

The Futility of the Massachusetts Wrongful Death Statute

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INTRODUCTION

Imagine this: a single father brought his twins skydiving in Cape Cod for their eighteenth birthday.¹ Before they were allowed on the plane, all three of them had to sign liability waivers.² After doing so, the family boarded the plane.³ When the plane reached the appropriate altitude, the twins and the father jumped out of the plane with their instructors.⁴ Both twins landed safely, only to find out that their father's parachute had malfunctioned.⁵ Neither he nor the instructor survived the accident.⁶ The twins had planned to start college in the fall, but now they

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¹ *Cf.* Cahalane v. Skydive Cape Cod, No. 17-P-706, 2018 Mass. App. Unpub. LEXIS 556, at *4 (July 3, 2018) (reciting facts regarding a skydiving accident that gave rise to a lawsuit); Justin L. Mack, *Son Mourns Greenfield Father After Deadly Skydiving Mistake*, *INDYSTAR* (May 19, 2014, 4:00 PM ET), <https://perma.cc/9R3Q-QRHG> (describing a skydiving accident that killed a father).

² *Cf.* Cahalane, 2018 Mass. App. Unpub. LEXIS at *2.

³ *Cf. id.*

⁴ *Cf. id.* at *4; Mack, *supra* note 1.

⁵ *Cf.* Christina Zdanowicz, *A Georgia Teen on Her First Skydive and a Veteran Instructor Died When Their Chutes Failed*, *CNN*, <https://perma.cc/S6J2-4FQP> (last updated July 16, 2020, 8:20 PM ET) (describing a tragic accident in which a parachute failed to open, killing the sky diver and instructor).

⁶ *Cf. id.*

had to plan their father's funeral instead.⁷ Not only were they devastated by the tragic loss of their only parent, but they also could not afford to pay for college or the funeral.⁸ They looked into suing the sky diving company and the parachute manufacturer for negligence.⁹ They were told they had no recourse due to the liability waiver their father had signed prior to the accident.¹⁰

Not only are two eighteen-year-olds now parentless, but they also cannot support themselves financially or continue their lives as planned.¹¹ This is because Massachusetts decided that wrongful death claims are derivative rather than independent.¹² By signing the required liability waiver prior to the accident, the father effectively waived his children's rights to recover for his death.¹³ At eighteen, both of his children relied on him financially.¹⁴ Not only did the twins have emotional and personal interests in their father's life, but they had legal and financial interests as well.¹⁵ However, according to the recent decision in *Doherty v. Diving Unlimited International, Inc.*, Massachusetts does not recognize these as distinct and separate interests.¹⁶ These particular facts are fictional, but they illustrate the tragic consequences that are likely to flow from the Massachusetts Supreme Court's ruling in *Doherty*.¹⁷ In effect, this decision renders Mass. Gen. Laws ch. 229, § 2 useless to many potential claimants.¹⁸

This article will argue that the right of recovery for statutory beneficiaries is *independent* of the decedent's cause of action. This conclusion is supported by the language of the statute itself, as well as its underlying purpose. Further, jurisdictions with similar wrongful death statutes interpret wrongful death claims as independent. In the alternative, certain

⁷ Cf. Mack, *supra* note 1; Zdanowicz, *supra* note 5.

⁸ See Jessica Gillespie, *Wrongful Death Lawsuits in Massachusetts*, NOLO, <https://perma.cc/UT3M-H3GR> (last visited Nov. 18, 2022) (explaining recoverable damages in a wrongful death suit and who is entitled to them); cf. Mack, *supra* note 1.

⁹ Cf. Cahalane, 2018 Mass. App. Unpub. LEXIS at *1.

¹⁰ See *Doherty v. Diving Unlimited Int'l, Inc.*, 484 Mass. 193, 195–96 (2020); Cahalane, 2018 Mass. App. Unpub. LEXIS at *8–10.

¹¹ Cf. Gillespie, *supra* note 8; Mack, *supra* note 1.

¹² *Doherty*, 484 Mass. at 195–96; GGNSC Admin. Servs., LLC v. Schrader, 484 Mass. 181, 191 (2020).

¹³ *Doherty*, 484 Mass. at 196.

¹⁴ Cf. Gillespie, *supra* note 8.

¹⁵ See Gillespie, *supra* note 8.

¹⁶ 484 Mass. at 196.

¹⁷ See *id.*

¹⁸ See *id.*

liability waivers, like the one at issue in *Doherty*, should be deemed unenforceable for public policy reasons. Lastly, the Court in *Doherty* erroneously concluded that the plaintiff was precluded from bringing a claim for gross negligence because she was not “executor or administrator” of the decedent’s estate.

I. Background

A. Wrongful Death Statute History and Interpretation

Massachusetts codified the country’s first wrongful death statute.¹⁹ The first version of the statute, written in 1840, allowed for recovery in very specific instances:

[I]f the life of any person, being a passenger, shall be lost by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, steamboat, stagecoach, or of common carriers of passengers, or by the unfitness or gross negligence or carelessness of their servants or agents, in this Commonwealth, such proprietor or proprietors, and common carriers, shall be liable to a fine, to be recovered by indictment, to the use of the executor or administrator of the deceased person.²⁰

Through many subsequent amendments, the statute has evolved into its present-day form.²¹ In addition to recovery from common carriers, the modern statute permits recovery from “[a] person who (1) by his negligence causes the death of a person, or (2) by willful, wanton or reckless act causes the death of a person *under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted.*”²² The last portion of this provision was added in 1958.²³ This clause will be relevant, as the Court relied heavily on the legislative intent behind this amendment in its analysis in the *Schrader* and *Doherty* cases.²⁴

Since Massachusetts enacted the wrongful death statute in 1840, the other forty-nine states have followed, each enacting their own variations of the statute.²⁵ Accordingly, states differ in their interpretation of these

¹⁹ GGNSC Admin. Servs., LLC v. Schrader, 484 Mass. 181, 187 (2020).

²⁰ Commonwealth v. Boston & Lowell R.R. Corp., 134 Mass. 211, 212 (1882).

²¹ MASS. GEN. LAWS ch. 229, § 2 (2022).

²² *Id.* (emphasis added).

²³ *Schrader*, 484 Mass. at 187–88.

²⁴ *Id.*; *Doherty v. Diving Unlimited Int’l, Inc.*, 484 Mass. 193, 196 (2020).

²⁵ See, e.g., *Wrongful Death Settlement Distribution Laws by State*, FINDLAW, <https://perma.cc/7L4C-YE9F> (last updated Dec. 3, 2018).

statutes. The most significant difference is whether a statute creates an independent cause of action for third parties, or if it is derivative of claims the decedent could have brought if he had survived. Some jurisdictions, such as Virginia, interpret their wrongful death statutes as independent claims.²⁶ As such, wrongful death claims arise upon a decedent's death to compensate a plaintiff for their loss, as opposed to being "a survival of a 'right of action' held by the injured person prior to death."²⁷ In *Stevens v. Med. Facilities of Am. XXXII*, a Virginia Circuit Court explained why it is proper to classify such claims as independent rather than derivative: "As an independent cause of action, [recovery is sought] for damages suffered by the decedent's statutory beneficiaries, not for damages sustained by the decedent"²⁸ Alternatively, jurisdictions that consider these claims as derivative hold that a beneficiary can only bring claims that the decedent could have brought in his own right if he had survived (e.g., personal injury or negligence claims).

B. *History of Liability Waivers in Massachusetts*

Liability waivers are generally enforceable in Massachusetts.²⁹ As early as 1888, the highest Court in Massachusetts upheld these contracts as "a valid and sufficient defense to an action against the defendant for injuries resulting from the negligence of the defendant's servants"³⁰ However, one cannot contract to exempt one's self from liability for gross negligence or reckless conduct.³¹ In *Lee v. Allied Sports Associates, Inc.*, the Massachusetts Supreme Court concluded that the release signed by the plaintiff "as [a] matter of law effectively released the defendant from liability for *ordinary*

²⁶ See, e.g., *Wilson v. Whittaker*, 207 Va. 1032, 1038 (1967) ("Our death by wrongful act statute does not cause to survive this right of action, but it creates in the decedent's personal representative a new right of action to compensate decedent's statutory beneficiaries for their loss.") (emphasis added); *Stevens v. Med. Facilities of Am. XXXII* (32), 98 Va. Cir. 376, 386 (2018) ("The wrongful death right of action is an independent action under §8.01-50(A).").

²⁷ *Stevens*, 98 Va. Cir. at 386; see also *Wilson*, 207 Va. at 1038.

²⁸ 98 Va. Cir. at 386 (emphasis added).

²⁹ See, e.g., *Sharon v. City of Newton*, 437 Mass. 99, 105 (2002) ("A party may, by agreement, allocate risk and exempt itself from liability that it might subsequently incur as a result of its own negligence."); *Lee v. Allied Sports Assocs., Inc.*, 349 Mass. 544, 550 (1965).

³⁰ *Bates v. Old Colony R.R. Co.*, 147 Mass. 255, 268 (1888).

³¹ E.g., *Rafferty v. Merck & Co.*, 479 Mass. 141, 156 (2018) ("Implicit in both our common and statutory law, then, is a long-standing public policy that, although we may be willing in certain circumstances to excuse ordinary negligence, we will not tolerate the reckless disregard of the safety of others."); *Zavras v. Capeway Rovers Motorcycle Club*, 44 Mass. App. Ct. 17, 19 (1997) ("[W]hile a party may contract against liability for harm caused by its negligence, it may not do so with respect to its gross negligence.").

negligence to signatories who were within its terms.”³² The use of the term “ordinary negligence” was significant for the Appellate Court in its decision in *Zavras v. Capeway Rovers Motorcycle Club*.³³ There, the Court distinguished the waiver of ordinary negligence from that of gross negligence.³⁴ In reaching this decision, the Court consulted the Second Restatement of Contracts, which states: “A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.”³⁵ The *Zavras* decision is often cited as authority for the principle that one may not contract against liability for acts that constitute more than “ordinary negligence.”³⁶ It is well settled in Massachusetts that liability waivers do not protect wrongdoers from “[liability] for gross negligence, recklessness, or intentional conduct,” as this would contrast with public policy.³⁷

Compared to “ordinary” negligence, gross negligence is “substantially and appreciably higher in magnitude ... [i]t is very great negligence, or the absence of slight diligence, or the want of even scant care.”³⁸ Surely, it would be a dangerous and slippery slope to allow people to contractually exempt themselves from liability for such conduct.³⁹ Because of this, courts are careful to make sure that such contracts do not protect conduct that reaches the level of gross negligence.⁴⁰ Though vague definitions like the one above are available, there is no “test” for what constitutes gross negligence.⁴¹ Thus, the classification as such must be decided on a case-to-case basis, according to the specific facts at hand.⁴²

II. The Court’s Opinion

Doherty v. Diving Unlimited International, Inc., and its companion case, *GGNSC Administrative Services, LLC v. Schrader*, are the first in Massachusetts

³² 349 Mass. at 551 (emphasis added).

³³ 44 Mass. App. Ct. at 18.

³⁴ *Id.* at 19.

³⁵ *Id.* at 19 (citing Restatement (Second) of Confs. § 195 (Am. L. Inst. 1981)).

³⁶ See, e.g., *Rafferty*, 479 Mass. at 155; *Sharon v. City of Newton*, 437 Mass. 99, 110 (2002); *Cahalane v. Skydive Cape Cod*, No. 17-P-706, 2018 Mass. App. Unpub. LEXIS 556 at *10 (Jul. 3, 2018); *Hunter v. Skate III*, 1999 Mass. App. Div. 274, 276 (1999).

³⁷ *Sharon*, 437 Mass. at 110.

³⁸ *Cahalane*, 2018 Mass. App. Unpub. LEXIS at *11 (citations omitted).

³⁹ See *Zavras*, 44 Mass. App. Ct. at 19 (cautioning against enforcement of releases of liability).

⁴⁰ See *id.*

⁴¹ See *Cahalane*, 2018 Mass. App. Unpub. LEXIS at *11.

⁴² See *id.*

to squarely address whether beneficiaries' claims under the wrongful death statute are independent or derivative claims.⁴³ Specifically, the Court was asked whether a statutory beneficiary's wrongful death claim is independent from, or derivative of, personal injury claims the decedent could have brought if he had survived.⁴⁴ Though the cases are factually different, this central question was integral as to whether the respective plaintiffs had a right to bring their claim at all.⁴⁵ Because the Court uses the same reasoning to answer the question in both cases, it is important to explore the facts of each.⁴⁶

In *Doherty*, the decedent was a certified scuba diver who drowned while participating in a promotional event for diving equipment that was sponsored by Diving Unlimited International (DUI).⁴⁷ The dive was led by John Golbranson, who supervised some of the participants.⁴⁸ Prior to the dive, the decedent was required to sign two documents: a release of liability for DUI, and an equipment rental agreement.⁴⁹ The former document stated: "Diver gives up valuable rights, including the right to sue for injuries or death," and that the decedent agreed "not to sue DUI for personal injury arising from scuba diving or its associated activities."⁵⁰ The release also stated that the decedent's "heirs or executors may not sue DUI for death arising from scuba diving or its associated activities."⁵¹ During the dive, Golbranson signaled for the group to go back to the surface when one of the divers was running low on air.⁵² The decedent did not follow and was separated from the rest of the group.⁵³ Soon after, "the decedent resurfaced and called for help."⁵⁴ Subsequently, the decedent passed away from "scuba drowning after unequal weight belt distribution."⁵⁵

Following this tragedy, the plaintiff brought a wrongful death suit as a

⁴³ *Doherty v. Diving Unlimited Int'l, Inc.*, 484 Mass. 193, 196 (2020); *GGNSC Admin. Servs., LLC v. Schrader*, 484 Mass. 181, 182 (2020).

⁴⁴ *Doherty*, 484 Mass. at 196; *Schrader*, 484 Mass. at 182.

⁴⁵ *Doherty*, 484 Mass. at 196; *Schrader*, 484 Mass. at 182–86.

⁴⁶ *See Doherty*, 484 Mass. at 196.

⁴⁷ *Id.* at 194.

⁴⁸ *Id.* (conceding that Golbranson was acting as an agent of DUI).

⁴⁹ *Id.* at 194–95.

⁵⁰ *Id.*

⁵¹ *Id.* at 195.

⁵² *Doherty*, 484 Mass. at 195.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

personal representative under Mass. Gen. Laws ch. 229, § 2.⁵⁶ Along with the wrongful death claim, the plaintiff alleged that the decedent endured conscious pain and suffering due to Golbranson's negligence.⁵⁷ The Superior Court granted summary judgment in favor of Golbranson based on the theory that, because Golbranson was an agent of DUI, the release from liability that the decedent signed extended to him.⁵⁸ Further, the Court concluded that ch. 229, § 2 "created a right to recovery that is derivative of the decedent's own cause of action," and the agreements "precluded any recovery on behalf of the decedent's statutory beneficiaries, who had no rights independent of the decedent's cause of action, which was waived."⁵⁹

The plaintiff appealed, arguing that "the statutory beneficiaries have an *independent right* to a wrongful death action that decedent could not have waived," and therefore, "neither waiver would prevent the decedent's statutory beneficiaries from recovering damages for wrongful death."⁶⁰ The Massachusetts Supreme Judicial Court transferred the case from the Appeals Court on its own motion.⁶¹ Citing its reasoning in *Schrader*, the Court held: "the valid waivers signed by the decedent preclude the plaintiff, as his 'executor or personal representative,' from bringing a lawsuit under ch. 229, § 2, for the benefit of the statutory beneficiaries."⁶²

Due to the significance of the *Schrader* rationale to the *Doherty* case, it is useful to understand those facts as well.⁶³ In *Schrader*, the plaintiff (Schrader), as decedent's personal representative, brought a wrongful death suit pursuant to ch. 229, § 2 in which she alleged GGNSC negligently caused her mother's death.⁶⁴ Soon after, GGNSC moved to compel arbitration, pursuant to an arbitration agreement Schrader had signed on her mother's behalf.⁶⁵ Schrader opposed arbitration, arguing that "the arbitration agreement could not control the wrongful death claim because the beneficiary's claim under the wrongful death statute was independent of the decedent's action and the decedent was the only legal party to sign the arbitration agreement."⁶⁶ The

⁵⁶ *Id.* (settling with all defendants except the dive leader, John Golbranson).

⁵⁷ *Id.*

⁵⁸ *Doherty*, 484 Mass. at 195.

⁵⁹ MASS. GEN. LAWS ch. 229, § 2; *Doherty*, 484 Mass. at 196.

⁶⁰ *Doherty*, 484 Mass. at 194–95 (emphasis added).

⁶¹ *Id.* at 194.

⁶² *Id.* at 196.

⁶³ *See id.* at 194.

⁶⁴ GGNSC Admin. Serv., LLC v. Schrader, 140 N.E.3d 397, 400 (Mass. 2020).

⁶⁵ *Id.*

⁶⁶ *Id.* at 401.

Federal District Court deemed the wrongful death action derivative and the arbitration agreement binding on wrongful death beneficiaries.⁶⁷ Schrader appealed to the First Circuit, which certified the following question to the Massachusetts Supreme Court: “Is the wrongful death claim of [the decedent’s] statutory heirs derivative or independent of [the decedent’s] own cause of action?”⁶⁸

In deciding this question, the Court claimed to have relied on the plain meaning of the statute, along with interpretations of common-law wrongful death claims and persuasive authority from other states.⁶⁹ The Court began its analysis by comparing the consequences of classifying the statute as derivative and independent, respectively.⁷⁰ If the beneficiary’s action was viewed as derivative, then wrongful death liability was simply an extension of the decedent’s personal injury claim.⁷¹ In other words, the beneficiaries would have a right to sue only if the decedent would have been in a position to sue if they had survived.⁷² Alternatively, if the claim was independent, the existence of a personal injury claim—or lack thereof—would have no effect on the wrongful death claim.⁷³ “The situation would be as though the injured person and his beneficiary each had a separate legal interest in his life, assertable by separate action.”⁷⁴ Classified this way, the decedent could not contract away the beneficiary’s possible claims, as the action deals only with the economic effect that the decedent’s death had on others.⁷⁵

Next, the Court looked at the plain language of the statute itself, emphasizing the importance of the Legislature’s intent.⁷⁶ The Court found the 1958 amendment of the statute to be particularly significant in discerning that intent: “In 1958, the Legislature amended G. L. c. 229, § 2, to permit compensation only ‘under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted.’”⁷⁷ The Court equated a wrongful death claim to a decedent’s personal injury claim, concluding no wrongful death action could exist unless the decedent could

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 402.

⁷⁰ *Schrader*, 140 N.E.3d at 401–02.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* (citations omitted).

⁷⁵ *Id.*

⁷⁶ *Schrader*, 140 N.E.3d at 403.

⁷⁷ *Id.* at 404.

have sued for personal injury.⁷⁸ Thus, the Court concluded the wrongful death claim derives from the underlying tort.⁷⁹

The Court went even further to conclude that the statute's "under such circumstances" clause applied to everything before it in the statute, i.e., "willful, wanton, or reckless acts," as well as negligent acts.⁸⁰ The Court found more support for this legislative intent in the fact that only the executor or administrator of the deceased can bring such a claim.⁸¹ The Court conceded that prior to the 1958 amendment, it had interpreted the statute to create "independent rights for beneficiaries," and that the issue had not been squarely addressed.⁸² However, the Court concluded that the direction of case law seemed to support the classification of such claims as derivative rather than independent.⁸³

Finally, the Court acknowledged that many other jurisdictions have expressly qualified their wrongful death actions as being derivative of the decedent's own claims.⁸⁴ Relying mostly on the legislative intent behind the 1958 amendments, the Court decided to join these jurisdictions and "adopt the majority rule that precludes wrongful death actions unless decedents could have brought an action for the injuries that caused their death."⁸⁵

ANALYSIS

III. The Court Erred in Its Statutory Interpretation of ch. 229, § 2 as Derivative

A. *The Language of ch. 229, § 2 Supports the Conclusion That Wrongful Death Claims Are Independent*

The *Doherty* Court made two significant mistakes in interpreting the wrongful death statute. First, the Court overlooked the fact that liability waivers are not included in the explicit exceptions for when the wrongful death statute does not apply. Second, the Court made a fatal error in statutory interpretation by attributing the 1958 amendment to the entire

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See MASS. GEN. LAWS ch. 229, § 2 (2022); *Schrader*, 140 N.E.3d at 404.

⁸¹ *Schrader*, 140 N.E.3d at 404.

⁸² *Id.* at 404–05.

⁸³ *Id.* at 405 ("Overall, the 'trend in [our] law is against allowing' claims under G. L. c. 229, § 2, to be independent of the decedent's own cause of action.").

⁸⁴ *Id.* at 405–06.

⁸⁵ *Id.* at 406.

statute instead of just to the phrases *following* the amendment.

1. Chapter 229, § 2 Does Not Have an Exception for Liability Waivers

Chapter 229, § 2 expressly carves out three exceptions for when the wrongful death statute does not apply.⁸⁶ First, the statute states that “the liability of an employer to a person in his employment shall not be governed by this section.”⁸⁷ Second, the statute exempts railroad operators from liability in circumstances where a person is killed while on the railroad tracks illegally.⁸⁸ Similarly, the third and final exemption from liability under this statute is afforded to “a person operating a street railway or electric railroad” if a person is killed while walking or being on the “street railway or electric railroad.”⁸⁹

When interpreting a statute, courts discern the legislative intent behind the statute by looking toward the plain language.⁹⁰ This is what the Court purported to do in *Schrader*.⁹¹ Based on the plain language of the statute, it is clear that there are three explicit exemptions from liability.⁹² All three of the exceptions are very specific and particular.⁹³ This supports the contention that the legislature intended this list to be *exhaustive*—not merely *illustrative*.⁹⁴ If the legislature intended to allow other exemptions to ch. 229, § 2, such exemptions would have been included in the statute.⁹⁵ Thus, it is clear that the legislature did *not* intend to include further exemptions to ch. 229 § 2 other than those explicitly laid out therein.⁹⁶

Noticeably absent from these exceptions are “liability waivers.”⁹⁷ The

⁸⁶ MASS. GEN. LAWS ch. 229, § 2 (2022).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Sisson v. Lhowe*, 954 N.E.2d 1115, 1117–18 (Mass. 2011) (“[C]onsistent with our general practice of statutory interpretation, we look first to the language of the statute because it is ‘the principal source of insight’ into the intent of the Legislature.” (citations omitted)).

⁹¹ *GGNSC Admin. Servs., LLC. v. Schrader*, 140 N.E.3d 387, 403 (Mass. 2020) (“‘When conducting statutory interpretation, this court strives to effectuate the Legislature’s intent by looking first to the statute’s plain language’ (quotations and citations omitted).”).

⁹² MASS. GEN. LAWS ch. 229, § 2 (2022).

⁹³ *See id.*

⁹⁴ *Id.*; *see Schrader*, 140 N.E.3d at 403–04.

⁹⁵ Ch. 229, § 2; *see Schrader*, 140 N.E.3d at 403–04.

⁹⁶ *See* Ch. 229, § 2; *Schrader*, 140 N.E.3d at 403–04.

⁹⁷ *See* Ch. 229, § 2.

wrongful death statute does not address the issue of liability waivers.⁹⁸ This is not because liability waivers are a recent phenomenon; quite conversely, liability waivers were legitimized by courts as early as 1888.⁹⁹ Following this rationale, if the legislature *intended* to include “liability waivers” as an exception to ch. 229 § 2, it had well over 100 years to amend the statute to reflect this.¹⁰⁰ Therefore, the court erred in concluding that liability waivers constitute an exemption to a wrongful death action.¹⁰¹

2. The Court Erroneously Attributed the 1958 Amendment to All Causes of Action Listed in the Statute

The *Schrader* Court found the 1958 amendment to be controlling when concluding that wrongful death claims are derivative.¹⁰² This amendment added that certain causes of action could only be brought if “the deceased could have recovered damages for personal injuries if his death had not resulted.”¹⁰³ If the deceased could not have recovered damages for personal injuries had he survived, the executor or administrator of the estate cannot recover such damages either.¹⁰⁴

Applying this concept to liability waivers, if the deceased had previously waived liability and his right to recovery, the estate could not recover for his death.¹⁰⁵ However, the 1958 amendment explicitly added this significant phrase to just two of the five enumerated bases for liability:¹⁰⁶

A person who (1) by his negligence causes the death of a person, or (2) by willful, wanton or reckless act causes the death of a person *under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted*, or (3) operates a common carrier of passengers and by his negligence causes the death of a passenger, or (4) operates a common carrier of passengers and by his willful, wanton or reckless act causes the death of a passenger *under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted*, or (5) is responsible for a breach of warranty arising under Article 2 of chapter one hundred and six which results in injury to

⁹⁸ *See id.*

⁹⁹ *See Bates v. Old Colony R.R. Co.*, 17 N.E. 633, 640 (Mass. 1888).

¹⁰⁰ *See id.*

¹⁰¹ *See* Ch. 229, § 2; *Schrader*, 140 N.E.3d at 404.

¹⁰² *Schrader*, 140 N.E.3d at 406; Part II, *supra* pp. 12–13.

¹⁰³ Ch. 229, § 2.

¹⁰⁴ *Id.*; *Schrader*, 140 N.E.3d at 404.

¹⁰⁵ *See Schrader*, 140 N.E.3d at 404.

¹⁰⁶ Ch. 229, § 2.

a person that causes death...¹⁰⁷

The Court concluded: “[b]y virtue of the conjunction ‘or’ placed between the different types of acts causing wrongful death, the clause also seems to modify the cause of action based on negligence.”¹⁰⁸ This line of reasoning would be more convincing if the legislature had only added the phrase after the “willful, wanton, or reckless” cause of action.¹⁰⁹ However, the phrase was also added after the cause of action for “willful, wanton, or reckless” operation of common carriers.¹¹⁰ If, as the Court concluded, the legislature intended for this phrase to apply to other statutory bases for liability, such as negligence, why would they explicitly add this modifier to only *two* of the bases?¹¹¹ This rationale supports the argument that the Court mistakenly determined that the 1958 Amendment modified the surrounding causes of action set out in ch. 229 § 2.¹¹² Thus, if the 1958 Amendment does not apply to all five of the causes of action laid out in the statute, claims can be brought under ch. 229 § 2 regardless of whether the decedent himself could have recovered.¹¹³ Therefore, the Massachusetts wrongful death statute allows for claims that are separate and distinct from a decedent’s theoretical right to recovery.¹¹⁴

B. *The Court’s Interpretation of the Statute Contradicts its Underlying Purpose*

The Court erroneously interpreted the statute in a way that contradicts its underlying purpose.¹¹⁵ There are established principles in our law that preclude such a reading.¹¹⁶ First, “[t]he provisions of a text should be interpreted in a way that renders them compatible, not contradictory.”¹¹⁷

¹⁰⁷ *Id.* (emphasis added).

¹⁰⁸ *Schrader*, 140 N.E.3d at 404.

¹⁰⁹ *See* Ch. 229, § 2; *Schrader*, 140 N.E.3d at 404.

¹¹⁰ Ch. 229, § 2.

¹¹¹ *See id.*; *Schrader*, 140 N.E.3d at 404.

¹¹² *See* Ch. 229, § 2; *Schrader*, 140 N.E.3d at 404.

¹¹³ *See* Ch. 229, § 2.

¹¹⁴ *Id.*

¹¹⁵ *Schrader*, 140 N.E.3d at 406.

¹¹⁶ *See* VALERIE C. BRANNON, CONG. RSCH. SERV., R45153: STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 4–5 (2022), <https://perma.cc/GP2W-DLHW> (“[W]hen a court interprets a federal statute, it seeks ‘to give effect to the intent of Congress’ . . . [judges] ‘are not free to simply substitute their policy views for those of the legislature that enacted the statute.’”).

¹¹⁷ *Id.* at 55.

Reading this statute to preclude potential beneficiaries from bringing claims for wrongful death is simply incompatible with the rest of the statute.¹¹⁸ Further, legislative history should not be relied upon if doing so would contradict the purpose of the statute.¹¹⁹ Allowing liability waivers to preclude potential claimants from bringing wrongful death claims plainly contradicts the underlying purpose of the statute.¹²⁰ This contradiction alone illustrates the Court's error in concluding that such claims are not wholly independent from claims which the decedent could have brought.¹²¹

C. *Mass. Gen. Laws ch. 229, § 2 Expressly Gives the Executor or Administrator of the Deceased the Right to Recovery*

The statute allows for damages to be recovered “in an action of tort by the executor or administrator of the deceased.”¹²² By its own terms, ch. 229 § 2 lays out five causes of action for which an executor or administrator of an estate can recover.¹²³ Such a claim does not accrue unless a person has died.¹²⁴ Thus, unless there is a decedent, a claim cannot be brought under ch. 229 § 2.¹²⁵ Because a claim for wrongful death cannot exist without a decedent, how can such a claim “derive” from claims a decedent could have brought in his own right?¹²⁶ This line of reasoning is flawed on its face.¹²⁷

IV. Jurisdictions with Similar Wrongful Death Statutes Interpret Them as Independent Rather than Derivative

A Virginia circuit court recently held that “[t]he wrongful death right of action is an independent action under §8.01-50(A).”¹²⁸ The Virginia statute is similar to Massachusetts’ in that it references actions the decedent could

¹¹⁸ See Ch. 229, § 2.

¹¹⁹ Brannon, *supra* note 116, at 36–37 (“Effect should not be given to evidence from the internal legislative history if the result would be to contradict a purpose otherwise indicated.”).

¹²⁰ See Ch. 229, § 2.

¹²¹ See Brannon, *supra* note 116, at 36–37 n.373, 53 n.532.

¹²² Ch. 229, § 2.

¹²³ *Id.*

¹²⁴ *Id.* (“An action to recover damages under this section shall be commenced within three years from the date of death.”)

¹²⁵ *Id.*

¹²⁶ See Corrected Brief of Amici Curiae AARP and AARP Foundation in Support of Defendant-Appellant and Reversal at 5, *GGNSC Admin. Servs., LLC v. Schrader*, (1st Cir. Nov. 14, 2018) (No. 18-1779), <https://perma.cc/JK59-BTNC> [hereinafter Brief of Amici Curiae].

¹²⁷ See *id.*

¹²⁸ *Stevens v. Med. Facilities of Am.* XXXII (32), 98 Va. Cir. 376, 386 (2018); see also *Wilson v. Whittaker*, 207 Va. 1032, 1038 (1967); Part I(A), *supra* at 3.

have brought: “Whenever the death of a person shall be caused by the wrongful act, neglect . . . would, if death had not ensued, have entitled the party injured to maintain an action . . . and to recover damages in respect thereof . . .”¹²⁹ Despite the clause pertaining to claims the decedent could have brought, Virginia still holds that wrongful death claims are independent.¹³⁰

Similar to Virginia, many other jurisdictions interpret their similarly worded statutes as creating causes of action that are separate and distinct from what the decedent could have brought.¹³¹ The American Association of Retired Persons outlined this in its Brief of Amici Curiae to the *Schrader* Court.¹³² The Brief provides many examples of wrongful death statutes that, similar to Virginia and Massachusetts, include provisions concerning the decedent’s would-be claims.¹³³ For example, Ohio’s statute limits claims to “[w]hen the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action to recover damages if death had not ensued”¹³⁴ Still, Ohio’s case law recognizes the distinction between a survivor’s claims and wrongful death claims: “[A] wrongful-death claim belongs to the decedent’s beneficiaries’ and is for their ‘exclusive benefit.’”¹³⁵

These jurisdictions, along with at least nine others, recognize the purpose behind the statute, and interpret the language in a light favorable to the beneficiaries it is intended to help.¹³⁶ Massachusetts can, and should, do the same.¹³⁷

V. Liability Waivers Should Be Unenforceable in Certain Circumstances

A. Liability Waivers Should Be Unenforceable as Against Public Policy

As previously mentioned, liability waivers are generally enforceable.¹³⁸

¹²⁹ VA. CODE ANN. § 8.01-50 (West 2020).

¹³⁰ *Stevens*, 98 Va. Cir. at 386; *Wilson*, 207 Va. at 1038.

¹³¹ See Brief of Amici Curiae, *supra* note 126, at 6.

¹³² Brief of Amici Curiae, *supra* note 126, at 6–11.

¹³³ Brief of Amici Curiae, *supra* note 126, at 6–11.

¹³⁴ OHIO REV. CODE ANN. § 2125.01 (West 2022); Brief of Amici Curiae, *supra* note 126, at 8.

¹³⁵ Brief of Amici Curiae, *supra* note 126, at 8 (quoting *Peters v. Columbus Steel Castings Co.*, 115 Ohio St. 3d 134, 136–37 (2007)).

¹³⁶ Brief of Amici Curiae, *supra* note 126, at 6–11.

¹³⁷ See *Doherty v. Diving Unlimited Int’l, Inc.*, 484 Mass. 193, 196 (2020); see also *GGNSC Admin. Servs., LLC v. Schrader*, 484 Mass. 181, 187–88 (2020).

¹³⁸ See, e.g., *Sharon v. City of Newton*, 437 Mass. 99, 102 (2002); *Lee v. Allied Sports Assocs., Inc.*,

However, there are strong arguments to the contrary in instances where the enforcement of such waivers would be against public policy.¹³⁹ In a frequently-cited case, the Massachusetts Supreme Judicial Court considered whether a waiver of a pre-termination hearing prior to an eviction was enforceable.¹⁴⁰ In answering this question, the Court emphasized public policy considerations: “courts have long refused to give effect to purported waivers of statutory rights where enforcement of the particular waiver would do violence to the public policy underlying the legislative enactment.”¹⁴¹ Ultimately, the Court determined that if the waiver of the statutory right to a predetermination hearing were deemed enforceable, it would effectively “destroy the very purpose of the statute.”¹⁴² Applying this logic to the present case, if liability waivers are enforceable against beneficiaries in wrongful death actions, ch. 229 § 2 becomes essentially useless.¹⁴³ The purpose of the wrongful death statute is to compensate the decedent’s next of kin and beneficiaries.¹⁴⁴ If these beneficiaries are denied recovery in cases where the decedent signed a liability waiver, the statute becomes useless for many potential claimants.¹⁴⁵ This contradicts long-standing principles of statutory interpretation mentioned above.¹⁴⁶

More recently, when dealing with waiving liability for violation of a statutory duty, the Massachusetts District Court held that “public policy precludes [the defendant] from exculpating itself from liability for negligence in a task that affects public interest and safety.”¹⁴⁷ Similarly, the Suffolk County Superior Court emphasized that “it is well settled that a waiver of liability will not be enforced where it is contrary to public

349 Mass. 544, 549 (1965).

¹³⁹ See *Fed. Ins. Co. v. Cogswell Sprinkler Co., Inc.*, No. 03-CV-10920-MEL, 2005 U.S. Dist. LEXIS 45287, at *4 (Feb. 15, 2005); *Spence v. Reeder*, 382 Mass. 398, 413 (1981); *Fed. Ins. Co. v. CBT/Childs Bertsman Tseckares, Inc.*, No. 2004-05022G, 2007 Mass. Super. LEXIS 153, at *8 (May 25, 2007).

¹⁴⁰ *Spence*, 382 Mass. at 413.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ See *id.*; see also MASS. GEN. LAWS ch. 229, § 2 (2022).

¹⁴⁴ *Wrongful Death Law*, HG.ORG LEGAL RES. <https://perma.cc/ZPT6-RHZT> (last visited Nov. 18, 2022) (“The purpose of these laws is to compensate the survivors, not the deceased victim.”).

¹⁴⁵ See *Doherty v. Diving Unlimited Int’l, Inc.*, 484 Mass. 193, 196 (2020); *GGNSC Admin. Servs., LLC v. Schrader*, 484 Mass. 181, 191 (2020).

¹⁴⁶ See Brannon, *supra* note 116, at 4–5.

¹⁴⁷ *Fed. Ins. Co. v. Cogswell Sprinkler Co., Inc.*, No. 03-CV-10920-MEL, 2005 U.S. Dist. LEXIS 45287, at *4 (D. Mass. Feb. 15, 2005).

policy.”¹⁴⁸ Although both of these cases dealt with release of liability from building code violations, the same public safety premise applies here.¹⁴⁹ Just as it is important to ensure that builders comply with codes, it is equally important that those in charge of dangerous recreational activities, like scuba diving, take their responsibilities seriously as well.¹⁵⁰ The mere lack of a statutory obligation should not allow those involved in recreational activities to release themselves from liability for their actions.¹⁵¹

B. *Liability Waivers Do Not Apply to Gross Negligence*

It is a well settled concept that one cannot waive responsibility for gross negligence.¹⁵² Although the plaintiff in *Doherty* did not allege gross negligence in her original complaint, if she subsequently brought such a claim and was able to show that Golbranson’s conduct reached the level of gross negligence, the waivers would not have precluded her from recovery.¹⁵³ However, the Court in *Doherty* foreclosed this possibility entirely, stating that only a decedent’s executor or administrator—not the statutory beneficiaries—can bring an action for gross negligence.¹⁵⁴ Thus, the Court concluded that because the plaintiff was acting as personal representative, she was precluded from bringing such a claim.¹⁵⁵ The Court seemed to nonchalantly address this in a footnote, possibly to deter the plaintiff from attempting a gross negligence claim.¹⁵⁶

¹⁴⁸ Fed. Ins. Co. v. CBT/Childs Bertman Tseckares, Inc., No. 2004-05022G, 2007 Mass. Super. LEXIS 153, at *8 (May 25, 2007).

¹⁴⁹ See *Cogswell*, 2005 U.S. Dist. LEXIS at *4; *CBT/Childs Bertman Tseckares, Inc.*, 2007 Mass. Super. LEXIS at *8.

¹⁵⁰ See *Cogswell*, 2005 U.S. Dist. LEXIS at *4; *Doherty*, 484 Mass. at 194–95; *Schrader*, 484 Mass. at 191.

¹⁵¹ See *Cogswell*, 2005 U.S. Dist. LEXIS at *4; *Doherty*, 484 Mass. at 194–95; *CBT/Childs Bertman Tseckares, Inc.*, 2007 Mass. Super. LEXIS at *8.

¹⁵² *Lee v. Allied Sports Assocs., Inc.*, 349 Mass. 544, 551 (1965); *Zavras v. Capeway Rovers Motorcycle Club*, 44 Mass. App. Ct. 17, 19 (1997); Part I(B) *supra*, at 4–5. See generally Law Office of James K. Meehan, *Under Massachusetts Law Parties Cannot Waive the Right to Recover for Gross Negligence*, MASS. INJ. LAWS BLOG (Sept. 6, 2018), <https://perma.cc/5QFL-PS2L> (explaining that although waivers are enforceable for ordinary negligence, plaintiffs may still bring claims for gross negligence).

¹⁵³ See *Doherty*, 484 Mass. at 194–95; *Cahalane v. Skydive Cape Cod*, No. 17-P-706, 2018 Mass. App. Unpub. LEXIS 556, at *10 (July 3, 2018).

¹⁵⁴ 484 Mass. at 197 n.5.

¹⁵⁵ *Id.* at 196.

¹⁵⁶ *Id.*

The Court's conclusion on this point is erroneous for two reasons.¹⁵⁷ First, gross negligence was not alleged, so it was unnecessary for the Court to address this issue at all.¹⁵⁸ Second, many Massachusetts authorities view executors and personal representatives as synonymous.¹⁵⁹ Because of this, it was both unnecessary and erroneous for the Court to conclude that a personal representative could not bring an action for gross negligence.¹⁶⁰

CONCLUSION

Massachusetts was the first state in the United States to codify a wrongful death statute in 1840.¹⁶¹ The Court's decisions in *Doherty* and *Schrader* render that statute obsolete and inaccessible to many of the people the statute is designed to help.¹⁶² The language and legislative history support the conclusion that such claims are independent.¹⁶³ Further, in its interpretation of the statute, the Court flatly contradicted the underlying policy rationale behind the statute.¹⁶⁴ Not only do these decisions simply not comport with the purpose of the statute, but they also defy long-standing principles of statutory interpretation.¹⁶⁵ Thus, the Court erred in interpreting the statute as creating derivative claims as opposed to independent claims.¹⁶⁶

Alternatively, in the instant case, the liability waiver should have been deemed unenforceable as against public policy.¹⁶⁷ At minimum, the plaintiff should not have been precluded from alleging gross negligence, which—if proved—would make the waiver unenforceable.¹⁶⁸

As it stands in Massachusetts, people like the twins mentioned in the

¹⁵⁷ See *Doherty*, 484 Mass. at 196 n.5.

¹⁵⁸ *Id.* at 195.

¹⁵⁹ E.g., *Who Is an Executor (Personal Representative) of a Will and What Are Their Duties?*, ECKERT BYRNE LLC (Oct. 19, 2018), <https://perma.cc/F4LA-U9TB> (defining executor and personal representative as synonymous).

¹⁶⁰ See *id.*

¹⁶¹ *Commonwealth v. Boston & Lowell R.R. Corp.*, 134 Mass. 211, 212 (1882).

¹⁶² See Wrongful Death Law, *supra* note 144.

¹⁶³ See *supra* Part III(A).

¹⁶⁴ See Wrongful Death Law, *supra* note 144.

¹⁶⁵ See Brannon, *supra* note 116, at 4–5; *supra* Part III(B).

¹⁶⁶ See Brannon, *supra* note 116, at 36 n.373.

¹⁶⁷ See *Fed. Ins. Co. v. Cogswell Sprinkler Co.*, No. 03-CV-10920-MEL, 2005 D. Mass. LEXIS 45287, at *4 (Feb. 15, 2005); *Fed. Ins. Co. v. CBT/Childs Bertman Tseckares, Inc.*, No. 2004-05022G, 2007 Mass. Super. Ct. LEXIS 153, at *8 (May 25, 2007).

¹⁶⁸ See *Cahalane v. Skydive Cape Cod*, No. 17-P-706, 2018 Mass. App. LEXIS 556, at *10 (Jul. 3, 2018); *Zavras v. Capeway Rovers Motorcycle Club*, 44 Mass. App. Ct. 17, 19 (1997).

introduction have no recourse.¹⁶⁹ But this is exactly the type of situation that the wrongful death statute was designed to alleviate in the first place.¹⁷⁰ For the aforementioned reasons, the Court erred in holding that wrongful death claims are derivative.¹⁷¹ As the originator of the wrongful death statute, and in order to maintain the statute's viability, Massachusetts should join the minority of jurisdictions that interpret their wrongful death statutes as creating an independent cause of action for beneficiaries.¹⁷²

¹⁶⁹ See *Doherty v. Diving Unlimited Int'l, Inc.*, 484 Mass. 193, 196 (2020); *GGNSC Admin. Servs., LLC v. Schrader*, 484 Mass. 181, 191 (2020); see also *Cahalane v. Skydive Cape Cod*, 93 Mass. App. Ct. 1118 (2018).

¹⁷⁰ See *Wrongful Death Law*, *supra* note 144.

¹⁷¹ See *Doherty*, 484 Mass. at 196; *Schrader*, 484 Mass. at 191.

¹⁷² See *Commonwealth v. Boston & Lowell R.R. Corp.*, 134 Mass. 211, 212 (1882); Brief of Amici Curiae, *supra* note 126, at 6–11.