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DAMAGES IN ACTIONS FOR WRONGFUL DEATH OF CHILDREN

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I. Introduction

Statutes providing for recovery for wrongful death generally fall into three categories: loss to survivors, loss to estate, and punitive. The "loss to survivors" type of statute gives the right to bring action to certain survivors who must establish a certain relationship and evidence of having received contributions or a probability of receiving contributions from the decedent in order to recover. The recovery awarded by the trier of facts under this type of statute is proportionate to the loss so established by each survivor named as a beneficiary under the statute.

The "loss to estate" type of statute permits recovery on the basis of the loss to the decedent's estate, without regard to the relationship of the beneficiaries to the decedent (so long as they are designated beneficiaries under the statute) or to the history of the beneficiaries receiving contributions from the decedent in the past, the probability of their receiving such contributions in the future, or even the probability of their inheriting from the decedent. The majority of states using this type of statute measure damages by computing the probable earnings of the decedent over his lifetime, deducting therefrom his expenses, and reducing the net thus obtained to present value. Other states having this type of statute use the accumulation theory in measuring damages. Still other states having this type of statute go under the gross earnings theory, whereby they measure damages by the total probable future earnings of the decedent, reduced to present value, with no deduction made for the decedent's probable living expenses.

The punitive statutes in most instances provide for punitive damages in addition to other damages awarded under the loss to survivors or loss to estate-type statutes, although in two states, Alabama and Massachusetts, the wrongful death act provides only for punitive damages which shall be proportionate to the culpability of the wrongdoer.

We shall discuss damages in child death cases in relation to the foregoing types of statutes.

II. Loss to Survivors Statute

This is the most common type of statute, although, in the opinion of the author, not the most favorable with respect to a substantial award for the death of a child. The key factor in this type of statute, which is patterned after Lord Campbell's Act, is the requirement that the survivors must establish, by whatever evidence, that the decedent would have made contributions to the survivors had

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he lived.[1] The trier of fact must determine what these contributions would have been with reference to each survivor-beneficiary, must ascertain the pecuniary value of the services which the decedent would have rendered to the survivor-beneficiaries, and must award specific amounts to the survivors keyed to the individual losses so established for each survivor. This, of course, may present extremely difficult problems of proof.

Ordinarily, the survivors bringing the action are the parents of the child, but in many instances this is not the case.[2] The parents themselves will usually have difficult problems of proof with reference to probability of contributions by the minor and value of services to be rendered by the minor. The farther the plaintiff survivor is situated from the parent-child relationship, the more difficult becomes his proof in these areas.

A. Contributions During Minority

The damages under these statutes are typically held pecuniary. The most common element of damages is measured by the contribution the child would have made in the form of earnings or services *during his minority* from the date of death (in a few states, from the date of injury).[3] From this amount is deducted the probable cost of rearing the child during that period.[4]

It is readily apparent that this pecuniary rule based on earnings or services of a minor, adopted in times when a child was an economic asset to a parent, is hopelessly inadequate. Courts in increasing numbers are displaying favor toward higher awards in child death cases, and often indulge in semantic gymnastics to justify a substantial award within the framework of this rule. Obviously, in most cases, were the rule followed literally, the child would prove to be an economic liability to the parent, and strict adherence to the rule could lead, reductio ad absurdum, to the conclusion that the tortfeasor should be reimbursed for having saved the parent money.

The problem of proving that the child's earnings and services would have outweighed the cost of maintaining and educating him is virtually insurmountable in most cases. Evidence is permitted as to the child's sex, intelligence, personality, health, character, tractability, industry, and the like. As a practical matter, juries in such cases make an award based mostly on sympathy, and the court permits as much of it to stand as it thinks can be squeezed within the confines of the rule. Naturally, a great deal of speculative evidence is considered. The whole process is awkward and the results unfavorable because this pecuniary rule of damages is a legal fiction.

B. Contributions After Majority

In addition to the foregoing damages, recovery has also been allowed, in a majority of courts, for contributions or benefits a child would have conferred on parents or other beneficiaries after majority. See *Inspiration Consol. Copper Co.*

1 Moore v. Palen, 228 Minn. 148, 36 N.W.2d 540 (1949).
2 In some states, *e.g.*, Florida and Idaho, by statutory provision, the action can be brought only by the surviving parents.
3 Annot., 14 A.L.R.2d 485.
4 *Id.*

v. Bergan (Ariz.),[5] *Herbertson v. Russell* (Colo.),[6] and other cases *infra*.[7] This type of holding, of course, affords a much more substantial basis for recovery. Now, however, one must deal with the problem of proof of contribution by the child to the beneficiaries after majority. Much speculation may ensue as to whether or not the child would marry, have dependents of his own, how close his association with the beneficiaries would remain, and so forth. Also, the question of the child's probable future earnings, which is a major problem of proof in "loss to estate" statutes, now comes into play. Of course, the younger the child at death, the more difficult this problem becomes.

The courts, while paying lip service to the rule against speculation, allow much evidence of speculative nature, stating that damages of this type are "not susceptible of precise mathematical computation." Even though the postmajority theory provides a much broader basis for an award, the problem of proving the probability that the benefits would have been conferred remains as perhaps the most significant one in the ordinary case.[8]

However, the following elements of proof are usually material:

(i) The child's age, sex, intelligence, health, disposition, character, mental and physical characteristics, and generally all evidence contributing to a qualitative and quantitative analysis of the child as a total being.
(ii) Age and health of parents or other beneficiaries.
(iii) Intelligence and station in life of parents or other beneficiaries.
(iv) Closeness of ties and degree of love and affection between child and parents or other beneficiaries.
(v) Evidence of past systematic contribution of services or money to parents or other beneficiaries.
(vi) Life expectancies of child and parents or other beneficiaries.
(vii) Probability of benefits to be conferred by child on parents or other beneficiaries (usually in the form of monies or services, but sometimes companionship, comfort, society, etc., in its pecuniary aspect).
(viii) Probability of future inheritance by parents or other beneficiaries from child.
(ix) Statutory obligation to support parents.
(x) Conditions under which child would have been raised, probability of education, and other factors to indicate the station child would have attained in life.
(xi) Probable earnings of child after majority.[9]

Some of the foregoing are common to the proof in the "loss to estate" statutes and will be discussed *infra*.

Methods of proving probability of contribution after majority will vary

5 Inspirational Consol. Copper Co. v. Bergan, 35 Ariz. 285, 276 P. 846 (1929).
6 Herbertson v. Russell, 150 Colo. 110, 371 P.2d 422 (1962).
7 *See generally* Appendix A.
8 *See, e.g.*, Murray v. Long, 256 N.E.2d 225 (Ct. App. Ohio 1968).
9 Annot., 14 A.L.R.2d 485.

widely, depending upon the facts of the case and the ingenuity of counsel. Evidence in this area will, almost without exception, lead into the realm of speculation,[10] and will be circumscribed in varying degrees, depending upon the court. Usually, the courts permit a good deal of latitude, trying to establish a judicial line of demarcation between outright speculation and reasonable prognostication, based on available evidence (while acknowledging that such proof must of necessity carry with it a certain degree of speculation).[11]

Courts have denied recovery altogether on the ground of failure to prove probability of future contribution by evidence of past systematic and consistent contributions by the decedent child.[12] Also, the necessity of proving the reasonable expectation of benefits by the survivor-beneficiaries, in addition to creating obstacles of proof, severely limits the amount of recovery in all but the most unusual cases. Some of the limiting factors are the age of the beneficiaries, the remoteness of the probability of their receiving benefits, the value or amounts of such benefits, the period over which benefits would be conferred, the closeness of the relationship of the beneficiaries to the decedent, the age of the child at death, and the evidentiary factors mentioned above.

Although many courts permit awards to be based on loss of some combination of premajority and postmajority earnings, services, contributions, or the like, a number of them hold the question of postmajority contributions to be entirely speculative by its very nature, and thus limit recovery to the premajority rule.[13] Particularly where courts follow the more restrictive premajority rule, but even where they adopt the broader combination of pre- and postmajority rules, the survivor type statutes, where held to allow only pecuniary damages, are unwieldy vehicles for the award of proper damages in infant death cases. One can almost hear the creaking of the judicial machinery of old Lord Campbell as it strains to accommodate an adequate award by a modern American court for the death, or more accurately, the life of a child.

C. Lost Investment Theory

Another theory of recovery permitted is the "lost investment" theory, whereby a parent can recover ostensibly for the investment in the child. This theory was established in *Wycko v. Gnotke*[14] and followed in *Currie v. Fiting*,[15] where the court held that damages could be measured by ". . . the expenses of birth, of food, of clothing, of medicines, of instruction, of nurture and shelter."[16] Although this theory opened another area of damages, it is far from a panacea. The damages which can be proven on the basis of the money spent in rearing

10 SPEISER, RECOVERY FOR WRONGFUL DEATH § 4:21 (1966).
11 This applies as well to defendant, who will try to show the probability of noncontribution, or to block evidence of future contribution on the basis of future marriage, begetting defendants, estrangement from parents, etc.
12 Murray v. Long, 256 N.E.2d 225 (Ct. App. Ohio 1968).
13 State use of Coughlan v. Baltimore & O.R.Co., 24 Md. 84 (1866); Parson v. Missouri R.R. Co., 94 Mo. 286, 6 S.W. 464 (1887); Caldwell v. Brown, 53 Pa. 453 (1866).
14 Wycko v. Gnotke, 361 Mich. 331, 105 N.W.2d 118 (1960).
15 Currie v. Fiting, 375 Mich. 440, 134 N.W.2d 611 (1965).
16 Wycko v. Gnotke, 361 Mich. 331, 105 N.W.2d 118 (1960).

and caring for the child are limited in the usual case.[17] Costs of birth, prenatal care, maintenance, and the like, have been offered as evidence of damage in the cases that have been tried under this theory.[18]

An interesting question arises as to what would happen in the case of the older child, or even adult child, who had been educated at expensive private schools or universities. Under the "instruction" element mentioned by the court in *Wycko,* it would be argued with force and logic that such expenditures should be recoverable. However, an even nicer question can be raised with reference to the value of such an investment, especially in the child's college education, as distinguished from the mere cost of it. Could the theory be broadened to return to the parent something of the profit he (or the child) hoped to realize on the investment, the fruits of his bargain, so to speak, in addition to the costs? This concept would bring one into the question of future prospects of earnings, and although it might overlap with these elements under survivor and estate loss statutes, nevertheless it would serve to broaden the base of recovery. If permitted, it could, for example, be employed to move the loss to survivor statute damages into the ambit of the more favorable loss to estate rule.

D. Other Damages

Other damages permitted by various courts are loss of inheritance,[19] medical expenses and funeral expenses. Under the ordinary loss to survivor statute, pain and suffering of the decedent is not an element of damages, but there are a few unusual statutory provisions which allow it.[20]

III. Loss to Estate Statute

Under this type of statute, the damages are measured by the loss to the decedent's estate,[21] although the estate is not the beneficiary of the action. Usually, the award goes to beneficiaries named in the statute, in proportions determined by the statute.[22] This is a critical distinction from the loss to survivor type statutes,[23] since the trier of fact does not have the obligation or the right to determine the amount of loss to any given beneficiary. Thus, the plaintiff does not have the considerable burden of proving what the loss to any given beneficiary would be. He is relieved of establishing that the decedent child would probably have contributed services, money, or the like, to the beneficiaries.

Other than proof that the statutory requirement of relationship of the beneficiaries exists, evidence as to the nexus or relationship of the beneficiaries to the decedent, whether it was close or remote, degree of love and affection, and the like, becomes immaterial.

17 For example, the verdict in *Wycko* was $14,000 plus funeral expenses.
18 Annot., 14 A.L.R.2d 485.
19 Connaughton v. Sun Printing & Pub. Assoc., 73 App. Div. 316, 76 N.Y.S. 755 (1902).
20 *E.g.,* Louisiana, Mississippi, Tennessee, and Wisconsin.
21 SPEISER, RECOVERY FOR WRONGFUL DEATH § 3:2 (1966).
22 *Id.* at 65, 66.
23 *Id.* at 64.

A. Net Earnings Rule

In the majority of states having this type of statute, damages are ascertained by computing the probable earnings of the decedent over his lifetime, deducting the amount he would have expended for his own maintenance, support and living expenses, and reducing the remainder to its present value.[24] This rule clearly provides a much greater opportunity for recovery of substantial awards for the death of children than any other pecuniary rule. For example, the child, if it was in good health, would have a maximum life-work expectancy. Projected earnings over such a span could be extremely large. It may be noted that evidence of probable future earnings of a child, as well as of probable expenses, will, again, necessarily border on speculation to a degree. However, courts in this area similarly permit wide latitude in proof of damages.

Some of the elements to be considered are:

(i) Life expectancy of child.
(ii) Age of child.
(iii) Age of parents, siblings and other relatives.
(iv) Intelligence, health, character, personality, and in general all the physical and mental qualities and characteristics of the child.
(v) Occupation and station in life of parents, siblings and relatives, where pertinent.
(vi) Intelligence, health, character, and mental and physical characteristics of parents, siblings and relatives, where pertinent.
(vii) Record of progress of child, and siblings in school.
(viii) Probabilities of education and other opportunities to be afforded by parents to child.
(ix) History of accomplishments of siblings.
(x) History of parents educating siblings.
(xi) Opportunities or intentions of entering certain occupations or professions (for older children).
(xii) Expenditures of parents for food, clothing, shelter, medical attention, general maintenance, entertainment, insurance, membership dues in unions, professional societies, etc.

Evidence concerning the age, health and station in life of the parents is not related to their need, since this is not material, but is used as a guide to the probable longevity and health of the child and the circumstances under which he would have been raised, to help the trier of fact determine the opportunities which would have been available to him.

In the case of a very young child, the plaintiff cannot reasonably contend

24 *See, e.g.*, Lengel v. New Haven Gas Light Co., 142 Conn. 70, 111 A.2d 547 (1955); Broughel v. Southern New England Tel. Co., 73 Conn. 614, 48 A. 751 (1901); Pitman v. Merrimar, 80 N.H. 295, 117 A. 18 (1922); Seriven v. McDonald, 264 N.C. 727, 142 S.E. 2d 585 (1965); Maker v. Philadelphia Traction Co., 181 Pa. 391, 37 A. 571 (1897); Burns v. Brightman, 44 R.I. 316, 117 A. 26 (1922); Memphis Street Ry. Co. v. Cooper, 203 Tenn. 425, 313 S.W.2d 444 (1958).

that it was intended the child would become a concert pianist or a brain surgeon.[25] However, the trier of fact must determine what the child's probable future earnings would be by evidence of his mental and physical characteristics, his family background, and the various considerations listed above. Although the evidence regarding the child's probable expenses, after majority, will seem even more vague and speculative, the courts have consistently held that these also must be determined from the general considerations mentioned above. With the older, or adult child, evidence as to his thrift, taste in clothing or entertainment, smoking habits, and the expenses incident to persons of his station or in the profession he might enter can be introduced. In the younger child, this is impossible, and most courts rely strongly on the father's mode of living and expenditures as a guide.

A fertile area in cases of young children lies in the use of statistical averages. For example, figures can be obtained and presented showing average earnings of grammar school graduates, high school graduates, persons having one year of college, and so on. The trier of fact could then be asked to determine from the child's intelligence, background, etc., how far he would have gone, and then apply the average earning figures to this. Similarly, statistics are available showing average living expenses of individuals in various areas under various conditions.[26]

The trier of fact, in determining the work expectancy of the child, may begin at majority or at the age at which the child would have begun to work, whether this precedes or succeeds majority. Depending upon the probable occupation and health of the child, the work expectancy may be to age 65 or beyond. Evidence of normal wage increase in certain occupations (or average increases), increases and decreases in cost of living, inflationary trends, etc., may also be considered. Earnings to be generated by mental exertions may be included, but income from interest, investments, and the like is usually excluded.[27]

The interest figure used in reducing the net earnings to present value again is determined by the trier of fact. Plaintiff will introduce and argue for a low interest figure, which will produce a higher award, while defendant will urge the reverse. Actuarial testimony is usually helpful to show the interest rates commonly used, especially for annuity policies. Evidence of governmental regulation of maximum interest rates allowable for annuity policies (quite low) should be admissible and can be extremely helpful.

B. Accumulations Rule

Some of the states using the loss to estate statute follow the rule of accumulations. Here, the damages are measured by the amounts the decedent would have accumulated in his estate at the end of his life. In arriving at this amount, all

25 Gill v. Laguerre, 51 R.I. 158, 152 A. 795 (1931).

26 The author is unaware of any appellate court cases upholding the use of such evidence, but he has employed these or similar devices in wrongful death trials which have not been appealed.

27 One must be careful to distinguish income from investments from the income produced by the mental activity of an individual, an investor, for example, who may make his living, wholly or partly, in this manner. The product of his efforts should be included.

probable expenditures by the decedent over his lifetime, for himself and his dependents (and others, if applicable), must be deducted.[28] In the usual case, this rule will be productive of a much smaller award. Especially is this so in the case of the child. It is the rare individual who will actually accumulate a large estate over his lifetime. The average man spends most of what he earns. Where the decedent is a child, since plaintiff ordinarily can't prove the child would have gone into a specific highly rewarding profession or would have become an industrialist, he must fall into the category of the average man, be it average high school or college graduate. Even if reasonable prospect of entering a high paying occupation (for an older child) were shown, much greater expenses would be deducted from income than under the net-earnings rule, and thus the award would be greatly reduced.

The proof of probable future earnings will encompass the elements discussed, *supra,* under the net-earnings rule.

C. Other Rules

In Georgia, the statute provides that a dependent mother may recover the "full value" of the life of a deceased child who was not married and childless,[29] defining "full value" as the value of the life of the deceased "without deduction for necessary or other personal expenses of the deceased had he lived."[30]

In Kentucky, loss of earnings of the decedent during minority has been allowed as an element of damages to decedent's estate rather than to the parent.[31]

It must be borne in mind that although these statutes are styled "loss to estate" statutes, the language "loss to estate" is merely descriptive of the manner of measuring damages and does not indicate that the estate is the true beneficiary, that the award is an asset of the estate or that it is subject to claims against the estate. When the action under such statutes is brought by an executor or administrator, he serves merely as a conduit, with the obligation to transfer the award to the statutory beneficiaries in such proportions as the statute prescribes. Some courts have erroneously taken this terminology ("loss to estate") to mean that the accumulation rule of damages must apply since the amount accumulated or remaining in an estate at the end of a life is, literally, the loss to the estate.

The First Circuit Court of Appeals, in *Williams v. United States,*[32] fell into this error in interpreting the decisional law of Rhode Island, which has a loss to estate type statute. The Circuit Court overruled an award in the United States District Court for the death of a seven-year-old boy on the ground that the accumulation theory must apply in loss to estate statutes. The Supreme Court of Rhode Island has always followed the net-earnings rule.[33]

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28 *See, e.g.,* Conn. v. Mann Constr. Co., 47 Del. 504, 93 A.2d 741 (1952); Ake v. Birnbaum, 156 Fla. 735, 25 So. 2d 213 (1945); Brophy v. Iowa-Illinois Gas & Electric Co., 254 Iowa 895, 119 N.W.2d 865 (1963).

29 GA. CODE ANN. § 105-1307 (1968).

30 *Id.*

31 Phelps Roofing Co. v. Johnson, 368 S.W.2d 320 (Kentucky, 1963).

32 Williams v. United States, 435 F.2d 804 (Ct. App. 1st Cir. 1970).

33 *Id.* As a result of this holding, a new statute, drawn by the author, was enacted. This statute spells out in detail the method of determining damages in wrongful death cases, in effect codifying the decisional law which has followed the net-earnings rule.

From the aspect of pecuniary damages, the loss to estate type statutes are far more favorable toward a substantial award in child death cases, whether they use the net-earnings or accumulation rule, than are the loss to survivor type statutes.

IV. Punitive Damages.

Punitive damages, as a general measure, will receive only passing mention. The author feels the concept is inappropriate at best, barbaric at worst. Its place, if one it has, is in the dim past along with corporal punishment and trial by ordeal.

The possibility of punitive damages as a deterrent is nebulous. Its apparent aim at punishing a wrongdoer rather than compensating a victim is misdirected. The wrongdoer usually suffers more than enough from having killed a child, and the victim is not made whole by retribution. If the principle ever had any validity, it has long since disappeared. The tortfeasor in almost every case today is represented by insurance. If there were some point in trying to punish him (which there is not), it is missed because he is not reached by the judgment. To make (as one state does) the award proportionate to the degree of culpability is unfair to all parties.[34]

A reasonable application of punitive damages would be in the special instances where public utilities, hazardous enterprises, public carriers, etc., are involved. These sophisticated defendants could conceivably be made to conduct their activities in a more careful manner by an awareness of punitive damages. Another reasonable application of punitive damages would be in the instance of intentional tort or gross or wanton negligence. However, even in these instances, punitive damages should be in addition to and not in substitution of other damages.

V. Non-Pecuniary Damages

Under the majority rule, the fact that the child has never demonstrated an earning capacity will not prevent the parent-survivor or other beneficiaries from receiving an award of "substantial" damages. The term "substantial" is, of course, relative, and the awards deemed by some courts to be substantial are pitifully small, indicating that such courts use "substantial" only in the sense that it is distinguished from "nominal."

Most states, under the loss to survivor or loss to estate type statutes, limit the award to pecuniary damages.[35] However, since the language prescribing damages in both types of statutes is usually general (e.g., "fair and just")[36] and the rule of damages established by judicial interpretation, either type statute could accommodate awards for non-pecuniary damages for bereavement, mental anguish, loss of companionship and society, loss of filial care and devotion, and so forth.[37] For example, the language of Lord Campbell's Act, which provided

34 MASS. GEN. LAWS, ch. 229, § 2 (1955).
35 SPEISER, RECOVERY FOR WRONGFUL DEATH § 3:1 (1966).
36 *E.g.*, ALASKA STAT. § 1320.330 (1962).
37 Florida C. & R.R. Co. v. Foxworth, 41 Fla. 1, 25 So. 338 (1889); Lithgow v. Hamilton, 69 So. 2d 776 (Fla. 1954); Kelly v. Lemki Irrig. & Orchard Co., 30 Idaho 778, 168 P. 1076 (1917); Gardner v. Hobbs, 69 Idaho 288, 206 P.2d 539 (1949); Shuford v. Employers' Liability Assur. Corp., 141 So. 2d 850 (La. App. 1962). For other cases see SPEISER, RECOVERY FOR WRONGFUL DEATH § 3:1 p. 62 n.17.

for recovery by the beneficiaries of ". . . damages proportioned to the injury resulting from such death,"[38] did not specifically limit the recovery to pecuniary damages. The original decisions interpreting this Act did so. A minority of states having survivor statutes patterned after Lord Campbell's Act presently permit recovery of non-pecuniary damages by decisional law.[39]

The language of loss to estate type statutes is similarly general, usually providing for such damages as the trier of fact may find "fair and just," or simply for "damages." A minority of states using this type of statute have permitted awards for non-pecuniary damages. The allowances of these so-called "sentimental" damages would obviate a great deal of wrestling with proofs of varying degrees of speculation and at varying odds with reality in the child death case.

What is suggested is not that pecuniary damages be eliminated. Although they may be semi-fictitious in some child death cases, in others they are concrete. They may provide a far greater basis for recovery than non-pecuniary damages. It is suggested that the areas of development of damages in wrongful death cases involving children, especially in states using the loss to survivor statutes, should be in the areas of non-pecuniary loss.

Pain and suffering have traditionally been compensable under general tort law. Mental pain and suffering, long included within this definition, is recognized as a real injury. Where this mental or emotional injury had originally been parasitic to physical injury, it has recently progressed in some cases to free standing status. Mental well-being, freedom from anxiety and anguish, are protected interests. Injury to these interests should be compensable, especially in wrongful death cases.

At common law, the major reason for denying recovery for non-corporal, invisible injuries, was the subjectivity of them. They were too easily feigned, too difficult of positive proof. However, in wrongful death cases, there is very little opportunity for feigned emotional injuries, especially where there is a close relationship such as parent-child.

Despite all the lip service paid to so-called pecuniary rules of damages, in the child death cases these often are mere artifacts. Isn't the true damage the bereavement, the suffering, and the loss of the love and affection of the child? And shouldn't the courts recognize this most grievous of all injuries and respond to it, directly, without having to resort to logic stretching arguments to comply with antiquated rules?

If a father watching his son ground beneath the wheels of a trailer truck is so devastated he spends the rest of his life in a mental hospital, is that a compensable injury? And if the damage is less obvious to the eye, whether weeks of pain, months of grief, or years of loneliness, it is no less real. Of course, if bereavement is to be an element of damages, it must be related directly to the effect on the injured survivor. The question, it is suggested, should not be whether emotional damage and loss should be compensated, but only whether it existed, and to what degree.

A new area of exploration for non-pecuniary damages lies in the concept

38 Fatal Accidents Act, 1846, 9 & 10 Vict. ch. 93, § 2.
39 SPEISER, RECOVERY FOR WRONGFUL DEATH § 3:1 (1966).

of interference with the family relationship. Some courts have recognized that the child is more than a commodity or a service-producing mechanism, but has a place as an integral part of the family unit. They have talked, realistically, about the child's place in society, as related to the family. Disturbance or destruction of the family relationship should be includable as an element of damages. There is precedent for this in other areas of the law. For example, parents have been awarded damages for injury resulting from the abduction or seduction of their child. Although various rationales have been employed by the courts in these cases, it can reasonably be argued that common to them all is the principle of compensating parents for the temporary loss of the child, its companionship, its society, in other words, the disturbance of the family relationship.

This concept should also be broadened to include persons other than the parents. The total effect on the family as well as its members severally should be examined.

VI. Trial and Settlement Techniques

A. Trial

The child death case presents singular problems regarding proof of damages. It must be tried, as should all cases, with one eye on the jury and the other on the record.

On the one hand, the nature of the proof in most cases tends to be boring, sere, because it relates to a pecuniary rule of damages. On the other, the death of a child is a pathetic occurrence. The dichotomy is obvious. A balance must be struck between the cold, pallid figures and the emotional cataclysm of death. While it is dangerous to fall into a mire of endless statistics which may rob the case of its personality, it may be even worse to produce a spectacle featuring sackcloth and ashes, garment rending, and the whole panoply of grief embarrassingly displayed.

The child must be brought to life, made a being before the jury, so that the full significance of his loss can be understood. Once the jury has a clear picture of the child in life, the devastation that is death becomes apparent. Death of a child is catastrophic—it requires no hyperbole. Pathos has no part in the trial. Maudlin sentimentality, and anything else which detracts from the dignity or solemnity of the event, should be carefully avoided. Overplayed, the death case becomes daytime television. Understated, its finality, its terror reveals itself.

I am reminded of a case I tried involving the death of a seven-year-old boy. His parents were English and highly intelligent. The father was a visiting professor of mathematics, the mother a college graduate. These people were extremely reluctant to go to trial. They had neither the inclination nor capacity to bare their inner selves before strangers. It was obvious during the trial that they held themselves rigidly in check, their emotions in tight rein. Not a tear was shed, not a sob sobbed. But it was manifest to everyone in the courtroom that these people were suffering the tortures of hell. Their attempts to recite in an objective, matter-of-fact way, the intimate details of their son's short life underscored the void that would never be filled, their words hollow, reverberating as

though spoken in a tunnel. When the jury returned with a verdict, it was they who were in tears.

The discipline shown by these plaintiffs served only to accentuate their bitter loss. Of course, people differ, and one cannot always manage restraint in plaintiffs. However, counsel should attempt at all times to instruct witnesses against any cheapening display of emotion. If sentiment is not applied with a heavy brush, then, if at some point tears begin to flow or a parent breaks down, it will be even more effective. At such a point, counsel should pause to allow the witness to gain control. (Courts often will recess, sua sponte, at this juncture.)

Great care must be taken to establish a basis, especially in the case of the younger child upon which a substantial verdict can rest, and withstand post-trial motions and appeal. The skeleton is the statistical evidence — the flesh what I like to call the human evidence.

Thought should be given to the order of evidence. We know that trials have peaks and valleys of interest. One of the greatest peaks is at the beginning of trial. The jury is eager to hear the details of the story of which they have been given the merest glimpse. This is an excellent time to present the strongest "human" witness — one who can paint a picture of the child, bring him into being, so that there will be a setting for everything that comes later. The jury now will be dealing with a *person,* not a number. Once life is breathed into the case, the figures become digestible, relevant, rather than in vacuo.

Ordinarily, one of the parents will be the first witness. Either parent may be used first. The choice should be made on the basis of the degree of closeness to the child, the ability to communicate, the attractiveness of the parent and the other general characteristics that go to make a good witness. In addition to the parents, brothers, sisters, relatives, especially other children, may make excellent witnesses. In another case I recall, the decedent child was survived by a brother, two years his elder. This child, enormously attractive and intelligent, captivated the jury. I kept him on the stand as long as possible, not so much for the testimony he offered (which was relevant) but because as they watched him, the jury came to see his brother, the decedent. This device, of bringing the dead child to life through a sibling, becomes available in a surprisingly large number of cases. (The sibling need not even be of the same sex.) Non-relatives should also be used as witnesses. Many persons whose testimony will have a neutral quality come into contact with the child during his life. Teachers, clergymen, athletic coaches, scoutmasters, camp directors, counselors, neighbors — the list is inexhaustible.

Other children — playmates, teammates, friends, should not be overlooked. Children make ingenuous, delightful witnesses. They will serve to focus the jury's attention on children — on *the* child. They do have relevant testimony to offer. They can tell about the decedent's intelligence, progress in school, athletic ability, personality, relationship with others, standing in the community of children, leadership, and any number of other characteristics. The choice of witnesses is thus very broad, depending upon the nature of the case.

The statistical witnesses will ordinarily be experts of various kinds. Care must be taken to relate their evidence, to the degree possible and at all times, to the

human element of the case, avoiding the clinical, sterile approach. It is a good tactic to intersperse dry witnesses with interesting ones, avoiding administering extended doses of soporific to the jury.

Actuaries may be used to demonstrate life expectancy, reduction to present value, increments in wages and costs of living, inflationary trends, meanings of money in terms of value, and many other things. A conference with an actuary will reveal that he is qualified to furnish statistics on an endless variety of subjects. Unique material proofs will suggest themselves from this fertile area.

Economists, sociologists, and experts in various fields of endeavor may be employed, depending upon the nature of the case. In the case of the black child, for example, while it may not be proper to show the specific occupation he would have entered, one could employ the sociologist to show that his opportunity was much greater than that of his father. The economist, again, may testify as to economic trends, values of dollars, living costs, etc.

In the case of the adult child, he may have progressed far enough so that there is a good indication of his future occupation, and evidence of this specific nature becomes admissible. In the case of the younger child, while it is held improper to offer proof of specific occupation for the child, proof of that of the parent is proper.

In the usual case, the proof of the child's future prospects, income, expenses, standard of living, and the like, must of necessity be general, based on prognostication. Thus, the courts will permit examination into the background, standard of living, earnings and expenses of the father, not on the theory that the child would follow his father's occupation, but ostensibly to show the manner in which the child would have been reared, the opportunity that would be available to him, and to provide the jury with some yardstick against which the child's future standard may be measured. (Also, proof of the occupations of relatives, brothers, sisters, aunts, uncles, cousins is ordinarily permitted to show the family background and capacity.) In this regard, experts who can testify to wage scales, increments, etc., in certain occupational fields, become important. Union officials may be used as experts to testify as to increments, benefits, pension funds, and the like. In most cases, the argument can be made that the child would have far greater opportunity available to him than his father, and that the father's standard should be used as a departure point.

Publications of all kinds are available from the United States Government Printing Office, which offer a fount of information. United States Department of Labor publications are particularly fertile. State agencies also publish a variety of statistics which may be relevant. Statistics are available concerning average income, expenses and costs of living in various areas of the United States, for people of varying degrees of education, and in various configurations of marriage and dependents. (Statistical Abstract of the United States). The admissibility of these publications will normally depend only upon their relevance and materiality.

In most cases, regardless of the type statute in use, the aforedescribed evidence of the child's family background, his opportunities, and all his personal characteristics is allowed. In the survivor type states, emotional evidence is per-

mitted because it is necessary to establish the closeness of the child to the parent, the probability of contribution, and the like. This sentimental area, the good-to-his-mother-type evidence, is circumscribed in the loss to estate states. However, this area may be invaded in these states if certain evidence can be made relevant to the rule of damages. For one example, actions of the child toward the parent which indicate some of his propensities for later success in life. For another, talks between father and son wherein the son tells his father of his future hopes and ambitions. Again, the range may be extended broadly by the inventiveness of counsel.

Evidence of health of the child, as well as of his parents, grandparents and other members of his family should be presented to show he would have had a full work expectancy.

Photos of the child, school transcripts, awards, prizes, and other documentary or physical evidence of accomplishment should be introduced where pertinent.

Special situations occur in the case of the gifted child. Experts familiar with the child's talent or future prospects may testify. Normally, this would be in the case of the older child, for instance, the athlete or the budding scientist, but it may involve a younger child, a musical prodigy, for example.

On the basis of the statistical evidence, the child's work-span and productivity must be projected. In most cases, as we have seen, this cannot be done with specificity, but ranges can be established based on these figures in conjunction with the evidence (described *supra*) of the child's characteristics, family background, opportunity, and the like.

If the child can be projected into a substantial earning bracket (and almost every normal human being can, even if statistical averages must be resorted to), then, since his work-span will ordinarily be at least forty-four years (age 21-65), his projected life income will amount to a sizeable total.

Reduction to present value is a difficult concept for juries to understand and must be explained thoroughly. The simplest way to get it across is to establish a factor for reduction to present value, which, when multiplied by the average annual income of the decedent, gives the proper reduced amount. This formula should be demonstrated on a blackboard for the jury.

Of course, the formula must be established by proper testimony. Usually an actuary is used. However, reduction to present value tables appears in standard works which are available in public libraries or law libraries. These are recognized by most courts as authoritative and may be introduced upon authentication by the librarian or custodian.[40]

In jurisdictions where future expenses of the child are a necessary element of proof (e.g., loss to estate statutes), these must be projected. This is probably the most difficult area of proof, bordering the most closely on speculation. In cases where a specific profession or occupation is indicated (e.g., the adult child or the exceptional child, *supra*), typical expenses of people in that profession may be shown. In the majority of cases, where one cannot indicate a specific occupation, again it is ordinarily permissible to use the parents' expenses,

40 Reynolds v. Narragansett Electric Co., 26 R.I. 457, 59 A. 393 (1904); Sweet v. Prov. & Springfield R.R., 20 R.I. 785, 40 A. 237 (1890); Turner v. Maxon, 53 R.I. 164, 165 A. 372 (1933).

standard of living, and the like, as a frame of reference. Also, statistical averages may be employed. These are to be taken together with all the other evidence described above to determine the level the child would have reached, and thus, his concomitant expenses.

Too often, there is a surfeit of emotional evidence and a paucity of statistics. Motivating the jury to want to award a large sum is one thing. The thought processes by which they arrive at it are another (usually a mystery). The record must be amply fortified with the detail and mathematics which will support the verdict.

B. Settlement

In discussing settlement, the adjuster or defense counsel will listen to your cogent argument about the emotional impact of your case. He will pay heed to the caliber of your witnesses, human and statistical. However, in order to justify a high settlement, he must have a substantial and concrete basis. He will be most influenced by figures and projections which will be admissible at trial and would support a high verdict. The presentation of all the statistics which would perfect your trial record as described above will permit the adjuster to make a settlement which will be approved by his superiors. Give him something to work with. Do not expect him to pick a figure from the air. In indicating to him the strongest evidence you intend to adduce, particularly the statistics, you not only offer him a reasonable justification for settlement, but simultaneously demonstrate that you know how to try the case, bring in a verdict, and hold it, if necessary.

Your demand should be higher than your settlement figure, of course, but not unreasonably high. You should be ready to support it with figures and reasons, and be able to argue logically that you could achieve and hold this verdict. It is helpful to be able to determine a high, low and median range for the possible verdict. A good settlement would fall somewhere between the high and the median.

Some collateral factors influencing the settlement will be:

(a) The plaintiff(s)
(b) The defendant(s)
(c) The decedent
(d) The witnesses (identity and attractiveness)
(e) The experts (stature and capacity as witnesses)
(f) The facts re liability
(g) Circumstances surrounding the death
(h) The forum
(i) The jury
(j) Plaintiff's counsel — his ability and reputation
(k) Defense counsel
(l) The insurer

Liability has not been discussed here. It goes without saying that any settle-

ment figure is a function of liability. The weaker the liability, the greater the discount. However, it is well to note, in the aggravated case, or the gruesome case, the jury may exact a penalty by giving a larger award, even though the rule of damages is in no way penal. Adjusters and defense counsel realize this (even though they pooh-pooh it) and it can be used to advantage in settlement.

In sum, the same preparation, the same detail which will provide the vehicle for a substantial jury verdict will afford the basis for a good settlement. Adhere to the rule of damages and demonstrate how your evidence will, under the rule, provide for a high verdict. It is only to escape exposure that the insurer will settle. If you convince him his exposure is great, your settlement will be adequate, if you are dealing with a reasonable company. If, sadly, you are dealing with one of the unreasonable insurers we all know of, then you must try your case, rather than accept the bone they deign to throw you. There is no way I know of to proffer or explain a niggardly offer to a parent in exchange for the life of a child. Rather than denigrate the child's memory by accepting a pittance, the client will feel better if he tries, even though he loses. You yourself will be more gratified in such a case, and will have earned the respect of the defense bar.

VII. Conclusion

The existing machinery for recovery for wrongful death of children is inadequate. It needs overhaul badly.

The job falls to the plaintiff's bar. The necessary changes can come one of two ways: decisional law or statutory revision.

The openings for new decisions permitting additional damages under the present wording of the statutes have been described above.

If new statutes are to be drawn and adopted, which would be far preferable, they should award both pecuniary and non-pecuniary damages. The most effective statute would take the form of a combination of loss to estate type plus specific provisions for award of non-pecuniary damages of all types in such proportions and to such persons as may be proven.

Proposed damage provisions of a model wrongful death act are attached as Appendix B.[41]

41 These provisions, split into two acts, have been placed by the author before the Rhode Island legislature. The purpose of splitting them into two bills was to give a greater chance of passage to the pecuniary act, the non-pecuniary provisions being novel and sure to meet with more resistance. At the time of writing, the pecuniary act has passed and been signed into law by the Governor. The non-pecuniary act has passed the Rhode Island Senate and is presently on the floor of the House.

APPENDIX A

ABSTRACT OF DAMAGE PROVISIONS OF WRONGFUL DEATH STATUTES WITH PERTINENT CASES

Alabama—ALA. CODE tit. 7, § 119.
". . . such damages as the jury may assess . . ."
Adkison v. Adkison, 46 Ala. App. 191, 239 So. 2d 555, *rev'd,* 239 So. 2d 562, 286 Ala. 305.
Damages recoverable in an action by a parent for wrongful death of a minor child are punitive only, the idea being to punish for wrongful death and to deter others from engaging in such conduct . . . $10,000 verdict for mother.

Alaska—ALASKA STAT. § 13.20.330.
"Such damages as the court or jury may consider fair and just . . ."
a. including, but not limited to, medical and funeral expenses.
b. Loss of assistance, services and expectation of pecuniary benefits without regard to the beneficiaries' ages or relationships to decedent and without regard to the probable accumulations decedent might have saved during his lifetime if he had lived; and loss of support contributions, consortium and prospective training and education . . . if action is for benefit of decedent's estate, recovery is limited to pecuniary loss.

Arizona—ARIZ. REV. STAT. ANN. § 12-542.
". . . fair and just . . ."
Inspiration Consol. Cooper Co. v. Bergan, 35 Ariz. 285, 276 P. 846 (1929). An award to or for the benefit of parents of a deceased minor child may be based in part on the value of benefits which, according to the evidence, the parents might reasonably have expected from the child after his majority.

Arkansas—ARK. STAT. ANN. § 27-909.
". . . fair and just . . . including loss of services and companionship of spouse and/or mental anguish." (also next of kin)

California—CAL. CIV. PRO. § 377.
"Such damages as under all the circumstances may be just, but not including any recoverable under the survival statutes."
Fields v. Riley, 81 Cal. Rptr. 671 (Ct. App. 1969).
Plaintiff's action for death of son held damages in wrongful death action are limited to pecuniary loss suffered by one because of death of another, and parents in wrongful death action may recover for loss of a child's comfort and society and subsequent protection which child may have afforded parent provided

those elements are considered in reasonable relation to pecuniary loss. Jury could take into consideration as offset against any loss factors, prospective cost of boy's maintenance and rearing. (4-year-old boy killed while riding in defendant's car) No damages.

Colorado—COLO. REV. STAT. ANN. § 41-1-3.
". . . fair and just . . ." ". . . if the decedent left neither a widow, widower, nor minor children, nor a dependent father or mother, the damages . . . shall not exceed forty-five thousand dollars."
Pierce v. Connors, 20 Colo. 178, 37 P. 721 (1894).
The probable contributions by the child, had he lived, to the parent.
Herbertson v. Russell, 150 Colo. 110, 371 P. 2d 422 (1962).
The value of the minor's services from the date of death until such minor would have reached majority, less the probable expense of rearing him or her during that period, including the expenses of support, education and medical care. Also, . . . in part on the value of benefits . . . reasonably have expected from child after majority. *Id.*

Connecticut—CONN. GEN. STAT. ANN. § 52-555.
". . . such damages as are just, plus cost of reasonably necessary medical, hospital and nursing services and funeral expenses."

Delaware—DEL. CODE ANN. § 3704.
". . . damages for the death and loss thus occasioned . . ."

District of Columbia—D.C. CODE ANN. § 16-2701.
" 'Damages' to be assessed with reference to the injury to decedent's spouse and next of kin, and shall include the reasonable expenses of last illness and burial. Trial or appeal court may order reduction of an excessive verdict."
Reed v. Gulf Oil Corp., 217 F. Supp. 370 (1963).
Pecuniary loss—to be measured by the experience and judgment of the jury, enlightened by a knowledge of the age, sex and physical and mental characteristics of the child.
Also, loss of services during minority. *Id.*
Hord v. National Homeopathic Hospital, 102 F. Supp. 792 (1952).
In part on benefits after minority terminated.

Florida—FLA. STAT., § 768.03.
Decedent's parent may recover, not only for loss of services of such minor child, but also such sum for the mental pain and suffering of the parent, or both parents if both survive, as the jury may assess.

Hardison v. Threets, 241 So. 2d 694 (Fla. App. 1970). FLA. STAT. § 768.02.
An administrator in a wrongful death action may recover the present value of the prospective earnings and savings which evidence indicates decedent could reasonably have been expected to accumulate during his life expectancy after coming of age and to have left to his heirs or beneficiaries at death.
Laskey v. Smith, 239 So. 2d 13 (Fla. 1970).
Evidence in action for death of plaintiff's two-year-old daughter supported award of $31,200 for pain and suffering and loss of estate.
Kuklis v. Hancock, 304 F. Supp. 336 (D.C.Fla. 1969).
Parents were permitted to recover damages for pain and suffering for wrongful death of their 17-year-old son in amount of $30,000 where their life expectancy was 30 years, 149 days and evidence showed that deceased son was bright, had special qualities of character, leadership and integrity as well as exceptional scholastic standing and athletic ability.
". . . loss of services . . . mental pain and suffering of the parent (or both parents) if they survive . . ." Fla. Stat., § 768.03.
MacDonald v. Forman, 238 So. 2d 131 (Fla. App. 1970).
Divorced mother of minor child who died while parents were married could assert claim for mental pain and suffering arising from death of child.

Georgia—GA. CODE ANN. § 105-1307.
Funeral, medical and other necessary expenses resulting from the injury and death. Full value of decedent's life as shown by the evidence without deduction for necessary or other personal expenses of decedent had he lived.
Daughty v. Stubbs, 167 S.E.2d 409 (Ct. App. Georgia 1969).
Although a father cannot recover for homicide of his minor child if mother is living at time of homicide, he may recover for loss of services of child until majority and for expenses of medicine and nursing, and expenses reasonably incurred in burial of child.

Hawaii—HAWAII REV. LAWS § 246.2.
Damages may be given as under the circumstances shall be deemed fair and just compensation, with reference to the pecuniary injury and loss of love and affection, including loss of consortium, marital care, attention, advice, companionship, protection, etc.; loss of filial or parental care and attention, guidance, training and education, suffered by persons entitled to bring action.

Idaho—IDAHO CODE ANN. §§ 5-311, 5-327.
Such damages may be given as under all the circumstances of the case may be just. However, if defendant dies, and there is no applicable liability insurance covering the wrongful acts of such decedent wrongdoer, damages recoverable from his personal representative shall not exceed $10,000 for each person injured or killed. No attempt shall be made to suggest to the jury either the existence or

absence of insurance, but if there is none and the verdict exceeds $10,000, the court shall reduce it.
Gardner v. Hobbs, 206 P.2d 539 (1949).
Sentimental losses—Jury could take into consideration "the degree of intimacy existing between the father and the child and the loss of companionship."

Illinois—ILL. REV. STAT., Ch. 70, § 2.
Jury may give such damages as they deem a fair and just compensation with reference to the pecuniary injuries to decedent's wife and next of kin, not exceeding $30,000, but damages shall not include any compensation with reference to the pecuniary injuries suffered by any person whose contributory negligence in whole or in part caused decedent's death.
ILL. REV. STAT., ch. 70, § 2 now adds:
"In no event shall the judgment entered upon such verdict exceed $20,000 where such death occurred prior to July 14, 1955, and not exceeding $25,000 where such death occurred on or after July 14, 1955, and prior to July 8, 1957, and not exceeding $30,000 where such death occurs on or after July 8, 1957, and prior to the effective date of this amendatory Act of 1967, and without limitation where such death occurs on or after the effective date of this amendatory Act of 1967.
Wallace v. Rock Island, 323 Ill. App. 639, 56 N.E.2d 636 (1944).
Based in part on benefits after minority terminated.

Indiana—IND. ANN. STAT., § 2-404.
Damages shall be in such amount as may be determined by the court or jury. But if decedent is survived by none of the statutory beneficiaries, measure of damages is limited to the total, not exceeding $4,000, of hospital, medical, surgical, funeral and burial, administration of decedent's estate.
Hahn v. Moore, 127 Ind. App. 149, 133 N.E.2d 900 (1956).
In allowing an award for loss of filial care and attention, some decisions characterize this element of damages as the value of the child's attention to his family obligations, including acts of kindness and faithfulness.
Thompson v. Ft. Branch, 204 Ind. 152, 178 N.E. 440 (1931).
Loss of services during minority.

Iowa—IOWA CODE, §§ 635.9, 613.11.
"Damages for the death" is construed to mean loss to estate. Decedent's personal representative may also recover, in such sum as jury deems proper, damages for the value of decedent's services . . . such damages to be treated as for the benefit of the estate in same manner as recovery for loss to estate. Medical, hospital and nursing expenses may also be recovered by the personal representative in any action for death of a woman.

Kansas—KAN. STAT. ANN. § 60-3203.

Such damages as may seem fair and just under all the facts and circumstances, not exceeding $25,000. Damages may include but are not limited to mental anguish, suffering, bereavement, loss of society, companionship, comfort or protection, loss of marital, parental or filial care, attention, advice, counsel, training, guidance and education.

KAN. STAT. ANN. § 60-1903 now adds:

"In any such action, the court or jury may award such damages as are found to be fair and just under all the facts and circumstances, but the damages cannot exceed in the aggregate the sum of fifty thousand dollars ($50,000) and costs.

Bartlett v. Hursche, 426 P.2d 763 (Kan. 1969). Awards of statutory maximum of $25,000 plus expenses of burial for each of two deceased boys, four and five years old, were not excessive. Mental anguish, suffering or bereavement of parents, loss of society and companionship, loss of filial care or attention.

Kentucky—KY. REV. STAT. § 411.130(6).

Damages may be recovered for the death. If the act was wilful or the negligence gross, punitive damages may be recovered. The Constitution of Kentucky prohibits any statutory limitation on the amount of damages recoverable.

KY. REV. STAT. § 411.135 now adds:

". . . may recover for loss of affection and companionship that would have been derived from such child during its minority, in addition to all other elements of the damage usually recoverable in a wrongful death action.

Rice v. Rizk, 453 S.W.2d 732 (Ky. 1970).

There is inference that stillborn child would have some earning power, affording basis for recovery for wrongful, negligent destruction of infant's power to earn money. $375.00 for pain and suffering, medical expenses $500, burial $125.

Leger v. Watkins, 449 S.W.2d 423 (Ky. 1970) (earning power). Judgment of $25,000 for wrongful death of ten-year-old attractive girl, with pleasing countenance who was an A-B student in apparent good health, was not excessive.

Bartley v. Childers, 433 S.W.2d 130 (Ct. App. Kentucky 1968).

Wrongful death of a swimmer against owners and operators of pool: Held that it was improper to exclude evidence of life expectancy of deceased minor on ground that minor had not been a wage earner.

City of Louisville v. Stuckenborg, 438 S.W.2d 94 (Ct. App. Ky. 1969).

Action for wrongful death of a child occurring four days after premature birth caused by fall on sidewalk. Held: viable unborn child is entity in meaning of general word "person" within wrongful death statute KY. REV. STAT. § 411.130. Parent who was contributorily negligent in death of child cannot receive benefits of recovery as designated beneficiary under Wrongful Death Act. Award of $25,000 . . . was not excessive within first blush rule.

Louisiana—LA. REV. STAT. ANN. § 2315.

"All other damages." Damages sustained by those of decedent's survivors entitled to bring suit.

Williams v. City of Baton Rouge, 200 So. 2d 420 (Ct. App. La. 1967).
Action by parents of 15-year-old youth who drowned in swimming pool against operator of pool and father of lifeguard held that award of $2,500 to each parent of youth who was one of four children, was of average intelligence, had caused no disciplinary problems, and was close to all members of the family, was so inadequate as to amount to an abuse of discretion, and thus court of appeals would amend judgment to increase award of damages to $10,000 for each of the parents. Criteria as expressed in *Curry* case:

a. Closeness of ties and degree of love and affection between child and parents
b. Age of child
c. Station in life of parents
d. Probability of future support by the child
e. Intelligence and other factors relating to the type of future life expectable for the child

Curry v. Fruin-Colnon Contracting Co., 202 So. 2d 345 (Ct. App. La. 1967).
Action by parents for alleged wrongful death of eight-year-old son who drowned in hole filled with water left by defendant. Held: in order to arrive at fair amount to be awarded to parents for death of child . . . it is necessary to look at the closeness of ties and the degree of love and affection between child and parents, the age of the child, the station in life of the parents, probability of future support by the child, and intelligence and other factors relating to the type of future life expectable for the child. Verdict $10,000 each parent.
Spears v. Travelers Ins. Co., 241 So. 2d 303 (La. App. 1970).
Award of $369.60 for special damages, and $7,500 for loss of love and affection and pain and suffering of four-year-old boy who died as a result of ingestion of weed killer on defendant's premises, was neither excessive nor inadequate.
Homax v. Earl Gibbon Transport, Inc., 226 So. 2d 573 (La. 1969).
Action by parents of 20-year-old boy killed in auto-truck collision against auto driver and his insurer and truck driver and his employer and insurer, held that award of $50,000 to each parent based exclusively on parents' loss of love and companionship of son was abuse of discretion by jury, and award of $20,000 to each parent for such loss would do substantial justice.
Mobabgab v. Orleans Parish School Bd., 239 So. 2d 456 (La. App. 1970).
Award of $20,000 to each parent for wrongful death of their 16-year-old son, who died following heat stroke sustained in high school football practice and was mature, well-rounded and intellectually superior was just and adequate.
Barrett v. State Farm Mut. Auto Ins. Co., 236 So. 2d 900 (La. App. 1970).
Where owner of automobile and father of minor motorist whose negligence resulted in death of motorbike rider had entire financial burden of judgment in death action, was man of modest means whose annual income was $4,200 and whose home was heavily mortgaged, award of $5,000 to each parent and special damages of $1,843.88 was not grossly inadequate for death of 14-year-old boy.
Sylvester v. Liberty Mut. Ins. Co., 237 So. 2d 431 (La. App. 1970).
In determining proper damage award for death of two minor children, decreasing purchasing power of the dollar could be considered.

Reduced $120,000 verdict to $80,000. They were healthy children above average mentally. Family was close-knit.

Maine—ME. REV. STAT. ANN. tit. 18, § 2552.
". . . fair and just compensation with reference to the pecuniary injuries resulting from such death to the persons for whose benefit such action is brought, and in addition thereto, shall give such damages as will compensate the estate of such deceased person for reasonable expenses of medical, surgical and hospital care and treatment and for reasonable funeral expenses, and in addition thereto, where the deceased was a minor child at the time of the injury which resulted in death, damages not exceeding $10,000 may be recovered on behalf of the parents of said deceased minor for the loss of comfort, society, and companionship of said minor, provided such action shall be commenced within 2 years after the death of such person."
Dostie v. Lewiston Crushed Stone Co., 136 Me. 284, 8 A.2d 393 (1939).
Loss of services during minority.
In part on benefits after minority terminated. *Id.*

Maryland—MD. ANN. CODE art. 67, § 4.
". . . such damages as they may think proportioned to the injury to the parties respectively for whose benefit the action is brought."
Section 4 now adds:
"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."

Massachusetts—MASS. GEN. LAWS ch. 229, § 2.
Damages in the sum of not less than $3,000 nor more than $30,000, to be assessed with reference to the degree of the wrongdoer's culpability. Damages may be recovered under a separate count at common law for conscious suffering resulting from the same injury.
Section 2 now adds:
"not less than $5,000 nor more than $50,000." This Act took effect on January 1, 1968, and applies only to actions for death resulting from injuries sustained or accidents occurring on or after said date.

Michigan—MICH. COMP. LAWS § 27A2922.
". . . such damages as the court or jury shall deem fair and just with reference to the pecuniary injury to those persons entitled to the recovery; and also damages

for the reasonable medical, hospital, funeral and burial expenses for which decedent's estate is liable and reasonable compensation for decedent's conscious pain and suffering between the time of injury and the time of death."
Dauer's Estate v. Zabel, 172 N.W.2d 701 (Mich. App. 1969).
Award of $15,721.40 for death of five-year-old boy was not excessive under evidence including showing that boy was healthy, intelligent and affectionate, that he was about to enter school, and that the funeral expenses amounted to $1,071.40.
". . . fair and just, with reference to the pecuniary injury resulting from such death, . . . reasonable medical, hospital, funeral and burial expenses for which the estate is liable and reasonable compensation for pain and suffering, while conscious, undergone by such deceased person during the period intervening between the time of the inflicting of such injuries and his death."

Minnesota—MINN. STAT., § 573.02.
. . . an amount as the jury deems fair and just in reference to the pecuniary loss resulting from such death, shall be for the exclusive benefit of the surviving spouse and next of kin, proportionate to the pecuniary loss severally suffered by the death.
Luther v. Dornack, 179 Minn. 528, 229 N.W. 784 (1930).
In part on benefits parents might reasonably have expected after minority terminated.

Mississippi—MISS. CODE ANN., § 1453.
Such damages as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit. Jury shall diminish damages in proportion to the amount of contributory negligence attributable to the decedent.
Sandifer Oil Co. v. Dew, 220 Miss. 609, 71 So. 2d 752 (1954).
Loss of services during minority.
Yazoo & M. Valley R. Co. v. Beasley, 158 Miss. 370, 130 So. 499 (1930).
Benefit received by parents after minority terminated.

Missouri—MO. REV. STAT. § 537.090.
". . . not exceeding fifty thousand dollars, as the jury may deem fair and just for the death and loss thus occasioned, with reference to the necessary injury resulting from such death, and having regard for the mitigating or aggravating circumstances attending the wrongful act, neglect or default resulting in such death."
Collins v. Strok, 426 S.W.2d 681 (Ct. App. Missouri 1968).
Action by parents for their minor child's wrongful death in crash of airplane owned and allegedly controlled by defendant's decedent. Held: where defendant failed to preserve for review question whether rule of law preventing jury from

drawing inferences that decedent's services to parents would continue past the decedent's majority should be applied, evidence was sufficient to allow jury to infer that child's services to parents would continue past majority. $15,000 verdict.

Montana—MONT. REV. CODES ANN. § 93-2810.
Such damages may be given as under all the circumstances of the case may be just. Punitive damages may be given when the injury resulted from fraud, oppression or malice, or where the act complained of was malicious, wilful or wanton. Loss of services during minority.
Burns v. Eminger, 84 Mont. 397, 276 P. 437 (1929).
Parents benefit after minority terminated.

Nebraska—NEB. REV. STAT. § 30-810.
Verdict or judgment should be for the amount of damages which the persons in whose behalf the action is brought have sustained.
Westring v. Schwanke, 177 N.W.2d 506 (Neb. 1970).
Damage which parents of decedent sustained from wrongful death was pecuniary loss resulting from their being deprived of his services during balance of his minority and loss of contributions which he could with reasonable certainty have been expected to make after reaching his majority.
$50,000 verdict held excessive—New trial.

Nevada—NEV. REV. STAT., ch. 41, § .090.
"The court or jury . . . may give such damages, pecuniary and exemplary, as shall be deemed fair and just . . . including damages for loss of probable future companionship, society, and comfort."

Nevada—NEV. REV. STAT. ch. 515 (New Act).

New Hampshire—N.H. REV. STAT. ANN., § 556:12.
The mental and physical pain suffered by decedent in consequence of his fatal injury, the reasonable expenses occasioned to his estate by the injury, the probable duration of his life but for such injury, and his capacity to earn money may be considered as elements of damages in connection with the other elements of damages allowed by law in a tort action for physical injury to the person.
Section 556:13 adds:
"In cases where the Plaintiff's decedent has left neither a widow, widower nor minor children nor a dependent mother nor father, the damages recoverable in any such action shall not exceed twenty thousand dollars. In all other cases the damages recoverable in any such action shall not exceed sixty thousand dollars;

provided, however, that in the trial of any such action by jury, the jury shall not be informed of the limitation of recovery imposed by this section, and if the jury awards damages in excess of such limitation the court shall reduce the amount of damages awarded to conform to such limitation."

New Jersey—N.J. REV. STAT., § 2A:31-5.

". . . jury may give such damages as they shall deem fair and just with reference to the pecuniary injuries resulting from such death, together with the hospital, medical and funeral expenses incurred for the deceased, to the persons entitled to any intestate personal property of the decedent."

Pecuniary loss—to be measured by the experience and judgment of the jury, enlightened by a knowledge of the age, sex and physical and mental characteristics of the child.

Gluckauf v. Pine Lake Beach Club, Inc., 78 N.J. Super. 8, 187 A.2d 357 (1963).

Loss of services during minority.

Bohrman v. Pennsylvania R. Co., 23 N.J. Super. 399, 93 A.2d 190 (1952).

In part benefits to parents after minority terminated.

Sakos v. Byers, 11 N.J. Misc. 527, 168 A. 222 (1933).

Age, physical and mental condition and characteristics of the decedent just prior to his fatal injury may be considered by jury in regard to his disposition to aid parents.

New Mexico—N.M. STAT. ANN., § 22-20-3.

Jury may give such damages, compensatory and exemplary, as they shall deem fair and just, taking into consideration the pecuniary injuries to the surviving parties entitled to judgment or to any interest therein, and having regard to any mitigating or aggravating circumstances attending such wrongful act, neglect or default.

New York—N.Y. DEC. EST. L. now ESTATES, POWERS AND TRUST LAW

Such sum as the jury (or court or referee . . .) deems to be fair and just compensation for pecuniary injuries to the persons for whose benefit action is brought; also the reasonable expenses of medical aid, nursing and attention incident to the fatal injury and the reasonable funeral expenses paid by the spouse or next of kin, or for the payment of which any such person is responsible. The Constitution of New York prohibits any statutory limitation on the amount of damages recoverable in a wrongful death action.

Jones v. U.S., 421 F.2d 835 (2d Cir. 1970).

Award in wrongful death action against United States under Federal Tort Claims Act, of $15,410.28, including medical and funeral expenses of $2,098.28, for pecuniary loss sustained by parents of 17-year-old boy, who was ejected from speeding ambulance by dangerous mental patient in custody of Veterans Admin-

istration, and $1,500 for decedent's conscious pain and suffering was not so grossly inadequate as to shock conscience.
Reynolds v. State of New York, 35 Misc. 2d 757, 231 N.Y.S.2d 681 (Court of Claims 1962).
Defendant paid a non-jury award of $75,000 for the death of a young man who had just graduated from college, had accepted an offer of employment at a salary of approximately $6,000 a year, but had not commenced work. He was survived by parents whom he was not supporting at the time.
LeBoeuf v. Newman, 251 N.Y.S.2d 72 (1964).
Award of $55,000 for death of 17-year-old boy was excessive and would be reduced to $35,000 plus proven special damages where deceased was a high school junior who worked part time during school and full time summers, bought his own clothing, saved money and occasionally contributed earnings to his family.

North Carolina—N.C. GEN. STAT. § 28-174.
(1) Expenses for care, treatment and hospitalization incident to the injury resulting in death.
(2) Compensation for pain and suffering of decedent.
(3) Reasonable funeral expenses.
(4) Present monetary value of decedent to persons entitled to receive the damages recovered, including, but not limited to:
    (a) Net income of decedent
    (b) Services, protection, care and assistance of the decedent
    (c) Society, companionship, comfort, guidance, kindly offices and advice.
(5) Punitive damages decedent could have recovered had he survived also through maliciousness, wilful or wanton injury, or gross negligence.
(6) Nominal damages where jury so finds.

North Dakota—N.D. CENT. CODE § 32-21-02.
The jury shall give such damages as it finds proportionate to the injury to the persons entitled to the recovery.
Wilbert v. Nielsen, 146 N.W.2d 26 (N.D. 1966).
Pecuniary loss plus loss of contributions after majority.
Scherer v. Schloberg, 18 N.D. 421, 122 N.W. 1000 (1909).
Loss of services during minority.

Ohio—OHIO REV. CODE § 2125.02.
The jury may give such damages as it thinks proportioned to the pecuniary injury resulting from such death to the persons, respectively, for whose benefit the action was brought, and the reasonable funeral expenses incurred . . . .
Murray v. Long, 256 N.E.2d 225 (Ct. App. Ohio 1968).
Administrator brought action for wrongful death of deceased in behalf of his

mother and father. Held: where deceased before his death made no systematic and consistent contribution to support of his father and was making no contribution to mother, who had remarried, and there was no evidence that mother or father could reasonably anticipate contributions in the future, and it was quite unlikely that they would inherit from deceased, and there was no evidence that deceased had or would likely have in the future an estate of any consequence, there could be no recovery for wrongful death. Verdict of $25,000—remittitur $12,500, but rev'd and remanded with instructions to enter judgment for defendant.

Wasilko v. United States, 300 F. Supp. 574 (N.D. Ohio 1967).

Action against United States for deaths of plaintiff's husband and son . . . held that under Ohio law, elements in determining compensatory damages for wrongful death of child are chance of future support by child of parent, age, sex and physical and mental condition of parents . . . loss of services which child might render parent, but only such as might be rendered up until age 21 . . . not entitled to damages for loss of possible inheritance, in view of probability that son would have outlived mother. Award $22,000 for death of 10-year-old son.

Oklahoma—OKLA. STAT. tit. 12, § 1053.

"Damages." The Constitution of Oklahoma provides that the amount of damages recoverable for wrongful death shall never be subject to any statutory limitation . . .

Parkhill Trucking Co. v. Hopper, 208 Okla. 429, 256 P.2d 810 (1953).

Loss of services during minority.

In part benefits parents might have reasonably expected after minority terminated.

Oregon—ORE. REV. STAT. § 30.020.

". . . such damages may be awarded as, in all the circumstances of the case, may be just, and will reasonably and fairly compensate the spouse, dependents or estate for the actual pecuniary loss, if any, to such spouse, dependents or estate and for all reasonable expenses paid or incurred for funeral, burial, doctor, hospital or nursing services for the decedent."

Escobedo v. Ward, 464 P.2d 698 (S. Ct. Oregon 1970).

Action by father to recover for wrongful death of his minor child, held that failure to inform jury that in determining value of child's services during his minority there should be deducted cost of rearing child during same period was reversible error (7-year-old son killed in earth slide while playing in gravel pit). Rev. and remanded.

Pennsylvania—PA. STAT. § 1602.

"Damages for the death" . . . medical, surgical and nursing care of decedent and such other expenses . . . as could have been recovered in an action by the injured person during his lifetime. Plaintiff may also recover the reasonable

funeral expenses if plaintiff has paid or incurred such expenses. If decedent is not survived by a spouse, child or parent, decedent's personal representative may recover the reasonable hospital, nursing, medical and funeral expenses and expenses of administration necessitated by the fatal injuries and death.
Dugas v. National Aircraft Corp., 310 F. Supp. 21 (E.D. Penn. 1970).
Action against pilot and owner of airplane for death of passengers in crash during trip over international waters . . . held that under Death on the High Seas Act, administrators of the estates of deceased passengers, both 16-year-old girls, were entitled to recover damages for period after girls would have reached their majorities, but were not entitled to recover for loss of girls' society and companionship or for loss of parents' investment in the girls. (Under this Act, $21,000 went to one estate and $17,000 to the other.)

Puerto Rico—P.R. LAWS ANN. § 311.
Such damages may be given as under all the circumstances of the case may be just.
Perianes v. Valdes, 4 Puerto Rico F. 126 (1908).
In allowing an award for loss of filial care and attention, some decisions characterize this element of damages as the value of the child's attention to his family obligations, including acts of kindness and faithfulness.

Rhode Island—R. I. GEN. LAWS ANN. § 10-7-1.
"Liable to an action for damages" . . . Whenever any person or corporation is found liable, damages shall not be less than $5,000.
Gill v. Laguerre, 51 R.I. 158, 152 A. 795 (1931).
In an action for the benefit of the estate of the deceased minor, an element of the recovery is the value of the minor's services from the date he would have reached his majority to the end of his period of life expectancy, less his reasonable expenses.

South Carolina—S.C. CODE ANN., § 10-1954.
Jury may give such damages, including exemplary damages, when the wrongful act, neglect or default was the result of recklessness, willfulness or malice, as they may think proportioned to the injury to the parties respectively for whose benefit the action is brought. Damages may include reasonable funeral expenses, if such expenses are not sought in a survival action.

South Dakota—S.D. CODE § 37.2203.
". . . the jury may give such damages as they may think proportionate to the pecuniary injury resulting from such death to the persons respectively for whose benefit such action shall be brought."
McCleod v. Tri-State Milling Co., 71 S.D. 362, 24 N.W.2d 485 (1946).
In part benefits parents reasonably expected after minority terminated. Age,

physical and mental condition and characteristics of the decedent just prior to his fatal injury may be considered by jury in regard to decedent's disposition to aid parents.

Tennessee—TENN. CODE ANN., § 20-614.

Plaintiff shall have the right to recover for the mental and physical suffering, loss of time and necessary expenses resulting to decedent from his personal injuries, plus the damages resulting to the parties for whose benefit the action survives because of the death.

Texas—TEX. REV. CIV. ST. ANN., at art. 4671 and art. 4673.

Jury may give such damages as they think proportionate to the injury resulting from such death. When death is caused by the wilful act or omission, or the gross negligence of the defendant, exemplary as well as actual damages may be recovered.

Smith v. Red Arrow Freight Lines, Inc., 460 S.W.2d 257 (Tex. Civ. App. 1970).

It was error to limit mother's recovery for death of sixteen-year-old son to medical and funeral expenses, where there was undisputed evidence that he worked in grocery store after school and gave mother money and occasionally took groceries home.

$1,016.35 verdict—remanded.

(loss of services during minority and financial contributions parent could reasonably expect to receive from child after reaching majority).

Hernandez v. United States, 313 F. Supp. 349 (D.C. Texas 1969).

Under Texas law, where suit by parent for death of minor child, parent may recover in addition to actual, reasonable expenses for hospital, medical and burial expenses, such amount as may be necessary to compensate him for loss of child's services during minority and for financial contributions parent could reasonably expect to receive from child after reaching majority.

$15,000 for use and benefit of boy.

$2,200 hospital and medical expenses.

Utah—UTAH CODE ANN. § 78-11-7.

Such damages may be given as under all the circumstances of the case may be just. The Utah Constitution provides: the amount recoverable shall not be subject to any statutory limitation, except where compensation for injuries resulting in death is provided by law.

Van Cleve v. Lynch, 109 Utah 149, 166 P.2d 244 (1946).

In part on benefits parents might have expected after minority terminated.

Vermont—VT. STAT. ANN. § 1492.

Court or jury . . . may give such damages as are just with reference to the pecuniary injuries to the surviving spouse and next of kin.

Allen v. Moore, 109 Vt. 405, 199 A. 257 (1938).

Damages may be measured by the experience and judgment of the jury, enlightened by a knowledge of the age, sex and physical and mental characteristics of the child in regard to probable contributions had the child lived.
Butterfield v. Community Light & Power Co., 115 Vt. 23, 49 A.2d 415 (1946).
In part, benefit expected by parents after minority terminated.

Virginia—VA. CODE ANN., § 8-363.
". . . such damages for solace as to it may seem fair and just, not exceeding twenty-five thousand dollars . . . actual funeral expenses, hospital, medical, ambulance. In addition . . . the jury may award such further damages, not exceeding fifty thousand dollars, as shall equal the financial or pecuniary loss sustained by the dependent or dependents of such decedent . . ."
Anderson v. Hygeir Hotel Co., 92 Va. 687, 24 S.E. 269 (1896).
An award to the parents for the death of a minor child may be based in part on the loss of the child's society and its care and attention . . .

Virgin Islands—VIRGIN ISLANDS CODE ch. 5, § 75.
Such damages may be given as under all the circumstances of the case may be just, but shall not include damages recoverable under the survival statutes . . . shall not include damages for pain, suffering or disfigurement or punitive or exemplary damages or compensation for loss of prospective profits or earnings after the death.

Washington—WASH. REV. CODE ANN. § 4.24.010.
". . . in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just."
Lochardt v. Besel, 426 P.2d 605 (S. Ct. Wash. 1967).
Wrongful death of 17-year-old boy by father held measure of damages under wrongful death statute should be extended to include loss of companionship of minor child during his minority without giving any consideration for grief, mental anguish or suffering of parents by reason of such child's wrongful death.
$6,363.07 verd. rev'd & remanded.

West Virginia—W. VA. CODE ANN., § 5475 (6)-55-7-6.
". . . fair and just, not exceeding ten thousand dollars, and the amount recovered shall be distributed . . . In addition, the jury may award such further damages, not exceeding the sum of one hundred thousand dollars, as shall equal the financial or pecuniary loss sustained by the dependent. Also, reasonable funeral expenses and . . . reasonable hospital, medical and other expenses."

Panagapoulous v. Martin, 295 F. Supp. 220 (S.D. West Va. 1969).
Proceeding on motion to dismiss action for wrongful death of a stillborn child held that action could be maintained but with damages limited to $10,000 for sorrow, distress and bereavement. (Death by cerebral hemorrhage from auto accident.)

Wisconsin—WIS. STAT. ANN. § 895.04.
Judgment for damages for pecuniary injury from wrongful death. Damages for loss of society and companionship may be awarded to spouse, unemancipated or dependent children or parents of deceased.
If personal representative brings action, . . . funeral expenses . . . not exceeding $2,000.

Wyoming—WYO. STAT. ANN., § 1-1-66.
". . . fair and just. Court or jury may consider, as elements of damage, the amount the survivors failed or will fail, by reason of the death, to receive out of decedent's earnings, any other pecuniary loss directly and proximately sustained by the survivors by reason of such death, including funeral expenses; . . . court or jury may add . . . reasonable sum for the loss of the comfort, care, advice and society of the decedent." The Constitution of Wyoming prohibits any statutory limitations on the amount of damages recoverable.

APPENDIX B

WRONGFUL DEATH ACT

SUGGESTED DAMAGE PROVISIONS

10-7-1. *Pecuniary Damages—How Determined.* Pecuniary damages to the beneficiaries described under 10-7-2 of this Title and recoverable by such persons shall be ascertained as follows:

1. Determine the gross amount of the decedent's prospective income or earnings over the remainder of his life expectancy, including therein all estimated income he would probably have earned by his own exertions, both physical and mental.

2. Deduct therefrom the estimated personal expenses that the decedent would probably have incurred for himself, exclusive of any of his dependents, over the course of his life expectancy.

3. Reduce the remainder thus ascertained to its present value as of the date of the award. In determining said award, evidence shall be admissible concerning economic trends, including but not limited to projected purchasing power of money, inflation and projected increase or decrease in the costs of living.

10-7-1.2. *Additional Damages Recoverable by Applicable Beneficiaries—Special Findings.* In addition to the pecuniary damages described in 10-7-1.1,

the following damages shall, in any such action, be recoverable by and severally awarded to or for the benefit of the applicable beneficiaries as described in 10-7-2:

1. Mental anguish, suffering and bereavement of such beneficiaries.

2. Loss of services, protection, care and assistance of the decedent, whether voluntary or obligatory, to such beneficiaries.

3. Loss of society, consortium, comfort, guidance, kindly offices and advice of the decedent to such beneficiaries.

In awarding damages under this Section 10-7-1.2, the trier of fact will make special findings of the amount of such damages to be awarded to each such applicable beneficiary which it finds entitled thereto.

10-7-1.3. *Pain and Suffering, Punitive Damages, Funeral and Burial Expenses Recoverable.* In addition to the foregoing damages, the beneficiaries described under 10-7-2 shall have the right to recover damages for the pain and suffering of the decedent resulting from such wrongful act, and:

1. Punitive damages if such wrongful act, negligence or default was willful, malicious, wanton or gross negligence.

2. Funeral and burial expenses of the decedent resulting from the wrongful death.

10-7-2. *Action by Executor or Administrator—Persons Benefitted—Commencement of Action—Minimum Recovery.* Every such action shall be brought by and in the name of the executor or administrator of such deceased person, whether appointed or qualified within or without the state, and the amounts recovered pursuant to 10-7-1.1 and 10-7-1.3 in every such action shall one-half (½) thereof go to the husband or widow, and one-half (½) thereof to the children of the deceased, and if there be no children the whole shall go to the husband or widow, and, if there be no husband or widow, to the next of kin, in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate. Provided, that every such action shall be commenced within two (2) years after the death of such person; and provided, further, whenever any person or corporation is found liable under Section 10-7-1 to 10-7-4, inclusive, he or it shall be liable in damages in the sum of not less than fifteen thousand dollars ($15,000).