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Damages Recoverable for Wrongful Death of Minor Children

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NOTES

DAMAGES RECOVERABLE FOR WRONGFUL DEATH OF MINOR CHILDREN

I. INTRODUCTION

The proper measure of damages recoverable for the wrongful death of a minor child is the subject of much controversy in our courts. No formula, either legislative or judicial, which will assure adequate recovery and prevent excessive jury verdicts in every case has as yet been set forth. Damages for wrongful death are normally assessed according to the pecuniary value of the victim. The test generally used by the courts is to measure the pecuniary worth of the services which the child would have rendered during his life and subtract the probable cost of maintenance, education and upbringing.[1]

This measure of damages was formulated in England in the early 19th century during a gloomy and dehumanized period when the factory system and child labor flourished. Justice Smith, in *Wycko v. Gnodtke*,[2] gives a graphic and nightmarish description of the retrograde social conditions which existed and describes it as ". . . one of the darkest chapters in the history of childhood." It is obvious that changes in our social and economic life have occurred so that children of today do not render as much service to their parents as did children in the last century.[3] A reappraisal and application of damages recoverable for the wrongful death of a child is therefore necessary to view the measure of compensation in the light of present day conditions.

II. HISTORY

At common law a third party had no cause of action for an injury provoked by the death of another human being

1. See TIFFANY, DEATH BY WRONGFUL ACT 348 (2d ed. 1913).
2. 361 Mich. 331, 105 N.W.2d 118 (1960).
3. Fussner v. Andert, 361 Minn. 347, 113 N.W.2d 355 (1961).

through a wrongful act;[4] the only recourse against the wrongdoer was through a criminal action. It was sometimes said that the tort merged in the felony, but this was simply that the right of action for personal injuries died with the victim.[5] It was, therefore, to the wrongdoer's financial benefit if his injured victim died.[6] The harsh result was that death, the most grievous of all injuries, left the bereaved family of the victim without a remedy. To correct this inequity, Parliament in 1846 enacted Lord Campbell's Act,[7] creating a remedy for wrongful death in favor of decedent's personal representative as a sort of statutory trustee for the benefit of certain specified relatives. While the Act did not provide a yardstick by which damages were to be measured, it remained for the leading case of *Blake v. The Midland Ry. Co.*[8] to harshly limit the award of damages to pecuniary loss to the beneficiaries.

The impetus provided by Lord Campbell's Act overcame the inertia of state governments. Their legislative bodies were quick to express their dissatisfaction with the archaisms of the law by the enactment of death statutes which embraced the outline, if not the precise details, of their English predecessor. Consequently, in this country states now have a statutory remedy for wrongful death[9] modeled after England's Lord Campbell's Act.[10] It was inevitable that there should be lack of uniformity in the language employed in the statutes of the several states and in the definitive treatment by their courts of the nature and boundaries of the measure of recovery provided thereby. However, despite the differences in phraseology, most of these statutes provide that " . . . the court or jury may give such damages as the court or jury shall deem fair and just with reference to the pecuniary injury resulting from such death."[11] A difficulty arises, however, in that most American Wrongful Death Statutes fail to prescribe,

4. Baker v. Bolton, 1 Camp. 493, 170 Eng. Rep. 1033 (1808).
5. Higgins v. Butcher, Yelv. 89, 80 Eng. Rep. 81 (1606).
6. PROSSER, TORTS 710 (2d ed. 1955); Coliseum Motor Co. v. Hester, 43 Wyo. 298, 3 P.2d 105 (1931) (discussing origin of common-law rule).
7. Lord Campbell's Act, 1846, 9 & 10 Vict, c. 93.
8. 18 Q.B. 93, 118 Eng. Rep. 35 (1852).
9. PROSSER, **supra** note 6, at 710.
10. TIFFANY, **supra** note 1, at 30 where the early statutes are compared.
11. See **e.g.,** Mich. Comp. Laws § 691.582(2) (1948).

except in general terms, the elements of damage to be recovered.[12] Several Courts have strictly applied the statutes and have limited recovery to the common concept of pecuniary loss, *i.e.*, the loss by the beneficiaries of the support and contributions which the decedent probably would have contributed to them during the remainder of his life expectancy.[13] Another measure of recovery for wrongful death of a minor in some other jurisdictions is the loss to the decedent's estate. Under this measure three noticeable variations are found. One, recovery should be that which the decedent probably would have earned if he had remained alive minus his own living expenses.[14] Two, recovery is the present worth of the amount the decedent would probably have saved during the remainder of his life expectancy.[15] And three, the measure of recovery is to be the present worth of the decedent's probable gross earnings without any deduction for expenses.[16]

The majority of jurisdictions permit the parents of a deceased minor child to recover for loss of services of such child during minority and also permit recovery for the loss of possible contributions the child may have made to them after reaching majority, less the cost of raising, educating and maintaining the child.[17] On the other hand, a few jurisdictions hold that there can be no recovery by the parents for loss of possible contributions the child might have made after reaching majority,[18] nor can the estate

12. Lord Campbell's Act provided that ". . .the jury assess such damages as they think proportioned to the injury resulting from the death to the parties respectively for whose benefit the action is brought." See TIFFANY, **op. cit. supra** note 1, at 153. Few modern death acts are more specific, and most of these are essentially copies of the English Act. See also McCORMICK, DAMAGES 106 (1935).

13. Fisher v. Trester, 119 Neb. 529, 229 N.W. 901 (1930); Tuffy v. Sioux City Transit Co., 69 S.D. 368, 10 N.W.2d 767 (1943).

14. Louisville & N. Ry. v. Garnett, 129 Miss. 795, 93 So. 241 (1922); Gurley v. Southern Power Co., 172 N.C. 690, 90 S.E. 943 (1916); Pittman v. Merriman, 80 N.H. 295, 117 Atl. 18 (1922).

15. Arizona Binghampton Copper Co. v. Dickson, 22 Ariz. 163, 195 Pac. 538 (1921); Florida E. Coast R.R. v. Hayes, 67 Fla. 101, 64 So. 504 (1914); Hough v. Illinois Cent. R.R., 169 Iowa 224, 149 N.W. 885 (1914).

16. Michael v. Western & Atl. R.R., 175 Ga. 1, 165 S.E. 37 (1932); Lexington Util. Co. v. Parker, 166 Ky. 81, 178 S.W. 1173 (1915).

17. Dawkins v. Chavez, 132 Colo. 61, 285 P.2d 821 (1955), **affirming** McEntyre v. Jones, 128 Colo. 461, 263 P.2d 313 (1953), in which the court concluded that the parents should receive as the net pecuniary loss what they might have expected from the continuation of the daughter's life, less the cost of maintaining and educating her.

18. Siebeking v. Ford, 128 Ind. 475, 148 N.E.2d 194 (1958); McFetridge v. Kurn, 125 S.W.2d 912 (Mo. App. 1939); Frantz v. Gower, 119 Pa. Super. 156, 180 Atl. 716 (1935).

recover these damages.[19] These decisions appear to be based on the theory that the probability of such contributions is too speculative to be the basis of an award since such factors as death, marriage, or even a refusal to contribute might intervene.[20] Another very common view is that the mere fact the death was wrongful raises a presumption of some damages.[21]

Generally, the pecuniary-loss theory permits no recovery by the beneficiaries for loss of society, comfort, and companionship of the child,[22] or the grief and mental suffering of the parents[23] on the theory that such injuries are incapable of being measured by any pecuniary standard. However, it is important to note that there is a recent trend to reverse these unduly rigorous views. For instance, in California,[24] Hawaii,[25] Utah,[26] Virginia,[27] Idaho,[28] Illinois[29] and Mississippi[30] loss of comfort and society is considered a pecuniary loss and is compensable as long as it bears some reasonable relationship to the other losses in the case. Wisconsin has expressly authorized recovery for such losses by statute.[31] Moreover, several states also allow damages for the grief or mental suffering of the survivors.[32]

North Dakota's Wrongful Death Statute[33] provides simply that " . . . the jury shall give such damages as it

19. Lane v. Hatfield, 173 Ore. 79, 143 P.2d 230, 234 (1943) (The administrator of the deceased child's estate brought this action in which the court concluded that the "estate would be entitled only to the accumulation of money and other property derived from her services, earnings, investments and savings during the period of her life subsequent to the time when she attained the age of majority").
20. State v. Cohen, 166 Md. 682, 172 Atl. 274 (1934).
21. Karr v. Sixt, 146 Ohio St. 527, 67 N.E.2d 331 (1946); Stevens v. Schickendanz, 316 P.2d 1111, (Okla. 1957).
22. American R.R. v. Didricksen, 227 U.S. 145 (1913); Louisville, N.A. & C. Ry. v. Rush, 127 Ind. 545, 26 N.E. 1010 (1891); Kalsow v. Grob, 61 N.D. 119, 237 N.W. 848 (1931).
23. Lehrer v. Lorenzen, 124 Colo. 17, 233 P.2d 382 (1951); Vincent v. Philadelphia, 348 Pa. 290, 35 A.2d 65 (1944).
24. da Silva v. J. M. Martinac Shipbuilding Corp., 153 Cal. App. 2d 397, 314 P.2d 598 (1957); Bond v. United Railroads, 159 Cal. 270, 113 Pac. 366 (1911).
25. Gabriel v. Margah, 37 Hawaii 571 (1947).
26. Van Cleave v. Lynch, 109 Utah 149, 166 P.2d 244 (1946) (in affirming award of $10,000 for death of a 6-year-old boy, the court stated that the damages primarily were for loss of society).
27. Anderson v. Hygeia Hotel Co., 92 Va. 687, 24 S.E. 269 (1896).
28. Checketts v. Bowman, 70 Idaho 463, 220 P.2d 682 (1950).
29. Hall v. Gillins, 13 Ill. 2d 26, 147 N.E.2d 352 (1958).
30. Delta Chevrolet Co. v. Waid, 211 Miss. 256, 51 So. 2d 443 (1951).
31. Wis. Stat. Ann. § 331.04(4) (1963 Supp.).
32. See, **e.g.**, Coast City Coaches v. Donat, 106 So. 2d 593, (Fla. 1958); Matthews v. Hicks, 197 Va. 112, 87 S.E.2d 629 (1955).
33. N.D. Cent. Code § 32-21-02 (1961).

finds proportionate to the injury resulting from the death to the persons entitled to the recovery" stating nothing as to what elements the jury is to consider. In *Haug v. Great Northern Railroad Co.*,[34] the North Dakota Supreme Court determined that the proper measure of damages recoverable is the probable value of the services of the child during minority, considering the cost of support and maintenance during the early and helpless part of its life. In the same opinion the court went on to say, "Upon one point the cases are united, and that is that the only damages recoverable in this action are for pecuniary loss. Nothing can be recovered for the loss of society or for damages in the way of solatium."[35] Thus, the pecuniary-loss theory as applied to cases where the deceased is a child is open to criticism, because such cases create uncertainties due to the difficulty in proving the possible earning power of the deceased.[36]

An even greater problem, in proving earning power, exists today, as a result of high costs involved in the rearing of the child, which normally greatly exceeds any monetary contributions made by him to his family. Thus, it would be possible in child death situations for the parents to be denied recovery if the pecuniary loss theory is applied strictly. The proposition then, that "it is cheaper to kill a child then an adult," although morbid, would seem realistic.[37]

III. THE NEW TREND (WYCKO V. GNODTKE)

Fortunately, a new trend toward more liberal awards in cases involving the death of a child is being advanced. This is exemplified in a 1960 landmark decision by the Michigan Supreme Court in *Wycko v. Gnodtke*.[38] In an action brought under the Michigan Death Act[39] by an Administrator for the wrongful death of a fourteen-year-old

34. 8 N.D. 23, 77 N.W. 97 (1898).
35. **Id.** at 101; **Aff'd** by Scherer v. Schlaberg, 18 N.D. 421, 122 N.W. 1000 (1909); Stejskal v. Darrow, 55 N.D. 606, 215 N.W. 83 (1927).
36. See generally, New York Law Revision Commission, 1949 Reports, Recommendations, and Studies 215.
37. But see 14 A.L.R.2d 550 (1950) for a general discussion. It is noted that cases show awards as high as $10,000 for children between the ages of fourteen and twenty-one.
38. 361 Mich. 331, 105 N.W.2d 118 (1960).
39. **Supra** note 11.

boy the jury awarded $14,000 damages, plus $979.50 for funeral and burial expenses. The trial judge, using the pecuniary loss test (earnings of child prior to majority minus cost of upkeep) ruled that this was excessive and ordered a new trial unless the plaintiff filed a remittitur, reducing damages to $7,500, plus the funeral expenses. On appeal, the order granting a new trial subject to remittitur was reversed,[40] and judgment was entered upon the jury's verdict. The Supreme Court rejected the child-labor theory as the sole measure of pecuniary-loss, and held that damages for a child's wrongful death should be based upon "the pecuniary value of the life"[41] and that the judgment was not excessive. The Court said in determining how to ascertain this value:

> . . . we must consider the expenses of birth, of food, of clothing, of medicines, of instructions, of nurture and shelter. . . The value of mutual society and protection, in a word, companionship. . . Finally, if, in some unusual situation, there is in truth . . . a wage-profit capability in the infant . . . the loss of such expectation should not be disregarded . . .[42]

In Michigan the courts have interpreted their Wrongful Death Action[43] accordance with the general rule,[44] that is, permitting beneficiaries to recover for only such economic injuries as they have sustained due to the loss of services or probable contributions by the deceased and denying recovery for injured feelings, loss of the companionship of the deceased and mental suffering.[45] The Michigan Court in *Hurst v. Detroit City Railway*,[46] said that the statute does not imply that pecuniary damage always results from a negligent killing and the burden of alleging and proving pecuniary injury was placed upon the plaintiff. In *Black*

40. Three justices of the eight justice court dissented in this opinion.
41. **Supra** note 38, at 122.
42. **Supra** note 38.
43. **Supra** note 11.
44. TIFFANY, 153, **op. cit. supra** note 1, at 323.
45. Mynning v. Detroit L. & N. R.R., 59 Mich. 257, 26 N.W. 514 (1886).
46. 84 Mich. 539, 48 N.W. 44 (1892) (negligent killing of one-year-eleven-month-old child).

v. Michigan Cent. Railroad,[74] a later case, it was held that the proof necessary, to establish pecuniary injury, was not the specific proof of the value of loss benefits and cost of maintenance of the minor; but that general facts were admissible and that the jury was qualified as well as a witness to determine the extent of the loss.[48] Affirming also Michigan's long standing rule, the court held in *Corvell v. Colburn*[49] that parents could not recover for the probable contributions the deceased child might have made to her parents after she became twenty-one. *Courtney v. Apple*[50] narrowed even more the chances for recovery. In this case the Michigan Supreme Court as late as 1956 held that a verdict of $700, the amount of funeral and burial expenses, was sufficient to compensate the parents of a three-year-old boy killed by the defendant's negligently driven automobile. In explanation the Court said that it was quite possible for the jury to find that the cost of raising the child would exceed his probable contributions. As a dissenter in that case, Justice Smith, who wrote the majority opinion in the *Wycko* case, pointed out that had the defendant killed a bull on the highway the owner could recover its actual value, but this child's parents, under the child-labor measure of recovery, were not entitled to any damages at all. In his *Wycko* opinion, he criticized those jurists who would without reservation place values on wrongfully destroyed machinery or farm animals, but who on the other hand refuse to face the problem of fairly evaluating the life of a human being. "This kind of delicacy would prevent the distribution of food to the starving because the sight of hunger is so sickening."[51] He spoke of the change which has taken place in the parent-child relationships throughout the years and condemned the harsh child-wage

47. 146 Mich. 568, 109 N.W. 1052 (1906) (negligent killing of seven-year-old boy).

48. "In the case of Black v. Railroad Co., . . .this court did not hold that such evidence, as above referred to, was not admissible, but did hold that where evidence had been given as to the age, calling, and condition of the health of the father, and of the age and condition of the mother, together with evidence that the child was healthy, intelligent, and of good disposition, and obedient to its parents, that was sufficient to authorize an award of substantial damages, and the courts in that case, refused to set aside a verdict of $1,500 damages." Sceba v. Manistee Ry., 189 Mich. 308, 320, 155 N.W. 414, 417 (1915).

49. 308 Mich. 240, 13 N.W.2d 275 (1944).

50. 345 Mich. 223, 76 N.W.2d 80 (1956).

51. **Supra** note 38, at 118, 122.

damage measure on the grounds that it was an outmoded result of the industrial revolution in England when "loss meant only money loss, and money loss from the death of a child meant only lost wages."[52]

The superlative opinion of the *Wycko* case announced a new and enlightened formula for measuring damages in child-death cases. It replaced the unconscionable child-labor formula with an infinitely superior rule entitling the parents to recover for their "lost investment" in their child and for loss of his "companionship." While clearing the books in Michigan of the harsh child-labor measure of damages for child death, Justice Smith declared in a coruscating phrase, "The bloodless bookkeeping imposed upon our juries by the savage exploitations of the last century must no longer be perpetuated by our courts."[53]

Following the *Wycko* decision, the Minnesota Supreme Court, in *Fussner v. Andert*,[54] construed its Wrongful Death Statute[55] as being remedial in character and should be construed in light of current social conditions. Speaking for the majority, Justice Murphy, in an elaborate opinion, reiterated the conditions which existed at the time of the adoption of Lord Campbell's Act. He pointed out that in applying the barbaric child-labor measure of damages in this day and age would have the effect of reading children out of the death acts. Concerning the recoverable damages the court said:

> "We cannot agree that loss of earnings, contributions, and services in terms of dollars represents the only real loss the parent sustains by the death of his child. With the passage of time the significance of money loss has been diminished. Conversely, there is a growing appreciation of the true value to the parent of the rewards which flow from the family relationship and are manifested in acts of material aid, comfort, and assistance which were once considered to be only of sentimental character."[56]

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52. **Id.** at 124.
53. **Supra** note 38, at 124.
54. 361 Minn. 347, 113 N.W.2d 355 (1961).
55. Minn. St. Ann. § 573-02(1) (1947) (provides that ". . .the recovery in

Prior to the *Fussner* case the Minnesota decisions expressed the view that the statute did not comprehend pecuniary compensation for loss of comfort or companionship of a relative nor for the pain and suffering of the deceased.[57]

The liberalizing trend was somewhat furthered by the luminous argument in *Hoyt v. U. S.*[58] as to why the cost of upkeep should not be deducted from the pecuniary value of the child's life. In that case the court concluded that in subtracting from the child's expectable contributions the estimated costs of his upkeep the effect of such a deduction would, more often than not, result in a minus figure.

In examining the term "pecuniary-loss," the Michigan courts have expanded the scope and meaning of that term so as to make it applicable not only to damages resulting from money loss but to include as well damages for loss of aid, comfort, and society suffered by the next of kin of the deceased.[59] In so doing they have started a trend away from the severity of the earlier decisions by taking into consideration economic realities and rejecting the old child-labor formula as being obsolete and not in accord with our present day social values. As a result child death awards in Michigan in the future may well be more substantial.

Despite the fact that this new trend has accomplished the desired result of more substantial awards in child death cases, it seems inevitable that it will be confronted with other problems. Will it remove the fictions inherent in the present pecuniary-loss test? Will it result in small or nominal verdicts in cases involving very young children? Will it, because of the emotional nature of unlawful death actions, result in excessive verdicts? These problems are not new ones, nor have they been created by this new trend. Courts and juries have always experienced very difficult problems in determining the pecuniary-loss to parents as a result of the wrongful death of their children. Standards applicable

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such action is such an amount as the jury deems fair and just in reference to the pecuniary loss resulting from such death").

56. **Supra** note 54, at 359.

57. Bolinger v. St. Paul & D.R. Co., 36 Minn. 418, 420, 31 N.W. 856 (1887); Bremer v. Minneapolis, St. P. & S.S.M. Ry. Co., 96 Minn. 469, 470, 105 N.W. 494 (1905).

58. 286 F.2d 356 (5th Cir. 1961).

59. **Supra** note 38.

when the deceased is an adult such as services, income[60] and other factors are inapplicable in cases which involve a child who has received no wages and developed few mature habits. Although the recent trend does not afford answers to all the problems, the obvious conclusion would seem to be that it is a credit to the old standard of scrupulous adherence to the pecuniary-loss test, while the child-labor measure of damages, which would ordinarily preclude any recovery in a child death action as the value of the modern child's services lost, would be far less then the probable cost of his upbringing.[61] When damages are recovered by the application of pecuniary-loss test, it necessarily implies a fiction, thus recoveries must actually be based upon other considerations, taken by the jury, which are probably emotional factors.[62] Although the awarding of damages for impalpable emotional harms is in accord with the modern trend in the field of torts,[63] it is believed that if the various state legislatures desire a pecuniary-loss test to remain the basis for recovery in such cases the fictional aspects of its application should be removed.[64]

It is suggested that a statutory minimum recovery, as has been enacted in other states,[65] would aid the courts in those cases where parents can prove little economic loss. The parents have sustained some loss which should be compensated for and the minimum requirement would remove the courts from having to draw fine lines where the evidence of loss is minute. And too, if a state is burdened with the fear that verdicts may become excessive it may, as Wisconsin did,[66] limit the amount recoverable by a statutory provision.

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60. Director General of Railroads v. Platt, 265 F. 918 (2d Cir. 1920); Perry v. Ryback, 302 Pa. 559, 153 Atl. 770 (1931).
61. Graham v. Consolidated Traction Co., 62 N.J.L. 90, 40 Atl. 773 (1898), is an early case taking the view that in a majority of cases the money spent for the benefit of the child would be far in excess of the amount received from him.
62. St. Luke's Hospital Ass'n v. Long, 125 Colo. 25, 240 P.2d 917 (1952); Chicketts v. Bowman, **supra** note 28.
63. PROSSER, **op. cit. supra** note 6, at 177.
64. Barnett v. Cohen, 2 K.B. 461 (1921) (recovery was denied since under the English law there must be a reasonable probability rather than a mere possibility that the child will earn money or give help to his parents).
65. R.I. Gen. Laws § 10-7-2 (1956) requires a minimum recovery of $5,000; Mass. Gen. Laws Ann. § 229(2) (1962 Supp.) provides for a minimum damage award of $3,000.
66. **Supra** note 31. (The statute requires recovery not to exceed $3,000 for loss of society and companionship).

IV. CONCLUSION

The Michigan approach seems to be a commendable one as it squarely faces the problem and recognizes that the death of a child results in loss of love, affection and solace, not money. It has been frank and realistic in its admission that recovery is being allowed for parental grief which results from the wrongful death of a child. Many of our present statutes which provide for strict application of the pecuniary-loss test are in need of revision and jurisdictions facing this situation might do well to follow the initial step taken by Michigan in a liberalizing direction. A more practical route may be suggested however, that is, by legislative revision rather than judicial. Such revision could be accomplished by the enactment of a statute which expressly authorizes a prescribed award of a reasonable amount for mental suffering and/or loss of society and companionship in addition to any pecuniary loss under the services of the minor which might reasonably have been expected from the child. This would have the effect of removing the great range of discretion now employed by juries and reviewing judges and result in a more practical means for arriving at substantial though not abusive awards.

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