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Richard D. Hall

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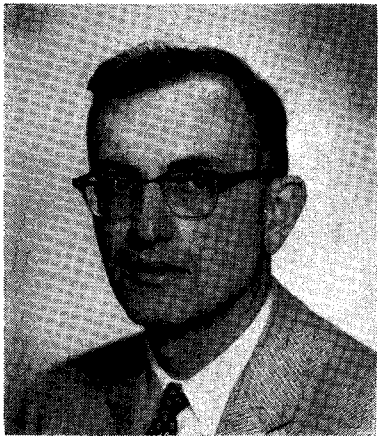
By Richard D. Hall



Richard D. Hall: University of Chicago, B.S.; University of Chicago Law School, J. D. cum laude; admitted Illinois Bar 1939, and Colorado Bar 1946; author of **Colorado Accident Law Digest**; partner in Denver firm of Yegge, Bates, Hall & Shulenburg; member of Denver and Colorado Bar Associations.

With the convening of the 35th General Assembly, the revision of the present $10,000 maximum limit on recovery in a death action in Colorado will undoubtedly be proposed and seriously considered. It therefore seems appropriate to inquire at this time into the nature of the Colorado Death Act and the reasons giving rise to the statutory limit on recovery.

The present statutory law regarding damages recoverable in death actions is found in Section 41-1-3, Colorado Revised Statutes 1953, and is in substantially the same form as when originally enacted in 1877,[1] except for the raising of the maximum recovery figure in 1951 from the original $5,000 to a maximum of $10,000, and a provision requiring a plaintiff to elect between the penal section of the death act relating to common carriers and the section relating to death caused by negligence by persons in general.[2] Such section provides in part as follows:

> "in every such action the jury may give such damages as they may deem fair and just, not exceeding ten thousand dollars, with reference to the necessary injury resulting from such death, to the surviving parties, who may be entitled to sue; and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect or default."[3]

The cause of action created by our death act has been held by the Colorado supreme court to be a separate and new action, and not a survival of the cause of action held by the deceased prior to his death.[4] This holding appears to be in conformity with the

1 Colo. Sess. Laws 342 (1877).
2 Colo. Sess. Laws c. 148 § 3 (1951).
3 *Ibid.*
4 Fish v Liley, 120 Colo. 156,.208 P.2d 930 (1949).

rulings of courts in other jurisdictions. As the action is created by the death act itself, the court has noted that the elements of damage are essentially different from those proper for consideration in the personal injury action to which the deceased would have been entitled if the death had not occurred.[5]

The various types of death acts have been classified into three categories: (1) The more usual form of statute, whose purpose is to compensate the survivors for the benefits which they would have derived from the earning power of the deceased if his life had not been cut short. (2) The type of death act whose purpose is to enable the survivors to recover a sum determined by the gravity of the defendant's fault in causing the death. (3) The type of death act in which the recovery is treated as if the cause of action were an asset of the deceased, and as if the decedent's cause of action was in effect surviving to his representative.[6] Our supreme court has always held that the recovery by the survivors under our present death act is purely compensatory in nature and does not allow any penal or punitive damages.[7] It is interesting to note that the first Colorado Death Act, passed in 1872[8] vested the cause of action in the personal representative of the deceased, and prescribed absolutely no rule as to the measure of damages. This 1872 Act, during the brief five years of its existence, was construed in effect to be the third type of Act, with the determination of the amount of damages left almost completely up to the jury, which had the right also to assess punitive damages.[9]

SURVIVING PARTIES

The language of the statute indicates that the damages must be measured by the "necessary injury" to the surviving parties who may be entitled to sue. The word "injury" is obviously not used in its ordinary sense, but in this context has a broad meaning synonymous with "loss" or "damages." As the word "injury" was used in the original death act known as Lord Campbell's Act, passed in 1846 in England, the use of such word in our Colorado statute appears to be one of those historical carry-overs of language that no longer conveys the same meaning as when originally used.

The Colorado act provides that the suit under the death act may be brought by the husband or wife of the deceased, but further provides that any judgment obtained in such action shall be owned by such persons as are the heirs at law of the deceased under the laws of descent and distribution, and shall be divided among such heirs in the same manner as real estate is divided according to the statute of descent and distribution.[10] Accordingly, where a husband is killed in an accident, the question arises as to whether the measure of damages should be the compensation of the widow who

5 *Id.* at 160, 208 P.2d at 932.
6 Restatement, Torts § 493 (1934).
7 Pierce v. Connors, 20 Colo. 178, 182, 37 Pac. 721, 722 (1894); Hayes v. Williams, 17 Colo. 465, 30 Pac. 352 (1892); Moffatt v. Tenney, 17 Colo. 189, 30 Pac. 348 (1892).
8 Colo. Sess. Laws 117 (1872).
9 Kansas Pac. Ry. Co. v. Miller, 2 Colo. 442 (1874).
10 Colo. Rev. Stat. Ann. § 41-1-1 (1953).

alone brings the suit, or should also include compensation for the children of such widow who will share in the recovery but who are not "entitled to sue." A similar question would arise if the surviving widow failed to sue within one year after the death of her husband and during the second year her children filed such suit. In such case the statute is unclear as to whether the widow would share in any way in the recovery, and is similarly unclear as to whether the measure of damages in such a suit would be the loss on the part of the children, or the loss on the part of both the children and the widow. These issues have not been decided by our supreme court. However, in the case of *Phillips v. Denver*

Tramway Co.,[11] the Colorado supreme court did review a judgment in favor of the Denver Tramway Company where the father and mother of a deceased child brought suit under the death act. The supreme court held that contributory negligence on the part of the father was no bar to recovery by the mother of her one-half interest in the death act claim. This decision, accordingly, would tend to indicate that the damages under a death act suit should be separately ascertained for each plaintiff.

INJURY

The "necessary injury" resulting from the death under our Colorado death act has uniformly and repeatedly been held to be the sum equal to the net pecuniary benefit which the plaintiff might reasonably have expected to receive from the deceased if the life of the deceased had not been terminated by the negligent act of the defendant.[12] In a long line of decisions, the court has also specifically stated that the Colorado act does not permit recovery of any exemplary or punitive damages under its terms, or recovery for the sorrow and grief of the plaintiffs, nor for their loss of the society and companionship of the deceased.[13] Our supreme court has not specifically considered whether the loss of the personal care, training and instruction of a parent would be considered a "pecuniary benefit."

The form of the jury instructions to be given in accordance with the above mentioned law has given the court no particular difficulty, and specific instructions have been approved by the Colorado supreme court.[14] However, where the plaintiffs have been parents recovering for the loss of a child, the court has been faced with the problem of the lack of any specific evidence of any net pecuniary loss to the parents by reason of the child's death. Accordingly, on general legal principles, such judgments in favor of the parents would seem to be open to challenge by way of a motion for a directed verdict, or a motion to set aside any such judgment as excessive under the evidence. This point was raised in the case of *St. Luke's Hospital Association v. Long*,[15] and the Colorado supreme court disposed of the problem as follows:

> "There was testimony that the boy was in good health and the Court sustained objection of defendant to further evidence along that line. It is impossible to establish with any definiteness or certainty the future earning ability of a three-year-old boy or his future generosity toward his parents. To hold that no recovery could be had in the absence of such showing would be in effect to abolish the right to recovery by parents of young children and such was not, we think, the Legislative intent in the enactment of the statute."[16]

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11 53 Colo. 458, 128 Pac. 460 (1912).
12 Lehrer v. Lorenzen, 124 Colo. 17, 233 P.2d 382 (1951); Pierce v. Connors, 20 Colo. 178, 37 Pac. 721 (1894).
13 *See e.g.*, McEntyre v. Jones, 128 Colo. 461, 263 P.2d 313 (1953); Lehrer v. Lorenzen, *supra* note 12.
14 *E.g.*, McEntyre v. Jones, *supra* note 13; St. Luke's Hosp. Ass'n v. Long, 125 Colo. 25, 240 P.2d 917 (1952); Lehrer v. Lorenzen, *supra* note 13.
15 *Supra* note 14.
16 125 Colo. at 33, 240 P.2d at 922.

The court, in the *St. Luke's Hospital Association* case, thus affirmed a verdict and judgment for $5,000 in favor of the parents of a three-year-old boy, where the evidence showed merely that the boy was in good health but nothing more as to his future earning ability, or the cost of supporting and educating him until the completion of his schooling. Under similar reasoning, the Colorado supreme court has affirmed a verdict and judgment in the sum of $7,500 in the favor of the parents of a thirteen-year-old girl,[17] and a verdict and judgment in the sum of $10,000 in favor of the parents of a nine-year-old daughter.[18]

In all three of these cases it is most evident that there was no proof of any net pecuniary loss to the parents at all approaching the amounts of the respective verdicts and judgments, even if the alleged value of the services of the deceased children during their minority were to be included in the figure. However, the Colorado supreme court would undoubtedly have been subject to much criticism if it had literally followed the wording of its own decisions and applied the same rules of evidence and requirements of proof to the death actions as it has in other cases, for there most certainly is a general feeling that parents are entitled to recover something for the intense grief and sorrow resulting from the loss of a child even though no specific pecuniary loss is actually proven.

Whatever the reasons or basis for such holdings, we do have a situation in the state of Colorado where the jury instructions limit the amount of the verdict to net pecuniary loss on the part of the parties entitled to sue, but verdicts far in excess of any net pecuniary loss proven by the parties are, without exceptions, upheld by the courts as not excessive under such jury instructions. The practical effect, of course, is to permit some recovery for sorrow, grief, and loss of companionship while the language of the supreme court decisions expressly forbids such a recovery. Every practicing lawyer who has defended death act suits, particularly suits by parents, is well aware that the net pecuniary loss in such an action is almost unimportant, and that the reason juries in such cases tend to bring in substantial verdicts is their desire to compensate the bereaved parents for the sorrow arising from the loss of their child.

MAXIMUM LIMIT OF RECOVERY

Various reasons have been given for the existence of a statutory maximum limit to recovery under the death act. Some are historical in nature, arising from the fact that the death act created an entirely new cause of action. The modern reasons given for such a 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.[19]

17 McEntyre v. Jones, 128 Colo. 461, 263 P.2d 313 (1953).
18 Dawkins v. Chavez, 132 Colo. 61, 285 P.2d 821 (1955).
19 16 Am. Jur. 123, *Death* § 184 (1938).

Before considering these stated reasons, it might be well to restate what to the writer is the fundamental and basic test as to the reasonableness or unreasonableness of such a statutory limitation; i.e., whether or not such a limitation is fair and just to both the plaintiff and the defendant. It is submitted that in the consideration of that question, the economic effects of raising or eliminating the present $10,000 statutory limit of recovery under the Colorado death act should not be allowed influence. Among the economic effects which would follow the raising or elimination of the statutory limit, and which would have a tendency to influence one or more groups of voters, are the following:

(1) Liability insurance companies would pay out more money to individual plaintiffs, and thereby some "poor" people would be helped.

(2) The loss ratios of the liability insurance companies would tend to increase, thereby reducing their profits.

(3) Plaintiffs would tend to recover larger verdicts and judgments in death cases, thereby enabling plaintiffs' attorneys to secure larger fees.

(4) The higher verdicts and judgments in death cases would tend to increase the loss ratios of liability insurance companies to an extent which possibly could result in higher automobile insurance premiums for policyholders.

The elements of special damages provable in a death act case certainly present similar problems of proof to those present in personal injury cases. Thus the proof of such items as loss of financial support, funeral expense, loss of services, and loss of prospective gifts or inheritance can presumably be as readily ascertained under the evidence by a jury as are similar items of damages in personal injury cases. However, when we come to the elements of grief, sorrow, mental shock, and loss of companionship and society of a wife, husband or child, we are faced with elements of damages which theoretically are not permitted under our Colorado law and regarding which no evidence can be or is produced in court for the jury to consider. The general rule in Colorado is that mental anguish alone, not arising from any physical injury to the plaintiff

himself and caused solely by simple negligence, is not a basis for an action for damages.[20]

However, as we have seen, in practice the items of grief, sorrow, mental anguish, and loss of companionship are the items which actually cause the verdicts in suits under the Colorado death act to be substantial even in cases where the special damages are very low.

The difficulties inherent in any determination of the amount of loss due to grief, sorrow, or mental anguish are aptly noted in the early decision of *Kansas Pacific Ry. Co. v. Miller*,[21] where the Colorado supreme court observed:

> "It seems to be settled that no damages can be recovered for the suffering which precedes the death. The grave bars out this right; upon what known principle can the mental sufferings of the survivors be estimated. If the family is large, and the grief proportional to its size, then the damages would be immense. If the family was small, but the grief were boundless, how could it be compassed. How could a jury estimate the relative mental anguish of a widow and twelve children. Furthermore, it would involve a minute scrutiny into the personal relations of all parties. Affection would have to be measured by a graduated scale. An account would have to be taken of the familiarity which existed between the deceased and the survivors.
>
> "If a confirmed drunkard, or a person of vile associations, the grief at his departure might not be so poignant.
>
> "If the widow had wearied of her lord, or the husband of his wife, death might be a joy instead of an anguish. How determine the duration of this mental suffering or the degree of its intensity? When a large number of survivors were found, an inquiry would have to be instituted into the feelings of each. This certainly might, in many instances, tend to scandals and disgrace. Neither the interests of the litigants nor the policy of the law could be subserved by such a course. None of these difficulties are encountered in estimating the mental suffering in the case of one suing for direct injuries to himself;

[20] Johnson v. Enlow, 132 Colo. 101, 286 P.2d 630 (1955).
[21] 2 Colo. 442 (1874).

his relations to others are in no sense material; it is a personal, not a relative, suffering."[22]

If some allowance is to be made in damages for such mental anguish, grief, sorrow and loss of companionship on the part of the survivors of the deceased, the allowance should be fixed or controlled in some manner by statute, and not left up to a jury to set on the basis of their emotions and sympathies and without any relation to any legal evidence, evidence on these items being completely inadmissable even if offered.

In attempting to work out some reasonable and not completely arbitrary solution to this unique problem, it seems apparent that plaintiffs under the death act should be divided into two categories, based upon the amount of special damages provable by them. Thus, the widow or minor children of a deceased, in every case, have very high provable special damages in the form of loss of substantial financial support. The present $10,000 maximum limitation on recovery for such parties appears most unjust as their special damages usually amount to far more than that figure independent of any allowance whatsoever for mental anguish, grief, sorrow or loss of companionship. However, adult and self-supporting children suing by reason of the death of a parent, parents suing for damages by reason of the death of a child, and a widower suing by reason of the death of his wife in most cases have very little in the way of provable special damages. Such plaintiffs are actually basing their re-

[22] *Id.* at 465.

covery almost entirely on the grief, sorrow, mental anguish and loss of companionship elements of damage, and a statutory limit of $10,000 as regards such plaintiffs does not appear to the writer to be at all unreasonable.

In that connection, we must also consider the equities as regards the defendant, who must either personally or through his insurer, pay such judgments. Any practicing attorney who has participated in a suit involving a claim under the death act is well aware that this type of action arouses the most intense sympathy on the part of the jury for the bereaved parent, widow, or other relative. After a photograph of the deceased has been shown to the jury, and the surviving widow or parent while testifying from the witness stand has broken into tears because of reliving the tragic accident, the emotional factor becomes so great that an unfairly high verdict is all too apt to result. No matter what the size of the verdict, under such conditions it is indeed difficult for it to be based upon a calm and rational approach, and in this respect this type of action is, in the writer's opinion, quite different from a personal injury action.

CONCLUSION

It is the earnest hope of the writer that the unfair and unjust $10,000 death act limitation as applied to widows and minor children will soon be raised to a reasonable and just figure by the General Assembly. It is also the earnest hope of the writer that the General Assembly will not go to the extreme of eliminating all death act limitations as to maximum recovery, and that the General Assembly will leave substantially unchanged the present $10,000 maximum recovery limitation as regards suits by adult children for deaths of parents, parents for deaths of children, or widowers for loss of wives because this limitation as applied to these plaintiffs appears to be reasonable in view of the lack of any substantial special damages provable by such plaintiffs.