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## RECOVERY FOR WRONGFUL DEATH IN VIRGINIA. THE EFFECT OF "DEPENDENCY" AND "PECUNIARY LOSS"

In 1968, substantial changes occurred in the statute allowing recovery for wrongful death in Virginia.<sup>1</sup> The General Assembly established "dependents" as a new class of persons, entitled to recover up to a maximum of \$50,000 in proportion to their "pecuniary loss."<sup>2</sup> The statute also designates a class of persons as beneficiaries and allows them to recover an additional \$25,000 for solace.<sup>3</sup> Thus, the total amount potentially available to persons who qualify as both a dependent and a statutory beneficiary is \$75,000.

The statutory changes are of great importance to anyone seeking damages for wrongful death.<sup>4</sup> Both the persons eligible to recover and the criteria for recovery differ from the old provisions. With the revisions in 1968, dependency is "a condition precedent to recovery for financial or pecuniary loss."<sup>5</sup> Past decisions are of little value in ascertaining the meaning of "dependents" and "pecuniary loss." Indeed, since the beneficiaries entitled to damages were named in the former statute, dependency was not an issue.

Although the meanings of dependent and pecuniary loss are not fully settled, a process of judicial clarification in Virginia has begun with several decisions since 1968. The most important of these cases is *Pugh v. Yearout*,<sup>6</sup> a case relied upon in subsequent decisions dealing with the question of pecuniary loss and dependency.

In *Pugh*, the decedent, a housewife who earned a small portion of the family's income, was survived by a husband and young daughter. Her primary contribution to the family was the performance of various household

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<sup>1</sup> Before 1968, the statutory provisions for wrongful death in Virginia differed from most wrongful death acts, including the original Lord Campbell's Act. Virginia permitted a designated class of beneficiaries to recover for sorrow and lack of decedent's society and attention instead of limiting recovery only to pecuniary loss suffered by dependents. Within the conservative limit of \$40,000, judicial interpretation of the statutory requirement that damages be "fair and just" provided a liberal basis for recovery. *Breeding v. Johnson*, 208 Va. 652, 159 S.E.2d 836 (1968); *Matthews v. Hicks*, 197 Va. 112, 87 S.E.2d 629 (1955); *Craig, Damages Recoverable for Wrongful Death*, 5 U. RICH. L. REV. 213 (1971) [hereinafter cited as *Craig*]; Note, *Wrongful Death Damages in Virginia*, 12 WM. & MARY L. REV. 396 (1970) [hereinafter cited as 12 WM. & MARY L. REV.].

<sup>2</sup> VA. CODE ANN. § 8-636 (Cum. Supp. 1972).

<sup>3</sup> In addition, the statute permits recovery for funeral expenses up to \$500 and actual ambulance service, hospital, and medical expenses. *Id.*

<sup>4</sup> Two articles, published shortly after the changes, discuss in detail the implications of the new provisions. *Craig, supra* note 1 and 12 WM. & MARY L. REV., *supra* note 1.

<sup>5</sup> *Craig, supra* note 1, at 223.

<sup>6</sup> 212 Va. 591, 186 S.E.2d 58 (1972).

chores and duties, the cost of equivalent services being \$50 to \$60 a week. Despite the defendant's objections that the facts did not establish a dependency relationship and showing of pecuniary loss, decedent's husband and child were allowed to recover as dependents.

While other cases have developed the court's position in other areas of dependency,<sup>7</sup> *Pugh* is the most significant because it is a definite attempt by the Virginia court to establish standards for dependency and pecuniary loss. In dealing with the issue of dependency, the court clearly differentiates dependents from the beneficiaries entitled to an award for solace.<sup>8</sup> Today, beneficiaries who may recover for solace are the same persons eligible for an award under the old statute.<sup>9</sup> A beneficiary may qualify and participate in an award merely by showing that he was within the class of persons the statute designates as beneficiaries.<sup>10</sup> In contrast to this liberal approach, *Pugh* strictly defines the concept of dependency. A showing of actual dependency is necessary, with dependency being a question of fact determined by the jury based upon the "factual circumstances existing at the time of death."<sup>11</sup> As a result, dependents may be part or all of the group recovering for solace or they may be entirely different persons.<sup>12</sup>

In addition, the decision narrows the scope of pecuniary loss. The old view of pecuniary loss, interpreted liberally to include the decedent's care, attention, and society,<sup>13</sup> has been reduced to a strictly monetary connotation. The court permits damages for pecuniary loss only where a person would benefit financially "by the continuing life of the decedent."<sup>14</sup> How-

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<sup>7</sup> *Patton v. Rose*, 213 Va. 36, 189 S.E.2d 385 (1972); *Denby v. Davis*, 212 Va. 836, 188 S.E.2d 226 (1972); *Claar v. Culpepper*, 212 Va. 771, 188 S.E.2d 86 (1972).

<sup>8</sup> 212 Va. at 595, 186 S.E.2d at 62.

<sup>9</sup> Compare VA. CODE ANN. § 8-636 (1957) with VA. CODE ANN. § 8-636 (Cum. Supp. 1972).

<sup>10</sup> If ever a claimant's status as beneficiary became an issue, the court has tried whenever possible to decide favorably for the claimant. In *Matthews*, the court classified the decedent's wife as a beneficiary, even though the couple was separated and she was involved in an adulterous relationship with another man. 197 Va. 112, 120-21, 87 S.E.2d 629, 634-35 (1955). Decisions have also included as beneficiaries relatives of the halfblood and parents of the decedent who have remarried. *Wolfe v. Lockhart*, 195 Va. 479, 78 S.E.2d 654 (1953).

<sup>11</sup> *Pugh v. Yearout*, 212 Va. at 595, 186 S.E.2d at 62.

<sup>12</sup> Although the decision required proof of actual dependency, it did not preclude recovery based on partial dependency. It rejected the defendant's argument that the decedent's husband and child were not dependents since the husband earned a salary used to support himself and his child. The court reasoned, "[p]artial dependency may exist even though a dependent could subsist without the contribution made by the deceased." *Id.*

<sup>13</sup> *Breeding v. Johnson*, 208 Va. 652, 654, 159 S.E.2d 836, 842 (1968).

<sup>14</sup> 212 Va. at 595, 186 S.E.2d at 62.

ever, the court does consider services "that relate to and have monetary value" as financial benefits.<sup>15</sup>

### I. DEPENDENCY

In *Pugh v. Yearout*, Virginia follows the majority of jurisdictions in which dependency is a prerequisite for recovery for wrongful death. By permitting recovery based upon partial dependency, Virginia adopts the more liberal majority view.<sup>16</sup> The court rejects a more restrictive approach defining dependency in terms of actual inability to support one's self.<sup>17</sup> Under the Virginia view, a substantial contribution in money or services along with a reasonable expectation of its continuance is sufficient to establish dependency.<sup>18</sup>

Likewise, the requirement of actual dependency based upon a factual rather than a legal determination of dependency follows the reasoning of a majority of courts in the United States.<sup>19</sup> An actual relationship of dependency based upon reliance by the claimant is necessary,<sup>20</sup> and legal dependents may be excluded because a lineal relationship raises no presumption of dependency.<sup>21</sup>

The majority view of dependency, while logically correct, is unfortunate in that it emphasizes factual questions involving the monetary contributions of the decedent at the expense of the equitable considerations that originally motivated wrongful death statutes. The court is left in the position of deciding how far, for a given set of facts, it wishes to go in interpreting monetary contributions as sufficient to establish a dependency relationship. As a result, recovery is often denied unless the court is willing to view dependency in a liberal and often unnatural context.<sup>22</sup>

Decisions in Virginia subsequent to *Pugh* illustrate the difficulties involved in following a strictly financial approach in determining the existence of dependents. To recover, a claimant must establish a reasonable probability

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<sup>15</sup> *Id.*

<sup>16</sup> See e.g., *Atlanta & C. Air-Line Ry. v. Gravitt*, 93 Ga. 369, 20 S.E. 550 (1894); *Carianni v. Schwenker*, 38 N.J. Super. 350, 118 A.2d 847 (1955); 22 AM. JUR. 2d *Death* § 29 (1965).

<sup>17</sup> *Wadsworth v. Friend*, 201 So. 2d 641 (Fla. 1967).

<sup>18</sup> *Craig*, *supra* note 1, at 225; 12 WM. & MARY L. REV., *supra* note 1, at 406.

<sup>19</sup> *Bohrman v. Pennsylvania R.R.*, 23 N.J. Super. 399, 93 A.2d 190 (1952); 22 AM. JUR. 2d *supra* note 16.

<sup>20</sup> *Bohrman v. Pennsylvania R.R.*, 23 N.J. Super. 399, 93 A.2d 190 (1952).

<sup>21</sup> *Rust v. Holland*, 15 Ill. App. 2d 369, 146 N.E.2d 82, 67 A.L.R.2d 739 (1957).

<sup>22</sup> In *Thompson v. Board of Rd. Comm'rs*, 357 Mich. 482, 98 N.W.2d 620 (1959), for example, the parents of a fifteen year old girl recovered for her death as dependents. The decedent presently earned approximately \$5 a week as a babysitter which she gave to the family. Her promise to assist in the support of the family after she finished school and reached the age of 21 was sufficient to establish a dependency relationship.

of pecuniary benefit from the continuing life of the deceased which, in Virginia, includes services having pecuniary value.<sup>23</sup> The services, however, must be clearly related to an exact monetary value; merely showing that services existed will not establish dependency.<sup>24</sup> Even when the services clearly are valuable and go beyond companionship or attention, the failure to establish their exact monetary value may prevent recovery.<sup>25</sup>

The financial nature of dependency excludes other types of dependency such as legal, psychological, and emotional dependency that could be potential sources of recovery.<sup>26</sup> Children or the spouse of the deceased may, in effect, be denied recovery whenever they have an independent source of support even though they have a close relationship with the deceased involving reliance and moral dependence. For example, three teenage children with one parent already deceased were unable in Virginia to recover for the death of the second parent, their father.<sup>27</sup> The father was unable to work because of a disability, and the family was receiving social security benefits and a Veterans' Administration pension. Because these benefits would continue after his death, the court did not consider the children to be dependents, since they suffered no financial loss from his death.

Finally, dependency as viewed in Virginia places undue emphasis upon the attributes of the decedent including his health, physical condition, financial status, and age. Recovery for the death of persons such as children, the elderly, and mental incompetents is difficult.<sup>28</sup> In the case of children, unless the facts clearly establish support for the family,<sup>29</sup> or unless the court is willing to adopt a liberal interpretation of the criteria for dependency,<sup>30</sup> recovery will be denied.<sup>31</sup> Neither of these circumstances has occurred

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<sup>23</sup> *Bohrman v. Pennsylvania R.R.*, 23 N.J. Super. 399, 93A.2d 190(1952); see, e.g., *Craig*, *supra* note 1, at 226; 12 WM. & MARY L. REV., *supra* note 1, at 406.

<sup>24</sup> Compare *Pugh v. Yearout*, 212 Va. 591, 186 S.E.2d 58 (1972) with *Claar v. Culpepper*, 212 Va. 771, 188 S.E.2d 86 (1972). In *Pugh*, the record showed that the decedent's services were worth from \$50 to \$60 a week, and the court used this to establish dependency. In contrast in *Claar*, the record only showed that the decedent rendered services to his son. Recovery was denied because the nature and exact value of the services were not established.

<sup>25</sup> In *Denby v. Davis*, 212 Va. 836, 188 S.E.2d 226 (1972), decedent was a young girl of elementary school age. Her services included caring for a younger retarded brother, acting as a "little mother" to him. The financial equivalent of these services was not established, and the parents were unable to recover as dependents.

<sup>26</sup> See *Domijan v. Harp*, 340 S.W.2d 728 (Mo. 1960); 22 AM. JUR. 2d *Death* § 29 (1965); *Craig*, *supra* note 1, at 225; 12 WM. & MARY L. REV., *supra* note 1.

<sup>27</sup> *Patton v. Rose*, 213 Va. 36, 189 S.E.2d 385 (1972).

<sup>28</sup> See *Craig*, *supra* note 1, at 230; 12 WM. & MARY L. REV., *supra* note 1, at 407, 412.

<sup>29</sup> *Bohrman v. Pennsylvania R.R.*, 23 N.J. Super. 399, 93 A.2d 190 (1952).

<sup>30</sup> *Thompson v. Board of Rd. Comm'rs.*, 357 Mich. 482, 98 N.W. 2d 620 (1959).

<sup>31</sup> See *Craig*, *supra* note 1, at 228.

in Virginia, and recovery for the death of an elementary school child who cared for a younger retarded brother has been denied.<sup>32</sup>

## II. PECUNIARY LOSS

Dependency is the first obstacle a claimant must pass to recover damages in addition to the compensation the statute offers for solace. Once dependency is proven, the claimant must then show pecuniary loss suffered from the death of the decedent. In dealing with pecuniary loss, the court is confronted with essentially the same problem it faces for dependency. It must determine the evidence sufficient to establish pecuniary loss.

In Virginia, the changes in the concept of pecuniary loss since 1968 have been dramatic. Before 1968, the permissive statutory language of "fair and just" compensation permitted the court to award damages for anything remotely resembling financial loss.<sup>33</sup> Under the old statute, pecuniary loss was merely a guide for fixing damages while under the new provisions, pecuniary loss sets a statutory limitation on the damages to be recovered.<sup>34</sup>

Since 1968, it appears that the decedent's earnings constitute the sole basis for measuring pecuniary loss, contrasting sharply with the old interpretation which measured damages only in reference to probable earnings.<sup>35</sup> The use of earnings as the prime criteria for pecuniary loss has an immediate effect upon recovery for the death of children. Before 1968, the earnings of a child were not the only criterion, and evidence that the child was normal, healthy, and well adjusted was sufficient to establish pecuniary loss.<sup>36</sup>

In using earnings as the major basis for recovery, Virginia is going against a trend in many jurisdictions liberalizing the meaning of pecuniary loss.<sup>37</sup> Eliminated under the new statute is the possibility of recovery based upon advice, comfort, and guidance.<sup>38</sup> While not impossible, it is less likely that recovery will be allowed for the services of a minor child or of a housewife or for the contributions made to a family by an adult child.<sup>39</sup>

In summary, although statutory changes in 1968 were made to liberalize Virginia's Wrongful Death Act, recovery is now more difficult. Raising the

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<sup>32</sup> *Denby v. Davis*, 212 Va. 836, 188 S.E.2d 226 (1972).

<sup>33</sup> *Gough v. Shaner*, 197 Va. 572, 90 S.E.2d 171 (1955).

<sup>34</sup> 12 WM. & MARY L. REV., *supra* note 1, at 409.

<sup>35</sup> *Wolfe v. Lockhart*, 195 Va. 479, 487, 78 S.E.2d 654, 659 (1953).

<sup>36</sup> *Gough v. Shaner*, 197 Va. 572, 581, 90 S.E.2d 171, 178 (1955).

<sup>37</sup> 12 WM. & MARY L. REV., *supra* note 1, at 409.

<sup>38</sup> *Gough v. Shaner*, 197 Va. 572, 90 S.E.2d 171 (1955).

<sup>39</sup> *See, e.g., Wadsworth v. Friend*, 201 So. 2d 641 (Dist. Ct. App., Fla. 1967); *Thompson v. Board of Rd. Comm'rs*, 357 Mich. 482, 98 N.W.2d 620 (1959); *Bohrman v. Pennsylvania R. R.*, 23 N. J. Super. 399, 93 A.2d 190 (1952); *Paragon Refining Co. v. Higbea*, 220 Ohio App. 440, 153 N.E. 860 (1925).

statutory maximum to \$75,000 is counterbalanced by restrictive criteria for recovery. Judicial interpretation must follow the language of the statute. Formerly the court was able to adopt one of the most liberal approaches to recovery for wrongful death in the United States. Today, Virginia's thinking on the question of pecuniary loss suffered by dependents appears to follow more closely the more conservative position of the majority of courts in the United States.

*E. A. B., III*