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peditiously handled since all rights could be determined in the single action.[26] Moreover, there would be no real objection to the introduction of evidence of the financial condition of one defendant; its use properly limited by instruction, so as to be applicable only to that particular defendant in the assessment of exemplary damages.[27] Nor would this separateness of compensatory and exemplary damages involve any substantive changes requiring legislative action;[28] instead, it would be a step toward procedural efficiency, a matter properly within the purview of judicial initiative.

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MEASURE OF DAMAGES FOR WRONGFUL DEATH OF A MINOR CHILD

In cases involving the wrongful death of a minor child, the proper measure of damages recoverable has been the subject of much litigation. As yet, no legislative or judicial formula has been evolved that will assure an adequate recovery in every case and at the same time prevent excessive jury verdicts. Because damages for the wrongful death of a human being are assessed according to the pecuniary value

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tort-feasors ... have been guilty of different degrees of oppression, fraud, or malice so as to justify a verdict or verdicts for exemplary damages ... and where such damages ... are to be awarded 'for the sake of example and by way of punishing' each particular defendant according to the measure of his offending, juries should be allowed so to admeasure and apportion such exemplary damages as to make the example as well as the punishment fit the offense." Thomson v. Catalina, 205 Cal. 402, 271 Pac. 198, 200 (1928).

[26]Davis v. Hearst, supra note 24 at 542.

[27]The defendants are still jointly and severally liable for compensatory damages, but are liable only severally for the amount of exemplary damages assessed against them individually.

[28]"Either it must be placed within the province of the jury to find separate verdicts, or the rule permitting the consideration of evidence of the wealth of the defendants must go out of the issue of punitive damage. There is no middle ground between these two propositions. Having to decide between such alternatives, we cannot doubt that the policy of allowing separate verdicts is preferable. The rule of one verdict against all the defendants found guilty will almost always cause the entire punishment to fall upon one alone. The other defendants will then be freed and discharged from liability on the judgment, thus being enabled, notwithstanding the 'example' of the verdict 'for the public good,' to wholly evade the penalty and defeat altogether the ends of justice. The policy of separate verdicts, on the other hand, requires that, in fixing the amount of punitive damages, the pecuniary conditions of the defendants should be considered." Johnson v. Atlantic Coast Line R.R., 142 S.C. 125, 140 S.E. 443, 454-55 (1927). Contra, McAllister v. Kimberly-Clark Co., 169 Wis. 473, 173 N.W. 216 (1919): "We have no inclination, even if we had power so to do, to establish by decision any such innovation in favor of this element of damage." 173 N.W. at 217.

of that person, the problem usually facing the court is to find a basis for sustaining *any* recovery in the case of a child's wrongful death since the child has no substantial earning capacity.[1]

The case of *Blisard v. Vargo*[2] presents the situation in which the child's future earning capacity, instead of being speculative, was adequately assured and substantial. In an action brought under the Pennsylvania wrongful death and survival statutes, the United States District Court held that an award of $50,000 in the survival action for the estate of an eight-and-a-half year old boy was not excessive. The boy had the prospect of almost certain employment in a prosperous and growing textile business owned by his family in which his father had an influential position. In denying a motion for a new trial the court said:

> "Assuming that the father's average earnings from the business would be $14,000 a year (a very conservative figure in light of his earnings during the last three years), and assuming, not unreasonably, in light of the continuous inflation to which we are all subject, that the son's average annual earnings would be the same, those earnings for the 47 years of his expectancy would amount to $658,000. This amount, decreased by the expenses of his maintenance, and reduced to present value, could very well leave a balance of $50,000."[3]

This holding was affirmed by the Court of Appeals for the Third Circuit.[4]

The result in the principal case is a product of a long evolution in the field of tort law. The death of a human being was not the ground of an action within the concept of "modern"[5] common law.[6]

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[1]For a discussion showing that a child uses more money than he makes during minority, see Dublin and Lotka, The Money Value of a Man (Rev. 1946). This report shows that the cost of bringing up a child to age 18 in families with an annual income of $2,500 totals $7,425; and when the family income is $5,000 to $10,000 it totals $20,785. Since this was the result of a 1936 survey, it can be assumed that costs would be substantially higher today.

[2]286 F.2d 169 (3d Cir. 1961), affirming 185 F. Supp. 73 (E.D. Pa. 1960).

[3]185 F. Supp. at 75.

[4]Blisard v. Vargo, 286 F.2d 169 (3d Cir. 1961).

[5]Before the Norman Conquest, a system of fixed monetary awards against a slayer for the benefit of the kinsmen of the slain was in effect among the Anglo-Saxons. The payment was known as "wergild." This system, which was largely punitive in purpose, disappeared when the government began to punish murder as a crime. 1 Pollock & Maitland, History of English Law 25 (1895).

[6]Panama R.R. v. Rock, 266 U.S. 209 (1924); The Harrisburg, 119 U.S. 199 (1886); Mobile Life Ins. Co. v. Brame, 95 U.S. 754 (1877); Pickett v. Matthews, 238 Ala. 542, 192 So. 261 (1939); Cummins v. Kansas City Pub. Serv. Co., 334 Mo. 672, 66 S.W.2d 920 (1933); Stevenson v. W. M. Ritter Lumber Co., 108 Va. 575, 62 S.E. 351 (1908). See also Tiffany, Death by Wrongful Act § 1 (2d ed. 1913); 25 C.J.S. Death § 13 (1941).

This was true because of two notions: Firstly, the right of action accruing to the person before his death abated at the death of the person injured; although the cause of action continued in theory, there was no one capable of asserting it.[7] Secondly, the common law did not recognize a separate and distinct cause of action accruing to the relatives of the injured persons.[8]

The injustice of these highly artificial conceptions was recognized in England with the adoption in 1846 of Lord Campbell's Act,[9] which established a new cause of action for certain designated beneficiaries for the wrongful death of the decedent. An alternative remedy is provided by the "survival acts"[10] which in their simplest form provide that personal actions shall not abate on the death of the wronged person but shall survive. This is commonly thought of as the cause of action in the estate of the deceased, to be brought by the executor or administrator. When the person supporting a family is killed, an adequate measure of damages can be based on such items as his life expectancy, past earnings, prospective future earnings and contributions to the family.[11] To assure a complete recovery when a person is wrongfully killed, a number of states, including the jurisdiction in the principal case,[12] have enacted both Lord Campbell and survival type statutes.[13]

The application of *both* statutes seems unrealistic when the decedent is a minor child. In such a case the beneficiaries under the wrongful death statute are usually the ultimate heirs of the estate under the survival statutes, *i.e.*, the parents. The reasons for separating these two classes of action for the same wrong do not exist in the case of the death of a minor because the child normally leaves no large debts, so that there are no creditors who need to be protected by the separate cause of action for the estate, and the child leaves no real *dependents* of the class a Lord Campbell type statute is designed to

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[7]Cummins v. Kansas Pub. Serv. Co., 334 Mo. 672, 66 S.W.2d 920 (1933). See also McCormick, Damages § 93 (1935); Schumacher, Rights of Action Under Death and Survival Statutes, 23 Mich. L. Rev. 114 (1925).

[8]Ibid.

[9]9 & 10 Vict. c. 93 (1846). See Cummins v. Kansas City Pub. Serv. Co., 334 Mo. 672, 66 S.W.2d 920 (1933).

[10]Porpora v. City of New Haven, 122 Conn. 80. 187 Atl. 668 (1936); Rasmussen v. Benson, 133 Neb. 449, 275 N.W. 674 (1937).

[11]McCormick, Damages § 99 (1935).

[12]The death action is provided by Pa. Stat. Ann. tit. 12, § 1601 (1960). The survival action is provided by Pa. Stat. Ann. tit. 20, § 320.603 (1960).

[13]Wright v. Smith, 136 Kan. 205, 14 P.2d 640 (1932); Micks v. Norton, 256 Mich. 308, 239 N.W. 512 (1931); Rasmussen v. Benson, 133 Neb. 449, 275 N.W. 674 (1937). For a listing of other cases see Note, 44 Hav. L. Rev. 980 (1931).

protect. In such cases, therefore, it seems desirable to have only one "death action" in favor of the parents.

Assuming that a wrongful death statute is held to be applicable in the death of a minor, what is the proper measure of damages? For purposes of analysis, the cases dealing with this subject can be broken down into two general classifications: (1) those which allow a recovery based on the present value of services and contributions the child might reasonably be expected to render to his parents before, as well as after, majority; and (2) those which limit recovery to the present value of the services the child owes the parents until he comes of age.

Because there is very little economic productivity during childhood and restricting the period to the child's minority thereby limits the recovery, a substantial number of jurisdictions adhere to the first view, allowing a recovery based on the full life expectancy of the decedent child.[14] These courts feel that this longer period more reasonably justifies a larger recovery, and consequently there is less compulsion to set aside such a verdict as excessive. In jurisdictions where the full life expectancy approach is used, various judicial or legislative limitations evolved to limit the recovery. Courts following this view may allow a deduction for the expense of providing for the child if he had lived; limit the period of recovery to the life expectancy of the parents; or require that the jury be satisfied by proof of the probability of actual loss.[15] *Wilscam v. United States*,[16] a leading case for the full life view, allowed the parents to recover for the wrongful death of their four-year-old child based on a reasonable expectation of pecuniary benefit extending over the entire life expectancy of the child. In sustaining an $11,460 award, the court said:

> "[T]he law does not make the question of damages in a case of this description turn upon the earning capacity of the minor. Indeed, the rule that parents are entitled to a minor's earnings is archaic and a remnant of times long since past. It does not accord with modern views of the parent-child relationship."[17]

Because the full life view places few limitations upon jury speculation and allows them to guess at the employment the decedent would

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[14]Bond v. United Railways, 159 Cal. 270, 113 Pac. 366 (1911); U.S. Brewing Co. v. Stoltenberg, 211 Ill. 531, 71 N.E. 1081 (1904); Dorsey v. Yost, 151 Neb. 66, 36 N.W.2d 574 (1949); Birkett v. Knickerbocker Ice Co., 110 N.Y. 504, 18 N.E. 108 (1888). See McCormick, Damages § 101 (1935); 2 Sedgewick, Damages § 575 (9th ed. 1920).

[15]Crawford v. Southern Ry. 106 Ga. 870, 33 S.E. 826 (1899); Dorsey v. Yost, 151 Neb. 66, 36 N.W.2d 574 (1949).

[16]76 F. Supp. 581 (D. Hawaii 1948).

[17]Id. at 586.

have chosen when grown, a substantial number of jurisdictions follow the second view and limit recovery to the value of the child's services during minority.[18] The basis of this approach is that it is only during the child's minority that the parent has any legal claim to the child's services.[19] In *Luessen v. Oshkosh Elec. Light & Power Co.*,[20] it was stated:

> "The surviving father here was entitled, as a matter of right, to the services of his son. As between him and the wrongdoers, the latter has deprived him of that right."[21]

Despite the criticism leveled at this "entitlement to earnings" rationalization,[22] there is added justification for this approach because it is the exception rather than the rule for a child, *after majority*, to contribute substantially to the support of his parents.

Those jurisdictions which allow recovery after the period of minority and those which limit recovery to the period before the decedent's majority usually arrive at different conclusions because of differences in the statutory conditions under which they are rendered.[23] To limit recoveries a number of states, including Virginia,[24] have statutory ceilings which apply in all cases involving wrongful death.[25] The Columbia University Committee to Study Compensation for Automobile Accidents has suggested that a scale of maximum and minimum recoveries for death cases resulting from automobile accidents be established by law.[26] The Committee recommended that for the

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[18]Morel v. Lee, 182 Ark. 985, 33 S.W.2d 1110 (1930); Thompson v. Town of Fort Branch, 204 Ind. 152, 178 N.E. 440, (1931); Cooper v. Lake Shore & M.S. Ry., 66 Mich. 261, 33 N.W. 306 (1887).

[19]Augusta Factory v. Davis, 87 Ga. 648, 13 S.E. 577 (1891); Stevenson v. W. M. Ritter Lumber Co., 108 Va. 575, 62 S.E. 351 (1908). See 25 C.J.S. Death § 103 (1941).

[20]109 Wis. 94, 85 N.W. 124 (1901).

[21]Id. at 126.

[22]See note 17 supra.

[23]In all cases, since the right of recovery is wholly statutory, the action must stand or fall by the terms of the statute under which recovery is sought. There can be no recovery in cases which do not come within the provisions of the statute. Bond v. United Railways, 159 Cal. 270, 113 Pac. 366 (1911); Annot., 14 A.L.R.2d 488 (1950); 2 Sedgewick, Damages § 571(b) (9th ed. 1920).

[24]Va. Code Ann. § 8-636 (Supp. 1960).

[25]The recent trend, however, has been either to raise or abolish this limit. An example is Virginia where the maximum recovery was raised from $15,000 to $25,000 in 1952 and where it was increased again in 1958 to $30,000. For other examples see McCormick, Damages § 104 (1935); 2 Sedgwick, damages § 571(a) (9th ed. 1920).

[26]Report by the Committee to Study Compensation for Automobile Accidents to Columbia University Council for Research in the Social Sciences at 142 (1932), cited in McCormick, Damages § 106 at 365 n.37 (1935).

death of unemployed children under 20 years of age the surviving parents should receive a minimum of $500 and a maximum of $2,500.[27]

In a recent case[28] which appears to take a realistic approach in finding an equitable means to compensate the parents of a deceased child, the Supreme Court of Florida has held that damages for parental grief, pain and suffering may be awarded by a jury.[29] An award of $5,500 for the parent for the negligent death of a three-year-old daughter was sustained with the following comment:

> "[R]ecovery in a case like this should be reasonable recompense for parental pain and suffering including fair compensation for services that might reasonably be expected the child would render the parents from the date of the accident to the date of its majority."[30]

Because damages are not ordinarily recoverable in death actions for the mental anguish, suffering or bereavement of the surviving relatives,[31] this approach goes to the heart of the issue and recognizes that the death of a child results in the loss of love, affection and solace—*not* money. Where the courts frankly admit they are allowing recovery for parental grief caused by death, recoveries tend to be more realistic.[32]

Therefore, the preferable rule would appear to be one which provides a separate standard in cases of the wrongful death of a minor with recovery based on the direct pecuniary loss which the parent can sufficiently prove coupled with considerations of parental grief.

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[27]Ibid.

[28]Winner v. Sharp, 43 So. 2d 634 (Fla. 1949).

[29]This was based on a Florida statute, Fla. Comp. Gen. Laws, 1941, art. 768.03. Apparently Florida is the only state which, by express provision of a statute, makes parental mental pain and suffering caused by the wrongful death of their minor child an element of damages. Note, 2 Baylor L. Rev. 350 at 352 (1950).

[30]Winner v. Sharp, 43 So. 2d 634, 636 (Fla. 1949).

[31]Croom v. Murphy, 179 N.C. 393, 102 S.E. 706 (1920); Sutherland v. State, 189 Misc. 953, 68 N.Y.S.2d 553 (Ct. Cl. 1947). See 74 A.L.R. 64 for a compilation of states and cases. See also 25 C.J.S. Damages § 104 (1941); Note, 16 Minn. L. Rev. 409 at 411 (1931).

[32]See Note, 2 Baylor L. Rev. 350, 355 (1950) for a comparison between Florida and Texas judgments in such cases. Texas does not allow recovery for the pain and suffering of parents.