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MISSOURI'S NEW WRONGFUL DEATH STATUTE— HIGHLIGHTS OF SOME SIGNIFICANT CHANGES

I. INTRODUCTION

On August 6, 1979, the Missouri General Assembly enacted a new so-called "wrongful death statute." In reality, the "statute" consists of five new sections which replace the identically numbered sections of prior law.¹ The sections, which became effective September 28, 1979, substantially change prior law. This Comment will explore those changes and their effect on a cause of action for wrongful death in Missouri.

II. WHO MAY SUE

The new statute makes substantial changes in the definition of persons who may bring suit for the death of another. Because the statute of limitations for wrongful death is relatively short,² an attorney retained to represent prospective plaintiffs in a wrongful death action should immediately ascertain the proper parties plaintiff. Mo. Rev. Stat. section 537.080 specifies who may bring a cause of action for wrongful death.³ Under prior law, section 537.080 contained a trap for the unwary. That section did provide that the spouse or minor children were vested with the cause of action for one year after death. If there were no minor children or spouse or if they existed but failed to sue within one year, the decedent's father and mother were proper plaintiffs. If there were no members of either of these classes, the administrator or executor was vested with the right to sue.

The old section 537.080 scheme and its inherent statute of limitations caused considerable difficulty for many plaintiffs.⁴ The statute was construed to bar a claim by a spouse or minor child of a deceased if suit was not brought within one year where the deceased was survived by a parent or parents.⁵ If there were no surviving parents, however, the spouse or minor children were deemed to have two full years in which to sue. If there were no spouse or minor children the parents of the deceased were

1. For purposes of comparison, the text of the new and old sections is set out in the Appendix to this Comment. For convenience, they may be referred to as the "new" and "old" wrongful death statutes.

2. See text accompanying notes 85 & 86 *infra*.

3. See Appendix for text of new and old sections *infra*.

4. In several Missouri cases, a viable cause of action for wrongful death was lost when suit was filed by a plaintiff after the statute of limitations had run on the persons contained in his class but before the general two year statute had expired. See, e.g., *Kansas City Stock Yards Co. v. Clark*, 536 S.W.2d 142 (Mo. En Banc 1976); *Saupe v. Kertz*, 523 S.W.2d 826 (Mo. En Banc 1975); *Forehand v. Hall*, 355 S.W.2d 940 (Mo. 1962).

5. *Kansas City Stock Yards Co. v. Clark*, 536 S.W.2d 142 (Mo. En Banc 1976).

allowed two years to bring suit.⁶ These classes of plaintiffs and time limitations could not be altered, even by assignment.⁷

The provisions of the new Mo. Rev. Stat. section 537.080 change the old scheme in several significant respects. The section sets out three classes of persons vested with the right to sue: (1) spouse, children, father, or mother; (2) brother, sister, or descendants; and (3) plaintiff *add litem*. The statute appears to prevent a person in a lower class from suing unless there are no persons in a higher class.⁸ Further, there is no statute of limitations "built in" to this section under the new statute. For example, suppose John Smith is killed in an automobile accident. He is survived by Jane (his wife), Jack (his son), Joe (his father), and Jeff (his brother). Under the old statute, if Jane or Jack failed to sue within one year after death, their claims would be barred since John left a surviving parent.⁹ Under the new statute the spouse, children, and parent are all in the same class. They will, however, have the full period of limitations¹⁰ within which to sue. The existence of beneficiaries of a second class does not affect the time within which a spouse, children, and parents have to file their claim.

A literal interpretation of the new statute indicates that the existence of Jane, Jack, and Joe bars suit by Jeff (the brother, a "class two" plaintiff) even if the class one plaintiffs chose not to sue. The old law gave the right to sue to the class two or three plaintiffs if no class one plaintiff sued in the first year, even if there were class one plaintiffs extant. Although this inherent one year statute of limitations on actions by class one plaintiffs caught many such plaintiffs by surprise,¹¹ it did ensure that a class two plaintiff could eventually bring suit in the event the class one plaintiffs(s) did not sue. The new statute, by removing the self-contained time limit, makes no express provision for suit by a lower class plaintiff when a higher class plaintiff exists. Although a contrary construction has been advocated,¹² such an approach appears to have no support in statutory construction or case law. In light of the strict construction of Missouri's wrongful death statute,¹³ it appears that this approach would be rejected.

6. *Id.* at 145.

7. *Wessels v. Gipfel*, 522 S.W.2d 653 (Mo. App., St. L. 1975); *Forsthove v. Hardware Dealers Mut. Fire Ins. Co.*, 416 S.W.2d 208 (Mo. App., St. L. 1967).

8. See notes 11-13 and accompanying text *infra*.

9. See, e.g., *Crane v. Riehn*, 568 S.W.2d 525 (Mo. En Banc 1978).

10. The period of limitations in the new statute is three years. See text accompanying notes 85 & 86 *infra*.

11. See note 24 and accompanying text *infra*.

12. Mo. Bar C.L.E., *Wrongful Death, Missouri Tort Law, Vol. II* § 22.28 (1980). The author proposes that courts allow a class two plaintiff to give notice to all existing class one plaintiffs and then file suit within three years. Then, if a class one plaintiff later filed suit within the limitations period, the suit by the class two plaintiff would be dismissed. If no suit were filed by a class one plaintiff, the cause of action would be waived as to all class one plaintiffs, and the class two plaintiff could proceed with his suit.

13. See *State ex rel. Jewish Hosp. v. Buder*, 540 S.W.2d 100 (Mo. App., St. L. 1976).

In addition to removing the self-contained statute of limitations, the new Mo. Rev. Stat. section 537.080 substantially changes the delineation of persons contained in each class.¹⁴ One of the most significant changes in the new statute is the complete elimination of the administrator or executor as a possible plaintiff. The new section provides that a plaintiff *ad litem*¹⁵ is the proper party plaintiff if there are no class one or class two plaintiffs.¹⁶ The plaintiff *ad litem* is appointed by a court upon "application of some person entitled to share in the proceeds of such action."¹⁷ Section 537.080 does not define this person, but reference to the new section 537.095(2) indicates eligible applicants are to be determined by reference to the laws of descent.¹⁸

The new statute also changes the law with respect to suit by children of the deceased. The old section specified only "minor" children as proper parties plaintiff.¹⁹ The word "minor" has been eliminated from the new statute,²⁰ thereby giving an adult child a cause of action for the death of a parent which did not exist under the old statute. For example, in *State ex rel. Jewish Hospital v. Buder*,²¹ the adult daughter of a deceased brought suit for the death of her mother within the two year limitations period of the old statute. Because an adult child had no right to sue under the old statute, an amended petition was filed, naming the administrator

14. See Appendix for text of new and old sections *infra*. A comparison of the persons contained in each class follows:

RSMo § 537.080 (1978)

[Old Statute]

CLASS ONE

Spouse

Minor children (natural or adopted)

CLASS TWO

Father (natural or adoptive)

Mother (natural or adoptive)

CLASS THREE

Administrator

Executor

RSMo § 537.080 (Supp. 1979)

[New Statute]

CLASS ONE

Spouse

Children (adult or minor, natural or adopted,

legitimate or illegitimate)

Father (natural or adoptive)

Mother (natural or adoptive)

CLASS TWO

Brother

Sister

Descendants of Brother and Sister

CLASS THREE

Plaintiff *ad litem*

15. A "plaintiff *ad litem*" (for the purposes of the suit) was apparently unknown in Missouri law before the passage of this Act.

16. The new statute makes no provision for the decedent's personal representative ever to be a plaintiff in a wrongful death action.

17. RSMo § 537.080(3) (Supp. 1979).

18. In spite of this reference to the Probate Code, the proceeds of a suit for wrongful death apparently are not deemed to inure to the benefit of the estate or its creditors. Even under the old Act, where the decedent's personal representative was a plaintiff, the suit proceeds were not estate assets but were held in trust for the heirs. Cf. *Caen v. Feld*, 371 S.W.2d 209 (Mo. 1963) (executor brought suit as "statutory trustee" on behalf of beneficiaries).

19. RSMo § 537.080(1) (1978).

20. RSMo § 537.080(1) (Supp. 1979).

21. 540 S.W.2d 100 (Mo. App., St. L. 1976).

of the mother's estate as plaintiff.²² The court held that since the amendment was made over two years after the death of the deceased, the administrator's claim was barred by limitations.

The costly mistake by plaintiff's attorneys in *Buder* points up the necessity of identifying the proper party plaintiff. Under the new statute, an adult child is a proper plaintiff. If an attorney fails to note this change in the law, however, he might file in the name of the class three plaintiff, as he would have under the old statute. Any attempt to amend the petition after the period of limitations has run would probably be unsuccessful as in *Buder*.²³ The result in such a situation is that there is no recovery by anyone for wrongful death of the decedent. The cases documenting the failure of plaintiffs' attorneys to bring suit in the name of the proper party are legion.²⁴ The change in the persons composing each class in the new statute will not help attorneys to avoid this trap. The attorney is still required to compare carefully the persons in each class to the living relations of the deceased to determine the correct plaintiff in each case.

In addition to granting plaintiff status to adult children, the new section 537.080 permits suit by illegitimate and adopted children.²⁵ The new statute uses the same language with regard to adopted children as did the old. Although illegitimate children were not mentioned in the old statute, their inclusion in the new statute appears to codify prior case law.²⁶

The new statute places the brother or sister (or their descendants) of a deceased in the class of possible plaintiffs.²⁷ These persons are class two plaintiffs who may not sue if there is a living class one member.²⁸ This change creates another trap for unwary plaintiffs' attorneys. Because the brother and sister could not be plaintiffs under the earlier statute,²⁹ they

22. Interestingly, the decedent's daughter was also the administrator of his estate. *Id.* at 105.

23. The *Buder* court held that an amended petition, filed after the statute of limitations had run on the plaintiff named therein, did *not* relate back to the time the original petition, which named a plaintiff who did not have a cause of action under the statute, was filed. The court noted that the wrongful death statute was to be strictly construed so as to determine the proper plaintiff. *See State ex rel. Jewish Hosp. v. Buder*, 540 S.W.2d 100, 107 (Mo. App., St. L. 1976). Even though the classes of plaintiffs have been changed by the new Act, the holding in *Buder* should still be good law. *See also Moore v. Watson*, 554 S.W.2d 537 (Mo.App., St. L. 1977).

24. *See, e.g., Kausch v. Bishop*, 568 S.W.2d 532 (Mo. En Banc 1978); *Kansas City Stock Yards Co. v. Clark*, 536 S.W.2d 142 (Mo. En Banc 1976); *Selsor v. Zenith Radio Corp.*, 536 S.W.2d 157 (Mo. En Banc 1976); *Saupe v. Kertz*, 523 S.W.2d 826 (Mo. En Banc 1975); *Day v. Brandon*, 394 S.W.2d 405 (Mo. 1965); *Forehand v. Hall*, 355 S.W.2d 940 (Mo. 1962); *Moore v. Watson*, 554 S.W.2d 537 (Mo. App., St. L. 1977); *State ex rel. Jewish Hosp. v. Buder*, 540 S.W.2d 100 (Mo. App., St. L. 1976); *Sterns v. MFA Mut. Ins. Co.*, 401 S.W.2d 510 (Mo. App., K.C. 1966).

25. RSMo § 537.080(1) (Supp. 1979).

26. *See Wessels v. Gipfel*, 522 S.W.2d 653 (Mo. App., St. L. 1975).

27. RSMo § 537.080(2) (Supp. 1979).

28. For a discussion of the possible judicial resolution of the problems caused by the existence of persons in more than one class, see notes 10-13 and accompanying text *supra*.

29. RSMo § 537.080 (1978). The brother and sister of the decedent were not included in any of the three classes in the old statute.

may be easily overlooked. Such an oversight could result in the loss of a valid cause of action. For example, if an unmarried, childless person dies with neither parent living, there would be no persons in class one. If he were survived only by a brother, the brother would be the proper plaintiff. Suit by the plaintiff *ad litem* would not be proper and, if the issue were raised by defendants after the period of limitations had run, there would be no recovery possible by anyone.³⁰

The addition of some peculiar language in the new section 537.080(2), however, may permit an argument that the existence of a class two plaintiff does not bar suit by a class three plaintiff. The section provides that an action may be brought by "the brother or sister of the deceased, or their descendants, *who can establish his or her right to those damages set out in section 537.090 because of the death.*" An argument can be made that a person listed in this section who makes no claim to the damages because he cannot "establish" any "right" to them is not a proper plaintiff. Under this construction, the existence of a brother (a class two plaintiff) would not prevent a plaintiff *ad litem* (class three) from suing. Because the peculiar language is new, resolution of this question will have to await court interpretation. It should be noted that subsection 537.080 (1) does *not* contain this language, precluding such an argument with regard to a class one plaintiff.³¹

Under prior law, the class three plaintiff was the administrator or executor.³² This provision has been eliminated and a "plaintiff *ad litem*" is substituted.³³ Bond may be required of the plaintiff *ad litem* at the discretion of the court.³⁴

Finally, Mo. Rev. Stat. section 537.080 (3) provides that "only one action may be brought under this section against any one defendant for the death of any one person." This language is identical to that contained in subsection (1) of the earlier statute.³⁵ The language apparently is designed to insulate defendants from multiple claims from members of the same class. Also, plaintiffs are required to satisfy the court that they have diligently attempted to notify all parties having a cause of action

30. See cases cited note 24 *supra*.

31. An argument could be made with regard to class one plaintiffs that existence of a superior class member who has not been damaged *should not* bar suit by a lower class member, notwithstanding the statutory language. A similar argument was rejected, however, in *Kansas City Stock Yards Co. v. Clark*, 536 S.W.2d 142, 148 (Mo. En Banc 1976).

32. RSMo § 537.080(3) (1978).

33. RSMo § 537.080(3) (Supp. 1979). See notes 14-18 and accompanying text *supra*.

34. RSMo § 537.080(3) (Supp. 1979).

35. Because old RSMo § 537.080(1) (1978) expressly provided that a defendant was not subject to more than one suit for the death of one person, this language was apparently only operative with regard to subsection (1) of that statute. New RSMo § 537.080 (Supp. 1979) contains the same provision at the end of the entire section. Accordingly, the prohibition against more than one suit now appears to apply to the entire section.

under section 537.080.³⁶ These two sections attempt to resolve the potential difficulties produced by the creation of numerous and diverse class members under section 537.080. For example, the deceased may be survived by a wife, daughter, mother, and father. The wife and daughter might bring suit and obtain judgment without joinder of the parents as plaintiffs. Section 537.080 (3) appears to protect a defendant against a later suit by the parents.³⁷ In order to insure that the parents' claim is adjudicated, section 537.095 requires the wife and daughter to establish that they have attempted to notify the mother and father.

The revisions to the "who may sue" section of the wrongful death statute have removed some of the more vexing problems in the old statute. Removal of the self-contained limitations period and the elimination of the bar to adult children as plaintiffs certainly make a more equitable scheme. These changes are not, however, without drawbacks. The retention of a class scheme and its priority rules will remain a trap for the unwary. Further, the changed composition of each class will no doubt cause some difficulty for plaintiffs' attorneys who practiced under the old statute.

III. DEFENSES

Although Mo. Rev. Stat. section 537.085,³⁸ regarding defenses to a wrongful death action, has been changed, the new section apparently will not affect substantive law. The new statute allows defendant to plead and prove "any defense the defendant would have had against the deceased." The old section expressly provided that defendant could plead and prove contributory negligence as a defense, but was not construed strictly. Case law permitted defendants in "product liability" actions, for example, to prove contributory fault but not contributory negligence.³⁹ The new section appears to codify this case law.

One effect of the new language with regard to defenses in wrongful death actions may be to facilitate the adoption of comparative negligence in Missouri. If the old language were retained an anomaly would have resulted in the event comparative negligence were adopted by judicial decision. In such event, the old section 537.085 seemingly would have permitted contributory negligence as a defense in wrongful death actions while comparative negligence would have been the rule in all other cases. The phraseology of the new statute gives defendants only the defenses which exist in non-death actions. Thus, if comparative negligence is adopted in

36. RSMo § 537.095.1 (Supp. 1979).

37. For a further discussion of the problems encountered when some of the members of a particular class fail to sue, see notes 81-84 and accompanying text *infra*.

38. See Appendix for text of new and old sections *infra*.

39. See, e.g., *Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362 (Mo. 1969) (adopting RESTATEMENT (SECOND) OF TORTS § 402A (1965)). See also cases cited notes 40 & 41 *infra*, permitting charitable and interspousal immunity to be asserted as a defense in wrongful death actions.

Missouri, the rule should prevail in wrongful death actions as well as in non-death claims.

Mo. Rev. Stat. sections 537.085 and 537.080 contain language indicating a wrongful death action may be brought only if the deceased would have been entitled to sue had death not ensued. The equivalent language of the old section 537.080 was construed to permit defendants to assert defenses such as charitable⁴⁰ and interspousal⁴¹ immunity when these defenses would have obtained against the decedent. Further, courts held that the workmen's compensation law provided immunity to an employer for the death of an employee even though the plaintiff is not the employee, but his spouse or parents.⁴² Because the new statute appears to follow the old law, these defenses should still be effective.

The effect of negligence by one other than the decedent⁴³ in a wrongful death action has long been the subject of debate. This issue arises when the defendant alleges that the plaintiff's (not the decedent's) negligence contributed to cause the death of the decedent. The language of the new statute does not appear to affect this issue.⁴⁴

IV. DAMAGES

Perhaps the most far-reaching change in the wrongful death statute is the damages provision under section 537.090. The old section 537.090 provided only for such damages as would "fairly and justly compensate" a plaintiff for his damages. This provision was construed to allow recovery only for "pecuniary" losses.⁴⁵ In other words, no recovery was permitted for loss of companionship, society, or comfort as a result of the death.⁴⁶

The new Act makes substantial changes in the damages area. New section 537.090 allows the trier of fact to award fair and just damages "having regard to the pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training and support." The effects of this expansive list are several. First, plaintiffs who were unable to state a cause of action under the old statute because they did not suffer pecuniary loss will now have an actionable claim. For example, in *Schwarz v. Gage*,⁴⁷ the collateral heirs of the decedent, suing

40. *Sisters of Mary v. Campbell*, 511 S.W.2d 141 (Mo. App., St. L. 1974).

41. *Fugate v. Fugate*, 582 S.W.2d 663 (Mo. En Banc 1979); *Klein v. Abramson*, 513 S.W.2d 714 (Mo. App., K.C. 1974).

42. *Tripp v. Choate*, 415 S.W.2d 808 (Mo. 1967); *Crain v. Webster Elec. Coop.*, 568 S.W.2d 781 (Mo. App., Spr. 1978).

43. For example, the negligence of the decedent's spouse, as plaintiff in a wrongful death suit, may be asserted as a bar to her recovery. See *Slagle v. Singer*, 419 S.W.2d 9 (Mo. 1967); *Dye v. Geier*, 345 S.W.2d 83 (Mo. 1961).

44. For an excellent discussion of the problem, see Davis, *Wrongful Death*, 1973 WASH. U.L.Q. 327, 359-62.

45. See, e.g., *Schwarz v. Gage*, 417 S.W.2d 33 (Mo. App., St. L. 1967).

46. See *Acton v. Shields*, 386 S.W.2d 363 (Mo. 1965).

47. 417 S.W.2d 33 (Mo. App., St. L. 1967).

through decedent's executor,⁴⁸ had their claim dismissed because they were unable to establish any pecuniary loss. Under the new statute, this claim would be actionable since the collateral heirs would not be restricted to recovery for pecuniary losses but could make a viable claim for loss of companionship or counsel.

The second effect of the new damages provision is that it creates problems of proof not encountered under the old Act. Although proof of damages for loss of companionship, guidance, counsel, and the like may appear to allow the jury to base its award on speculation, there are nevertheless restrictions in this area with which the trial lawyer must be familiar.⁴⁹ The general rule in jurisdictions which allow recovery for loss of guidance, counsel, and education is that plaintiff must offer some evidence that the deceased was disposed and qualified to render such services.⁵⁰ If the Missouri courts follow this approach, plaintiffs' attorneys must be prepared to put on such evidence if they expect to argue and recover for these damages.

Another potential proof problem under the new damages provision is that evidence may be required to support an award for loss of companionship, even when the plaintiff is the spouse of the decedent. For example, in *Galloway v. Korzekwa*,⁵¹ the court refused to allow the decedent's wife to recover damages for loss of the society and companionship of her husband because the evidence showed the husband spent Christmas vacations with another woman. In most situations, of course, plaintiffs will have little difficulty in establishing a right to damages for loss of companionship, comfort, and the like.

One likely result of the elimination of the pecuniary loss limitation is that far larger awards will be obtained in wrongful death cases. Cases from jurisdictions which allow recovery for non-pecuniary losses show that substantial awards are often made.⁵² While plaintiffs' attorneys defend

48. Collateral heirs in a suit under the new Act would bring the action directly or through a plaintiff *ad litem*. The decedent's executor or administrator will never be a plaintiff under the new Act. See notes 27-32 and accompanying text *supra*.

49. For a discussion of methods of proof, see S. SPEISER, RECOVERY FOR WRONGFUL DEATH 2d (1966); Kennelly, *Proving Damages in a Wrongful Death Case—How To Do It*, 1975 TRIAL LAW. GUIDE 25; 4 AM. JUR. PROOF OF FACTS 71 (1960); 11 AM. JUR. TRIALS 1 (1966).

50. See *Solomon v. Warren*, 540 F.2d 777 (5th Cir. 1976); *Miller v. Southern Pac. Co.*, 117 Cal. App. 2d 492, 256 P.2d 603 (1953). See generally Page, "Pecuniary" Damages for Wrongful Death, 1963 TRIAL LAW. GUIDE 398.

51. 346 F. Supp. 1086 (N.D. Miss. 1972).

52. See, e.g., *Spangler v. Helm's New York-Pittsburgh Motor Express*, 396 Pa. 482, 153 A.2d 490 (1959) (award of \$46,059 for loss of mother's companionship, comfort, society, guidance, solace, and protection). Because very few jurisdictions make use of special verdicts, it is difficult to determine the amount of the verdict which the jury allocated to this type of damages. Large general verdicts do, however, lend some support to the theory advanced. See *Jeffery v. United States*, 381 F. Supp. 505 (D. Ariz. 1974) (\$135,000 for death of 8-year-old son); *Metropolitan Dade County v. Dillon*, 305 So. 2d 36 (Fla. Dist. Ct. App. 1974) (\$900,000 for death

provisions allowing large recoveries as necessary for full compensation, it would seem that some control over recovery for non-pecuniary losses is desirable. Because the value of a human life is difficult, at best, to ascertain, a jury verdict of several million dollars for the death of another could be upheld under the new Act. Such astronomical recoveries are arguably not conducive to the orderly administration of justice or consistent with section 537.090's requirement that awards be "fair and just."

One possible solution to the problem of excessive awards for non-pecuniary losses is that adopted by the Kansas legislature. A 1976 Kansas statute similar to Missouri's new Act allows recovery for both pecuniary and non-pecuniary losses.⁵³ The Kansas statute, however, limits recovery for non-pecuniary losses to \$25,000.⁵⁴ This compromise appears to provide a reasonable and fair approach to wrongful death recoveries. As to pecuniary losses (*e.g.*, wages and earnings of the decedent which were to benefit plaintiff), the plaintiff is fully compensated since there is no limit on recovery for these damages. Only as to non-pecuniary losses (*e.g.*, companionship, love, affection), where there is a grave danger of astronomical jury awards, is the plaintiff's recovery limited. This approach appears to be fair to both plaintiffs and defendants and provides an adequate safeguard against verdicts based on sympathy and passion.⁵⁵

The new section 537.090 makes other significant changes in addition to providing an expansive list of recoverable damages. One such change is the specific provision that damages are *not* limited "to those which would be sustained prior to attaining the age of majority by the deceased or by the person suffering any such loss." Although this provision is contrary to the rule long followed in Missouri, the recent case of *Mitchell v. Buchheit*⁵⁶ changed that rule and allowed recovery for damages which would be sustained after the deceased reached the age of majority. Therefore, this provision in the new Act merely confirms the holding in *Mitchell*.

Section 537.090 now permits "the trier of the facts [to] award such damages as the deceased may have suffered between the time of injury and the time of death and for the recovery of which the deceased might have maintained an action had death not ensued." These damages are often called "survival damages." The earlier statute and cases thereunder did not permit recovery of most survival damages in an action for wrongful death.⁵⁷ Recovery for medical and funeral expenses *was* permitted under

of 6-year-old daughter); *Rinaldi v. State*, 49 A.D.2d 361, 374 N.Y.S.2d 788 (1975) (\$375,000 for death of 38-year-old man).

53. KAN. STAT. ANN. §§ 60-1903 to -1904 (1976).

54. *Id.* § 60-1903.

55. For a discussion supporting the Kansas approach, see Note, *Damages for Wrongful Death in Kansas: Some Problems, Questions and Answers*, 17 WASHBURN L.J. 73 (1977).

56. 559 S.W.2d 528 (Mo. En Banc 1977), *overruling* *Parsons v. Missouri Pac. Ry.*, 94 Mo. 286, 6 S.W. 464 (1888).

57. *See, e.g.*, *Schwarz v. Gage*, 417 S.W.2d 33 (Mo. App., St. L. 1967); *Goss v. Missouri Pac. Ry.*, 50 Mo. App. 614 (K.C. 1892).

the old Act but only in unusual circumstances.⁵⁸ The distinction between "survival damages" and "death damages" is best explained by reference to the person injured. "Death damages," normally recoverable in death actions, are awarded for the injury caused to the *plaintiff* by reason of the untimely death of the decedent. Such damages include the loss of income that the decedent would have used to benefit the *plaintiff* and the consortium and comfort that the *plaintiff* lost. On the other hand, "survival damages" are awarded for injury to the *decedent*, and include pain and suffering experienced by the *decedent* prior to his death.

Prior to the new Wrongful Death Act, recovery for survival damages was permitted only if the decedent's death did not result from the defendant's act.⁵⁹ For example, assume the decedent was injured in an automobile accident but before obtaining a recovery from the defendant driver, was killed in an unrelated industrial accident. The decedent's personal representative is permitted, under section 537.020, to recover the damages from the automobile accident which the decedent would have recovered had he lived. Under prior law, however, if the decedent died as a result of the automobile accident, recovery for the survival damages was not permitted—only a wrongful death action could be brought.⁶⁰ The new Act now permits recovery for both types of damages in the death action.⁶¹

The significance of the new statute's provision for recovery of survival damages can be appreciated only by examining awards made in states which have permitted recovery for both survival and death damages in a wrongful death action. For example, in *Parker v. McConnell Manufacturing Co.*,⁶² the jury awarded the plaintiff \$25,000 for pain and suffering experienced by the *decedent* after an automobile accident. This award was set aside because the plaintiff did not establish that the decedent had actually suffered pain before he died. The holding in *Parker* shows that

58. For cases holding that medical and funeral expenses were not recoverable in a wrongful death action, see *Robinson v. Richardson*, 484 S.W.2d 27 (Mo. App., St. L. 1972); *McCullough v. Powell Lumber Co.*, 205 Mo. App. 15, 216 S.W. 803 (Spr. 1919).

For cases permitting recovery for funeral and medical expenses in unusual circumstances, see *Caen v. Feld*, 371 S.W.2d 209 (Mo. 1963) (funeral expenses recoverable when paid by plaintiffs to avoid burial of deceased as a pauper); *Wilt v. Moody*, 254 S.W.2d 15 (Mo. 1953) (funeral and medical expenses recoverable by husband in action for death of wife); *Hildreth v. Key*, 341 S.W.2d 601 (Mo. App., Spr. 1960) (funeral and medical expenses recoverable by parents in action for death of minor child).

59. Recovery in this situation is provided for by a statute entirely separate from the Wrongful Death Act, RSMo § 537.020 (1978), which authorizes recovery for damages only when the cause of action is for injuries "other than those resulting in death." This language precludes recovery of survival damages when the cause of action is for wrongful death (*i.e.*, when the injuries *result* in death).

60. This distinction is discussed in *Davis*, *supra* note 44, at 346.

61. Of course, if the decedent's death is not the result of the defendant's acts, a cause of action for wrongful death does not lie. Recovery for survival damages in such a case is still permitted by RSMo § 537.020 (1978).

62. 40 A.D.2d 587, 334 N.Y.S.2d 586 (1972).

significant jury verdicts for pain and suffering experienced prior to the decedent's death are possible in wrongful death actions.⁶³ Attorneys representing plaintiffs under the new Act should be careful to explore this possibility and assert a claim for such damages whenever viable.

Awards for pain and suffering of the decedent must be supported by evidence. The holding in *Parker* illustrates this rule. Similarly, in *Burrows v. Knotts*,⁶⁴ a \$40,000 verdict was remitted to \$10,000 because the plaintiff did not establish that the decedent had maintained consciousness before he died in an apartment fire. Proof of pain and suffering may be difficult in many cases. Testimony that the decedent moved his leg and jaw and turned his head while in the hospital has been held insufficient,⁶⁵ while testimony showing that the decedent "moaned and groaned" has been held sufficient to support an award for pain and suffering.⁶⁶ The general rule is that there can be no recovery for pain and suffering experienced by the decedent when death is instantaneous or nearly so.⁶⁷

Permitting recovery for survival damages in a wrongful death action subjects defendants to the danger of double liability. This is because section 537.020 permits recovery by the decedent's *personal representative* for damages caused by injuries *not resulting* in death, and section 537.090 now permits recovery by certain persons (not the decedent's personal representative) for the same damages if death *does result* from the injuries. The principles of *res judicata* and collateral estoppel do not estop a person who was not a party in the prior action in which a judgment was entered. Thus, for example, the decedent's spouse may sue the defendant under the Wrongful Death Act and recover survival damages. In a separate action the decedent's personal representative may sue the defendant under section 537.020, and by proving the death was not the result of the injuries sued for by the spouse, recover the same damages.

The danger of separate actions based on the same conduct by defendant

63. See also *Weiner v. White Motor Co.*, 223 Pa. Super. Ct. 212, 297 A.2d 924 (1972) (\$35,000 award for pain and suffering lasting approximately one minute); cases cited in 2 PERSONAL INJURY VALUATION HANDBOOK 457-58 (1976), which reports verdicts of \$1,000,000 for pain lasting 11 days and \$575,000 for pain lasting six hours.

64. 482 S.W.2d 358 (Tex. Civ. App. 1972).

65. *Parker v. McConnell Mfg. Co.*, 40 A.D.2d 587 (1972).

66. *Kinner v. Kuroczka*, 12 A.D.2d 383, 212 N.Y.S.2d 479 (1961). See also *McLeod v. Young*, 257 So. 2d 605 (Fla. Dist. Ct. App. 1972) (laborious breathing showing fluid in lungs supports award for pain and suffering); *Carr v. Arthur D. Little, Inc.*, 348 Mass. 469, 204 N.E.2d 466 (1965) (movement, moaning and groaning, clenching of hands too speculative to make a jury question on pain and suffering).

67. See *Feldman v. Allegheny Airlines, Inc.*, 382 F. Supp. 1271 (D. Conn. 1974); *Cincotta v. United States*, 362 F. Supp. 386 (D. Md. 1973); *Northern Lights Motel, Inc. v. Sweaney*, 561 P.2d 1176 (Alaska 1977); *Dermody v. Utley*, 328 Mass. 209, 103 N.E.2d 234 (1952); *Micks v. Morton*, 256 Mich. 308, 239 N.W. 512 (1931); *Fisher v. Dye*, 386 Pa. 141, 125 A.2d 472 (1956). But see *Weiner v. White Motor Co.*, 223 Pa. Super. Ct. 212, 297 A.2d 924 (1972) (upholding award for \$35,000 for pain and suffering lasting one minute).

occasionally arose under the prior Act. Although the defendant was subject to additional liability, however, it was not double liability in the sense it is under the new statute.⁶⁸ A defendant faced with this dilemma under the new Act can effectively avoid double exposure only by interpleading all eligible wrongful death plaintiffs and the decedent's personal representative. This procedure was approved in *Plaza Express Co. v. Galloway*⁶⁹ and should be used whenever there is any possibility that one jury could find the injuries did not cause the decedent's death while another could find that the death was a direct result of the injuries.

Although the damage provisions of the new Wrongful Death Act seem to favor plaintiffs, they may also allow for innovation by defendants' attorneys. Because the statute permits recovery for such items of damage as companionship, comfort, and instruction, the particular family situation of the decedent and the plaintiffs would appear to be relevant. Thus, evidence of desertion and adultery of the surviving spouse,⁷⁰ alcoholism,⁷¹ desertion of a father,⁷² separation of spouses,⁷³ and other factors involved in interpersonal relationships⁷⁴ have been held admissible in wrongful death actions.

Admissibility of evidence of the remarriage of a wrongful death plaintiff has long been the subject of debate.⁷⁵ Although the rule in some jurisdictions is to the contrary,⁷⁶ the Missouri rule has been that evidence of remarriage in a wrongful death action is not admissible.⁷⁷ It is suggested, however, that the change in Missouri's Wrongful Death Act demands re-examination of this rule. If damages for loss of companionship of the decedent are allowed, fairness demands a defendant be permitted to show the remarriage of the plaintiff in mitigation of such damages. This approach would not provide a windfall to the tortfeasor, as plaintiffs' at-

68. This is because survival damages under the old Act were, in effect, forfeited when the decedent died as the result of the injuries caused by the defendant. If the defendant was exposed to liability for survival damages in an action under RSMo § 537.020 (1978) (providing for recovery for survival damages when decedent's death not a result of injuries sued for), this would be additional liability but not double liability. Under the new Act, the defendant may be required to pay twice for the same damages since survival damages are now recoverable under both statutes. See *Harris v. Coggins*, 374 S.W.2d 6 (Mo. En Banc 1963 (res judicata held not applicable because no identity of parties)). *Accord*, *Prentzler v. Schneider*, 411 S.W.2d 135 (Mo. En Banc 1966).

69. 365 Mo. 166, 280 S.W.2d 17 (En Banc 1955). See also *Donohue v. St. Louis Pub. Serv. Co.*, 374 S.W.2d 79 (Mo. 1963).

70. *Matthews v. Hicks*, 197 Va. 112, 87 S.E.2d 629 (1955).

71. *Nesfield v. Griswald*, 33 Misc. 2d 203, 226 N.Y.S.2d 514 (Sup. Ct. 1962).

72. *Joyner v. Williams*, 35 So. 2d 812 (La. Ct. App. 1948).

73. *Smith v. United States*, 437 F. Supp. 1004 (E.D. Pa. 1977).

74. *Johnson v. State Farm Ins. Co.*, 303 So. 2d 779 (La. Ct. App. 1974).

75. See generally *Shields & Giles, Remarriage and the Collateral Source Rule*, 36 INS. COUNSEL J. 354 (1969); Comment, *Remarriage and Wrongful Death*, 50 MARQ. L. REV. 653 (1967).

76. *Campbell v. Schmidt*, 195 So. 2d 87 (Miss. 1967); *Jensen v. Heritage Mut. Ins. Co.*, 23 Wis. 2d 344, 127 N.W.2d 228 (1964).

77. *Davis v. Springfield Hosp.*, 204 Mo. App. 626, 218 S.W. 696 (Spr. 1920).

torneys are wont to argue. Remarriage is relevant to the question of damages for lost companionship just as re-employment is evidence of reduced damages for lost wages. Certainly, no one argues that the tortfeasor receives a "windfall" because the plaintiff in a personal injury action made a quick physical recovery. Likewise, the gaining of a new companion should be relevant evidence in a wrongful death action where damages for companionship are recoverable.

Finally, the new section 537.090 provides that "[t]he mitigating or aggravating circumstances attending the death may be considered . . . but damages for grief and bereavement by reason of the death shall not be recoverable." Because identical language with regard to aggravation and mitigation was contained in the old statute, the cases under that law should apply. For example, evidence of an attempt to pass when vision to the front was not clear has been held to constitute "aggravating circumstances" under this section.⁷⁸ The specific prohibition against recovery for damages for grief and bereavement added in the new Act is merely a codification of prior law and does not make any substantial change.⁷⁹

V. SETTLEMENT

The new section 537.095 contains specific provisions regarding the settlement of a wrongful death action which did not exist under the prior Act.⁸⁰ At the outset, every attorney should be aware that section 537.095 requires *approval of the circuit court* for any wrongful death settlement. Moreover, the provision apparently applies whether or not a suit has been filed prior to settlement.

The need for the new settlement approval provision becomes obvious when one examines the provisions of the Act regarding who may sue.⁸¹ The classes of possible plaintiffs under the old Act were such that the members composing each were homogenous and relatively few in number.⁸² The classes under the new Act contain groups of people which, in some family situations, might disagree on whether to sue. For example, the spouse and parents of the decedent are both "class one" plaintiffs under the new Act. The new section 537.095 allows less than all the members of a class to sue and recover without joinder of other members if the plaintiffs satisfy the court that they have diligently attempted to notify all other members. Even if the remaining members do not join the settlement or suit, the recovery is

78. *Dougherty v. Smith*, 480 S.W.2d 519 (Mo. App., K.C. 1972). See also *May v. Bradford*, 369 S.W.2d 225 (Mo. 1963).

79. *Oliver v. Morgan*, 73 S.W.2d 993 (Mo. 1934). An instruction so informing the jury is permitted. See MO. APPROVED INSTR., Nos. 5.01-09 (1969 ed.).

80. See Appendix for text of new and old sections *infra*. RSMo § 537.095.3, .4 (Supp. 1979) of the new Act are identical to the provisions in the old Act and will not be discussed here.

81. See notes 2-37 and accompanying text *supra*.

82. Under the old Act, class one plaintiffs were spouse and minor children, class two were parents, and class three was the personal representative.

for the "use and benefit" of those *entitled* to sue and of whom the court has "actual written notice."⁸³ Thus, a person may share in the recovery without being a named plaintiff.⁸⁴

Defendants' attorneys should be careful to observe the new court approval requirements and be certain all members of the class have been notified, if possible. Because the statutory language is new there are no judicial opinions as to the penalty for failure to observe these provisions. Even though section 537.080 (3) provides that only one action may be brought against any one defendant for the death of any one person, one possible construction is that a member of the class who is purportedly cut off from recovery by an out-of-court settlement or because no one attempted to notify him of the pendency of suit, will be allowed to maintain a suit against the defendant. Until this question is resolved by the courts, the defendant, to avoid potential double liability, should see that the provisions of section 537.095 are followed scrupulously.

VI. STATUTE OF LIMITATIONS

The provisions of the new section 537.100,⁸⁵ setting forth the statute of limitations for wrongful death actions, are identical to the old Act except that the period is now three years instead of two. As has already been noted, the built-in limitations period for each class of plaintiffs was removed by section 537.080.⁸⁶ The tolling provisions contained in the old statute, providing for extension of the time limitation in limited circumstances, are present in the new statute in identical form.

VII. CONCLUSION

Missouri's new Wrongful Death Act has incorporated many needed changes. Perplexing problems still exist, however, some of which are a direct result of the changes made by the new Act. Further, the significant changes made in the types of damages recoverable may cause verdicts in wrongful death cases to soar. If this does occur, further examination of the wrongful death action by the legislature will be warranted. Until then both plaintiffs' and defendants' attorneys should be careful to observe the technical provisions of the new Act.

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83. RSMo § 537.095.2 (Supp. 1979).

84. RSMo § 537.095.2 (Supp. 1979) provides for the apportionment of a settlement or recovery by a plaintiff *ad litem*. RSMo § 537.095.3 (Supp. 1979) is the general provision on apportionment of damages among plaintiffs.

85. See Appendix for text of new and old sections *infra*.

86. See notes 2-13 and accompanying text *supra*.

APPENDIX

RSMo § 537.080 (1978) (prior to 1979 amendment):

Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, which damages may be sued for and recovered.

(1) By the spouse or minor children, natural or adopted, of the deceased, either jointly or severally; provided, that in any such action the petitioner shall satisfy the court that he has diligently attempted to notify all parties having a cause of action under this subdivision; and provided, further, that only one action may be brought under this subdivision against any one defendant; or

(2) If there be no spouse or minor children or if the spouse or minor children fail to sue within one year after such death, or if the deceased be a minor and unmarried, then by the father and mother, natural or adoptive, who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor; or if the surviving parents are unable or decline or refuse to join in the suit, then either parent may bring and maintain the action in his or her name alone, for the use and benefit of both such parents; or

(3) If there be no husband, wife, minor child or minor children, natural born or adopted as herein indicated, or if the deceased be an unmarried minor and there be no father or mother, then in such case suit may be instituted and recovery had by the administrator or executor of the deceased, and the amount recovered shall be distributed according to the laws of descent.

RSMo § 537.085 (1978) (prior to 1979 amendment):

On the trial of such actions to recover damages for causing death, the defendant may plead and prove as a defense that such death was caused by the negligence of the deceased.

RSMo § 537.090 (1978) (prior to 1979 amendment):

In every action brought under section 537.080, the trier of the facts may give to the party or parties entitled thereto such damages as will fairly and justly compensate such party or parties for any damages he or they have sustained and are reasonably certain to sustain in the future as a direct result of such death. The mitigating or aggravating circumstances attending the death may be considered by the trier of the facts.

RSMo § 537.095 (1978) (prior to 1979 amendment):

1. In any action for damages under section 537.080, the trier of the facts shall state the total damages found or the total settlement approved. The court shall then enter a judgment as to such damages, apportioning them among those persons entitled thereto as determined by the court.

2. The court shall order the claimant:

- (1) To collect and receipt for the payment of the judgment;
- (2) To deduct and pay the attorney's fees as contracted and expenses of recovery and collection of the judgment;
- (3) To acknowledge satisfaction in whole or in part for the judgment and costs;
- (4) To distribute the net proceeds as ordered by the court; and
- (5) To report and account therefor to the court. In its discretion the court may require the claimant to give bond for the collection and distribution.

RSMo § 537.100 (1978) (prior to 1979 amendment):

Every action instituted under section 537.080 shall be commenced within two years after the cause of action shall accrue; provided, that if any defendant, whether a resident or nonresident of the state at the time any such cause of action accrues, shall then or thereafter be absent or depart from the state, so that personal service

cannot be had upon such defendant in the state in any such action heretofore or hereafter accruing, the time during which such defendant is so absent from the state shall not be deemed or taken as any part of the time limited for the commencement of such action against him; and provided, that if any such action shall have been commenced within the time prescribed in this section, and the plaintiff therein take or suffer a nonsuit, or after a verdict for him the judgment be arrested, or after a judgment for him the same be reversed on appeal or error, such plaintiff may commence a new action from time to time within one year after such nonsuit suffered or such judgment arrested or reversed; and in determining whether such new action has been begun within the period so limited the time during which such nonresident or absent defendant is so absent from the state shall not be deemed or taken as any part of such period of limitation.

RSMo § 537.080 (Supp. 1979) (as amended):

Whenever the death of a person results from any act, conduct, occurrence, transaction, or circumstance which, if death had not ensued, would have entitled such person to recover damages in respect thereof, the person or party who, or the corporation which, would have been liable if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured, which damages may be sued for

(1) By the spouse or children, natural or adopted, legitimate or illegitimate, or by the father or mother of the deceased, natural or adoptive;

(2) If there be no persons in class (1) entitled to bring the action, then by the brother or sister of the deceased, or their descendants, who can establish his or her right to those damages set out in section 537.090 because of the death;

(3) If there be no persons in class (1) or (2) entitled to bring the action, then by a plaintiff ad litem. Such plaintiff ad litem shall be appointed by the court having jurisdiction over the action for damages provided in this section upon application of some person entitled to share in the proceeds of such action. Such plaintiff ad litem shall be some suitable person competent to prosecute such action and whose appointment is requested on behalf of those persons entitled to share in the proceeds of such action. Such court may, in its discretion, require that such plaintiff ad litem to give bond for the faithful performance of his duties;

Provided further that only one action may be brought under this section against any one defendant for the death of any one person.

RSMo § 537.085 (Supp. 1979) (as amended):

On the trial of such action to recover damages for causing death, the defendant may plead and prove as a defense any defense which the defendant would have had against the deceased in an action based upon the same act, conduct, occurrence, transaction, or circumstance which caused the death of the deceased, and which action for damages the deceased would have been entitled to bring had death not ensued.

RSMo § 537.090 (Supp. 1979) (as amended):

In every action brought under section 537.080, the trier of the facts may give to the party or parties entitled thereto such damages as the trier of the facts may deem fair and just for the death and loss thus occasioned, having regard to the pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support of which those on whose behalf suit may be brought have been deprived by reason of such death and without limiting such damages to those which would be sustained prior to attaining the age of majority by the deceased or by the person suffering any such loss. In addition, the trier of the facts may award such damages as the deceased may have suffered between the time of injury and the time of death and for the recovery of which the deceased might have maintained an action had death not ensued. The mitigating or aggravating circumstances attending the death may be considered by the trier of the facts, but damages for grief and bereavement by reason of the death shall not be recoverable.

RSMo § 537.095 (Supp. 1979) (as amended):

1. Except as provided in subsection 2 of this section, if two or more persons are entitled to sue for and recover damages as herein allowed, then any one or more of them may compromise or settle the claim for damages with approval of any circuit court, or may maintain such suit and recover such damages without joinder therein by any other person, provided that the claimant or petitioner shall satisfy the court that he has diligently attempted to notify all parties having a cause of action under section 537.080. Any settlement or recovery by suit shall be for the use and benefit of those who sue or join, or who are entitled to sue or join, and of whom the court has actual written notice.

2. When any settlement is made, or recovery had, by any plaintiff ad litem, the persons entitled to share in the proceeds thereof shall be determined according to the laws of descent, and any settlement or recovery by such plaintiff ad litem shall likewise be distributed according to the laws of descent unless special circumstances indicate that such a distribution would be inequitable, in which case the court shall apportion the settlement or recovery in proportion to the losses suffered by each person or party entitled to share in the proceeds and, provided, that any person entitled to share in the proceeds shall have the right to intervene at any time before any judgment is entered or settlement approved under this section.

3. In any action for damages under section 537.080, the trier of the facts shall state the total damages found, or upon the approval of any settlement for which a petition or application for such approval has been filed, the court shall state the total settlement approved. The court shall then enter a judgment as to such damages, apportioning them among those persons entitled thereto in proportion to the losses suffered by each as determined by the court.

4. The court shall order the claimant:

- (1) To collect and receipt for the payment of the judgment;
- (2) To deduct and pay the expenses of recovery and collection of the judgment and the attorneys' fees as contracted, or if there is no contract, or if the party sharing in the proceeds has no attorney representing him before the rendition of any judgment or settlement, then the court may award the attorney who represents the original plaintiff such fee for his services, from such persons sharing in the proceeds, as the court deems fair and equitable under the circumstances;
- (3) To acknowledge satisfaction in whole or in part for the judgment and costs;
- (4) To distribute the net proceeds as ordered by the court; and
- (5) To report and account therefor to the court. In its discretion the court may require the claimant to give bond for the collection and distribution.

RSMo § 537.100 (Supp. 1979) (as amended):

Every action instituted under section 537.080 shall be commenced within three years after the cause of action shall accrue; provided, that if any defendant, whether a resident or nonresident of the state at the time any such cause of action accrues, shall then or thereafter be absent or depart from the state, so that personal service cannot be had upon such defendant in the state in any such action heretofore or hereafter accruing, the time during which such defendant is so absent from the state shall not be deemed or taken as any part of the time limited for the commencement of such action against him; and provided, that if any such action shall have been commenced within the time prescribed in this section, and the plaintiff therein take or suffer a nonsuit, or after a verdict for him the judgment be arrested, or after a judgment for him the same be reversed on appeal or error, such plaintiff may commence a new action from time to time within one year after such nonsuit suffered or such judgment arrested or reversed; and in determining whether such new action has been begun within the period so limited, the time during which such nonresident or absent defendant is so absent from the state shall not be deemed or taken as any part of such period of limitation.