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NOTES AND COMMENT

DAMAGES FOR WRONGFUL DEATH — HOW MUCH AND TO WHOM

Introduction

Under the common law, and as late as little more than a century ago, no action would lie to recover damages for the death of a human being occasioned by the wrongful or negligent act of another, however close the relationship might have been between the deceased and the survivor and however clearly the death may have involved pecuniary loss to the plaintiff.¹ The operation of the common law rule frequently caused great hardship to the surviving family and next of kin of the deceased. At last, in view of the absurdity of the situation and the fact that there was no sensible reason why a defendant should pay damages for scratching his victim and yet escape all liability for negligently causing death, legislation was introduced about the middle of the nineteenth century to modify or abrogate the severity of the common law and to furnish a remedy for the bereaved, and often destitute family.

In 1846, the English Parliament led the way by passing the Fatal Accidents Act or what is more commonly known as Lord Campbell's Act.² It was speedily followed in this country by acts having in view the same general purpose.³

Since limitations of space preclude a detailed analysis of wrongful death statutes in general, it is intended to confine the discussion herein to but two of their many aspects. They are: First, the elements of damages recoverable in actions brought under such statutes; and Second, those persons to whom distribution of such damages will be made.

¹ See *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808). For a critique of the common law rule, see 3 HOLDSWORTH, A HISTORY OF ENGLISH LAW 333-336 (1934).

² 9 & 10 Vicr. c. 93 (1846) which provided:

§ 1. ". . . whensoever the death of a person shall be caused by wrongful act, neglect, or default, . . . the person who would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured. . . ."

§ 2. ". . . every such action shall be for the benefit of the wife, husband, parent, and child of the person . . . and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages 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; and the amount so recovered . . . shall be divided amongst the before mentioned parties in such shares as the jury by their verdict, shall find and direct."

³ For a survey of wrongful death liability, see *Coliseum Motor Co. v. Hester*, 43 Wyo. 298, 3 P. 2d 105 (1931).

As representative of state wrongful death statutes, those of New York⁴ will be used herein; and since the federal death acts,⁵ so far as they are applicable, have superseded both the common law and the state statutes, we have chosen the most important and most comprehensive of these, to wit: the Federal Employer's Liability Act,⁶ for the purposes of discussion which will follow.

Finally, just as the applicability of a federal death statute automatically excludes the applicability of state laws, neither the federal nor state statutes control when the death arises out of a case that falls within the scope of an international treaty.

In the light of the ever-growing frequency of international air travel, and hence the expanding prominence of the rules adopted by the Convention at Warsaw in 1929, and followed by the United States since 1934,⁷ it becomes necessary to consider its effects on wrongful death recoveries.

Background of the New York and of the Federal Statute

Only one year after the enactment of Lord Campbell's Act in England, the New York Legislature, acknowledging the wisdom of, and the necessity for such remedial legislation, followed with an act⁸ which in almost exactly the same language gave to the personal representative of one whose death had been caused by the wrongdoing of another, a statutory right of action for damages for the benefit of the next of kin.⁹ This act was amended in 1849¹⁰ by limiting the amount of recovery in this type of action to \$5,000. This limitation continued in force until by the constitution of 1894, the cause of action became constitutionally guaranteed by the provision that the "right . . . shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation."¹¹ This, however, does not preclude the legislature from changing the designation of the persons amongst whom the proceeds shall be divided.¹²

⁴ N. Y. DEC. EST. LAW §§ 130-134.

⁵ *E.g.*, Death on the High Seas Act, 41 STAT. 537 (1920), 46 U. S. C. § 761 (1946) (death occurring "on the high seas beyond a marine league" from the mainland); Jones Act, 41 STAT. 1007 (1915), 46 U. S. C. § 688 (1946) (death of merchant seamen); Longshoremen's and Harbor Workers' Compensation Act, 44 STAT. 1424 (1927), 33 U. S. C. §§ 901-950 (1946); Federal Employers' Liability Act, 35 STAT. 65 (1908), as amended, 45 U. S. C. §§ 51-60 (1946) (death of employee of carrier engaged in inter-state commerce).

⁶ 35 STAT. 65 (1908), as amended, 45 U. S. C. §§ 51-60 (1946). Whenever the words "federal act" or "federal statute" are used herein, the FELA is meant unless otherwise indicated.

⁷ U. S. TREATY SER. NO. 876 (1934).

⁸ Laws of N. Y. 1847, c. 450, §§ 1, 2.

⁹ For a history of the wrongful death statute in N. Y., see *In re Meng*, 96 Misc. 126, 159 N. Y. Supp. 535 (Surr. Ct. 1916).

¹⁰ Laws of N. Y. 1849, c. 246.

¹¹ N. Y. CONST. ART. I, § 18. This became Article I, Section 16, of the Constitution of 1938.

¹² *In re Meng*, 227 N. Y. 264, 125 N. E. 264 (1919).

The Federal Employers' Liability Act had its inception in 1906¹³ and was intended by Congress to regulate the liability of railroad companies engaged in interstate commerce to their employees while engaged in such commerce. Prior to this act Congress had not deemed it expedient to legislate upon the subject although its power was ample. One year later however, the act of 1906 was declared unconstitutional as being so broad that it might cover cases of intrastate commerce.¹⁴ It was immediately followed by the Second Federal Employers' Liability Act.¹⁵ and its constitutionality was sustained by concluding that it was a valid exercise of the power of Congress to regulate commerce among the states.¹⁶

It is generally recognized that both the New York¹⁷ and the federal statute¹⁸ confer a new, original, and distinct cause of action, unknown to the common law¹⁹ and one which is essentially in the nature of a suit for injury to the property rights which the named beneficiary has in the life of the decedent on whom he is, or may be dependent, or to whose services he is entitled.²⁰

Scope of the Statutes

As would be expected, an action lies under the New York statute only for a death resulting from a wrong committed within the state²¹ except, when the wrong is perpetrated outside the state, and there exists in such foreign state a statute authorizing a recovery on grounds substantially similar to those in force in New

¹³ 34 STAT. 232 (1906).

¹⁴ Employers' Liability Cases, 207 U. S. 463 (1907).

¹⁵ 35 STAT. 65 (1908), as amended, 45 U. S. C. § 51 (1946).

¹⁶ *In re* Second Employers' Liability Cases, 223 U. S. 1 (1912).

¹⁷ N. Y. DEC. EST. LAW § 130:

"The executor or administrator . . . of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused. . . ."

¹⁸ 35 STAT. 65 (1908), as amended, 45 U. S. C. § 51 (1946), providing:

"Every common carrier . . . shall be liable in damages . . . in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow and husband and children . . . ; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee for such . . . death resulting . . . from the negligence . . . of such carrier. . . ."

¹⁹ See, e.g., *Mossip v. F. H. Clement & Co.*, 256 App. Div. 469, 10 N. Y. S. 2d 592 (4th Dep't 1939), *aff'd without opinion*, 283 N. Y. 554, 27 N. E. 2d 279 (1940); *Greco v. S. F. Kresge Co.*, 161 Misc. 781, 293 N. Y. Supp. 53 (Sup. Ct. 1937), *aff'd*, 251 App. Div. 667, 297 N. Y. Supp. 258 (2d Dep't 1938), *aff'd*, 277 N. Y. 26, 12 N. E. 2d 557. See Note, 115 A. L. R. 1020 (1938); *Siso v. Kleiner*, 185 Misc. 154, 56 N. Y. S. 2d 219 (Sup. Ct. 1945); *Fogarty v. Northern Pac. Ry.*, 85 Wash. 90, 147 Pac. 652 (1915) (FELA).

²⁰ *Stutz v. Guardian Cab Corp.*, 273 App. Div. 4, 74 N. Y. S. 2d 818 (1st Dep't 1947); *In re Brennan's Account*, 160 App. Div. 401, 145 N. Y. Supp. 440 (2d Dep't 1914).

²¹ *Baldwin v. Powell*, 294 N. Y. 130, 61 N. E. 2d 412 (1945).

York. In such a case, New York courts may entertain the death action by way of comity.²² Even where the wrong has been committed in New York, circumstances may render the New York law inapplicable as in a case where the Federal Employers' Liability Act would control.

The federal act regulates solely the liability of carriers engaged in interstate or foreign commerce.²³ For the act to apply the defendant carrier, at the time of the accident, must have been engaged in interstate commerce, and plaintiff's decedent must have been employed by the carrier in such commerce.²⁴ Once it has been determined that the act applies, it then becomes paramount and exclusive and it can neither be extended nor abridged by the common or statutory laws of any state.²⁵ The act itself provides for concurrent jurisdiction by state and federal courts;²⁶ however, the decisions of the federal courts determining questions of construction, applicability, and rights and liabilities of the parties under the act are binding upon the state courts.²⁷ Hence, it follows that no state limitation on recovery can apply to an action brought under the federal act.²⁸

The Theory of Damages and the Elements Admissible

Both the New York and the federal actions proceed on the theory of compensating the individual beneficiaries for the loss of economic benefit which they might reasonably have expected to receive from the decedent during the remainder of his lifetime if he had not been tortiously killed,²⁹ and in New York the damages awarded to the plaintiff:

. . . may be such sum as the jury upon a writ of inquiry, or upon a trial, or where issues of fact are tried without a jury, the court, or the referee,

²² *Zeikus v. Florida East Coast Ry.*, 144 App. Div. 91, 128 N. Y. Supp. 933 (1st Dep't 1911).

²³ See note 18 *supra*.

²⁴ *Erie R. R. v. Welsh*, 242 U. S. 303 (1916); *Shanks v. Delaware, L. & W. R. R.*, 239 U. S. 556 (1916). See Delisi, *Scope of the Federal Employers' Liability Act—Recent Developments*, 18 Miss. L. J. 206 (1947).

²⁵ "If it is a case wherein relief may be properly had under the federal act, it supersedes the common law of the state and any recovery . . . must necessarily be based upon the federal act." *Cincinnati, etc., R. R. v. Clark*, 169 Ky. 662, 185 S. W. 94, 97 (1916). However, the employee still retains his common law right to sue any third party who is jointly liable for the injury. *Cott v. Erie R. R.*, 231 N. Y. 67, 131 N. E. 737 (1921), *cert. denied*, 257 U. S. 636 (1921).

²⁶ 35 STAT. 66 (1908), as amended, 45 U. S. C. § 56 (1946).

²⁷ *Hopps' Estate v. Chesnut*, 324 Mich. 256, 36 N. W. 2d 908 (1949); *Southern Ry. v. Melton*, 240 Ala. 244, 198 So. 588 (1940).

²⁸ *Chicago R. I. & P. R. R. v. Devine*, 239 U. S. 52 (1915).

²⁹ *E. g.*, 2 CLARK, NEW YORK LAW OF DAMAGES § 538 *et seq.* (1925). See 1949 LEG. DOC. No. 65(c), 1949 Report N. Y. Law Revision Commission; *Michigan Cent. Ry. v. Vreeland*, 227 U. S. 59 (1913) (FELA).

deems to be a fair and just compensation for the pecuniary injuries resulting from the decedent's death to the person or persons for whose benefit the action is brought.³⁰

The federal act contains no such clear-cut direction as to the measure of damages, but by court decision the gravamen of recovery has been held to be the aforesaid pecuniary loss.³¹ Simply stated then, under the above theory, damages in death cases determined by ascertaining the monetary loss suffered by the surviving relatives on whose behalf the executor or administrator acts³² and it should be noted that this theory is expressly sanctioned by the terms of Lord Campbell's Act, the original death statute,³³ which provided that:

. . . the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively, for whom or for whose benefit such action shall be brought.

This theory it may be said in passing is in direct contrast with the doctrine prevailing in many states which measure the recovery by the loss to the estate of the deceased.³⁴ Under the "pecuniary loss" theory the relational interest³⁵ of the beneficiaries is protected. Damages are given for injury to the interest which one member of the family has by reason of his family relation to the deceased. Speaking of this, McCormick has the following to say:

It represents merely a protection, after the death of the injured members, of the survivor's familial interests which are asserted during the lifetime of the injured persons through such actions as the husband's for injury to his wife, or the father's claim for loss of the services of his injured son.³⁶

The basis of recovery is the "expectancy disappointed by death" of the surviving relatives of the decedent to receive financial benefits from him had his life continued.³⁷ Thus the damages include the aggregate total of the demonstrated losses of the surviving spouse and next of kin who can prove that they probably would have received financial benefits from the decedent had he lived.

The inherent difficulty of laying down comprehensive rules for the estimation of damages has been recognized by the courts from the beginning. It must be apparent that ultimately the determination

³⁰ N. Y. DEC. EST. LAW § 132.

³¹ Michigan Cent. Ry. v. Vreeland, 227 U. S. 59 (1913).

³² Judgments recovered do not constitute assets of the estate of the deceased but are a special fund, the distribution of which is limited to persons designated by the statute. Drake v. Gilmore, 52 N. Y. 389 (1873); *In re Butler*, 20 F. Supp. 995 (D. C. Va. 1937) (FELA).

³³ See note 2 *supra*; Blake v. Midland R. R., 18 Q. B. 93 (1852).

³⁴ For a discussion of both theories and of damages for death in general, see McCormick, DAMAGES §§ 93-106 (1935).

³⁵ See Green, *Relational Interests*, 29 ILL. L. REV. 460, 470 (1934).

³⁶ McCormick, DAMAGES 347 (1935).

³⁷ Loetsch v. New York City Omnibus Corp., 291 N. Y. 308, 52 N. E. 2d 448 (1943).

of the amount recoverable depends on the facts and circumstances peculiar to each case.³⁸ The Court of Appeals has stated:

The pecuniary loss in any such case may be composed of very different elements. It may consist of special damages, that is of an actual, definite loss, capable of proof, and of measurement with approximate accuracy; and also of prospective and general damages, incapable of precise and accurate estimate because of contingencies of the unknown future. . . . the damages to the next of kin in that respect are necessarily indefinite, prospective, and contingent. They cannot be proved with even an approach to accuracy. . . . Human lives are not all of the same value to the survivors.

The age and sex, the general health and intelligence of the person killed, the situation and condition of the survivors and their relation to the deceased; these elements furnish some basis for judgment. That it is slender and inadequate is true; but it is all that is possible, and while that should be given, more cannot be required.³⁹

It is clear that the complicating factor in each case is the large element of speculation involved, and the dependency on the life expectancy of both the deceased⁴⁰ and the person or persons for whose benefit the action is brought.⁴¹ The fact that the deceased was engaged in a hazardous occupation is material in determining his life expectancy.⁴² Thus, though mortality tables may be introduced into evidence, they are not controlling on the jury.⁴³ The victim's

³⁸ *Liubowsky v. State*, 260 App. Div. 416, 23 N. Y. S. 2d 633 (3d Dep't), *aff'd without opinion*, 285 N. Y. 701, 34 N. E. 2d 385 (1940).

³⁹ *Finch, J.*, in *Houghkirk v. Delaware & H. Canal Co.*, 92 N. Y. 219, 225 (1883).

⁴⁰ *Pieczonka v. Pullman Co.*, 89 F. 2d 353 (2d Cir. 1937).

⁴¹ *Briscoe v. United States*, 65 F. 2d 404 (2d Cir. 1933); *In re Urvic's Estate*, 142 Misc. 775, 255 N. Y. Supp. 638 (Surr. Ct. 1932). The expectancy of the beneficiary is a vital consideration since the lesser of the two expectancies determines the measure of damages for the reason that it terminates the possibility of pecuniary benefits accruing. Mortality tables based on the joint lives of both may be introduced. See *Lewis v. State*, 112 Misc. 667, 183 N. Y. Supp. 653 (Ct. Cl. 1920), *rev'd on other grounds*, 197 App. Div. 712, 189 N. Y. Supp. 560 (3d Dep't 1921), *aff'd without opinion*, 234 N. Y. 587, 138 N. E. 457 (1922); *Haidacker v. Central R. R. of New Jersey*, 52 F. Supp. 713 (D. C. N. Y. 1943) (FELA).

⁴² *Sibert v. Litchfield & M. Ry.*, 159 S. W. 2d 612 (Mo. 1942) (where a 51-year-old railroad brakeman was treated as 54 years of age with a life expectancy of eighteen and nine-tenths years because of his hazardous employment); *Jones v. Kansas City Southern Ry.*, 143 La. 307, 78 So. 568 (1918) (in determining the life expectancy of a locomotive engineer, the court adopted the practice of insurance companies of adding eight years to age because of hazardous occupation).

⁴³ *Louisville & N. R. R. v. Holloway*, 246 U. S. 525 (1918), *affirming* 168 Ky. 262, 181 S. W. 1126 (1916) (defendant not entitled as a matter of law to have it declared that decedent would not have survived his probable expectancy).

character,⁴⁴ health,⁴⁵ habits,⁴⁶ earning capacity,⁴⁷ chances of worldly success, and past contributions to his family,⁴⁸ all must be weighed together with the vicissitudes of an uncertain future to arrive at the value of the loss caused to the survivors by the untimely intervention of death.⁴⁹ It has even been held that the devaluation of the dollar and its decreased purchasing power may be considered in assessing the monetary value of the loss.⁵⁰

Since human lives are of varied value to the survivors and since pecuniary loss is the sole measure of damage, it may well be asked, "Can a human life be taken with no resultant loss?" It has been held that no pecuniary loss is produced by the death of a person who is incurably insane and confined to a state hospital with no prospects of ever being released.⁵¹ Damages there are restricted to the funeral expenses.⁵² However, the mere fact that the statute gives the right of action seems to indicate that nominal damages, at

⁴⁴ *Sternfels v. Metropolitan St. Ry.*, 73 App. Div. 494, 77 N. Y. Supp. 309 (1st Dep't 1902), *aff'd without opinion*, 174 N. Y. 512, 66 N. E. 1117 (1903).

⁴⁵ *Ibid.*

⁴⁶ *McIlwaine v. Metropolitan St. Ry.*, 74 App. Div. 496, 77 N. Y. Supp. 426 (1st Dep't 1902).

⁴⁷ *Seifter v. Brooklyn Heights Ry.*, 55 App. Div. 10, 66 N. Y. Supp. 1107 (2d Dep't 1900), *rev'd on other grounds*, 169 N. Y. 254, 62 N. E. 349 (1901). Under the FELA, plaintiff is not limited to his earnings from the defendant carrier, but may submit for the consideration of the jury, his earnings from any other business in which he was engaged, *Illinois Cent. Ry. v. Humphries*, 174 Miss. 459, 164 So. 22 (1935) (denying defendant's argument that income outside of railroad earnings have no relation to interstate commerce and could not be considered in awarding damages under FELA).

⁴⁸ *Wethers v. N. Y. Cent. R. R.*, 120 Misc. 830, 199 N. Y. Supp. 875 (Sup. Ct.), *aff'd without opinion*, 207 App. Div. 810, 201 N. Y. Supp. 957 (1st Dep't 1923). The decedent's earnings alone are not the test of the beneficiaries' loss. It is that portion of his future earnings that might reasonably have been bestowed on them, had he not been killed. *Illinois Cent. R. R. v. Humphries*, 170 Miss. 840, 155 So. 421 (1934).

⁴⁹ *See, e.g., Dimitroff v. State*, 171 Misc. 635, 13 N. Y. S. 2d 458 (Ct. Cl. 1939); *In re Mangan's Estate*, 162 Misc. 495, 294 N. Y. Supp. 974 (Surr. Ct. 1937); *Louisville & N. R. R. v. Stephens*, 298 Ky. 328, 188 S. W. 2d 447 (1944) (FELA).

⁵⁰ *Liddie v. State*, 190 Misc. 347, 75 N. Y. S. 2d 182 (Ct. Cl. 1947); *Burtman v. State*, 188 Misc. 153, 67 N. Y. S. 2d 271 (Ct. Cl. 1947); *Culver v. Union Pac. R. R.*, 112 Neb. 441, 199 N. W. 794 (1924) (FELA). *Contra: Edwards v. Southern Ry.*, 184 S. E. 370 (Ga. App. 1936) (FELA).

⁵¹ *St. Pierre v. State*, 33 N. Y. S. 2d 151 (Ct. Cl. 1942), *aff'd mem.*, 272 App. Div. 973, 71 N. Y. S. 2d 608 (3d Dep't 1947); *Grosso v. State*, 177 Misc. 690, 31 N. Y. S. 2d 398 (Ct. Cl. 1941), *aff'd without opinion*, 264 App. Div. 745, 34 N. Y. S. 2d 440 (3d Dep't 1942), *aff'd without opinion*, 289 N. Y. 552, 43 N. E. 2d 530 (1943) (where inmate of institution for defective delinquents though 28 years old, had a mental age of six years and nine months, and an I. Q. of 42, and there were no prospects of his being paroled and his past record indicated he'd never be of assistance to his family, *held*, the evidence was insufficient to establish indefinite and prospective damages for his death). It is extremely doubtful that such a case would arise under the FELA where the deceased must be an employee of an interstate carrier.

⁵² *St. Pierre v. State*, *supra* note 51. For a discussion of funeral expenses as an element of damages, see *infra*.

least, may be had where the negligence of the defendant is established,⁵³ and in the absence of confinement or insanity of the decedent, it would seem that there is a presumption that his wife and minor children have suffered pecuniary loss, and they may recover without proof of actual loss.⁵⁴ This presumption is based on the legal obligation to support and hence the fact that no contribution was in truth received during the victim's life is deemed immaterial.⁵⁵

Bearing in mind that pecuniary loss to the *survivors* is the criterion, it follows that the pain and suffering undergone by the decedent between the time of injury and the time of death are not proper elements of damage under the death statute. Such is the case in New York⁵⁶ where such damages plus the loss of earnings during lifetime are allocated to an action brought under the survival statutes.⁵⁷ By the New York law, the recovery in that action is expressly for the benefit of the estate⁵⁸ and the action may be prosecuted concurrently with the death action provided that a separate verdict is rendered as to each cause of action.⁵⁹

In the matter of survival, the federal act differs in certain respects from the law of New York. By a 1910 amendment, the survival of the right of action was provided for, and the beneficiaries were permitted to recover not only for their pecuniary loss, but also for the pain and suffering endured by the decedent.⁶⁰ It should be

⁵³ *Quin v. Moore*, 15 N. Y. 432 (1857).

⁵⁴ *In re Uravic*, 142 Misc. 775, 255 N. Y. Supp. 638 (Surr. Ct. 1932); "When the relation between the deceased and the beneficial plaintiff is either that of husband and wife or parent and minor child, in the absence of evidence to the contrary, actual pecuniary loss will be presumed from the death." *Gilliam v. Southern R. R.*, 108 S. C. 195, 93 S. E. 865, 867 (1917); *cf. Norfolk, etc., R. R. v. Holbrook*, 235 U. S. 625 (1915), wherein, a charge to the jury that ". . . the widow and infant children of decedent are entitled to larger damages than would be the case of persons suing who were more distantly related," was held erroneous.

⁵⁵ *In re Uravic*, *supra* note 54.

⁵⁶ N. Y. DEC. EST. LAW § 132. "Neither the personal wrong or outrage to the decedent, nor the pain and suffering he may have endured, are to be taken into account. This would be the foundation of the action, and would furnish the criterion of damages if death had not ensued, and the injured party had brought the suit. But the claim of the administrator and through him of the next of kin, is altogether different." *Comstock, J., in Quin v. Moore*, 15 N. Y. 432, 435 (1857).

⁵⁷ N. Y. DEC. EST. LAW §§ 119-120.

⁵⁸ N. Y. DEC. EST. LAW § 120. See Note, *The Wrongful Death Act as Affected by the Survival Statute*, 15 ST. JOHN'S L. REV. 58 (1940).

⁵⁹ N. Y. DEC. EST. LAW § 120.

⁶⁰ 36 STAT. 291 (1910), 45 U. S. C. § 59 (1946); *St. Louis, etc., R. R. v. Craft*, 237 U. S. 648 (1915). Once it has been established that the decedent has suffered for an appreciable time before death, it becomes the function of the jury to determine the damages, and the only limitation upon the amount of the award is that it must be within reason; *cf. Bimberg v. Northern Pac. R. R.*, 217 Minn. 187, 14 N. W. 2d 410, 416 (1944), in which case the court stated: "The FELA places no ceiling on recoveries under the act, nor does it fix an hourly or per diem rate for conscious pain and suffering which would have been a distinct legislative innovation."

noted, that while expressly on behalf of the estate in New York, this recovery is explicitly for the benefit of the named beneficiaries by the terms of the federal act,⁶¹ and unlike the New York statute, the FELA does not require separate verdicts or apportionment of the damages between the action for pain and suffering and wrongful death.⁶²

Having determined some of the factors which are deemed material in reaching the monetary loss, it is now in order to discuss some of those which are excluded from the consideration of the jury. As early as the decision in *Blake v. Midland R. Co.*,⁶³ which in construing Lord Campbell's Act, ruled out damages for the grief of the survivors, the New York courts have invariably excluded the loss of companionship and consortium of the deceased,⁶⁴ mental anguish of his family⁶⁵ and other incidents of family association as items of damage for the reason that they are too uncertain in their nature, incapable of direct proof and hence inestimable. For like reasons, the same result has been reached under the FELA.⁶⁶

Undoubtedly, the fear of allowing sympathetic juries to evaluate the bereavement of the widow and orphans lies back of the reluctance to compensate for the love lost, the sorrow caused, and the sentiments wounded. In a word, nothing beyond the material contributions which may have reasonably been expected is awarded, save that the child's loss of parental care and guidance and the value to the child of his parents' efforts devoted to his moral and educational training may be considered.⁶⁷ Difficult as it is to estimate the value of such training, if proven, it is allowed. Likewise, if the widow can show that she had received valuable help and advice in the management of her separate estate or in the conduct of a business of her

⁶¹ *St. Louis, etc., R. R. v. Rodgers*, 118 Ark. 263, 176 S. W. 696 (1915).

⁶² 36 STAT. 291 (1910), 45 U. S. C. § 59 (1946); *Frabutt v. New York C. & St. L. R. R.*, 84 F. Supp. 460 (D. C. Pa. 1949). We deal no further with the many interesting problems arising in conjunction with survival actions since they are not germane to the discussion.

⁶³ 18 Q. B. 93, 111 (1852), wherein the court stated:

"... if the jury were to proceed to estimate the respective degrees of mental anguish of a widow and twelve children from the death of the father of the family, a serious danger might arise of damages being given to the ruin of the defendants."

⁶⁴ *Lewis v. State*, 112 Misc. 667, 183 N. Y. Supp. 653 (Ct. Cl. 1920), *rev'd on other grounds*, 197 App. Div. 712, 189 N. Y. Supp. 560 (3d Dep't 1921), *aff'd without opinion*, 234 N. Y. 587, 138 N. E. 457 (1922).

⁶⁵ *Smith v. Lehigh Valley R. R.*, 177 N. Y. 379, 69 N. E. 729 (1904).

⁶⁶ *Louisville & N. R. R. v. Holloway*, 168 Ky. 262, 181 S. W. 1126 (1916), *aff'd*, 246 U. S. 525 (1918).

⁶⁷ *Alabama Great Southern R. R. v. Cornett*, 214 Ala. 23, 106 So. 242 (1925), (FELA). *Contra*: *Davis v. Cincinnati, etc., R. R.*, 172 Ky. 55, 188 S. W. 1061 (1916) (FELA). This is especially so where the decedent was the mother of the child. *Tilley v. Hudson River R. R.*, 29 N. Y. 252 (1864).

own, she would presumably be entitled to show this as a pecuniary loss.⁶⁸

Naturally, when the victim is a child,⁶⁹ or the wife and mother, rather than the husband and father, special facts must be considered in computing the damages suffered. Chief among the injuries sustained by the husband at the death of his wife is the loss of household services and the material value of any aid she was expected to render in his business.⁷⁰ Generally speaking, damages for the death of a minor child consist of the net value of services it was expected to render during minority plus such services and contributions as could reasonably be expected after majority, minus the probable cost of rearing the child.⁷¹ The court will look to the age, sex, general health and capacities of the child, the situation and condition of the survivors and to the possibility that the parent might in future look to the child for support.⁷² It appears that where the deceased is an adult child, the pecuniary loss would be the present value of services and the contributions actually shown.⁷³

In every wrongful death case, once the loss has been ascertained, it is discounted so that its worth may be determined for present payment⁷⁴ and the fact that the beneficiaries of the action have succeeded to the property of the deceased,⁷⁵ or have collected life insurance,⁷⁶ or have become entitled to a pension⁷⁷ is not admissible in mitigation of damages as the damages are concerned with benefits

⁶⁸ See *Michigan Cent. R. R. v. Vreeland*, 227 U. S. 59, 74 (1913) (FELA). On the grounds that such services were capable of pecuniary measurement, recovery has been allowed the widow for certain services rendered by the deceased such as repairing the premises, working the garden, and caring for the livestock, *Western & A. R. R. v. Hughes*, 37 Ga. App. 771, 142 S. E. 185 (1928) (FELA).

⁶⁹ See Note, *Elements of Compensation for Death of a Minor Child*, 16 MINN. L. REV. 409 (1932).

⁷⁰ *Steenberg v. Lewis*, 221 App. Div. 808, 223 N. Y. Supp. 444 (3d Dep't 1927).

⁷¹ The relationship of parent and child alone is not enough. A reasonable expectation of pecuniary benefit must be alleged. *Boettcher v. Auslander*, 76 Colo. 399, 232 Pac. 683 (1925) (FELA). Where the deceased is a minor, a reasonable expectation of pecuniary benefit is sufficient to sustain a recovery though the child has not contributed to the support of his parents. *Moffet v. Baltimore & O. R. R.*, 220 Fed. 39 (4th Cir. 1914).

⁷² *Houghkirk v. Delaware & H. Canal Co.*, 92 N. Y. 219 (1883).

⁷³ *McCord v. Schaff*, 279 Mo. 558, 216 S. W. 320 (1920) (FELA); *Erickson v. Bork*, 225 App. Div. 188, 232 N. Y. Supp. 379 (4th Dep't 1929). See also CLARK, NEW YORK LAW OF DAMAGES §§ 556-557 (1925); McCORMICK, DAMAGES § 86 (1935).

⁷⁴ McCORMICK, DAMAGES § 86 (1935); *Simmons v. Louisiana Ry. & Nav. Co.*, 153 La. 405, 96 So. 12 (1923) (FELA) (discount of estimated future contributions to beneficiaries' support at the rate of 5% per annum approved).

⁷⁵ *Terry v. Jewett*, 78 N. Y. 338 (1879).

⁷⁶ *Kellog v. New York Cent. R. R.*, 79 N. Y. 72 (1879); *Brabham v. Baltimore & O. R. R.*, 220 Fed. 35 (4th Cir. 1914) (FELA).

⁷⁷ *Geary v. Metropolitan St. Ry.*, 73 App. Div. 441, 77 N. Y. Supp. 54 (1st Dep't 1902).

to be derived from continued living not with those arising on account of death.

The question of whether exemplary or punitive damages may be had in such actions was settled early by the pronouncement that under Lord Campbell's Act, pecuniary loss was the only basis for recovery⁷⁸ and such damages are precluded by the New York statute which also limits the recovery to the pecuniary loss, and by the federal statute which has been construed to contain the same limitation.⁷⁹

The problem of funeral and medical expenses has been resolved in New York by the statute itself which states:

. . . in addition to any other lawful element of the damages recoverable, the reasonable expenses of medical aid, nursing and attention incident to the injury causing death and the reasonable funeral expenses of the decedent *paid by a husband or wife or next of kin or for the payment of which any such person is responsible, also shall be deemed proper elements of damage.*⁸⁰ (Italics ours.)

Thus it is seen that so long as the requirement of the statute has been met, and the beneficiary either has paid or is responsible for the payment of these expenses, they are proper items of damage. However, because no like phraseology is present in the federal act, the courts have consistently held that funeral expenses form no element of the damages recoverable.⁸¹ It would seem that medical costs are likewise excluded.⁸² In New York, the jury, employing as its measure, "pecuniary injury" prescribed by law, and including in its judgment all the permissible items discussed above, determines the loss of the plaintiff and to the "fair and just compensation" so awarded, "The clerk must add . . . interest thereupon from the decedent's death. . . ." ⁸³ Since the FELA makes no provision for the award of interest, it has been held that interest from the time of death cannot be allowed on a verdict reached under that act.⁸⁴

⁷⁸ Blake v. Midland Ry., 18 Q. B. 93 (1852).

⁷⁹ Wagner v. Clausen & Son Brewing Co., 146 App. Div. 70, 130 N. Y. Supp. 584 (1st Dep't 1911); Cain v. Southern Ry., 199 Fed. 211 (E. D. Tenn. 1911) (FELA). *Contra*: Ennis v. Yazoo & M. V. R. R., 118 Miss. 509, 79 So. 73 (1918).

⁸⁰ N. Y. DEC. EST. LAW § 132. This provision was added by Laws of N. Y. 1935, c. 224.

⁸¹ Heffner v. Pennsylvania R. R., 81 F. 2d 28 (2d Cir. 1936).

⁸² New York Central & H. R. R. v. Tonsellito, 244 U. S. 360 (1917). *Contra*: Berry v. St. Louis-San Francisco Ry., 324 Mo. 775, 26 S. W. 2d 988 (1929), *cert. denied*, 281 U. S. 765 (1930).

⁸³ N. Y. DEC. EST. LAW § 132.

⁸⁴ Murrman v. New York N. H. & H. R. R., 258 N. Y. 447, 180 N. E. 114 (1932) (FELA).

Beneficiaries and Apportionment of the Recovery.

Having concluded an analysis of the elements of damages for wrongful death, and of the factors composing the recovery and final judgment, it is appropriate to turn to the question of the distribution of that amount. Who is to benefit from what has been awarded, and to what extent does each beneficiary participate in the distribution?

Inasmuch as each act names the parties on whose behalf the action is brought, the answer to the question may best be had by examining the statutes themselves. The FELA creates three classes of beneficiaries.⁸⁵ If there is a surviving spouse or children, all other persons are excluded; if there are no members of the first class, but there are parents, next of kin are excluded; if there are no members of the first two classes, next of kin *dependent* upon the employee may recover.⁸⁶ The order of priority of the beneficiaries is determined by the relationship they bear to the deceased, not by their dependency upon him. The mere existence of beneficiaries of one class, whether or not they have suffered a pecuniary loss, will preclude a recovery in behalf of a beneficiary of a lower class even though the latter has sustained pecuniary loss.⁸⁷ However, this rule does not apply as among the members of a particular class.⁸⁸ If there are no representatives of any class described in the statute, there can be no recovery.⁸⁹ While only pecuniary loss is needed on which to predicate a recovery in favor of members of the first two classes, when a recovery in behalf of the next of kin is sought, some degree⁹⁰ of dependency must be shown.⁹¹ There is present in the

⁸⁵ See note 18 *supra*.

⁸⁶ *In re Stone*, 173 N. C. 208, 91 S. E. 852 (1917), *error dismissed*, 245 U. S. 638 (1918).

⁸⁷ *Chicago, & B. & Q. R. R. v. Wells-Dickey Trust Co.*, 275 U. S. 161 (1927) (where the deceased left surviving a mother and a sister, and the mother died prior to the appointment of an administrator, the court held that the dependent sister could not bring an action for wrongful death even though she was then "next of kin" because the cause of action vested in the mother at the son's death).

⁸⁸ "We are not warranted in treating as an antecedent class the nearer next of kin who are not dependent. That would be to rewrite the statute. Congress has created three classes, not four or more. Yet to hold that the existence of nearer next of kin who are not dependent bars recovery by more remote next of kin who are dependent is to assume that the former constitute a preferred class. Congress, however, placed all next of kin in one class." *Poff v. Pennsylvania R. R.*, 327 U. S. 399, 401 (1946).

⁸⁹ *In re Stone*, 173 N. C. 208, 91 S. E. 852 (1917), *error dismissed*, 245 U. S. 638 (1918).

⁹⁰ It is not necessary that the next of kin be completely, or substantially, or materially dependent upon the deceased; a partial dependency may be a sufficient basis for an award. *Smith v. Pryor*, 195 Mo. App. 259, 190 S. W. 69 (1916).

⁹¹ *Smith v. Pryor*, *supra* note 90. The word dependent in the statute has been construed to refer only to the next of kin. *Berg v. Atlantic Coast Line R. R.*, 108 S. C. 63, 93 S. E. 390 (1917).

act no language requiring apportionment of the damages recovered and although at least one early case held apportionment to be the duty of the jury;⁹² this was later held to be permissive rather than mandatory.⁹³

Today, the law of New York in the matter of beneficiaries and apportionment has for the most part been brought into conformity with the federal act. Before the 1949 revision of the Decedent Estate Law, the final award, though measured by the pecuniary loss of the survivors, was distributed in accordance with the provisions of the statute governing intestate distribution and hence the express intent to compensate for loss was in effect thwarted, with the occasional result that some collateral who actually suffered no monetary injury might share in the recovery.⁹⁴ The hardship produced by the prior law is mirrored in the case of *Snedeker v. Snedeker*,⁹⁵ where by the operation of the intestacy statute, a widow left without visible means of support was nevertheless forced to share the net amount of the judgment with the father of the adult victim although the father could show no pecuniary loss.

By the 1949 revision, the manifestly illogical and unjust requirement that the damages be distributed as if they were unbequeathed assets was abolished, and the inconsistency was rectified. The statute⁹⁶ now provides that the damages:

. . . must be distributed . . . in proportion to the pecuniary injuries suffered, the proportion to be determined upon notice to all interested persons in such manner as the court shall deem proper after a hearing. . . .

However, it is submitted that while it adheres to the pecuniary loss standard, the present law is not entirely clear as to beneficiaries. Whereas FELA expressly divided the distributees into three classes, no such classification has ever appeared in the New York statute. Nevertheless, since the statute prior to revision declared that any recovery was to be distributed in accordance with the intestacy statute, a division into classes resulted.⁹⁷ For example: when a spouse and children survived, $\frac{1}{3}$ of the proceeds went to the spouse, and $\frac{2}{3}$ to the children, parents and collaterals being automatically excluded. So also, when a wife and no issue survived, the parents of the deceased, and if none, his collaterals necessarily became members of the class of beneficiaries. And so, although Section 133 merely says that the damages are to be for the benefit of the "husband or wife, and next of kin," the inter-relation of the two statutes resulted in one class necessarily taking to the exclusion of others.

⁹² *Gulf, C. & S. F. R. R. v. McGinnis*, 228 U. S. 173 (1913).

⁹³ *Central Vermont R. R. v. White*, 238 U. S. 507 (1915).

⁹⁴ *Matter of Snedeker v. Snedeker*, 164 N. Y. 58, 58 N. E. 4 (1900).

⁹⁵ *Ibid.*

⁹⁶ N. Y. DEC. EST. LAW § 133, as amended, Laws of N. Y. 1949, c. 639.

⁹⁷ N. Y. DEC. EST. LAW § 83.

This was the state of the law at the turn of the century. In 1911, subdivision one was added to Section 133, providing that when a spouse and no issue survived, the recovery is for the sole benefit of the spouse. This provision seems to have been added to prevent a situation from arising such as that in the *Snedeker* case⁹⁸ where a wealthy parent who demonstrated no pecuniary loss, participated in the distribution of damages recovered. As of 1911 then, distribution still followed the terms of the intestacy statute except, that when a spouse survived without issue, the next of kin who would ordinarily be entitled to share in intestacy were expressly excluded by subdivision one.⁹⁹ The other subdivisions of Section 133 were added by the legislature from time to time seemingly to correct abuses that might result, were the intestacy statute to control absolutely. In the event of the named contingency, abandonment of the deceased, the abandoning parent or spouse was barred notwithstanding the operation of the intestacy statute.

The case of the adult child, completely self-dependent, who could show no loss and who nevertheless received $\frac{2}{3}$ of the recovery remained perplexing. To remedy this remaining inequity, the 1949 revision changed the theory of distribution and now damages are distributable in proportion to the pecuniary loss sustained.¹⁰⁰ It would thus appear that a new problem is engendered. Section 133 never divided the beneficiaries into classes and does not do so today. During the period when the intestacy statute as modified by the subdivisions of Section 133 defined the pattern, there was no doubt but that classes resulted. When the intestacy statute is no longer a correlative of the death statute, what becomes of the classes that the concomitance of the two created? Unlike the FELA, Section 133 names no classes. Will they be implied?

Since the death statute now directs distribution in proportion to the pecuniary injuries suffered, a possible construction would permit a recovery by any spouse or next of kin showing a loss. Assuming that the survivors are a wife, no children, and a dependent brother, and the recovery is the aggregate of the losses shown by both, why should not each take a proportional share? Yet, subdivision one of Section 133 expressly provides that where a spouse and no issue survives, the damages are solely for the spouse. Was not subdivision one adopted to remedy an injustice produced by the intestacy statute where a *non-dependent* parent or collateral suffering no loss could share in the recovery simply by virtue of his relationship to the deceased? Now such a result is impossible for there can be no recovery without showing loss. When the reason for including said subdivision was eliminated, it would appear that

⁹⁸ *Snedeker v. Snedeker*, 164 N. Y. 58, 58 N. E. 4 (1900).

⁹⁹ *Matter of Meng*, 227 N. Y. 264, 125 N. E. 508 (1919).

¹⁰⁰ N. Y. DEC. EST. LAW § 133. See 1949 LEG. DOC. NO. 65(C), 1949 Report, N. Y. Law Revision Commission.

the need for the subdivision vanished as well, and that its retention is anomalous and vestigial. Subdivision one, it will be remembered, applies only when a spouse and no children survive, and in such case, all but the wife are expressly excluded. When children as well as a spouse survive, the body of Section 133 applies. The body of the section provides for distribution in proportion to the pecuniary injury. Is it not paradoxical to assume that the brother in the above hypothetical might share when a wife *and* children remain, because he can show a loss (which is all the body of the section now requires) and yet be expressly precluded from sharing when a wife *alone* survives, in consequence of the express words of the first subdivision? The same argument may be extended by analogy to the other subdivisions of Section 133. No cases in point have arisen as yet, however there is a likelihood that they will. When they do arise, there is no indication that the courts will construe the statute as suggested above. In all probability, the courts will adopt the remaining alternative and hold that the beneficiaries are divided into classes by implication. The reasoning back of this construction might be that the legislature in revising the statute, did not intend to abrogate the effect of the intestacy statute in creating classes but merely aimed at rectifying the evil with regard to apportionment within the class. In support of this latter construction, it might be urged that while the intestacy statute no longer governs distribution, Section 134 still defines "next of kin" as those who take the unbequeathed assets of a decedent and hence the statute regulating intestate succession remains effectual in breaking down the recipients into classes. Should this latter construction be adopted, the federal act and the New York statute will be substantially alike.

On returning to an analysis of the adjudicated cases, it is clear both in New York and under the FELA that since the death damages form no part of the assets of the estate, the proceeds are immune from creditors' claims and are not subject to the payment of decedent's debts.¹⁰¹ It would seem that since "next of kin" is defined as those who would take in intestacy, those merely standing *in locus parentis*, step-parents, and the natural parents of adopted children are excluded as beneficiaries.¹⁰² Other decisions have made plain the fact that it is of no consequence that the bene-

¹⁰¹ *In re Butler*, 20 F. Supp. 995 (W. D. Va. 1937) (FELA); *Matter of Ehret*, 247 App. Div. 456, 288 N. Y. Supp. 122 (2d Dep't 1936). However, by Section 189 of the New York Lien Law, a lien attaches against the proceeds in favor of a hospital for the reasonable charges for treatment of decedent prior to his death provided only that expenses of hospital treatment and medical care were elements of damage in the death action.

¹⁰² See Note, 56 A. L. R. 1349 (1928). For a discussion of exclusion on moral grounds (abandonment, marital misconduct, etc.), see Notes, 18 A. L. R. 1409 (1922); 90 A. L. R. 920 (1934).

fiary is an alien.¹⁰³ The contributory negligence of the *beneficiary* is no bar to his recovery either in New York or under federal law, and thus in an unusual case, damages were awarded in favor of the husband and sole next of kin of deceased, whose negligence was alone responsible for her death, against the owner of a car (which the husband had borrowed and was driving at the time of the accident) by imputing the husband's negligence to the owner under Section 59 of the New York Vehicle and Traffic Law.¹⁰⁴

*Death Damages Under the Warsaw Convention.*¹⁰⁵

Just as the circumstances of a particular case may serve to bring it within the scope of the FELA, thereby supplanting the law of New York, a death action may arise which falls within the scope of the Warsaw Treaty¹⁰⁶ in which case New York law is of only limited applicability. In order to present a three-dimensional picture of death liability in New York, it is fitting that the provisions of this treaty be discussed.

The convention's creation arose out of the necessity for having some international law which would establish a uniform code of liability of those flying between various countries, and which would replace the mass of conflicting local statutes with standard procedures and remedies, that would in turn perform the social function of encouraging aviation and aiding it to grow and prosper.

The treaty applies to "all international transportation of persons, baggage or goods" by air.¹⁰⁷ By "international transportation" is meant any transportation in which "according to the contract made by the parties" the place of departure and the place of destination are situated within the territories of two parties to the Convention¹⁰⁸

¹⁰³ *Hamilton v. Erie R. R.*, 219 N. Y. 343, 114 N. E. 399 (1916), *error dismissed*, 248 U. S. 369 (1919); *McGovern v. Philadelphia & R. Ry.*, 235 U. S. 389 (1914) (FELA).

¹⁰⁴ *Rozewski v. Rozewski*, 181 Misc. 793, 46 N. Y. S. 2d 743 (Sup. Ct. 1944).

¹⁰⁵ A Convention for the Unification of Certain Rules Relating to International Transportation by Air, and an Additional Protocol Thereto, concluded at Warsaw on October 12, 1929. Adherence advised by the Senate of the United States with reservation, June 15, 1934 (legislative day of June 6, 1934). Adherence declared by the President of the United States, with reservation, June 27, 1934. Declaration of adherence of the United States deposited at Warsaw, July 31, 1934. Proclaimed by the President of the United States, October 29, 1934.

¹⁰⁶ U. S. TREATY SER. No. 876 (Dep't State 1934). The entire French and English texts of the Convention may also be found in 49 STAT. 3000 (1934).

¹⁰⁷ Article I, § 1.

¹⁰⁸ *Wyman v. Pan American Airways, Inc.*, 181 Misc. 963, 43 N. Y. S. 2d 420 (Sup. Ct. 1943), 1943 U. S. Av. R. 1 (1943), *aff'd without opinion*, 267 App. Div. 947, 48 N. Y. S. 2d 459 (1st Dep't 1944), *aff'd without opinion*, 293 N. Y. 878, 59 N. E. 2d 785 (1945), *cert. denied*, 324 U. S. 882 (1945) (where passenger died in plane which disappeared over the Pacific Ocean on route from San Francisco to Hong Kong).

or within the territory of a single party if there is an agreed stopping place within the territory of any foreign nation even though that foreign nation is not a party to the Convention.¹⁰⁹ In effect, whether or not a trip is international depends upon the contract between the parties, not upon the flight of the plane or the place of the accident, and thus if the contract so reads, and the Convention's other conditions are met, the terms of the treaty may bind a passenger on a purely local flight when it is part of an international flight as defined above. In an illuminating article in the *Virginia Law Review*, George W. Orr gives the following example:¹¹⁰

For instance, the United States and Mexico are parties to the Convention; Cuba is not. A ticket or contract from Chicago to Mexico City would subject that whole flight to the Convention. If injury were sustained at Chicago in taking off, even though this accident happened on a portion of the flight, say, from Chicago to St. Louis, the Convention would apply as to those passengers holding tickets from Chicago to Mexico City. Naturally, it would not apply to any passengers aboard who held tickets only from Chicago to St. Louis, so it is possible to have passengers aboard both subject and not subject to the Convention, all in the same accident. The Convention would not apply to passengers, for instance, from Miami to Cuba, even though this is an international flight in the usual sense of that term, as Cuba is not a party to the Convention. But a return ticket from Miami to Cuba to Miami (or any other point in the United States) would be subject to the Convention as the point of departure and the place of destination would be within the jurisdiction of a party to the Convention and there would be an agreed stopping place in a foreign jurisdiction, it not being necessary that the jurisdiction of the agreed stopping place be that of a party to the Convention. Therefore, if passengers or goods were injured on the take-off from Miami or the landing at Havana, some of the passengers might be subject to the Warsaw Convention, those with return tickets to Miami, while others, those with one way tickets, would not be subject to the Convention.

Once it has been determined that the flight was "international transportation," and once it is demonstrated that the prescribed conditions as to the character of the ticket or contract¹¹¹ have been complied with, the terms of the Convention raise a presumption of liability against the carrier,¹¹² subject to certain enumerated defenses,¹¹³ and what is most important, the liability of the carrier is expressly limited unless wilful misconduct has been shown.¹¹⁴

¹⁰⁹ *Garcia v. Pan American Airways, Inc.*, 269 App. Div. 287, 55 N. Y. S. 2d 317 (2d Dep't 1945), 1945 U. S. Av. R. 39, *aff'd*, 295 N. Y. 852, 67 N. E. 2d 257 (1946), *cert. denied*, 329 U. S. 741 (1946) (round trip ticket to New York with stopping place at Lisbon, Portugal).

¹¹⁰ Orr, *The Warsaw Convention*, 31 VA. L. Rev. 423, 428 (1945). The author states that ". . . this article was written from the viewpoint of information to a person with no knowledge of the Convention and intended merely as an introduction to the basic ideas and principles involved."

¹¹¹ Article III, § 1.

¹¹² Article XVII.

¹¹³ Article XX.

¹¹⁴ Article XXV.

Article XXII of the Convention limits the damages recoverable for death or injury to a passenger to 125,000 gold francs of a fixed fineness which today equals \$8,291.87 in United States currency. Thus, the plaintiff in a death action would receive up to this sum without any showing of negligence or fault, unless the carrier can show that its servants, including those in the airplane, were free from all fault. As a practical matter, that is extremely difficult if not impossible for every accident generally results in the substantial destruction of all equipment and the death of the parties involved.

This maximum recovery for death, what we in the United States would regard as a relatively modest sum, has been both bitterly criticized and staunchly defended. The reasons put forth by those in favor of retaining the present limitation may be divided into the "quid pro quo" argument and the "social interest" argument. By the former, they claim that in exchange for the limitation, the burden of proof has been shifted; in exchange for the speed and convenience of airliners, the passenger accepts the attendant risks when he selects this mode of travel in preference to rail, ship, or motor. By the latter, they point to the reduction of litigation, and to the decrease in insurance rates for airlines which in return reduces costs and stimulates a young and growing industry. Further, it is asserted, the passenger can, if he chooses, purchase individual trip insurance at a very reasonable fee. In addition, we are reminded that unanimity was the compelling motive behind the treaty and that any increase would force those countries in which the human life is worth less to withdraw, and would forever dissuade those countries which still haven't ratified from ever doing so.¹¹⁵

The proponents of an increase claim that the shifting of the burden of proof merely gave what was already available by the doctrine of *res ipso loquitur* and that the maximum liability is grossly inadequate and inequitable by American standards.¹¹⁶

The courts of New York are bound to apply this liability limitation when the facts of the case warrant it, notwithstanding the

¹¹⁵ See, e.g., Allen, *Limitations of Liability to Passengers by Air Carriers*, 2 J. AIR. L. 325 (1936); Butler, *Limitations of Air Carriers Tort Liability and Related Insurance Coverage—A Proposed Federal Air Passenger Liability Act*, 11 AIR. L. REV. 262 (1940); Clare, *Evaluation of Proposals to Increase the "Warsaw Convention" Limit of Passenger Liability*, 16 J. AIR. L. & C. 53 (1949); Parker, *The Adequacy of the Passenger Liability Limits of the Warsaw Convention of 1929*, 14 J. AIR. L. & C. 37 (1947); R. Henberg, *Limitations of Airline Passenger Liability*, 6 J. AIR. L. 365 (1935).

¹¹⁶ On January 30, 1950, Rep. Latham of New York introduced H. J. R. 406 directing the Civil Aeronautics Board to procure an amendment to the Warsaw Convention with reference to the limitation of liability on international air travel. It would also require the carrier to secure insurance in behalf of each passenger of not less than \$25,000, the cost thereof to be added to the price of the ticket. H. J. R. 406 was referred to the House Committee on Foreign Affairs. See also Rhyne, *International Law and Air Transportation*, 47 MICH. L. REV. 41 (1948).

constitutional provision which forbids a limitation on wrongful death recoveries. This is so, because by its nature as a treaty, the Warsaw Convention ranks with the Federal Constitution as the supreme law of the land and transcends all conflicting state laws. It has been held that the treaty is self-executing and that it is constitutional and in derogation of no power of Congress and no personal right.¹¹⁷ No right of action for wrongful death is found in the Convention so the beneficiaries of the action and the substantive law of damages would have to be ascertained by the death statute of the place of the accident.¹¹⁸ Thus, the New York law discussed above, would control only when the accident occurs in this jurisdiction. However, by Article XXVIII of the Convention, the plaintiff has the option of bringing the action in the courts of: (1) the carrier's domicile, (2) the carrier's principal place of business, (3) the place of business through which the contract of carriage was made, or (4) the place of destination. Since by the same Article, all questions of procedure are to be governed by the law of the court to which the case is submitted, the adjective law of New York may be applicable when, in any of the above instances, the action is brought here.

JUSTIN L. VIGDOR,
JAMES P. KEHOE.

ARBITRATION PROCEEDINGS UNDER ARTICLE 84 OF THE CIVIL PRACTICE ACT

The word arbitration is ordinarily applied to an extrajudicial hearing and determination of a matter or matters of difference between contending parties by arbiters either chosen by the parties involved, or appointed by the court.¹ The decision rendered is called an award. This procedure may embrace either international, labor, or commercial controversies. The discussion herein will be limited to the last mentioned type of dispute.

The inception of this special type of proceeding occurred early in man's history. The Greeks and Romans were familiar with its process, and from the charters that were issued to the English guilds,

¹¹⁷ *Indemnity Ins. Co. v. Pan American Airways*, 58 F. Supp. 338, 1945 U. S. Av. R. 52 (S. D. N. Y. 1944).

¹¹⁸ *Choy v. Pan American Airways, Inc.*, 1941 U. S. Av. R. 10, 1942 U. S. Av. R. 93.

¹ 6 WILLISTON, *CONTRACTS* § 1918 (rev. ed. 1938); see invaluable symposium on arbitration in 83 U. of PA. L. Rev. 119 (1934).