North Dakota Law Review

Volume 43 | Number 1 Article 6

1966

Death - Distribution of Amount Recovered - Reasonable Compensation for Pain and Suffering

Marianne Munson Milloy

RECENT CASES

DEATH—DISTRIBUTION OF AMOUNT RECOVERED—REASONABLE COMPENSATION FOR PAIN AND SUFFERING—Deceased lived for nine hours after being injured in an automobile collision. The plaintiff, administratix of the estate of deceased, brought this action under the wrongful death statute and originally claimed pecuniary loss to a surviving widow and damages for conscious pain and suffering. The claim for the surviving widow was withdrawn and no testimony was offered at the trial as to existence of any surviving heirs. The jury returned a verdict of $10,000 which the judge concluded was for decedent's pain and suffering. The trial judge then ordered a remission to $5,000 which was affirmed on appeal by a divided court. *French v Mitchell*, 140 N.W 2d 426 (Mich. 1966)

The Michigan wrongful death statute provides for recovery of damages for conscious pain and suffering and in this case the Michigan Supreme Court in interpreting the statute had no trouble in reaching the conclusion that under the statute recovery for conscious pain and suffering is permitted when no heirs survive.[1] The measure of recovery under wrongful death statutes is usually the injury resulting to survivors, and thus, unless expressly provided for, there can be no special recovery for conscious pain and suffering, and no action under the statute can be brought without the existence of surviving kin.[2] This is the case in North Dakota,[3] however, in North Dakota and many jurisdictions, unlike in Michigan,[4] all actions for such deaths are not limited to actions under the wrongful death statute. North Dakota's survival statute permits actions by deceased's representative which could recover for damages suffered by deceased before deceased's death—thus for conscious pain and suffering.[5] Furthermore, since the deceased's representative could bring the action no heirs need survive. Thus similar actions to the case in point could be brought in North Dakota and in most jurisdictions.

---

1. MICH. COMP. LAWS § 691.581 and § 691.582 (1948).
2. See generally, 25A C.J.S. *Death* § 106 (1966).
3. Satterberg v. Minneapolis, St. P & S.S. My. Ry. Co., 19 N.D. 38, 121 N.W 70 (1909) N.D. CENT. CODE § 32-21-02 (1960).
4. MICH. COMP. LAWS § 691.581 (1948).
5. N.D. CENT. CODE § 28-01-26.1 (1960) for other jurisdictions see generally, 15 AM. JUR. *Damages* § 101 (1938).

The three opinions rendered in this case on the validity of the trial court's remittitur set out three different views concerning a court's power to substitute its view in place of the jury's. Each opinion concedes such a power to the bench, but the requirements as to when the power may be exercised differ The lines of distinction between the three views are narrow and in practice may appear negligible.

The majority opinion affirms a broad judicial power by liberally realizing a judicial duty, imposed by the legislature, to limit such recoveries under the wrongful death statute, and by ascertaining a public policy for guarding against excessive awards. Thus, the majority opinion permits a judge, in an action for conscious pain and suffering under the wrongful death statute, to set a reasonable verdict on mere ground that he felt the jury's verdict was unreasonable. It is an interesting discourse by which this view is reached.

In 1939 the wrongful death statute in Michigan was amended to allow recovery of "reasonable compensation for [conscious] pain and suffering."[6] The qualifying word "reasonable" in the amendment is the basis for the majority's finding of a legislatively imposed judicial duty to limit recoveries. The majority believed this to be the first case to interpret this qualifying word.

There is no question that the legislature has power to limit recoveries obtained under statutory actions. Minnesota limits damages to $10,000 in wrongful death actions.[7] In suit against the owner of a vehicle for damages caused by the vehicle while operated by another, California limits the owner's liability to $10,000 if no master-servant relationship exists.[8] In the instant case recovery is statutory, but the legislature has only limited recovery for conscious pain and suffering to a "reasonable" amount. By this one word the majority feels that the legislature has imposed a duty on the courts "to control such compensation to a reasonable extent" and has given the court the right to substitute its view as to what is reasonable in place of the jury's.

The majority, by a curious discussion of statutory liability insurance requirements, discerns a public policy which supports this judicial duty The majority reasons that since in the future, with this case as precedent, such recoveries for conscious pain and suffering may exceed the liability coverage required of Michigan motorists, it is imperative that this judicial duty, as seen by the majority, be recognized and exercised. The insurance carried by

6. MICH. COMP. LAWS § 691.582 (1948).
7. MINN. STAT. ANN. § 573.02 (1945).
8. VEHICLE CODE OF CALIF. § 17151.

defendant is not properly to be considered by the jury and disclosure or pleading of such fact in some circumstances has been held to be reversible error [9] Michigan by statute declares that there should be no disclosure concerning insurance during the course of the trial.[10] The matter of insurance is said to be wholly immaterial in these cases. A further reason against such disclosure by plaintiff is that the jury may fix liability when none exists or arrive at an excessive amount because of the fact that the burden would not have to be met by defendant.[11] The rule against disclosure of insurance is, however, also applied to defendant; Michigan courts have held that the defendant cannot produce evidence to show that he is not insured or to show the limit of his insurance.[12] Nevertheless, in this case the Michigan Supreme Court feels that the matter of liability insurance coverage should be taken into account for the purpose of ascertaining public policy and setting important precedent.

Michigan is one of the few jurisdictions which allows the per diem argument of pain and suffering damages illustrated with a figure to be submitted to the jury [13] Thus this case could be used in counsel's argument to present a figure (a little over $1,000 an hour—$24,000 a day) to the jury on which they could compute the damages. North Dakota doesn't allow a figure to be used by counsel, although counsel may explain the per diem method to the jury [14] Thus in North Dakota this case as precedent would not present such a threat. But, in the jurisdictions like Michigan where the per diem argument coupled with a figure is permittedly used by counsel, it can be said that the courts should guard against such precedents to avoid the spiral staircase of skyrocketing verdicts. The question presented is whether the court can and should avoid bad precedent by recognizing a broad power in the court to substitute its view as to what is reasonable for that of the jury's merely on the ground that to let the jury's verdict stand would set bad precedent.

The concurring opinion concedes power to the judge to use remittitur when the judge believes the verdict is excessive and therefore must have been based on improper criteria. The judge may say what is reasonable but must believe that the jury's unreasonable verdict was arrived at by improper methods although

9. 20 AM. JUR., *Evidence* § 388 (1939).
10. MICH. COMP. LAWS § 522.33 (1948).
11. Ryan v. Noble, 116 So. 766 (Fla. 1928).
12. Socony Vacuum Oil Co. v. Marvin, 313 Mich. 528, 21 N.W.2d 841 (1946).
13. Yates v. Wenk, 363 Mich. 311, 109 N.W.2d 828 (1961), 60 MICH. L. REV. 612 (1962).
14. King v. Railway Express Agency, Inc., 107 N.W.2d 509 (N.D. 1961), 39 N.D.L. REV. 209 (1963).

there is no evidence of improper methods other than the size of verdict. The distinction between this and the majority view may be mere judicial verbiage. The stricter of the three views is the minority opinion which allows the judge power to adjust the verdict only where there is a showing of the use of improper methods, sympathy or prejudice. This opinion is concerned with the usurpation of judgement of the duly constituted trier of fact.

North Dakota's high court's verbiage is similar to that of the concurring opinion. The North Dakota court has spoken of "verdict not so large or excessive as to indicate passion or prejudice by the jury,"[15] "damages proportionate to injury,"[16] and evidence bearing a reasonable relationship to elements of injury and damages proved.[17] The result is that the court is left with the determination of such excessiveness, proportionateness, and reasonableness of the relationship. Thus in a similar case brought in North Dakota under the survival statute, although there are only judicial, not legislative, pronouncements that recovery for conscious pain and suffering must be reasonable, the North Dakota court would probably adopt the view set forth in the concurring opinion.

The procedure of remittitur presents the question of conflict with constitutional provision for trial by jury and while it hastens final determination of litigation and thus lessens expense, restraint of its excessive and indiscriminatory use has been urged.[18] The public policy reasons for limiting the recent trend of unusually high recoveries must be weighed against public policy considerations in usurping right to trial by jury In this case of such a tenuous public policy derived from the state liability insurance requirements, the jurors as Michigan citizens who must be assumed to know these requirements and the average coverage maintained by Michigan drivers, should be just as capable as the court to protect the interests of Michigan drivers. A more lucid public policy is called for in order to usurp the right of the jury to determine the verdict.

MARIANNE MUNSON MILLOY

15. Clark v. Josephson, 66 N.W.2d 539 (N.D. 1954).
16. Henke v. Peyerl, 89 N.W.2d 1 (N.D. 1958).
17. Lake v. Neubauer, 87 N.W.2d 888 (N.D. 1958).
18. Conklin, *Appellate Courts and the Quest for Just Compensation Additur and Remittitur*, 42 N.D. L. REV. 397 (1966).