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COLORADO'S MAXIMUM RECOVERY FOR WRONGFUL DEATH v. THE CONSTITUTION

BY M. NEAL SINGER*

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Thirteen states today¹ are depriving their citizens of a basic constitutional right. They have restricted recovery in death actions, even where losses greatly exceed limitation figures. Some courts, when presented with the problem, have attempted to evade the issue by placing responsibility upon the legislature.² This note attempts to analyze the situation and point out the inevitable solution—the duty of protecting property rights rests with the judiciary.

I. BACKGROUND: STATUTORY HISTORY AND INTERPRETATION

The old common law rule that no cause of action exists for a wrongful death dates back to 1607.³ It was crystallized by Lord Ellenborough in his instruction to the jury in *Baker v. Bolton*.⁴ Most authorities on the subject conclude that no satisfactory reasons for the rule have ever been advanced.⁵

England, in 1846, attempted to provide a remedy for this obvious common law defect through the enactment commonly referred to as Lord Campbell's Act.⁶ It is important to note that the act contains no limitation of damages, but leaves the amount of recovery in the hands of the jury:

. . . and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought. . . .⁷

Colorado, in 1872, passed a statute patterned after Lord Campbell's Act wherein a deceased's personal representative could maintain an action for the benefit of specified beneficiaries (spouse, then

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¹ See note 17 *infra*.

² See note 28 *infra*.

³ *Muggins v. Butcher*, 1 Brownl. & Golds. 205, Yelv. 89, 80 Eng. Rep. 61 (1607).

⁴ 1 Camp. 493, 170 Eng. Rep. 1033 (1808).

⁵ See Holdsworth, *Origin of the Rule in Baker v. Bolton*, 32 L. Q. Rev. 431 (1916); Prosser, Torts § 105 at 710 (2d ed. 1955), states: ". . . result [of the common law rule] was that it was more profitable for the defendant to kill the plaintiff than to scratch him, and that the most grievous of all injuries left the bereaved family of the victim, who frequently were destitute, without a remedy."

⁶ Stat. 9, 10 Vict. c. 93 (1846):

"It is Enacted,

1. That whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

11. That every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct."

⁷ Stat. 9, 10 Vict. ch. 93, § 11 (1846).

children, then father or mother).⁸ This original statute did not limit the amount of recovery. However, the legislature amended the statute in 1877 and inserted a limitation of \$5,000 maximum recovery.⁹ Colorado has construed the act to be compensatory and has held that recovery is "limited to the pecuniary loss resulting from the death, to the party who may be entitled to sue."¹⁰ It [the act] is always described as compensatory, and never as a solace for wounded feelings."¹¹ Compensatory damages have been defined as "the estimated accumulations of the deceased during the probable remainder of his life, if he had not come to an accidental death, having reference to his age, occupation, habits, bodily health and ability."¹²

*Mollie Gibson Consol. Mining & Milling Co. v. Sharp*¹³ determined that the act of 1877 was not unconstitutional merely because it was a general title, broad enough to include all appropriate matters (constitutionality of the \$5,000 maximum, however, was not discussed).¹⁴

Colorado's recovery limitation was raised from \$5,000 to \$10,000 in 1951.¹⁵ This figure was increased in 1957 to \$25,000, our present maximum.¹⁶

II. STATUTORY AND CONSTITUTIONAL PROVISIONS—OTHER STATES

Although statutory provisions for death recovery are found in every jurisdiction, only thirteen states have retained maximum limitations.¹⁷ Constitutions in at least eight states specifically provide that there shall be no statutory maximum limitation upon recovery in death actions.¹⁸

In general, the measure of damages is based on earning capacity (at least this is one element to be considered by the jury).¹⁹ Language similar to the following indicates today's prevailing view:

⁸ Colo. H. Jour. 9th Sess. (1872).

⁹ Colo. Sess. Laws 1877 ch. XXV, § 879 (3).

¹⁰ *Denver & Rio Grande Ry. v. Spencer*, 25 Colo. 9, 14, 52 Pac. 211, 213 (1898).

¹¹ *Mollie Gibson Consol. Mining & Milling Co. v. Sharp*, 5 Colo. App. 321, 327, 38 Pac. 850, 852 (1894).

¹² *Hayes v. Willis*, 17 Colo. 465, 474, 30 Pac. 352, 355 (1892).

¹³ *Supra* note 11.

¹⁴ See Colo. Const. art. V, § 21, requiring that any bill contain only one subject, which must be clearly expressed in its title.

¹⁵ Colo. Rev. Stat. § 41-1-3 (1953).

¹⁶ Colo. Rev. Stat. § 41-1-3 (1957).

17 State	Statute	Maximum Limitation
Colorado	§ 41-1-3	\$25,000
Illinois	§ 70-1-2	\$30,000
Kansas	§ 69-3203, 3204	\$25,000
Maine	ch. 165, § § 9, 10; ch. 188	\$20,000 (plus listed expenses)
Massachusetts	ch. 238	\$2,000 - \$20,000, depending on culpability.
Minnesota	§ 573.02	\$25,000
Missouri	§ 537.090	\$25,000
New Hampshire	ch. 556, § § 11-13; ch. 91	\$10,000 (\$25,000 with widow, widower, minor child or children, or dependent father or mother)
Oregon	§ § 30.020, 121.020	\$20,000
South Dakota	§ 37.22	\$20,000
Virginia	§ § 635, 636, 638	\$30,000
West Virginia	ch. 55, art. 7, § 6	\$20,000
Wisconsin	§ 331.03-04	\$22,500 (with additions for more children)

¹⁸ State: Arizona, art. 1, § 31; Arkansas, art. V, § 32; Kentucky, § 54; New York, art. 1, § 16; Ohio, art. 1, § 19 (a); Oklahoma, art. 23, § 7; Pennsylvania, art. 3, § 21; Utah, art. XVI, § 5.

¹⁹ See *Klepal v. Pa. R.R.*, 129 F. Supp. 668, *aff'd*, 229 F. 2d 610 (1956); *Boise Payette Lumber Co. v. Larsen*, 214 F.2d 373 (1954); *Holliday v. Pac. Atl. S.S. Co.*, 117 F. Supp. 729, *aff'd*, 212 F.2d 206 (1954); *Frabutt v. N.Y. Central & St. Louis Ry.*, 84 F. Supp. 460 (1949); *Hayes v. Williams*, 17 Colo. 465, 30 Pac. 352 (1892); *McKirdy v. Cascia*, 142 Conn. 80, 111 A. 2d 555 (1955); *Seaboard Air Line R.R. v. Martin*, 56 So. 2d 509 (Fla. 1952); *Louisville & N. R.R. v. Young's Adm'x*, 253 S.W.2d 585 (Ky. 1952); *Hall v. Stiles*, 57 N.M. 281, 258 P.2d 386 (1953).

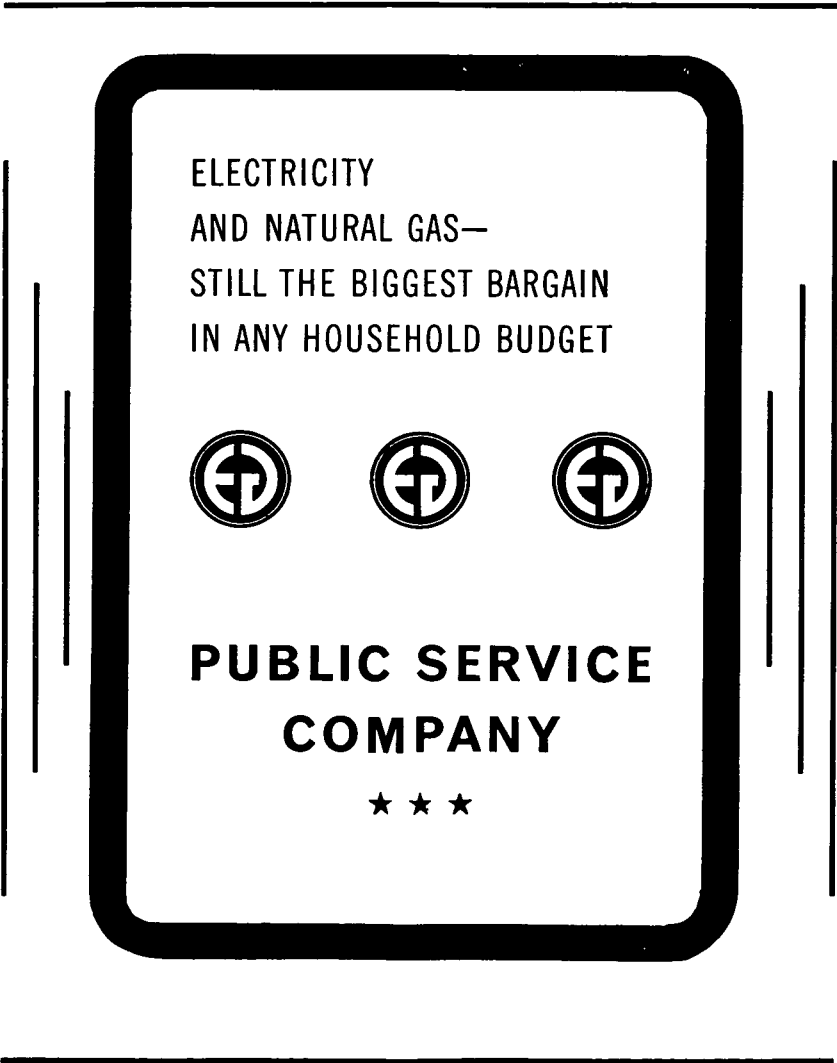
“the amount of damages [in death actions] is primarily for the jury to determine, and . . . its verdict will not be disturbed except where abuse of its discretion clearly appears.”²⁰ It is obvious that only by discarding any semblance of logic can the mechanical approach of a recovery maximum apply.

III. COLORADO AND FEDERAL CONSTITUTIONAL RIGHTS

The constitution of Colorado provides:


In order to assert our rights, acknowledge our duties, and proclaim the principles upon which our government is

²⁰ *Checkettes v. Bowman*, 70 Idaho 463, 220 P.2d 682, 684 (1950).



The advertisement is enclosed in a large, thick black rounded rectangular border. Inside, the text is centered and reads: "ELECTRICITY AND NATURAL GAS— STILL THE BIGGEST BARGAIN IN ANY HOUSEHOLD BUDGET". Below this text are three identical circular logos, each containing a stylized 'P' and 'S' intertwined. At the bottom, the text "PUBLIC SERVICE COMPANY" is written in a bold, sans-serif font, followed by three stars "★ ★ ★". The entire graphic is flanked by vertical lines on both sides.

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founded, we declare: . . . [That] all persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and *protecting property*; and of seeking and obtaining their safety and happiness.²¹

. . . [That] courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property, or character; and that right and justice should be administered without sale, denial or delay.²² . . . [That] no person shall be deprived of life, liberty or property, without due process of law.²³

These rights are derived from the natural law and given constitutional sanction!

It appears that the Colorado Supreme Court has interpreted the right of recovery for wrongful death to be a property right:

. . . in contemplation of the Death Act plaintiff has sustained a *property damage* attendant upon the death of her husband. If, since the death was caused by injuries inflicted through negligence, a tort action terminology must be employed in describing the nature of plaintiff's action, it can be classified as a *property* tort action and cannot be classified as a tort action "for injuries done to the person. . . ."²⁴

In *Rosane v. Senger*,²⁵ a malpractice suit which held that the statute of limitations began to run only upon patient's discovery of the gauze negligently left inside the wound, the court stated that "A legal right to damage for an injury is property and one cannot be deprived of his property without due process. There can be no due process unless the party deprived has his day in court. . . ."²⁶

"A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference."²⁷

Before determining whether this property right is protected by the constitution of Colorado (and the federal constitution), it must first be decided whether it really is a right. Since the old common law concept is that there is no right of action for wrongful death, the argument arises that legislative action gives birth to a "privilege," and not to a "right." In fact, one Illinois decision upholds the constitutionality of the Illinois Death Act on this basis.²⁸ The court there indicated that when further legislative action appeared likely, such likelihood has always mitigated against judicial change. However, as shown above, all fifty states provide a remedy for wrongful death by statute and thirty-seven states have no statutory maximum (some by express constitutional provision, others without express authority in their constitutions²⁹). On this basis, one finds it

21 Colo. Const. art. II, § 3 (Emphasis added.)

22 Colo. Const. art. II, § 6.

23 Colo. Const. art. II, § 25.

24 *Fish v. Liley*, 120 Colo. 156, 163, 208 P.2d 930, 933 (1949). (Emphasis added.)

25 112 Colo. 363, 149 P.2d 372 (1944).

26 *Id.* at 370, 149 P.2d at 375.

27 2 Cooley, *Constitutional Limitations* 756 (8th ed. 1927); and cases cited in the footnote.

28 *Hall v. Gillins*, 13 Ill.2d 26, 147 N.E.2d 352 (1958).

29 *Supra* notes 17, 18.

difficult to validly argue that a "right" has not arisen. Use of the word "privilege" is obviously erroneous when describing an action to sue for wrongful death. Consequently, one must be lead to conclude that the common law has been extended into this area—though it was accomplished by means of decisions dealing with the statutes.

Since an action for wrongful death is a matter of substance—a property right—it should be protected by the above provisions of the Colorado Constitution.³⁰ Justice Franz, dissenting in a recent Colorado decision³¹ upholding the constitutionality of the guest statute, stated:

Provisions of a Bill of Rights are primarily limitations on government, declaring rights that exist without any governmental grant, that may not be taken away by government and that government has the *duty to protect* . . .³² *As those authorities show, any governmental action in violation of these declared rights is void so that provisions of the Bill of Rights are self executing to this extent.* . . .³³

The bill of rights does not exist in a vacuum; but this effect substantially occurs when a right is created and recovery (the remedy) upon this right is so limited that only a partial remedy arises. Is the total injury redressed by only a partial or limited relief?

The Constitution of the United States provides:

The citizens of each State shall be entitled to all privileges and immunities of citizens in the several states.³⁴

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.³⁵

It appears that the Constitution secures in each state to citizens of all other states "the right by the usual modes to acquire and hold property, and to protect and defend the same in law."³⁶

The right to bring an action for wrongful death, being a property right, must also fall within the protection of "due process."³⁷ The state is depriving a plaintiff of this right by limiting recovery just as effectively as if it were to completely remove the remedy. Where one has sustained a loss, he should be compensated for the full amount of his damage. To limit recovery is to say: "Whether your loss is determined to be \$25,000 or \$250,000, you may only recover \$25,000." For practical purposes, therefore, only the poor can afford to be killed in Colorado!

In *Stoltz v. Burlington Transp. Co.*,³⁸ plaintiff brought an action in Colorado to recover for the death of his son, caused by defend-

³⁰ *Supra* notes 21, 22, 23.

³¹ *Taylor v. Welle*, 352 P.2d 106 (Colo. 1960).

³² See 1 Cooley, *Constitutional Limitations* 93, 358 (8th ed. 1927); 11 *Am. Jur. Constitutional Law* § 308 (1937); 16 C.J.S. *Constitutional Law* § 199 (1956).

³³ *Supra* note 30 at 110, the court cites *Quinn v. Buchanan*, 298 S.W.2d 413 (Mo. 1957).

³⁴ U.S. Const. art. IV, § 2 (1).

³⁵ U.S. Const. Amend. XIV, § 1.

³⁶ 2 Cooley, *Constitutional Limitations* 821 (8th ed. 1927). (Emphasis added.)

³⁷ *Supra* note 34.

³⁸ 178 F.2d 574 (10th Cir. 1949), cert. denied, 339 U.S. 929 (1949).

ant's negligent act occurring in Utah. The court held that amount of recovery is governed by the *lex loci* and not by the *lex fori*. Therefore, Utah's statutes and constitution determined the amount of recovery upon plaintiff's property "right." This decision leads to a frightening analogy. If a man earning \$200,000 per annum were to be negligently killed on the Colorado-Wyoming border (Colorado — \$25,000 limitation; Wyoming — no limitation), then a matter of inches would determine whether his personal representative were to receive \$500,000 or \$25,000. At the same time, both states maintain that the damages awarded shall be fair compensation for resulting "pecuniary" injuries.³⁹

The guaranty of equal protection of the laws is one that seeks an equality of treatment of all persons, even though they enjoy the protection of due process. It does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate, but merely requires that all persons subject to such legislation shall be treated alike, under like circumstances and conditions, both in privileges conferred and liabilities imposed.⁴⁰ Following this reasoning, one might logically conclude that equal protection is not denied by limited recovery. It can be shown that the act applies equally to all citizens of the state. This point, however, serves as mere dictum when its advocate attempts to by-pass the safeguards guaranteed by due process.

Here, the state is not varying the procedural aspects, which are permitted under the equal protection clause,⁴¹ but there are substantive rights involved. Numerous decisions prevail wherein plaintiff's property rights were protected, thus allowing him full recovery for his damage and providing due process under the constitution.⁴²

IV. DECISIONS IN OTHER JURISDICTIONS UPHOLDING DEATH ACTS

In *Carroll v. Missouri Pac. Ry.*,⁴³ the Missouri court awarded damages of \$5,000, the maximum amount permitted by statute. Defendant's special defense that the damage act was unconstitutional because the amount of recovery was fixed at \$5,000, was not allowed. The court held the act constitutional, basing this conclusion on (1) the fact that a decision of unconstitutionality "would invalidate a very large number of other sections in our statutes,"⁴⁴ and (2) the fact that other similar sections and provisions of the

³⁹ *St. Lukes Hosp. Ass'n. v. Long*, 125 Colo. 25, 240 P.2d 917 (1952); *Denver & Rio Grande Ry. v. Spencer*, 25 Colo. 9, 52 Pac. 211 (1898); *Colo. Coal & Iron Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 251 (1895); *Mollie Gibson Consol. Mining & Milling Co. v. Sharp*, 5 Colo. App. 321, 38 Pac. 850 (1894); *Pierce v. Connors*, 20 Colo. 178, 37 Pac. 721 (1894); *Coliseum Motor Co. v. Hester*, 43 Wyo. 298, 3 P.2d 105 (1931).

⁴⁰ 2 Cooley, *Constitutional Limitations* 824 (8th ed. 1927).

⁴¹ *Missouri v. Lewis*, 101 U.S. 22 (1879).

⁴² *O'Toole v. U.S.*, 342 F.2d 308 (1957) where an award of \$400,000 damages for wrongful death of a 54 year old man with annual earnings of \$250,000, and a life expectancy of at least 10 years, was not excessive; *New York, N.H. & H.R. Co. v. Zermani*, 200 F.2d 240 (1st Cir. 1952), judgment for \$141,500 aff'd; *McKee v. Jamestown Baking Co.*, 198 F.2d 551 (3rd Cir. 1952), verdict for \$69,769.55 held not excessive; *Frazier v. Ewell Eng'r & Contracting Co.*, 62 So.2d 51 (Fla. 1952), judgment on verdict of \$66,000 entered; *Sandifer Oil Co. v. Dew*, 220 Miss. 609, 71 So.2d 752 (1954), an action to recover damages for death of 14 year-old girl caused by gasoline explosion, where it was held that an award of \$90,000 damages was not excessive; *Curtis v. Atchison*, 363 Mo. 779, 253 S.W.2d 789 (1952), verdict of \$60,000, on appeal, reduced by remittitur to \$40,000; *Hicklin v. Jeff Hunt Mach. Co.*, 226 S.C. 484, 85 S.E.2d 739 (1955), verdict and judgment for \$30,000 aff'd; *Mock v. Atl. Coast Line Ry.*, 227 S.C. 245, 87 S.E.2d 833 (1955), verdict awarding \$50,000 actual plus \$15,000 punitive damages not excessive.

⁴³ 88 Mo. 239, 57 Am. Rep. 382 (1885).

⁴⁴ *Id.* at 246.

law had been "heretofore declared constitutional," citing *Missouri Pac. Ry. v. Hume*.⁴⁵

Upon careful examination of the *Carroll* case, it is evident that no constitutional question was actually decided. The first reason set forth, (1) above, bears no semblance to the constitutional policy of protecting and preserving individual property rights. Authorities cited to support the remainder of the decision, (2) above, were not in point. *Missouri Pac. Ry. v. Hume* upheld a Missouri statute which imposed double damages on any railroad corporation not complying with requirements of erecting and maintaining cattle guards and fences on the sides of its roads, stating there were no violations of due process or equal protection. This was a penal statute and had no provisions for limiting recovery rights—factors creating a weak precedent for the decision.

The Illinois Wrongful Death Act, limiting recovery to \$25,000,⁴⁶ has been held constitutional.⁴⁷ Rationale for this decision rested upon three foundations: (1) The legislature created both the right and the remedy, and its power to limit the maximum recovery in the action that it created can not be questioned; (2) The common law has characteristically imposed close limitations upon the parties entitled to sue. If the deceased had survived, his injuries might have been such as to inflict upon these plaintiffs deprivations of the same kind and of equal severity. Yet the only person entitled to recover would be the injured man himself; (3) The differences between the action sought to be maintained and the action that is available under the statute are not sufficiently significant to warrant recognition of a new remedy, because this point of great concern has been the subject of frequent legislative attention;⁴⁸ the likelihood of further legislative action has always militated against judicial change.

In (1) above, it is conceded that the legislature originally created the right and the remedy. However, Colorado has interpreted the right as being one of property,⁴⁹ consequently, the right

⁴⁵ 115 U.S. 512 (1885).

⁴⁶ Ill. Rev. Stat., ch. 70 (1) (2) (1957).

⁴⁷ *Hall v. G'Ilins*, 13 Ill.2d 26, 147 N.E.2d 352 (1958).

⁴⁸ Amount of recovery in Illinois was increased to \$10,000 in 1903, to \$15,000 in 1947, to \$20,000 in 1951, to \$25,000 in 1955, and to \$30,000 in 1957.

⁴⁹ *Fish v. Liley*, *supra* note 24; *Rosanne v. Senger*, *supra* note 25.

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is protected by the constitution. In (2) above, the Illinois court apparently overlooks the fact that an action for wrongful death is a "new cause of action"—not a "survival" statute.⁵⁰ Therefore, the court's analogy is misleading.

Finally, in (3) above, the court refuses to act because "further legislative action appears likely." Surely, this is no reason to deprive a person of his constitutional rights. If our legislature is subject to a strong insurance lobby, then the courts must protect the rights of the individual from the profit-motivated forces of these organizations. If the only solution is for the courts to create a new cause of action, then so be it! Rights guaranteed by the constitution must be protected from legislative abuse.

As was stated in *Muller v. Oregon*,⁵¹ "[I]t is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking."⁵²

CONCLUSION

It is not a valid argument that the majority of death actions involve amounts under \$25,000 (or \$35,000, or whatever a future limitation might be). State action in this area must be derived from its sovereign or police power. Surely, the enactment of the wrongful death limitation cannot be said to be reasonably calculated to protect the health, safety, welfare or morals of the people of Colorado. Traditionally the amount of recovery for *property* loss is determined by a jury. Little justification can be found for a legislature's substitution of a mechanical barrier when the property right happens to be the support and comfort of a loved one. Mr. Justice Cardozo has observed:

Death statutes have their roots in dissatisfaction with the archaisms of the law . . . It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied.⁵³

Modern reasons for existence of a maximum recovery limit are (1) the difficulty of measuring damages arising by reason of the wrongful death of a person, and (2) the possibility of extreme awards being made by juries due to the strong feelings of sympathy aroused by such cases.⁵⁴ The obvious answer to this reasoning is that constitutional safeguards should not be removed merely because the problem becomes more difficult or because emotionally toned verdicts become possible. These should never be grounds for refusal of adequate relief in a modern court system.

Through legislative enactment, a child today has a right enforceable in a court of law against one who has deprived him of support and maintenance of his father, as well as damages for loss of other rights arising out of the family relationship destroyed or defeated by a wrong-doing third party. Further legislation to limit the amount of recovery upon this right now vested, materially and unconstitutionally impairs its intended substance.

⁵⁰ *Fish v. Liley*, *supra* note 24.

⁵¹ 208 U.S. 412 (1907).

⁵² *Id.* at 420.

⁵³ *Van Beech v. Sabine Towing Co.*, 300 U.S. 342, 350 (1937).

⁵⁴ 16 Am. Jur. Death § 184 (1938).