

GEORGIA STATE UNIVERSITY LAW REVIEW

VOLUME 7

NUMBER 2

SPRING 1991

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WHAT'S A HUMAN LIFE REALLY WORTH? RECOVERING DAMAGES FOR DECEDENTS' NON-ECONOMIC LOSSES IN GEORGIA WRONGFUL DEATH ACTIONS

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"Life," Blackstone has reminded us, "is the immediate gift of God, a right inherent by nature in every individual. . . ."¹

INTRODUCTION

In 1900, former Georgia Supreme Court Chief Justice Thomas Simmons wrote, "At the present time, [wrongful death] statutes exist in nearly all of the States of the Union, and none more liberally protect the rights of the [spouse] and child than does that in Georgia."² That observation is still valid today, and has been consistently reflected in Georgia Appellate decisions interpreting Georgia wrongful death law and assessing damages in wrongful death cases.³

While the original Georgia Wrongful Death Act provided no measure of damages,⁴ a later amendment provided that the measure of damages for destruction of a human life is "the full value of the life of the deceased."⁵ The present wrongful death statute includes this same measure of damages.⁶ Like Georgia's original wrongful death statute, the present statute treats the decedent as if she had survived the tortious injury and were

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1. 1 W. BLACKSTONE, COMMENTARIES, 129 (1803).

2. Southern Bell Tel. & Tel. Co. v. Cassin, 111 Ga. 575, 576, 36 S.E. 881, 881 (1900).

3. South-Western R.R. v. Paulk, 24 Ga. 356, 369 (1857).

4. 1850 COBB'S DIGEST 476 (1851).

5. CIV. CODE OF GA. § 4425 (1910); see also TIFFANY, DEATH BY WRONGFUL ACT § 139 (2d ed. 1913). Prior to the December 16, 1878 Act of the Georgia Assembly, the statute provided no measure of damages. Macon & W. Ry. Co. v. Johnson, 38 Ga. 409 (1868).

6. O.C.G.A. § 51-4-2(a) (1981 & Supp. 1990).

The surviving spouse or, if there is no surviving spouse, a child or children, either minor or sui juris, may recover for the homicide of the spouse or parent the full value of the life of the decedent, as shown by the evidence.

Id.

bringing the case in her own name.⁷ Understanding this fact is crucial to understanding what is meant by the phrase, "full value of the life of the decedent."⁸

In construing and effectuating the wrongful death statutes enacted by the Georgia General Assembly, Georgia appellate courts have held that the "full value of a decedent's life" consists of two components — an economic component and a non-economic, or "intangible," component.⁹

The economic component reflects the projected value of the decedent's probable future earnings or services that have an economically determinable value.¹⁰ Loss of life, however, means more than deprivation of the right to exist, or the ability to earn a living; it includes being deprived of the pleasures of life.¹¹ The United States Supreme Court and lower federal courts have recognized this principle in cases involving the fourteenth amendment to the United States Constitution.¹²

Numerous Georgia wrongful death decisions also reflect this principle by acknowledging that a pecuniary value, apart from the economic value of expected future earnings and services, may be placed upon the non-economic loss the decedent suffers by reason of death.¹³ These decisions establish that the court may

7. F. ELDRIDGE, *GEORGIA WRONGFUL DEATH ACTIONS* §§ 1-10, 6-1 (1987) [hereinafter *GEORGIA WRONGFUL DEATH ACTIONS*].

8. O.C.G.A. § 51-4-2(a) (1981 & Supp. 1990). The present Georgia Code uses "decedent" rather than "deceased," as found in the 1910 Code.

9. *Peeler v. Central of Ga. R.R.*, 163 Ga. 784, 791, 137 S.E. 24, 27 (1926); *South-Western R.R. v. Paulk*, 24 Ga. 356, 369 (1857); see also L. COBB & F. ELDRIDGE, *GEORGIA LAW OF DAMAGES* § 37-2 (3d ed. 1989) [hereinafter *GEORGIA LAW OF DAMAGES*]; *GEORGIA WRONGFUL DEATH ACTIONS*, supra note 7, at §§ 1-9, 6-3; McLeod and C. Foster, *Economic Evaluation of Damages in Personal Injury and Wrongful Death Litigation*, 19 GA. ST. B. J. 60 (1982).

10. *South-Western R.R. Co. v. Paulk*, 24 Ga. 356, 369 (1857). See also *GEORGIA LAW OF DAMAGES*, supra note 9, at § 37-2; *GEORGIA WRONGFUL DEATH ACTIONS*, supra note 7, at § 6-4.

11. *Sherrod v. Berry*, 629 F. Supp. 159 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195 (7th Cir. 1987), *rev'd on other grounds*, 835 F.2d 122 (7th Cir. 1988).

12. See, e.g., *Munn v. Illinois*, 94 U.S. 113, 142 (1876) (Field, J., dissenting); *Sherrod v. Berry*, 629 F. Supp. 159 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195, *rev'd on other grounds*, 835 F.2d 122 (7th Cir. 1988).

13. See, e.g., *Kerr v. Mims*, 130 Ga. App. 54, 202 S.E.2d 244 (1973); *Bulloch County Hosp. Auth. v. Fowler*, 124 Ga. App. 242, 247, 183 S.E.2d 586 (1971); *Henry Grady Hotel Corp. v. Watts*, 119 Ga. App. 251, 167 S.E.2d 205 (1969); *Smith v. McBride*, 119 Ga. App. 94, 166 S.E.2d 407 (1969); *Rhodes v. Baker*, 116 Ga. App. 157, 162, 156 S.E.2d 545 (1967); *Pollard v. Boatwright*, 57 Ga. App. 565, 569, 196 S.E. 215 (1938); *Pollard v. Kent*, 59 Ga. App. 118, 200 S.E. 542 (1938); *Georgia Ry. & Power Co. v. Shaw*, 25 Ga. App. 146, 102 S.E. 904 (1920); *Western & Atl. R.R. v. Jarrett*, 22 Ga. App. 313, 96 S.E. 17 (1918); *Standard Oil Co. v. Reagan*, 15 Ga. App. 571, 84 S.E. 69 (1915).

award damages in a wrongful death case to compensate the decedent for the loss of the intangible elements of the experience of living that are incapable of exact proof.¹⁴

This well-established rule of law comports with the Judeo-Christian philosophy prevalent in western civilization that each individual life is valuable, if only to the individual living it.¹⁵ Through the years, Georgia wrongful death case law has evolved to reflect these ideals about the value of human life. If a wrongful death verdict is to reflect the "full value" of the life lost, the advocate must understand the origin and theoretical basis of the measure of damages under Georgia's wrongful death law.

I. THE ORIGIN AND BASIS OF GEORGIA'S MEASURE OF DAMAGES FOR WRONGFUL DEATH

Britain's Parliament enacted the first wrongful death legislation in 1846.¹⁶ That statute, Lord Campbell's Act, created a cause of action for wrongful death in favor of a decedent's surviving family where no right to sue for wrongful death had existed under the common law.¹⁷ Shortly after the passage of Lord Campbell's Act in England, New York and other states began to pass similar legislation.¹⁸ The Georgia General Assembly enacted Georgia's first wrongful death statute in 1850.¹⁹

The development of wrongful death legislation in the United States generated two distinctive types of statutes. Both evolved from Lord Campbell's Act.²⁰ The first type of statute was closely modeled after Lord Campbell's Act. This statute created a *new* cause of action, based on the destruction of a human life, in favor of certain surviving family members.²¹

Difficulties in applying statutes modeled upon Lord Campbell's Act resulted in a modification of the approach of that act.²² Thus, a second type of wrongful death statute emerged in America. These statutes *continued* the cause of action for personal injuries

14. See *supra*, note 13.

15. GEORGIA LAW OF DAMAGES, *supra* note 9, at § 37-2.

16. 25A C. J. S. *Death* § 14 (1966).

17. *Baker v. Bolton*, 1 Campb. 493, 170 Eng. Rep. 1033 (1808); see also S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 1:1 (2d ed. 1975) [hereinafter SPEISER].

18. SPEISER, *supra* note 17, at § 1:9.

19. 1 COBB'S DIGEST 476 (1851).

20. 12 AM. JUR. TRIALS, *Wrongful Death Actions* § 3 (1975) [hereinafter AM. JUR. TRIALS].

21. *Id.* at § 4.

22. GEORGIA WRONGFUL DEATH ACTIONS, *supra* note 7, at § 1-10.

that the decedent would have had under the common law, had he lived. This type of wrongful death statute is commonly called a "survival" or "continuation" statute.

Survival statutes allow the cause of action to continue by providing that the decedent's claims survive to the decedent's personal representative.²³ When the Georgia General Assembly enacted the original Georgia Wrongful Death Statute in 1850, it avoided construction and application problems experienced in other jurisdictions by treating the decedent as if he or she had survived the fatal injury and were bringing a lawsuit for personal injuries through a personal representative.²⁴

The chief distinction between a traditional wrongful death statute, modeled on Lord Campbell's Act and a survival statute, such as Georgia's, is that the former creates a new cause of action that views damages from the perspective of the statutorily named beneficiaries.²⁵ The latter, however, merely continues the cause of action the decedent would have had if the death had not occurred; thus, damages are viewed from the perspective of the decedent. A survival statute allows compensation for all losses that would have been compensable if the decedent had survived the injury.²⁶ This distinction is enormously important, giving rise to a radically different measure of damages. Failure to appreciate this distinction has led some trial courts to apply an inadequate measure of damages in Georgia wrongful death cases.

Because damages are calculated from the perspective of the decedent's survivors, wrongful death statutes modeled upon Lord Campbell's Act usually limit damages to the decedent's survivors' future economic losses.²⁷ This rather demeaning "add-up-the-paychecks" approach to the value of human life has been sharply criticized as fundamentally inconsistent with western ideals about the meaning and purpose of human life. This measure of damages

23. *Id.* at § 7.

24. *Trust Co. Bank v. Thornton*, 186 Ga. App. 706, 368 S.E.2d 158 (1988); see also *GEORGIA WRONGFUL DEATH ACTIONS*, *supra* note 7, at § 1-10.

25. SPEISER, *supra* note 17, at § 1:9.

26. *GEORGIA WRONGFUL DEATH ACTIONS*, *supra* note 7, at § 1-10 (1987).

27. 22A AM. JUR. 2d *Death* § 7 (1988); see also AM. JUR. TRIALS, *supra* note 20, at § 6. For a discussion of what various states allow in recoverable damages based on the "loss to survivors" theory, see SPEISER, *supra* note 17, at § 3:1, and AM. JUR. TRIALS, *supra* note 20, at §§ 17-23.

results in systematic undervaluation of the lives destroyed by tortious conduct.²⁸

In contrast, under survival statutes, damages are determined from the decedent's perspective and are designed to compensate for the whole loss the decedent suffered because of the wrongful death.²⁹ Recoverable damages under these survival statutes usually include special damages for the economic loss resulting from the decedent's death, as well as general damages for the destruction of the decedent's capacity to carry on life's activities.³⁰

Although Georgia's wrongful death statute evolved from Lord Campbell's Act,³¹ it is a modified version.³² This modified statute is really a "hybrid" because judicial construction has incorporated characteristics from both Lord Campbell's Act and from the pure survival statutes.³³ Georgia's progressive measure of damages for wrongful death is largely a product of the "hybrid vigor" that resulted from judicial incorporation of features from both types of wrongful death statutes.

Appellate courts have held that Georgia's wrongful death statute, like the traditional Lord Campbell's Act, creates a new cause of action for the benefit of the decedent's family.³⁴ As under a Lord Campbell's Act wrongful death statute, damages awarded are for the benefit of certain statutorily designated beneficiaries.³⁵ Unlike jurisdictions with typical Lord Campbell's Act wrongful death statutes, Georgia courts reason that the designated beneficiaries listed in the Georgia statute are subject to the same defenses as those to which the decedent would have been subject

28. L. Cohen, *Toward an Economic Theory of Measurement of Damages in a Wrongful Death Action*, 34 EMORY L. J. 295, 296 (1985). See also SPEISER, *supra* note 17, at iii.

29. *Reliance Ins. Co. v. Bridges*, 168 Ga. App. 874, 311 S.E.2d 193 (1983); *Pollard v. Boatwright*, 57 Ga. App. 565, 196 S.E. 215 (1938); *Atlantic, Valdosta & Western R.R. v. McDilda*, 125 Ga. 468, 54 S.E. 140 (1906); *Southern Bell Tel. & Tel. Co. v. Cassin*, 111 Ga. 575, 36 S.E. 881 (1900). See also AM. JUR. TRIALS, *supra* note 20, at §§ 5, 7.

30. See AM. JUR. TRIALS, *supra* note 20, at § 6; *Chase v. Fitzgerald*, 132 Conn. 461, 45 A.2d 789 (1946).

31. *Thompson v. Watson*, 186 Ga. 396, 197 S.E. 774 (1938); see also GEORGIA WRONGFUL DEATH ACTIONS, *supra* note 7, at § 1-4.

32. GEORGIA WRONGFUL DEATH ACTIONS, *supra* note 7, at §§ 1-10, 6-3; see also AM. JUR. TRIALS, *supra* note 20, at § 5, n.18.

33. AM JUR. TRIALS, *supra* note 20, at § 5, n.8 (1975); see also C. Hilkey, *Actions for Wrongful Death in Georgia*, 19 GA. B. J. 277 (1957).

34. See, e.g., *Burns v. Brickle*, 106 Ga. App. 150, 126 S.E.2d 633 (1962); *Caskey v. Underwood*, 89 Ga. App. 418, 79 S.E.2d 658 (1963); *Southern Bell Tel. & Tel. Co. v. Cassin*, 111 Ga. 575, 36 S.E. 881 (1900); *Western and Atl. R.R. v. Bass*, 104 Ga. 390, 30 S.E. 874 (1898).

35. *Bloodworth v. Jones*, 191 Ga. 193, 11 S.E.2d 658 (1940); *Thompson v. Watson*, 186 Ga. 396, 197 S.E. 744 (1938); see also O.C.G.A. § 51-4-2 (1981 & Supp. 1990).

if he had survived the injury and were suing in his own name.³⁶ Thus, as is typical of a survival statute, the decedent's personal representative stands in the shoes of the decedent with all of his or her rights and limitations.³⁷

However new . . . [the wife's cause of action for wrongful death] may be, in the very nature of things, it cannot be independent; it is inherently rooted and grounded in the injury of the husband. It grows out of it, and is a part of it, having almost complete identity of the substance and subject to the same defenses . . . she stands in his shoes, has his rights, and takes his responsibilities . . . it is true she may recover the full value of his life, but that value depends on what he was and what he did in his life-time.³⁸

Thus, while Georgia courts have concluded that the wrongful death statute creates a new and distinct cause of action, it in effect continues for the benefit of statutorily designated beneficiaries the right of action that at common law would have terminated at the decedent's death.³⁹ This interpretation enlarges the scope of the statute, allowing recovery from the decedent's perspective for the *entire injury* that results from the death.⁴⁰ For this reason, general damages for the decedent's non-economic losses caused by premature death are recoverable, in addition to or even in the absence of economic loss.

II. JUDICIAL CONSTRUCTION OF STATUTORY LANGUAGE RELATIVE TO DAMAGES

Georgia's wrongful death statute provides that the plaintiff may recover the "full value of the life of the decedent as shown by the evidence."⁴¹ A separate statute defines this specified measure of damages by providing that "full value of the life of

36. See, e.g., *Thompson v. Watson*, 186 Ga. 396, 197 S.E. 774 (1938); *Western & Atl. R.R. v. Strong*, 52 Ga. 461 (1874); *Trust Co. Bank v. Thornton*, 186 Ga. App. 706, 368 S.E.2d 158 (1988); *Caskey v. Underwood*, 89 Ga. App. 418, 79 S.E.2d 558 (1953). For an interesting discussion of the early Georgia appellate decisions, see C. Hilkey, *Actions for Wrongful Death in Georgia*, 19 GA. B. J., 277 (1957).

37. *Southern Bell Tel. & Tel. Co. v. Cassin*, 111 Ga. 575, 38 S.E. 881 (1900).

38. *Id.* at 580, 38 S.E. at 883.

39. *Solomon v. Sapp*, 169 Ga. App. 267, 312 S.E.2d 166 (1983); *Shields v. Yonge*, 15 Ga. 349 (1854).

40. *Atlantic, Valdosta & W. R.R. v. McDilda*, 125 Ga. 468, 54 S.E. 140 (1906).

41. O.C.G.A. § 51-4-2(a) (Supp. 1990).

the decedent as shown by the evidence" means "the full value of the life of the decedent without deducting for any of the necessary or personal expenses of the decedent had he lived."⁴²

Georgia appellate courts have construed some language of the current and previous wrongful death statutes strictly and have interpreted other language broadly. For example, wrongful death provisions are strictly construed for purposes of determining the persons or classes of persons who are entitled to their benefit⁴³ and deciding when tortious conduct resulting in death is actionable.⁴⁴

On the other hand, Georgia courts have construed more liberally the remedial components of the statute providing that the measure of recovery is an amount representing the "full value of the life of the decedent."⁴⁵ While no appellate decision flatly states that the portion of the statute governing damages should be "liberally construed" to effectuate its remedial purposes, the case law demonstrates that approach. Since "full value" is literally interpreted, economic loss alone is not determinative.

Liberal construction of the statutory provisions governing damages, but strict construction of the provisions identifying permissible plaintiffs or actionable conduct is consistent with the approaches of other states.⁴⁶ Among American jurisdictions, this is the intermediate position.⁴⁷

Other jurisdictions using the intermediate approach hold that if the legislative purpose is clear, the act must be liberally construed to effectuate the true intent and meaning of the

42. O.C.G.A. § 51-4-1(1) (1982).

43. See, e.g., *Lovett v. Garvin*, 232 Ga. 747, 208 S.E.2d 838 (1974); *Happy Valley Farms, Inc. v. Wilson*, 192 Ga. 830, 16 S.E.2d 720 (1941); *Bloodworth v. Jones*, 191 Ga. 193, 11 S.E.2d 658 (1940); *Thompson v. Watson*, 186 Ga. 396, 197 S.E. 744 (1938); *Limbaugh v. Woodall*, 121 Ga. App. 638, 175 S.E.2d 135 (1970); *St. Paul Fire & Marine Ins. Co. v. Miniweather*, 119 Ga. App. 617, 168 S.E.2d 341 (1969); *Burns v. Brickel*, 108 Ga. App. 150, 126 S.E.2d 633 (1962).

44. See, e.g., *Higginbotham v. Ford Motor Co.*, 540 F.2d 762 (5th Cir. 1976); *Southern Bell Tel. & Tel. Co. v. Cassin*, 111 Ga. 575, 603, 36 S.E. 881, 892 (1900); *Western & Atl. R.R. v. Bass*, 104 Ga. 390, 30 S.E. 874 (1898); *Western & Atl. R.R. Co. v. Strong*, 52 Ga. 461, 467 (1874); *Limbaugh v. Woodall*, 121 Ga. App. 638, 175 S.E.2d 135 (1970); *Lovett v. Emory Univ.*, 116 Ga. App. 277, 156 S.E.2d 923 (1967).

45. O.C.G.A. § 51-4-2(a) (Supp. 1990).

46. *Almcrantz v. Carney*, 490 S.W.2d 59 (Mo. 1973); *Whittlesey v. City of Seattle*, 94 Wash. 645, 163 P. 193 (1917). See also 22A AM. JUR. 2d *Death* at § 6 (1988).

47. SPEISER, *supra* note 17, at § 1:12. In some states, the entire statute is construed strictly. Conversely, courts in other states hold that wrongful death statutes are remedial and should be given liberal construction in every respect. *Id.*

statute.⁴⁸ Similarly, in non-wrongful death cases, the Georgia appellate courts reason that if the language of a statute is clear, direct, positive, and affords a suitable remedy, courts should be governed by the obvious meaning and import of its terms.⁴⁹ Therefore, courts have concluded that, because the Georgia General Assembly selected clear, direct, and positive statutory language, the legislature intended recovery to exceed mere economic losses in wrongful death cases.

Georgia courts have generously interpreted the "full value of the life" language, allowing recovery of damages for the decedent's non-economic, intangible losses.⁵⁰ Because Georgia's wrongful death law is a hybrid and measures damages from the perspective of the deceased, Georgia courts have construed the statutorily specified measure of damages to compensate for the whole of the decedent's loss, rather than simply for the loss of ability to earn income.

III. THE RIGHT TO RECOVER DAMAGES FOR THE INTANGIBLE VALUE OF A DECEDENT'S LIFE UNDER GEORGIA'S WRONGFUL DEATH STATUTE

In *South-Western Railroad Co. v. Paulk*,⁵¹ the Georgia Supreme Court first recognized that monetary damages should be awarded for the "non-economic" or "intangible" component of a decedent's life.⁵² In that decision, Justice Lumpkin wrote:

In any view of the question of damages, something is due, *independent of income*, for the loss of the care, protection and assistance of the husband and father. . . . [S]ee the variety of ages, sexes, conditions, avocations of the crowd; doctors of divinity and of medicine, judges and lawyers, planters, merchants, mechanics, manufacturers, bankers, teachers, men, women and children: to apply a uniform rule, by which to compensate for the life of each would require more than the wisdom of Solomon in all his glory.⁵³

48. See, e.g., *Almerantz v. Carney*, 490 S.W.2d 59 (Mo. 1973); *Whittlesey v. City of Seattle*, 94 Wash. 645, 163 P. 193 (1917).

49. See, e.g., *Richmond County Bd. of Tax Assessors v. Georgia R.R. Bank & Trust Co.*, 242 Ga. 23, 247 S.E.2d 761 (1978); *Barton v. Atkinson*, 228 Ga. 733, 187 S.E.2d 835 (1972); *Ezekiel v. Dixon*, 3 Ga. 146 (1847).

50. See *supra* note 49.

51. *South-Western R.R. v. Paulk*, 24 Ga. 356 (1858).

52. *Id.* at 369.

53. *Id.* (emphasis added).

Since *Paulk*, numerous cases have held that the jury is not restricted to "adding up the paychecks" to calculate the *full* value of a decedent's life.⁵⁴ The jury can award damages in a wrongful death case to compensate for the intangible component of a decedent's life, even though that component is not capable of exact proof. Georgia courts have held repeatedly that a plaintiff need not offer direct evidence of these intangible factors to support such a recovery.⁵⁵ In Georgia, the jury appraises these intangibles based upon their experiences and knowledge of human affairs. The jury may also consider the decedent's relationships, living conditions, and family circumstances.⁵⁶ The standard for measuring such damages is the "enlightened conscience of impartial jurors," as in any general damages award.⁵⁷

Some jurists have expressed reservations about the discretion juries may exercise when assessing general damages for a decedent's intangible, non-economic loss, and have suggested that such damages are too speculative.⁵⁸ One jurist who campaigned for a less complete measure of recovery conceded that assessing wrongful death damages only from the standpoint of economic loss resulted in inadequate compensation from the perspective of both the decedent and the survivors.⁵⁹

54. See, e.g., *Elsberry v. Lewis*, 140 Ga. App. 324, 231 S.E.2d 789 (1976); *Kerr v. Mims*, 130 Ga. App. 54, 202 S.E.2d 244 (1973); *Bulloch County Hosp. Auth. v. Fowler*, 124 Ga. App. 242, 183 S.E.2d 586 (1971); *Henry Grady Hotel Corp. v. Watts*, 119 Ga. App. 251, 167 S.E.2d 205 (1969); *City of Macon v. Smith*, 117 Ga. App. 363, 160 S.E.2d 622 (1968); *Rhodes v. Baker*, 116 Ga. App. 157, 156 S.E.2d 545 (1967); *Walker v. Southeastern Stages, Inc.*, 68 Ga. App. 320, 22 S.E.2d 742 (1942); *Atlanta B. & C. R.R. v. Thomas*, 64 Ga. App. 253, 12 S.E.2d 494 (1940); *Standard Oil Co. v. Reagan*, 15 Ga. App. 571, 84 S.E. 69 (1914).

55. *Calloway v. Rossman*, 150 Ga. App. 381, 257 S.E.2d 913 (1979). See also *Metropolitan St. R.R. v. Johnson*, 91 Ga. 466, 18 S.E. 816 (1893); *Wright v. Dilbeck*, 122 Ga. App. 214, 176 S.E.2d 715 (1970); *Smith v. McBride*, 119 Ga. App. 94, 166 S.E.2d 407 (1969); *City of Macon v. Smith*, 117 Ga. App. 363, 160 S.E.2d 622 (1968); *Collins v. McPherson*, 91 Ga. App. 347, 85 S.E.2d 552 (1954); *Pollard v. Kent*, 59 Ga. App. 118, 200 S.E. 542 (1938); *Georgia R.R. & Banking Co. v. Farmer*, 45 Ga. App. 130, 164 S.E. 71 (1932); *Georgia Ry. & Power Co. v. Shaw*, 25 Ga. App. 146, 102 S.E. 904 (1920); *Western & Atl. R.R. v. Jarrett*, 22 Ga. App. 313, 96 S.E. 17 (1918); *Standard Oil Co. v. Reagan*, 15 Ga. App. 571, 84 S.E. 69 (1914).

56. See *supra*, note 55.

57. *South-Western R.R. v. Paulk*, 25 Ga. 356, 369 (1857); see also *Elsberry v. Lewis*, 140 Ga. App. 324, 327, 231 S.E.2d 789, 791-92 (1976); *Collins v. McPherson*, 91 Ga. App. 347, 85 S.E.2d 552 (1954); *Pollard v. Boatwright*, 57 Ga. App. 565, 196 S.E. 215 (1938); *Central of Georgia Ry. v. Minor*, 2 Ga. App. 804, 59 S.E. 81 (1907).

58. *Macon & W. Ry. v. Johnson*, 38 Ga. 409 (1868). See also *Miller v. Tuten*, 137 Ga. App. 188, 223 S.E.2d 237 (1976); *Slater Contracting Co. v. Williams*, 101 Ga. App. 549, 114 S.E.2d 448 (1960).

59. *Macon & W. Ry. v. Johnson*, 38 Ga. 409, 435 (1868).

Allowing the jury to award general damages for the intangible value of life is no different from allowing the jury to assess general damages for pain and suffering, mental anguish, or loss of consortium in cases involving non-fatal injuries.⁶⁰

Miller v. Tuten is the only modern Georgia case that deviates from the mainstream view that the "full value" of human life is not limited to economic loss.⁶¹ The court returned to the mainstream view within a year, however.⁶² Subsequent cases have convincingly reaffirmed the rule permitting recovery for the decedent's non-economic, intangible loss.⁶³

The Georgia Supreme Court has held that, while the task of assessing damages in a wrongful death case may be difficult, courts are obliged to measure life in dollars and cents because that is the only justice the legal system can provide.⁶⁴ The case law unequivocally holds that a jury is not bound by any fixed rule in arriving at the full value of the life of the deceased.⁶⁵

Numerous Georgia decisions discuss the intangible, non-economic component of the "full value" of life in the context of the death of husbands and fathers,⁶⁶ wives and mothers,⁶⁷ and sons and

60. See *Sea-Land Servs. Inc. v. Gaudet*, 414 U.S. 573 (1974).

61. *Miller v. Tuten*, 137 Ga. App. 188, 223 S.E.2d 237 (1976). One explanation for the result in this case is that the appellant failed to call to the court's attention the wealth of Georgia authority permitting the recovery of damages for the decedent's non-economic, intangible loss.

62. *Elsberry v. Lewis*, 140 Ga. App. 324, 231 S.E.2d 789 (1976).

63. See, e.g., *Bradley Center, Inc. v. Wessner*, 161 Ga. App. 576, 287 S.E.2d 716 (1982); *Calloway v. Rossman*, 150 Ga. App. 381, 257 S.E.2d 913 (1979). Others who have surveyed the wrongful death case law of Georgia also conclude that there is no doubt that a jury has considerable latitude in determining the full value of the decedent's life, including the non-economic component. See, e.g., *GEORGIA LAW OF DAMAGES*, *supra* note 9, at § 37-2; *GEORGIA WRONGFUL DEATH ACTIONS*, *supra* note 7, at § 6-7; McLeod and Foster, *Economic Evaluation of Damages in Personal Injury and Wrongful Death Litigation*, 19 GA. ST. B. J. 60 (1982).

64. See also, *Southern Bell Tel. & Tel. Co. v. Cassin*, 111 Ga. 575, 594, 36 S.E. 881, 888-89 (1900); *Atlanta, Birmingham & Coast R.R. v. Thomas*, 64 Ga. App. 253, 12 S.E.2d 494 (1940); *City of Thomasville v. Jones*, 17 Ga. App. 625, 87 S.E. 923 (1916).

65. See, e.g., *Kerr v. Mims*, 130 Ga. App. 54, 202 S.E.2d 244 (1973); *Bulloch County Hosp. Auth. v. Fowler*, 124 Ga. App. 242, 183 S.E.2d 686 (1971); *City of Macon v. Smith*, 117 Ga. App. 363, 160 S.E.2d 622 (1968); *Atlanta, Birmingham & Coast R.R. v. Thomas*, 64 Ga. App. 253, 12 S.E.2d 494 (1940).

66. See, e.g., *Peeler v. Central of Ga. Ry.*, 163 Ga. 784, 137 S.E. 24 (1926); *South-Western R.R. v. Paulk*, 24 Ga. 356 (1857); *Southern Ry. v. Turner*, 89 Ga. App. 785, 81 S.E.2d 291 (1954).

67. See, e.g., *Wright v. Dilbeck*, 122 Ga. App. 214, 176 S.E.2d 715 (1970); *Walker v. Southeastern Stages, Inc.*, 68 Ga. App. 320, 22 S.E.2d 742 (1942); *Pollard v. Kent*, 59 Ga. App. 118, 200 S.E. 542 (1939); *Georgia R.R. & Banking Co. v. Farmer*, 45 Ga. App. 130,

daughters.⁶⁸ While Georgia courts have encouraged recovery for the non-economic, intangible value of human life, they have seldom articulated the reasons. Law *should* follow logic and apply society's values. Finding a member of this society who is willing to profess the belief that the "full value" of a human life is limited to future earning capacity would be difficult.

Several Georgia cases have averred that the measure of damages is the value of the decedent's life to the decedent himself, if he had lived — not the value of the decedent's life to the survivors.⁶⁹ Life has more meaning and value to the individual living it than the mere ability to work and earn pay. Thus, from the decedent's perspective, just compensation requires remuneration for the more important elements of non-economic and intangible loss caused by premature death. The loss of enjoyment of life, family, friends, and pastimes must be compensated.⁷⁰

In Connecticut, where wrongful death law is similar to that of Georgia, courts have held that the measure of damages is "that sum which would have compensated the deceased so far as money could do for the destruction of his capacity to carry on life's activities."⁷¹ Cases in Connecticut and Georgia also support damage awards that include damages for the mere fact of death itself.⁷²

Georgia courts reason that a human life has intrinsic value to each individual,⁷³ as well as extrinsic value to family members

164 S.E. 71 (1932); *Georgia Ry. & Power Co. v. Shaw*, 25 Ga. App. 146, 102 S.E. 904 (1920); *Western & Atl. R.R. v. Jarrett*, 22 Ga. App. 313, 96 S.E. 17 (1918); *Standard Oil Co. v. Reagan*, 15 Ga. App. 571, 84 S.E. 69 (1914).

68. *See, e.g.*, *Reliance Ins. Co. v. Bridges*, 168 Ga. App. 874, 311 S.E.2d 193 (1983); *Seaboard Coastline R.R. v. Duncan*, 123 Ga. App. 479, 181 S.E.2d 535 (1971); *Henry Grady Hotel Corp. v. Watts*, 119 Ga. App. 251, 167 S.E.2d 205 (1969); *Royal Crown Bottling Co. v. Bell*, 100 Ga. App. 438, 111 S.E.2d 734 (1959); *Collins v. McPherson*, 91 Ga. App. 347, 85 S.E.2d 552 (1954).

69. *See, e.g.*, *Atlantic, Valdosta & W. R.R. v. McDilda*, 125 Ga. 468, 54 S.E. 140 (1906); *Reliance Ins. Co. v. Bridges*, 168 Ga. App. 874, 311 S.E.2d 193 (1983); *Pollard v. Boatwright*, 57 Ga. App. 565, 196 S.E. 215 (1938). In *Reliance Ins. Co. v. Bridges*, however, the court stressed that while the loss is theoretically measured from the decedent's perspective, the measure of damages is *not* measured by the value that the decedent would place upon his own life. *Reliance Ins. Co.*, 168 Ga. App. at 874, 311 S.E.2d at 193.

70. *Southern Ry. v. Decker*, 5 Ga. App. 21, 62 S.E. 678 (1908).

71. *Chase v. Fitzgerald*, 132 Conn. 461, 45 A.2d 789, 793 (1946).

72. *See, e.g.*, *Lengel v. New Haven Gas Light Co.*, 142 Conn. 70, 111 A.2d 547 (1955); *Atlantic, Valdosta & W. R.R. v. McDilda*, 125 Ga. 468, 54 S.E. 140 (1906).

73. *Southern Ry. v. Decker*, 5 Ga. App. 21, 62 S.E. 678 (1908).

and persons other than the decedent.⁷⁴ It follows that the measure of damages in a wrongful death action is the same as in a personal injury action in which a person survives the tortious injury but is totally and permanently disabled.⁷⁵ Chief Judge Kalodner of the United States Court of Appeals for the Third Circuit expressed this concept in *Downie v. United States Lines Company*:⁷⁶

I cannot subscribe to a doctrine which sanctions compensation for "inability to dance, bowl, swim, or engage in similar recreational activities" but denies compensation for the loss of the right to life itself; the right to enjoy the companionship of loved ones; the right to see the glorious dawn and sunset, to feel the caress of gentle breezes or the invigorating sting of winter winds, to hear the murmur of the idling brook and the music of warbling birds, to smell the sweet fragrance of nature's flowers, and to taste the diet of life itself.⁷⁷

Basic fairness demands the conclusion that recovery for death — the greatest injury that can be inflicted upon an individual — should not be less than recovery for losses resulting in total and permanent disability.

While Georgia's courts have held that the major purpose of the wrongful death action is to *compensate*,⁷⁸ for deterrence purposes, they have also sanctioned the public policy goal of extracting a civil penalty from a defendant who negligently causes a homicide.⁷⁹ Because of this public policy, *exact* compensation for economic loss is not a goal of the wrongful

74. See, e.g., *Calloway v. Rossman*, 150 Ga. App. 381, 257 S.E.2d 913 (1979); *City of Macon v. Smith*, 117 Ga. App. 363, 160 S.E.2d 622 (1968); *Walker v. Southeastern Stages, Inc.*, 68 Ga. App. 320, 22 S.E.2d 742 (1942).

75. *South-Western R.R. v. Paulk*, 24 Ga. 356, 369 (1857); see also GEORGIA WRONGFUL DEATH ACTIONS, *supra* note 7, at § 6-1.

76. 359 F.2d 344 (3d Cir. 1966).

77. *Downie v. United States Lines Co.*, 359 F.2d at 350.

78. See *Happy Valley Farms, Inc. v. Wilson*, 192 Ga. 830, 16 S.E.2d 720 (1941); *Burns v. Brickle*, 106 Ga. App. 150, 126 S.E.2d 633 (1962).

79. See *Harden v. United States*, 485 F. Supp. 380 (S.D. Ga. 1980); *Western & Atl. R.R. v. Michael*, 175 Ga. 1, 165 S.E. 37 (1932); *Engle v. Finch*, 165 Ga. 131, 139 S.E. 868 (1927); *Atlantic, Valdosta & W. R.R. v. McDilda*, 125 Ga. 468, 54 S.E. 140 (1906); *Savannah Elec. Co. v. Bell*, 124 Ga. 663, 53 S.E. 109 (1906); *Gielow v. Strickland*, 185 Ga. App. 85, 363 S.E.2d 278 (1987); *Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 319 S.E.2d 470 (1984); *Reliance Ins. Co. v. Bridges*, 168 Ga. App. 874, 311 S.E.2d 193 (1983); *Collins v. McPherson*, 91 Ga. App. 347, 85 S.E.2d 552 (1954).

death statute.⁸⁰ If the measure of damages in a wrongful death case were limited to pecuniary loss, the cost to the tortfeasor might be too low to deter negligent homicides. This result would thwart the public policy of encouraging safety through deterrence.⁸¹

Georgia courts have rejected the argument that allowing recovery for "the full value of the life" of the deceased, including damages for non-economic loss, results in a "windfall" to those who have lost a loved one.⁸² Such recovery serves two public policy goals: just compensation, benefitting the survivors, and deterrence, benefitting society.⁸³

Economic theory teaches that if justice is not done, one may have an incentive to act to his or her own advantage at the expense of others.⁸⁴ Statutes that allow full recovery against tortfeasors create incentives that encourage one to consider the costs that wrongful conduct may impose; thus, these statutes stimulate greater care for human life.⁸⁵

Interestingly, if courts were limited to "adding up the future paychecks" in calculating the value of human life, many human lives would have no "legal" value at all. The life of a student, a chronically ill person, a homemaker, a temporarily unemployed person, or a senior citizen would have little or no value because their death would result in little or no economic loss. Georgia courts have made it clear that Georgia law does not permit such an approach to calculating the value of a human life.⁸⁶

The economic value of the life of a well compensated individual such as a surgeon, corporate executive or lawyer is great. Still, no one would say that the full value of such an individual's life

80. See *Har-Pen Truck Lines, Inc. v. Mills*, 378 F.2d 705 (5th Cir. 1967); *Atlantic, Valdosta & W. R.R. v. McDilda*, 125 Ga. 468, 470, 54 S.E. 140, 141 (1906); *Savannah Elec. Co. v. Bell*, 124 Ga. 663, 669, 53 S.E. 109, 112 (1906); *Collins v. McPherson*, 91 Ga. App. 347, 85 S.E. 552 (1954).

81. *Reliance Ins. Co. v. Bridges*, 168 Ga. App. 874, 311 S.E.2d 193 (1983); see also *GEORGIA WRONGFUL DEATH ACTIONS*, *supra* note 7, at § 6-7.

82. *Western & Atl. R.R. v. Michael*, 175 Ga. 1, 165 S.E. 37 (1932); *Engle v. Finch*, 165 Ga. 131, 139 S.E. 868 (1927); *Atlantic, Valdosta & W. R.R. v. McDilda*, 125 Ga. 468, 54 S.E. 140 (1906); *Savannah Elec. Co. v. Bell*, 124 Ga. 663, 53 S.E. 109 (1906); *Reliance Ins. Co. v. Bridges*, 168 Ga. App. 874, 311 S.E.2d 193 (1983); *Collins v. McPherson*, 91 Ga. App. 347, 85 S.E.2d 552 (1954).

83. *GEORGIA LAW OF DAMAGES*, *supra* note 9, at § 37-6.

84. L. Cohen, *Toward An Economic Theory of The Measurement of Damages in a Wrongful Death Action*, 34 *EMORY L.J.* 295 (1985) [hereinafter Cohen].

85. *Western & Atl. R.R. v. Michael*, 175 Ga. 1, 165 S.E. 37 (1932); see also 22A *AM. JUR. 2d Death* at § 12 (1988).

86. See *Kerr v. Mims*, 130 Ga. App. 54, 202 S.E.2d 244 (1973); *Bulloch County Hosp.*

is greater than the full value of the lives of humanitarians and other public servants, most of whom receive minimal paychecks. The Georgia Supreme Court recognized this principle as early as 1857, when Justice Lumpkin acknowledged the impossibility of applying a uniform rule to calculate the value of the lives of persons in various vocations.⁸⁷ Other jurists have reaffirmed the principle that the system must retain flexibility, so that the intangible value of each life may be assessed on a case-by-case basis.⁸⁸

In Georgia, the standard for determining the full value of each life is the enlightened conscience of the jury.⁸⁹ This flexibility that juries may exercise when assessing damages for non-economic loss is a virtue that "adds . . . justice to a system which is otherwise grossly unjust."⁹⁰

IV. AN EMERGING TREND

In a recent, widely publicized wrongful death case, the United States Court of Appeals for the Seventh Circuit upheld a substantial award of "hedonic" damages for the decedent's deprivation of the pleasures of life, in addition to damages for the economic loss occasioned by the death.⁹¹ Legal publications⁹² and the general media⁹³ have attempted to characterize recovery of such damages as something new. In truth, the concept is quite old and has been recognized by progressive courts since the advent of recovery for wrongful death.

Less progressive jurisdictions have begun at last to conform their rules of law to reflect society's values and to allow recovery

Auth. v. Fowler, 124 Ga. App. 242, 183 S.E.2d 586 (1971); *Smith v. McBride*, 119 Ga. App. 94, 166 S.E.2d 407 (1969); *Henry Grady Hotel Corp. v. Watts*, 119 Ga. App. 251, 167 S.E.2d 205 (1969); *Rhodes v. Baker*, 116 Ga. App. 157, 156 S.E.2d 545 (1967).

It is error, however, to argue the punitive component of Georgia's wrongful death law to the jury. See *Gielow v. Strickland*, 185 Ga. App. 86, 363 S.E.2d 278 (1987).

87. *South-Western R.R. v. Paulk*, 24 Ga. 356, 369 (1857).

88. *Southern Bell Tel. & Tel. Co. v. Cassin*, 111 Ga. 575, 594, 38 S.E. 881, 888-89 (1900).

89. *Henry Grady Hotel Corp. v. Watts*, 119 Ga. App. 251, 167 S.E.2d 205 (1969).

90. Cohen, *supra* note 84, at 339.

91. *Sherrod v. Berry*, 629 F. Supp. 159 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195 (7th Cir. 1987), *rev'd on other grounds*, 856 F.2d 802 (7th Cir. 1988).

92. Smith, *Hedonic Damages in Wrongful Death Cases*, 74 A.B.A. J., Sept. 1, 1988, at 70.

93. *The Pleasure Principle*, NEWSWEEK, Feb. 27, 1989, at 61; *The Awarding Side of Lost Pleasure*, INSIGHT, Feb. 18, 1991, at 54.

for the *real* value of human life.⁹⁴ As the United States Supreme Court noted, "[a] clear majority of [s]tates . . . have rejected such a narrow view of damages [in wrongful death cases], construction and, either by express statutory provision or by judicial construction, permit recovery for loss of society."⁹⁵ This emerging consensus is long overdue.⁹⁶

V. PRACTICAL TRIAL CONSIDERATIONS IN A GEORGIA WRONGFUL DEATH CASE

In Georgia wrongful death actions, conventional wisdom suggests that plaintiff's counsel introduce extensive evidence to prove the economic value of the decedent's life. Unfortunately, this purely economic component has little or nothing to do with the real value of a decedent's life and certainly demeans the full value of almost any human life. Commonly, practitioners introduce documentary evidence of past earnings and, through the use of an economist, project the future loss of earnings or services with an economically determinable value. Except in cases based on the death of a highly paid individual, structuring the damages theme around the economic component of the decedent's life may be a serious mistake.

Georgia courts allow the practice of presenting an economist who states an opinion of the sum that represents the economic component of the full value of the decedent's life, but jurists have discouraged allowing such a witness to express a particular sum that represents the *full* value of the life of the decedent. This is because earnings, reduced to present value, do not represent the full value of the decedent's life.⁹⁷ Unfortunately, presenting the jury with a fixed sum, or even a range of figures that represent the economic value of a decedent's life, may set a ceiling on recovery because the jury focuses unduly upon those figures.

The plaintiff's counsel should instead emphasize the intangible value of the decedent's life. This permits the jury to return a verdict that truly reflects the *full* value of the decedent's life. Educating the jury about the full value of the decedent's life

94. See PROSSER & KEETON, *THE LAW OF TORTS* 951-52 (5th ed. 1984); AM. JUR. TRIALS, *supra* note 20 at §§ 19, 22.43; see also RESTATEMENT (SECOND) OF TORTS § 925(b) (1977).

95. *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 587 (1974).

96. SPEISER, *supra* note 17, at iii.

97. *Henry Grady Hotel Corp. v. Watts*, 119 Ga. App. 251, 167 S.E.2d 205 (1969).