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MEASURE OF DAMAGES UNDER MISSOURI WRONGFUL DEATH ACT

JOSEPH J. RUSSELL*

It was well settled at common law that there could be no recovery for wrongful death, even on a theory of compensation for loss of services.¹ Some American courts, including Missouri (even as late as 1931), had permitted recovery by a father for the loss of services occasioned by the death of a son.² Lord Campbell's Act,³ enacted in England in 1846, first gave a cause of action for wrongful death. Missouri's wrongful death act, patterned after Lord Campbell's Act, was first passed in 1855.⁴ The present act, which is essentially the same as the original, is found in Missouri Revised Statutes, 1939, Section 3652, 3654, as amended by Laws 1945, p. 846.⁵ This article is concerned primarily with the measure of damages under the act and the matters which may properly be considered by a jury in assessing the plaintiff's damages. Historical development and theory will be considered only insofar as it is pertinent to the measure of damages.

The original Missouri act, as well as the present one, was divided into two parts. One part, commonly denominated the "penalty section," provided a penalty of Five Thousand Dollars for death caused by negligence, unskillfulness, or criminal intent in the operation of a common carrier.⁶ The recovery being for a fixed amount, it was well settled that if the plaintiff could recover at all, the verdict should be for \$5,000,⁷ regardless of the type of negligence involved.⁸ If the jury returned anything other than an "all or

*Attorney, Cape Girardeau. LL.B., University of Missouri, 1949.

1. *Baker v. Bolton*, 1 Campb. 493 (1808).

2. *James v. Christy*, 18 Mo. 162 (1853); *Shields v. Yonge*, 15 Ga. 349, 60 Am. Dec. 698 (1854); *Sullivan v. Union Pac. Ry.*, 23 Fed. Cas. No. 13,599 (C.C.D. Neb. 1874); *Marx v. Parks*, 39 S.W. 2d 570 (Mo. App. 1931).

3. 9 & 10 Vict. c. 93 (1846).

4. Mo. REV. STAT. p. 647 (1855). An Act for the Better Security of Life, Property, and Character.

5. Sec. 3670, Mo. REV. STAT. (1939), was reenacted by Laws 1947, Vol. 2, p. 225, to include a provision that actions for wrongful death should not be abated by the death of the wrongdoer. Prior to this change, the cause of action was abated by the death of the wrongdoer. *Mennemeyer v. Hart*, 221 S.W. 2d 960 (Mo. 1949).

6. Mo. REV. STAT. § 2, p. 647 (1855).

7. *Le May v. Missouri Pac. Ry.*, 105 Mo. 361, 16 S.W. 2d 1049 (1891); *Anderson v. Missouri Pac. Ry.*, 196 Mo. 442, 93 S.W. 394, 113 Am. St. Rep. 748 (1906).

8. *Becke v. Missouri Pac. Ry.*, 102 Mo. 544, 13 S.W. 1053, 9 L.R.A. 157 (1890); *Meyer v. Southern Ry. Co.*, 135 Mo. 512, 36 S.W. 367 (1896).

nothing" verdict, it was the duty of the court to grant a new trial.⁹ But whether the amount recovered was entirely penal or partly compensatory was a matter of dispute—one line of cases holding it to be remedio-penal in nature,¹⁰ another holding it to be penal.¹¹ If the statute were viewed as partly compensatory in nature, the plaintiff need not ask for the full \$5,000, and the jury need give only the amount asked.¹² Viewed as a penalty, there could be no mitigation of damages.¹³

In 1905 the statute was amended to provide that the penalty should be "not less than two thousand dollars and not exceeding ten thousand dollars, in the discretion of the jury."¹⁴ This amendment brought renewed conflict as to the nature of the recovery. It was said that the court had no authority to limit the jury to a verdict of \$2,000, the section being penal within the limits provided¹⁵ and that the only change made by the amendment was to give the jury a discretion as to the amount of the penalty.¹⁶ The jury nevertheless was entitled to consider all the pertinent facts for the proper exercise of its discretion. Hence it could consider the age and earning capacity of the deceased¹⁷ and the nature of the defendant's conduct,¹⁸ but it was error to give an instruction authorizing recovery of a compensatory nature.¹⁹

Opposed to this view was a line of cases holding the penalty section partly penal and partly compensatory²⁰ and permitting a showing of compensatory elements. A reconciliation of the conflict was attempted in *Moyes v. St. Louis, I.M. & S. Ry.*,²¹ on the basis that the section was penal and com-

9. Rafferty v. Missouri Pac. Ry., 15 Mo. App. 559 (1884).

10. Philpott v. Missouri Pac. Ry., 85 Mo. 164 (1884); see also Coover v. Moore & Walker, 31 Mo. 574 (1862).

11. Casey v. St. Louis Transit Co., 116 Mo. App. 235, 91 S.W. 419 (1905).

12. Marsh v. Kansas City Southern Ry., 104 Mo. App. 577, 78 S.W. 284 (1904) (It was said in this case that where a statute fixes the amount of damages, a plaintiff may seek and recover under it a lesser sum, but the contrary is true where the statute is strictly penal—that is, where all or part of the recovery goes to the state, or is collected in the name of the state, or by an informer authorized to sue by the state. But see Casey v. St. Louis Transit Co., *supra* note 11.

13. Senn v. Southern Ry., 124 Mo. 621, 28 S.W. 66 (1894), former appeal, 108 Mo. 142, 18 S.W. 1007 (1892) (Where suit is brought by both parents, and one dies before judgment, the other is entitled to the entire penalty.)

14. Mo. Laws 1905, p. 136.

15. Potter v. St. Louis & S. F. R. R., 136 Mo. App. 125, 117 S.W. 593 (1909).

16. Moyes v. St. Louis, I. M. & S. Ry., 158 Mo. App. 461, 138 S.W. 937 (1911).

17. Pratt v. Missouri Pac. Ry., 139 Mo. App. 502, 122 S.W. 1125 (1909).

18. Young v. St. Louis, I. M. & S. Ry., 227 Mo. 307, 127 S.W. 19 (1910).

19. Ervin v. St. Louis, I. M. & S. Ry., 158 Mo. App. 1, 139 S.W. 498 (1911).

20. Hartzler v. Metropolitan St. Ry., 140 Mo. App. 665, 126 S.W. 760 (1910); O'Connell v. Missouri Pac. Ry., 149 Mo. App. 501, 131 S.W. 117 (1910).

21. 158 Mo. App. 461, 138 S.W. 937 (1911).

pensatory both only in the sense that the penalty might accrue to the person aggrieved and to that extent compensate him or her, such compensation being a mere incident, relative only to the disposition of the penalty after it was imposed. The matter was apparently settled by *Boyd v. Missouri Pac. Ry.*²² On the first appeal of this case, it was held that the pecuniary loss of the plaintiff was properly shown, the court saying:

“ . . . the section . . . does not call for any measure of damages. It provides for a minimum and maximum, and the exercise of a discretion by the jury between the two extremes. That discretion was certainly not intended for the exercise of a mere whim, caprice, or prejudice. As the statute has a remedial side to it, the jury may consider the extent of the injury to be remedial; and, as it has a penal side, the jury have the right to consider the facts of the negligence in determining the amount to be allowed under that phase of the case.”²³

On the second appeal, it was concluded that the first \$2,000 of the permissible recovery was penal and the remainder compensatory, so that it was correct to instruct the jury on a compensatory theory in order to guide the jury's discretion.²⁴ This view was dominant for several years,²⁵ but in 1921, in *Grier v. Kansas City, C.G. & St. J. Ry.*²⁶ it was disapproved and the entire recovery held to be penal, the term “penalty” being synonymous with “punishment,” and the phrase “in the discretion of the jury” was said to have been inserted to permit the jury to consider the facts constitut-

22. First appeal: 236 Mo. 54, 139 S.W. 561 (1911); second appeal: 249 Mo. 110, 155 S.W. 13, Ann. Cas. 1914D 37 (1913).

23. *Boyd v. Missouri Pac. Ry.*, 236 Mo. 54, 139 S.W. 561, 571 (1911).

24. *Boyd v. Missouri Pac. Ry.*, 249 Mo. 110, 155 S.W. 13, Ann. Cas. 1914D 37 (1913). Anything over \$2,000 given because of aggravating circumstances was also penal in nature. See *Tibbels v. Chicago, Gt. W. R. R.*, 219 S.W. 109 (Mo. App. 1920).

25. *Johnson v. Springfield Traction Co.*, 178 Mo. App. 445, 163 S.W. 896 (1914); *Williams v. Chicago, B. & O. Ry.*, 169 Mo. App. 468, 155 S.W. 64 (1913); *Griggs v. Dunham*, 204 S.W. 573 (Mo. App. 1918), *reversed* 213 S.W. 459 (1919); *Muller v. Harvey*, 199 Mo. App. 627, 204 S.W. 926 (1918); *Rollinson v. Lusk*, 203 Mo. App. 31, 217 S.W. 328 (1920); *Taber v. Missouri Pac. Ry.*, 186 S.W. 688 (Mo. 1916), writ of error dismissed, 244 S.W. 200 (1916).

26. 286 Mo. 523, 228 S.W. 454 (1921), *rehearing overruled* 254 S.W. 359 (1921), *judgment aff'd.* 258 U.S. 610 (1921). The *Grier* case, however, looks upon the recovery as having a secondary compensatory nature, much as in the *Moyes* case, *supra* note 21.

This raised a question as to whether recovery could be had against the United States for deaths during the government's operation of the railroads. It had been held in *McDaniel v. Hines*, 239 S.W. 471 (Mo. 1922) that such recovery could be had. But following the decision in the *Grier* case, it was said in *Pryor v. Payne*, 209 Mo. App. 7, 244 S.W. 369 (1922) that there could be no recovery against the federal director general of railroads under a state penal statute.

ing negligence, the circumstances, and the pecuniary loss resulting. The jury may not give less than the minimum penalty.²⁷ This view has been followed subsequently, so that, while the damages recovered under the penal section are not limited to the pecuniary loss of the plaintiff,²⁸ the jury may consider such pecuniary loss,²⁹ as well as the facts constituting the negligence of the defendant³⁰ and, where they exist, aggravating and mitigating circumstances,³¹ just as in cases brought under the compensatory section. It thus appears that, while the jury cannot be instructed as to a compensatory measure of damages in suits brought under the penal section, the jury may properly consider, "in the exercise of its discretion," the same elements it could consider in giving compensatory damages.³²

As originally passed, the compensatory section of the wrongful death act authorized the jury to

"give such damages as they may deem fair and just, not exceeding Five Thousand Dollars; with reference to the necessary injury resulting from such death, having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect, or default."³³

The amount recoverable was increased to \$10,000 in 1907,³⁴ and to \$15,000 in 1945.³⁵ Because the elements which may be considered by the jury vary slightly, depending upon the relation between the plaintiff and the deceased, it is difficult to lay down any but the broadest general rules. The theory of recovery is compensatory.³⁶ The statute is said to be broad enough

27. *Bloomcamp v. Missouri Pac. Ry.*, 208 Mo. App. 464, 236 S.W. 388 (1922).

28. *Faulk v. Kansas City Rys.*, 247 S.W. 253 (Mo. 1923). See also *Rawie v. Chicago, B. & Q. R. R.*, 310 Mo. 72, 274 S.W. 1031 (1925), where an instruction limiting recovery to \$2,000 because no damages were shown was held to be properly refused.

29. *Beaber v. Kurn*, 231 Mo. App. 22, 91 S.W. 2d 70, 74 (1936) ("... pecuniary loss is not the sole criterion but only a fact to be considered with others and the importance to be given it in determining the amount of the recovery should be left to the unfettered discretion of the jury."); *Ward v. Missouri Pac. Ry.*, 311 Mo. 92, 277 S.W. 908 (1925).

30. *Kamoss v. Kansas City & W. B. Ry.*, 202 S.W. 434 (Mo. App. 1918); *Long v. Kansas City, C. C. & St. J. Ry.*, 258 S.W. 747 (Mo. App. 1923).

31. *Roques v. Butler County R.R.*, 264 S.W. 474 (Mo. App. 1924).

32. It is interesting to note that the penal section still covers travel by stage-coach, but does not yet cover travel by air, as pointed out by Judge Hyde in *Cummins v. Kansas City Public Service Co.*, 334 Mo. 672, 66 S.W. 2d 920 (1933).

33. MO. REV. STAT. § 4, p. 648 (1855).

34. Mo. Laws 1907, p. 252.

35. Mo. Laws 1945, p. 846.

36. *McCullough v. W. H. Powell Lumber Co.*, 205 Mo. App. 15, 216 S.W. 803 (1919).

to embrace any damages of a compensatory nature³⁷ or which may be estimated on a pecuniary standard—present, prospective, or proximate,³⁸ the phrase “necessary injury” being held to mean the damage the plaintiff will necessarily sustain.³⁹ However, there can be no exact mathematical formula for computing the damages and the jury is given a broad discretion, its verdict being conclusive unless that discretion is abused.⁴⁰ Exemplary damages may be recovered where aggravating circumstances exist.⁴¹ The limitation placed on the recovery is a provision against excessive damages⁴² and is not intended to be considered the maximum value of a human life.⁴³ The maximum recovery under the statute, including punitive damages, is the statutory limit,⁴⁴ though the plaintiff may sue for any desired sum within the limits of the statute.⁴⁵ The beneficiaries may elect to sue under either the compensatory section or the penal section, where applicable.⁴⁶ Where punitive damages are sought in addition to compensation, there is no need for a separate claim for them.⁴⁷

37. *Bennette v. Hader*, 337 Mo. 977, 87 S.W. 2d 413, 101 A.L.R. 1190, 1197 (1935); *Hertz v. McDowell*, 203 S.W. 2d 500 (Mo. App. 1947).

38. *Miller v. Williams*, 76 S.W. 2d 355 (Mo. 1934).

39. *Hogue v. Chicago & A. R. R.*, 32 Fed. 365 (C.C.E.D. Mo. 1887).

40. *Dowell v. City of Hannibal*, 200 S.W. 2d 546 (Mo. App. 1947), *reversed* 210 S.W. 2d 4 (Mo. 1948); *Marlow v. Nafziger Baking Co.*, 333 Mo. 790, 63 S.W. 2d 115 (1933); *Polk v. Krenning*, 2 S.W. 2d 107 (Mo. App. 1928); *Gentry v. Wabash R. R.*, 172 Mo. App. 638, 156 S.W. 27 (1913); *Harris v. McClintic-Marshall Const. Co.*, 168 Mo. App. 724, 154 S.W. 879 (1913); *McCarty v. St. Louis Transit Co.*, 192 Mo. 396, 91 S.W. 132 (1905). See also *Edwards v. Bell*, 103 S.W. 2d 315, 323 (Mo. App. 1937) (dissenting opinion: “. . . if there was nothing in the case to indicate passion and prejudice on the part of the jury in arriving at the amount of verdict, then it was a verdict that should stand in the amount as fixed by the jury.”)

41. *Gray v. McDonald*, 104 Mo. 303, 16 S.W. 398 (1891); *Haehl v. Wabash R. R.*, 119 Mo. 325, 24 S.W. 737 (1893).

42. *Dove v. Stafford*, 230 Mo. App. 241, 91 S.W. 2d 161 (1936). But contrast the maximum recovery of \$15,000 permitted by the Missouri statute with the \$55,000 verdict (cut to \$45,000 by the trial court) in *Mooney v. Terminal R. Ass'n of St. Louis*, 353 Mo. 1080, 186 S.W. 2d 450 (1945), *cert. denied* 326 U. S. 723 (1945), a suit brought under the Federal Employers' Liability Act. Or with the \$40,000 verdict and judgment in *Hampton v. Wabash R. R.*, 356 Mo. 999, 204 S.W. 2d 708 (1947), which was also brought under the Federal Employers' Liability Act.

43. *Marlow v. Nafziger Baking Co.*, 333 Mo. 790, 63 S.W. 2d 115 (1933).

44. *Perkins v. Wilcox*, 294 Mo. 700, 242 S.W. 974 (1922).

45. *Hawkins v. Missouri Pac. Ry.*, 182 Mo. App. 323, 170 S.W. 459 (1914).

46. *Cooper v. Kansas City Public Service Co.*, 356 Mo. 482, 202 S.W. 2d 42 (1947). This has not always been true. See, for example, *Hegberg v. St. Louis & S.F. R.R.*, 164 Mo. App. 514, 147 S.W. 192, 205 (1912) (“The causes of action given by the penal and compensatory sections of the damage act in case of a wrongful death resulting from negligence are diametrically opposite; the affirmative of the constituent parts of a cause of action under one section is a denial of them under the other.”). And see *Holmes v. Hannibal & St. J. R.R.*, 69 Mo. 536 (1879), and *Flynn v. Kansas City, St. J. & C. B. R. R.*, 78 Mo. 195 (1883).

47. *Spalding v. Robertson*, 206 S.W. 2d 517 (Mo. 1947).

In determining the amount of damages to be awarded to a wife for the death of her husband,

“. . . it is the pecuniary interest alone which the wife has in her husband's life that she may recover, and it is peculiarly the province of the court to give the jury the measure of damages, and their province to fix the amount under the guidance of the court.”⁴⁸

In determining this amount, the jury is given, as in other wrongful death actions, a wide discretion.⁴⁹ The elements of a wife's damages may differ from those of her husband,⁵⁰ and she will be permitted to recover, even though she introduced no evidence of pecuniary loss, for the law will imply such loss to her by reason of the negligent killing of her husband.⁵¹ In such a case she is not limited to nominal damages,⁵² the jury being allowed to measure her damages by its own experience and judgment, enlightened only by a knowledge of the age, sex, and condition in life of the deceased,⁵¹ and the law will presume that her husband was industrious, sober, tender, and gave her proper treatment and support.⁵⁴

In establishing her damages (or guiding the jury's discretion), a wife may show the number and age of her children⁵⁵ since the burden of supporting, raising and educating them alone was thrown on her by the defendant's negligence and it is proper for her to show the extent of the burden. She may show the earning power of her husband⁵⁶ but she is entitled to re-

48. *Schaub v. Hannibal & St. J. R.R.*, 106 Mo. 74, 16 S.W. 924 (1891).

49. *Wilkerson v. Missouri Pac. Ry.*, 69 S.W. 2d 299 (Mo. App. 1934); *Haines v. Pearson*, 107 Mo. App. 481, 81 S.W. 645 (1904); *Steger v. Meehan*, 63 S.W. 2d 109 (Mo. 1933).

50. *O'Mellia v. Kansas City, St. J. & C.B. R.R.*, 115 Mo. 205, 21 S.W. 503 (1893).

51. *Steinmetz v. Saathoff*, 84 S.W. 2d 434 (Mo. App. 1935).

52. *Most v. Goebel Construction Co.*, 199 Mo. App. 336, 203 S.W. 474 (1918).

53. *Hays v. Hogan*, 180 Mo. App. 237, 165 S.W. 1125 (1914), *modified* 273 Mo. 1, 200 S.W. 286, L.R.A. 1918C, 715, Ann. Cas. 1918E 1127 (1917).

54. *Voelker v. Hill-O'Meara Const. Co.*, 153 Mo. App. 1, 131 S.W. 907 (1910).

55. *Holmes v. St. Louis, I. M. & S. Ry.*, 176 S.W. 1041 (Mo. 1915); *O'Mellia v. Kansas City, St. J. & C.B. R.R.* *supra* note 50; *Tetherow v. St. Joseph & D.M. Ry.*, 98 Mo. 74, 11 S.W. 310, 14 Am. St. Rep. 617 (1889); *Howard v. Thompson*, 157 S.W. 2d 780 (Mo. App. 1942); *Wilkerson v. Missouri Pac. Ry.*, 69 S.W. 2d 299 (Mo. App. 1934) (In absence of evidence to contrary, total dependence of wife and children on husband for support will be presumed.); *Burton v. Kansas City*, 181 Mo. App. 427, 168 S.W. 889 (1914); *Atchison, T. & S.F. R.R. v. Wilson*, 48 Fed. 57 (C.C.A. 8th 1891).

56. *Overby v. Mears Mining Co.*, 144 Mo. App. 363, 128 S.W. 813 (1910); *Wilkerson v. Missouri Pac. Ry.*, 69 S.W. 2d 299 (Mo. App. 1934) (Evidence of husband's earnings admissible, though he and plaintiff had been separated six months and there was no evidence of his contributions to her.); note *Loomis v.*

cover only an amount equal to the amount of support she would have received from him.⁵⁷ Her damages are not limited to her support, however, for she has other property rights in the life of her husband, such as a right to his personal attention and aid in the home,⁵⁸ and the court will not presume her husband's life to be worth less than the maximum set by the statute simply because he is of a humble station in life.⁵⁹ A wife is not entitled to recover for the loss of her husband's society⁶⁰ as this would be an attempt to fix money recompense for grief, sorrow, and anxiety which is not allowed.⁶¹ It is proper for the jury to consider his age and health,⁶² his life expectancy, general habits and personal expenses.⁶³ As was stated in *Dowell v. Hannibal*,

“. . . in general it may be said that the basis for the allowance of damages may be found in the character, habits, capacity, business, and condition of the deceased, as well as the age, sex, circumstances, and condition in life of the next of kin.”⁶⁴

Metropolitan St. Ry., 188 Mo. App. 203, 175 S.W. 143 (1915), wherein it was stated that a man who has retired, but who still manages his affairs, investments, etc., is engaged in gainful occupation, resulting in “earnings.”

Plaintiff's recovery is not conditioned on a showing of her husband's earning power, however. See *Voelker v. Hill-O'Meara Const. Co.*, note 54 *supra*.

57. *Knight v. Sadtler Lead & Zinc Co.*, 75 Mo. App. 541 (1898) (but she does have an interest in the whole of his earnings if her husband was saving the surplus which would descend to her as an heir to his estate.). This amount is not limited to one-half of his earnings. *Steger v. Meehan*, 63 S.W. 2d 109 (Mo. 1933).

58. *Haines v. Pearson*, 107 Mo. App. 481, 81 S.W. 645 (1904); *Voelker v. Hill-O'Meara Const. Co.*, *supra* note 54.

59. *Honea v. St. Louis, I.M. & S. Ry.*, 245 Mo. 621, 151 S.W. 119 (1912), motion to transfer to court en banc denied, 247 Mo. 542, 153 S.W. 486 (1913) (A verdict of \$10,000 was sustained. Judge Graves, in a vigorous dissent, argued that the maximum included damages for aggravating circumstances and the legislature never intended the wife of a man earning \$1.25 per day to recover \$10,000. He said, “The verdict in this case outrages the very statutes under which it was recovered. To permit it to stand would be to make mockery of the law, and enter upon the records one more travesty upon justice.”).

60. *Knight v. Sadtler Lead & Zinc Co.*, 75 Mo. App. 541 (1898); *Atchison, T. & S.F. R.R. v. Wilson*, 48 Fed. 57 (C.C.A. 8th 1891); *Edwards v. Bell*, 103 S.W. 2d 315 (Mo. App. 1937).

61. *Haines v. Pearson*, 107 Mo. App. 481, 81 S.W. 645 (1904); *Schaub v. Hannibal & St. J. R.R.*, 106 Mo. 74, 16 S.W. 924 (1891).

62. *Hach v. St. Louis, I. M. & S. Ry.*, 208 Mo. 581, 106 S.W. 525 (1907).

63. *Morton v. Southwestern Telegraph & Telephone Co.*, 280 Mo. 360, 217 S.W. 831 (1920) (It is proper also, to show the health, earning capacity, age, habits of person killed, without pleading them, where the damage naturally flows from the injury the suit is based on); *Holmes v. St. Louis, I.M. & S. Ry.*, 176 S.W. 1041 (Mo. 1915); *O'Mellia v. Kansas City, St. J. & C.B. R.R.*, 115 Mo. 205, 21 S.W. 503 (1893).

64. *Dowell v. City of Hannibal*, 200 S.W. 2d 546, 559 (Mo. App. 1947), *reversed* 210 S.W. 2d 4 (Mo. 1948).

In discussing the verdict given by the jury, the following items have been given attention by the appellate courts:⁶⁵ age of the plaintiff and the deceased, the length of time they had been married, the dependence of the wife for support on the husband, the length of time the deceased was under medical care,⁶⁶ the life expectancy of the deceased, his average earnings,⁶⁷ the age of the plaintiff and surviving children,⁶⁸ the life expectancy of the plaintiff, the manner in which the deceased earnings were divided, the health of the plaintiff,⁶⁹ the seasonable nature of deceased's work,⁷⁰ the intelligence of deceased and the inference that his earnings would increase,⁷¹ the fact that the plaintiff was forced to go to work after husband's death,⁷² physical handicaps of the deceased,⁷³ length of time the deceased had been retired.⁷⁴

There are comparatively few cases discussing the recovery permitted to a husband for the death of his wife. The general rules are of course the same—the recovery is compensatory in nature. A husband is therefore entitled to show anything which will help in estimating his pecuniary loss: his wife's capacity to do housework,⁷⁵ the cost of a housekeeper to care for the children,⁷⁶ the number of children,⁷⁷ funeral expenses.⁷⁸ And while a wife is not entitled to compensation for the loss of her husband's society, he is entitled to compensation for the loss of her comfort and society⁷⁹ and he need not offer direct proof of the value of such society.⁸⁰

It has been said that under the wrongful death statute, a right of

65. No attempt has been made to cite these fully, since some of them appear in nearly all of the cases. Rather, one citation is given to cover as many items as possible.

66. *Dowell v. City of Hannibal*, 200 S.W. 2d 546 (Mo. App. 1947), *reversed* 210 S.W. 2d 4 (Mo. 1948).

67. *Steger v. Meehan*, 63 S.W. 2d 109 (Mo. 1933).

68. *Sing v. St. Louis S.F. Ry.*, 30 S.W. 2d 37 (Mo. 1930).

69. *Gude v. Weick Bros. Undertaking Co.*, 322 Mo. 778, 16 S.W. 2d 59 (1929).

70. *Troxell v. De Shon*, 279 S.W. 438 (Mo. App. 1926).

71. *Stewart v. Laclede Gaslight Co.*, 241 S.W. 909 (Mo. 1922).

72. *Vessels v. Kansas City Light & Power Co.*, 219 S.W. 80 (Mo. 1920).

73. *Hays v. Hogan*, 273 Mo. 1, 200 S.W. 286, L.R.A. 1918C 715, Ann. Cas. 1918E 1127 (1917), *modifying* 180 Mo. App. 237, 165 S.W. 1125 (1914).

74. *Loomis v. Metropolitan St. Ry.*, 188 Mo. App. 203, 175 S.W. 143 (1915).

75. *Hartzler v. Metropolitan St. Ry.*, 140 Mo. App. 665, 126 S.W. 760 (1910); *Martin v. St. Louis S.F. Ry.*, 227 S.W. 129 (Mo. App. 1921), *quashed* 289 Mo. 479, 233 S.W. 219 (1921).

76. *Leaman v. Campbell 66 Express Truck Lines*, 355 Mo. 359, 199 S.W. 2d 359 (1947).

77. *Kearse v. Seyb*, 200 Mo. App. 645, 209 S.W. 635 (1919).

78. *Leaman v. Campbell 66 Express Truck Lines*, *supra* note 76.

79. *Smith v. Simpson*, 288 S.W. 69 (Mo. App. 1926); *Martin v. St. Louis S.F. Ry.*, *supra* note 75.

80. *Martin v. St. Louis S.F. Ry.*, *supra* note 75.

action can accrue only to the parent of a *minor* child⁸¹ and that the law presumes the life of a minor is of value to the parent—the parent being entitled to the services of the child and responsible for its support.⁸² The wrongful death statutes provide the exclusive remedy available to the parents for the death of a child.⁸³ As in other actions under the statute, the plaintiff is entitled to recover damages for his necessary injury.⁸⁴

In an early case it was stated that in estimating the damages to a parent, “. . . the jury may properly consider . . . the loss of services of the deceased during his minority, the cost of nursing, surgical and medical attendance, and appropriate funeral expenses. These constitute ‘the necessary injury resulting from such death,’ to which the plaintiff is restricted by the statute.”⁸⁵

It is clear, however, that the measure of damages is not quite so broad as stated, being limited by the cost of raising and maintaining the child during its minority. The measure of damages is the actual expense of the accident plus the value of the child’s services, less the expense of educating, supporting, and maintaining the child from the time of the accident until its majority.⁸⁶

In no other area is the jury given as broad a discretion as in this area. The verdict may be based on the pecuniary loss of “every kind and character which will necessarily result from the death, to those entitled to recover for it.”⁸⁷ Lack of proof of value of the services or expenses does not limit the recovery to nominal damages,⁸⁸ the jury being permitted to measure the damages by their own experience and judgment, enlightened only by knowledge of the age, sex, and condition in life of the child.⁸⁹ If the facts are few, the jury’s verdict will be disturbed only where it shocks “the sense of justice

81. *Parsons v. Missouri Pac. Ry.*, 94 Mo. 286, 6 S.W. 464 (1888).

82. *Parsons v. Missouri Pac. Ry.*, *supra* note 81; *Degan v. Jewell*, 292 Mo. 80, 239 S.W. 66 (1922); *Grogan v. Broadway Foundry Co.*, 87 Mo. 321 (1885). *But see* *Oliver v. Morgan*, 73 S.W. 2d 993 (Mo. 1934).

83. *Mennemeyer v. Hart*, 221 S.W. 2d 960 (Mo. 1949). This overrules the view expressed in *James v. Christy*, 18 Mo. 162 (1853), and subsequent cases, that a parent has a property right in the services of a minor child.

84. *Marshall v. Consolidated Jack Mines Co.*, 119 Mo. App. 270, 95 S.W. 972 (1906).

85. *Rains v. St. Louis, I.M. & S. Ry.*, 71 Mo. 164, 36 Am. Rep. 459 (1879).

86. *Degan v. Jewell*, 292 Mo. 80, 239 S.W. 66 (1922); *Hickman v. Missouri Pac. Ry.*, 22 Mo. App. 344 (1886); *Lindstroth v. Peper*, 203 Mo. App. 278, 218 S.W. 431 (1920) (The “probable money value of the child’s services” is not solely tested by what he might earn if put to outside labor.”); *see* *Mennemeyer v. Hart*, 221 S.W. 2d 960 (Mo. 1949).

87. *Ponticello v. Liliensiek*, 83 S.W. 2d 150 (Mo. App. 1935).

88. *Grogan v. Broadway Foundry Co.*, 87 Mo. 321 (1885).

89. *Parsons v. Missouri Pac. Ry.*, 94 Mo. 286, 6 S.W. 464 (1888).

of the judicial mind."⁹⁰ The discretion of the jury is particularly broad in the case of a young child, for

"The necessary pecuniary loss resulting to a mother from the death of a son too young to have developed any particular talents or aptitudes can be reached only on considerations of the most general character. In such case much must be left to the knowledge, experience, good sense, and fairness of the jury."⁹¹

In one of the most recent cases, the Missouri Supreme Court said that no formula exists, and each case must be determined on its own facts, considering uniformity of decision, economic conditions, expressed legislative policy, and "all pertinent factors," the test which must finally be met being whether the verdict is such as to shock the conscience of the court or is within the bounds of reason.⁹²

Among the items making up the pecuniary loss to a parent from the death of a child are funeral expenses,⁹³ medical costs,⁹⁴ and the value of the child's services.⁹⁵ Such value is not confined to the amount of earnings which would be voluntarily turned over to the parents⁹⁶ and the jury is justified in inferring a constantly increasing earning capacity⁹⁷ and may consider the value of services apart from wages earned.⁹⁸ The life expectancy of the parents may enter the picture, since it may be less than the period of the child's minority.⁹⁹ In discussing the value of a child's services and the amount of the verdict returned by the jury, Missouri appellate courts have mentioned the following items in addition to those given above: Age of the child, its health, its grades in school,¹⁰⁰ the work done by the child, the amount of wages turned over to the parents, the probability of the child's wages being increased, his intention to return home,¹⁰¹ the intention of the parents to educate the child, the increasing value of the child's services as it

90. *Ibid.*

91. Ponticello v. Liliensiek, 83 S.W. 2d 150 (Mo. App. 1935).

92. Wright v. Osborn, 356 Mo. 382, 201 S.W. 2d 935 (1947) (sustaining \$8,695 verdict for death of 8 year old boy).

93. Owen v. Brockschmidt, 54 Mo. 285 (1873).

94. Rains v. St. Louis, I.M. & S. Ry., 71 Mo. 164, 36 Am. Rep. 459 (1879).

95. Degan v. Jewell, *supra* note 86

96. *Ibid.*

97. Barnes v. Columbia Lead Co., 107 Mo. App. 608, 82 S.W. 203 (1904).

98. Kelly v. City of Higginsville, 185 Mo. App. 55, 171 S.W. 966 (1914).

99. Heath v. Salisbury Home Telephone Co., 27 S.W. 2d 31 (Mo. App. 1927), *aff'd* 326 Mo. 875, 33 S.W. 2d 118 (1930).

100. Wright v. Osborn, *supra* note 92.

101. Knight v. Donnelly, 110 S.W. 687 (Mo. App. 1908).

gets older,¹⁰² the habits of the child—industry, obedience, diligence,¹⁰³ errands and chores done around the home.¹⁰⁴

One Missouri case, *Sharp v. National Biscuit Co.*,¹⁰⁵ indicated that parents might recover for the loss of a child's society. However, this was soon disapproved and stated to be mere dictum¹⁰⁶ and the final word seems to have been stated in *Pyle v. City of Columbia*:

"If there is a proposition of law settled in this state, it is that no recovery by the parents can be had for the loss of the society, comfort, and affection of a minor child who meets his death under the conditions covered by the death statutes. A discussion of the matter at this late date would be wholly unprofitable."¹⁰⁷

The broad discretion granted the jury in this type of case seems particularly wise. The cost of raising a child, from birth to majority, varies greatly, depending on the varying circumstances and economic condition of the family.^{107a} In most cases, it would be very difficult for parents to establish a pecuniary loss, in actual terms of dollars and cents, of a large amount, yet few people would be prone to say that the death of a child does not result in damage to the parents, though in theory it is possible that the death of a child might result, in the long run, in a pecuniary saving to the parents.¹⁰⁸ Notwithstanding the theoretical possibility, juries have with ever increasing frequency returned verdicts in excess of \$5,000 in cases of this nature which have been sustained, not only by Missouri courts, but by

102. *Kenny v. City of Higginsville*, 185 Mo. App. 55, 171 S.W. 966 (1914).

103. *Pulsifer v. Albany*, 47 S.W. 2d 233 (Mo. App. 1931).

104. *Haynie v. Jones*, 127 S.W. 2d 105 (Mo. App. 1939).

105. 179 Mo. 553, 78 S.W. 787 (1904).

106. *Marshall v. Consolidated Jack Mines Co.*, 119 Mo. App. 270, 95 S.W. 972 (1906); *Kelly v. City of Higginsville*, 185 Mo. App. 55, 171 S.W. 966 (1914); *Howard v. Scarritt Estate Co.*, 161 Mo. App. 552, 144 S.W. 185 (1912); *Dando v. Home Telephone Co.*, 126 Mo. App. 242, 103 S.W. 103 (1907).

107. 263 S.W. 474 (Mo. App. 1923).

107a. The cost of raising a child to age 18 in a family of five persons with an annual income of \$2500.00, based on the price level of 1935 and 1936, has been estimated at \$9866.00, and in a family with an income of \$5,000.00 to \$10,000.00, the cost has been estimated at \$20,785.00. See DUBLIN and LOTKA, *THE MONEY VALUE OF A MAN*, pp. 44-58 (rev. ed. 1946). These figures include estimates for birth, food, clothing, health, shelter, household expenses, education, allowance for expense incurred in raising children who die before reaching age 18, and interest on money spent, as well as miscellaneous expenses such as personal care, newspapers and magazines, life insurance, transportation and recreation. As pointed out by the authors, no allowance is made for the value of the mother's contribution, which is extremely difficult to ascertain, and is an item of no little importance.

108. *Oliver v. Morgan*, 73 S.W. 2d 993 (Mo. 1934).

other state courts as well.¹⁰⁹ It might well be said in this connection (as it was in another matter),

“We adopt this rule with all its rigor, but with a consciousness that juries, in the exercise of their equity powers, do in practice correct many matters in which the law, by reason of its universality, is deficient.”¹¹⁰

A child may sue for damages incurred by the death of its parents¹¹¹ and is entitled to recover compensatory damages therefor.¹¹² An early statement that the measure of damages to minor children for the loss of their father was the fair and reasonable compensation for the loss of his services as a means of support during their minority¹¹³ is clearly too narrow. The loss to a minor by the death of a parent is more than the loss of a board bill, and minors are entitled to recover for loss of support, education, maintenance, intellectual and moral instruction,¹¹⁴ it being said that

“The loss of a parent’s care in the education, maintenance, and pecuniary support of children, have, in addition to their moral value, an appreciable pecuniary value.”¹¹⁵

The jury is not limited to a strict calculation, but has a wide discretion which will not be overturned unless abused¹¹⁶ and may give more than

109. *Wright v. Osborn*, *supra* note 92; *Chapman v. Terminal R.R. Ass’n of St. Louis*, 137 S.W. 2d 612 (Mo. App. 1940) (\$7,500 for young man, age 20 9/12, under Illinois law, which does not confine jury to value of services during minority); *Williams v. Excavating & Foundation Co.*, 93 S.W. 2d 123 (Mo. App. 1936) (\$5,000 for 10 year old child. Court indicates this might be excessive but for aggravating circumstances.); *Smyth v. Driv-Ur-Self Stations*, 93 S.W. 2d 56 (Mo. App. 1936) (\$5,000 for 18 year old boy); *Ponticello v. Lilieinsiek*, 83 S.W. 2d 150 (Mo. App. 1935) (\$6,500 for a minor son); *Miller v. Hotel Savoy Co.*, 68 S.W. 2d 929 (Mo. App. 1934) (\$6,250 for 16 year old boy); *Butterfield v. Community Light & Power Co.*, 49 A. 2d 415 (Vt. 1946) (\$6,500 for 10 year old boy); *Poe v. Chesapeake & O. Ry.*, 64 F. Supp. 358 (D.C. E.D. Ky. 1946) (\$10,000 for 8½ year old girl); *Long v. Shafer*, 164 Kan. 211, 188 P. 2d 646 (1948) (\$5,788.16 for 16 year old girl).

110. *Davis v. Springfield Hospital*, 204 Mo. App. 626, 218 S.W. 696, 700 (1920), former appeal in 196 S.W. 104 (Mo. App. 1917) (statement made in connection with mitigation of damages).

111. The statute gives the right of action to the children if there is no surviving spouse, or if the surviving spouse does not sue within six months. MO. REV. STAT. § § 3652, 3654 (1939).

112. *Goss v. Missouri Pac. Ry.*, 50 Mo. App. 614 (1892). See also *McGowan v. St. Louis Ore & Steel Co.*, 109 Mo. 518, 19 S.W. 199 (1892) (minority opinion) *reversing* 16 S.W. 236 (Mo. 1891).

113. *McPherson v. St. Louis, I.M. & S. Ry.*, 97 Mo. 253, 10 S.W. 846 (1889).

114. *Williams v. Kansas City*, 177 S.W. 783 (Mo. App. 1915); *Gamache v. Johnston Tin Foil & Metal Co.*, 116 Mo. App. 596, 92 S.W. 918 (1906); *Supple v. Laclede Gaslight Co.*, 125 Mo. App. 81, 102 S.W. 608 (1907).

115. *Stoher v. St. Louis, I.M. & S. Ry.*, 91 Mo. 509, 4 S.W. 389, 393 (1887).

116. *Gamache v. Johnston Tin Foil & Metal Co.*, 116 Mo. App. 596, 92 S.W. 918 (1906); *Ventimiglia v. M. A. Heiman Mfg. Co.*, 256 S.W. 139 (Mo. App. 1923).

nominal damages even where there is no showing of the parent's earnings at the time of his death.¹¹⁷ A child may recover for the death of a divorced parent, even though in the custody of the survivor, it being said that the child has a right to the care of its parent, despite the divorce, and can't be affected by a decree to which it was not a party.¹¹⁸ However, a child is not entitled to compensation for loss of the society and advice of the parent¹¹⁹ and it has been said that the physical pain of the deceased and the mental suffering of the plaintiff cannot be considered.¹²⁰ Very few of the cases have arisen from the death of a mother, but it is clear that the same general principles should govern the death of either parent. The home furnished by the mother, the mental and moral training and physical care she provides, are of pecuniary value to the child¹²¹ and the jury is not limited to a precise calculation.¹²² Among other items considered by courts and juries in cases of this nature are the probable earnings of the parent, based on age, business capacity, experience, habits, health, energy, perseverance, the life expectancy of the deceased, the age of the plaintiff, and contributions made for the support of the child.¹²³

Where there is no surviving spouse, child, or parent eligible to bring suit under the wrongful death statute, the deceased's administrator or executor may bring an action¹²⁴ if there are beneficiaries who have been pecuniarily injured by the death of the deceased, the amount recoverable being compensatory.¹²⁵ If there are no such beneficiaries, or they were receiving no

117. *Stoher v. St. Louis, I. M. & S. Ry.*, *supra* note 115; *Sipple v. Laclede Gaslight Co.*, *supra* note 114.

118. *Sipple v. Laclede Gaslight Co.*, *supra* note 114 (Father, divorced, killed. Child in custody of mother permitted to maintain suit).

119. *Stokey v. St. Louis S.F. Ry.*, 209 Mo. App. 33, 236 S.W. 426 (1922).

120. *McGowan v. St. Louis Ore & Steel Co.*, 109 Mo. 518, 19 S.W. 199 (1892), *reversing* 16 S.W. 236 (Mo. 1891); *Goss v. Missouri Pac. Ry.*, 50 Mo. App. 614 (1892).

121. *Smith v. Mederacke*, 302 Mo. 538, 259 S.W. 83 (1924).

122. *Johnson v. Scheerer*, 109 S.W. 2d 1231 (Mo. App. 1937).

123. *Smith v. Mederacke*, 302 Mo. 538, 259 S.W. 83 (1924); *Sipple v. Laclede Gaslight Co.*, 125 Mo. App. 81, 102 S.W. 608 (1907) (The court here observed that, while the deceased father had been an alcoholic for three or four years prior to his death, he had reformed after being divorced.); *Ventimiglia v. M. A. Heiman Mfg. Co.*, 256 S.W. 139 (Mo. App. 1923); *McGowan v. St. Louis Ore & Steel Co.*, 109 Mo. 518, 19 S.W. 199 (1892), *reversing* 16 S.W. 236 (Mo. 1891).

124. Mo. REV. STAT. § 3652 (1939).

125. *McCullough v. W. H. Powell Lumber Co.*, 205 Mo. App. 15, 216 S.W. 803, 807 (1919) "The test . . . is: Were the persons named in the petition as the beneficiaries, so far as concerns the question of damages, pecuniarily injured by the death of the deceased, or would they have pecuniarily benefited by the continuing life of the deceased . . . Recovery will not be sustained for the death of an adult, where there is no evidence that the beneficiary was receiving any pecuniary benefits

financial support, the administrator is entitled only to nominal damages.¹²⁶ In the absence of a showing of the anticipated earnings of the deceased, the administrator is entitled at least to nominal damages.¹²⁷ Where there are several possible beneficiaries, only one of whom was receiving financial aid from the deceased, the amount of damages is limited to the pecuniary loss of that one but is not limited to the actual monetary contributions made to the beneficiary.¹²⁸

Where the administrator sues under the penal section of the statute, the jury may not give less than the minimum penalty¹²⁹ and in such an action the administrator is not limited to the minimum penalty even if no pecuniary damages to anyone are shown.¹³⁰ As in the case in actions brought by other party plaintiffs, the life expectancy, age, ability, qualifications to work, general habits and personal expenses of the deceased are factors to be considered,¹³¹ as well as depreciation of the value of the dollar and increased wages¹³² and any other matters tending to show pecuniary loss. It should be noted, however, that medical and funeral expenses are recoverable only if there is a legal duty on the part of the beneficiary to supply them.¹³³

The wrongful death statute reads, ". . . and considering the aggravating and mitigating circumstances."¹³⁴ Just what these circumstances are, and when it is proper to instruct the jury to consider them, is a problem which has caused some difficulty. It has been said that the expression "aggravating and mitigating circumstances" was well known to the law when the legislature passed the wrongful death statute, and therefore the statute must

from the deceased at the time of his death. Dependency . . . means dependency in fact, and not necessarily a strict legal dependency, making the deceased legally liable to furnish support."

126. *Bagley v. St. Louis*, 268 Mo. 259, 186 S.W. 966 (1916).

127. *Morgan v. Oronogo Circle Mining Co.*, 160 Mo. App. 99, 141 S.W. 735 (1911).

128. *Newell v. St. Louis Transfer Co.*, 205 Mo. App. 543, 226 S.W. 80 (1920) (Father was only beneficiary who suffered loss, brother and sister having received no aid. Therefore only father's loss could be considered by jury.).

129. *Bloomcamp v. Missouri Pac. Ry.*, 208 Mo. App. 464, 236 S.W. 388 (1922).

130. *Rawie v. Chicago, B. & Q. R.R.*, 310 Mo. 72, 274 S.W. 1031 (1925); cf. *Maier v. Metropolitan St. Ry.*, 176 Mo. App. 29, 162 S.W. 1041 (1914).

131. *Bagley v. St. Louis*, 268 Mo. 259, 186 S.W. 966 (1916).

132. *Newell v. St. Louis Transfer Co.*, 205 Mo. App. 543, 226 S.W. 80 (1920).

133. *McCullough v. W. H. Powell Lumber Co.*, 205 Mo. App. 15, 216 S.W. 803 (1919) (Petition alleged deceased was single, unmarried, without wife or children surviving, over 21 and left his parents, brothers and sisters as heirs. In action by administrator, medical and funeral expenses were not proper elements of damage since there was no legal duty to pay them.).

134. Mo. REV. STAT. § 3654 (1939).

mean that exemplary as well as actual damages are recoverable.¹³⁵ However, exemplary damages may be recovered only where the deceased could have recovered them had he lived.¹³⁶ It is clear that such damages are proper where the case involves malice, wantonness, recklessness, willfulness, conscious negligence, wrong intent, or oppressiveness.¹³⁷ If such issues are not involved, it is not proper for the jury to consider the aggravating circumstances in fixing the verdict.¹³⁸ Where aggravating circumstances are present, it is proper for the jury to consider the defendant's financial standing.¹³⁹ In actions brought under the penal section of the statute, aggravating circumstances may be shown to guide the discretion of the jury, and damages above the minimum penalty may be awarded on the basis of such circumstances.¹⁴⁰

It has been said that where the phrase "mitigating and aggravating circumstances" is used, the court should tell the jury what such circumstances are.¹⁴¹ While instances of aggravating circumstances abound, the cases give examples of what does not constitute mitigating circumstances, rather than what does. Remarriage of a woman is not a mitigation of the damages sustained by her because of the death of her husband.¹⁴² Insurance money received because of the deceased's death is not a mitigation of damages,¹⁴³ it being said that such mitigation

135. *Gray v. McDonald*, 104 Mo. 303, 16 S.W. 398 (1891); *Haehl v. Wabash R.R.*, 119 Mo. 325, 24 S.W. 737 (1893).

136. *Otto Kuehne Preserving Co. v. Allen*, 148 Fed. 666, 8 Ann. Cas. 746 (C.C.A. 8th 1906).

137. *Boyd v. Missouri Pac. Ry.*, 236 Mo. 54, 139 S.W. 561 (1911) ("punitive or exemplary damages are allowed on account of willfulness, malice, wantonness, recklessness, or conscious negligence or wrong intent."); *Haehl v. Wabash R.R.*, 119 Mo. 325, 24 S.W. 737 (1893) (exemplary damages are permitted when the wrongful act is "willful, wanton, reckless, oppressive, or malicious"); *Calcaterra v. Iovaldi*, 123 Mo. 347, 100 S.W. 675 (1906) (Evidence warranted exemplary damages. Showed wantonness and gross negligence amounting to recklessness).

138. *Goode v. Central Coal & Coke Co.*, 167 Mo. App. 169, 151 S.W. 508 (1912); *Barth v. Kansas City Elevated Ry.*, 142 Mo. 525, 44 S.W. 778 (1898) (The words "having due regard to the mitigating or aggravating circumstances" are proper only in a case in which punitive damages or smart money may be allowed.).

139. *Cole v. Long*, 207 Mo. App. 528, 227 S.W. 903 (1921).

140. *Lackey v. United Rys. Co.*, 288 Mo. 120, 231 S.W. 956 (1921); see also *Tibbels v. Chicago, Gt.W. R.R.*, 219 S.W. 109 (Mo. App. 1920).

141. *Nichols v. Winfrey*, 79 Mo. 544 (1883).

142. *Katz v. North Kansas City Development Co.*, 14 S.W. 2d 701 (Mo. App. 1929), former appeal in 215 Mo. App. 662, 258 S.W. 752 (Mo. App. 1924); *Platt v. Cape Girardeau Bell Telephone Co.*, 12 S.W. 2d 933 (Mo. App. 1929); *Clark v. Goebel Construction Co.*, 204 S.W. 62 (Mo. App. 1918).

143. *Bright v. Thacher*, 202 Mo. App. 301, 215 S.W. 788 (1919).

“. . . if allowed, would defeat or modify actions under the statute, where the party killed had, by his own prudence and at his own expense, sought to provide for the maintenance of his own family in the event of his death, and would enable the wrongdoer to protect himself to the extent of the insurance against the consequences of his own wrongful and unlawful acts.”¹⁴⁴

Likewise, the defendant may not claim as mitigation the payment of damages arising out of the same accident to other plaintiffs, the courts having said that

“The provision of the statute providing that recovery may be had ‘for every such person . . . so dying’ would be nullified to an extent if the jury were permitted to lessen the recovery for the death of one of such persons killed by reason of a recovery in the case of another person or persons killed in the same collision. The jury might lessen the recovery in a given case to a very material extent. We cannot construe the statute to mean this, in view of its terms.”¹⁴⁵

However the fact that juries do mitigate damages is recognized.¹⁴⁶

While this article is concerned primarily with Missouri’s wrongful death act, a few words as to the measure of damages under the Federal Employer’s Liability Act¹⁴⁷ seems appropriate. It may be said in general that the same principles and considerations govern, the Federal Act being compensatory in nature.¹⁴⁸ However, the Federal Act permits recovery for conscious pain and suffering before death¹⁴⁹ and contributory negligence serves to scale down the damages, rather than to bar the action,¹⁵⁰ and where the deceased is a minor, the damages may include contributions anticipated

144. *Carroll v. Missouri Pac. Ry.*, 88 Mo. 239, 57 Am. Rep. 382 (1885).

145. *Bloomcamp v. Missouri Pac. Ry.*, 208 Mo. App. 464, 236e S.W. 388 (1922).

146. *Davis v. Springfield Hospital*, 204 Mo. App. 626, 218 S.W. 696 (1920), former appeal in 196 S.W. 105 (Mo. App. 1917). For a case which may be an example of such mitigation, though it is not so stated, see *Leahy v. Davis*, 121 Mo. 227, 25 S.W. 941 (1894), in which a verdict of \$175 for the death of a 16 year old boy who was earning \$7.50 per week, and whose funeral expenses were \$120, was sustained as not being inadequate.

147. 45 U.S.C.A. c. 2, § § 51-60 (1943).

148. *Hancock v. Kansas City Term. Ry.*, 339 Mo. 1237, 100 S.W. 2d 570 (1936) (Damages are “such pecuniary benefits as the beneficiaries reasonably might have received had the deceased not died from his injuries.”); *Truesdale v. Wheelock*, 335 Mo. 924, 74 S.W. 2d 585 (1934) (Financial contributions not the sole measure of recovery, and it is impossible to measure the value of the loss by material standards. No recovery allowed for loss of companionship and mental anguish.); *Newkirk v. Pryor*, 183 S.W. 682 (Mo. App. 1916); *Walker v. Missouri Pac. Ry.*, 210 Mo. App. 592, 243 S.W. 261 (1922).

149. *Kilburn v. Chicago, M. & St.P. Ry.*, 289 Mo. 75, 232 S.W. 1017 (1921).

150. *Crecelius v. Chicago, M. & St.P. Ry.*, 284 Mo. 26, 223 S.W. 413 (1920).

by his parents after he reaches majority.¹⁵¹ Verdicts in actions under the Federal Act are not limited by the statute, and run considerably higher than under the state act. It was argued at one time that verdicts under the federal act should be limited to the size permitted by the state act, as a matter of public policy and fairness to other citizens.¹⁵² However, the state statutory limit has no bearing on the matter¹⁵³ and the question has not been seriously urged for many years. Much attention has been given in recent years to uniformity of decision, and the Missouri Supreme Court has not hesitated to order a remittitur where the verdict was believed excessive.¹⁵⁴

In conclusion, it may be said that the trend of verdicts in wrongful death actions, reflecting the trend in economic conditions, consistently has been toward higher verdicts. To the question of what is proper for consideration by the jury in assessing a verdict, or by the court in reviewing it, a simple answer may be given—anything which tends to show the extent of the pecuniary loss caused by the death of the deceased, with a proportionate reward in the form of a higher verdict to the attorney whose initiative brings the greatest quantity of such information into court.

151. *Walker v. Missouri Pac. Ry.*, 210 Mo. App. 592, 243 S.W. 261 (1922).

152. *Burtch v. Wabash Ry.*, 236 S.W. 338 (Mo. 1921) (dissenting opinion); *Midwest National Bank & Trust Co. v. Davis*, 288 Mo. 563, 233 S.W. 406 (1921) (dissenting opinion).

153. *Dodd v. Missouri-Kansas-Texas R.R.*, 354 Mo. 1205, 193 S.W. 2d 905 (1946), first appeal in 353 Mo. 799, 184 S.W. 2d 454 (1945).

154. *Ford v. Louisville & N. R.R.*, 355 Mo. 362, 196 S.W. 2d 163 (1946); *Finley v. St. Louis S.F. Ry.*, 349 Mo. 330, 160 S.W. 2d 735 (1942); *Miller v. Terminal R. Ass'n of St. Louis*, 349 Mo. 944, 163 S.W. 2d 1034 (1942), *cert. denied* 317 U.S. 678 (1942), *rehearing denied* 317 U.S. 710 (1942).