Chapter 6: Damages for Personal Injury or Death

James W. Smith

Follow this and additional works at: http://lawdigitalcommons.bc.edu/asml

Part of the Civil Law Commons

Recommended Citation
CHAPTER 6

Damages for Personal Injury or Death

JAMES W. SMITH

§6.1. Introduction. This chapter has two purposes. Since the area of the law called "Damages" has not received separate treatment in past editions of the ANNUAL SURVEY OF MASSACHUSETTS LAW, it seemed desirable to discuss the major recent developments in Massachusetts in the personal injury damage area, which were not included in the Torts chapters of previous SURVEYS. Thus, such matters as the adoption of the Uniform Contribution Among Tortfeasors Act, which were previously discussed,¹ are not repeated.

Second, for some reason unknown to this author, damage problems which have become a matter of great controversy in other states have been virtually ignored in Massachusetts. Some of these problems are discussed in this chapter.

§6.2. Benefits from collateral sources. Often an injured plaintiff, as a result of his injuries, will receive certain benefits from sources other than the defendant or the defendant's insurer. There are basically three types of benefits which a plaintiff may receive from such a collateral source: (a) continuation of wages during the period of disability; (b) proceeds received from health and accident insurance policies; (c) services rendered gratuitously. The question arises as to whether the defendant is entitled to have the plaintiff's damages reduced by the amount received from these collateral sources.

(a) Wages. Wages received by the plaintiff during his disability, whether received as a matter of right under his employment contract or as a gratuity from his employer, are not deducted from the damages recoverable from the defendant for impairment of earning capacity.¹ This result occurs because recovery in Massachusetts is not for lost wages as such, but strictly for the impairment of earning capacity.² A plaintiff's earning capacity may be impaired despite the fact that he has lost no wages.

JAMES W. SMITH is Professor of Law at Boston College Law School. He is a member of the Massachusetts Bar.

The author wishes to acknowledge the research assistance of the following students at the Boston College Law School: Carl E. Axelrod, Robert V. Costello, James O. Druker, Myron J. Fox, James D. Lawlor, Thomas McArdle, Thomas R. Murtagh and Alan P. Shepard.


There have been no recent cases in Massachusetts involving this rule. The only recent cases in the general area deal with the admissibility of evidence of the receipt of wages by the plaintiff on the issue of malingering. In *McElwain v. Capotosto,* the Supreme Judicial Court held that such evidence was admissible in the discretion of the trial judge on the issue of whether the period of time of the plaintiff’s absence from work was prolonged by the fact that he was being paid his wages without working and that the amount of such wages would not be deducted from his recoverable damages.4

(b) *Insurance proceeds.* With respect to the receipt of proceeds from health and accident insurance policies, Massachusetts follows the rule of most states. The defendant is not entitled to benefit from the fact that the plaintiff has a health and accident insurance policy. Thus, despite the fact that it will result in a windfall to the plaintiff, the defendant is not entitled to have the proceeds received by the plaintiff from his insurance company deducted from the damages.5 There have been no recent cases in Massachusetts affecting this rule.

(c) *Services.* It is difficult today to state with any degree of certainty the law of Massachusetts with respect to whether the plaintiff, in a personal injury case, may recover for the value of services which were rendered gratuitously by a friend or relative. In an early case, *Copithorne v. Hardy,* the plaintiff, an adult, was allowed to recover the value of services rendered gratuitously by her mother. In a later decision, *Daniels v. Celeste,* the Supreme Judicial Court refused to allow the plaintiff to recover the value of the services performed by his wife who was a registered nurse. The Court distinguished the *Copithorne* decision on the basis that the plaintiff could be legally bound to pay her mother for the reasonable value of the services, whereas the inability of a husband and wife to contract with each other precluded the existence of such a legal obligation in the *Daniels* case.

In 1963, the statutory provisions precluding the making of contracts between husband and wife were amended to allow such contracts.8 Hence, if the sole reason for the result in the *Daniels* case was the inability of a husband and wife to contract with each other, then the law of Massachusetts today is that a plaintiff may recover from the

4 In a recent United States Supreme Court decision, *Eichel v. New York Cent. R.R.*, 375 U.S. 253 (1965), the Court held that the likelihood of misuse by the jury of such evidence outweighs its value on the issue of malingering and is therefore inadmissible. Hence, in a case being tried in a federal court, the source of the collateral benefit may be critical on the admissibility of this evidence. In a recent diversity case, *Thompson v. Kawaski Kisen, K.K.*, 348 F.2d 879 (1st Cir. 1965), the court followed the Massachusetts rule set out in the *McElwain* decision, taking the position that since the payments were not made under a federal statute, the court was not bound by the rule set out in the *Eichel* decision.
§6.3

DAMAGES FOR PERSONAL INJURY OR DEATH

75

defendant the reasonable value of services made necessary by the defendant's conduct, even though such services were, as a matter of fact, rendered gratuitously, irrespective of the personal relationship between the plaintiff and the person performing the services. 9 On the other hand, if the Daniels decision, taken as a whole, simply reflected an unwillingness by the Supreme Judicial Court to allow a plaintiff to recover damages for a medical expense which he never incurred, then the Court might well overrule Copithorne v. Hardy in some future decision. 10

§6.3. Impairment of earning capacity. As mentioned in the previous section, the plaintiff in a personal injury action in Massachusetts does not recover for lost salary or wages as such; he recovers for the impairment of his earning capacity caused by the injury. 1 Apart from its effect on the operation of the collateral source rule discussed above, 2 this distinction has several ramifications. It allows a plaintiff to prove that the salary or wages being received by him at the time of the injury were not the true measure of his earning capacity, either present or future. 3 This rule is particularly important to plaintiffs who at the

9 A few exceptions to this statement may exist. For example, it seems unlikely that a person who receives gratuitous services from a charity or from a state or federal institution may be able to recover their value from the defendant. When the plaintiff receives services from an infirmary operated by his employer, however, it could be argued that this situation is analogous to that in which one receives proceeds from a health insurance policy since the services may be considered part of the consideration he receives for his employment, and the plaintiff may be able to recover them as such.

10 There are several reasons to believe that the Daniel decision may have simply reflected a dislike by the Court of the collateral source rule with respect to its application to gratuitous services. The distinction made by the Court with respect to contracts between husband and wife was overly technical. It was highly unlikely that the mother in the Copithorne case would maintain an action against her daughter for the value of her services. Furthermore, unless such services were performed with the reasonable expectation of being paid for them, it is doubtful whether any legal obligation arose to pay for them. See Kirchgassner v. Rodick, 170 Mass. 543, 49 N.E. 1015 (1898). Secondly, the Court in the Daniels case made no mention of the possibility of a moral obligation to pay for the services as being sufficient for the application of the collateral source rule despite the fact that such a theory has been held sufficient for its application in an earlier decision. See Sibley v. Nason, 196 Mass. 125, 81 N.E. 887 (1907), involving a debt discharged in bankruptcy. See also Schwartz, The Collateral Source Rule, 41 B.U.L. Rev. 348, 355 (1961). Finally, the Court in the Daniel case distinguished the cases allowing recovery for impairment of earning capacity despite the fact that the plaintiff's salary was continued during his disability, on the basis that recovery in that situation is not for loss of salary but rather for the impairment of the capacity to earn. 303 Mass. at 151, 21 N.E.2d at 3.


2 See §6.2 supra.

3 In Mitchell v. Walton Lunch Co., 305 Mass. 76, 78, 25 N.E.2d 151, 153 (1940), the Supreme Judicial Court enumerated the elements relevant to the determination of damages for the impairment of earning capacity in the following language: "The determination of damages for the impairment of earning capacity is not susceptible to arithmetical calculation; its ascertainment must to a large degree depend upon

Published by Digital Commons @ Boston College Law School, 1967
time of their injury had not yet reached an earning plateau in their field of endeavor. Furthermore, it allows a plaintiff to recover for impairment of earning capacity even though he had never been gainfully employed or was unemployed at the time he received his injury. This rule is particularly important in cases involving injuries to minors or housewives.

Only two cases involving the above rules were decided by the Supreme Judicial Court in recent years. In *Thornton v. First National Stores, Inc.*, the Supreme Judicial Court ordered a new trial confined to the issue of damages where the trial judge’s instructions could have been interpreted by the jury as permitting a husband to recover consequential damages for the impairment of his wife’s earning capacity. The wife had died prior to the trial. Since the wife through her administrator was entitled to recover for impairment of her earning capacity, allowing the husband to recover in his own right for such impairment would have resulted in a double recovery.

In *Kane v. Fields Corner Grille Inc.*, the Supreme Judicial Court reiterated the rule established in earlier cases that while recovery is for impairment of earning capacity and not for wages as such, wages earned prior to the injury are admissible as proof of earning capacity of the plaintiff.

Two of the most intriguing problems which have arisen in recent years with respect to the recovery of damages for impairment of earning capacity are: (1) whether the defendant is entitled to have the jury instructed that since tort awards are not subject to federal tax, earning capacity should be calculated on the basis of net earnings after taxes rather than on the basis of gross earnings; and (2) whether the practical sagacity, common knowledge and good sense of the jury in considering the age, skill, training and industry of the plaintiff, the extent of his physical injury, the wages commonly received by one pursuing a similar occupation in the vicinity of the plaintiff’s employment and whatever other evidence is introduced to aid them in arriving at a just conclusion.

---


5 In Massachusetts a minor can recover for the impairment of his earning capacity only from the time he reaches his majority. During minority, the minor’s father has an action for loss of services. See Zarba v. Lane, 322 Mass. 132, 76 N.E.2d 318 (1947).


8 See note 6 supra.


11 Internal Revenue Code of 1954, §104.

12 One of the most complete discussions of this question is contained in the opinions in *McWeeney v. New York, N.H. & H. R.R.*, 282 F.2d 34 (2d Cir. 1960), *cert.*
the plaintiff is entitled to have the jury instructed that it may consider the decreasing value of the dollar in assessing damages for future impairment of earning capacity. While many other jurisdictions have dealt with these problems the Supreme Judicial Court has not as yet been called upon to decide these questions.

Most jurisdictions which have considered the first question have taken the position that in computing the plaintiff's earning capacity no consideration should be given to the matter of federal taxation. The reasons given for this position are: (1) uncertainties as to the plaintiff's future tax liability render such considerations too conjectural (e.g., number of exemptions, use of joint return, possible change in tax rates); (2) introduction of such matters would greatly complicate the trial of the case; (3) such matters as inflation and attorney's fees tend to offset any financial advantage received by the plaintiff; (4) by exempting such awards from federal taxation Congress intended that the victim and not the wrongdoer receive the tax benefit.

With respect to the second question most courts have held that the matter of inflation or deflation is a proper consideration for the jury in arriving at an award for personal injury.

§6.4. Medical expenses. In Massachusetts, damages are recoverable for medical expenses both past and future. For convenience in presentation we shall first deal with the problems of medical expenses up to the date of the trial and then discuss the problems involved in future medical expenses.

(a) Past medical expenses. The plaintiff in a personal injury case may recover the reasonable expenses incurred by him for medical care and nursing in the treatment and cure of his injury. While such medical services must have been necessary to alleviate the injury, the test of necessity is not whether the services were in fact necessary but whether they were reasonable, in the light of facts known at the time they were rendered.

14 See note 12 supra.
15 See note 13 supra.

3 In Hunt v. Boston Terminal Co., 212 Mass. 99, 101, 98 N.E. 786, 786 (1912), the Court defined the rule as follows: "If the appearance of the patient's body resulting from the defendant's wrong, together with an honest and fair statement of his feelings and sensations, are such as sometimes in common experience might cause an attending physician, selected in the exercise of reasonable prudence in view of the seriousness of the injury, to believe that a certain physical condition existed, and to give treatment in accordance with that belief, then the defendant will be responsible even though subsequent developments may demonstrate that the supposed physical condition in fact did not exist, and would not have been supposed to exist by a physician more skillful, experienced or highly trained, and even though the injury may be aggravated by the treatment in fact given."
When a married woman or a minor brings an action for personal injuries, the husband of such woman or a parent or guardian of such minor, if he has paid or incurred medical expenses because of such injuries, may, upon motion, be admitted as a party plaintiff for the recovery of such medical expenses. Of course, in this situation the action for these consequential damages stands no better than the principal case and falls if the latter falls.

As mentioned previously, recovery of medical expenses is limited to those expenses which are reasonable. Difficulties have arisen in many jurisdictions as to how reasonableness is proven. Perhaps the most significant development in Massachusetts in recent years in the area of medical expenses was the enactment of General Laws, Chapter 233, Section 79G. This section provides that, in an action for personal injury or for consequential damages arising therefrom, an itemized bill sworn to by the physician, dentist or authorized agent of the hospital rendering services shall be admissible as evidence of the fair and reasonable charge for such services. Written notice of the intention to offer such a bill as such evidence together with a copy of the bill must be given to the opposing party or his attorney not less than ten days before trial. The statute does not limit the right of the defendant to summon the witness at his own expense for the purpose of cross examination with respect to such bill or to rebut the contents thereof or for any other purpose or to adduce other testimony regarding the bill.

(b) Future medical expenses. The plaintiff in a personal injury action is entitled to recover damages for proven future probable medical expenses. Unlike the situation involving recovery for past medical expenses a husband may not recover for the future medical expenses likely to be incurred as a result of injury to his wife. Such recovery belongs to the wife alone. The reason for this rule is that if the husband recovered the damages for future medical expenses, there would be no assurance that he would use the money for such purpose. He would not hold it in trust. It would be part of his estate at his death. He could squander it. As was pointed out by the Supreme Judicial Court in Cassidy v. Constantine: "It is, however, common knowledge that divorces are frequent, that husbands occasionally squander their substance and sometimes desert their wives and otherwise fail in the performance of their full conjugal duties."

4 G.L., c. 231, §6A. If it appears that the wife, rather than the husband, has paid her medical expenses or has rendered herself liable for such expenses, she may recover for them in her own action. Thibeault v. Poole, 283 Mass. 480, 186 N.E. 632 (1933).
9 Id.
11 269 Mass. at 59, 168 N.E. at 170 (1929).
§6.5 DAMAGES FOR PERSONAL INJURY OR DEATH

An interesting question which has not yet been presented to the Supreme Judicial Court is whether the rationale of the Cassidy case would be equally applicable in the situation involving recovery for future medical expenses of a minor. If such expenses are recoverable as consequential damages by a parent of the injured minor, they would become part of that parent’s estate at his death, available for payment of his debts, and thus might never be used to provide the needed medical services for the minor. Or, as mentioned in the Cassidy case with respect to a husband, a parent might squander the money or desert his family. A majority of the jurisdictions which have considered this problem have held that for the protection of the minor, future medical expenses should be recoverable in the action brought on the minor’s behalf, rather than in an action by the parent on his own behalf.12

§6.5. Pain and suffering. Although not an out-of-pocket expense, the successful plaintiff in a personal injury case is entitled to recover damages for his pain and suffering.1 Recovery will be allowed both for past pain and suffering and for such pain and suffering as is shown to be reasonably probable to continue in the future.2

(a) Past pain and suffering. Many of the cases dealing with past pain and suffering involve situations where the victim died subsequent to his injuries, but before suit was brought. While a substantial recovery may be had in such situations, even for a very brief period of pain and suffering,3 the plaintiff has the burden of proving that the decedent was conscious for some period of time following the injury.4

12 See Annot., 32 A.L.R.2d 1060, 1075 (1953, Supp. 1963). For a case accepting the minority view, see Peer v. City of Newark, 71 N.J. Super. 12, 176 A.2d 249 (1961), holding that the parent is entitled to recover future medical expenses for care of the minor, including expenses incurred after the infant reaches majority. As mentioned in the text, there is no Massachusetts decision directly on point.

There is, however, language in one Massachusetts opinion which could be interpreted as meaning that the parent in his own right could recover the future medical expenses when a minor is injured. In the case of Rodgers v. Boynton, 315 Mass. 279, 280-281, 52 N.E.2d 576, 577 (1946), the Court stated: “The amount of compensation that a wrongdoer is required to pay does not depend upon the fact that the victim is a minor or a married woman. In such instances, the law splits the cause of action arising from the personal injury to the minor or married woman and gives each the right to recover for personal injuries, and gives the parent or husband, as the case may be, the right to recover for medical and nursing expenses, but in the case of the husband only for such expenses up to the time of trial.” (Emphasis added.)

2 In Pullen v. Boston Elev. Ry., 208 Mass. 356, 94 N.E. 469 (1911), the Supreme Judicial Court pointed out that a possibility that suffering will occur in the future is insufficient to allow recovery.
3 In Toczko v. Armentano, 341 Mass. 474, 170 N.E.2d 703 (1960), the Supreme Judicial Court refused to interfere with a verdict of $7500 for approximately eighty-five minutes of conscious suffering.
4 In Royal Indemnity Co. v. Pittsfield Elec. Co., 293 Mass. 4, 199 N.E. 69 (1935), the Court held that a finding that the decedent, who was killed by a severe electric shock, suffered consciously after the shock was not warranted on evidence that he emitted a “scream” or “two cries” about a second apart.
of the recent Massachusetts cases in this area have involved the question of whether the plaintiff's evidence was sufficient to warrant a finding of consciousness on the part of the decedent.

Evidence admissible on the issue of consciousness may involve statements by the decedent prior to death, exclamations, groans, various movements of the body such as the squeezing of a hand, response by the victim to the calling of his name, response by the victim to a stimulus such as a pinprick or simply the nature of the injury and the manner in which death occurred. If there is one point, however, which recent cases emphasize, it is the importance of expert medical testimony in a close case. This is best illustrated by comparing two Massachusetts decisions, *Alden v. Norwood Arena, Inc.* and *Carr v. Arthur D. Little, Inc.*

In the *Alden* case, the decedent was struck by a wheel which flew from a stock car while she was watching a stock car race with her husband. She died two days later from the injuries she received. During this two-day period her husband, a physician, was constantly at her side. At the trial he testified that on four occasions the decedent squeezed his hand in response to short phrases which he whispered in her ear. He also testified that she squirmed in response to a pinprick although he conceded that a person could withdraw from a pinprick involuntarily. When asked what he saw that would indicate his wife was suffering, the husband said that he observed the expression on her face, the way she was breathing, the color of her skin and her movements, such as they were. On this evidence the Supreme Judicial Court held that a jury could find conscious suffering. While admitting that it was a close case, the Court stated that considering the fact that the decedent's husband was a physician of many years experience, his

---

6 In a 1965 case, Baldassare v. Crown Furniture Co., Inc., 349 Mass. 183, 207 N.E.2d 268, the victim was killed by bricks from a falling building. The Court held that exclamations uttered by the decedent were insufficient to warrant a finding of conscious suffering where the evidence failed to disclose that such exclamations were uttered subsequent to the victim being struck by the falling bricks.
8 Alden v. Norwood Arena, Inc., 332 Mass. 267, 124 N.E.2d 505 (1955). In Markell v. Gahn, 343 Mass. 468, 179 N.E.2d 587 (1962), the victim apparently attempted to prevent a nurse from removing his wallet by rolling over and using his left hand. In Ghiz v. Wantman, 337 Mass. 415, 149 N.E.2d 595 (1958), the Court held the evidence that the victim moaned, moved his head and tried to raise it, and mumbled some incomprehensible words before he died was insufficient to warrant a finding of conscious suffering.
11 In Campbell v. Romanos, 346 Mass. 361, 191 N.E.2d 764 (1963), evidence that the victim came in contact with a fire that burned her hair and that she ran away from the flames back into her apartment and later was found dead there was held sufficient to warrant a finding of conscious suffering.
13 348 Mass. 469, 204 N.E.2d 466 (1965).
testimony as to the significance of his wife’s appearance and behavior was enough to warrant the judge to submit the case to the jury.\textsuperscript{14}

In the \textit{Carr} case the decedent received a severe head injury. The evidence presented by the plaintiff on the issue of consciousness was that the decedent, during the ten-minute ambulance trip to the hospital, moaned and groaned every half minute or so. His hands were opening and clenching. During the two-day period prior to his death, the decedent’s wife, a registered nurse, was with him. On three occasions she ran her finger down the sole of her husband’s foot and his toes moved. On one occasion she called his name several times and he moved his head very slightly toward her and moved his hand with his fingers toward her. A qualified neurologist, called by the defendant, was the only medical witness in the case. He testified that the movements of the decedent were not necessarily indicative of consciousness and that it was his opinion that the decedent was never conscious following the accident. The Court held that the evidence of conscious action was at most speculative and did not meet the burden of proof which is upon the plaintiff.\textsuperscript{15}

A comparison of the \textit{Alden} and \textit{Carr} cases demonstrates that apart from the medical testimony in the cases, the evidence presented by the plaintiff in each case is almost identical. In each case there was a severe head injury, a two-day interval from injury to death during which the victim moaned and groaned, physical response to a stimulus and an apparent response to words uttered by the victim’s spouse. The difference between the two cases was that in the \textit{Alden} case the victim’s husband was a physician who testified that in his opinion his wife experienced conscious pain whereas in the \textit{Carr} case the only medical testimony was presented by the defendant.

The opinion in the \textit{Carr} case provides an excellent review of the Massachusetts cases on the issue of consciousness and its summary of these cases highlights the importance of medical testimony:

The foregoing review of our cases on this subject leads to the conclusion that they may be classified in three categories. 1. Cases wherein the sounds, movements, or both, of the decedent are insufficient in the light of common experience and present medical knowledge to warrant a finding of conscious suffering. 2. Cases wherein the acts, utterances or both are sufficient in the light of common experience to warrant a finding of conscious suffering regardless of expert medical testimony. 3. Cases wherein the sounds, movements, or both, are insufficient to warrant laymen finding conscious suffering, but which when supported by interpretive expert medical testimony could warrant a finding of conscious suffering.\textsuperscript{16}

(b) \textit{Future pain and suffering}. As mentioned previously, the success-

\textsuperscript{14}332 Mass. at 274, 124 N.E.2d at 509 (1955).
\textsuperscript{15}348 Mass. at 478, 204 N.E.2d at 471 (1965).
\textsuperscript{16}Id. at 477, 204 N.E.2d at 471.
ful plaintiff in a personal injury action is entitled to recover damages for such pain and suffering as is likely to occur in the future. The major legal question today in the area of future pain and suffering is whether counsel, in argument to the jury, may use a mathematical formula by stating that specific sums per day, hour or minute may be allowed as damages for pain and suffering. This argument based upon a unit-of-time measurement of pain and suffering is generally referred to as a "per-diem argument."

The principal reasons advanced in favor of the per-diem argument are that since translating pain and suffering into dollars can, at best, be an arbitrary determination, the per-diem argument is an aid to the jury, will not mislead them, and is a logical method to clarify the difficult problem of granting a total verdict. The principal objection to the per-diem argument is that it is misleading. A small sum multiplied by the number of hours in the plaintiff's life expectancy introduces an element of apparent precision that is illusory and compounds the dangers of conjecture. While there are approximately ten jurisdictions which have rejected the use of the per-diem argument, a majority of the jurisdictions which have considered the matter have allowed it. In a case decided during the 1967 survey year, Cuddy v. L. and M. Equipment Co., the Supreme Judicial Court declined the opportunity to state its position on the matter. In the Cuddy case, the defendant maintained that the plaintiff's reference to possible per-diem sums upon which the jury could calculate damages for pain and suffering was prejudicial. In refusing to pass upon the validity of the per-diem argument the Court pointed out that whatever dangers such a line of argument may be thought to present, those dangers were adequately forestalled by the judge's charge to the jury.

Whether one agrees or disagrees with the validity of the per-diem argument, it is unlikely that a trial judge's charge could neutralize the prejudicial effect of the per-diem argument. Since a jury will ordinarily have difficulty in arriving at a figure for future pain and suffering, the per-diem approach, once suggested to them, will appear to be the only definite standard given to them in the course of the trial;

---

21 Id. at 755, 225 N.E.2d at 908.
22 Id. at 756 n.4, 225 N.E.2d at 908 n.4. The relevant portion of the charge read as follows: "There is no formula by which we determine damages if you come to that phase of it; and the only method by which you determine damages is to exercise your good common sense and your reason, as far as evidence is concerned, in relation to the injuries and the circumstances that bear upon the matter of injuries received as claimed, and the determination whether they have been substantiated. I would also like to say that the determination of dollars and cents is determined by the exercise of common sense."
much more definite than common sense and reason. Since the validity of the per-diem argument is basically a matter of procedure, which will no doubt arise in many future cases, it is not clear why the Supreme Judicial Court refused to take a position on it. Perhaps the Court preferred to await a case where the damages appeared to be clearly excessive before commenting on its validity.

§6.6 Wrongful death. As in all other states, the right of action for wrongful death in Massachusetts is statutory. Unlike the law of most states, however, the damages recoverable by the survivors of the decedent in Massachusetts are measured by the degree of culpability of the defendant’s conduct rather than by the loss sustained by the survivors. While this standard avoids some difficult damage problems, such as ascertaining the pecuniary loss sustained by parents resulting from the death of their infant, the inequities of this standard seem to clearly outweigh the benefits resulting from its simplicity of application. In fact, one of the most significant developments in recent years with respect to the Massachusetts wrongful death statute has been the refusal on the part of other jurisdictions to apply it with respect to accidents occurring in Massachusetts.

The fact that the Massachusetts wrongful death statute is penal in nature has some rather interesting ramifications, many of which have been highlighted by recent decisions.

(a) Releases. The law of most jurisdictions is that a wrongful death action cannot be maintained where the decedent, prior to his death, executed a release with respect to his injuries. The reasons for this rule range from a literal reading of the applicable wrongful death statute to the fact that allowance of the action could result in a double recovery to the survivors and operate to discourage the settlement of claims in serious personal injury cases. In Wall v. Massachusetts...

§6.6. 1 G.L., c. 229.
2 Massachusetts is one of only two states which uses a culpability standard in assessing damages for wrongful death. See G.L., c. 229, §2. The other state is Alabama. See Ala. Code, tit. 7, §123 (1953).
3 For a discussion of the difficulties involved in calculating compensatory damages for the wrongful death of an infant, see Wycko v. Gnodtke, 361 Mich. 331, 105 N.W.2d 118 (1960).
4 See Kilberg v. Northeast Airline, Inc., 9 N.Y.2d 34, 172 N.E.2d 526 (1961), wherein the New York Court of Appeals refused to apply the limits on recovery set out in the Massachusetts death statute with respect to a recovery for an accident which occurred in Massachusetts causing death to a New York resident. A subsequent case, Pearson v. Northeast Airlines, Inc., 199 F. Supp. 539 (S.D.N.Y. 1961), aff’d, 309 F.2d 553 (2d Cir. 1962), a diversity action arising from the same accident, went further than the Kilberg case. It held that not only the limits on recovery but the penal standard of the Massachusetts death statute was inapplicable. See 1963 Ann. Surv. Mass. Law §8.1. See also §7.1 infra.
Northeastern Street Ry., the Supreme Judicial Court held that such a release did not bar recovery under the Massachusetts statute, principally because recovery under the Massachusetts statute is a penalty imposed for bringing about the decedent's death. It is a cause of action over which the deceased had no control during his lifetime and hence could not affect by his release. The Wall case had an interesting application in a recent decision of the United States Court of Appeals, Montellier v. United States, involving the Federal Tort Claims Act. In the Montellier case, the decedent was killed in Massachusetts through the negligence of agents of the United States government. The decedent's administratrix brought a death action against the United States under the Federal Tort Claims Act and recovered $168,000. This amount greatly exceeded the maximum recovery allowable under the Massachusetts death statute. This point was, however, not contested by the Government because it had been held in an earlier United States Supreme Court decision, Massachusetts Bonding and Insurance Co. v. United States, that since punitive damages cannot be awarded under the Federal Tort Claims Act, the punitive aspect of the Massachusetts death statute could not be applied against the United States. However, rather than denying recovery on this basis, the United States Supreme Court held that the Massachusetts death statute could be used to determine the existence of liability, but compensatory damages would be substituted for punitive damages, and since the maximum recovery provision in the Massachusetts death statute was associated with the punitive concept of the statute it would not be applied.

In the Montellier case, the decedent had executed a release of all claims. The Government, while conceding that such a release under the Wall case did not bar a subsequent wrongful death action, argued that since the rationale of the Wall case was based upon the penal nature of the Massachusetts death statute, it had no application in the present case where, due to the Massachusetts Bonding and Insurance Co. decision, the damages recoverable against the United States government were compensatory in nature. The Court of Appeals rejected this argument, holding that since the effectiveness of the release goes to the existence of liability of the United States, it is immaterial that the Massachusetts rule as established in the Wall case stems from the penal nature of the Massachusetts death statute. Since the release would be ineffective to bar a death action under Massachusetts law, it was therefore ineffective in a death action brought under the Federal Tort Claims Act as the result of an accident occurring in Massachusetts.

7 229 Mass. 506, 118 N.E. 864 (1918).
8 Id. at 507, 118 N.E. at 864.
9 315 F. 2d 180, 184-185 (2d Cir. 1963).
10 The maximum recovery now under the Massachusetts death statute is $50,000. G.L., c. 229, §2.
12 Id. at 133.
§6.6  DAMAGES FOR PERSONAL INJURY OR DEATH

(b) Joint tortfeasors. If a plaintiff has been injured by the conduct of joint tortfeasors, while he may obtain a judgment for the full amount of his loss against each tortfeasor, he obviously is not entitled to have his judgment satisfied twice. On the other hand, when a person is killed by the wrongful conduct of several tortfeasors, the damages recoverable against each of the tortfeasors under the Massachusetts death statute are assessed separately and any amount paid by one of the tortfeasors has no effect on the amount paid by the other. In fact, in death cases, no single action against joint wrongdoers can be maintained. This result is based on the premise that since the Massachusetts death statute is penal in nature, logically, "as in the criminal law, each wrongdoer may be made to suffer the maximum penalty, no matter how many are guilty." This reasoning applies even though the total amount recovered against all of the tortfeasors exceeds the $50,000 maximum set out in the death statute. Where, however, there is more than one defendant solely because of the application of the doctrine of vicarious responsibility, such as respondent superior, the plaintiff is limited in the amount he can recover from all the tortfeasors to the statutory limit of $50,000. In such instance, while judgments may be rendered in single actions against the master and the servant, and the plaintiff may pursue both master and servant until satisfaction is obtained, the plaintiff cannot collect fully on both judgments.

The recent decision of Baldassare v. Crown Furniture Co., Inc., presented a unique application of this problem. In Baldassare the decedent was killed when a building collapsed on him. The building was owned by Dora Fagelman and was leased by Crown Furniture Co., Inc. The collapse of the building was primarily due to the negligence of the agents of Crown in removing certain jacks which were supporting the building. These agents were Dora’s husband, son and son-in-law. In the trial court a judgment was rendered against Dora as the owner and one in control of the premises for $16,000, and a judgment was rendered against Crown for $18,000. On appeal, the Supreme

17 "The statute, following a pattern familiar in criminal and penal provisions, limits the penalty that can be imposed upon one person for causing one death. It does not limit the amount that can be collected from a number of wrongdoers for one death.” Id.
Judicial Court held that, while the evidence permitted recovery against Dora for failure to take adequate precautions to protect the public, there was nothing in the evidence to suggest that she acted or omitted to act otherwise, with respect to the building, than through the same persons who acted more immediately for Crown. The Court thus concluded that a maximum of $18,000 could be recovered against Crown and a maximum of $16,000 could be recovered against Dora, but any amount collected from Dora must be credited against Crown's liability and any amount collected from Crown must be credited against Dora's liability.

The result reached in the Baldassare case appears correct. Dora, while the owner of record of the building, seems to be nothing more than a straw for Crown. The result, however, does have one inconsistency. If, as the Court stated, the same acts or omissions imputed to Crown and to Dora, without independent activity or participation by her, are the basis of the recovery against Crown and against Dora, then the amount of the judgment against Dora should have been the same as the amount against Crown. Obviously the conduct of the agents of Crown was not less culpable when imputed to Dora than when imputed to Crown.

(c) Death of a child. The only situation where the Massachusetts wrongful death statute brings about a result which is more sensible than that reached in jurisdictions having a compensatory type of statue is where the death of a child is involved. Most Lord Campbell-type death statutes have been interpreted as allowing recovery only for losses which are pecuniary in nature. While the pecuniary loss theory has generally been interpreted to encompass loss of consortium on the death of a spouse or loss of guidance on the death of a parent, it has not generally been stretched to include damages for grief.

When the pecuniary loss theory first came into existence it could be logically applied to the death of a child. A healthy child was at that time an economic asset. While certain types of child-labor laws were coming into existence, most children over the age of ten years were working and contributing their meager earnings to the family. Today, most children are economic liabilities. Therefore, in most instances, recovery for the death of a child under the usual type of death statute has become a game of "make-believe." Recovery for grief is being allowed under the guise of a pecuniary loss.

---

20 Id. at 194-95, 207 N.E.2d at 275-276.
22 A few jurisdictions have expressly rejected the view that recovery for the death of a child must be based upon the potential earning capacity of the child during minority. Thus, in Wycko v. Gnodtke, 361 Mich. 331, 105 N.W.2d 118 (1960), the court held recovery may be had for the pecuniary value of the child's life which includes the expenses of birth, of food, of shelter, of clothing, of medicines, of instruction and of nurture. Also recoverable is the value of the child as a member of the family as a loved and cherished member.
§6.7 DAMAGES FOR PERSONAL INJURY OR DEATH

Since the Massachusetts wrongful death statute utilizes a culpability standard for the determination of damages, no unique and difficult problems arise in Massachusetts in the wrongful death of an infant. This is perhaps best illustrated by a recent Massachusetts decision, Torigian v. Watertown News Co.\textsuperscript{23} In the Torigian case, the Supreme Judicial Court held that the Massachusetts wrongful death statute was applicable to the situation where a child died two and one-half hours after her birth from injuries received two months earlier while the child was a nonviable fetus in her mother's womb. This is the first time that the Supreme Judicial Court has decided that recovery could be had for a prenatal injury which occurred prior to viability.\textsuperscript{24} Had the Massachusetts wrongful death statute been compensatory in nature, an extremely difficult problem in the ascertainment of damages would have been presented to the Court in the Torigian case. What would be the pecuniary loss to the parents resulting from the death of their infant apart from burial expenses?\textsuperscript{25}

The fact that the Massachusetts wrongful death statute provides an easy solution to the damages problem in a case involving the death of a child should not obscure the fact that recovery under a wrongful death statute should be based upon loss to the survivors and not upon the degree of culpability of the defendant's act. It is patently absurd to allow as death damages to the widow and children of a wage-earner, upon whose earnings they were dependent for their support, the same or a lesser amount than that received by parents for the death of a young child.

§6.7. Excessive and inadequate damages. When a jury returns a

of the family, that is, the value of the society and companionship of the child to the family.

\textsuperscript{23} 1967 Mass. Adv. Sh. 735, 225 N.E.2d 926, also noted in §3.10 supra.

\textsuperscript{24} In 1884 in the case of Dietrich v. Inhabitants of Northampton, 138 Mass. 14, the Supreme Judicial Court formulated the rule that there could be no recovery to a child or a child's administrator for prenatal injuries. The rule was unchanged in Massachusetts until 1960 when the Court, in the case of Keyes v. Construction Service Inc., 340 Mass. 633, 165 N.E.2d 912, held that recovery could be had for prenatal injuries provided that the injury occurred after the child had become viable and the child was born alive. For a discussion of the Keyes case see 1960 Ann. Surv. Mass. Law §3.1.

\textsuperscript{25} In a recent New Jersey decision, Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964), the court held that no recovery could be had for prenatal injuries resulting in the death of the child when the child was stillborn. The mother was seven months pregnant when the accident occurred. The court based its decision upon the fact that there could be no evidence from which to infer pecuniary loss to the surviving beneficiaries.

The Supreme Judicial Court in the Torigian case does not deal with the question of whether there may be recovery under the Massachusetts death statute when the child dies prior to birth, since the child in the Torigian case lived for two and one half hours after birth. Logically, since the Massachusetts statute is punitive in nature, it should make no difference whether the child is stillborn or lives several hours after birth. It may, however, be necessary to draw the line somewhere, even if arbitrarily.
verdict in a civil case which is either excessive or inadequate, the trial judge may, upon a written motion, set aside the verdict and order a new trial. Prior to ordering a new trial, however, the judge must determine whether the verdict may be corrected by the proper use of remittitur or additur and whether the appropriate party is willing to remit or accept an addition to the verdict. The standard for the trial judge in this situation is set out in General Laws, Chapter 231, Section 127, in the following language:

A verdict shall not be set aside as excessive until the prevailing party has first been given an opportunity to remit so much thereof as the court adjudges is excessive. A verdict shall not be set aside solely on the ground that the damages are inadequate until the defendant has first been given an opportunity to accept an addition to the verdict of such amount as the court adjudges reasonable.

Prior to a 1967 amendment, the additur could be used only with the consent of both the plaintiff and the defendant. Chapter 139 of the Acts of 1967 struck out the word "parties" and substituted the word "defendant." Presumably this 1967 amendment was based upon the premise that it was unfair to require only the approval of the plaintiff for a remittitur but require the consent of both parties for an additur. Actually the pre-1967 statutory provision was unnecessary. It made the additur little more than a settlement. On the other hand, the 1967 amendment could create some difficulties.

The distinction made prior to the 1967 amendment between the remittitur (requiring the consent of only one party) and the additur (requiring the consent of both parties) was not entirely arbitrary or groundless. When the damages are excessive there is no doubt that all the members of the jury are fully convinced on the issue of the defendant's liability. Except where the magnitude of the excessiveness of the damages indicates a passion or prejudice which may well have permeated the liability issue, the mistake on the part of the jury relates only to the damage issue. Thus, in the case of excessive damages it is not unfair to the defendant that the plaintiff be given the opportunity to avoid a new trial by remitting the damages which are excessive. On the other hand, when the damages are clearly inadequate, there is a strong possibility that there was a compromise verdict.

§6.7. 1 G.L., c. 231, §127.
3 See, however, Clark v. Henshaw Motor Co., 246 Mass. 386, 140 N.E. 593 (1923), wherein the Supreme Judicial Court upheld the refusal of the trial judge to grant a new trial after the defendant had filed a stipulation increasing the contract damages from one dollar to fifty-one dollars. The consent of the plaintiff was not obtained.

http://lawdigitalcommons.bc.edu/asml/vol1967/iss1/9
§6.7 DAMAGES FOR PERSONAL INJURY OR DEATH

When there has been a compromise verdict no one can say with reasonable certainty which way the jury would have found on the issue of liability had it not reached a compromise. In this situation it seems unfair to give the defendant the sole option of preventing a new trial by agreeing to add some amount to the verdict.5

There is involved in this situation not merely the question of unfairness, but also the question of whether the denial of the plaintiff's motion for a new trial, conditioned upon the defendant's agreeing to increase the amount of the verdict, denies the plaintiff his right to a jury trial under the Massachusetts Constitution6 with respect to the damages claimed by him. In 1935, in the case of Dimick v. Schiedt,7 the United States Supreme Court held that the use of the additur deprived the plaintiff of his right to a jury trial under the Seventh Amendment to the United States Constitution. The Court distinguished the remittitur in the following language:

Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess—in that sense that it has been found by the jury—and the remittitur has the effect of merely lopping off an excrescence. But where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict.8

The decision of the United States Supreme Court in the Dimick case is not binding in the state courts because the states are not bound by the provisions of the Seventh Amendment, either directly9 or by reason of incorporation into the due process clause of the Fourteenth Amendment.10 The reasoning of the Dimick case, however, may well be applicable to an argument that the additur violates the plaintiff's right

5 A parallel may be drawn from the Massachusetts decision, Simmons v. Fish, 210 Mass. 563, 97 N.E. 102 (1912). In the Simmons case the plaintiff received a verdict of $200 for the loss of an eye. The trial judge, agreeing that the damages were inadequate, ordered a new trial limited to the issue of damages. The defendant argued that the amount of the damages awarded indicated a compromise verdict and was in effect a finding for the defendant on the issue of liability. The Supreme Judicial Court held that it would be a gross injustice to set aside such a verdict as to damages alone against the protest of a defendant, and force him to a new trial with the issue of liability closed against him when it appears obvious that no jury had ever decided that issue against him on justifiable grounds.

6 Mass. Const., part I, art. XV, provides in part: "[I]n all suits between two or more persons, except in cases in which it has heretofore been otherways used and practised, the parties have a right to a trial by jury; and this method of procedure shall be held sacred. . . ."

7 293 U.S. 474 (1935).
8 Id. at 486.
10 Walker v. Sauvinet, 92 U.S. 90 (1875); Malloy v. Hogan, 378 U.S. 1, 4 n.2 (1964) (dictum).
to a jury trial under the Massachusetts Constitution, particularly where the verdict appears to have been a compromise verdict.

While it is true that the Massachusetts Constitution does not use the precise language of the Seventh Amendment to the United States Constitution, the variation in language would not seem to warrant a different result. Such was the holding in the California decision, Dorsey v. Barba, 38 Cal. 2d 350, 357, 240 P.2d 604, 608 (1952): "The reasoning of the Dimick case, however, is applicable here since both the state and federal Constitutions adopted the existing rules of common law with regard to trial by jury, and the variation in language does not warrant a different interpretation of the state Constitution."

It may be that a trial judge would not use the additur if he believed that the inadequate verdict was a compromise verdict. The language of G.L., c. 231, §27, as amended by Acts of 1967, c. 139, is as follows: "A verdict shall not be set aside solely on the ground that the damages are inadequate until the defendant has first been given the opportunity to accept an addition to the verdict as the court adjudges reasonable." On the other hand, unless the amount of the damages awarded indicated a mistake by the jury in applying the judge's instructions, how would one know whether the inadequacy of the award was due to a compromise verdict?