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Kentucky Law Survey: Remedies

Kenneth B. Germain
University of Kentucky

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Remedies

BY KENNETH B. GERMAIN *

I. WRONGFUL DEATH RECOVERY WHERE A JOINT TORTFEASOR IS A STATUTORY BENEFICIARY

In *Cox v. Cooper*¹ a woman in her eighth month of pregnancy was a passenger in an automobile driven by her husband. Due to the joint negligence of her husband and the driver of another automobile, a collision occurred, killing the unborn infant and injuring the woman so seriously that a hysterectomy was necessary. The woman sued both drivers in her individual capacity and as administratrix of her deceased infant's estate. The jury awarded verdicts of \$53,660 and \$40,196 respectively, and explicitly indicated that the awards were to be apportioned 50% apiece against the two defendants, who, in its view had equally contributed to the accident. Consequently, judgment was entered against each of the defendants for half of the plaintiff's individual damages and for half of the wrongful death recovery less the father's beneficial interest. The plaintiff thus recovered \$26,830 against each defendant in her individual capacity and \$10,098² against each defendant in her representative capacity.

Numerous appeals were filed. Of most interest are plaintiff's claim that the judgment should have been rendered for

* Associate Professor of Law, University of Kentucky. B.A. 1966, Rutgers University; J.D. 1969, New York University School of Law.

¹ 510 S.W.2d 530 (Ky. 1974).

² Although the actual judgment papers show the figure at \$10,275, the Court of Appeals opinion suggests the \$10,098 figure. The discrepancy is apparently attributable to the circuit court's inclusion of an additional \$177 per defendant for the costs of administration of the deceased infant's estate. Compare *Cooper v. Cox*, No. 19130, Judgment ¶¶ 3-4, (Kenton Circuit Ct., filed Nov. 16, 1970) with *Cox v. Cooper*, 510 S.W.2d 530, 532, 537 & n.5 (Ky. 1974). Although the inclusion of an amount for the costs of administration is totally unsupported by case law, it is quite consistent with the somewhat strained statutory interpretation the Court of Appeals used to approve recognition of funeral expenses as an item of wrongful death damages in *Square Deal Cartage Co. v. Smith's Adm'r*, 210 S.W.2d 340, 345 (Ky. 1948). The Court of Appeals' opinion in *Cox* does not address this item, probably because the defendants did not take an appeal on the matter. For purposes of this discussion the Court of Appeals' figure will be used.

“joint” rather than “several” liability and plaintiff’s attorneys’ appeal that their contingent fee award regarding the wrongful death action should have been based on the full verdict rendered by the jury, without a deduction for the amounts disallowed to the tortfeasor-father.³

The issue of whether the judgment should have been “joint”—recoverable to its full extent against either of the defendants—or “several”—recoverable only to the extent of the portions specifically designated by the judgment—is determined by recourse to §§ 454.040 and 412.030 of the Kentucky Revised Statutes [hereinafter cited as KRS]. Section 454.040 provides:

In actions of trespass the jury may assess joint or several damages against the defendants. When the jury finds several damages, the judgment shall be in favor of the plaintiff against each defendant for the several damages, without regard to the amount of damages claimed in the petition, and shall include a joint judgment for the costs.⁴

Section 412.030 provides: “Contribution among wrongdoers

³ Cox, the unrelated defendant, also appealed the denial of her motions for directed verdict and judgment notwithstanding the verdict, but the circuit court’s rulings were upheld. *Cox v. Cooper*, 510 S.W.2d 530, 533-35 (Ky. 1974). Likewise, Cox’s protestation that the verdict of \$40,000 for the death of the unborn infant was excessive was rebuffed on the authority of *Modern Bakery, Inc. v. Brashear*, 405 S.W.2d 742, 745 (Ky. 1966), wherein an award of \$37,200 for the death of a child with a life expectancy of 63 years was upheld. 510 S.W.2d at 535. The standard to be used in ascertaining damages in this type of case was recently set out in *Rice v. Rizk*, 453 S.W.2d 732 (Ky. 1970): “The measure of damages in a wrongful death action involving an infant is the *destruction of the infant’s power to earn money.*” *Id.* at 735 (emphasis added); *accord*, *Hale v. Hale*, 230 S.W.2d 610, 612 (Ky. 1950). Cox’s further protestation that the award of \$50,000 for the plaintiff’s pain and suffering was excessive also met with failure, even though the Court noted that there was no proof of any permanent loss of earning capacity on the part of the plaintiff. On this point the Court’s specific language may be instructive for future cases:

We think the shock and grief that must surely attend the killing of an eight-month child in its mother’s womb is beyond human calculation. Quite aside from [plaintiff’s] also having been rendered incapable of bearing any more children, that alone is enough to sustain this verdict.

510 S.W.2d at 535.

⁴ KY. REV. STAT. § 454.040 (1970) [hereinafter cited as KRS]. It is noteworthy that this statute is probably the only one of its kind in the United States and that in the rest of the states it is assumed that “no rational division can be made” regarding the responsibility of joint tortfeasors. W. PROSSER, *LAW OF TORTS* § 52, at 316 n.39 (4th ed. 1971).

may be enforced where the wrong is a mere act of negligence and involves no moral turpitude."⁵ Pursuant to his interpretation of these statutes, the circuit judge had given written instructions to the jury, indicating that it was entitled to apportion the total recovery between the two defendants.⁶ This, of course, opened the door for the "several" verdict to which the plaintiff took exception. The Court of Appeals, in affirming both the circuit judge's interpretation of the statutes and the questions he submitted to the jury, took the occasion to clarify several aspects of these statutes.

The first matter broached by the Court was the standard for apportionment between or among joint tortfeasors under KRS § 454.040. That section itself is completely silent on the matter, merely stating that "the jury may assess joint or several damages."⁷ The Court reviewed some of its earlier decisions on the issue, pointing out that a line of cases starting in 1888⁸ and continuing to the 1970 case of *Orr v. Coleman*⁹ had indicated that *culpability* was the relevant yardstick. However, the Court also noted that the *Orr* case had in fact correctly held that the crucial standard was *causation* rather than *culpability*: "[W]hen it is considered that mere culpability has no relationship to a tort except insofar as it is a *cause* of the injury, the only logical basis for an apportionment is *causation* rather than *degree of negligence*."¹⁰ Thus, the Court declared that the jury instruction used in *Orr*, framed in terms of the percentage of causation attributable to the negligence of

⁵ KRS § 412.030.

⁶ The actual questions and answers in the circuit court were as follows:

5—Do you wish to apportion the total finding of damages . . . between the defendants according to the amount of negligence which you believe to be attributable to each defendant that you have found to be negligent? (Yes)

6—If your answer to the above question is "yes" state, percentage-wise, how much of the total should be paid by:

Defendant . . . Cox	(50%)
Defendant . . . [father]	(50%)
Total (the total of the answers must equal 100%)	(100%)

510 S.W.2d at 536.

⁷ KRS § 454.040, quoted in text accompanying note 4 *supra*.

⁸ *Central Passenger Ry. v. Kuhn*, 6 S.W. 441, 447 (Ky. 1888).

⁹ 455 S.W.2d 59, 61 (Ky. 1970).

¹⁰ 510 S.W.2d at 536 n.3 (emphasis by the Court).

each tortfeasor,¹¹ was "preferable" to instructions based on culpability and to the instruction given in the instant case, which did not specifically mention causation.¹²

Although the bar should be thankful to the Court for attempting to clarify the confusion¹³ created by its earlier decision,¹⁴ it is doubtful whether any real improvement has resulted. While the new test, based on causation, is doctrinally superior to its predecessor, which was based on culpability, it too is very problematic in actual application. The problem, of course, is how can the jury ascertain the portion of an indivisible injury that was *caused* by each of two or more joint tortfeasors? The danger inherent in such an approach seems not unlike the danger existent under the earlier "culpability" approach—namely, that the jury would engage in speculation.¹⁵ However, in the final analysis, the problem does not appear to be a judicial one at all; any judicial interpretation of this statute will present serious problems of measurement. Nevertheless, from a policy viewpoint it may be deemed important enough *to try* to apportion tort damages. Thus, the following comment, though written when culpability was the standard, may still adequately sum up the current situation, when causation is the test:

The same argument advanced against apportionment in comparative negligence statutes . . .—that degrees of responsibility cannot be accurately allocated between parties both at fault—may be urged against [the Kentucky

¹¹ *Orr v. Coleman*, 455 S.W.2d 59, 61-62 (Ky. 1970).

¹² 510 S.W.2d at 536 n.3. Although the Court used the term "preferable," and indeed did not find reversible error in this case for failure to use the "causation" instruction, circuit judges would be wise to take heed so as to avoid reversible error in the future.

¹³ This confusion is exemplified by one student commentator's justifiable conclusion that "the allocation of damages does not depend upon the determination of the extent of injury caused by the negligence of each tortfeasor, but rests entirely on the degree of his negligence." 48 Ky. L.J. 606, 607 (1960), referring to *Murphy v. Taxicabs of Louisville, Inc.*, 330 S.W.2d 395 (Ky. 1959).

¹⁴ The confusion was aggravated by a 1963 case emphasizing the "participation of the respective defendants in the tortious act." *Elpers v. Kimbel*, 366 S.W.2d 157, 161 (Ky. 1963).

¹⁵ 48 Ky. L.J. 606, 611 (1960): "It appears that the near impossibility of defining a standard to measure degrees of culpability would result at times in an apportionment based on nothing more than the mere conjecture of the jury."

apportionment statute]. But although apportionment according to fault may not result in exact justice, it more closely approximates an equitable allocation than does an arbitrary division according to the number of tortfeasors.¹⁶

The second matter faced by the Court was the interaction of §§ 454.040 and 412.030. The plaintiff argued that these statutes, read together, required a joint verdict against the tortfeasors, plus apportionment between the tortfeasors only for the purpose of contribution *inter se*. The Court, expressly recognizing that one of its earlier decisions seemed to substantiate this view, "hasten[ed] to correct that impression."¹⁷ Thus, the Court concluded:

From a literal construction of KRS 454.040 there can be little doubt that when the jury chooses to apportion its award between or among joint tortfeasors their respective liabilities become fixed and finally settled, not only as to the plaintiff or plaintiffs, but as among themselves, except for the costs of the proceeding, which the statute expressly reserves as a joint liability. The applicability of KRS 412.030 is thus limited to the costs alone.¹⁸

As a result of the Court's holding, the plaintiff's recovery is put in jeopardy whenever a jury elects to avail itself to a several verdict under KRS § 454.040: "[T]he risk of insolvency is shifted to the plaintiff since each defendant is liable only for the several judgment entered against him. It appears that this result would seriously impair the primary objectives of victim compensation and loss distribution."¹⁹ Once again, however, it should be recognized that a policy shortcoming of this type cannot be blamed upon the judiciary. Rather, the legislature should give some thought to amending KRS § 454.040 so as to limit the use of apportionment to the matter

¹⁶ Legislation Note, 40 HARV. L. REV. 312, 318 (1935).

¹⁷ 510 S.W.2d at 536 & n.4, referring to *Orr v. Coleman*, 455 S.W.2d 59, 61 (Ky. 1970).

¹⁸ 510 S.W.2d at 536-37; *accord*, S.W. *Corum Hauling, Inc. v. Tilford*, 511 S.W.2d 220, 223 (Ky. 1974).

¹⁹ 48 Ky. L.J. 606, 610 (1960); *cf. Park, Comparative Negligence is Here Now*, 39 KY. BENCH & B. 19 (Jan. 1975). It might be noted that the Court did not address itself to the interaction of §§ 454.040 and 412.030 in cases where the jury did *not* apportion damages severally. It thus is unclear whether the apportionment approach of § 454.040 would be allowed in a § 412.030 contribution action. On this matter, *see Park, supra*.

of contribution between tortfeasors *inter se*, thereby furthering the basic tort law policy of compensation.²⁰

The other appeal of significance in *Cox v. Cooper* involves the proper interpretation of the wrongful death statute, KRS § 411.130, in a case where one of the statutory beneficiaries was also one of the tortfeasors who jointly caused the decedent's death. In *Cox*, the father of the unborn child was found to have been 50% responsible for the death. Thus, following the authority of *Bays v. Cox' Administrator*,²¹ the circuit judge deducted the father's beneficial interest²² from the verdicts rendered against him and the other tortfeasor. As a necessary first step, the gross judgment of \$40,196 was lessened by the \$196 worth of funeral expenses, leaving the net amount of \$40,000 as the total beneficial interest of the estate. Ordinarily this \$40,000 would have been divided equally between the decedent's two living parents, pursuant to the wrongful death statute:

The amount recovered, less funeral expenses and the costs of administration and costs of recovery including attorney fees, not included in the recovery from the defendant, shall be for the benefit of and go to the kindred of the deceased in the following order:

If the deceased leaves no widow, husband, or child, then the recovery shall pass to the mother and father of the deceased, one moiety each, if both are living . . . and if the father is dead and the mother living, the whole thereof shall go to the mother.²³

²⁰ The following statute would serve as an apt model for legislative consideration: When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares solely for the purpose of determining their rights of contribution among themselves, each remaining severally liable to the injured person for the whole injury as at common law. ARK. STAT. ANN. § 34-1002(4) (1962 repl. ed.); accord, DEL. CODE ANN. tit. 10, § 6302(d) (1953). Of course the legislature could substitute "causation" in place of "fault" if it so desired.

²¹ 229 S.W.2d 737 (Ky. 1950).

²² In a case like this, involving the wrongful death of a minor, "beneficial interest" means the amount of damages recoverable for the destruction of the decedent's power to earn money. *Id.* at 740. Accord, *Rice v. Rizk*, 452 S.W.2d 732, 735 (Ky. 1970), discussed in note 3 *supra*.

²³ KRS § 411.130(2)(d). For some unaccountable reason, the Court of Appeals referred to the general intestate succession statutes—KRS §§ 391.010 and 391.030—rather than the wrongful death statute. See 510 S.W.2d at 538 n.6.

However, under the *Bays* rule, which is based on the general tort principle that a person should not be entitled to profit from his own wrong, the tortious father was prohibited from recovering in this case, and the mother, the remaining beneficiary under the statute, was allowed to recover only "her" beneficial interest of \$20,000 (*i.e.*, $\frac{1}{2}$ of the \$40,000 "total" beneficial interest). Because the jury had apportioned the damages equally and severally against each of the two tortfeasors, judgment was entered against each of them for \$10,000 (plus, of course, equal amounts to cover the funeral expenses).²⁴ As a result of this procedure, half of what would normally have gone to the estate for distribution in accordance with KRS § 411.130(2) was not recovered because the two tortfeasors were held to owe only half of the amounts normally due. However, the mother actually received exactly as much as she would have received if her husband had not been found jointly liable for the tort. Her award of \$20,000 was then treated by the circuit court as the basis for determining the amount of her attorneys' contingent fee, despite the attorneys' arguments that the "total" beneficial interest (of \$40,000) should have been used.

The Court of Appeals disagreed with the appealing attorneys' analysis and consequently affirmed the circuit court's disposition of this issue. It sensibly reasoned that "[a] contingent fee contract is based on the recovery, not the amount of the verdict," and that the actual recovery in this case was \$20,000, not the "provisional or working figure" of \$40,000.²⁵ The Court summarily brushed aside the apparent conflict between its decision and the language of KRS §§ 411.130(2), which suggests that attorney's fees are to be deducted before the beneficial recovery is distributed to the statutory beneficiaries,²⁶ by categorically stating that "[i]f there is any possible

²⁴ *Cooper v. Cox*, No. 19130, Judgment ¶¶ 3-4 (Kenton Circuit Ct., filed Nov. 16, 1970). As discussed in note 2 *supra*, the Court also assessed equal amounts for the costs of administering the decedent's estate.

²⁵ 510 S.W.2d at 538: "The amount of damages found by the verdict in this particular situation is no more than a provisional or working figure from which the recovery allowed in the judgment is to be computed. The fee cannot be assessed on the basis of that which is not only unrecovered but unrecoverable."

²⁶ See the first paragraph of KRS § 411.130(2), quoted in the text accompanying note 23 *supra*.

twisting of KRS § 411.130 into a contrary aspect it is defeated by simple logic."²⁷ More significantly, however, the Court stated an important dictum directly impinging upon the *Bays* rule and explicitly lamenting the plaintiff's failure to seek reversal of it:

As an original proposition, a good argument can be made to the effect that in such a case the recovery to the estate should not be diminished at all, because if it is . . . the wrongdoer gains back half of what he loses. A better policy would pass what would otherwise be his share of the recovery on to those who would take it if he were dead We might have given favorable consideration to adopting such a policy had the administratrix brought the question to us, but sadly she did not, so we must live for the time at least with the ruling in *Bays*²⁸

There are only a few things to be said regarding the Court's holding on the wrongful death portion of the case that the attorney's contingent fee must be based upon the net judgment granted to the plaintiff. First, the Court clearly reached the "just" result; upholding the attorneys' claim would have resulted in the plaintiff's having to pay an inordinate and unexpectedly high portion of her recovery to her attorneys. As the Court aptly observed, the normal arrangement is for the attorney to take a predetermined portion of the *actual* recovery obtained by his client. Second, notwithstanding the "justness" of the Court's decision, it should not have so cavalierly dispensed with the wording of the wrongful death statute; the bar deserves to know why a particular result is reached, not merely what that result is. Moreover, it would be beneficial to know the Court's reaction to the peculiar conflict-of-interest problem created by its decision: Is not the personal representative's attorney's loyalty to his client compromised when he realizes that he can collect twice as much if one of the two alleged tortfeasors (the statutory beneficiary) is *not* found liable?²⁹ Per-

²⁷ 510 S.W.2d at 538.

²⁸ *Id.*

²⁹ To quantify this problem, consider the attorney's plight in this case, assuming a 30% contingency fee rate. Under the *Bays* rule, if both the father and the unrelated party are found liable, the "estate's" \$40,000 total beneficial recovery is "distributed" as follows: Mother, \$14,000; Father, nothing; Attorneys, \$6,000; Total, \$20,000 (since

haps the Court deliberately chose to give this short shrift because it had de facto overruled *Bays* anyway, in which event the problem would no longer exist.³⁰ With this in mind, a careful consideration of the *Bays* rule becomes important.

The *Bays* rule, which was reaffirmed by the Court as recently as 1969,³¹ has a history dating back at least to 1908 when Professor Wigmore suggested that an amount ordinarily payable to a tortious beneficiary should not have to be paid at all, that is, that the other beneficiaries' recoveries should not be augmented at the expense of the paying defendants.³² By 1930 the rule had gained considerable acceptance,³³ and, in fact, was included in a comment to the *Restatement of Torts*.³⁴ *Bays*, of course, was not decided until 1950. Presently, the *Bays* rule has the sanction of as eminent an authority as the late Dean Prosser:

Where only one of several beneficiaries is contributorily negligent, the better view, and now the prevailing one, is that the action is not barred as to those who were not negligent, but

the father's beneficial interest is unrecoverable). However, if only the unrelated party were found liable, then: Mother, \$14,000; Father, \$14,000; Attorneys, \$12,000; Total, \$40,000. [N.B. These figures are based on the recovery the plaintiff seeks *not* as mother of the decedent, but as the personal representative of the decedent suing on behalf of its estate. Thus, the attorneys who represent her in this capacity really have the estate as their client, not the mother as an individual; consequently, their fee should be based on whatever amount is "recovered," *i.e.*, actually adjudged due, by all of the statutory distributees, *not* only the mother-administratrix who hired them.]

³⁰ Continuing the example from note 29, if *Bays* were discarded in favor of a rule treating the tortious beneficiary (here the father) as dead for purposes of "distribution" under the wrongful death statute, then the following recoveries would be realized: If both alleged tortfeasors were found liable: Mother, \$28,000; Father, nothing; Attorney, \$12,000; Total, \$40,000. If only the unrelated party were found liable: Mother, \$14,000; Father, \$14,000; Attorney, \$12,000; Total, \$40,000. Here the plaintiff's attorney's share in the proceeds is not adversely affected by his success in proving that both of the defendants were tortious.

³¹ *City of Louisville v. Stuckenborg*, 438 S.W.2d 94, 98 (Ky. 1969).

³² Wigmore, *Contributory Negligence of the Beneficiary as a Bar to an Administrator's Action for Death*, 2 *ILL. L. REV.* 487, 495 n.37 (1908). Wigmore also opined that decisions allowing tortious beneficiaries to recover indirectly—on the theory that the "estate" recovered in full and could properly distribute the decedent's "assets" as per the usual intestacy statutes—were "fallacious." *Id.* at 492. For a case of this sort, see *Oviatt v. Camarra*, 311 P.2d 746 (Ore. 1957). See also *RESTATEMENT (SECOND) OF TORTS* § 493, comment *a*, ¶ 3 (1965).

³³ Wettach, *Wrongful Death and Contributory Negligence*, 16 *N.C.L. REV.* 211, 228 (1937-38).

³⁴ *RESTATEMENT OF TORTS* § 493, comment *a*, ¶ 1 (1939).

that recovery is diminished to the extent of the damages of the negligent beneficiary, who is denied all share in the proceeds.³⁵

Futhermore, the *Restatement (Second) of Torts* has retained its original view in almost unchanged form:

Where the statute is [designed to compensate the survivors for the benefits they would have derived from the earning power of the decedent had his life not been cut short], the fact that a beneficiary is himself guilty of negligence which contributed to the death of the decedent does not prevent recovery unless he is the sole beneficiary. It may, however, affect the amount recoverable. If one of the beneficiaries is guilty of contributory negligence he is in most jurisdictions not allowed to benefit by the statute. The amount which he would have received had he not been negligent is deducted from the amount recoverable by the survivors as a group, the rest being distributed among the survivors as though the negligent beneficiary did not exist.³⁶

Finally, there is ample case authority in agreement with *Bays*.³⁷

Against this background stands KRS § 411.130, which by its own terms could easily justify the rule suggested by the Court of Appeals in *Cox*. This is so because the statute is divided into two subsections, the first of which authorizes an action for wrongful death damages by the personal representative of the decedent,³⁸ and the second of which is concerned solely with the distribution of the "damages" authorized under the first.³⁹ Under this two-step approach, which was directly approved by the Court of Appeals in *Bays*,⁴⁰ the loss caused by the wrongful death is measured exclusively by the first subsection, which places no importance whatsoever on *whose* loss is involved, for there is neither mention of, nor allusion to, any beneficiary in particular. Indeed, the Court of Appeals' deci-

³⁵ W. PROSSER, LAW OF TORTS § 127, at 913-14 (4th ed. 1971).

³⁶ RESTATEMENT (SECOND) OF TORTS § 493, comment a, ¶ 1 (1965).

³⁷ See, e.g., *Walden v. Coleman*, 124 S.E.2d 265 (Ga. 1962); *Kokesh v. Prince*, 161 N.W. 715 (Minn. 1917); *Bartholomay v. St. Thomas Lumber Co.*, 148 N.W.2d 278 (N.D. 1966).

³⁸ KRS § 411.130(1).

³⁹ KRS § 411.130(2), quoted in relevant part in the text accompanying note 23 *supra*.

⁴⁰ *Bays v. Cox' Adm'r*, 229 S.W.2d 737, 739-40 (Ky. 1950).

sions on the determination of damages in wrongful death cases have never treated the loss as personal to anyone.⁴¹ In other words, this subsection is completely unconcerned with the identity or number of the beneficiaries. The clear import of this fact is that the damages are measured exclusively by reference to the defendant himself.

On the other hand, the sole factor in determining the *distribution* of the damages under the second subsection of KRS § 411.130 is which potential beneficiaries are alive at the moment of the decedent's death.⁴² In fact, in one fairly recent case,⁴³ there were substantial dicta to the effect that the full amount determined under KRS § 411.130(1) would be recoverable by a non-negligent parent whose spouse had contributed to the death of their child, but who had predeceased the child. This view, which would allow the fortuity of the earlier death of the tortious beneficiary to affect the amount recoverable by the innocent beneficiary, further suggests that the distribution portion of the wrongful death statute works completely separately from the damages portion. Moreover, it seems to provide an easy transition to rejection of the *Bays* rule, probably through the legal fiction of treating the tortious beneficiary as having predeceased the wrongfully killed decedent. This could be done as an "equitable" matter of decisional law, perhaps even employing an analogy to the distribution of the property of a decedent who was feloniously killed by one of his devisees or heirs. In this type of case, a statute declares that the killer forfeits all rights in the decedent's property, which is then distributed to the decedent's other heirs at law.⁴⁴ Quite significantly, the Court of Appeals has held that this statute operates so as to treat the killer as having predeceased the decedent, with the result that the killer's share can go to those who would

⁴¹ See *Empire Metal Corp. v. Wohlwender*, 445 S.W.2d 685, 687 (Ky. 1969), in which the Court said that "the statute . . . does not provide for any scaling of the recovery on the basis of who the beneficiaries are . . ." The Court then went on to reaffirm *Freeman v. Oliver M. Elam, Jr., Co.*, 372 S.W.2d 796, 798 (Ky. 1963) by "holding that the identity of the beneficiaries is 'not material to the issues' [regarding the extent of liability]." See also *Rice v. Rizk*, 452 S.W.2d 732, 735 (Ky. 1970) (discussed in note 3 *supra*); *Hale v. Hale*, 230 S.W.2d 610, 612 (Ky. 1950).

⁴² *Sharp's Adm'r v. Sharp's Adm'r*, 284 S.W.2d 673 (Ky. 1955).

⁴³ *McCallum v. Harris*, 379 S.W.2d 438, 443-44 (Ky. 1964).

⁴⁴ KRS § 381.280.

have taken under those circumstances.⁴⁵ This result was recently applauded by a commentator who noted that the Kentucky Court of Appeals had "reached it in the face of inconsistent statutory language."⁴⁶

Under the approach the Court of Appeals has forecast in *Cox*, the result will be that all of the tortfeasors will pay the full damages assessed against them by the jury. Thus, under *Cox's* facts, the father and the unrelated defendant each would have to pay \$20,098, all of which (less the lawyers' contingent fee) would be payable to the innocent beneficiary (mother) under the wrongful death statute. However, even this may not be an appropriate result, for, to be realistic, whatever the mother collects will inure to the benefit of the tortious father since this type of a case is not likely to destroy their marriage, and the father is not usually paying the award personally anyway—his liability insurer will generally be responsible to the extent of the policy limits. Consequently, the unrelated tortfeasor (and his insurance carrier) are likely to make a fairly convincing argument that allowing a full recovery to the mother circumvents the contributory negligence bar to his (their) detriment. Unfortunately, no perfect resolution to this problem comes to mind.

II. CONDEMNATION: JURY INSTRUCTIONS ON THE VALUE OF PROPERTY TAKEN

In two cases decided on the same day, the Court of Appeals

⁴⁵ *Bates v. Wilson*, 232 S.W.2d 837 (Ky. 1950), noted in 39 Ky. L.J. 496 (1950-51).

⁴⁶ *McGovern, Homicide and Succession to Property*, 68 MICH. L. REV. 65, 73 (1969), directly referring to *Bates v. Wilson*, 232 S.W.2d 837 (Ky. 1950). Of course, this analogy is somewhat rough, since the problem of distribution of assets other than wrongful death proceeds is quite different from the instant one. Indeed, *McGovern* expressly recognizes that "[d]ifferent problems arise if the killing was wrongful but not intentional" with the result that the killer is not usually disqualified from receiving the assets of the decedent. *McGovern, supra* at 92, citing *Commercial Travelers Mut. Accident Ass'n v. Witte*, 406 S.W.2d 145 (Ky. 1966), in which a wife convicted of the misdemeanor of involuntary manslaughter of her husband was allowed to collect the accidental death insurance proceeds notwithstanding KRS § 381.280, which was held literally inapplicable to nonfelonious killings, and despite the obvious confrontation with the traditional maxim that one should not be allowed to profit by his own wrong.

On the analogous estate and insurance issues, see generally *Carter v. Carter*, 88 So. 2d 153 (Fla. 1956); *Metropolitan Life Ins. Co. v. Wenckus*, 244 A.2d 424 (Me. 1968); R. KEETON, *BASIC TEXT ON INSURANCE LAW* § 4.11(g)(3) (1971); T. ATKINSON, *LAW OF WILLS* 153-56 (2d ed. 1953).

added some interesting embellishments to Kentucky condemnation law. In *Commonwealth v. Campbell*,⁴⁷ the Court held "that it is prejudicial error to include in the [jury] instructions in a condemnation case the highest and lowest before and after value fixed by the [expert] testimony."⁴⁸ It thereby expressly overruled *Commonwealth v. Spillman*,⁴⁹ in which the Court had concluded that although it was "preferable" for the judge not to mention such values, it was not prejudicial to do so. Reliance was placed upon *Commonwealth v. C. S. Brent Seed Co.*,⁵⁰ which the Court indicated had "said that instructions should not state either maximum or minimum limits of recovery in condemnation cases."⁵¹

Justice Reed wrote a separate concurring opinion, "thoroughly disagree[ing] . . . that the instruction should not inform the jury of the proper money limits to be taken into account in making an award."⁵² He then explained:

In my view, the jury should be told in the instructions that they should make an award in the amount they find from the evidence to be the *difference* in the fair market value before and after the taking. They should be further instructed that this award should not be less than the lowest *difference* testified to by any of the expert witnesses nor greater than the highest *difference* testified to by any such expert witnesses. This would eliminate in many instances the necessity of new trials with their attendant time and expense occasioned merely because a jury was not given understandable guidelines in the instructions.⁵³

In other words, Justice Reed believes that the instructions should restrict the jury to the range of "differences" testified

⁴⁷ 510 S.W.2d 1 (Ky. 1974).

⁴⁸ *Id.* at 2.

⁴⁹ 489 S.W.2d 811, 814 (Ky. 1973).

⁵⁰ 376 S.W.2d 310 (Ky. 1964).

⁵¹ 510 S.W.2d at 2. While this reference is technically accurate, *Brent Seed's* actual holding was that it was not reversible error for a circuit judge to refuse to inform the jury of the condemnation award set by the county court. This is quite different from the more typical case, like *Campbell*, wherein the judge is asked to give instructions directly restricting the jury to the amounts testified to by the expert witnesses. However, this difference was expressly recognized and treated as inconsequential in *Commonwealth v. Spillman*, 489 S.W.2d 811, 813 (Ky. 1973).

⁵² 510 S.W.2d at 2 (concurring opinion).

⁵³ *Id.* (emphasis added).

to by the expert witnesses. This might even be an indication that Justice Reed would prefer unadorned general verdicts rather than the general verdicts with interrogatories, specifying "before," "after," and "difference" figures, now characteristic of condemnation cases.⁵⁴

Justice Reed's concurrence is particularly interesting in light of the other condemnation case to be considered here. In *Commonwealth v. Bowling*,⁵⁵ the majority⁵⁶ of the Justices expressly rejected Justice Reed's range of "differences" approach by holding that a jury verdict exceeding the largest "difference" testified to by any expert witness was *not* defective per se.⁵⁷ The majority summed up its position as follows:

Although we do not hold that the difference in market value as established by a jury verdict must fall within the range of the differences in market value as established by the evidence, we would not uphold a verdict where there is a flagrant deviation between the difference in the fair market value established by the verdict and the difference as fixed by the evidence, as such deviation would evidence the fact that the jury, in fixing its before and after values, failed to give due consideration to the totality of the evidence but, on the contrary, used disconnected areas of the evidence to reach a conclusion not supported by the evidence when viewed in its proper perspective.⁵⁸

Justice Steinfeld dissented, stressing that the expert witnesses had testified to the "differences" regarding the land values and that the verdict was inappropriately "not within the range of the evidence."⁵⁹ Justice Reed joined in Justice Steinfeld's dissenting opinion and also placed reliance on his

⁵⁴ See *id.* at 2-3: "I see no reason to draft instructions to a jury in condemnation cases in such a fashion that the issue of damages is treated in a manner completely inconsistent with the way in which the issue is explained to the jury in substantially all other instances."

⁵⁵ 510 S.W.2d 3 (Ky. 1974).

⁵⁶ The vote was 4-2, with Justice Osborne not participating.

⁵⁷ This resulted because the jury chose one of the highest "before" values and one of the lowest "after" values. Thus, the jury's "difference" came out as \$26,000, even though the greatest "difference" testified to by any one of the expert witnesses was \$24,020. 510 S.W.2d at 4.

⁵⁸ 510 S.W.2d at 5.

⁵⁹ *Id.* (dissenting opinion).

own concurring opinion in the *Campbell* case.⁶⁰

The area of controversy involved in these two cases can be narrowed by briefly indicating the matters on which the Justices are in agreement with each other. The jury may *not* set an "after" value lower than the lowest value testified to by an expert witness⁶¹ or higher than the highest value.⁶² Likewise, it may *not* set the "before" value lower than the lowest value testified to.⁶³ Although the Justices apparently have never decided a case where the jury set the "before" value too high, they have indicated that they would also consider this invalid.⁶⁴ Moreover, the Justices have very recently reiterated their agreement that expert testimony may *not* be relied upon where it is substantially at variance from reliable nonopinion evidence.⁶⁵ Furthermore, the Justices agree that the trial judge may *not* mention the highest and lowest "before" and "after" values in his instructions to the jury.⁶⁶ In fact, the Justices agree that the proper standard in condemnation cases is the difference between the value of the land before and after the

⁶⁰ See text accompanying notes 52-54 *supra*.

⁶¹ *Commonwealth v. S & M Land Co.*, 503 S.W.2d 495 (Ky. 1972); *Commonwealth v. Bauman*, 468 S.W.2d 315 (Ky. 1971); *Commonwealth v. Brooks*, 436 S.W.2d 499 (Ky. 1969); *Commonwealth v. Creason*, 402 S.W.2d 427 (Ky. 1966); *Commonwealth v. Wynn*, 396 S.W.2d 798 (Ky. 1965).

⁶² *Commonwealth v. Stephens' Estate*, 502 S.W.2d 71 (Ky. 1973).

⁶³ *Commonwealth v. S & M Land Co.*, 503 S.W.2d 495 (Ky. 1972).

⁶⁴ See *Commonwealth v. Bowling*, 510 S.W.2d 3 (Ky. 1974), wherein the Court (without objection on this point from the dissenting justices) said:

We have long held that a jury verdict which establishes a *before value in excess of the highest before value* of any witness or an after value below the lesser of the after values established by the witnesses is erroneous and must be set aside. *Com., Dept. of Highways v. Bauman*, Ky., 468 S.W.2d 315 (1971); *Com., Dept. of Highways v. Wynn*, Ky., 396 S.W.2d 798 (1965).

Id. at 4 (emphasis added). However, both of the cases expressly relied upon actual involved "after" values that were too low, *not* "before" values that were too high.

⁶⁵ *Commonwealth v. Mullins*, 510 S.W.2d 9, 11 (Ky. 1974):

We pointed out in *Commonwealth, Department of Highways v. Nelson*, Ky., 441 S.W.2d 403 (1968), that where the value fixed by expert testimony greatly exceeds the value shown by nonopinion evidence, that testimony's lack of rational support will deny it the probative value required to support an award. It has long been the rule that to the extent that the valuation given by the expert witnesses is palpably extravagant and inconsistent with known comparable sales it is without probative value. See *Commonwealth, Department of Highways v. Tabor*, Ky., 402 S.W.2d 434 (1966).

⁶⁶ *Commonwealth v. Campbell*, 510 S.W.2d 1 (Ky. 1964).

“taking.”⁶⁷ They even agree that the relevant evidence will usually be in the form of expert testimony.⁶⁸ So, the only area of disagreement involves *how* the before-after difference is to be ascertained: Whereas the majority of the Justices approve of utilizing a general verdict with interrogatories,⁶⁹ whereby the jury separately specifies the “before” and “after” figures along with its ultimate “difference,”⁷⁰ Justices Reed and Steinfeld seem to prefer a general verdict that focuses the jury’s attention directly upon the “differences” testified to by the experts.⁷¹ However, since these Justices have not objected to the usual practice of asking the jury to indicate the “before” and “after” figures in addition to the “difference” figure, it may be that they merely want to engraft the “range of differences” limitation onto the majority’s approach.

It seems to this commentator that the Court of Appeals’ decision in *Campbell*—that it is reversible error for a trial judge to instruct the jury regarding the highest and lowest “before” and “after” values indicated by the expert testimony—is correct. The Court’s holding apparently is premised on avoiding judicial usurpation of the jury’s function by *de facto* decisions on disputed material facts—the maximum and minimum limits of recovery.⁷² Thus, the Court seeks to assure that the jury does not feel compelled to render a verdict based on the testimony if it finds such testimony insufficiently credible—as, for example, where there is other, nonopinion evidence of a reliable character that entirely undercuts the expert testimony,⁷³ or where the demeanor or credentials of all of the

⁶⁷ See generally cases cited in note 61 *supra*.

⁶⁸ *Id.*

⁶⁹ This type of verdict is authorized by Ky. R. Civ. P. 49.02.

⁷⁰ *Commonwealth v. Bowling*, 510 S.W.2d 3 (Ky. 1974).

⁷¹ *Id.* at 5 (Steinfeld, J., dissenting); *Commonwealth v. Campbell*, 510 S.W.2d 1, 2-3 (Reed, J., concurring).

⁷² See *Commonwealth v. Spillman*, 489 S.W.2d 811, 813 (Ky. 1973), in which the Court seemingly endorsed the following contention by the Commonwealth:

[The instruction] was erroneous in that it permitted the jury to arrive at a difference in fair market value without requiring them to listen to any testimony. The trial court in effect gave instructions which assumed a material fact on which the evidence conflicted, namely, the before and after values of the subject property as testified to by witnesses for appellant and appellees, respectively.

⁷³ *Cf. Commonwealth v. Mullins*, 510 S.W.2d 9, 11 (Ky. 1974), quoted in relevant part in note 65 *supra*.

expert witnesses are viewed as unsatisfactory. This is a reasonable position in these cases, where the proceeding is really an appeal—albeit in trial de novo form—from a determination by a county court,⁷⁴ because the jury could “find” for the “respondent” by rejecting all of the evidence adduced at the trial.⁷⁵ This would be consistent with the rule⁷⁶ placing the burden of proof on the party seeking a modification of the lower court’s determination.⁷⁷ The drawback to the *Campbell* rule, of course,

⁷⁴ See KRS §§ 177.081-.089, which sets forth the established procedures to be followed by the Commonwealth in condemnation cases. Basically, § 177.081(3) authorizes a department (such as “Highways”) to request a county to appoint commissioners (§ 177.082(3)) according to specified rules. See § 177.083. The commissioners’ report (setting the landowner’s damages) can be appealed to the county court *only* on the issue of the propriety of the condemnation proceeding, not on the matter of the damages caused thereby. § 177.085. An appeal to the circuit court may be filed by either party regarding the amount of damages provided by the commissioners. § 177.087(1); § 177.086(2)-(4). An appeal to the circuit court may also be filed by the Commonwealth if the county court dismissed the condemnation proceeding. §§ 177.087(2), 177.086(4). Appeals of damage awards are tried “de novo” by a jury. § 177.087(1). However, appeals from dismissals are tried to the court without the intervention of a jury. § 177.087(2).

The Eminent Domain Act of 1970, codified in KRS §§ 416.410-.530 (Supp. 1973), provides an alternate method for condemnation available to all authorized condemners. Under its provisions, the circuit court appoints the commissioners and the county court’s roles are abrogated. § 416.430. The decision on condemnability is a judicial one, § 416.470, but damages are ascertained by a jury. § 416.480. Thus, in these two latter respects condemnation under the “alternate” method is quite similar to the established method.

⁷⁵ See generally *Commonwealth v. Snyder*, 309 S.W.2d 351 (Ky. 1958); *Citizens Fidelity Bank & Trust Co. v. Jefferson County*, 283 S.W.2d 1 (Ky. 1955).

⁷⁶ See Ky. R. Civ. P. 43.01(2), which states: “The burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side.” The Rules of Civil Procedure are made applicable by express statutory provisions. See KRS §§ 177.081(4), 416.510. See also *Commonwealth v. Snyder*, 309 S.W.2d 351,352 (Ky. 1958).

⁷⁷ The following statements from *Commonwealth v. Snyder*, 309 S.W.2d 351, 352 (Ky. 1958), explain how the burden of proof is allocated under various circumstances:

- (a) [I]nitially the condemner has the burden of proof in the whole action and ordinarily this burden does not shift to the other party.
- (b) If the condemner does not appeal an award, he has been successful in the action and the original burden of proof is extinguished. If then the landowner alone appeals, he assumes a new burden of proof on the issue of damages since he becomes the only party who would be defeated on this issue if no evidence was introduced.
- (c) [W]hen *both parties* appeal to the circuit court . . . the burden of proof upon a trial of the issue of damages before a jury is upon the condemner.

is the difficulty that it may cause for circuit judges, one of whom recently stated the problem in these terms:

[T]here have been numerous condemnation cases . . . which have had to be retried because in using the standard instructions there is no guide for the jurors and they have on numerous occasions gone outside the values as testified to by the various witnesses which have resulted in bad verdicts and the trials would have to be set aside and retried.⁷⁸

Although this problem has been acknowledged as a valid one by the Court of Appeals, it has been considered subordinate to the countervailing arguments.⁷⁹

A compromise position might be superior to either of the positions described above, if it could satisfy circuit judges' desires for clear jury instructions without undercutting the appellate judges' concern for the integrity of the jury's function. Perhaps these goals could be achieved by (1) allowing the circuit judge to restrict the jury's determinations to *evidence in the record* but (2) requiring the circuit judge to further instruct the jury that it could reject all of the evidence if it found none of it credible. The first part of this compromise position provides leeway for cases involving credible nontestimonial or non-opinion evidence;⁸⁰ the second part is merely a corollary of the usual rule that if the "proof" is unsatisfactory, the determination under appeal is affirmed.⁸¹ Thus no new ground need be plowed in order to reach a reasonable resolution of this problem.

It also seems that the Court of Appeals took the right position in the *Bowling* case, which held that the jury's "difference" figure need *not* be within the range of "differences" testified to by the individual expert witnesses.⁸² The Court's decision implicitly recognizes that it is nonsensical to ask a jury to ascertain the ultimate "difference" figure without very direct consideration of the "before" and "after" figures. This, of

⁷⁸ *Commonwealth v. Spillman*, 489 S.W.2d 811, 813 (Ky. 1973), quoting the circuit judge's explanation for overruling the Commonwealth's objection to his jury instruction setting numerical limits on the "before" and "after" values.

⁷⁹ *See id.* at 814.

⁸⁰ *See* note 65 *supra*.

⁸¹ *See* notes 75-77 *supra* and text related thereto.

⁸² *See* discussion in text accompanying notes 55-58 *supra*.

course, is entirely consistent with its decisions of at least the last ten years, for in 1965 it unmistakably approved this approach: "Manifestly, in order for the jury to reach a verdict based upon its findings as to the difference in the "before" and "after" values *it must first agree as to what those two values are.*"⁸³ This, in turn, is consistent with the Court's apparently noncontroversial requirement that the jury accompany its verdict with its findings as to the "before" and "after" figures.⁸⁴ However, the Court's dictum that, "we would not uphold a verdict where there is a flagrant deviation between the difference in the fair market value established by the verdict and the difference as fixed by the evidence"⁸⁵ is somewhat inconsistent with its basic view and seems to place an unnecessary limit upon it. Instead of treating a so-called "flagrant deviation" as jury error per se, the Court at most should have indicated that a wide variance from the range of differences might be viewed as creating a rebuttable presumption that "the jury, in fixing its before and after values, failed to give due consideration to the totality of the evidence."⁸⁶ This is preferable because it is possible that a jury could permissibly conclude that the most convincing evidence in fact supported a very wide or, on the other hand, a very narrow "difference" figure. The conclusion here, then, is that the Court should not have proceeded beyond its sound holding to its dubious dictum.

It only remains to say that the view of dissenting Justices Steinfeld and Reed missed the mark. This should be apparent because they ask the jury to perform in an internally inconsistent and indeed impossible fashion. The inconsistency is caused by requiring the verdict to set forth "before" and "after" figures which *must* be such as to produce a "difference" within the range of the "differences" testified to. Thus, the jury must look first at the "before" and "after" figures, then to the "difference" figure, then to the range of "differences," and then

⁸³ Commonwealth v. Priest, 387 S.W.2d 302, 306 (Ky. 1965) (emphasis added).

⁸⁴ See *id.* wherein it is stated: "When the jury reports its determination of "before" and "after" values, the litigants and the court are apprised of the jury's conclusions on these two vital points, and the propriety of the verdict as measured against the evidence is more readily determined."

⁸⁵ Commonwealth v. Bowling, 510 S.W.2d 3, 5 (Ky. 1974). See fuller quotation in text accompanying note 58 *supra*.

⁸⁶ *Id.*

perhaps reverse the process in the event that the ascertained "difference" happens not to fall with the required range. The impossibility should be obvious, for on what basis is the jury to determine the ultimate "difference" figure except by first arriving at "before" and "after" figures? Quite frankly, this commentator is totally bewildered by this approach, which does not appear to rest in any way on authority in analogous areas of the law.⁸⁷

III. THE COLLATERAL SOURCE RULE AS APPLIED TO SICK PAY BENEFITS

In *Davidson v. Vogler*,⁸⁸ a garden-variety automobile accident case, the trial judge directed a verdict in favor of the plaintiff and then submitted the various damages issues to the jury. The jury arrived at a verdict comprised of amounts attributable to the plaintiff's medical expenses and his pain and suffering, but no recovery was provided for either lost wages or permanent impairment of the plaintiff's earning power. Numerous errors were alleged by the plaintiff, who was quite dissatisfied with the jury's total verdict of \$1,524.48 for his "whiplash" injury. The Court of Appeals affirmed on the issues involving the alleged "inadequacy" of the verdict and impropriety in the determination that the plaintiff had not suffered any permanent impairment of his earning capacity.⁸⁹ Of much more interest, however, was the Court's reversal of the trial judge's handling of the lost wages issue on the basis of its disagreement with his understanding of the "collateral source rule."⁹⁰

The collateral source rule, or CSR, may be stated as follows:

[B]enefits received by the plaintiff from a source collateral to the tortfeasor . . . may not be used to reduce the defendant's liability for damages. This rule holds even though the benefits are payable to the plaintiff because of the defen-

⁸⁷ See generally D. DOBBS, LAW OF REMEDIES 312, 379-80 (1973); C. MCCORMICK, LAW OF DAMAGES 470-72, 480-81 (1935). Neither of these noted authorities suggests a "direct" difference approach for injuries to realty or personalty.

⁸⁸ 507 S.W.2d 160 (Ky. 1974).

⁸⁹ *Id.* at 162-63.

⁹⁰ *Id.* at 163-65. Although the Court used the term "collateral source doctrine," the more widely-used phrase "collateral source rule" will be used in this discussion.

dant's actionable conduct and even though the benefits are measured by the plaintiff's losses.⁹¹

As a result of the CSR, a plaintiff's recovery of proceeds from his *own* medical or accident insurer does not reduce the defendant's liability.⁹² Likewise, a plaintiff's receipt of gratuities from disinterested parties does not serve to reduce the defendant's liability.⁹³ However, a plaintiff's recovery of insurance proceeds from the *defendant's* insurer *does* reduce the defendant's liability because in this situation the "source" of the payment is not "collateral" to the defendant.⁹⁴ These applications are consistent with the theory of the CSR, which is that the defendant should not get credit for an amount that actually lessens the plaintiff's economic injury unless such a reduction is "equitable," which, in turn, is defined as when the benefits are derived from the defendant rather than a "collateral" source.⁹⁵ The merit of the rule is much debated,⁹⁶ but well beyond the scope of this discussion.

In *Davidson*, the trial court allowed the defendant, over objection, to ask the plaintiff on cross-examination whether he in fact had lost any pay due to his injuries; the plaintiff replied that he had not because "the company paid me."⁹⁷ Moreover, the trial judge refused to give the jury any instruction regarding the plaintiff's receipt of "pay" from his employer during his period of disability, despite the fact that a pretrial deposition indicated that the employer had made these payments because they were due to the plaintiff as "sick pay" in accordance with the employment contract.⁹⁸

When presented with the sick pay issue, the Court of Appeals seemed to presume that the trial judge had acted in accordance with its most recent decision regarding the CSR's

⁹¹ D. DOBBS, LAW OF REMEDIES § 3.6, at 185 (1973).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 186.

⁹⁵ RESTATEMENT OF TORTS § 920 (1939).

⁹⁶ See, e.g., D. DOBBS, LAW OF REMEDIES § 8.10, at 584-87 (1973); Sedler, *The Collateral Source Rule and Personal Injury Damages: The Irrelevant Principle and the Functional Approach, Part II*, 58 KY. L.J. 161 (1970); Note, 77 HARV. L. REV. 741 (1964).

⁹⁷ 597 S.W.2d at 163.

⁹⁸ *Id.* at 163-64.

application to lost wages situations. Thus, it immediately launched into a discussion of *Rankin v. Blue Grass Boys Ranch, Inc.*⁹⁹ The Court recalled *Rankin* in these terms: “[T]he substance of our holding was that payments made to a personal injury claimant by his employer because of the claimant’s *legal entitlement* to them reduces his claim for lost wages but that workmen’s compensation or gratuitous payments by the employer do not.”¹⁰⁰ The Court then went on to suggest that since *Rankin* had not involved “payments of ‘sick pay’ by an employer to a personal injury claimant pursuant to a *contractual arrangement* between the employer and the employee,”¹⁰¹ *Rankin* should not be viewed as an obstacle to recovery by the plaintiff in the current case. However, recognizing that *Rankin* might be interpreted otherwise, the Court declared: “It is now apparent to us that if the general principle enunciated in *Rankin* be *literally construed*, then payments of sick pay in such instances would operate to reduce the injured employee’s claim for lost wages.”¹⁰² Then, quoting extensively from *American Jurisprudence*,¹⁰³ the Court concluded as follows: “[O]ur holding in *Rankin* is modified to the extent that the rule expressed therein shall not apply to payments by an employer for sick pay and vacation pay pursuant to a contract of the type above mentioned.”¹⁰⁴

This conclusion was further justified on the ground that the reduction of the plaintiff’s damages by the amount of sick pay he had received would result in an inequitable “windfall” to the defendant and would incorrectly deprive the plaintiff of

⁹⁹ 469 S.W.2d 767 (Ky. 1971).

¹⁰⁰ 507 S.W.2d at 163 (emphasis added), paraphrasing *Rankin v. Blue Grass Boys Ranch, Inc.*, 469 S.W.2d 767, 774 (Ky. 1971), which had said: “If those payments were made because of Rankin’s legal entitlement to them, then Rankin did not suffer lost wages to that extent.”

¹⁰¹ 507 S.W.2d at 163 (emphasis added).

¹⁰² *Id.* at 164 (emphasis added).

¹⁰³ *Id.*, quoting 22 Am. Jur. 2d *Damages* § 208, at 291 (1965), as follows:

Where payment is made by the employer pursuant to such a contract, the cases are nearly unanimous that the tortfeasor cannot deduct these payments from the total recovery. Any amounts paid to the plaintiff-employee pursuant to one of these contract plans should not be deducted from his recovery from the tortfeasor, because the right to payment was earned as a part of the employee’s compensation prior to the injury.

¹⁰⁴ 507 S.W.2d at 164.

a "valuable vested right, i.e., the right to use sick days . . . in the future which accrued to him prior to the injury and to receive pay therefor."¹⁰⁵ Thus, the admissibility of evidence that the plaintiff had received compensation for his lost time from his employer was stated to be limited to "circumstances coming within the *Rankin* rule, as herein modified"¹⁰⁶ and the issue of "malingering."¹⁰⁷ The *Davidson* case was remanded for a new trial solely on the issue of lost wages; at that trial the judge, outside of the jury's presence, would consider the reason the employer had paid the employee for his lost time.¹⁰⁸

Only a few words need be said about the Court's disposition of the CSR-sick pay issue in *Davidson*. First, and probably most important, the Court succeeded in reaching the correct result, for, assuming the general justifiability of the CSR, the sick pay situation falls well within the rule. Consider, for example, the *Restatement* view:

[T]he damages which [the injured party] is entitled to recover are not diminished by the fact that . . . as a matter of contract right . . . the transaction results in no loss to him. Where a person has been disabled and hence cannot work but derives an income during the period of disability from a contract of . . . employment which requires payment during such period, his income is not the result of earnings but of previous contractual arrangements made for his own benefit, not the tortfeasor's.¹⁰⁹

Moreover, the *Davidson* decision is consistent with *Conley v. Foster*, a 1960 Court of Appeals case in which no reduction was made from the defendant's liability due to the plaintiff's receipt of reimbursement for medical expenses from a union fund to which he had made prior contributions.¹¹⁰ There the Court said:

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ "Malingering" refers to an injured party's failure to make reasonable attempts to "mitigate" his damages by returning to work. See *Hellmueller Baking Co. v. Risen*, 174 S.W.2d 134, 136 (Ky. 1943).

¹⁰⁸ 507 S.W.2d at 164-65.

¹⁰⁹ RESTATEMENT OF TORTS § 920, comment *e* at 620 (1939); accord, D. DOBBS, LAW OF REMEDIES § 8.10, at 582 (1973); Sedler, *supra* note 96, at 192-95.

¹¹⁰ 335 S.W.2d 904 (Ky. 1960), expressly overruling *Sedlock v. Trospen*, 211 S.W.2d 147 (Ky. 1948).

We now hold that in the absence of an assignment or express contractual subrogation the injured person may recover medical and hospital expenses incurred in his behalf, at least where the expenses are paid pursuant to any agreement based upon the payment of premiums or contributions by or on behalf of the injured person.¹¹¹

On the other hand, the Court's opinion in *Davidson* deserves criticism because it lacks genuineness. This defect results from the Court's effort to persuade the reader that *Davidson* merely represents a "modification" of *Rankin*, when in fact *Davidson* is a repudiation and de facto overruling of *Rankin*. This is borne out by a careful comparison of the facts of the two cases, since both involved an employer's legally owed payments to his employee. *Rankin* held that the employee's "legal entitlement" to the payments was fatal to that employee's claim for lost wages damages,¹¹² whereas *Davidson* held that the "contractual agreement" between the employer and the employee was not fatal to the employee's claim for lost wages damages. The only possible explanation for the differing treatments of *Rankin* and *Davidson* might be the theory that benefits earned through actual employment (e.g., accumulated sick pay days in *Davidson*) are to be given preferred treatment over those derived directly from the employment contract (e.g., continued wages during temporary disability in *Rankin*).¹¹³ However, it had been clearly pointed out even before *Rankin* was decided that these two situations merit identical treatment in the application of the CSR.¹¹⁴ Thus, unless there is some

¹¹¹ 335 S.W.2d at 907.

¹¹² Consider this language from *Rankin*: "The amount allowed at the original trial for loss of wages shall be credited by such sums, if any, as the jury finds was paid to Rankin by his employer by reason of the legal duty to pay the amount, and the judgment shall be amended accordingly." *Rankin v. Blue Grass Boys Ranch, Inc.*, 469 S.W.2d 767, 774 (Ky. 1971). Oddly enough, the *Davidson* Court quoted the passage immediately preceding this one, but stopped short of this passage itself. 507 S.W.2d at 163.

¹¹³ Actually the *Rankin* Court did not know the nature of the payments made by the injured worker's employer, and thus remanded the case for an evidentiary hearing in order to find out. 469 S.W.2d at 774. However, its instructions to the trial court were perfectly clear to the effect that the existence vel non of a "legal obligation" was crucial. *See id.*

¹¹⁴ *See Sedler, supra* note 96, at 192-95; *accord*, D. DOBBS, *LAW OF REMEDIES* § 8.10, at 582 (1973).

other basis for differentiating the two cases, the conclusion stands that *Rankin* has been overruled rather than just modified. If so, it would have been much better for the Court to have directly said so, thereby avoiding the confusion which may now ensue. Admittedly, it might have been somewhat embarrassing for the Court to overrule a case only three years old without any claim of a material change in circumstances; nevertheless, it would be preferable for the Court to admit and rectify its mistakes as soon as they are recognized.

