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The Value of a Child

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I. The History of Wrongful Death

The early English common law afforded no remedy in civil courts for damages sustained by the wrongful death of a human being.[1] However, a method of redress was available under the common law which was called the "appeal."[2] Such an "appeal" consisted of an accusation against one who had committed a heinous crime, and a demand for punishment for the injury suffered, rather than for the offense against the public.[3] This form of redress was the offspring of the ancient doctrine of "wergild" under which pecuniary satisfaction was tendered to the injured party of his relations as expiation for enormous offenses.[4] It has been argued that the later enactments of Wrongful Death Statutes are actually the reappearance of the old remedy of "wergild," despite the fact that courts have stated that such statutes create a new right not recognized at common law.[5] In the following examination of the current treatment of damages for wrongful death, it is valuable to remember this ancient history and to consider whether courts are indeed perpetuating "wergild" to some extent.

Lord Campbell's Act[6]

In 1846, Lord Campbell's Act was enacted in Britain. The act recognized the wrongful killing of a human being as a tort, and allowed the decedent's beneficiaries to recover such dam-

1. " 'At common law there was no right of action for death caused by wrongful act.' *Dennis v. A.C.L.RR. Co.*, 70 S.C. 254, 49 S. E. 869, 870. . . . There are numerous other South Carolina cases sustaining the foregoing statement. Indeed, it is now elementary in this as well as other jurisdictions. 'Although the rule has been criticized as being technical and without the support of sound principle, it is too firmly established to be longer open to question.' 17 C.J. 1181." *Tollerson v. Atlantic C.L.RR. Co.*, 188 S. C. 67, 69, 198 S.E. 164, 165 (1936).

2. Annot., 74 A.L.R., 11, 13 (1931) *citing Underwood v. Gulf Ref. Co.*, 128 La. 968, 55 So. 641 (1911).

3. *Id.*

4. *Id* at 14.

5. *Id. citing* McKay v. New Eng. Dredging Co., 92 Me. 454, 43 A. 29 (1899).

6. 9 & 10 Vict., ch. 93 (1846).

ages as the jury determined had resulted.[7] The present-day wrongful death statutes embody Lord Campbell's Act provisions insofar as the right to maintain such an action is concerned.[8] The recognized interpretation of Lord Campbell's Act and its offspring is that such statutes create a new cause of action "beyond that which the deceased would have had, had he survived."[9] From this matrix, varying interpretations of the measure for damages evolved. The history of legal actions subsequent to the enactment of Lord Campbell's Act sufficiently explains why the question of damages has been and still is a perplexing one.

In one of the first cases decided under Lord Campbell's Act, *Armsworth v. South Eastern Railroad Co.*, [10] the British court stated that one reason such actions had been prohibited previously was due to the concensus of opinion that it would be impossible to determine the value of a human life. The court then stated that the question of the amount of damages would long be a source of consternation to both juries and judges until some definite principles were established. The court instructed the jury to grant what it considered to be a fair compensation.

It was in the cases that followed, particularly *Blake v. Midland Railroad Co.*,[11] that the recovery under Lord Campbell's Act became confined to compensation for the amount of pecuniary loss suffered by the beneficiaries. This type of loss was interpreted to include the amount of benefit which such beneficiaries could reasonably have expected to receive from the deceased. This interpretation permitted the awarding of a substantial recovery for the death of a child.[12]

In general, there are three major approaches to the recovery of damages under wrongful death statutes in the United States. The first of these, adhered to by few states, is

7. 22 AM. JUR. 2d *Death* §2 (1965).

8. *Id.*

9. Annot., 74 A.L.R. 11, 14 (1931).

10. 11 JUR. (Eng.) 758 (1847), discussed in Annot., 74 A.L.R. 11, 14-15 (1931).

11. 18 Q.B. 93, 118 Eng. Reprint 35 (1852), discussed in Annot., 74 A.L.R. 11, 15 (1931).

12. Bramall v. Lees, 29 L.T. (Eng.) 111 (1857); Dalton v. South Eastern R. Co., 4 C.B.N.S. 296, 140 Eng. Reprint 1098 (1858), discussed in Annot., 74 A.L.R. 11, 15 (1931).

the punitive approach to damages.[13] Under such a statute, damages are awarded in proportion to the degree of culpability inherent in the wrongful act of the defendant.[14]

The second, and majority approach is the pecuniary loss theory.[15] Under this theory, recovery by the beneficiaries is limited to the probable amount of pecuniary loss suffered as a result of the death of their relative. In determining this amount, it is generally held that the following elements may be evaluated:

> [B]roadly speaking, in determining the amount of damages recoverable for wrongful death, it is proper to take into consideration such factors, varying in individual cases, as the victim's life expectancy, character, health, habits, talents, prospects, prior earnings, probable future earnings, needs of and contributions to dependents, and current returns on investments.[16]

The third approach, to which South Carolina adheres, provides for recovery of pecuniary loss but also permits the recovery of damages for loss of companionship, mental suffering, and other intangible injuries.[17]

This brief examination of the history of wrongful death statutes and the current varieties of such statutes is a necessary foundation for the examination of recoveries for the wrongful death of minor children, since few states have special statutes dealing exclusively with this area.[18] It is also valuable as illustrative of the inherent speculative nature of damages in all wrongful death actions before focusing on the minor child area in which such speculation is necessarily even

13. 22 AM. JUR. 2d *Death* §2 (1965).

14. *Id.*

15. 22 AM. JUR. 2d *Death* §118 (1965); 25A C.J.S. *Death* §95 (1966).

16. 22 AM. JUR. 2d *Death* §140 (1965).

17. *Id* at §§104, 107, 126, 127. *See* Brooks v. U.S., 273 F. Supp. 619 (D.S.C. 1964).

18. For examples of special statutes for the wrongful death of a minor child, see FLA. STAT. ANN. §768.03 (1964) which provides that the father of the child, or if he is dead, the mother may recover "not only for the loss of services of such minor child, but in addition thereto, such sum for the mental pain and suffering of the parent (or both parents) if they survive, as the jury may assess." Indiana, likewise has a separate statutory provision for the maintenance of an action for the wrongful death of a child. BURNS IND. STAT. ANN. §2-217 (Supp. 1962). But, being a pecuniary loss jurisdiction, damages are limited to the value of the child's services until he would have reached his majority, less the costs of support and maintenance during that period. *See,* Jones v. Dreury's Ltd., 149 F. 2d 250 (7th Cir. 1945).

more prevalent. Of the three approaches to damages discussed, the pecuniary loss and the pecuniary loss plus intangible injuries approaches are by far the most widely used and shall be the subjects of discussion.

II. The Pecuniary Loss Approach to Damages

In a jurisdiction utilizing the pecuniary loss approach to damages, either because of specific statutory language or because of judicial interpretation, the often enunciated measure for such damages is the value of the child's services to his parents or other persons entitled to such services until he reaches his majority, less the probable expense that would be incurred in rearing and educating the child.[19] The majority of States also permit recovery for the value of benefits which, from the evidence, the parents or other beneficiaries could reasonably have expected to receive from the child after he attained his majority.[20]

A Pennsylvania district court held that the following elements were properly considered in determining the measure of pecuniary loss: the child's age, health, mental condition and probable earning capability as reflected by the occupation and economic status of the parents.[21] Another federal court in an action for wrongful death under Nebraska law, allowed the jury to consider the condition of the parties involved, including health, physical condition, income and life expectancy of the parents and all of the other related circumstances revealed by the evidence.[22] Another case held that the following aspects of a child's life were proper elements of consideration:

> In the case of the death of a minor, its age and sex have been said to be a proper consideration. And in the case of the wrongful death of a child old enough to have established a character, elements that the courts have recognized as proper for consideration in assessing the beneficiary's loss include the decedent's habits of industry, sobriety, kindliness, tractability, and obedience.[23]

It is generally the rule in pecuniary loss jurisdictions that when a minor is killed, a presumption of pecuniary loss

19. Annot., 14 A.L.R. 2d 485 (1950), listing the following States as adherents to this approach: Ark., Cal., Colo., Hawaii, Ind., Iowa, Kan., Maine, Md., Mich., Miss., Missouri, Mont., Neb., N.J., N.D., Penn., Texas., and Wash.

20. Annot., 14 A.L.R. 2d 485, 506 (1950).

21. Palmer v. Moren, 44 F. Supp. 704 (D. Pa. 1942).

22. Wright v. Hoover, 329 F. 2d 72 (8th Cir. 1964).

23. 22 Am. Jur. 2d *Death* §147 (1965).

arises.[24] In at least one jurisdiction, Illinois, this presumption alone is sufficient to warrant a substantial recovery.[25]

The obvious failing of the pecuniary loss of "balance sheet" method of damages, in its strict form, is the fact that the cost of rearing and educating a child greatly exceeds the value which could be assigned to the services such a child could render. While this has not prevented the awarding of damages to parents of the deceased, it has obviously been conducive to relatively small awards. If nothing else, it has surely misdirected the attention of the jury to a relatively insignificant aspect of the parent-child relationship. This approach ignores the major injury suffered, which is obviously emotional, even thought it would be quixotic to believe that regardless of such instructions, a jury would not consider the sentimental and emotional aspects of such a case. Understandably, the pecuniary loss approach has received criticism.

Wycko v. Gnodtke[26]

In 1960 the Michigan Supreme Court's growing dissatisfaction with the pecuniary loss approach to damages for the wrongful death of a child reached maturity in *Wycko v. Gnodtke*. In this decision the court presented an incisive analysis of the historical milieu in which Lord Campbell's Act was enacted and interpreted:

> The rulings reflect the philosophy of the times, its ideals, and its social conditions. . . . It was an era when ample work could be found for the agile bodies and nimble fingers of small children. . . . In 1816, the apprenticeship of parish children under the age of nine was forbidden, but the underground employment of children under ten was not forbidden until 1843, just five years before the passage of the progenitor of our statute.
>
> This, then, was the day from which our precedents come, a day when employment of children of tender years was the accepted practice and ther (sic) pecuniary contributions to the family both substantial and provable. It is not surprising that the courts of such a society should have read into the statutory words "such damages as they [the jury] may think proportional to the injury resulting from such death" not only the requirement of a pecuniary loss, but, moreover, a pecuniary loss established by a wage benefit-less-cost measure of damages. . . . Loss meant only money loss, and money loss from the death of a child

24. 25A C.J.S. *Death* §118 (1966); *22* AM. JUR. 2d *Death* §250 (1965).

25. Pavalon, *Damages—Wrongful Death of Children*, 50 CHI. B. REC. 84 (1968). The writer states that Illinois does not, however, tell the jury to deduct the cost of rearing and educating the child.

26. 361 Mich. 331, 105 N.W. 2d 118 (1960).

> meant only his lost wages. All else was imaginary. The only reality was the King's shilling.[27]

Condemning this method of evaluating damages as obviously out of step with modern sociological conditions, the Michigan Court rejected the child-labor measure of pecuniary loss. In its place, the court substituted what has been labeled the "lost investment"[28] test for pecuniary loss:

> The use of material analogies may be helpful and inoffensive. Just as with respect to a manufacturing plant, or industrial machine, value involves the costs of acquisition, emplacement, upkeep, maintenance, service, repair and renovation, so, in our context, we must consider the expenses of birth, of food, of clothing, of medicines, of instruction, of nurture and shelter. Moreover, just as an item of machinery forming part of a functioning industrial plant has a value over and above that of a similar item in a showroom, awaiting purchase, so an individual member of a family has a value to others as part of a functioning social and economic unit. This value is the value of mutual society and protection, in a word, companionship. The human companionship thus afforded has a definite, substantial, and ascertainable pecuniary value and its loss forms a part of the "value" of the life we seek to ascertain. We are, it will be noted, restricting the losses to pecuniary losses, the actual money value of the life of the child, not the sorrow and anguish caused by its death.[29]

While forbidding recovery for sorrow and anguish, the court recognized that such injuries were capable of pecuniary evaluation, but could not be recovered in Michigan until the legislature permitted the recovery of these elements of damage.[30]

The *Wycko* decision has become the model for reformation in pecuniary loss jurisdictions.[31] In recognizing that a child is a "blessed" expense and permitting recovery for this expense, the court has placed the jury evaluation of damages on a more tangible basis than the child-labor standard. Futhermore, in permitting recovery for loss of companionship, which

27. *Id* at 335-37, 105 N.W. 2d at 120-21.

28. Note, *Damage Recoverable for Wrongful Death of Minor Children*, 39 N.D.L. REV. 198 (1963).

29. Wycko v. Gnodtke, 361 Mich. 331, 339-40, 105 N.W. 2d 118, 122-23 (1960).

30. *Id.* at 340, 105 N.W. 2d at 123.

31. *See* Forrado v. Jill Bros., 249 N.Y.S. 2d 833 (Sup. Ct. 1964) in which a New York court advocated revision of that State's wrongful death act to conform to *Wycko*. *See also* Note, *Damages Recoverable for Wrongful Death of Minor Children*, 39 N.D.L. REV. 198 (1963); Pavalon, *Damages—Wrongful Death of Children*, 50 CHI. B. REC. 84 (1968).

the court states can be valued on the "open market,"[32] the jury is able to consider the emotional aspects of the injury, at least indirectly. The element of companionship is primarily an intangible one and, to a great degree, speculative, but the "lost investment" elements are much more definite and economically ascertainable measures of damages than the old wage benefit-less-rearing cost test, and obviously, is more conducive to the awarding of higher verdicts than the old test.

III. THE SOUTH CAROLINA APPROACH TO DAMAGES

The South Carolina statutes dealing with wrongful death provide the following guidelines to measure damages in such cases:

> In every such action the jury may give such damages, including exemplary damages when such wrongful act, neglect or default was the result of recklessness, wilfulness or malice, as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought.[33]

This provision has been interpreted as not restricting recovery strictly to pecuniary losses:

> [I]t will be noticed that our statute, unlike many others of a similar character, does not speak of *pecuniary* loss or injury which might possibly tend to show the injury for which damages are allowed, was confined to the deprivation of some *legal* claim susceptible of measurement by a pecuniary standard, but its language is broader . . . and . . . it is quite certain that the beneficiaries of the action may sustain injury by the death of a relative over and above the loss of any *legal* claim which they have upon such relative.[34]

While South Carolina's statutory provisions are similar to those of England and other States which limit recovery to pecuniary loss,[35] the South Carolina case law has expanded the elements of injury which are compensable. In *Mishoe v. Atlantic Coast Line Railroad Company*,[36] the South Carolina Supreme Court listed the following as general elements of damage recoverable in a wrongful death action:

32. Wycko v. Gnodtke, 361 Mich. 331, 340, 105 N.W. 2d 118, 123 (1960).

33. S. C. CODE ANN. §10-1954 (1962).

34. Petrie v. Columbia & G. R. R. Co., 29 S. C. 303, 320, 7 S. E. 515, 520 (1888) (emphasis added).

35. Annot., 74 A.L.R. 11, 39 (1931); Annot., 14 A.L.R. 2d 485, 493-94 (1950).

36. 186 S. C. 402, 197 S.E. 97 (1938).

> (1) pecuniary loss, (2) mental shock and suffering, (3) wounded feelings, (4) grief and sorrow, (5) loss of companionship, and (6) deprivation of the use and comfort of the intestate's society, the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries, in addition to the loss of his ability to earn money for the support, maintenance, care and protection of his wife and children, and for the education and training of the latter.[37]

Pecuniary loss is but one element of injury which can be redressed and is not essential to the recovery of damages for the other elements listed.[38]

Where pecuniary loss becomes compensable either by a presumption or by actual proof of such loss, the controlling considerations in valuing this element of damage have been described as follows in *Brooks v. United States*:[39]

> Broadly stated, the controlling considerations in fixing "pecuniary loss" are (1) the prospective earnings of the decedent subsequent to death, (2) calculated on the basis of his "work expectancy", and (3) the extent to which his statutory beneficiaries "might logically and reasonably have been expected to share in "such prospective earnings. . . . And although, in the case of a widow and surviving children, there is a presumption of "pecuniary loss" . . . the actual determination of the "loss" should be established through "facts and data" duly proven, sufficient to furnish "a basis from which" the jury or Court "may approximate the proper amount with reasonable certainty."[40]

As stated in the quotation above, the court will presume a pecuniary loss in certain wrongful death cases. But in applying the wrongful death statute to the death of a minor child this presumption does not arise.[41] The basis for the refusal to presume a pecuniary loss is the rudimentary observation that few children, if any, actually contribute substantial financial support to any family:

> Of course, it is presumed that the dependents of a family breadwinner have suffered pecuniary loss because of his death, but the converse of that proposition does not necessarily follow in this day after the aboli-

37. *Id* at 419, 197 S. E. at 104-105 (1938); *See also* Brooks v. U.S., 273 F. Supp. 619 (D. S.C. 1967).

38. Barksdale v. Seaboard Air Line Ry. 76 S. C. 183, 56 S. E. 906, 908 (1907).

39. 273 F. Supp. 619 (D. S. C. 1967).

40. *Id.* at 626.

41. *See* Patrick v. U. S., 316 F. 2d 9 (4th Cir. 1963); Gregg v. Coleman, 235 F. Supp. 237 (D. S. C. 1964); Zorn v. Crawford, 252 S. C. 127, 165 S.E. 2d 640 (1969); Mock v. Atlantic C.L.R.R. Co., 227 S. C. 245, 87 S. E. 2d 830 (1955).

> tion of a child labor and the substantial economic emanicpation of those minors, approaching majority, who do work.[42]

How pecuniary loss can be proven in such an action is not clear from South Carolina case law. It seems that if some sort of pecuniary contribution to a family can be shown, recovery for pecuniary loss would be proper. But such contribution would probably have to be in the form of outside or extra-family employment, and the sum so earned would probably have to be fairly substantial. The *Brooks* test for evaluating pecuniary loss is inapplicable since as a general rule in wrongful death actions for minor children, damages are recoverable only for the period of the child's minority and for such benefits after minority as are probable and reasonably certain from the evidence.[43] Although there is no South Carolina case directly on this point, it seems probable that this view would be followed since the South Carolina statutory law is intended to redress the relatives or heirs at law of the deceased for the loss they suffered from the death.[44] In the case of a child, relatives could normally expect to receive pecuniary aid, if any, only during the child's minority.

If no pecuniary loss can be shown, the elements of damages are limited to "mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship and deprivation of the use and comfort of intestate's society. . . ."[45] In addition, the funeral costs are compensable in such an action.[46]

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42. Patrick v. U. S., 316 F. 2d 9, 11 (4th Cir. 1963).

43. 25 A. C.J.S. *Death* §103(b) (1966). One case decided in Hawaii, in 1961 permitted recovery for the likely earnings of a four year old boy during his life expectancy. This figure was to be diminished by the probable cost of his *own* maintenance and the provisions he would have made for his family and dependents during his life. However, this award was made under the survival statute of that State which had been interpreted to permit such a recovery by parents of a child. *See* Rohlfing v. Moses Akiona, Ltd., 369 P. 2d 96 (1961).

44. S. C. CODE ANN. §10-1952 (1962).

45. Zorn v. Crawford, 252 S. C. 127, 165 S. E. 2d 640 (1969); Mock v. Atlantic C.L.R.R. Co., 227 S. C. 245, 87 S. E. 2d 830 (1955); Gomillion v. Forsythe, 218 S. C. 211, 65 S. E. 2d 297 (1950).

46. S. C. CODE ANN. §10-209.1 (Supp. 1970). Apparently, even prior to the enactment of this statuory provision, *Petrie v. Columbia & G.R.R. Co.*, 29 S. C. 303, 7 S. E. 515 (1888) provided authority for the recovery of such costs. In Gomillion v. Forsythe, 218 S. C. 211, 226, 62 S. E. 2d 297, 303 (1950), the court stated,

> [T]here is considerable conflict among the authorities in other States as to whether funeral expenses really constitute a proper element of damages in such a case. The law, however is settled in this State that where such expenses are paid by the beneficiary they are a proper element of damages. *Petrie v. Columbia & G.R.R. Co.* . . . It may also be mentioned that ordinarily funeral expenses are not involved in a Lord Campbell's Act case, being usually payable out of the estate of the decedent.

In allowing recovery for sentimental losses, South Carolina has taken the minority view.[47] Moreover, there is considerable conflict of opinion between jurisdictions regarding the recovery of damages for the loss of companionship.[48] It is apparent that, aside from the factor of presuming no pecuniary loss, South Carolina takes a liberal view toward the compensable elements of damages in wrongful death actions involving minor children. This does not mean that verdicts rendered are necessarily higher, but it does allow the jury or judge greater leeway in arriving at a dollar amount.

In evaluating the South Carolina approach to damages, the judicial comments in reported cases provide the most useful critiques. In the 1955 South Carolina case of *Mock v. Atlantic Coast Line Railroad Company*,[49] the father of a twelve year old boy was awarded $50,000 actual damages and $15,000 punitive damages. The large amount of the verdict led to a lengthy discussion by the court of the propriety of granting this large sum. The majority felt that the court should overturn jury verdicts only in extraordinary situations:

> The unquestioned power of this court . . . to strike down the judgment of the lower court has been, and should continue to be exercised only in those rare instances in which the amount of the verdict is so shockingly excessive as manifestly to show that the jury was actuated by passion, partiality, prejudice or corruption. Proper application of this power is always difficult, because . . . there is no fixed standard by which the court may ascertain and characterize the excessiveness. . . .[50]

The majority pointed to a case in which a four year old child's parents were awarded $30,000 actual damages, which verdict was not attacked on appeal.[51] In refusing to grant a new trial,

47. Annot., 14 A.L.R. 2d 485, 495-96 (1950). The only other States permitting recovery for sentimental losses are Florida, Louisiana, Virginia, and West Virginia.

48. *Id.* at 498-99.

49. 227 S. C. 245, 87 S. E. 830 (1955).

50. *Id* at 266, 87 S. E. 2d at 839.

51. *Id.* at 267, 87 S. E. 2d at 840, *citing* Hicklin v. Jeff Hunt Mach. Co., 226 S. C. 484, 85 S. E. 2d 739 (1955).

the court discussed the basic difficulty in determining excessiveness of verdicts in actions for the wrongful death of a child:

> It is inherently difficult [to determine excessiveness], where as in the case at bar, there is no tangible factor of damage, such as earning capacity, and the standard of recovery must be measured only by such imponderables as mental anguish, grief and loss of companionship.[52]

The dissenting opinion in the *Mock* case, felt that the verdict was grossly disproportionate to the injury and relied on two legal annotations to support this view.[53] Noting that the average vedict in similar cases tried in other jurisdictions was $10,000 or less, and that no verdict of as much as $50,000 could be found in these annotations, the dissenting opinion believed that a clear abuse of discretion was evidenced by the verdict.[54]

In a later case, *Elliott v. Black River Electrical Co-op*,[55] involving the wrongful death of a farmer who was electrocuted by the defendant's power lines, a verdict of $106,100 actual damages and $5,000 punitive damages was returned. The court again expressed its concern with such large awards:

> The growing tendency in recent years toward verdicts in death cases, which although not manifestly the result of passion, prejudice or other improper motive, are nevertheless so large as to indicate, even in an inflated economy, undue liberality on the part of the jury, has given this court much concern; but we have no power to reduce such verdicts. If relief from them is to be provided, it must come from: (1) the juries themselves, upon whose shoulders rests, primarily, responsibility for them; (2) the trial judges in whom alone resides the discretionary power to reduce such a verdict by ordering a new trial *nisi;* or (3) the General Assembly, which alone has power to amend the present statute by limiting recovery to pecuniary loss, by eliminating intangible and imponderable factors such as grief, etc., or by otherwise establishing a reasonably calculable measure of damages for wrongful death.[56]

52. Mock v. Atlantic C.L.R.R. Co., 227 S. C. 245, 267, 87 S. E. 2d 830, 840 (1955); *but see* Zorn v. Crawford, 252 S. C. 127, 165 S. E. 2d 640 (1969) in which an award of $250,000 actual damages for the death of a fifteen year old girl was set aside.

53. Mock v. Atlantic C.L.R.R. Co., 227 S. C. 245, 262, 87 S. E. 2d 830, 837 (1955) *citing* Annot, 48 A.L.R. 837 (1927), and Annot., 14 A.L.R. 2d 550 (1950).

54. *Id.*

55. 233 S. C. 233, 104 S. E. 2d 357 (1958).

56. *Id.* at 265-66, 104 S. E. 2d at 374.

The frustration evinced by these judicial remarks is due partly to the inherent speculative nature of damages in all wrongful death actions, but is also partly due to the liberal damages standards in South Carolina which encourage even greater speculation. Even in trials without juries, judges themselves have difficulty in evaluating the amount of damages. One court noted that verdicts rendered under South Carolina law by a court without a jury ranged from "a low of $6,500 for the death of a 3 year old boy to a high of $50,000 for the death of a 12 year old boy.[57] This court resorted to comparing the facts of the case at bar to a previously decided case on the basis of the age of the decedent, the accident causing death, and the applicable law involved, and rendered a verdict of exactly one half the size of the award in the earlier case, reasoning that only one parent had suffered in the case at the bar, while two had suffered in the earlier case.[58] The very least that can be said about such a method of determining damages is that it is unusual.

IV. CONCLUSION

Comparing South Carolina's method of measuring damages with the pecuniary loss, wage benefit-less-rearing costs approach, the former is bogged down in a morass of intangible elements which create a situation in which too much speculation is permitted, while the latter is confined too greatly by an unworkable, anachronistic formula. *Wycko* has been acclaimed by pecuniary loss jurisdictions as a harbinger of the future method of measuring damages in children's wrongful death actions.[59] *Wycko* should not be an example for pecuniary loss jurisdictions alone, but should also be a guide for jurisdictions, like South Carolina, where the judiciary feels unable to curb excessive verdicts.

The *Wycko* "lost investment" test has the effect of facilitating larger verdicts in pecuniary loss jurisdictions, partially because the jury does not have to deduct rearing costs and partially because the element of loss of companionship is redressable. In South Carolina, *Wycko* would create a tangible

57. Gregg v. Coleman, 235 F. Supp. 237, 241 (D. S. C. 1964).

58. *Id. citing* Patrick v. U. S., 316 F. 2d 9 (4th Cir. 1963).

59. Pavalon, *Damages—Wrongful Death of Children,* 50 CHI. B. REC. 84 (1968); Note, *Damages Recoverable for Wrongful Death of Minor Children,* 39 N. D. L. REV. 198 (1963).

foundation from which the jury could work. This seems infinitely preferrable to permitting a jury to conjure up a figure based on intangible elements of damages alone. It would also provide the court with an economically understandable figure against which awards for the intangible elements could be measured to see if such awards were fairly proportionate to the "lost investment" figure. It might be argued that this would result in even larger verdicts than are presently being awarded. To curb this possibility, the courts could combine what are now considered three separate elements of damages — grief and sorrow, wounded feelings, and mental shock and suffering — into one element of, for example, mental grief and sorrow.[60] The three elements are not realistically separate and distinct. The same factual considerations proving each of these elements usually overlap. Even if these elements were not condensed into one, the courts would at least have what they have been complaining is absent — a tangible foundation for damages. Of course, in rare cases in which a wage benefit from a child can be shown, such benefit should also be used in determining pecuniary loss.

The propriety of classifying as a pecuniary loss a parent's monetary expenditures in raising a child is not artificial or unreasonable. The amounts spent in the process of raising a child are literally an investment by the parents toward a future, as well as a present, return on this investment. Such a return is not necessarily monetary since it may consist of only a return of future companionship, care and attention for the parents. In a family, this is a very real return from the rearing of a child. Furthermore, the life of the child prior to death is a composite of many of the elements set out in *Wycko*. For example, his health is due to the proper feeding, clothing, and medical attention provided for him by his family. The extent to which he is capable of providing companionship is, at least to some extent, dependent on his educational growth. It does not seem that a court would be relying on very tenuous grounds in classifying these losses as pecuniary. While it may be argued that these are duties owed a child by law and should,

60. One Federal District Court Decision in South Carolina classified damages awarded in that case in a manner similar to that suggested. Brooks v. U. S., 273 F. Supp. 619 (D. S. C. 1967). In this case, awards were given for (a) pecuniary loss, (b) loss of companionship and (c) for mental shock and suffering.

therefore, not be compensable, it must be realized that a wrongful death action is not between a parent and child, but between a third party and a parent or beneficiary and, therefore, the parent-child obligation is not involved. What is involved is the third party's destruction of the parent-child relationship.

Sanctioning the *Wycko* formula in South Carolina would have benefits for both plaintiffs and defendants. The obvious benefit to defendants is that this formula would tend to put a jury on a more concrete foundation in determining damages which would arguably permeate the deliberations in both the tangible and intangible aspects. Plaintiffs are aided by the fact that, even with an unsympathetic jury, a very real and provable degree of damages can be persuasively demonstrated. Further, this method would be beneficial in negotiating a settlement figure.

As South Carolina cases have pointed out, the amounts of wrongful death verdicts are increasing. A 1963 survey summarized this trend to that point in time:

> [T]he average death award for minors was $15,086 with a range of $13,773 for children aged 12 or below and $16,562 for children aged 13 and above. A meticulous search of the reported and unreported cases during the last 5 years discloses . . . the modern trend to grant or affirm substantial reparation for the untimely death of minor children.[61]

It is foreseeable that the future problems in the minor child wrongful death area will not be the awarding of insufficient damages, but the awarding of excessive damages. The current South Carolina standards for determining damages in such a case can do nothing but stimulate this excessiveness. The 1969 case of *Zorn v. Crawford*[62] reveals the failing of South Carolina's present standard. In that case, a jury returned a verdict $250,000 actual damages for the death of a fifteen year old girl killed in an automobile accident. On appeal, a new trial was ordered. The court stated that the evidence did not sustain such a large verdict and stated that "[t]here must be some semblance of a basis for justifying the verdict."[63] Without

61. VALUATION HANDBOOK SERVICE No. 33 (Oct. 1963) (Jury Verdict Research, Cleveland, Ohio) *cited* in 32 AM. TRIAL LAWYERS JOURNAL 633, 635 (1968).

62. Zorn v. Crawford, 252 S. C. 127, 165 S. E. 2d 640 (1969).

63. *Id* at 138, 165 S. E. 2d at 646 *quoting* Mock v. Atlantic C.L.R.R. Co., 227 S. C. 245, 87 S. E. 2d 830 (1955).

some boundaries, or principles by which damages can be ascertained, at least some tint of "wergild" — or the paying for the enormity of the offense — is still visibly present in the awarding of damages for wrongful death.

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