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THE WEST VIRGINIA BAR ASSOCIATION

REMOVAL OF LIMITATION OF RECOVERABLE AMOUNT IN ACTIONS FOR WRONGFUL DEATH AND EXTENDING RIGHT OF ACTION GENERALLY FOR INJURY TO PERSON OR PROPERTY *

JULIAN F. BOUCHELLE**

It would be superfluous to comment upon the history of Lord Campbell's Act providing for recovery in actions for wrongful death, well known to every practitioner and included in the curriculum of every law school. But much may be said concerning the statutory limitation of the recoverable amount, $10,000.00, as now contained in our statute, $5,000.00 at the time of its adoption in 1863. The time is long since past for its enlargement into one of a humanely and properly conpensatory one, not only with respect to the amount recoverable, but liberalization in other respects. The legislative standardization of the value of a human life cannot be justified in reason and justice. To give the jury and the courts the latitude they have in fixing damages for personal injury and to restrict them in cases of death have been found unjust and unfairly compensable in thirty-three states whose statutes contain no limitation of the recoverable amount. I suppose it is the spirit of compromise inherent in many juries that often impels them to return a verdict under the amount fixed by our statute, which sometimes results in inadequate verdicts. Such, in any event, has happened in my circuit in several instances. Incidentally it may be observed that, should the present statute remain unchanged, a three-fourths jury verdict would be a more salutary rule — instance the case previously referred to in which there was a $2,500.00 verdict with two jurors resisting any award, and ten in favor of a substantial one.[1]

It is interesting to note that Lord Campbell's Act, as enacted by the English Parliament, contained no limitation upon the amount recoverable. Section 2 of the act is very broad in its terms, providing that it shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been caused;

* Conclusion of an address delivered at the fifth annual meeting of the West Virginia Judicial Association, at White Sulphur Springs, West Virginia, October 16, 1941. Part I appeared in (1942) 48 W. VA. L. Q. at p. 149.

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1 (1942) 48 W. VA. L. Q. at p. 152.

and that the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively, for whose benefit the action shall be brought.

It is stated that the difficulty of measuring damages sustained by the wrongful death of a person and the possibility of extreme awards by juries led to legislative adoption in the early statutes of a stipulated limit of the amount recoverable. The courts, however, have established satisfactory rules for measuring damages sustained, upon which time does not permit me here to dwell.

Honorable B. J. Pettigrew, President of the Bar Association of the City of Charleston, when a member of the judiciary committee of the house of delegates in the session of 1919, advised me that he was active in the passage of a bill, introduced by Mr. Orville Hackney, a fellow member, amending our statute removing the limitation upon the recoverable amount, which passed the house but was promptly lulled to peaceful slumber in the somnolent arms of the judiciary committee of the senate, and could not be awakened therefrom despite strenuous and persistent efforts. I am not advised of any other effort to so amend the act. Verifying this, Mr. Pettigrew, who was a former assistant United States attorney and is now assistant general counsel of the United Fuel Gas Company, one of the largest utilities in the state, authorized me to say that he was still of the same mind.

In one respect the statute has been broadened by our legislature by the enactment of the amendment of 1931 to the Code,[2] which provides for the survival of an action for an injury done to the person of another upon the death of the wrongdoer, either by revival of a pending suit, or the institution of an original suit, whether or not the death of the wrongdoer occurred before or after the death of the injured person. This was construed by the Supreme Court of Appeals in the case of *Byrd v. Byrd,*[3] to extend only to injuries which resulted in the death of the injured person as surviving against the personal representatives of the wrongdoer—far short of the extent to which the statute has been amended in many jurisdictions.

In thirty-three states there is no limitation upon the recoverable amount; seven by constitutional inhibition. Eleven states, including our own, limit the amount to $10,000.00; one to $5,000.00; one to $15,000.00 and one to $12,500.00. The Federal Employers' Liability Act, actions under which may be maintained in state

[2] W. VA. REV. CODE (1931) c. 55, art. 7, § 5.
[3] 7 S. E. (2d) 507 (W. Va 1940).

courts concurrently with federal courts, contains no limitation upon the amount of a verdict in case of death of the employee.[4]

[4] WRONGFUL DEATH

STATE	AMOUNT RECOVERABLE LIMITED BY STATUE	AMOUNT RECOVERABLE NOT LIMITED BY STATUTE	CONSTITUTION INHIBITS LIMITATION OF AMOUNT RECOVERABLE
Alabama	— —	X	
Arizona	— —	X	Art. II, Sec. 31
Arkansas	— —	X	Art. V, Sec. 32
California	— —	X	
Colorado	$5,000		
Connecticut	$15,000		
Delaware	— —	X	
Florida	— —	X	
Georgia	— —	X	
Idaho	— —	X	
Illinois	$10,000		
Indiana	$10,000		
Iowa	— —	X	
Kansas	$10,000		
Kentucky	— —	X	Sec. 54
Louisiana	— —	X	
Maine	$10,000		
Maryland	— —	X	
Massachusetts*	$10,000		
Michigan	— —	X	
Minnesota	$10,000		
Mississippi	— —	X	
Missouri	$10,000		
Montana	— —	X	
Nebraska	— —	X	
Nevada	— —	X	
New Hampshire	$10,000		
New Jersey	— —	X	
New Mexico*	— —	X	
New York	— —	X	
North Carolina	— —	X	
North Dakota	— —	X	
Ohio	— —	X	Art. I, Sec. 19a
Oklahoma	— —	X	Art. XXIII, Sec. 7
Oregon	$10,000		
Pennsylvania	— —	X	Art. III, Sec 21
Rhode Island	— —	X	
South Carolina*	— —	X	
South Dakota	$10,000		
Tennessee	— —	X	
Texas	— —	X	
Utah	— —	X	Art. XVI, Sec. 5
Vermont	— —	X	
Virginia	$10,000		
Washington	— —	X	
West Virginia	$10,000		
Wisconsin*	$12,500		
Wyoming	— —	X	
TOTALS	15	33	7

* Indicates law somewhat peculiar to particular state.

In some states the statutes allow the recovery not only of such damages as the injured person might have recovered had he survived, but also for damages for his death. The courts of these states construe such statutes as not independent of or unrelated to the right of action which was in the deceased at his death, but which relates to the consequences of the wrong inflicted on the decedent; that is, that there are not two independent rights of action, but only one liability, and such for the consequences for the wrongful act, including the death. I perceive no sound objection to statutory enlargements of this nature.

Our mother state, which surely is considered conservative in matters of this kind, has adopted progressive amendments to her original wrongful death statute, however, still retaining the maximum recoverable amount of $10,000.00. Section 5786 of the Virginia Code, as amended in 1926, contains an amendment identical to ours of 1931, and I am informed that the latter amendment was taken from the former. Section 5790, being a general revision by the Acts of 1928, provides that an action under Section 5786 shall not abate by the death of a defendant; and that where an action is brought by a person injured by the wrongful act of another and the injured person dies pending the action, it may be revived; with the proviso that if death resulted from the injuries, the declaration shall be amended to conform to an action under Section 5786, thus, perhaps, because of the limit of $10,000.00, providing for survival against the estate of the wrongdoer only in the event the injuries result in the death of the injured person. The remaining provisions of Section 5790 of the Virginia Code provide for the survival of an action for an injury done to the person of another, not resulting in death, upon the death of the wrongdoer. And such suit may be revived against the estate of the wrongdoer, or an original suit brought against his personal representative, whether or not the death of the wrongdoer occurred before or after the death of the injured party.

I favor a general revision of our wrongful death statute, removing all limitation upon the recoverable amount, and providing generally for actions for personal injury, as well as for wrongful death, both in favor of the injured person and his estate, whether the injuries result in death or not, and against the tort-feasor or his estate. So that it may be understood by the layman—recognize right of action for injury to person or property by the dead against the living, the dead against the dead, and the living against the

dead. The questions of the nature of damages, whether punitive, exemplary or compensatory, and the measure of damages, whether determined by the existence of beneficiaries, next of kin, surviving spouse and dependents generally, earning capacity and life-expectancy of the deceased, are all incidental matters which can readily be provided for in a carefully prepared act. Legislative action only will be required to carry into effect such suggested amendments.

While having no quarrel particularly with the majority opinion in the case of *Wilder v. Charleston Transit Co.*,[5] which came to me from the Court of Common Pleas of Kanawha County, and was by me certified to the Supreme Court of Appeals, upon a plea that the decedent left no next of kin or beneficiaries capable of taking under the statute provided for in the distribution of the personal estate of an intestate, I am impressed with the liberality of the language of the minority opinion saying that in part, "The statute for the recovery of damages for death by a wrongful act is a remedial one and should be liberally construed," and "It seems almost repellent to basic conceptions of right and justice that in any supposed case a defendant, guilty through gross negligence of causing the death of another, might come into court and, though admitting his negligence, avoid liability," because of the non-existence of a surviving spouse or blood relative, or for any reason. With me, as with the two minority judges, "The thought prevails" that the tort-feasor "should face the issue on the merits," and "if adjudged guilty, let him pay. Beyond that he should have no concern."

REPEAL OF SECTION 35 OF ARTICLE VI OF THE WEST VIRGINIA CONSTITUTION AND ADOPTION OF AMENDMENT PERMITTING SUITS AND ACTIONS AGAINST THE STATE

In another important respect the march of progress has overshadowed a constitutional provision materially and vitally affecting the rights of the citizens of the state. I refer to Section 35, Article 6 of the Constitution providing that the state shall never be made a defendant in any court of law or equity, amended in 1936, subjecting the state and its officers to garnishee process. Only three other states contain similar constitutional inhibitions, Alabama, Arkansas and Illinois.

[5] 120 W. Va. 319, 197 S. E. 814 (1938).

The Constitution of 1863, largely an adoption of the Virginia Constitution, contained no such provision, as did not the State of Virginia and which does not now have such. A careful perusal of the journal of the Constitutional Convention of 1872 does not disclose any mention of the provision, except its inclusion in the report of the committee on the whole on "legislative department," and no discussion of it is found anywhere in the journal. As adopted it was identical in terms with the Illinois Constitution. It may be well assumed, however, that the reason motivating its adoption was the contemplated possible involvement and harrassment of the state by reason of inherited debts and obligations.

The background, of course, of such provision is the ancient dogma, "The King can do no wrong," which was engrafted in our theories of government, federal and state, along with the great body of the common law, and by legislative enactment, more often judicial determination, made prerequisite the consent of the state to be made a party defendant. The cases of *Stewart v. State Road Comm.*,[6] and *Watts v. State Road Comm.*,[7] made absolute the state's immunity from suit upon any cause of action, legal or equitable, overruling a prior decision which tended to relax its positive mandate. At the time of the decision of these two cases, I was Assistant Attorney General and on briefs in both of them for the state. Prior to my experience in that office, I had no clear appreciation of the injustice of the denial of this right to citizens of the state; but, by numerous instances of irremedial wrong inflicted upon citizens, which came under my observation, I was awakened to the need for some measure providing a remedy. There is no sound reason why the principle of *respondeat superior* should not apply to the state, much to the same extent that it does to the individual. I advocated then, if not outright repeal of the provision, the creation of a court of claims; and, upon mature reflection, I am now of the opinion that Article 6, Section 35 of the Constitution should be repealed and an amendment enacted permitting suits against the state, surrounded with proper safeguards.

I have eminent and respectable precedent for this opinion. By joint resolution adopted March 9, 1929, the legislature directed the governor to appoint a commission of eleven members "to study the Constitution and the needs of the State and submit to the next regular session such Amendments as the commission deems

[6] 117 W. Va. 352, 185 S. E. 567 (1936).
[7] 117 W. Va. 398, 185 S. E. 570 (1936).

necessary to remove existing barriers and restrictions to the further and greater development of the State." A commission of distinguished and able men duly made its report, upon which, however, no action was taken by the succeeding legislature. The following comment accompanied a proposed change of Article 6, Section 35:

> "At present a number of the agencies of the State Government have the authority to, and do make contracts with private individuals. There is no method by which such private individuals may have adjudicated their claims for breach of such contracts. State agencies through their agents and employees may commit torts upon private individuals and their property without being required to answer in a court of law or equity for damages sustained thereby. The commission is of opinion that remedies should be provided under proper safeguards whereby just claims arising either out of breach of contract or tort may be adjudicated and satisfied."

And the amendment should not confine venue to the county where the seat of government is located, but should make provision for such as in suits between individuals. I must confess to a sense of selfishness in this suggestion, for thereby would I be relieved of much mental anguish which accompanies the numerous suits involving state officers and agencies. There are four waiting gloatingly in Charleston to haunt my return.

The extension of governmental activities in fields of private enterprises, the vast and increasing number of its agents and the continuous urge for expansion of governmental function beyond the original concept of democratic forms of government provide reason for the abolition of such an outmoded and onesided law.

The absurdity and unsoundness of constitutional, statutory or common law denial of the rights of the citizens in this regard are well illustrated by two quotations. Again from Herbert's *Uncommon Law,* where he has one of his characters say:

> "One of the first actions of a loyal young Englishman who begins to study the law of the land is to read carefully the pages which are concerned with the King; and he learns with some surprise the ancient constitutional and legal principle that the King can do no wrong. He is surprised for this reason; that the whole course of his historical studies at school has led him to believe that at the material dates of English history the King was always doing wrong. . . . It is not too much to say that the whole constitution has been erected upon the assumption that the King not only is capable of doing

wrong but it more likely to do wrong than other men if he is given the chance. To this hypothesis we owe the Great Charter, the Petition of Right, the Bill of Rights, the Act of Settlement, the Habeas Corpus Act, the doctrine of Ministerial responsibility, the independence of the judiciary, the very existence of the two Houses of Parliament, and indeed, all the essential pillars in the noble fabric of the Constitution.

"It is odd, then, that this maxim should survive in a political system which was invented to contradict it, and that our forefathers, who were compelled to rebel against the practice, should have reverently retained the principle. For in origin, I suspect, these words were not so much a testimony to royal infallibility as a convenient excuse for royal misfeasance. King John, I believe, was the first monarch to announce to his people that the King could do no wrong. . . .

"All these Departments, nominally controlled by one who is nominally the King's Minister, enjoy in practice the benefit of the doctrine that the King can do no wrong. So that if a subject be injured through the negligent or dangerous driving of a Post Office van he has at law no remedy against the Crown or Post Office; whereas in like case he could recover damages from a private company which employed the driver. For the Crown is incapable of negligence; neither can it be charged with libel or fraud or any other tortious act; nor is it responsible, like the rest of us, for the tortious acts of its servants done within the general scope of their employment. . . . This cannot be justified except by loose or arrogant thinking. . . . There is no good reason, except in time of war or civil emergency, why a Government Department should not be amenable to the ordinary law of tort in its relations with the subject or its own servants; nor can I perceive why a contract of service in the Army or Navy should not be as sacred and as strictly enforceable as a contract of service in a restaurant or drugstore. This is no trivial or academic matter; for the Crown or State is constantly enlarging the scope of its activities and the number of its servants."

Professor Borchard, in an article written in 1924, made these very sound observations:

"The common law and the political theory underlying both British and American constitutional law have been regarded as a bulwark of protection to the individual in his relations with the government. . . . Yet it requires but a slight appreciation of the facts to realize that in Anglo-American law the individual citizen is left to bear almost all the risks of a defective, negligent, perverse or erroneous administration of the State's functions, an unjust burden which is becoming

graver and more frequent as the Government's activities become more diversified and as we leave to administrative officers in even greater degree the determination of the legal relations of the individual citizen. . . . Yet there is no reason why the most flagrant of the injuries wrongfully sustained by the citizen, those arising from the torts of officers, should be allowed to rest, as they now generally do, in practice if not in theory, at the door of the unfortunate citizen alone. This hardship becomes the more incongruous when it is realized that it is greatest in countries like Great Britain and the United States, where democracy is assumed to have placed the individual on the highest plane of political freedom and individual justice.

"The reason for this long-continued and growing injustice in Anglo-American law rests, of course, upon a medieval English theory that 'the King can do no wrong,' which without sufficient understanding was introduced with the common law into this country, and has survived mainly by reason of its antiquity. The facts that the conditions which gave it birth and that the theory of absolutism which kept it alive in England never prevailed in this country and have since been discarded by the most monarchical countries of Europe, have nevertheless been unavailing to secure legislative reconsideration of the propriety and justification of the rule that the State is not legally liable for the torts of its officers.'"[8]

The constitutions of fourteen states make affirmative provisions for suits against the state, which, however, are not self-executing, but require enabling legislation. Quite generally, although there are a few exceptions, there is a reluctance to permit recovery upon tort claims. Such is so held in a recent case decided by the Virginia Court of Appeals.[9] In passing, it is interesting to note the liberality of Virginia towards its citizens in this regard, containing express statutory provisions for the assertion of claims against the state in its courts, and the liberal construction of such statutes by its courts.

One annotator has observed that the Commonwealth of Virginia will not be astute to escape inquiry into its liability or to take advantage of technical defenses which are permissible to other litigants. Bouldin, J., in *Higginbotham's Ex'x v. Commonwealth*,[10] thus expressed his views:

". . . my opinion is, that under the statutes of the state, she is liable to be sued in this case by petition against the

[8] Borchard, *Government Liability in Tort* (1924) 34 YALE L. J. 1.
[9] Wilson v. State Highway Comm'r, 174 Va. 82, 4 S. E. (2d) 746 (1939).
[10] 25 Gratt. 627, 637 (Va. 1874).

auditor, and that judgment should have been rendered against her. I do not mean to intimate that a state can be sued in any case either by her own citizens or others, in her own courts, without her authority and against her consent. But it has ever been the cherished policy of Virginia to allow to her citizens and others the largest liberty of suit against herself; and there never has been a moment since October 1778 (but two years and three months after she became an independent state), that all persons have not enjoyed this right by express statute."

The creation of the court of claims by the last legislature is at least a forward gesture. Time does not permit an analysis or discussion of this act, except to observe that it contains many deficiencies, both in the act itself, and in the remedy intended to be given. A careful examination of it will disclose inherent imperfections and weaknesses. It is only advisory and provides merely a recommended recovery, and under the present constitutional inhibition, any legislature may ignore its findings.

The procedure is too loose and nonlegalistic. In the adjudication of the state's liability in matters contractual or tort, it should be given the benefit and protection accorded the individual litigant in following recognized and established rules of evidence, the right of trial by jury, application of equitable principles and the learning and experience of the chancellor in equity procedure.

The most precious, the most cherished confirmation of human rights is found in Article 3, Section 17 of the Constitution:

> "The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay."

This is the hub, the fixed immovable center around which all other constitutional grants and guarantees revolve. In the process of change and development of human rights and restraints, evolutionary or revolutionary, they should be molded by its pattern and ever held within control of its sphere.

ANNOUNCEMENTS

1942 Annual Meeting

The fifty-sixth annual meeting of The West Virginia Bar Association will be held at Wheeling, West Virginia, on Thursday and Friday, October 8 and 9, 1942. The invitation was extended