



1974

Recent Developments: Remedies—Measure of Damages for the Wrongful Death of a Minor Child.
Barrett v. Charlson, 18 Md. App. 80, 305 A.2d 166 (1973)

Stephen M. Hearne
University of Baltimore School of Law

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/ubl>

 Part of the [Law Commons](#)

Recommended Citation

Hearne, Stephen M. (1974) "Recent Developments: Remedies—Measure of Damages for the Wrongful Death of a Minor Child. *Barrett v. Charlson*, 18 Md. App. 80, 305 A.2d 166 (1973)," *University of Baltimore Law Review*: Vol. 3: Iss. 2, Article 10.
Available at: <http://scholarworks.law.ubalt.edu/ubl/vol3/iss2/10>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Review by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

REMEDIES—MEASURE OF DAMAGES FOR THE WRONGFUL DEATH OF A MINOR CHILD. *BARRETT V. CHARLSON*, 18 Md. App. 80, 305 A.2d 166 (1973).

In the early morning hours of May 31, 1970, Deborah Barrett was killed in a single vehicle automobile accident. A wrongful death action¹ was brought by her parents against Randall Charlson, the driver, for the loss of society, companionship, comfort, filial care and attention, mental anguish, and emotional pain and suffering.²

At the end of the evidentiary portion of the trial, the judge ordered a directed verdict against Charlson regarding the question of negligence. On the issue of damages, the trial judge submitted the case to the jury, stating:

[Y]ou should award to the plaintiffs such money damages as in your opinion would be fair and just compensation for the mental anguish . . . which you may find they suffered as a consequence of the accident at that time and *up to the time Deborah would have reached her twenty-first birthday*.³

Appellants' exception to the part of the instruction limiting recovery for pain and mental suffering up to the time that the decedent would have reached her twenty-first birthday was overruled.⁴ From a judgment absolute in favor of the plaintiffs, an appeal was taken.

The 1969 amendment to the wrongful death statute allowed damages for *solatium*, which includes mental anguish, emotional pain and suffering, and related damages. The issue on appeal was whether these new categories of damages should be limited to the period from the date of the minor child's death until the time when the child would have attained his majority.⁵

The Court of Special Appeals reversed the lower court decision and remanded the case for a new trial stating that section 3-904(d) is remedial in nature and should be liberally construed. Such a construction, the court believed, dictated that recovery for emotional pain and suffering not be limited to the projected minority of the deceased minor child, but should be extended over the projected life of the parent to the extent that the evidence warrants.⁶

1. This action was brought under MD. ANN. CODE art. 67, § 4(b) (1973) (repealed and re-enacted in MD. ANN. CODE, Ct's & Jud. Proc. art., § 3-904(d) (1974)).

2. Former MD. ANN. CODE art. 67, § 4(b) (1969) provided, in part:

In the case of the death of a spouse or a minor child, the damages awarded by a jury in such cases shall not be limited or restricted to the "pecuniary loss" or "pecuniary benefit" rule, but may include damages for mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education where applicable.

3. *Barrett v. Charlson*, 18 Md. App. 80, 82-83, 305 A.2d 166, 168 (1973).

4. *Id.* at 83, 305 A.2d at 169.

5. *Id.* at 82, 305 A.2d at 168.

6. *Id.*

Prior to 1852, under the common law, Maryland permitted no recovery for pecuniary loss suffered by a relative of one killed by the negligence of another. In that year, the General Assembly enacted a statute⁷ which created an action at law for the benefit of a wife, husband, parent and child of a person whose death was caused by the wrongful act, neglect or default of another, against the person wrongfully causing such death.⁸

The original version of Maryland's wrongful death statute was a replica of England's Lord Campbell's Act.⁹ That law was enacted by the English Parliament in 1846, creating a new cause of action, but it neglected to state upon what principle damages were to be measured.

In 1885, the Court of Appeals was asked to rule on the measure of damages under Maryland's statute in *Baltimore & Ohio Railroad Co. v. State ex rel. Mahone*.¹⁰ Since the statute was in derogation of the common law and since there were no prior decisions construing the statute, the court turned to English case law.¹¹ It based its decision on two English cases—*Blake v. Midland Railroad Co.*¹² and *Franklin v. South Eastern Railroad Co.*¹³ *Blake* held it was settled law that damages were not to be given for grief or mental suffering on the part of the relatives of the deceased. *Franklin* held that only the persons described in the statute could maintain a claim. That claim must be based on an actual or expected pecuniary loss. The measure of damages was the value of the pecuniary interest of the plaintiffs in the life of the person killed.¹⁴ This construction was consistently followed over the years and was reaffirmed as recently as 1969.¹⁵

The first case before the Court of Appeals dealing with the measure of damages awarded to parents for the wrongful death of their minor child was *State ex rel. Coughlan v. Baltimore & Ohio Railroad*,¹⁶ where the mother of a minor child sued for the negligent killing of her minor son. The plaintiff, appealing an adverse decision, claimed the trial judge, when instructing the jury as to the measure of damages, ignored her mental sufferings, thereby confining her claim to pecuniary damages.¹⁷

7. Law of May 25, 1852, ch. 299, [1852] Laws of Md.

8. See *McKeon v. State ex rel. Conrad*, 211 Md. 437, 442, 127 A.2d 635, 637 (1956).

9. 9 & 10 Vict., c. 93 (1846).

10. 63 Md. 135 (1885).

11. Nineteen years before this decision the Court of Appeals decided *State ex rel. Coughlan v. Baltimore & O.R.R.*, 24 Md. 84 (1866); however, the court made no mention of *Coughlan* when deciding *Mahone*, which is discussed herein.

12. 118 Eng. Rep. 35 (Q.B. 1852).

13. 157 Eng. Rep. 448 (Ex. 1858).

14. 63 Md. at 146.

15. When the Court of Appeals decided *Hutzell v. Boyer*, 252 Md. 227, 249 A.2d 449 (1969), it quoted with approval *United States v. Guyer*, 218 F.2d 266, 268 (4th Cir. 1954) which said: "Under the law of Maryland the measure of recovery for wrongful death . . . is the present value of the pecuniary benefit which the [survivors] might reasonably have expected to receive from (the deceased) if he had not been killed." See generally *Wittel v. Baker*, 10 Md. App. 531, 272 A.2d 57 (1970).

16. 24 Md. 84 (1866).

17. In the case of a minor child's death, the damage under the "pecuniary loss" or "pecuniary benefit" rule are determined by measuring the pecuniary worth of the services which the

She also alleged error in limiting the pecuniary loss to the minority of the child.¹⁸ The mother argued she should be compensated for the value of lost labor and services of the son, even after he would have reached majority. The *Coughlan* court disposed of the mother's claim to recovery for grief and mental suffering by referring to the English cases and quoting *Blake* as saying: "[O]ur only safe course is to look at the language the Legislature has employed. . . . The Title of the Act is for compensating families of persons, etc., not for solacing their wounded feelings."¹⁹ The court next turned to the question of whether to compensate the mother for lost services after the deceased child would have attained majority. On this point, the court said:

To submit to a jury the value of a life without limit as to years, would have been to leave them to speculate upon its duration, without any basis of calculation. The law entitles the mother to the services of her child during his minority only, the father being dead; beyond this, the chances of survivorship, his ability or willingness to support her, are matters of conjecture too vague to enter into an estimate of damages merely compensatory.

According to the appellant's theory the mother and son are supposed to live together to an indefinite age: the one craving sympathy and support, the other rendering reverence, obedience and protection. Such pictures of filial piety are inestimable moral examples, beautiful to contemplate, but the law has no standard by which to measure their loss.²⁰

The holding in *Mahone* as limited by *Coughlan* was consistently reaffirmed for the next one hundred years.²¹ This rule has placed Maryland among a minority of jurisdictions that limit damages that could be awarded to parents for the death of their minor child to the loss of benefits the child could have rendered during his minority.²² The majority of jurisdictions allows an award to the parents of a deceased minor child based partially on the value of pecuniary benefits which, according to the evidence, the parents reasonably might have expected to receive from the child after he reached majority.²³

The strongest challenge to the Maryland rule came in *State ex rel.*

child would have rendered during his life until he reached majority and to subtract from this the probable cost of his maintenance, education, and upbringing.

18. 24 Md. 84, 105 (1866).

19. *Id.* at 105-06.

20. *Id.* at 107-08.

21. See *State ex rel. Parr v. Prince George's County*, 207 Md. 91, 113 A.2d 397 (1955); *Agricultural & Mech. Ass'n of Washington County v. State ex rel. Carty*, 71 Md. 86, 18 A. 37 (1889); *Baltimore & O.R.R. v. State ex rel. Hauer*, 60 Md. 449 (1883).

22. See Annot., 14 A.L.R.2d 485, 509-10 (1950). See generally Decof, *Damages in Actions for Wrongful Death of Children*, 47 NOTRE DAME LAWYER 197 (1971).

23. Annot., 14 A.L.R.2d 485, 506 (1950). See, e.g., *Hord v. National Homeopathic Hosp.*, 102 F. Supp. 792 (D.D.C. 1952), *aff'd*, 204 F.2d 397 (D.C. Cir. 1953).

*Strepy v. Cohen*²⁴ wherein the father of a deceased twenty-year-old son sued for the wrongful death of the boy claiming damages for loss of expected benefits after his child would have reached majority. The father was a destitute invalid and the son had been doing the father's work as well as his own. The child, who lived at home, was killed two weeks before his twenty-first birthday. He had stated he would continue to support his father after he reached twenty-one. The plaintiff relied on a Maryland statute²⁵ which made it a criminal offense for the adult children of destitute parents to fail to support their parents if the children were financially able to do so. The Court of Appeals rejected the father's argument, stating that the statute in question was penal in nature, and punishes an offense against the sovereign. Relying on this theory the court reasoned that, while the child was obligated under the criminal statute to support the parent, this obligation was not transferred as a right to the parent to recover for the loss of support because prosecution under the criminal statute would not result in the support of the parent, but the punishment of the child.²⁶ A further reason for the inapplicability of the criminal statute is that it fails to provide any guidelines for determining the need of the parent.

Following *Strepy* the general rule in Maryland concerning the wrongful death of a minor child remained that a parent may recover only for the pecuniary loss suffered due to the lost services the child would have rendered from the date of the minor's death to the date on which the child would have reached his majority.²⁷ Two premises have been repeatedly assigned in justification of this rule:

First, it was said that the parent is lawfully entitled to the services or earnings of his child only during the latter's minority. Second, the claim was that it would be too speculative to contemplate the financial assistance which a minor might render the parents after he or she had reached majority.²⁸

However, the value of future services which a child might render after reaching majority was not the only form of damages considered too speculative to be allowed. Over the years, the courts have refused to encompass *solatium* when awarding damages for wrongful death. This

24. 166 Md. 682, 172 A. 274 (1934).

25. Law of April 18, 1916, ch. 637, [1916] Md. Laws 1320 (now MD. ANN. CODE art. 27, § 104 (1971)).

26. 166 Md. at 690, 172 A.2d at 278.

27. Under the original wrongful death statute, suit was brought by the state on behalf of all possible beneficiaries. Law of May 25, 1852, ch. 299, § 2, [1852] Laws of Md. The jury decided in what proportions and to whom the award was distributed. Today, the statute permits beneficiaries to bring suit in their own name, but all qualified beneficiaries must join in the same action. MD. ANN. CODE, Ct's & Jud. Proc. art., § 3-904(d) (1974). Emancipation of a deceased minor would be a factor to be considered by the jury.

28. *Barrett v. Charlson*, 18 Md. App. 80, 87, 305 A.2d 166, 171 (1973).

traditional judicial posture was changed by the 1969 amendment. Consequently, the *Barrett* court held, that:

As the result of the enactment of Section [3-904(d)] it can no longer be argued that damages for mental anguish, pain and suffering, loss of society, companionship and the other categories of *solatium* enumerated in the statute are too speculative in the eyes of the law to permit recovery in a suit by a spouse or a parent.²⁹

While the pecuniary damages aspect of an award is no longer an issue, the argument against the speculative nature of *solatium* as allowable by the decision in *Barrett* still exists. Although the General Assembly has said that damages for grief and mental suffering should be allowed whether speculative or not,³⁰ the legislature has not said what limitations should be placed on the measure of damages. Treating this omission as an ambiguity, the *Barrett* court turned to statutory construction principles for a solution. There was a very basic conflict between two tenets of statutory construction that the court had to resolve. On the one hand is the principle that statutes in derogation of the common law must be strictly construed. On the other, is the tenet of relatively recent vintage that remedial statutes must be liberally construed. Along this line, the *Barrett* court held:

Section [3-904(d)] is a "remedial statute", an amendment to the original wrongful death act, and enacted "to change a law which had . . . been found to be undesirable in some respects" . . . and "should be accorded a liberal construction consistent with the objective sought to be accomplished" by the General Assembly.³¹

In further support of this position, the court quoted from the Supreme Court decision in *Van Beeck v. Sabine Towing Co.*:

Death statutes have their roots in dissatisfaction with archaisms of the law It would be a misfortune if a narrow . . . construction were to exemplify and perpetuate the very evils to be remedied. . . . "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed."³²

According to the *Barrett* decision, a liberal construction meant that

29. *Id.* at 91, 305 A.2d at 173. The 1969 amendment took Maryland out of one minority camp (pecuniary loss limited to deceased's minority) and placed it in another (right to recover for emotional pain and anguish). See generally SPEISER, RECOVERY FOR WRONGFUL DEATH, App. A (1966).

30. MD. ANN. CODE, Ct's & Jud. Proc. art., § 3-904(d) (1974).

31. 18 Md. App. at 92, 305 A.2d at 173-74.

32. 300 U.S. 342, 350-51 (1937).

none of the limitations of the pecuniary loss rule should apply to an award for solatium.³³

The term "remedial statute" has been applied to a statute which makes a change in the substantive law of the state, and is designed to correct an inadvertent error made in some prior statute or to change a law which has been found to be undesirable in some respect.³⁴ While Maryland's original wrongful death statute changed the common law rule disallowing any recovery, Maryland decisional law for the last hundred years has held that the statute is in derogation of the common law and should be strictly construed.³⁵

In order to justify its decision and to divorce itself from Maryland's traditional position on wrongful death legislation, the *Barrett* court presented two closely aligned arguments. First, the court relied upon the authority in *Van Beeck* and *Klepper v. Breslin*³⁶ that wrongful death statutes are deserving of a liberal construction due to their remedial nature. Second, the court held that section 3-904(d) could be considered separate and apart from the other related sections in the same article. This would allow the court to construe section 3-904(d) liberally without disturbing previous decisions which construed the statute strictly. Neither aspect of the argument is supported by the authority cited by the court.

Van Beeck was a federal decision based upon Texas law. Texas is a common law state; however, it had completely eliminated the principle of strict construction of statutes in derogation of the common law by statute.³⁷ *Klepper* is a Florida decision which held that its *entire* wrongful death statute was remedial and should be afforded a liberal construction.³⁸ *Klepper* and *Van Beeck* are representative of the principle that wrongful death statutes are remedial in nature and, therefore, should be liberally construed in their entirety. It is a well settled principle of law that a statute must be construed as a whole.³⁹ With regard to amendatory statutes, the provision introduced by the amendatory act should be read together with the provisions of the original statute as if they had been originally enacted at the same time.⁴⁰ The *Barrett* court failed to recognize this principle when it favorably acknowledged the decision in *Flores v. King*⁴¹ that Maryland's wrong-

33. 18 Md. App. at 93, 305 A.2d at 174.

34. *Wittel v. Baker*, 10 Md. App. 531, 537, 272 A.2d 57, 60 (1970).

35. *Flores v. King*, 13 Md. App. 270, 282 A.2d 521 (1971); *McKeon v. State ex rel. Conrad*, 211 Md. 437, 127 A.2d 635 (1956); *Dunnigan v. Cobourn*, 171 Md. 23, 187 A. 881 (1936).

36. 83 So. 2d 587, 592-93 (Fla. 1955).

37. VERNON'S TEXAS STAT. ANN. art. 10(8) (1966), provides: "The rule concerning statutes in derogation of the common law has been abolished." See *Galveston, H. & S. A. Ry. v. Walker*, 48 Tex. Civ. App. 52, 106 S.W. 705 (1906) (holding that the above-mentioned statute existed prior to 1900).

38. Since this decision, Florida recodified its statute at FLA. STAT. ANN. § 768.17 (Supp. 1973) providing: "Sections 768.17-768.27 [Wrongful Death Statute] are remedial and shall be liberally construed."

39. *City of Phoenix v. Kelly*, 90 Ariz. 116, 366 P.2d 470 (1961).

40. *Kirchner v. Kansas Turnpike Auth.*, 336 F.2d 222 (10th Cir. 1964).

41. 13 Md. App. 270, 282 A.2d 521 (1971).

ful death statute should be strictly construed, while, at the same time, holding that the amendatory section should be liberally construed. Unless the Maryland Court of Special Appeals is willing to take a similar stand, *Klepper* and *Van Beeck* should not be cited as authority. An examination of judicial decisions in other states has not led to any decision that holds a wrongful death statute should be liberally construed in part and strictly construed in part. Absent the support of *Klepper* and *Van Beeck*, an inconsistency has been created by the *Barrett* court that should not be allowed to stand.

The fact that a particular statute is remedial in nature is seldom sufficient grounds, by itself, for classifying it as one entitled to a liberal interpretation. The interpretative implications of such a classification can only be resolved by resorting to other aids and guidelines.^{4 2} "Whether a statute is construed liberally or strictly depends on (1) its relationship to former law, (2) the way it affects persons and rights, (3) how much leeway the language of the statute affords; and (4) the purposes and objects of the statute."^{4 3} The court, in *Barrett*, ceased considering these other factors once it decided that section 3-904(d) was remedial.

An essential question to be answered for purposes of establishing the rule of construction is, what was the intention and purpose of the General Assembly in enacting the 1969 amendment? In attempting to answer this question, the Court of Special Appeals has previously stated:

[D]espite its pronouncements in the preamble to ch. 352, it is patent that the legislature did not feel that the pecuniary loss rule was utterly wrong, for it superseded the rule only in the case of the death of a spouse or minor child The legislature had before it whether to make the provisions of [§ 3-904(d)] applicable to every wrongful death action but did not do so. The bill as written read: "In every such action, including the death of a minor child" but was changed before passage to read: "In the case of the death of a spouse or a minor child" ^{4 4}

This change in wording appears to indicate that the legislature was extending compensation for the mental anguish of a plaintiff who could only be both physically and psychologically close to the decedent. As

42. See *Watkinson v. Adams*, 187 Okla. 432, 103 P.2d 498 (1939).

43. 2A A. SUTHERLAND, STATUTORY CONSTRUCTION § 58.01 (Sands ed. 1973).

44. *Wittel v. Baker*, 10 Md. App. 531, 536, 272 A.2d 57, 59 (1970). See Law of April 23, 1969, ch. 352, [1969] Laws of Md. 811 (preamble):

WHEREAS, Strict application of the ["pecuniary loss" rule] in the case of a minor's death . . . results in a minus figure, since the value of his services lost by death in modern society is generally much less than the probable cost of raising the child; and

WHEREAS, It is desirable to substitute a valid test for determining damages for the fictional test of the "pecuniary loss" or the "pecuniary benefit" rule in which emotional factors frequently enter; now therefore

the above quote indicates, the legislature apparently took cognizance of the fact that parents and their children "drift apart" by denying recovery for *solatium* for the parent who loses an adult child.^{4 5}

The *Barrett* court was seeking the legislative intent when it said: "The mischief which the General Assembly wanted to undo through the 1969 amendment of article 67 was to avoid the limited recoveries which often occurred in cases of the wrongful deaths of children or spouses as a consequence of strict application of the 'pecuniary loss' rule."^{4 6} The court was correct in its determination of the mischief in the former law; however, the court went too far in its interpretation of the remedy. The amendment was meant to increase the measure of damages above a minus figure for the wrongful death of a minor child. As stated in the preamble of the amendment: "[I]n the case of a minor's death, the strict application of [the 'pecuniary loss'] test results in a minus figure, since the value of his services lost by death in modern society is generally much less than the probable cost of raising the child."^{4 7} By the addition of section 3-904(d), the legislature expanded those categories of damages to be measured. The evil to be cured in the law was the rule that the anticipated services and contributions of the child could be offset by the costs of his rearing, not that the damages were limited to the child's minority; therefore, the damages for grief and mental suffering should be limited by the projected minority of the deceased child. Such an approach will guarantee a positive award to the parents of deceased minor children due to the inapplicability of any offsetting expenses. The decision in *Barrett* not to limit the damages for grief and mental suffering goes much farther than curing this evil and the court's interpretation of section 3-904(d) is, therefore, not consistent with the intent of the legislature.

In *Barrett*, the court said that if the General Assembly had intended to limit the period for which such damages could be recovered, it could easily have done so by making the limitations of the "pecuniary loss" rule expressly applicable to the categories of damages authorized by the statute.^{4 8} The wrongful death statute has been changed or amended six times^{4 9} since its original passage and not once did the General Assem-

45. At the time of writing of this casenote, there was, before the Maryland General Assembly legislation that would enlarge section 3-904(d). H.B. 1309, Md. Gen. Asse., 1974 Sess. provides in part:

[I]n the case of a death of an unmarried child eighteen years of age through twenty-five years of age, the damages awarded by a jury in such cases shall not be limited or restricted to the "pecuniary loss" or to the "pecuniary benefit" rule, but may include damages for mental anguish. . . .

46. *Barrett v. Charlson*, 18 Md. App. 80, 92, 305 A.2d 166, 173 (1973).

47. See *Agricultural & Mech. Ass'n of Washington County v. State ex rel. Carty*, 71 Md. 86, 18 A. 37 (1889).

48. *Barrett v. Charlson*, 18 Md. App. 80, 95-96, 305 A.2d 166, 175 (1973).

49. Law of May 25, 1852, ch. 299, [1852] Laws of Md.; Law of May 18, 1937, ch. 38, [1937] Laws of Md. 39; Law of March 28, 1950, ch. 89, [1950] Laws of Md. 415; Law of March 28, 1952, ch. 16, [1952] Laws of Md. 225; Law of April 28, 1959, ch. 751, [1959] Laws of Md. 1141; Law of March 23, 1962, ch. 36, [1962] Laws of Md. 156; Law of April 23, 1969, ch. 352, [1969] Laws of Md. 811.

bly act in the manner suggested by the *Barrett* court. It has been amended two times since 1969 without such action.⁵⁰ The limitations on section 3-902 were set by the Court of Appeals in the *Mahone* case in 1885 and the General Assembly has not changed that ruling to date.

As stated previously, an important factor to consider when applying statutory construction is the relationship between the section being construed and the former law. It is apparent that section 3-904(d) has the same basic purpose and object as the other sections of the wrongful death statute. This new section is meaningless unless it is construed with the other related sections in the Maryland Code. As such, they are *in pari materia*. Statutes can be *in pari materia* whether independent or amendatory in form, whether they are one act or several sections in a code.⁵¹ Once the sections have been classified as being *in pari materia*, the limitations of one apply to the other; ergo, the limitations of section 3-902 should be applied to section 3-904(d).

The fact that section 3-904(d) is amendatory raises a further presumption. When the General Assembly passes amendatory legislation, there is a presumption that the legislators know the prior construction of the act being amended. Consequently, if similar terms are adopted in the amendatory act that have been previously construed in the unamended sections, there is an inference "that the legislature intended to adopt the prior construction as to the terms used in the amendment."⁵² By passing the 1969 amendment, the General Assembly was not attempting to eradicate *all* vestiges of the "pecuniary loss" rule, but merely to expand those categories of damages which could be included in an award.⁵³

One final factor to consider is the way the construction adopted will affect the persons entitled to recover. This factor will remain basically the same whether a liberal or a strict construction is adopted. The vast majority of pain and mental suffering occurs immediately after the child's death; therefore, the greater percentage of damages recoverable will be allowable whether recovery is limited to the minority of the child or not.

Four arguments have been presented to support the contention that section 3-904(d) should be strictly construed. First, the entire wrongful death statute should be construed as a whole. Second, the legislative intent was only to eliminate the possibility of a jury arriving at a negative figure when awarding damages to the parents whose minor child is wrongfully killed. Third, section 3-904(d) is *in pari materia* with the rest of the wrongful death statute. Fourth, the legislature is presumed to know and expect any prior construction to be transferred to the amendatory section unless the amendment *expressly* states to the

50. Law of May 28, 1971, ch. 784, § 1, [1971] Laws of Md. 1719; Law of May 24, 1973, ch. 651, § 32, [1973] Laws of Md. 1343.

51. 1A A. SUTHERLAND, STATUTORY CONSTRUCTION § 22.35 (Sands ed. 1972).

52. *Id.*

53. Law of April 23, 1969, ch. 352, [1969] Laws of Md. 811.

contrary. Application of these four concepts and an awareness that the end result will not be detrimental to the proposed beneficiaries of the statute support the conclusion that section 3-904(d) should be strictly construed to the extent that the measure of damages for parental grief and mental suffering should be limited to the projected minority of the deceased minor child. Such a conclusion would be consistent with the judicial posture established in Maryland for the last one hundred years.

The *Barrett* court cited with approval *Southern & Florida Railway v. Perry*,⁵⁴ a federal case in which Florida law was determinative, allowing the introduction of mortality tables to show how long the parents are expected to live. No consistency can be attained by this approach. The court's approval of this holding indicates that Maryland trial judges should allow such tables to be introduced. The result of such a position will be to allow younger parents to recover larger awards than older parents who are faced with the prospect of never having another child. While mortality tables look attractive due to their tangibility in a bog of intangibles, the result of such evidence can only be arbitrary.⁵⁵

It is the duty of the General Assembly to correct errors in legislation. As Judge Scanlan said, speaking for the entire court: "This Court should not[,] . . . 'under the guise of construction . . . remedy possible defects of the statute . . .'"⁵⁶ Nor should a construction be used that will create inequities since the purpose of remedial legislation is to eliminate them. It is the duty of the appellate courts of this state to interpret Maryland's wrongful death statute in a light that will set the scales of justice in balance. The liberal interpretation espoused by the *Barrett* court will not set that proper balance. Application of the approach adopted in *Barrett* would allow an award of damages to the parents of a deceased seventeen year old but not to the parents of a deceased eighteen year old, both of whom are single and live at home. It is clear from the statute that this is permissible; however, to award damages beyond the projected minority of that seventeen year old and to continue to ignore the mental sufferings of the parents of the eighteen year old, except for pecuniary damages, is neither reasonable nor just. Had the court applied the principles of strict construction to section 3-904(d) by allowing *solatium* but limiting its recovery to the minority of the child, it may not have aided the Barretts, but would have attained two beneficial results. First, it would eliminate the injustice created by the *Barrett* court's interpretation of section 3-904(d) and second, it would serve notice upon the General Assembly that revisions of the statute are mandated if a truly remedial statute is

54. 326 F.2d 921 (5th Cir. 1964).

55. Alabama and Massachusetts have attempted to eliminate such arbitrary awards. The legislatures in those two states recognize the fact that *all* human life is precious. Love and affection run to equal heights whether the decedent is a prince or a pauper. The only variable is the culpability of the defendant and the degree of culpability is the determining factor in measuring damages. See MASS. GEN. LAWS ANN. ch. 229, § 2 (1972) and CODE OF ALA. Tit. 7, § 119 (1960).

56. 18 Md. App. at 96, 305 A.2d at 175.

desired. A review of Maryland law offers no basis for a court changing the limitations on the measure of damages set in *Coughlan* and *Mahone*. The common law was adopted by the General Assembly and must be overridden by the General Assembly.^{5,7} Use of judicial fiat for this purpose as was done in *Barrett* bodes more mischief.

Stephen M. Hearne

57. MD. CONST., DECLARATION OF RIGHTS, art. 5.

DOMESTIC RELATIONS—INCREASE OR DECREASE OF PERMANENT ALIMONY AND CHILD SUPPORT—GRANTED WITHOUT THE NECESSITY OF SHOWING A CHANGE IN THE CIRCUMSTANCES OF BOTH PARTIES. *LOTT V. LOTT*, 17 Md. App. 440, 302 A.2d 666 (1973).

In *Lott v. Lott*¹ the Court of Special Appeals held that a substantial change in the circumstances of *both* parties is not necessary for the modification of alimony or child support. Accordingly, the court affirmed an increase in these payments which would correspond to the husband's increase in income since the original award. This modification was granted despite the petitioner-wife's concession that her needs had not changed since the time of the divorce² and the husband's assertion that a substantial change in the circumstances of *both* parties must be shown.³ The determination that the husband's increase in income after divorce⁴ may in itself justify a modification of alimony and child support reflects the unusually broad discretion which the Maryland courts of equity apply to alimony awards and to subsequent modifications.

Dr. and Mrs. Lott entered the "oft recurring phase of the war of the sexes — the primeval struggle for division of the husband's productivity after the couple have [sic] separated"⁵ in 1970 when the peti-

1. 17 Md. App. 440, 302 A.2d 666 (1973).

2. *Id.* at 443, 302 A.2d at 668.

3. *Id.* at 442, 302 A.2d at 668.

4. The Lotts were divorced in 1970. They were married in 1952, after which Mrs. Lott worked to put her husband through medical school. In 1968, upon Mrs. Lott's refusal to grant her husband a divorce, he left Maryland and went west with his paramour. He returned to Maryland nine months later with his companion and a child of their adultery. In his absence, the \$65,000 home previously shared by the Lotts was lost in a foreclosure sale and Mrs. Lott moved to a modest apartment. She was forced to gain employment in order to maintain herself and her son. After the final divorce was granted in 1970, Dr. Lott married his paramour and, due to alimony payments, supported his wife and the three children in addition to his previous wife and their only child.

Factors considered in the original award of alimony were: the sacrifices of the working wife while her husband attended medical school, the adultery of the husband and the wife's right to be supported in a life style to which she had become accustomed during the marriage. *Id.* at 442-43, 302 A.2d at 668.

5. *Stansbury v. Stansbury*, 223 Md. 475, 164 A.2d 877 (1960).