CLYMER v. WEBSTER

Supreme Court of Vermont, 1991.
156 Vt. 614, 596 A.2d 905.

Before GIBSON, DOOLEY and MORSE, JJ. and BARNEY, C[illegible]t.) and SPRINGER, DISTRICT JUDGE (Ret.), Specially Assigned.

GIBSON, Justice.

This appeal concerns the remedies available to the parents and the administrator of the estate of Jane Clymer, an adult decedent, in an action against two commercial vendors that served alcohol to a patron who thereafter drove his car and struck and killed the decedent....

I.

On September 14, 1985, after being served alcohol at The Rotisserie Restaurant and at Wesson's Diner, Theron Webster drove his car and struck Jane Clymer, an eighteen-year-old college student, while she was pushing her bicycle along the side of Route 116 in the town of Williston. Ms. Clymer suffered massive brain damage, but was kept alive until her

parents arrived the next morning, when she was pronounced brain dead and allowed to expire. Theron Webster was charged with and pled guilty to DWI-death resulting.

In a complaint filed in July of 1986, plaintiffs alleged negligence against Theron Webster, and a Dram Shop Act violation against the commercial vendors and certain of the vendors' employees, seeking compensatory damages for medical and funeral expenses, ... loss of companionship, ... and loss of means of support.... Plaintiffs eventually settled with Theron Webster, and the court dismissed him from the action .... After several rulings that limited the damages recoverable by plaintiffs "to medical and funeral expenses and lost services and guidance," the court dismissed the action with prejudice and entered judgment for the defendants on the ground that those damages did not exceed the $120,000 plaintiffs had already recovered from the negligent driver.

On appeal, plaintiffs argue that the trial court erred by denying their claims for (1) damages for deprivation of love, affection and society (loss of companionship) under ... the Wrongful Death Act [WDA] ....

. . . .

III.

The WDA allows the decedent's personal representative to recover "such damages as are just, with reference to the pecuniary injuries resulting from such death," on behalf of decedent's spouse and next of kin. 14 V.S.A. § 1492(b).[36] A 1976 amendment to § 1492(b) added a provision that "where the decedent is a minor child, the term pecuniary injuries shall also include the loss of love and companionship of the child and for destruction of the parent-child relationship in such amount as under all the circumstances of the case, may be just." Because the WDA was "designed to allay the harsh common law rule denying liability due to the death of the victim," it is remedial in nature and must be construed liberally....

A.

The question confronting us herein is whether the WDA permits a parent to recover damages for the loss of companionship resulting from the death of an adult child. The 1976 amendment recognizes a right of recovery for loss-of-companionship damages when the decedent is a minor child, but it makes no mention of adult children. Although we cannot be certain as to the reason for the omission, the legislative history of the amendment suggests that the Legislature was more concerned with clarifying the scope of damages available to the relatives of minor decedents than limiting the damages available upon the death

36. The Survival Statutes, 14 V.S.A. §§ 1451–1453, allow a decedent's estate to recover for injuries sustained by the decedent prior to his or her death ...; the decedent's death need not result from the injury as with wrongful death actions. [Footnote by the court.]

of an adult decedent. See H. 58 (1975 Vt., Bien.Sess.) (sponsor's statement of purpose: "the purpose of this bill [is] to provide guidelines for the compensation to parents for the death of a minor child"); *cf.* Caledonian Record Publishing Co. v. Walton, 154 Vt. 15, 25, 573 A.2d 296, 302 (1990) (a proviso may be added to an existing statute to exclude a possible misunderstanding of its extent).

In any case, the amendment neither expressly nor implicitly precludes a plaintiff who is seeking compensation for the death of an adult child from showing that, under the circumstances of a particular case, he or she is entitled to loss-of-companionship damages. In accordance with our analysis hereinafter, we do not believe the statute should be narrowly construed to foreclose the recovery of loss-of-companionship damages for parents of decedent adult children. As previously noted, the WDA is to be liberally construed. The negative inference that defendants would have us adopt—that loss-of-companionship damages are not available to a parent of a deceased adult child—does not rise to the level of "plain meaning" so as to require us to hold otherwise, and we decline to do so. *Cf.* McAllister v. AVEMCO Ins. Co., 148 Vt. 110, 112, 528 A.2d 758, 759 (1987) (Court will expand plain meaning of statute by implication only when necessary to make statute effective).

At first glance, our rules of statutory construction seem to work in favor of defendants. For instance, normally "we must presume that all language is inserted in a statute advisedly" . . .; thus, one might argue that permitting pecuniary damages for the death of both a minor and an adult child, in effect, interprets the amendment as if the word "minor" were not there. Moreover, the use of the word "also" in the amendment evidences a recognition that pecuniary injuries did not formerly include what is bestowed by the amendment. . . . Perhaps defendants' strongest argument is summed up in the Latin phrase "*expressio unius est exclusio alterius*"—the expression of one thing is the exclusion of another. . . . Pursuant to this maxim, the inclusion of the term "a minor child" in the amendment evidences an intention to exclude an adult child. . . .

On the other hand, such canons are routinely discarded when they do not further a statute's remedial purposes. See Herman & MacLean v. Huddleston, 459 U.S. 375, 387 n.23 (1983); *see also* Hardesty v. Andro Corp., 555 P.2d 1030, 1036 (Okla.1976) (*expressio unius* maxim is "to be applied with great caution, is not of universal application, and is not conclusive as to the meaning of a statute"); *cf.* State v. Baldwin, 140 Vt. 501, 511, 438 A.2d 1135, 1140 (1981) ("Rules of construction are not laws, hard and inflexible, which *must* be applied in a given situation simply because it is possible to do so."). As noted, the Legislature passed the 1976 amendment, not to limit the damages available to the relatives of adult decedents, but rather to further the remedial purposes of the WDA by developing the definition of pecuniary injuries.

By 1976, in Vermont, as elsewhere, the case law concerning the nature and extent of pecuniary loss available under the WDA was in a state of gradual intermittent development. Although no Vermont case

had held that relational damages available for the death of a parent or spouse were also available for the death of a child, a parent could recover any reasonable "financial loss which the evidence shows will probably be caused by the death." It had already long been established that pecuniary loss was not restricted to loss of services, see Lazelle v. Town of Newfane, 70 Vt. 440, 445, 41 A. 511, 512 (1898) [action by adult son for wrongful death of his mother in which the plaintiff sought to recover for pecuniary losses above and beyond the loss of service which his mother had provided to his family while she was living with them] (pecuniary injury includes lost "intellectual and moral training and proper nurture of a child") [quoting from Tilley v. Hudson River Railroad Co., 24 N.Y. 471, 86 Am. Dec. 297 (1862) (action by minor child for death of minor child's mother)], and that damages resulting from a child's death need not be restricted to damages accruing during the decedent's minority. D'Angelo v. Rutland Ry. Light & Power Co., 100 Vt. 135, 137–39, 135 A. 598, 599 (1927).

We believe that rather than intending to restrict the development of case law recognizing that pecuniary loss is more than loss of services, the 1976 amendment intended to further that development by ensuring that such damages would be available for the death of a minor child. Because the type of damages available to adult decedents is not essential to the principal remedial purpose of the amendment, we shall not adopt the negative implication of the amendment argued by the defendants. The amendment does not expressly restrict the damages available under the WDA, which must be construed with its remedial purposes in mind. The following statement by Justice Cardozo, though made in a different factual setting, is equally relevant here:

> 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. Van Beeck v. Sabine Towing Co., 300 U.S. 342, 350–51 (1937).

Having concluded that the 1976 amendment did not foreclose an award of loss-of-companionship damages to relatives of adult decedents, we now consider whether such damages constitute "pecuniary injury."

At common law, despite the fact that the courts allowed recovery for wrongful injury, a civil action for wrongful death was not permitted.... Lord Campbell's Act, the predecessor of the American wrongful death acts, was adopted in England in the mid-nineteenth century to correct this anomaly. The act allowed the jury to award "Damages as they may think proportioned to the Injury resulting from such Death." Lord Campbell's Act, 1846, 9 & 10 Vict., ch. 93. The English courts held, however, that damages under the act must be based on pecuniary loss—a limitation imposed in many of the American wrongful death statutes, including Vermont's....

Many early cases, reflecting nineteenth-century social conditions when children were valued largely for their capacity to contribute to the

family income, resulted in minimal awards representing the monetary loss occasioned by the parents' deprivation of their child's services. *See, e.g.*, Allen v. Moore, 109 Vt. 405, 409, 199 A. 257, 258 (1938) ($200 verdict for wrongful death of 17–year-old daughter not grossly inadequate). Nonetheless, early on, this Court approvingly cited language stating that pecuniary damages should include " 'all pecuniary loss of every kind which the circumstances of the particular case establish with reasonable certainty will be suffered by the beneficiary of the statute in the future.' " *D'Angelo*, 100 Vt. at 138, 135 A. at 599 (quoting Bond v. United R.R., 159 Cal. 270, 277, 113 P. 366, 369 (1911)). Further, as in most jurisdictions, this Court did not always construe the term "pecuniary loss" in its strictest sense. *See, e.g., Lazelle*, 70 Vt. at 445, 41 A. at 512 (citing with approval cases that allowed damages for a child's loss of intellectual and moral training and proper nurture, as well as a widow's loss of her husband's care and protection).

By the early 1960s, some courts were rejecting the child-labor measure of pecuniary loss,[37] and expanding its scope to include loss of companionship. *See, e.g.*, Wycko v. Gnodtke, 361 Mich. 331, 340, 105 N.W.2d 118, 122–23 (1960) (the human companionship between individual family members "has a definite, substantial, and ascertainable pecuniary value") .... In recent years, a clear majority of jurisdictions with statutes limiting wrongful death recovery to pecuniary loss have expanded the scope of such loss to encompass loss of companionship of a child. *See, e.g.*, Bullard v. Barnes, 102 Ill.2d 505, 512, 515, 82 Ill.Dec. 448, 452, 454, 468 N.E.2d 1228, 1232, 1234 (1984); Sanchez v. Schindler, 651 S.W.2d 249, 252–53 (Tex. 1983). Further, many courts have refused to limit recovery for loss of companionship to situations where the decedent is a minor child. *See, e.g.*, Grandstaff v. City of Borger, 767 F.2d 161, 172 (5th Cir. 1985) (Texas law allows parents to recover for loss of companionship, and no distinction is made based on whether the decedent is an adult or a minor child); ... Ballweg v. City of Springfield, 114 Ill.2d 107, 120, 102 Ill.Dec. 360, 366, 499 N.E.2d 1373, 1379 (1986) (presumption of loss of society pertains to cases where decedent is adult child) ....

We now hold that the loss of the comfort and companionship of an adult child is a real, direct and personal loss that can be measured in pecuniary terms. Children have an intrinsic value to their parents regardless of who is supporting whom at the time of death. Whether the decedent child is an adult or a minor, society recognizes the destruction of the parents' investment in affection, guidance, security and love....

In some cases, the close, familial ties that unite a minor child with his or her parents may dissipate as the child becomes an adult. Nonetheless, the WDA does not preclude the parents of an adult child from showing that the death of their child did in fact injure them by depriving them of the society of that child. Every case must stand upon its own

37. Under this approach, pecuniary loss consisted of the financial burden upon the parents that resulted from loss of the child's services. [Footnote by the court.]

facts and circumstances. In determining whether and what amount of damages are appropriate for loss of companionship, the court or jury should consider the physical, emotional, and psychological relationship between the parents and the child. Accordingly, among other things, the factfinder should examine the living arrangements of the parties, the harmony of family relations, and the commonality of interests and activities.... Prior cases contrary to our holding herein are overruled.

* * * *

Reversed and remanded.