University of Richmond Law Review

Volume 5 | Issue 2 Article 4

1971

Damages Recoverable for Wrongful Death

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ARTICLES

DAMAGES RECOVERABLE FOR WRONGFUL DEATH

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THE Virginia Legislature at the 1968 session of the General Assembly amended Section 8-636 of the Code of Virginia and thereby altered drastically both the amount and the method of distribution of damages recoverable under Virginia's Wrongful Death Act.[1] Only the section dealing with damages and the distribution thereof was altered, but the amendment changed substantially those entitled to an award of damages for financial or pecuniary loss and the conditions prerequisite to recovery for such loss.

Prior to its amendment in 1968,[2] Section 8-636 provided that the jury might award, "such damages as to it may seem fair and just, not exceeding forty thousand dollars." As amended,[3] Section 8-636 provides for an award of the following:

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* Judge, Corporation Court of Danville, Virginia. B.A., Dartmouth, 1949; LL.B., Virginia, 1952.

1 VA. CODE ANN. §§ 8-633 to -640 (Cum. Supp. 1970).

2 VA. CODE ANN. § 8-636 (Cum. Supp. 1966):

> The jury in any such action may award such damages as to it may seem fair and just, not exceeding forty thousand dollars, and may direct in what proportion they shall be distributed to the surviving widow or husband and children and grandchildren of the deceased, or if there be none such, then to the parents, brothers and sisters of the deceased. Nothing shall be apportioned to the parents, brothers and sisters of the deceased, if there be a surviving widow or husband, children or grandchildren, but between members of the same class the jury shall have absolute discretion as to who shall receive the whole or any part of the recovery. The maximum amount of damages that may be awarded under this section in the amount of fifty thousand dollars shall not apply to any cause of action arising prior to July one, nineteen hundred sixty-six.

3 VA. CODE ANN. § 8-636 (Cum. Supp. 1970):

> The jury in any such action may award such damages for solace as to it may seem fair and just, not exceeding twenty-five thousand dollars, and may direct in what proportion they shall be distributed to the surviving widow or husband and children and grandchildren of the deceased, or if there be none such, then to the parents, brothers and sisters of the deceased. Nothing shall be apportioned to the parents, brothers and sisters of the deceased, if there be a surviving widow or husband, children or grandchildren, but between members of the same class the jury shall have absolute discretion as to who shall receive the whole or any part of the recovery. In addition to the recovery above, in every such action, the personal representative of the deceased person shall be entitled 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

1. Such damages for solace as to the jury may seem fair and just, not exceeding twenty-five thousand dollars.

2. Actual funeral expenses of the decedent, not exceeding five hundred dollars, and the actual hospital, medical, and ambulance service expenses incurred.

3. Such further damages, not exceeding fifty thousand dollars as shall equal the financial or pecuniary loss sustained by the dependent or dependents of the decedent.

The purpose of this article will be to review and discuss the historical background, development and interpretation of the Virginia statutes providing for recovery in actions for wrongful death, to analyze the changes wrought by the 1968 amendment to Section 8-636, and to examine the situation now facing counsel and the court in the trial of a wrongful death action in Virginia. Several amendments to Section 8-636 proposed to and rejected by the General Assembly during its 1970 session will be reviewed.

I. Historical Background

At common law, there was no civil remedy provided in cases of wrongful death.[4] There was no cause of action by or on behalf of the survivors of a deceased to recover for the loss sustained by them as a result of his death, and the decedent's estate was without a cause of action for loss to it resulting from his death. The reasons behind the rule are not entirely clear.[5]

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decedent as a result of the wrongful act. Any recovery hereunder, of the funeral expenses and hospital, medical and ambulance service expenses shall be expended by the personal representative in the payment of such expenses, the funds available for payment of hospital, medical and ambulance service expenses being apportioned pro rata among such specific creditors, as their respective interests may appear. In addition to the damages set forth above, the jury may award such further damages, not exceeding fifty thousand dollars, as shall equal the financial or pecuniary loss sustained by the dependent or dependents of such decedent and shall further direct in what proportion such damages shall be distributed to such dependents, regardless of class.

No recovery hereunder shall be deemed to be assets of the estate of the decedent and the court shall apportion the costs of recovery as it shall deem proper.

Such damages for funeral expenses, solace and such additional damages for medical and hospital expenses and pecuniary loss that may be awarded under this section shall not apply to any cause of action arising prior to July one, nineteen hundred sixty-eight.

[4] *See* 3 W. Holdsworth, A History of English Law 333-36 (3d ed. 1923); 22 Am. Jur. 2d *Death* § 44 (1965); *See also* Mozingo v. Consolidated Constr. Co., 171 F. Supp. 396 (E.D. Va. 1959).

[5] 25A C.J.S. *Death* § 13 (1966); 22 Am. Jur. 2d *Death* § 1 (1965); 16 Am. Jur. *Death* § 48 (1938).

Perhaps it derived from the proposition that personal actions die with the person, from the theory that the life of a freeman cannot be evaluated in terms of money, or from the doctrine that where the wrongful acts constitute a crime, the civil wrong is merged in the crime and extinguished.[6]

Historically, the origin of the rule may have evolved because of the criminal nature and origin of actions for wrongful death. At one point in England a penalty for wrongfully or negligently causing another's death was forfeiture to the crown of all goods and chattels of the wrongdoer, which effectively eliminated any need for or benefit to be gained by a civil action on behalf of the decedent's survivors.

The case law precedent for the rule was established in the early English case of *Baker v. Bolton.*[7] The bereaved husband and unsuccessful plaintiff had lost his wife in a stagecoach accident and subsequently brought suit to recover for his loss. Unfortunate dictum in the case created the decisional basis for a harsh and inequitable rule. In his opinion, Lord Ellenborough held, without citing controlling authority or precedent, that a husband had no cause of action for the loss of his wife's services, declaring that in a civil court "the death of a human being could not be complained of as an injury."

The rule of *Baker v. Bolton* not only became the law in England, it soon became firmly entrenched and accepted in this country.[8] Severe criticism of the unjustness of the rule was frequent. In *Rowe v. Richards,*[9] the court expressed the following dissatisfaction with it:

> With the evolution of modern industry, resulting as it did in frequent deaths from negligence, the injustice of the rule of the common law became impressed upon the leaders of thought, and, from a realization of its injustice to a recognition of the utter unsoundness of the reasons urged in support thereof was but a short and natural step. The thinking mind could not help but recognize that the then established rule presented 'a glaring absurdity in allowing a husband and father, if injured, but not killed, a right of action for the recovery of the damages thus sustained, and denying to his widow and children any compensation for the damages inflicted upon them, should the injury be greater and result in his death.' [10]

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[6] *See* Van Beeck v. Sabine Towing Co., 300 U.S. 342 (1937).

[7] 1 Camp. 493, 170 Eng. Rep. 1033 (1808).

[8] *See* Mobile Life Ins. Co. v. Brame, 95 U.S. 754 (1877).

[9] 35 S.D. 201, 151 N.W. 1001 (1915).

[10] *Id.* at 203, 151 N.W. at 1003.

Relief in England arrived in 1846 in the form of the Fatal Accidents Act, more commonly known and referred to as Lord Campbell's Act,[11] which created a statutory cause of action for wrongful death. Recovery was limited to designated beneficiaries and damages were awarded based upon the pecuniary loss to those surviving. The jury was permitted to "give such damages as they may think proportionate to the injury." Under the English Act, it was necessary to aver for whose benefit the suit was instituted and prosecuted,[12] and there could be no recovery in the absence of actual pecuniary injury.[13]

II. The Virginia Wrongful Death Acts

Several types of statutes have been enacted in this country, each providing a remedy for death by wrongful or negligent acts. Some are survival statutes which do not create a new cause of action but prevent an abatement of the deceased's claim. Others, such as those patterned after Lord Campbell's Act, create a new cause of action on behalf of designated beneficiaries who have suffered pecuniary loss. Still another method of providing relief is by the enactment of a wrongful death act granting a new right of action on behalf of the deceased's estate rather than a new cause of action.[14] Under such acts, recovery of damages is measured by the loss to the estate and is not conditioned upon there being persons who survive the deceased who have suffered financial or pecuniary loss.

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[11] 9 & 10 Vict., ch. 93 (1846).

[12] Matthews v. Warner, 70 Va. (29 Gratt.) 570 (1877); Baltimore & Ohio R.R. v. Wightman, 70 Va. (29 Gratt.) 431 (1877), *rev'd on other grounds sub nom.* Baltimore & Ohio R.R. v. Koontz, 104 U.S. 5 (1881).

[13] Baltimore & Ohio R.R. v. Noell, 73 Va. (32 Gratt.) 394 (1879). The statutes of some states are patterned after Lord Campbell's Act and require proof of actual pecuniary loss. Such was the situation in North Carolina prior to the 1969 amendment to its Wrongful Death Statute. *See* Scriven v. McDonald, 264 N.C. 727, 142 S.E.2d 585 (1965); Armentrout v. Hughes, 247 N.C. 631, 101 S.E.2d 793 (1958).

[14] For some time, controversy has existed as to whether or not a new cause of action or a new right of action was created by the Virginia Statute. Grady v. Irvine, 254 F.2d 224 (4th Cir.), *cert. denied*, 358 U.S. 819 (1958); Sherley v. Lotz, 200 Va. 173, 104 S.E.2d 795 (1958); Note, *Death by Wrongful Act and Survival of Personal Injury Actions in Virginia*, 38 Va. L. Rev. 959 (1952). The majority and better view appears to be the right of action (remedy) is totally new but arises from the same cause of action (wrong) that was created by the original actionable tort and is dependent upon the character of the wrong and subject to its defenses and infirmities. Wilson v. Whittaker, 207 Va. 1032, 154 S.E.2d 124 (1967); Hoffman v. Stuart, 188 Va. 785, 51 S.E.2d 239 (1949); Street v. Consumers Mining Corp., 185 Va. 561, 39 S.E.2d 271 (1946); 25A C.J.S. *Death* § 15 (1966). *See also* Reynolds v. Willis, 209 A.2d 760 (Del. 1965); Burke v. Burnham, 97 N.H. 203, 84 A.2d 918 (1951).

The Virginia Legislature enacted the State's first wrongful death act on January 14, 1871.[15] It deprived wrongdoers and tortfeasors of their common law immunity by permitting an action to be brought in the name of the personal representative of the deceased. The codified sections of the act, which were included in the 1887 Code, relating to damages and the distribution thereof provided:

> Sec. 2903. How and when to be brought; how damages awarded; new trials.—Every such action shall be brought by and in the name of the personal representative of such deceased person, and within twelve months after his or her death. The jury in any such action may award such damages as to it may seem fair and just, not exceeding ten thousand dollars, and may direct in what proportion they shall be distributed to the wife, husband, parent and child of the deceased. But nothing in this section shall be construed to deprive the court of the power to grant new trials, as in other cases.
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> Sec. 2904. To whom amount recovered to be paid.—The amount recovered in any such action shall, after the payment of costs and reasonable attorneys' fees, be paid to the wife, husband, parent, and child of the deceased, in such proportion as the jury may have directed, or, if they have not directed, according to the statute of distributions, and shall be free from all debts and liabilities of the deceased; but if there be no wife, husband, parent, or child, the amount so received shall be assets in the hands of the personal representative, to be disposed of according to law.

From 1871 until 1968 the above sections of the Virginia Act underwent a number of amendments and recodifications,[16] but their basic provisions with respect to the recovery and distribution of damages remained intact until 1968. Some changes were made in the designation of beneficiaries and in the amount of damages recoverable. In 1904, the parents, brothers and sisters were placed in a deferred class and allowed to share in the absence of primary beneficiaries, and it was provided that where the deceased left a widowed mother and also a widow but no children the damages should be divided between the mother and the widow.[17] In 1920 grandchildren

[15] Va. Acts of Assembly 1870-71, ch. 29, at 27; VA. CODE §§ 2902-06 (1887).

[16] Section 2903 and 2904 of the Code of Va. (1887) became Sections 5787 and 5788 of the Code of Va. (1919 and 1942) and Sections 8-634 to 8-638 of the 1950 Code. For a capsule history of the Virginia Wrongful Death Act, *see* Hudson Motor Car Co. v. Hertz, 121 F.2d 326 (6th Cir.), *cert. denied*, 314 U.S. 696 (1941).

[17] Va. Acts of Assembly 1904, ch. 64, at 110.

were added to the preferred class of beneficiaries with the provision regarding a division between a widowed mother and widow only applying in the absence of both children and grandchildren.[18] The statutory limit of damages increased gradually from $10,000 in 1871 to $15,000 in 1942, $25,000 in 1952, $30,000 in 1958, $35,000 in 1962 and to $40,000 in 1966. Although the amount recoverable was raised, damages continued to be allocated in such manner as the jury deemed fair and just. The Virginia statute in all its modifications continued to make it clear that no recovery was subject to the debts or liabilities of the deceased and that, in the absence of named beneficiaries in either the deferred or preferred class, any award was to be considered assets in the hands of the personal representatives to be disposed of according to law. In other words, in the absence of named beneficiaries, more remote next-of-kin were allowed to share in the recovery.[19] The 1968 amendment to Section 8-636[20] did not disturb the designation of named beneficiaries but limited their participation to an award for solace in the amount of twenty-five thousand dollars. The main significance of the amendment was that it created a new class consisting of the surviving dependents of the deceased who were permitted to recover such damages up to fifty thousand dollars as equalled their financial or pecuniary loss.

III. Interpretation of The Virginia Act 1871–1968

Early judicial interpretations of the Virginia Wrongful Death Statute made it clear that it would be liberally construed. It was not necessary for the deceased's personal representative to allege and file a statement of the persons for whose benefit the action was being brought.[21] Indeed, it was not required that any particular member of the deceased's family survive him, since the statute did not declare that the action was for the exclusive benefit of any particular beneficiary or set of beneficiaries.

The phrase "fair and just" was given broad meaning from the beginning.[22] Accepted instructions allowed the jury to consider the following elements of damage in making its award:[23]

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[18] Va. Acts of Assembly 1920, ch. 25, at 26.

[19] John v. Blue Ridge Transfer Co., 199 Va. 63, 97 S.E.2d 723 (1957).

[20] Va. Code Ann. § 8-636 (Cum. Supp. 1970).

[21] Cases cited note 12 *supra.*

[22] Baltimore & Ohio R.R. v. Noell, 73 Va. (32 Gratt.) 394 (1879); Matthews v. Warner, 70 Va. (29 Gratt.) 570 (1877). *See also* Eisenhower v. Jeter, 205 Va. 159, 135 S.E.2d 786 (1964); Harris v. Royer, 165 Va. 461, 182 S.E. 276 (1935).

[23] *See* Ratcliffe v. McDonald, 123 Va. 781, 97 S.E. 307 (1918); Chesapeake & O. Ry. v.

1. The pecuniary loss sustained by survivors with reference to the probable earnings of the deceased in view of his health, age, business capacity and experience;

2. The loss of the decedent's care, attention and society;

3. Such further sum as deemed fair and just by way of solace and comfort for the sorrow, suffering and mental anguish caused his survivors.

Considering these elements of damage in reverse order, solace meant simply comfort in grief or an award for the alleviation of grief. Its recovery was not limited to named beneficiaries but available, in the absence of such beneficiaries, to other next of kin. Even actual proof of sorrow or suffering by the deceased's beneficiaries was not necessary. The jury was given a right to infer sorrow, suffering and mental anguish as a result of death.[24] Where no claim was made of pecuniary loss, the defense could not offer in mitigation of damages for solace any bad habits or improper morals of the decedent.[25] However, once the character of the decedent was put in issue by the plaintiff, then the defendant was permitted to introduce evidence to show the decedent's bad habits, bad morals, lack of sobriety or unhappy relationship with his family.[26] Evidence of the magnitude and seriousness of the decedent's injuries, the extent of mutilation to his body and other circumstances likely to inflame, influence or prejudice the jury or invite its sympathy were not admissible.[27] Neither the mental anguish nor the physical pain suffered by the decedent prior to his death were considered elements of damage for solace.[28]

Beyond solace, the Virginia courts considered that the loss of decedent's care, attention and society constituted a pecuniary loss. No proof of actual financial deprivation was required. Damages were recoverable even if the deceased was one whose life conferred no pecuniary benefit such as an aged or infirm father or husband, an invalid wife or an afflicted child.[29] Depen-

Ghee, 110 Va. 527, 66 S.E. 826 (1910); Pocahontas Collieries Co. v. Rukas, 104 Va. 278, 51 S.E. 449 (1905); Norfolk & W. Ry. v. Cheatwood, 103 Va. 356, 49 S.E. 489 (1905); Anderson v. Hygeia Hotel Co., 92 Va. 687, 24 S.E. 269 (1896); M. DOUBLES, E. EMROCH & R. MERHIGE, VIRGINIA JURY INSTRUCTIONS § 23.08 (1964).

[24] Virginia Transit v. Hill, 208 Va. 171, 156 S.E.2d 888 (1967).

[25] *Id.*

[26] Basham v. Terry, 199 Va. 817, 102 S.E.2d 285 (1958).

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

[28] *See* Seymour & Burford Corp. v. Richardson, 194 Va. 709, 75 S.E.2d 77 (1953); Virginia Iron Co. v. Odle, 128 Va. 280, 105 S.E. 107 (1920).

[29] Baltimore & Ohio R.R. v. Noell, 73 Va. (32 Gratt.) 394 (1879).

dency was not a condition precedent to the recovery of damages,[30] and a wealthy man could recover for the death of a destitute brother, child or impoverished relative. During the 1952 session of the General Assembly, a bill was offered to limit the award of damages to "fair and just pecuniary injury resulting from such death."[31] The bill died in committee. Its purpose may have been to eliminate any recovery for either solace or for loss of the decedent's society and companionship.

Even if the bill to limit the award of damages to pecuniary injury had passed, its practical effect would have been limited in view of the extremely broad judicial interpretation which had been given to the term "pecuniary loss." In a case involving the death of a 13 year old boy, the Supreme Court of Appeals of Virginia offered this definition:

> In view of the comprehensive language of the statute, the phrase 'pecuniary loss,' when used in an instruction in connection with what damages are recoverable, is to be given liberal interpretation. When so construed, it does not mean merely the loss of immediate monetary benefits, nor is it limited to the loss of pecuniary benefits susceptible of positive proof and exact estimate. In addition to financial loss, it includes present and prospective loss of services, nurture and care, and other advantages and benefits of a pecuniary nature which have been cut off or will probably be lost in the future by reason of the death of the person from whom derived or from whom they might have been expected.[32]

In some jurisdictions, where the death of a child is involved, recovery is not allowed for pecuniary loss in the absence of proof of actual economic loss to the survivors, the theory being that it is not the value of a human life which is the criteria but the damage actually sustained by those surviving.[33] This reasoning has been applied in cases involving recovery for the death of an unborn child.[34] Although the Virginia courts have denied

[30] Wolfe v. Lockhart, 195 Va. 479, 78 S.E.2d 654 (1953); Colonial Coal Co. v. Gass, 114 Va. 24, 75 S.E. 775 (1912).

[31] Va. House Bill No. 229 (1952).

[32] Gough v. Shaner, 197 Va. 572, 578-79, 90 S.E.2d 171, 176 (1955).

[33] Breckon v. Franklin Fuel Co., 383 Mich. 251, 174 N.W.2d 836 (1970); Zorn v. Crawford, 252 S.C. 127, 165 S.E.2d 640 (1969). Prior to the 1969 amendment to its statute, North Carolina required that pecuniary loss be shown by positive testimony. Stetson v. Easterling, 274 N.C. 152, 161 S.E.2d 531 (1968); Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966); Scriven v. McDonald, 264 N.C. 727, 142 S.E.2d 585 (1965).

[34] *See, e.g.*, Panagopoulous v. Martin, 295 F. Supp. 220 (S.D.W. Va. 1969); White v. Yup, 85 Nev. 527, 458 P.2d 617 (1969).

recovery for the death of an unborn viable child,[35] they have adopted a liberal view regarding recovery for the loss of an infant. Even though the child was too young at death to have worked for wages or to have established an earning capacity, substantial damages could be obtained for the pecuniary loss occasioned by reason of the child's death.[36] A child was not precluded from recovery for loss suffered by reason of the fact that he was born after the wrongful death of his father.[37] Thus, whether infant or adult, a beneficiary could recover prospective damages for the loss of a deceased even if there had been no proof of contribution to the beneficiary's support by the deceased at the time of death. If there was actual financial or pecuniary loss sustained, it could be shown.[38] Punitive damages, however, were not allowed,[39] and prior to 1968 there was no right to recover for any hospital, medical, ambulance or funeral services rendered the deceased, although, arguably, they were expenses occasioned by the death.[40]

Where a claim was made for financial or pecuniary loss, evidence of the character and habits of the deceased was considered admissible to prove his worth to his survivors.[41] The amount of damages recoverable could not be reduced because of benefits received from collateral sources, and for this reason evidence of insurance proceeds received by beneficiaries as a result of the decedent's death was not admissible.[42] The deceased's life expec-

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35 Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969), *commented on in* 4 U. RICH. L. REV. 322 (1970).

36 Gough v. Shaner, 197 Va. 572, 90 S.E.2d 171 (1955); Ratcliffe v. McDonald, 123 Va. 781, 97 S.E. 307 (1918); Colonial Coal Co. v. Gass, 114 Va. 24, 75 S.E. 775 (1912). Virginia has allowed substantial recovery for infant deaths. *See, e.g.,* Spruill v. Boyle-Midway, Inc., 308 F.2d 79 (4th Cir. 1962). The *Spruill* decision involved the death of a 14 month old infant. The verdict was for $20,000. In R. F. Trant, Inc. v. Upton, 159 Va. 355, 165 S.E. 404 (1932), $10,000 was awarded for the death of a 4 year old girl.

37 Chick Transit Corp. v. Edenton, 170 Va. 361, 196 S.E. 648 (1938).

38 *See* Jessee v. Slate, 196 Va. 1074, 86 S.E.2d 821 (1955), where evidence was admitted that the decedent was receiving at his death a sum each month in Social Security payments.

39 Wilson v. Whittaker, 207 Va. 1032, 154 S.E.2d 124 (1967). For a discussion of the right to punitive or exemplary damages in automobile wrongful death cases, *see* Annot., 62 A.L.R.2d 813 (1958).

40 Holley v. The Manfred Stansfield, 186 F. Supp. 805 (E.D. Va. 1960); Conrad v. Thompson, 195 Va. 714, 80 S.E.2d 561 (1954).

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

42 Walthew v. Davis, 201 Va. 557, 111 S.E.2d 784 (1960); Burks v. Webb, 199 Va. 296, 99 S.E.2d 629 (1957).

tancy could be estimated by the jury and the production or introduction of mortality tables was permissible but not required.[43]

Although evidence of the loss sustained by the decedent's beneficiaries was admissible regarding the quantum of damages, and the number and ages of those surviving could be shown,[44] evidence of the physical condition of the beneficiaries, whether they were weak or strong, was considered improper.[45] Of more significance, perhaps, for the purpose of the present discussion, evidence of the pecuniary condition, whether rich or poor, of either the deceased or his survivors was not considered admissible with regard to the amount of damages to be awarded.[46] Once the jury had returned its verdict settling the amount of damages awarded, evidence of the physical or pecuniary condition of the decedent's beneficiaries was permitted and considered material on the question of the apportionment of such damages. In such cases, the trial court, upon request, was directed to postpone the receipt of evidence of the physical or pecuniary condition of the beneficiaries until after the jury had established the quantum of damages.[47] If within the statutory limit, the jury's verdict assessing damages was considered final and conclusive,[48] not to be set aside or disturbed unless there could be a clear showing made that it was a result of passion, prejudice or corruption.[49]

Until 1968 the bench and bar could look to and rely upon a simple and direct wrongful death statute relatively unchanged since its birth in 1871 which had been reviewed, explained and interpreted in a consistent manner by the Supreme Court of Appeals of Virginia. As a result, there was little anxiety, confusion or controversy as to what was provable in a wrongful death action, what damages were recoverable, and which persons were entitled to share in the jury's award.

IV. Analysis of the 1968 Amendment

A cursory examination of the 1968 amendment to Section 8-636 might

[43] Gough v. Shaner, 197 Va. 572, 90 S.E.2d 171 (1955); Norfolk & W. Ry. v. Phillips, 100 Va. 362, 41 S.E. 726 (1902).

[44] Baltimore & Ohio R.R. v. Sherman, 71 Va. (30 Gratt.) 602 (1878).

[45] Crawford v. Hite, 176 Va. 69, 10 S.E.2d 561 (1940).

[46] *See* Matthews v. Hicks, 197 Va. 112, 87 S.E.2d 629 (1955); Colonial Coal Co. v. Gass, 114 Va. 24, 75 S.E. 775 (1912); Chesapeake & O. Ry. v. Ghee, 110 Va. 527, 66 S.E. 826 (1910).

[47] Crawford v. Hite, 176 Va. 69, 10 S.E.2d 561 (1940).

[48] *See* Highway Express Lines, Inc. v. Fleming, 185 Va. 666, 40 S.E.2d 294 (1946); Chick Transit Corp. v. Edenton, 170 Va. 361, 196 S.E. 648 (1938).

[49] Harris v. Royer, 165 Va. 461, 182 S.E. 276 (1935).

lead the reader to believe that its purpose was to increase the amount of damages recoverable in a wrongful death action. There is considerable doubt that this result was achieved in all cases.

Instead of a general award of damages considered fair and just in an amount not in excess of $40,000, the jury now may award such damages for solace as may seem fair and just not exceeding $25,000. Since solace has been singled out as a special and separate item of damages, it would appear that recovery for this element of damages is exclusively a recovery for the sorrow and grief of the decedent's survivors and cannot be expanded to include other matters such as loss of the decedent's care, attention and society. Another problem may exist. Section 8-638 of the Code, not amended in 1968, still provides that any amount recovered shall be assets in the hands of the personal representative to be disposed of according to law in the absence of named statutory beneficiaries. However, the new Section 8-636 provides that no recovery shall be assets of the decedent's estate. In the absence of surviving class beneficiaries, can there be any recovery on behalf of more remote next of kin for solace? Presumably, prior precedent will be followed and the next of kin will not be denied compensation for solace. A convincing argument certainly can be made that the new language of Section 8-636 merely protects any recovery from creditors and was not intended to limit a recovery of solace to those specifically mentioned in the preferred and deferred classes of beneficiaries. But if this argument is accepted, little reason can be seen for the inclusion of new language.

The problems of recovery for solace are minor ones, as are those pertaining to the recovery of funeral, ambulance, medical and hospital expenses, although the direction that the personal representative apportion any recovery for hospital, medical and ambulance expenses could cause difficulty should the jury not see fit to award the full amount of the expenses proven at the trial.

The major difficulty with the 1968 amendment to Section 8-636 will arise when damages in excess of the $25,000 recoverable for solace are sought. Normally, when a statute provides for recovery of financial or pecuniary loss, proof of dependency is not a prerequisite.[50] Prior to 1968, this was the rule in Virginia.[51] However, the new statute has made dependency a condition precedent to recovery of any part of the $50,000 which may be awarded for financial or pecuniary loss. If it can be shown that

[50] *See* S. SPEISER, RECOVERY FOR WRONGFUL DEATH, 582-83 (1966).

[51] Wolfe v. Lockhart, 195 Va. 479, 78 S.E.2d 654 (1953); Colonial Coal Co. v. Gass, 114 Va. 24, 75 S.E. 775 (1912).

the deceased was a wage-earning head of a household with a dependent wife and children, little trouble will be encountered; but if he was unemployed, ill, infirm, senile, or an infant and no one was actually dependent upon him, at least in the sense of economic dependency, then a serious problem will be encountered in the recovery of any amount in excess of the damages allowable for solace.

The accepted definitions of dependent and dependency all appear to have a financial connotation, whether in a legal[52] or a non-legal[53] context. The decided cases also have considered dependency to be measured by an economic yardstick. Thus, it is held that the dependency must be present and actual, amounting to a want or need on the part of the decedent; that is, an actual dependence coupled with a reasonable expectation of support or a reasonable claim to support.[54] It is not anticipated dependency or future expectation of pecuniary loss that counts but rather the condition of dependency existing at the time of the decedent's death. An excellent and comprehensive analysis of the type of dependency needed under wrongful death statutes specifically requiring its existence is found in the case of *Duval v. Hunt*,[55] where the court stated:

> We think that when the suit is brought by a person who bases his right to recover upon the fact that he is dependent upon the deceased for support, then he must show, regardless of any ties of relationship or strict legal right to such support, that he or she was, either from the disability of age, or nonage, physical or mental incapacity, coupled with the lack

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[52] BLACK'S LAW DICTIONARY 524 (4th ed. 1951), defines "dependency" as "[a] relation between two persons, where one is sustained by another or looks to or relies on aid of another for support or for reasonable necessaries consistent with dependent's position in life."

"Partial dependency" is defined in BALLENTINE'S LAW DICTIONARY 915 (3d ed. 1969) in the following manner:

> The status of a person who depends upon another for part of his support and maintenance. The status of a person who has some means but not sufficient for his support.

[53] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 604 (1968).

[54] *See* Burgh v. Carroll, 217 So. 2d 353 (Fla. App. 1969); Wadsworth v. Friend, 201 So. 2d 641 (Fla. App. 1967).

[55] Duval v. Hunt, 34 Fla. 85, 90, 15 So. 876, 881 (1894). In Rust v. Holland, 15 Ill. App. 2d 369, 146 N.E.2d 82 (1957), the court defined "dependency" as follows:

> The word 'dependency' implies a present existing relation between two persons where one is sustained by another or looks to or relies on the aid of another for support or for reasonable necessaries consistent with the dependent's position in life.

Id. at 371, 146 N.E.2d at 84.

> of property means, dependent in fact upon the deceased for a support. There must be, when adults claim such dependence, an actual inability to support themselves, and an actual dependence upon someone else for support, coupled with a reasonable expectation of support, or with some reasonable claim to support, from the deceased.

The circumstances must be sufficient to establish that on the date of the decedent's death there was some degree of dependency and necessitous want on the part of the claimant together with a recognition of that necessity on the part of the deceased. Although there are cases which hold that a statute establishing a legal obligation of support may provide dependency and proof of pecuniary loss,[56] the majority view is that dependency, under wrongful death statutes, means dependency in fact rather than a strict legal dependency or legal requirement of support.[57]

Although the dependency must be actual rather than legal, it is not necessary to show that the claimant was totally dependent upon the deceased. A partial dependency will suffice as long as it consists of substantial contributions by the decedent and corresponding reliance upon such contributions.[58] Even a relatively small contribution in terms of overall need, if made on a regular basis and if required and relied upon by the beneficiary for his or her maintenance, will establish partial dependency. However, occasional gifts or contributions will not suffice.[59] Payments for board, lodging or other accommodations and mere gifts, donations, or acts of generosity by children to parents, standing alone, are not sufficient to establish dependency on the

[56] Thompson v. Board of Rd. Comm'rs, 357 Mich. 482, 98 N.W.2d 620 (1959). *But cf.* Noble v. Edberg, 252 Iowa 135, 106 N.W.2d 102 (1960).

[57] *See, e.g.*, Novak v. Chicago & Calumet Dist. Transit Co., 235 Ind. 489, 135 N.E.2d 1 (1956); MacDonald v. Quimby, 350 Mich. 21, 85 N.W.2d 157 (1957); Domijan v. Harp., 340 S.W.2d 728 (Mo. 1960); Wente v. Shaver, 350 Mo. 1143, 169 S.W.2d 947 (1943).

[58] *See* Bohrman v. Pennsylvania R.R., 23 N.J. Super. 399, 93 A.2d 190 (1952); Joski v. Short, 1 Wash. 2d 454, 96 P.2d 483 (1939); Estes v. Shulte, 146 Wash. 688, 264 P. 990 (1928).

[59] *See In re* Updike's Heirs, 282 P.2d 230 (Okla. 1955); Turon v. J. & L. Constr. Co., 8 N.J. 543, 86 A.2d 192 (1952). In the *Updike* case, it was asserted that the deceased's grandsons were her dependents. The evidence disclosed that the deceased was very thoughtful of and generous to them, that she had stayed with and taken care of them when the occasion demanded and that she had made numerous gifts of clothing to them. In rejecting the claim that the grandsons were the deceased's dependents, the court said:

> But, it takes much more than that to establish dependency. The children lived with and constituted the family of their father and mother. He, the father, was president of the company which was doing a good business at the time of his death and he received no financial aid from his mother other than the clothes which she gave the children.

In re Updike's Heirs, 282 P.2d 230, 232 (Okla. 1955).

part of the recipient.[60] In one case the court, in declining to find any dependency where a 25 year old son had lived separate and apart from his parents, had visited them a few times each year and had occasionally made cash gifts to them. The court commented:

> This evidence does not, in our opinion, establish such a support or dependency as is contemplated by the statute. It shows nothing more than such gifts as countless sons occasionally bestow upon their parents, with no thought of dependency, nor that it is a gift of necessity. Our statute means something more, while we would not give it such a strict construction as to say it means wholly dependent, or that the parent must have no means of support or livelihood other than the deceased, such a construction being too harsh and not in accordance with the humane purpose of the act. Nevertheless, there must be some degree of dependency, some substantial dependency, a necessitous want on the part of the parent, and a recognition of that necessity on the part of the child.[61]

Contributions in the form of money or negotiable securities are not essential. It is sufficient if the dependency rests upon the performance by the deceased of some service or duty for the beneficiary.[62] In such cases, the evidence should show the need for the service together with the performance of it on a regular basis. The degree of the dependence is not as important as the fact that it is more than the mere receipt of occasional benefits and services.[63] The duties performed or services rendered must be in the nature of needed or required assistance and there must be an expectation of the continuation of such services and a reliance upon them by the recipient. In this connection, evidence of the financial condition of the beneficiaries and of their health and physical condition at the time of the decedent's death may be admissible at the trial prior to a determination of the amount of the award either to establish dependency or pecuniary loss or both.[64] This, of course, would represent a distinct departure from prior case law in Virginia on this point.

As indicated, the dependency required, whether total or partial or in the

[60] *See* Kirkpatrick v. Bowyer, 131 Ind. App. 86, 169 N.E.2d 409 (1960); Bortle v. Northern Pac. Ry., 60 Wash. 552, 111 P. 788 (1910).

[61] Bortle v. Northern P. Ry., 60 Wash. 552, 553, 111 P. 788, 789 (1910).

[62] Hogan v. Williams, 193 F.2d 220 (5th Cir. 1951), *cert. denied,* 343 U.S. 942 (1952); Savannah Elec. Co. v. Thomas, 30 Ga. App. 405, 118 S.E. 481 (1923); Carianni v. Schwenker, 38 N.J. Super. 350, 118 A.2d 847 (1955); Clement v. Cummings, 212 Ore. 161, 317 P.2d 579 (1957).

[63] Bohrman v. Pennsylvania R.R., 23 N.J. Super. 399, 93 A.2d 190 (1952).

[64] *See* Paragon Ref. Co. v. Higbea, 220 Ohio App. 440, 153 N.E. 860 (1925); Cincinnati St. Ry. v. Altemeier, 60 Ohio St. 10, 53 N.E. 300 (1899).

form of cash contributions, services rendered or duties performed, must be of an economic nature. Emotional or psychological dependency, even if clearly established, will not meet the test.[65] Dependency predicated upon the deceased's companionship, attention and society or upon his advice, instruction and physical, moral and intellectual training and guidance will not qualify.

If recovery of damages in excess of $25,000 is sought for the wrongful death of a child, it must be shown that the deceased child actually contributed to his parents in either money or services in order to establish dependency and financial or pecuniary loss.[66] The difficulty is illustrated by the situation presented in *Grant v. Libby, McNeill & Libby,*[67] where a mother sought damages for the death of her 14 year old daughter. The deceased's father had deserted his family and her mother had supported herself and her two daughters by domestic service and seasonal farm work. Evidence was produced to show that the deceased on several occasions had taken babysitting jobs and had delivered the $1.00 to $1.50 earned to her mother. She had also done some farming work but had earned little. The daughter was shown to be very affectionate and a bright scholar, her intention being to finish high school and then to become a stenographer and assist in the support and maintenance of her mother and younger sister. The court in refusing to find dependency, quoted from an earlier Washington case with respect to claims of prospective or future dependency:

> The right of recovery in this class of cases depends upon a condition,

[65] A somewhat different view is expressed in Lambert, *Comments on Recent Important Personal Injury (Torts) Cases,* 18 NACCA L.J. 288, 378 (1956), regarding the damages which should be recoverable for the loss of a child:

> The death of a minor child is a deep emotional wounding, and it may be admitted that there is a decided tendency for the law to compensate for the grievous injury to family feelings involved in the death of such children or, phrased otherwise, to place a money value upon the lost companionship, deprived presence, and the co-adventuring implicit in the parent-child relationship. This enlarged view suggests that these deprivations are 'services,' financially compensable, lost to the survivors of the deceased child.

See also Corman v. Weg Dial Tel. Inc., 194 Kan. 783, 402 P.2d 112 (1965).

[66] Thompson v. Board of Rd. Comm'rs, 357 Mich. 482, 98 N.W.2d 620 (1959). The case involved a 15 year old girl who had worked and contributed $5.00 per week to her parents and who performed cooking, washing and general housework for the family to the extent of 4 to 6 hours of work each day. Dependency was considered established.

Prior to 1952 in Georgia a father could not maintain an action for the death of an infant child who was at the time of death incapable of rendering the father any service. Kehely v. Kehely, 200 Ga. 41, 36 S.E.2d 155 (1945). *See generally* Annot., 14 A.L.R.2d 485 (1950).

[67] 145 Wash. 31, 258 P. 842 (1927).

> and not upon a promise—if it may be so called—made by the deceased—a promise that has been made by all boys from the time they were old enough to fashion their affection into words, and repeated until the course of nature leads them from the family root tree to set up an establishment of their own. Such utterances are not evidence of anything, unless they have something to operate on. Upon a showing of dependence, absolute or partial, such words may be considered in connection with the natural impulse which prompts every child to shield a parent from the wants and perils of age. A child might indeed remain with and, in a sense, care for, his parents in old age, and yet they might not be dependents in the sense in which that term is used in the law. It is a pretty sentiment, but no one is deceived by it but the child, and his deception is usually short-lived. . . . Such pictures of filial piety are inestimable moral examples, beautiful to contemplate, but the law has no standard by which to measure their loss.[68]

Even when children seek to recover for the wrongful death of a parent, the relationship of parent and child, standing alone, will not suffice, it being necessary to show that the child in fact was dependent upon the parent at the time of the parent's death.[69]

If the deceased was incompetent or mentally retarded or a patient in a mental hospital, there can be no recovery where dependency and pecuniary loss are required unless it can be shown that his eventual recovery and a resumption of his support were probable.[70] In one instance involving the death of a child while confined in a mental hospital, recovery of damages on behalf of the child's mother was denied, since her right to recover was contingent upon a showing of actual dependency upon the child for support and actual contribution to the mother's support by the child at the time of the wrongful death.[71] It was pointed out that although the child may have contributed to his mother's support prior to his confinement, at the date of his death he was making no contribution and his condition and confinement were of uncertain duration.

The decided cases in this area may seem to reach harsh and unjust results in many situations. However, it must be remembered that the basis for the denial of recovery is the language of the wrongful death acts requiring proof

[68] Kanton v. Kelley, 65 Wash. 614, 616, 118 P. 890, 892 (1911).

[69] *See* Rust v. Holland, 15 Ill. App. 2d 369, 146 N.E.2d 82 (1957). The same result obtains in workmen's compensation cases where dependency is a statutory requirement. Copple v. Bowlin, 172 Neb. 467, 110 N.W.2d 117 (1961); Kosmicki v. Aspen Drilling Co., 76 N.M. 234, 414 P.2d 214 (1966).

[70] *See* Lange v. United States, 179 F. Supp. 777 (N.D.N.Y. 1960); Brawner v. Bussell, 50 Ga. App. 843, 179 S.E. 231 (1935).

[71] Brawner v. Bussell, 50 Ga. App. 843, 179 S.E. 231 (1935).

of economic dependency. The requirement of dependency is not limited to wrongful death statutes but has found favor and acceptance in related areas. Under the Federal Employees Liability Act,[72] the recovery of damages by the deceased employee's next of kin is conditioned upon dependency being both pleaded and proven,[73] and the term pecuniary loss is not interpreted as encompassing the loss of the deceased's society or companionship.[74] The Jones Act,[75] enacted to benefit the survivors of seamen, provides that the deceased's personal representative may maintain an action for damages for his death. Again, where next of kin are concerned, dependency must be shown.[76] The Death on The High Seas by Wrongful Act statute[77] permits a decedent's personal representative to maintain a suit for damages for the benefit of his "wife, husband, parent, child, or dependent relative." Proof that relatives were at least partially financially dependent upon the deceased at the time of his death is essential.[78] Workmen's compensation statutes often require proof of dependency and, where required, it must be shown as actual dependency existing at the time of the deceased worker's death.[79] Under Virginia's Workmen's Compensation Act,[80] dependency upon the deceased employee is made a criterion of recovery. Section 65.1-66 sets forth those persons conclusively presumed to be wholly dependent, and its provisions control regardless of whether or not there is evidence of actual dependency.[81] In the absence of these conclusive statutory presumptions, Section 65.1-67 provides:

> In all other cases questions of dependency in whole or in part shall be determined in accordance with the facts as the facts are at the time of the accident; but no allowance shall be made for any payment made in lieu of board and lodging or services and no compensation shall be allowed unless the dependency existed for a period of three months or more prior to the accident.

It should be noted that under Section 65.1-67, dependency rests not upon

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[72] 45 U.S.C.A. §§ 51-59 (1954).

[73] Durham v. Southern Ry., 254 F. Supp. 813 (W.D. Va. 1966); Hopps v. Chesnut, 324 Mich. 256, 36 N.W.2d 908 (1949).

[74] Chafin v. Norfolk & W. Ry., 80 W. Va. 703, 93 S.E. 822 (1917).

[75] 46 U.S.C.A. § 688 (1958).

[76] Bailey v. Baltimore Mail S.S. Co., 43 F. Supp. 243 (S.D.N.Y. 1941).

[77] 46 U.S.C.A. § 761 (1958).

[78] First Nat. Bank v. National Airlines, Inc., 288 F.2d 621 (2d Cir.), *cert. denied*, 368 U.S. 859 (1961); *In re* Risdal & Anderson, Inc., 291 F. Supp. 353 (D. Mass. 1968).

[79] Copple v. Bowlin, 172 Neb. 467, 110 N.W.2d 117 (1961); Kosmicki v. Aspen Drilling Co., 76 N.M. 234, 414 P.2d 214 (1966).

[80] VA. CODE ANN. §§ 65.1-65 to -67 (Cum. Supp. 1970).

[81] Basham v. R. H. Lowe, Inc., 176 Va. 485, 11 S.E.2d 638 (1940).

relationship or presumption, but upon the facts as they existed at the time of death.[82] In determining what type and degree of dependence satisfies the statutory requirement, the Virginia workmen's compensation cases have held that to establish dependency it must be shown that the deceased employee contributed with some degree of regularity to the person claiming to be a dependent and that such contributions were relied upon by the claimant for reasonable necessaries consistent with his or her station in life.[83]

To summarize, the criteria for recovery of financial or pecuniary loss has changed radically. Reliance upon a loss of society, companionship and beneficial instruction and guidance will be misplaced. To qualify as a beneficiary entitled to an award for financial or pecuniary loss, one must have been dependent upon the decedent in at least some degree for financial assistance or its equivalent in services at the time the wrongful death occurred.

V. The Post–1968 Wrongful Death Action

When the cause of action arises subsequent to July 1, 1968, the motion for judgment should be more detailed and specific. Good pleading now requires that the plaintiff allege that there was a funeral bill in excess of $500.00 and that there were other specified hospital, medical and ambulance services expenses. Solace in the amount of $25,000 should be asked for separately and the beneficiaries listed if they fall within either the preferred or deferred classes. Dependency might well occupy a separate paragraph with each dependent listed and an allegation that because of such dependency the dependent or dependents are entitled to the sum of $50,000 which equals the financial or pecuniary loss sustained.

If the fact of dependency is to be in issue, consideration should be given by defense counsel to disposing of this controversy prior to the trial date, or, if at the trial, in the absence of the jury. This, of course, will be possible only where the evidence is clear and uncontradicted and where dependency does not present an issue of fact for the jury. If the plaintiff can present a factual issue regarding dependency, then the jury would hear evidence of the physical and pecuniary condition of the alleged dependents prior to making its award. This might benefit the dependents and increase the amount of the verdict but would not be welcomed by the defense. If dependency is not established sufficiently, a motion to strike the evidence regarding any recovery of the $50,000 should be successful. Even so, if the

[82] Commonwealth v. McGuire, 188 Va. 444, 50 S.E.2d 284 (1948); Virginia Elec. & Power Co. v. Place, 150 Va. 562, 143 S.E. 756 (1928).

[83] Glassco v. Glassco, 195 Va. 239, 77 S.E.2d 843 (1953). *See also* Dunivan v. Hunter, 197 Va. 194, 89 S.E.2d 44 (1955).

jury has heard evidence of the physical or pecuniary condition of alleged dependents, it could be influenced to some extent in its award of solace if the person claiming to be a dependent also qualifies as a statutory beneficiary or next of kin.

A suggested jury instruction for use under the new statute is set forth in Appendix A in the hope that it may be of some value to trial counsel.

It should be noted that the jury may be confused as to its function since it is required to distribute all or any part of the $50,000 but is given an option with respect to the $25,000 awardable for solace. A form verdict may be helpful and may serve to avoid confusion and controversy. A suggested form verdict is set forth in Appendix B. It may be difficult during the trial to keep the proof of damages for solace separate from the proof of damages for pecuniary loss to dependents. Perhaps the jury, being sensible laymen, will have an easier time with this than will the courts and the bar.

VI. 1970 Proposed Legislative Amendments

Efforts were made during the 1970 session of the Virginia General Assembly to amend Section 8-636. One proposed bill[84] would have amended and reenacted Section 8-636 in the same form as it existed prior to the 1968 change, the only difference being that the proposed bill included no statutory limit on the amount of damages recoverable. Another proposed amendment[85] would have reverted to the pre-1968 language of Section 8-636, imposed a statutory limit of $75,000, specified that in the absence of named statutory beneficiaries any award should be distributed to more remote kindred according to the law of descent and distribution, and allowed a recovery of funeral expenses not exceeding one thousand dollars and the actual hospital, medical and ambulance expenses incurred by the decedent as a result of the wrongful act. Both of these bills would have permitted the jury again to award such damages as it deemed fair and just under the evidence presented. Neither bill passed the Virginia House or Senate.

One bill,[86] patterned after the 1969 North Carolina Wrongful Death Statute, did pass the House. The language of the pre-1968 Section 8-636 was reenacted with a statutory limit of $100,000. The jury was permitted to award damages based upon what might seem fair and just, but the bill went considerably further and specified as follows:

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[84] Va. House Bill No. 344 (1970).

[85] Va. House Bill No. 396 (1970).

[86] Committee Amendment In The Nature of a Substitute For Va. House Bill No. 344 (1970).

(a) Damages recoverable for death by wrongful act include:
  (1) Expenses for care, treatment and hospitalization incident to the injury resulting in death.
  (2) Compensation for pain and suffering of the decedent.
  (3) The reasonable funeral expenses of the decedent.
  (4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected:
    a. Net income of the decedent.
    b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered.
    c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered.
  (5) Sorrow, mental anguish, and solace.

(b) All evidence which reasonably tends to establish any of the elements of damages included in subsection (a), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act.

The Senate rejected the form of this House bill, perhaps on the grounds that its terms would be to generous to prospective plaintiff's counsel. Whatever the reason for the rejection of each of the proposed amendments, the 1970 General Assembly failed to take advantage of an opportunity to return to the world of fair and just damages for those aggrieved by wrongful death and to eliminate actual economic dependency as a condition precedent to an award in excess of $25,000. Perhaps during the 1972 session, some newly revised and more acceptable amendment will obtain the endorsement of both houses of the Virginia Legislature.

VII. Conclusion

Although ostensibly the 1968 amendment to Section 8-636 increases the statutory damage limit from $40,000 to $75,000, the recovery of damages now may be more difficult to obtain. The amendment, which was designed to liberalize recovery, has created more problems than it has solved and in practice often will impair rather than help those seeking recovery of damages for wrongful death. An amendment in 1972 is needed, and hopefully, will be forthcoming.

APPENDIX A

THE COURT INSTRUCTS THE JURY that if from the evidence and the other instructions of the Court you find your verdict in favor of the plaintiff, you may award damages with reference to the following:

1. The actual funeral expenses of the decedent, not exceeding $500.00, and the actual hospital, medical and ambulance service expenses incurred by the decedent as a result of the defendant's act.
2. Such damages as to you may seem fair and just by way of solace for sorrow, suffering and mental anguish occasioned by the death of the decedent to the following persons, not to exceed a total of $25,000.00:
   (list statutory beneficiaries and relationship to decedent)

The jury may, but are not required to, direct in what proportion any such damages for solace shall be distributed to such persons.

3. Such further damages, not exceeding a total of $50,000.00, as shall equal the financial or pecuniary loss, if any, sustained by the dependent or dependents of the decedent.
   The jury shall direct in what proportion any such damages for financial or pecuniary loss shall be distributed to such dependents.

APPENDIX B

We, the jury, on the issue joined, find in favor of the plaintiff and affix the damages as follows:

1. $..... actual funeral expenses (not to exceed $500.00); and
   $..... actual hospital, medical and ambulance service expenses; and
2. $..... by way of solace to the following (List statutory beneficiaries and relationship).

We elect to distribute such sum as follows:

Name	*Relationship*	*Amount*
.....	.....	$.....
.....	.....	$.....
.....	.....	$.....

3. $..... by way of financial or pecuniary loss sustained by the following dependent or dependents of the decedent.

This sum shall be distributed as follows:

Name of Dependent	*Amount*
.....	$.....
.....	$.....
.....	$.....

.....

Foreman