr v. Sixt*, *supra* note 24.

⁴³ SPEISER, *supra* note 15, at 259.

⁴⁴ *Danker v. Iowa Power & Light Co.*, 249 Iowa 327, 86 N.W.2d 835 (1957); *Mathis v. State, Dept. of Rds.*, 178 Neb. 701, 135 N.W.2d 17 (1965).

⁴⁵ 82 Ill. 198 (1876).

⁴⁶ *Chapman v. Gulf Mobile & O.R.R.*, 337 Ill. App. 611, 86 N.E.2d 552 (1949); *Franko v. Crosby*, 278 Ill. App. 416 (1935).

⁴⁷ *Hardin v. Sellers*, 270 Ala. 156, 117 So. 2d 383 (1960); *Karpeles v. City Ice Delivery Co.*, 198 Ala. 449, 73 So. 642 (1916).

⁴⁸ MASS. ANN. LAWS ch. 229, § 2 (Supp. 1966).

⁴⁹ COLO. REV. STAT. ANN. § 41-2-2 (1963); KY. REV. STAT. § 411.130 (1962); MONT. REV. CODE ANN. § 17-208 (1947); NEV. REV. STAT. § 41.090 (1957); N.M. STAT. ANNO. § 22-20-3 (1953); S.C. CODE ANN. § 10-1961 (1962).

widow, heirs of his or her body, or such of them as there may be," the right to recover punitive damages in cases of wrongful death.⁵⁰

Although a number of states departed from Lord Campbell's Act and incorporated limitations on recovery into their wrongful death statutes,⁵¹ the reasons for the adoption of such limitations have never been explicitly defined. Apparently they were adopted either to prevent the possibility of extreme awards or by reason of the difficulty of measuring damages caused by wrongful death.

Over the past seventy-four years, there has been a constant trend among the various jurisdictions either to abolish the statutory limitation on recovery allowed for wrongful death, or to increase the ceiling on recovery. By 1935, only seventeen jurisdictions retained a limitation on recovery,⁵² and by 1965, this number had been reduced to twelve.⁵³ Two states, Rhode Island⁵⁴ and Massachusetts,⁵⁵ have imposed a statutory minimum on recovery. It is also interesting to note that the constitutions of at least nine states specifically provide that there shall be no statutory maximum limitation upon recovery in wrongful death actions.⁵⁶

WRONGFUL DEATH IN ILLINOIS

The Illinois Legislature first enacted a wrongful death statute in 1853.⁵⁷ The statute required "compensation for causing death by wrongful act, neglect or default,"⁵⁸ and provided that the jury should "award fair and just compensation with reference to the pecuniary injuries to the widow and next of kin of a person killed through the wrongful act, neglect or default of another person."⁵⁹ The act also provided that such an award should not exceed \$5,000.⁶⁰ For 114 years Illinois followed the minority of states⁶¹ and

⁵⁰ TEX. REV. CIV. STAT. ANN. art. 4673 (1952).

⁵¹ SPEISER, *supra* note 15, at 13.

⁵² SPEISER, *supra* note 15, at 490.

⁵³ SPEISER, *supra* note 15, at 490.

⁵⁴ R.I. GEN. LAWS ANN. § 10-7-2 (Supp. 1966).

⁵⁵ MASS. GEN. LAWS ANN. ch. 229, § 2 (Supp. 1966).

⁵⁶ 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.

⁵⁷ Chapman, *Should Compensation in Wrongful Death Actions Be Limited?*, 50 ILL. B.J. 782 (1962).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Until the recent Illinois amendment, twelve states imposed a statutory limitation on

declined to remove the imposed limitation, even though it did increase the \$5,000 limit. However, the 75th General Assembly has now repudiated this inflexible standard by amending the statute via passing House Bill 626.⁶² This amendment, which was approved and became effective on August 18, 1967, provides: "the jury shall determine the amount of damages to be recovered without regard to and with no special instruction as to the dollar limits on recovery imposed by this section."⁶³ It is important to note that this amendment specifically provides that it is to apply "where such death occurs on or after the effective date of this amendatory Act of 1967."⁶⁴ Therefore, all wrongful death actions in which the death occurred prior to August 18, 1967, will remain subject to the imposed limitation, and the beneficiaries of the decedent cannot avail themselves of the statutory change.

The exact effects of the amendatory act cannot be precisely assessed since the construction given it by the courts will play a decisive role in its interpretation. The Illinois courts have adopted the rule that the wrongful death statute should be given a strict construction, and have held that its benefits should not be extended to causes not fairly within its language nor fairly inferable therefrom.⁶⁵ The basis for recovery is the pecuniary value of decedent's life to his next of kin.⁶⁶ Pecuniary damages have not been limited to the present loss of money.⁶⁷ Recovery is allowed for the loss of services,⁶⁸ and for the loss of instruction or training to a minor by reason of the death of a parent.⁶⁹ Recovery, however, is denied for pain and suffering of the

recovery for wrongful death, these included: COLO. REV. STAT. ANN. § 41-1-3 (1963) (\$25,000 limitation); ILL. REV. STAT. ch. 70, § 2 (1965) (\$30,000 limitation); KAN. STAT. ANN. § 60-1903 (1963) (\$25,000 limitation); MASS. GEN. LAWS ANN. ch. 229, § 2 (Supp. 1966) (\$50,000 limitation); MINN. STAT. ANN. § 573.02 (Supp. 1966) (\$35,000 limitation); MO. ANN. STAT. § 537.90 (Supp. 1966) (\$25,000 limitation); N.H. REV. STAT. ANN. ch. 556 § 13 (Supp. 1965) (\$40,000 limitation); ORE. REV. STAT. § 30.020 (1963) (\$25,000 limitation); S.D. CODE § 37.2203 (Supp. 1960) (\$20,000 limitation); VA. CODE ANN. § 8-636 (Supp. 1966) (\$50,000 limitation); W. VA. CODE ANN. § 55-7-6 (Supp. 1967) (\$110,000 limitation); WIS. STAT. ANN. § 331.04 (1958) (\$22,500 limitation).

⁶² Ill. H.B. 626.

⁶³ Ill. H.B. 626.

⁶⁴ Ill. H.B. 626.

⁶⁵ *Schlavick v. Manhattan Brewing Co.*, 103 F. Supp. 744 (N.D. Ill. 1952).

⁶⁶ *Zostautas v. St. Anthony De Pauda Hosp.*, *supra* note 27; *Saunders v. Schultz*, 20 Ill. 2d 301, 170 N.E.2d 163 (1960).

⁶⁷ *Hall v. Gillins*, 13 Ill. 2d 26, 147 N.E.2d 352; *Wilcox v. Bierd*, *supra* note 26.

⁶⁸ *Hall v. Gillins*, *supra* note 67; *McClure v. Lence*, 345 Ill. App. 158, 102 N.E.2d 546 (1952).

⁶⁹ *Graul v. Adrian*, 32 Ill. 2d 345, 205 N.E.2d 444 (1965); *Saunders v. Schultz*, *supra* note 66.

decedent,⁷⁰ for grief suffered by his next of kin by reason of his death,⁷¹ for medical and hospital expenses,⁷² and for funeral expenses.⁷³ Punitive damages cannot be awarded under the Illinois statute,⁷⁴ but nominal damages may be.⁷⁵

Since no inflexible or mathematical rule exists with which to determine wrongful death damages, the amount of the award rests to a great extent within the discretion of the Illinois court.⁷⁶ The jury is to estimate the damages by considering all evidence presented, testimony, and matters of common observation.⁷⁷ Mortality tables and expert testimony are admissible in allowing the jury to deduce what the monetary damages should be, but they are neither conclusive nor a requisite to plaintiff's case.⁷⁸ With the new Illinois Act, the Illinois courts' discretion will include not only the amount of damages within a certain limit but also the upper limits of recovery.

ARGUMENTS SUPPORTING RECOVERY LIMITATIONS

Undoubtedly, the weight of public opinion appears to favor awarding to the widow and children unlimited damages when the breadwinner of the family is killed. Nevertheless, there are a number of arguments that can be raised to rebut this popular opinion. One argument espoused by many is that if the ceiling on the recovery allowed is removed, serious economic problems may result. For example, a case may arise where a wage-earner, thirty years of age, with three or more minor children and earning approximately \$9,000

⁷⁰ *Robertson v. White*, 11 Ill. App. 2d 177, 136 N.E.2d 550 (1956); *Saunders v. Schultz*, *supra* note 66.

⁷¹ *Zostautas v. St. Anthony De Pauda Hosp.*, *supra* note 27; *Holton v. Daly*, 106 Ill. 131 (1882).

⁷² *Graul v. Adrian*, *supra* note 69; *Saunders v. Schultz*, *supra* note 66.

⁷³ *Graul v. Adrian*, *supra* note 69; *Saunders v. Schultz*, *supra* note 66. However, in Illinois under the Family Expense Act (ILL. REV. STAT. ch. 68, § 15 (1965)) the courts have allowed a wife to maintain an action for funeral expenses for her wrongfully killed husband. *Staken v. Shanle*, 23 Ill. App. 2d 269, 162 N.E.2d 604 (1959).

⁷⁴ *Union Steamboat Co. v. Fitzgibbons*, 261 F. 768 (7th Cir. 1919).

⁷⁵ *Chapman v. Gulf Mobile & O. R.R.*, *supra* note 46; *Hudnut v. Schmidt*, 324 Ill. App. 548, 58 N.E.2d 929 (1944); *Johnson v. McKnight*, 313 Ill. App. 260, 39 N.E.2d 700 (1942).

⁷⁶ *Robinson v. Workman*, 15 Ill. App. 2d 25, 145 N.E.2d 265 (1957); *Chicago City Ry. v. Reddick*, 139 Ill. App. 160 (1908); *Chicago City Ry. v. Strong*, 129 Ill. App. 511 (1906).

⁷⁷ *Robinson v. Workman*, *supra* note 76; *City of Chicago v. Scholten*, 75 Ill. 468 (1874); *City of Chicago v. Major*, 18 Ill. 349 (1857).

⁷⁸ *Pennell v. Baltimore & O. R.R.*, 13 Ill. App. 2d 433, 142 N.E.2d 497 (1957).

per year, negligently causes the death of an executive, sixty years old, earning \$250,000 a year, and leaving a widow of age fifty-seven. Under these circumstances, the jury, if given full discretion, could award an excessive amount of damages, such as \$400,000. The proponents of recovery limitations would argue that under these facts the defendant could never afford to pay such an award, because he would not then be able to meet the financial responsibility of providing food, shelter and clothing for himself or his family.⁷⁹ However, this argument is rebuttable. First of all, the law should not be designed to protect the unscrupulous or the negligent. Secondly, the situation in a wrongful death case might exist where a real estate operator, earning \$250,000 per year negligently causes the death of a doctor, lawyer or college professor, with five minor children, earning approximately \$15,000 per year. In this instance, if the beneficiaries were fortunate enough to receive the maximum of \$30,000, that previously existed in Illinois, the recovery would not be sufficient to support the family at a modest but adequate level in a city like Chicago for five years.⁸⁰

A second argument set forth by limitation proponents is that damages are speculative in a wrongful death action. This means that the jury must take into account all of the evidence, including such things as the decedent's yearly earnings, expenses, and contributions, his life expectancy, the possibility of sickness, lack of employment, and reduction in wages; and, from these, estimate the damages to be awarded. The contention is that these factors fall into the realm of speculation, so that the jury must partake in conjecture in awarding damages.⁸¹ This argument also seems to be weak. The courts have not taken the position that recovery is to be denied or limited merely because there is a great deal of difficulty involved in ascertaining damages. Where two defendants concurrently injure the plaintiff, one defendant causing injury to plaintiff's arm, and the other to his leg, the result may be that the plaintiff also sustains internal injuries, wherein it cannot be readily determined which defendant was responsible. In this instance, where an unsurmountable problem arises in the apportionment of damages, the courts have not denied recovery, but have held that the jury must determine what damages were caused by each tortfeasor as best as they can.⁸² Thus it would seem that where damages are warranted they should not be denied because they are difficult to ascertain.

Another argument is that the removal of the ceiling on damages will cause

⁷⁹ Warden, *Unlimited Damages—Wrongful Death Actions*, 51 ILL. B.J. 722, 723 (1963).

⁸⁰ U.S. BUREAU OF THE CENSUS, 87 STATISTICAL ABSTRACT OF THE UNITED STATES 359 (1966); the annual cost of living for a family of four in Chicago in 1965 was \$6,567.00.

⁸¹ Warden, *supra* note 79, at 723.

⁸² *McAllister v. Pennsylvania R.R.*, 324 Pa. 65, 187 A. 415 (1936).

insurance rates to rise.⁸³ This argument is not valid for conceding that insurance rates might increase, it is not the function of the law to keep insurance premiums at a minimum. "The function of insurance is 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."⁸⁴

Sympathy as a motivating factor resulting in excessive wrongful death jury awards is another reason enunciated by many to retain a limitation on recovery.⁸⁵ However, this notion, that limitations on recovery are required in order to protect defendants from excessive verdicts, is without merit. Where personal injuries are the subject matter of litigation, no limitation is imposed upon the amount of recovery allowed, and the case may well be one where the injuries suffered are far more gruesome than death; and, this surely will play on the sympathy of the jury.

A final argument is that wrongful death actions are not the same as personal injury actions wherein there is no limitation on recovery. It is conceded that these actions are not the same, since in a wrongful death action, the deceased, a material witness, is not available. In addition, the defendant in a wrongful death action is not permitted to testify on his own behalf, and he is obliged to overcome a legal presumption that the deceased was free from contributory negligence.⁸⁶ However, merely because wrongful death can be distinguished from personal injury is no reason to impose a limitation on recovery.

ARGUMENTS SUPPORTING ABOLISHMENT OF LIMITATIONS

The fact that the constitutions of nine states forbid any limitation on recovery in wrongful death actions⁸⁷ is indicative of the growing resentment towards such limitations. Several arguments have been set forth supporting the amendatory act abolishing the Illinois limitation on recovery. First, the previous Illinois damage limit did not correspond to the losses suffered by the dependents of a decedent. The maximum recovery of \$30,000 was usually far below the actual income loss sustained by the family when all extenuating circumstances were considered. This maximum did not even permit the beneficiaries to maintain an adequate standard of living. For example, in the

⁸³ Warden, *supra* note 79, at 727.

⁸⁴ Comment, *Wrongful Death Limitations in Oregon—A Rational Result or a Historical Mistake*, 1 WILLAMETTE L.J. 616 (1961).

⁸⁵ SPEISER, RECOVERY FOR WRONGFUL DEATH 491 (1966).

⁸⁶ Warden, *supra* note 79, at 725.

⁸⁷ 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.

City of Chicago, the annual cost of maintaining a family of four at a modest but adequate standard of living is in excess of \$6,500.⁸⁸ Thus, if a widow were awarded the maximum recovery of \$30,000, and invested this amount and received a most liberal rate of return of approximately eight per cent, this would produce only \$2,400 per year which is far below the adequate standard.

Another factor which contributed to bringing about the statutory change was that the maximum damages recoverable remained fixed, while the cost of living continued to increase. In less than twenty years, the dollar has lost almost 50% of its purchasing power, and all indications are that this inflation will continue.⁸⁹ This statutory limitation neglects to consider this increase in the cost of living and the fact that the wages of the deceased probably would have increased correspondingly.⁹⁰

Still another important factor considered was that the ceiling on recovery gave the defendant an advantage in settlement of negotiations out of court. The defendant knew that his liability was limited, and that the plaintiff had to pay attorney's fees and court costs out of the recovery awarded. In addition, the trial calendar may often run years behind. These factors placed a great deal of pressure upon the plaintiff to settle his claim below the statutory limitation, irrespective of the facts and circumstances.⁹¹

The argument also was made that it is illogical that the beneficiaries be denied adequate recovery merely because of the place of death.⁹² Three of the states bordering Illinois have no limitation on the recovery allowable.⁹³ Thus, if a person were killed just within the Illinois border prior to August 18, 1967, the statutory limitation applied; however, if the decedent were only a few feet away, on the opposite side of the border, the amount of recovery allowed would have been unlimited. This issue was presented in the case of *Kilberg v. Northeast Airlines, Inc.*,⁹⁴ wherein the plaintiff's intestate died as a result of the crash of defendant's airplane in which the intestate was a passenger. The plane crashed in Massachusetts and the plaintiff brought suit in New York. New York had repealed its statutory limitation on recovery for wrongful death, while Massachusetts had a limitation of \$30,000. The New York court refused to apply the limitation of the Massa-

⁸⁸ U.S. BUREAU OF THE CENSUS, 87 STATISTICAL ABSTRACT OF THE UNITED STATES 359 (1966). Since this, the most recent authority, states the 1965 cost of living in Chicago was \$6,567, today it necessarily stands in excess of \$6,500.

⁸⁹ *Id.* at 351.

⁹⁰ Chapman, *supra* note 57, at 784.

⁹¹ Chapman, *supra* note 57, at 784.

⁹² Chapman, *supra* note 57, at 787.

⁹³ KY. CONST. § 54; IND. STAT. ANN. § 2-404 (Supp. 1966); IOWA CODE ANN. § 611:20 (1950).

⁹⁴ 9 N.Y.2d 34, 172 N.E.2d 526 (1961).

chusetts statute, stating that, "modern conditions make it unjust and anomalous to subject the traveling citizens of the state to the various laws of other states through and over which they move."⁹⁵ The court decided that the limitation on damages prescribed by the Massachusetts statute was a procedural or remedial question controlled by the policies of New York as the law of the forum. Thus, the New York court rejected the traditional rule of law by declining to apply the laws of Massachusetts, the place of death, and determined that the recovery should be based on actual loss without limitation.

An important inconsistency existed regarding the past Illinois policy of limiting wrongful death recovery and the Illinois Scaffolding Act.⁹⁶ This Act, adopted in 1907 and still in effect today, provides that if a person is killed while working on scaffolding or other specified construction equipment, a right of action shall lie for his widow, lineal heirs or adopted children, for the injuries so sustained.⁹⁷ This Illinois statute covering one specific area of unnatural death places no restriction on the amount of damages recoverable. In the case of *Mitsell v. Acme Steel Co.*,⁹⁸ the court stated that since no limitation on the amount of recovery has been included in the Scaffolding Act, "[t]his omission must be presumed to have been intended."⁹⁹ The court went on to say that, "[s]ince the statute has never been materially amended in this respect, it seems equally clear that no dollar limitation exists today."¹⁰⁰ In this case, the decedent was killed while working on scaffolding on defendant's premises when an oil-burning salamander, located on the scaffold immediately about the decedent, overturned, causing burning oil to fall upon him. The court in rendering this decision determined that the \$30,000 limitation contained in the wrongful death act was not applicable to damages recoverable under the Scaffolding Act. In the instant case no limitation was imposed on the damages recoverable from the death, because the decedent died while working on scaffolding. However, if the decedent had not been killed in this manner, recovery would have been limited to \$30,000. This was most illogical, since the decedent's beneficiaries suffered no less damages if the decedent's death resulted from a situation outside the provisions of the Scaffolding Act, and suffered no more damages if decedent's death resulted from a situation within the Scaffolding Act. Therefore, the 1967 Illinois amendatory act was enacted as the only logical alternative in light of legislative inconsistencies.

⁹⁵ *Id.* at 39, 172 N.E.2d, at 527.

⁹⁶ ILL. REV. STAT. ch. 48, § 60 (1959).

⁹⁷ ILL. REV. STAT. ch. 48, § 69 (Supp. 1966).

⁹⁸ 208 F. Supp. 805 (N.D. Ill. 1962).

⁹⁹ *Id.* at 807.

¹⁰⁰ *Id.*

CONCLUSION

Since Lord Campbell's Act was adopted in 1846, all of the jurisdictions of the United States have enacted statutes creating a cause of action for wrongful death. Prior to the enactment of House Bill 626,¹⁰¹ Illinois and eleven other states had placed a limitation on the amount of recovery allowed. However, with the enactment of this bill the Illinois Legislature deleted the limitation provision from the statute. Because Illinois recently removed the limitation on recovery that had existed since the original enactment of the statute, we must endeavor to determine the ramification of such action.

The rationale for amending the Illinois Wrongful Death Statute was to permit the courts to award to the beneficiaries of a decedent a realistic compensation, the effect being that the recovery received will be in accordance with the actual damages sustained. The possible higher awards should now allow the beneficiaries of a decedent to recover amounts sufficient to enable them to maintain an adequate standard of living.

Notwithstanding higher cash recoveries, the verdicts themselves should not increase. Prior to House Bill 626, an amendment was attached to the Illinois Wrongful Death Statute which provided "the jury shall determine the amount of damages to be recovered without regard to and with no special instruction as to the dollar limits on recovery imposed by this section."¹⁰²

This instruction enabled the jury to render verdicts in excess of \$30,000. However, in such an instance the plaintiff would be compelled to accept a remittitur so as to limit his compensation in accordance with the statutory limitation.¹⁰³ Therefore, only the compensation and not the verdicts will be affected by the removal of the limitation. The deletion of the limitation provision will not directly affect the attorney in his presentation of damages, nor will it affect the jury in computing damages since the elements comprising damages for wrongful death will remain the same.

House Bill 626 may even decrease the number of cases going to trial. With the probability of a recoverable judgment in excess of \$30,000, defendants in wrongful death actions may be more prone to settle. Previously, if the plaintiff requested damages less than or equal to the maximum recovery allowed, the defendant would consider it advantageous to proceed to trial because he had a chance of winning, and if he lost, he knew that the extent of his liability was only \$30,000. The enactment also removes the pressure on a plaintiff to settle where he has a valid claim, as not only will damages

¹⁰¹ Ill. H.B. 626.

¹⁰² ILL. REV. STAT. ch. 70, § 2 (1965).

¹⁰³ See Comment, *Additur—Procedural Boon or Constitutional Calamity*, 17 DE PAUL L. REV. 175 (1967), for a history and discussion of both additur and remittitur.

be awarded, but compensation should be received without a statutory restriction.

Another effect of House Bill 626 is that the compensation in wrongful death cases will increase or decrease in accordance with the increase or decrease in the cost of living. This is beneficial since we are currently living in an inflationary society and all indications are that this inflationary trend will continue.

Undoubtedly, the deletion of this provision prescribing a limitation on recovery will bring about an increase in insurance premiums. While this effect will not be beneficial to any of the litigants, it is not the purpose of our legal system to restrict the amount of compensation in order to keep insurance premiums at a minimum.

Finally, as has been noted, before the Illinois Legislature amended its wrongful death statute the majority of states had no limitation on the amount of recovery allowed and had functioned more equitably thereby. No better test can exist than the successful operation of law under the actual conditions sought to be imposed.

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