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WRONGFUL DEATH

FREDERICK DAVIS*

The average person would think it ridiculous to question the right of a widow to recover damages from a person whose irresponsible conduct had caused the death of her husband. After all, if the man had lived he would have been able to sue for his personal injuries. One needs only some common sense to conclude that, when a husband dies, the wife should be able to recover for her loss.

In fact, this is the way the law began.¹ Scholars have pointed out that under early Saxon law a person responsible for the death of another was required to pay *wergild* as compensation to those deprived of the deceased's support.²

The matter became confused, however, when it was decided to make killing a crime as well as a tort. Under English law, the killing of one of the Crown's subjects was made such a grievous offense against the Crown that all of the assets of the person responsible for such an outrage escheated to the Crown.³ In such an "assetless" condition the defendant was hardly worth suing. On top of this, the English law developed something called a "merger doctrine," which seemed to declare

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1. See Hay, *Death as a Civil Cause of Action in Massachusetts*, 7 HARV. L. REV. 170, 171 (1893).

2. I F. POLLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW* 46 (2d ed. reissued 1968). The very early common law obligation to pay some compensation to the relatives of the deceased victim of a wrongful act appears to have developed from an official condonation of the practice of "buying off" those capable of exercising the prerogative of revenge. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 425 (5th ed. 1956). A good summary of the various histories and explanations is found in Smedley, *Wrongful Death—Bases of the Common Law Rules*, 13 VAND. L. REV. 605 (1960).

3. S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* 5 (1966) [hereinafter cited as SPEISER] (collecting authorities). *Contra*, *Grosso v. Delaware, L. & W. R.R.*, 50 N.J.L. 317, 318, 13 A. 233, 234 (1888) (pointing out that forfeiture of the assets of a person responsible for death ensued only in certain types of deaths and that, however logical it is to assume that forfeiture of assets explains the prohibition of a civil action, the case law does not support it).

that a person who caused the death of another was so reprehensible that the tort merged with the felony.⁴ The implication was that the Crown's interest in revenge was preemptive, and the prerogative to seek such revenge was reserved exclusively for the Crown. The situation was not unlike that which occasionally plagues a litigant today when he brings suit for private damages against an entity subject to government regulation. Such a litigant may be barred by the doctrine of primary jurisdiction, a judicial principle which suspends the pursuit of an otherwise vested private remedy on the theory that the pursuit of that remedy may upset a legislative system of regulation.⁵ Labor lawyers also will recognize an analogy in the preemptive theory of the National Labor Relations Act, which bars private tort claims which would otherwise be actionable.⁶

As to damage actions for death, it is surprising that the gradual destruction of a right of action should have occasioned so little comment or criticism, but few voices appear to have been raised in any protest. In 1808 the final annihilation of the right of action was made explicit in the English case of *Baker v. Bolton*.⁷ In that decision Lord Ellenborough ruled that no action could be maintained at common law for wrongful death. As was true of the decision holding a charity immune from liability in tort, the opinion was probably bad law,⁸ but, as in the case of the charitable immunity doctrine, that did not prevent the importation of the opinion's holding into the United States, where it spread like the dutch elm disease.⁹

4. The leading case cited by all discussions of the problem is *Higgins v. Butcher*, 80 Eng. Rep. 61 (K.B. 1607), but there are other examples of the merger doctrine collected in Smedley, *supra* note 2, at 611-13.

5. See L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 121 (1965); Convisser, *Primary Jurisdiction: The Rule and its Rationalizations*, 65 *YALE L.J.* 315 (1956).

6. A leading case on the preemption doctrine of the National Labor Relations Act is *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). For excellent updates on the status of the preemption doctrine, see Cox, *Labor Law Preemption Revisited*, 85 *HARV. L. REV.* 1337 (1972); Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of Garmon*, 72 *COLUM. L. REV.* 469 (1972).

7. 170 Eng. Rep. 1033 (K.B. 1808). The literature on the case of *Baker v. Bolton* is extensive. See Smedley, *supra* note 2, at 613-19.

8. Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 *L.Q. REV.* 431 (1916).

9. See Malone, *The Genesis of Wrongful Death*, 17 *STAN. L. REV.* 1043, 1067-71 (1965). But see *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), overruling earlier precedent and recognizing a "general maritime" and non-statutory remedy for wrongful death. Massachusetts has recently followed that case and

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The reaction to *Baker v. Bolton*¹⁰ generated in England the now famous Lord Campbell's Act, which, in general, permits the personal representative of the deceased to bring an action to recover damages on behalf of those persons suffering injuries as a result of the death of the deceased by the defendant's wrongful act.¹¹ Although the overwhelming majority of statutes enacted in the various states used Lord Campbell's Act as a model, the variations in language and in the interpretations given to these various statutes leave few threads of consistency or uniformity.

As a matter of historical fact, little need existed in most American jurisdictions for wrongful death statutes. A number of colonial decisions, following the traditional common law, permitted recoveries for wrongful death,¹² and a few post-American Revolution decisions support the notion that a common law action for wrongful death was maintainable in most American state courts.¹³ Unfortunately, however, the heresy of *Baker v. Bolton*¹⁴ was uncritically accepted in almost all states. Of all American jurisdictions, only Hawaii and Massachusetts appear to have recognized a common law action for wrongful death, but even in those jurisdictions the action is statutory.¹⁵

Although a wide variety of statutes exists today with very little in the way of unifying decisional law, trends, or general rules of authority,

recognized that the action for death has a common law and not a statutory origin. *Gaudette v. Webb*, — Mass. —, 284 N.E.2d 222, 229 (1972). For a discussion of the rise and fall of the erroneous doctrine of charitable immunity, see Davis, *The Charitable Immunity Doctrine*, 25 J. MO. BAR 350 (1969).

10. 170 Eng. Rep. 1033 (K.B. 1808).

11. Fatal Accidents Act of 1846, 9 & 10 Vict., c. 93.

12. The pre-revolutionary decisions permitting recovery for wrongful death are collected in SPEISER 7-8.

13. The post-revolutionary decisions permitting recovery for wrongful death on a common law basis are collected and discussed in Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1066-67 (1967).

14. For a discussion offering theories to explain the uncritical acceptance of the rationale of *Baker v. Bolton* in the United States, see Miller, *Dead Men in Torts: Lord Campbell's Act Was Not Enough*, 19 CATH. U.L. REV. 283, 289-91 (1970).

15. An early Hawaiian case rejecting the rule in *Baker v. Bolton* is *Kake v. C.S. Horton*, 2 Hawaii 209 (1860). Hawaii has a liberal wrongful death statute, based upon the theory of the original Lord Campbell's Act. HAWAII REV. STAT. § 663-3 (1968). But it has been held that the common law action for wrongful death has been "merged" with the statutory action. *Rohlfing v. Moses Akiona, Ltd.*, 45 Hawaii 443, 369 P.2d 96 (1962). See note 9 *supra*.

it is possible to classify the various wrongful death statutes into three general categories:

- (1) the "Lord Campbell" type of statute, which creates a new cause of action in or on behalf of named beneficiaries for the losses they have sustained as a result of the wrongful death of their deceased;¹⁶
- (2) the so-called "loss to the estate" type of action, which tends to assign an economic value to the life span of any given individual based upon a demonstrable capacity of such individual to produce income, and to award damages roughly based upon the net gain which will never be realized as a result of the premature destruction of the economically productive unit;¹⁷
- (3) the "punitive" type of action, which permits the recovery of damages as a substitute for a "fine" or "penalty," and which is therefore neither geared to the decedent's capacity to produce nor to the actual economic loss suffered by those dependent upon him for support.¹⁸

In recent years states burdened with the loss to the estate type of action have tended either to soften its absurd results by judicial decision, or to repudiate it in its entirety.¹⁹ Although variants of the punitive type

16. Fatal Accidents Act of 1846, 9 & 10 Vict., c. 93. Most jurisdictions follow the theory of the English statute by clearly indicating that the action is for the losses sustained by those dependent upon the deceased. *See, e.g.*, MO. REV. STAT. § 537.080 (1969).

17. Three state statutes which exemplify the so-called "loss to the estate" theory of damages for wrongful death are CONN. GEN. STAT. REV. § 52-555 (Supp. 1972); IOWA CODE ANN. § 633.336 (Supp. 1972); N.H. REV. STAT. ANN. §§ 556:12, 556:13 (Supp. 1971). One disability encountered in jurisdictions following a "loss to the estate" theory of damages for wrongful death is the possibility, which can be disastrous, of having the award considered subject to federal estate taxes on the deceased's estate. *See Connecticut Bank & Trust Co. v. United States*, 330 F. Supp. 999 (D. Conn. 1971).

18. *See SPEISER* 71-74.

19. *McCoy v. Raucci*, 156 Conn. 115, 239 A.2d 689 (1968) (recovery of damages authorized when deceased was 74 years old); *Mickel v. New England Coal & Coke Co.*, 132 Conn. 671, 47 A.2d 187 (1946) (earning capacity and *not* net savings for the estate is the proper element of damage). Iowa appears to be adhering to the doctrinal statement that the damages in wrongful death are limited to the net loss to the estate of savings which the deceased might have been able to accumulate, reduced to present worth. *See Wendelin v. Russell*, 259 Iowa 1152, 1157, 147 N.W.2d 188, 191 (1966). But the Iowa bark appears much worse than the actual bite. *See Marean v. Petersen*, 259 Iowa 557, 570, 144 N.W.2d 906, 914 (1966) (appellate courts will not invade the province of the jury, will not compare verdicts, and will take judicial notice of decreasing purchasing power of dollar) (\$11,000 for death of 17 year old boy not out of line); *Soreide v. Vilas & Co.*,

of death statute existed in some jurisdictions during the earlier years of the twentieth century (at times co-existing with compensatory or Lord Campbell statutes), only two jurisdictions, Massachusetts and Alabama, retain statutes of this type today.²⁰

Thus the overwhelming majority of the states have wrongful death statutes patterned after the Lord Campbell type, although the differences, *inter sese*, are so numerous that they defy analytical classification.

WRONGFUL DEATH AND SURVIVAL STATUTES

A clear understanding of the ways in which the various wrongful death statutes affect the opportunities of wrongful death plaintiffs cannot be acquired without a differentiation between wrongful death statutes and survival statutes. The difference is not fully understood by too many lawyers, and even judges have created unnecessary confusion by failing to recognize the distinction.²¹ The problem is further com-

247 Iowa 1139, 78 N.W.2d 41 (1956) (\$50,000 reduced on remittitur to \$37,500 for 33 year old service station attendant.) Note also IOWA R. CIV. P. 8 (1951), which allows a parent to recover for the loss of services sustained as a result of the death of a minor child. See *Wardlow v. City of Keokuk*, 190 N.W.2d 439 (Iowa 1971). The Supreme Court of New Hampshire has declared that whether there is any incremental savings loss to the estate of a 13 year old deaf mute with cerebral palsy is "a question of fact to be determined by the jury under appropriate instructions." *Pierce v. Mowry*, 105 N.H. 428, 431, 201 A.2d 901, 904 (1964). Before assuming that New Hampshire is as liberal as Iowa about affirming jury verdicts apparently out of harmony with the "loss to the estate" rule, one should consider how the New Hampshire Supreme Court follows its own rule. After the trier of fact found that the loss to the estate was \$6,581, the Supreme Court of New Hampshire took its own look at the facts and cut the recovery to \$3,581. *Pierce v. Mowry*, 106 N.H. 306, 210 A.2d 484 (1965).

20. The Massachusetts statutes on wrongful death constitute a complex universe beyond capture in a single footnote, however erudite. For a summary, see SPEISER 822-32. The provision most closely corresponding with the normal wrongful death provision is MASS. GEN. LAWS ANN. ch. 229, § 2 (Supp. 1972), which explicitly provides that the damages, within the limits established, are "to be assessed with reference to the degree of culpability." The Alabama statute is not explicit on the point, but leaves the matter to the jury. ALA. CODE tit. 7, §§ 119, 123 (1960). The penal quality of the Alabama statute is entirely attributable to judicial construction. *Liberty Life Insurance Co. v. Weldon*, 267 Ala. 171, 100 So. 2d 696 (1958). But, in a long and exhaustive opinion in what apparently was a hotly contested case, the Alabama Supreme Court (Chief Justice Heflin dissenting in a special opinion) held that circumstances relevant to the pecuniary loss could be asserted as a plea "in bar" directed toward the issue of the standing of the plaintiff to maintain the action. *Crenshaw v. Alabama Freight, Inc.*, 287 Ala. 372, 252 So. 2d 33 (1971).

21. See, e.g., *Callies v. Reliance Laundry Co.*, 188 Wis. 376, 206 N.W. 198 (1925). For an accurate, readable and well-documented explanation of the differ-

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plicated by statutes which occasionally blend elements of wrongful death with survival, or permit survival damages to be recovered in the main wrongful death action.²²

Technically speaking, the wrongful death action is an entirely new cause of action independent from anything which the deceased had or would have had. Its purpose is to provide compensation to those who have been deprived of a relationship. Furthermore, by adding a judicial gloss to wordings which are arguably not so limited, a number of jurisdictions have limited the wrongful death recovery to the so-called "pecuniary loss" which those whom the statute was intended to benefit have suffered.

The wrongful death action is occasionally characterized as "derivative," but that description is inaccurate.²³ A derivative suit is typically brought by a plaintiff whose standing is only nominal, and when the primary obligation sought to be enforced is owed by the defendant to a third party or entity on whose behalf the nominal plaintiff brings the action.²⁴ In such actions the nominal plaintiff may have an incidental or derivative interest in the outcome of the action, but the theory of the derivative suit is that the main obligation is owed to a person or entity other than the party who initiates the action.²⁵ The shareholder's corporate derivative suit, brought against officers and directors for wrongs against the corporation, is the primary example of the true derivative action,²⁶ but there are other examples, such as the individual's action to abate a public nuisance.²⁷ The whole system of extraordinary

ence between a "survival" action and an action for wrongful death, *see* Rohlfling v. Moses Akiona, Ltd., 45 Hawaii 443, 369 P.2d 96 (1962).

22. A jurisdiction which exemplifies the practice of awarding both survival damages and wrongful death damages in the same action is Michigan. *See, e.g.*, MICH. COMP. LAWS ANN. § 27A.2922 (Supp. 1972). Other jurisdictions are discussed in SPEISER 747-50.

23. *E.g.*, Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964). *See also* Fenster v. Gulf States Ceramic, 124 Ga. App. 102, 107, 182 S.E.2d 905, 909 (1971) (consortium action by wife against employer not barred by workmen's compensation law, but death action is barred because "derivative.").

24. R. BAKER & W. CARY, CASES AND MATERIALS ON CORPORATIONS 601-604 (3d abr. ed. 1959), contains as complete and concise a definition of the derivative suit as can be found.

25. *See, e.g.*, Smith v. Sperling, 354 U.S. 91, 99 (1956) (derivative suit described in dissenting opinion by Mr. Justice Frankfurter).

26. *See, e.g.*, Goldstein v. Studley, 452 S.W.2d 75 (Mo. 1970); 38 CORNELL L.Q. 244 (1953).

27. *See, e.g.*, Ravndal and Ravndal v. Northfork Placers, 60 Idaho 305, 91 P.2d 368 (1939); The Clinic & Hospital, Inc. v. McConnell, 241 Mo. App. 223, 236 S.W. 2d 384 (1951).

remedies or prerogative writs is based upon a derivative theory,²⁸ as is the so-called "private attorney-general" theory of Judge Frank, which enlarged the constitutionally permissible scope of those having standing to challenge governmental actions.²⁹

The wrongful death action is *not* such a suit. It is brought solely for the direct injuries sustained by those dependent upon the deceased to some degree. While it is true that under the original Lord Campbell's Act, and in many jurisdictions today, the action is brought by the personal representative of the estate of the deceased, that fact does not make the action a derivative one in the true sense of the word. A better way to characterize the action for wrongful death is to speak of it as a "relational" action—a lawsuit brought to redress an injury inflicted upon the plaintiff and involving an interference with a relationship.

The survival action, on the other hand, is simply a continuation of the action which the deceased would have been bringing were he not dead.³⁰ It is brought, whenever possible, to recover for impairment of earning capacity, medical and hospital expenses, pain and suffering and other general damages which the deceased may have suffered between the time of injury and the time of death.³¹

At the time most wrongful death statutes were being enacted, the general common law rule prevailed to the effect that an action for personal injuries abated upon the death of either party.³² For this reason the

28. See Riesenfeld, Bauman & Maxwell, *Judicial Control of Administrative Action by Means of the Extraordinary Remedies in Minnesota*, 33 MINN. L. REV. 569, 576-79 (1949).

29. Associated Indus. of New York State, Inc. v. Ickes, 134 F.2d 694 (2d Cir.), *rev'd on other grounds*, 320 U.S. 707 (1943). For a good discussion of the whole problem of the derivative nature of the private action against an alleged abuse of governmental power, see L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 516-21 (1965).

30. An elaborate discussion of the distinction between the survival action and the action for wrongful death can be found in both the majority and concurring opinions in *Rohlfing v. Moses Akiona, Ltd.*, 45 Hawaii 373, 369 P.2d 96 (1961). See also *Douchette v. Bouchard*, 28 Conn. Supp. 460, 265 A.2d 618 (Super. Ct. 1970); *cf. St. Louis, I.M. & S. Ry. v. Craft*, 237 U.S. 648 (1915).

31. For a decision in which the equities favored allowing recovery to an unemancipated minor for the damages sustained by his deceased father, but in which the court was at pains to point out that the damages sustained by the deceased between the time of injury and the time of death can be allocated only to the estate of the deceased, see *Smith v. Hewett*, 235 N.C. 615, 70 S.E.2d 825 (1952).

32. The Latin formulation of the rather unusual rule that tort actions die with the victim or with the tortfeasor is the much quoted *quia actio personalis moritur cum persona*. An erudite discussion of the rule can be found in Winfield, *Death as Affecting Liability in Tort*, 29 COLUM. L. REV. 239, 244-50 (1929).

drafters of the wrongful death statutes may be excused for failing to foresee and to guard against the confusion which would result when this common law rule was changed.

A majority of the states allow, with varying degrees of permissiveness, the recovery of both survival damages and relational damages from the tortfeasor.³³ Some permit two actions to be maintained while others effect what amounts to a joinder or merger of the two types of actions. Missouri is a significant exception. The Missouri statute explicitly conditions the survival of an action for personal injuries on the death of the decedent from some cause other than the defendant's negligent or wrongful act.³⁴ Thus the Missouri policy, which is illogical, is to make the actions mutually exclusive. Two examples will help to illustrate this point:

Example 1: X is seriously injured in an accident attributable to the defendant's negligence. He spends 18 months in the hospital and incurs earnings losses of \$30,000, medical and hospital expenses of \$10,000 and general damages of \$60,000. Before he files suit against the defendant, however, he dies from the injuries. While X's wife has an action against the defendant for wrongful death, she can recover only her pecuniary losses up to the \$50,000 limitation. X's personal representative recovers nothing.³⁵

Example 2: Same facts as in Example 1 except that X, rather than dying, is discharged from the hospital but is killed by lightning while golfing. X's personal representative has an action against the de-

33. See Oppenheim, *The Survival of Tort Actions and the Action for Wrongful Death—A Survey and A Proposal*, 16 TUL. L. REV. 386, 391 (1942). The area has always been one of immeasurable confusion. In 1942, a special committee under the chairmanship of Dean Paul Brosman of the Tulane University School of Law submitted the draft of a Uniform Act on Survival of Tort Actions and Death by Wrongful Act to the National Conference of Commissioners on Uniform State Laws. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE 52D ANNUAL CONFERENCE 228 *et seq.* (1942). The Act would have unified and rationalized the confusing melange which then existed and which survives to this day, but the Act was later withdrawn from consideration by the Conference. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE 53D ANNUAL CONFERENCE 56 (1943).

34. MO. REV. STAT. § 537.020 (1969).

35. The law supporting Example 1 is clearly established by the peculiar language of MO. REV. STAT. § 537.020 (1969) ("... *other* than those resulting in death . . ." [emphasis added]) and the language in the following decisions: *Plaza Express Co. v. Galloway*, 365 Mo. 166, 172-73, 280 S.W.2d 17, 22 (1955); *Bay-singer v. Hanser*, 355 Mo. 1042, 1046, 199 S.W.2d 644, 647 (1947).

fendant for all medical and hospital expenses, earnings losses and general damages sustained by *X* between the time of injury and the time of death. *X*'s widow has no action for wrongful death.³⁶

Although not employing the same statutory language, at least five other states do not permit the recovery of survival damages in the situation when the injured party dies from the injury inflicted.³⁷ In four other jurisdictions no statutory provision is made for the survival of negligence actions, so that only the relational damages for wrongful death can be recovered in those states.³⁸ In at least twenty-five percent of the American jurisdictions, all of the damages which a deceased sustained between the time of injury and the time of death may *not* be recovered from the tortfeasor whose negligently inflicted injury caused the death. In some jurisdictions, by statute or by judicial interpretation, some of the damages which would normally be a part of the survival action can be recovered by the statutory beneficiary in the wrongful death case. For example, in Missouri a husband in an action for the wrongful death of his wife may recover her medical and hospital expenses attributable to the defendant's wrongful act and incurred between the time of injury and the time of death.³⁹

36. *Harris v. Goggins*, 374 S.W.2d 6 (Mo. 1963); *Longan v. Kansas City Rys. Co.*, 299 Mo. 561, 253 S.W. 758 (1923).

37. IND. ANN. STAT. § 2-403 (Supp. 1966); MICH. COMP. LAWS ANN. § 27A-2921 (1967); MINN. STAT. ANN. § 573.02 (1971); NEV. REV. STAT. § 41.100 (1966); W. VA. CODE ANN. § 55-7-8 (1966).

38. SPEISER 745.

39. *Wilt v. Moody*, 254 S.W.2d 15 (Mo. 1953). Funeral expenses are not logically allocable to either the survival or the wrongful death claim because all the wrongdoer has done has been to accelerate the time for the payment of what is inevitable. See J. MITFORD, *The American Way of Death* (1963). The rule of *Wilt v. Moody*, which allows the husband to recover both the medical and hospital expenses as well as the funeral expenses of the deceased wife in a Lord Campbell type action for wrongful death is apparently based upon the theory that he is legally obligated to assume such expenses. MISSOURI APPROVED JURY INSTRUCTIONS No. 5.05 (2d ed. 1969) [hereinafter cited as MAI]. The foregoing inference is based upon the fact that the Missouri Approved Jury Instructions do not permit such damages to be sought when the action is for the wrongful death of a child, MAI No. 5.03; for the death of a husband, MAI No. 5.02; for the death of a parent, MAI No. 5.09; or in the personal representative's action on behalf of the heirs, MAI No. 5.07. However, where it is alleged that the plaintiff paid the funeral expenses in order to prevent their being a charge against the public, they seem to be recoverable. *Caen v. Feld*, 371 S.W.2d 209 (Mo. 1963). Accord, *Robinson v. Richardson*, 484 S.W.2d 27 (Mo. App. 1972). But see *Hildreth v. Key*, 341 S.W.2d 601, 613-14 (Mo. App. 1960), in which the funeral expenses incurred by the parents in connection with the wrongful death of a child were permitted to be recovered under broad

The significance of this can be appreciated by considering cases in which large recoveries have been authorized for pain and suffering endured by the deceased between the time of injury and the time of death, even in situations when the interval of survival was relatively short.⁴⁰ In jurisdictions such as Missouri, which deny the maintenance of survival actions under those circumstances, such recoveries are forever lost.

Setting aside, for the moment, further consideration of the survival action, attention will be given to a number of perplexing problems which the conventional Lord Campbell type of relational damages action for wrongful death presents.

WHO CAN SUE?

A problem common to all jurisdictions is identifying the person or persons having capacity to sue for wrongful death. The problem is particularly perplexing in those jurisdictions having variants of the Lord Campbell model.

As noted earlier, the action for wrongful death is normally a relational action—that is, an action based upon a direct interference with a relationship advantageous to the plaintiff. The action for wrongful death is not the only such relational action recognized by the law. Actions for loss of services,⁴¹ interference with contract,⁴² enticement away of servants or services⁴³ and loss of consortium⁴⁴ are common examples. In the typical relational action the plaintiff sues in his own right for relational injuries sustained as a result of the defendant's actions against or involving a third person.⁴⁵

language which makes no allusion to the parents' legal responsibility, if any, or to the absence of any estate which would otherwise require burial at public expense.

40. *E.g.*, *Caldecott v. Long Island Lighting Co.*, 298 F. Supp. 540 (S.D.N.Y. 1969), awarding \$50,000 for excruciating pain suffered during short interval before death by carbon monoxide poisoning, but later reduced, on remittitur, to \$10,000, 417 F.2d 995 (2d Cir. 1969).

41. Injury to a minor gives rise to two causes of action, one of which is for the minor, and the other of which is for the loss of services etc. sustained by the parents, although it is possible for all elements of damages to be recovered in one action by the minor where his parent brings the action as his duly appointed guardian and curator. *See, e.g.*, *Garrison v. Ryno*, 328 S.W.2d 557 (Mo. 1959).

42. *See, e.g.*, *Coonis v. Rogers*, 429 S.W.2d 709 (Mo. 1968).

43. *See Mills v. Murray*, 472 S.W.2d 6 (Mo. App. 1971); W. PROSSER, *LAW OF TORTS* 929 (4th ed. 1971).

44. *See Blandford v. St. Louis Pub. Serv. Co.*, 199 S.W.2d 887 (Mo. App. 1947); L. GREEN, W. PEDRICK, J. RAHL, E. THODE, C. HAWKINS & A. SMITH, *INJURIES TO RELATIONS* 243 *et seq.* (1968).

45. L. GREEN, *supra* note 44, at ix.

In most relational actions (other than those for alienation of affection⁴⁶ or wrongful death) little trouble is encountered in determining who can bring the action. Thus, in the consortium action, it is the actual spouse. In the enticement action, it is the previous employer.⁴⁷ So also in the contractual interference cases, the persons suffering the relational damages are rarely more than one, and even when multiple, they are easily identified.⁴⁸

The wrongful death action presents other problems. In the normal situation there are multiple dependents aggrieved by the defendant's death-producing wrongful act. The wife and children of the deceased are the most obvious, but in many situations the parent or parents of the deceased have suffered a demonstrable economic and emotional loss. Moreover, in many cases the degree of loss varies appreciably from individual to individual, depending upon the circumstances.

Example 3: Deceased was divorced from his first wife and making child support payments for the three minor children by the first wife. He has two additional minor children by his second wife. The second wife of the deceased is an heiress with more than enough income to support herself and her two children. The first wife has no independent means. The first wife and minor children thereof are the seriously aggrieved persons, but in many jurisdictions they may not receive damages commensurate to their losses.

Example 4: Deceased was married with no children. His wife's parents are deceased, but he was contributing substantial support to his own parents. His wife works and is earning a substantial income. The parents are the truly aggrieved parties but they may not be entitled to sue and may not recover anything in many jurisdictions.

It can be seen from the foregoing examples that the wrongful death action, because it is relational, presents three distinct and troublesome problems which the statutory draftsman has not satisfactorily solved:

(1) the type of relationship or dependency necessary in order to justify

46. In most jurisdictions the only person having standing to maintain the action for alienation of affections is the aggrieved spouse. *Comte v. Blessing*, 381 S.W.2d 780 (Mo. 1964). A minority view would allow a child to bring the action, and in jurisdictions following such a view problems can arise in connection with the distribution of damages among multiple parties, all of whom are aggrieved by the same act. *Daily v. Parker*, 152 F.2d 174 (7th Cir. 1945). See also *Nocca, Should a Child Have a Right of Action Against a Third Person Who Has Enticed One of His Parents Away from the Home*, 2 N.Y.L. FORUM 357 (1956).

47. See, e.g., *Anderson v. Moskovitz*, 260 Mass. 523, 157 N.E. 601 (1927).

48. See, e.g., *Imperial Ice Co. v. Rossier*, 18 Cal. 2d 33, 112 P.2d 631 (1941).

holding the defendant liable for the aggravement consequentially inflicted (basically a question of "proximate cause");

- (2) the person or persons who have "standing" to bring the action; and
- (3) when there are multiple beneficiaries, apportioning the award in accordance with the relative needs of the beneficiaries.

The original approach to the problem was both simple and direct: the personal representative of the deceased brought the action on behalf of certain beneficiaries designated by statute, and the award was apportioned as the trier of facts found and directed.⁴⁹ In this situation it was typically contemplated that the personal representative would act as a "trustee" for the designated beneficiaries, and the award was generally considered to be beyond the reach of the creditors of the estate.⁵⁰

This approach, derived from the fundamental English statute, apparently remains the pattern in the majority of American jurisdictions today. Nevertheless, many variations from this pattern exist, all of which give the cause of action to someone other than the personal representative. It is not altogether clear what policy considerations dictated a departure from the traditional approach, but one can guess that there were misgivings concerning the vigor with which the personal representative and his attorney (normally a lawyer concerned with trusts and estates but not with personal injury actions) would press the tort claim. A more cynical explanation would attribute the changes to the so-called "personal injury bar," victorious in its campaign to get this "business." Whatever the reason for the changes, however, they have taken place in a number of jurisdictions, and in every case the three problems mentioned above, which were so simply and directly disposed of by the original Lord Campbell's Act, have become more complicated.

In this respect the Missouri experience is typical. The present Missouri statute provides for a system of sequential "appropriation" by classes of dependents.⁵¹ The spouse or minor children may bring the action "within one year after such death." If they fail to bring the action within that year, the parent or parents of the deceased may bring the action, and if there are no parents, then the personal representative

49. Fatal Accidents Act of 1846, 9 & 10 Vict., c. 93.

50. *Dukes v. Dukes*, 233 Ark. 850, 349 S.W.2d 339 (1961); *State v. Cambria*, 137 Conn. 604, 80 A.2d 516 (1951).

51. Mo. REV. STAT. § 537.080(1)-(3) (1969).

may bring the action, with, in the latter case, the proceeds being distributed in accordance with the laws of descent.

Although the system appears reasonable in the abstract, in practice it generates maddening perplexities and uncertainties, all of which make the settlement of wrongful death claims virtually impossible in all but the simplest type of case. A few examples will illustrate this:

Example 5: At the time of his death, deceased was separated from his wife and had custody of three minor children who were being cared for by the widowed mother of the deceased. The mother is estranged from the children. If the defendant wishes to settle, he must secure a reconciliation of conflicting claims. The children's duly appointed "guardian" may join in any action, but the persons on whose behalf he appears have interests hostile to his co-plaintiff.

Example 6: Deceased, who was unmarried and 30 years of age at the time of his death resulting from defendant's wrongful act, provided the only support for his aged parents. Under one interpretation of the Missouri statute, the parents can sue for the wrongful death. Under another equally persuasive interpretation, the personal representative must bring the action.⁵²

Example 7: Deceased's widow, on behalf of herself and her two minor children, brings an action against *D* for the wrongful death. *D*'s insurer settles the case for \$10,000 and obtains a release. Despite the fact that deceased's widow had satisfied the court that she had ". . . diligently attempted to notify all parties having a cause of action under this subdivision," a child by a former, but undisclosed, marriage of the deceased files a subsequent claim within the period of limitation. *D*'s insurer may have to pay again.

Example 8: The parents of a 35 year old bachelor are killed as a result of the wrongful act of *D*. Even though the bachelor is the only person aggrieved by the wrongful death, the death action must, under the Missouri statute, be brought by the personal representative.⁵³

Example 9: Deceased dies as a result of the defendant's wrongful act and is survived by a widow but no children or parents. The widow brings an action against *D* 14 months after the death of the deceased. Even though the statute requires the action to be brought within 2 years after the cause of action accrues, the widow's claim is barred.

52. See text accompanying notes 66 and 67 *infra*.

53. The Missouri statute limits the action to minor children. MO. REV. STAT. § 537.080(1) (1969). Hence, the action for the death of parents of an adult child must be brought by the personal representative. MO. REV. STAT. § 537.080(3) (1969).

An additional problem involves the third point mentioned above; namely, the apportionment of damages among beneficiaries with varying degrees of need and aggrievement. In Missouri, for example, the concurrent negligence of one of the wrongful death beneficiaries does not necessarily bar the action, although the contributory negligence of the deceased will bar it.

Example 10: Plaintiff's deceased is killed at a railway crossing as a direct result of the defendant's negligence in the operation of its railway train. Deceased was driving a car and had a clear view of the track and of the approaching train. Plaintiff's widow has no action for wrongful death because of the contributory negligence of the deceased.⁵⁴

Example 11: Plaintiff's deceased was a passenger in a vehicle being driven by deceased's minor daughter when the vehicle was struck at a railway crossing by defendant's negligently operated railway train. Deceased's minor daughter was also negligent in failing to maintain a proper lookout, and, as a direct result of both negligent acts, deceased was killed and deceased's minor daughter sustained personal injuries. The daughter may not recover damages from the railroad company because of her own contributory negligence. Plaintiff, who is the widow of the deceased, may nevertheless recover from the railroad company for the wrongful death of her husband even though the grant of damages will result in benefits to the minor daughter, who is technically a joint tortfeasor.⁵⁵

Example 12: A widower with three minor children is killed as a direct result of the defendant's wrongful act. One child is 18 years of age and earns \$30,000 a year as a nationally recognized folk-singer and television personality. A second child, aged 16, is a high school student. A third child, aged 10, has rheumatoid arthritis and needs a good deal of medical attention and care. Under the original plan of Lord Campbell's Act, the personal representative brought the suit, but the allocation of the award between the multiple beneficiaries was made by the trier of the facts (the jury, or when the jury is waived, by the judge as the fact trier). In states such as Missouri, however, the distribution of the award is apportioned by the judge.⁵⁶

Several difficulties are presented by the situation in which there are multiple beneficiaries. Even when the jury apportions the award, there

54. *Davenport v. Wabash R.R.*, 435 S.W.2d 641 (Mo. 1968).

55. Results in example supported by rules declared in *Reynolds v. Thompson*, 215 S.W.2d 452 (Mo. 1948); *Herrell v. St. Louis-S.F. Ry.*, 324 Mo. 38, 23 S.W.2d 102 (1929).

56. MO. REV. STAT. § 537.095(4) (1969).

is the argument that the competing claimants are adverse to each other and should be represented independently.⁵⁷ Whether the responsibility be confined to judge or jury there is the problem of what standards and criteria to weigh and consider in making the apportionment. Moreover, it is possible to argue that the prerogative of independent counsel in the allocation process may be constitutionally entrenched.⁵⁸ Where, as in Missouri, the division of the award among beneficiaries having competing interests is made by the *court*, there is the additional problem of whether a constitutional right to a jury trial has been infringed.⁵⁹

Mention has been made of the perplexities and uncertainties encountered under the Missouri wrongful death statute. Two of these, as illustrated by Examples 6 and 8 above, require special mention. The first is when an adult child is dependent upon the support of a sole surviving parent who is killed, or upon parents with no other children and the parents are killed simultaneously as a result of the defendant's wrongful act. The damages law of Missouri allows a minor to recover only support lost from a wrongfully killed parent during the period of minority.⁶⁰ This suggests that an adult child suffers no pecuniary loss. But the case law is clear that when an *adult* child does suffer a pecuniary loss as a result of the death of his parent, he can recover damages.⁶¹ Paradoxically, however, in such a situation the action must be brought by the personal representative rather than by the person actually suffering the pecuniary loss.⁶² This is because Missouri Revised Statute section 537.080 authorizes direct recovery only by the spouse, *minor* children, or a parent. Absent any of those, the action *must* be maintained by the personal representative. Moreover, in such a case the statute orders the proceeds of the recovery to be "distributed according to the laws of descent," which, if literally interpreted, would allow

57. See generally 23 J. Mo. BAR 543, 566 (1967).

58. *Id.*

59. The constitutionality of the statutory provision authorizing judicial apportionment of a wrongful death award between competing beneficiaries in a single death action was challenged in *Grothe v. St. Louis-S.F. Ry.*, 460 S.W.2d 711 (Mo. 1970), but the validity of the challenge could not be considered by virtue of the absence of sufficient aggravement giving the defendant standing to address such a challenge.

60. *Cummins v. Kansas City Public Service Co.*, 334 Mo. 672, 66 S.W.2d 920 (1933); *McPherson v. St. Louis I.M. & S. Ry.*, 97 Mo. 253, 10 S.W. 846 (1889).

61. *Contestible v. Brookshire*, 355 S.W.2d 36 (Mo. 1962); *Domijan v. Harp*, 340 S.W.2d 728 (Mo. 1960).

62. MO. REV. STAT. § 537.080(3) (1969).

“laughing heirs” to preempt the deserving adult child.⁶³ On the other hand, that provision is in direct conflict with another provision of the statute which requires the victorious plaintiff in a wrongful death action “[t]o distribute the net proceeds as ordered by the court.”⁶⁴ Because the more specific provision is likely to prevail over the more general, the possibilities are that in a litigated case the “laughing heir” will prevail.⁶⁵

Even more incongruous is the situation in which a parent or parents suffer the death of an adult child upon whom he, she or they depend for support. Again, the case law is clear that in such situations the parent or parents may recover for the wrongful death of the adult unmarried child if they have in fact sustained a pecuniary loss.⁶⁶ But the statute is not at all clear as to whether, in such a case, the action is to be brought by the parental plaintiff or by the personal representative. Missouri Revised Statute section 537.080(2) provides that the action may be brought “by the father and mother, natural or adoptive,” in those situations when there is “no spouse or minor children, or if the spouse or minor children fail to sue within one year after such death.” So far it would seem that if the deceased had no wife and no children, then his parents obviously may sue. The ambiguity, however, results from another alternative in the same sentence in the statute which allows the parents to sue when “the deceased be a minor and unmarried.” This can be construed to be exclusive, and to eliminate recovery by the parents when the deceased is *not* a minor and is unmarried, or it may be construed to grant a cause of action to the parents in the limited situation in which the deceased is a minor who is unmarried and whose dependent children might otherwise have the action.

Between the two constructions, the second would be more logical and would permit the parents to sue for the wrongful death of the adult child. This is so because the provisions are alternative and, in the case hypothesized, there is “no spouse or minor children.” But one must then consider Missouri Revised Statute section 537.080(3), which provides:

63. MO. REV. STAT. § 537.080(3) (1969). See Cavers, *Change in the American Family and the “Laughing Heir,”* 20 IOWA L. REV. 203 (1934); 23 J. MO. BAR 543, 566 (1967).

64. MO. REV. STAT. § 537.095 2(4) (1969).

65. See Laughlin v. Forgrave, 432 S.W.2d 308, 313 (Mo. 1968).

66. See, e.g., Hertz v. McDowell, 355 Mo. 383, 214 S.W.2d 546 (1948); Anderson v. Robertson, 402 S.W.2d 589 (Mo. App. 1966).

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.

The ambiguity may not be apparent at first. Note, however, that the first two clauses are *alternative* clauses. If the second alternative is omitted, the statute reads:

If there be no husband, wife, minor child or minor children, natural born or adopted as herein indicated . . . 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.

Since the unmarried adult child fits this category, and does not fit the omitted alternative clause because he is not a minor, this can be read as giving the cause of action to the personal representative, with the "laughing heir" given the distinct possibility of scoring twice.

If the reader is inclined to think of this problem in terms of the speculations of an academic, let it be reported that the author has received calls from practicing attorneys who found this ambiguity the only obstacle to settlement of a case and who had hoped, unsuccessfully, that the author was aware of an authoritative solution.⁶⁷

DAMAGES

The language of the original Lord Campbell's Act was general with respect to the issue of damages and allowed the jury to award ". . . such damages as they may think proportioned to the injury."⁶⁸ Shortly after its enactment, however, the statute was given an extremely restrictive interpretation which limited recovery under its provisions to actual "pecuniary losses" sustained by the surviving beneficiaries.⁶⁹ A literal interpretation of the "pecuniary loss" rule results in the following type of anomaly:

Example 13: An 18 year old honor student and Eagle Scout is killed as a direct result of the negligence of the defendant. The deceased's parents had predeceased him three years earlier, thereby making him the sole surviving heir of two maternal grandparents. Because the

67. *But see* Rogers v. Fiandaca, 491 S.W.2d 560 (Mo. 1973).

68. Fatal Accidents Act of 1846, 9 & 10 Vict., c. 93.

69. Blake v. Midland Ry., 118 Eng. Rep. 35 (Q.B. 1852).

grandparents were not receiving any support from the deceased at the time of his death, they sustain no "pecuniary loss" and the defendant is not liable for any damages.⁷⁰

Not all states adhere to the pecuniary loss rule, even though, in a particular case like Georgia, the state's statute is modeled after the original Lord Campbell's Act. In that state, after a number of uncertain decisions as to the appropriate measure of damages to be applied in death cases,⁷¹ the courts finally settled on the proposition that the measure of damages in each case must be left to "the enlightened conscience of the jury."⁷²

As previously mentioned, a number of jurisdictions permit the recovery of "survival damages" along with a recovery for the losses directly sustained by the surviving beneficiaries under the wrongful death act.⁷³

Example 14: A husband is injured as a direct result of the defendant's negligence. Following two years of hospitalization during which he sustains \$60,000 loss of earnings, and \$50,000 in general damages, the husband dies. His wife and children thereby sustain additional damages for loss of support amounting to \$50,000. Many jurisdictions in this situation allow a full recovery of \$160,000.

70. Facts for the example are suggested by the notorious case of *Heath v. United States*, 85 F. Supp. 196 (N.D. Ala. 1949), allowing, in a situation almost identical to the facts in the example, damages of \$1.00.

71. Compare *Collins v. McPherson*, 91 Ga. App. 347, 85 S.E.2d 552, 556 (1954), and *Atlanta, B. & C. R. Co. v. Thomas*, 64 Ga. App. 253, 12 S.E.2d 494 (1940), with *T.D. Slater Contracting Co. v. Williams*, 101 Ga. App. 549, 114 S.E.2d 448 (1960), and *Royal Crown Bottling Co. v. Bell*, 100 Ga. App. 438, 111 S.E.2d 734 (1959). In the *Slater* case it was observed that it may be prejudicial error to use the ritual phrase "enlightened conscience of the jury" too often in charging the jury as to the proper measure of damages to be applied in a wrongful death case. It was also emphasized that it may be error to employ the phrase "enlightened conscience of the jury" without evidence as to the age, propensities, family circumstances etc., of the child in question. See the ambiguous language of GA. CODE ANN. § 105-1308 (1968). Also see the ambiguities which prompted the certification of certain questions to the Georgia Supreme Court in *Bullock County Hosp. Auth. v. Fowler*, 227 Ga. 638, 182 S.E.2d 493 (1971).

72. "In an action to recover for the wrongful death of a minor child, the measure of damages 'is the full value of the life' of the child as found by the enlightened conscience of the jury." *Seaboard Coast Line R.R. Co. v. Duncan*, 123 Ga. App. 479, 181 S.E.2d 535, 538 (1971).

73. Michigan is one of the major jurisdictions which permits the recovery of "survival" damages as part of the claim for wrongful death. MICH. STAT. ANN. § 27A.2922(1) (Supp. 1972). See text accompanying note 22 *supra*.

It should be noted that the jurisdictions which permit recovery of both "survival" and "death" damages as illustrated by Example 14 vary considerably in the mechanics of recovery. Some require all damages to be recovered by the personal representative,⁷⁴ while others allow the surviving beneficiary or beneficiaries to maintain the action.⁷⁵ In some situations the personal representative may bring the survival action with an independent action maintainable by the surviving beneficiary.⁷⁶ If the defendant happens to be the United States Government it should be noted that the Federal Tort Claims Act follows state law on the damages rule to be applied except in those states (Alabama and Massachusetts) having wrongful death acts which are "penal" in character.⁷⁷ In those jurisdictions the Act requires an "actual or compensatory" damages rule to be followed.⁷⁸

The Federal Employers Liability Act (FELA) establishes the conditions under which employees of common carriers by rail may recover damages for injuries sustained in the course of employment.⁷⁹ Under its terms, both survival damages and death damages are recoverable in a death action brought by the personal representative of the deceased. Unique jury instructions are therefore required in those states whose substantive law does not permit recoveries of both items.⁸⁰ But the Missouri Supreme Court recently qualified this liberal damages rule by holding that in a death action under FELA, unless there is some person actually in some way "dependent" upon the deceased, the "survi-

74. *E.g.*, MICH. STAT. ANN. § 27A.2922 (Supp. 1972).

75. *E.g.*, LA. CIV. CODE ANN. art. 2315 (1971).

76. *E.g.*, PA. STAT. tit. 12, §§ 1601-1604 (1950) (providing for action for wrongful death by designated persons); PA. STAT. tit. 20, § 320.610 (1950) (providing for the maintenance of survival action by personal representative). That the statutes deal with two independent causes of action maintainable by independent parties is made clear by the review of the law in *Frankel v. Burke's Excavating, Inc.*, 223 F. Supp. 945 (E.D. Pa. 1963). However, where both actions involve common questions of fact (which they almost always do) provision is made for the consolidation of actions. PA. R. CIV. P. 213(e) (1971).

77. 28 U.S.C. § 2674 (1970).

78. *Id.* The penal character of the Massachusetts and Alabama statutes is well known, but it is not so well known that the penal character of the Alabama statute is from a judicial construction and not from the actual wording of the statute. *Compare* MASS. GEN. LAWS ANN. ch. 299, § 2 (Supp. 1972), *with* ALA. CODE tit. 7, §§ 119, 123 (1958). *See* note 20 *supra*.

79. 45 U.S.C. §§ 51, 52 (1970).

80. *Id.* The survival action under the Federal Employers' Liability Act is under 45 U.S.C. § 59 (1970). *See* MAI No. 8.01.

val" damages sustained by the deceased (*i.e.* the deceased's actual medical and hospital expenses, loss of wages, and general damages endured between the time of injury and the time of death) may *not* be recovered under the Act.⁸¹

Subject to narrow exceptions to be discussed, a number of states do not permit the damages which the deceased sustained before death to be recovered in the wrongful death action. Missouri is such a jurisdiction,⁸² but is also one of a handful of jurisdictions which continues to impose a limitation or "lid" on the wrongful death recovery.⁸³ Two examples may help to illustrate the unfairness which such a combination of bad rules produces.

Example 15: A Granite City, Illinois, man is killed as a direct result of the negligence of an employee of the federal government. He was 32 years old at the time of his death, industrious, and was establishing a name for himself in the field of industrial computer processing. He leaves a wife and three children under 10 years of age. He also sustained general damages of about \$10,000 between the time of injury and the time of death. Since Illinois has no "lid" on recovery for wrongful death, permits survival damages to be recovered in such an action, and has a wrongful death statute which is not "penal" in nature, a substantial recovery is not unlikely, and \$200,000 is reasonable. The action would be under the Federal Tort Claims Act.⁸⁴

Example 16: Same facts as in Example 15 except that the deceased and his family are residents of University City, Missouri. Since Missouri does not permit the recovery of survival damages under these circum-

81. *Auld v. Terminal R.R. Ass'n*, 463 S.W.2d 297 (Mo. 1970).

82. Mo. REV. STAT. §§ 537.020, 537.090 (1969).

83. Mo. REV. STAT. § 537.090 (1969) (\$50,000 limit). Over the past six years Colorado, Illinois, Minnesota, Oregon and South Dakota have removed their limitations on actions for wrongful death. This leaves, other than Missouri, only six jurisdictions with an arbitrary limit on the amount recoverable: Kansas (\$35,000); Massachusetts (\$50,000); New Hampshire (\$60,000); Wisconsin (\$35,000); Virginia (\$40,000); and West Virginia (\$110,000). S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* § 7.2 (Cum. Supp. 1972).

84. Illinois law applies to the death action against the federal government arising out of an act in Illinois. 28 U.S.C. § 2674 (1970). There is no monetary limit to the action for wrongful death in Illinois. ILL. ANN. STAT. ch. 70, § 2 (Smith-Hurd, Supp. 1972), Ill. Laws 1967, p. 3227, § 1. Actions for personal injuries do not survive the death of the victim in Illinois, but the survival damages, if they consist of medical and hospital expenses actually paid for by the beneficiary of the wrongful death action, or if such beneficiary would be liable for them, may be recovered in the wrongful death action. *American Nat'l Bank & Trust Co. v. Peoples Gas Light & Coke Co.*, 42 Ill. App. 2d 163, 191 N.E.2d 628 (1963).

stances, and since Missouri has a \$50,000 "lid" on recovery for wrongful death, \$50,000 is the maximum which the widow can recover from the federal government.

A state such as Missouri may place a third limitation or discriminatory condition upon the wrongful death claimant. It may, in addition to placing a "lid" on the amount which may be recovered, and in addition to denying the recovery of what may be called "survival" damages, follow the general rule that recovery in a wrongful death action may be only for the pecuniary losses sustained by the surviving beneficiaries. The rule denies recovery for losses of consortium, companionship, guidance and other such relational losses which in many cases are the real losses visited upon the relatives of the deceased victim.⁸⁵

The pecuniary loss rule has been characterized as barbarous.⁸⁶ It was never a part of the actual wording of the original Lord Campbell's Act, and generally is not found in those statutes derived from or based upon the English statute. It would appear to be nothing more than a gratuitous and muddle-headed inference drawn by some misguided nineteenth century judges.⁸⁷ The false credentials of the pecuniary loss rule were eloquently exposed for what they are by former Professor Talbot Smith. As a state judge, former Professor Smith wrote for a divided Michigan Supreme Court in the case of *Wycko v. Gnodtke*⁸⁸ as follows:

The fiction now employed as the measure of pecuniary loss should be abandoned. . . . The child is a person and is not to be read out of the act by judicial acquiescence in the chief baron's theory that his life has no pecuniary value save as that of a wage earner. The bloodless bookkeeping imposed upon our juries by the savage exploitations of the

85. See Judge Holtzoff's realistic approach to the problem of compensating the parents for the death of an infant in *Hord v. National Homeopathic Hosp.*, 102 F. Supp. 792 (D.D.C. 1952). See also the provisions of the Hawaiian wrongful death statute, which make elaborate provision for compensating losses of a non-pecuniary nature, HAWAII REV. STAT. § 663-3 (1968).

86. *Wycko v. Gnodtke*, 361 Mich. 331, 105 N.W.2d 118, 121 (1960).

87. *Blake v. Midland Ry.*, 118 Eng. Rep. 35 (Q.B. 1852). Very little attention has been given to this remarkable judicial emasculation of a remedial statute. Dean Prosser accounts for the decision in terms of a judicial "alarm" about the difficulty of evaluating the damages. W. PROSSER, LAW OF TORTS § 121 (4th ed. 1971). Dean Vernon X. Miller attributes the endurance of such incongruities to judicial laziness. Miller, *Dead Men in Torts: Lord Campbell's Act Was Not Enough*, 19 CATH. U.L. REV. 283, 290 (1970) ("Judging is easier when magistrates can rely on legalisms and precedents.").

88. 361 Mich. 331, 105 N.W.2d 118 (1960).

last century must no longer be perpetuated by our courts.⁸⁹

Despite Missouri's continued adherence to the pecuniary loss rule, under some circumstances the Missouri Supreme Court has indicated a willingness to depart from its strict application. One basis upon which the Missouri Supreme Court has indicated a willingness to depart from the pecuniary loss rule is found in the Missouri statute which permits the jury to take into account "the mitigating or aggravating circumstances attending the wrongful act, neglect or default resulting in such death."⁹⁰ Although this concept of permitting the aggravating circumstances to be taken into account when awarding damages is directly opposite to the pecuniary loss rule, the Missouri Supreme Court relied upon the "aggravating circumstances" phrase in upholding a \$25,000 verdict (the statutory maximum in force at the time of death) in the case of a young man who suffered a particularly horrible death as a result of insecticide poisoning.⁹¹

It can be argued that the existence of "aggravating circumstances" of such a nature which justify an award greater than the actual pecuniary losses sustained is the same as allowing one to receive "punitive damages." Although this contention is technically correct, the courts have insisted that the concepts are different, while conceding that in effect the results are the same.⁹² Thus, if the degree of culpability of the de-

89. *Wycko v. Gnodtke*, 361 Mich. 331, 342, 105 N.W.2d 118, 124 (1960). The appeal to reason in the opinion of Judge Talbot Smith has not been accepted in many jurisdictions, and in Michigan, subsequent decisions have, in effect, repudiated Judge Smith's call for an abandonment of the pecuniary loss rule by characterizing it as dictum. See *Breckon v. Franklin Fuel Co.*, 383 Mich. 251, 174 N.W.2d 836 (1970); *Johnson, Wrongful Death and Intellectual Dishonesty*, 16 S. DAK. L. REV. 36, 45 *et seq.* (1971).

90. Mo. REV. STAT. § 537.090 (1969).

91. *Tripp v. Choate*, 415 S.W.2d 808 (Mo. 1967). See also *Hertz v. McDowell*, 358 Mo. 383, 388, 214 S.W.2d 546, 550 (1948) ("pecuniary loss of every kind and character") (emphasis added); *Nuckols v. Andrews Investment Co.*, 364 S.W.2d 128 (Mo. App. 1962). Note, however, that in connection with the death of a minor the Missouri law appears to permit the pecuniary loss recovery only for amounts which the minor might have been expected to contribute during his minority. *Brewer v. Rowe*, 363 Mo. 592, 252 S.W.2d 372 (1952). This rule seems to conflict with those decisions which permit the parents of an adult child to recover damages for the death of such adult child. See note 66 *supra* and accompanying text. Although the case of a parent continuing to receive support from an adult child can be distinguished as a special case. When evidentiary submissions are made to indicate the parents' right to expect support to continue past minority, damages may be awarded to compensate the parent for the loss of such an expectancy. See *Collins v. Stroh*, 426 S.W.2d 681 (Mo. App. 1968).

92. See, e.g., *May v. Bradford*, 369 S.W.2d 225 (Mo. 1963).

defendant satisfies any of the numerous but vague pejoratives listed by the courts as a condition for the award of punitive damages,⁹³ such damages may be given over and above the actual pecuniary loss, but must be formally attributed to "aggravating circumstances" and not identified as "punitive damages." It is important to remember that even though there be aggravating circumstances, the entire recovery may still not exceed the statutory limit. In other words, damages based upon aggravating circumstances can be used to make up the difference between the actual damages sustained and the statutory maximum, but not to exceed the statutory maximum.

The statutory language which permits a partial escape from the rigors of the pecuniary loss rule also allows "mitigating" circumstances to be taken into account.⁹⁴ Although this phrase has been construed in other jurisdictions, no judicial construction of the term appears to have been rendered in Missouri in the context of the wrongful death act. One of the circumstances which might appear "mitigating" to the wrongful death defendant is when the widow of the deceased remarries a person far more affluent than the deceased. In this situation, the plaintiff's pecuniary loss is in fact a pecuniary gain. While England, faithful to the bloodless bookkeeping imposed by the Court of Exchequer, takes this circumstance into account,⁹⁵ the majority of American jurisdictions reject the notion that a propitious remarriage should

93. See MAI Nos. 10.01 (willful, wanton or malicious misconduct), 10.02 (conscious disregard for others). The courts have generated a variety of characterizations of the culpable conduct necessary to the award of punitive or exemplary damages, but none of these identifies the culpability level with any real precision. See *Mills v. Murray*, 472 S.W.2d 6, 17 (Mo. App. 1971).

94. MO. REV. STAT. § 537.090 (1969). MAI No. 6.01. The Supreme Court Committee has supplied no cases or serious commentary concerning the circumstances under which the giving of an instruction authorizing consideration of "mitigating circumstances" might be appropriate. Two intermediate appellate decisions dealing with the predecessor of present § 537.090 (1969) suggest that "mitigating circumstances" are relevant only in the event that the petition alleges "aggravating circumstances" and may not be used to reduce the level of recovery to a point below the actual pecuniary losses of the statutory beneficiaries. *Nichols v. Winfrey*, 79 Mo. 544 (1883), *aff'd on rehearing on other grounds*, 90 Mo. 403, 2 S.W. 305 (1886); *Gilfillan v. McCrillis*, 84 Mo. App. 576 (1900).

95. See Annot., 87 A.L.R.2d 252, 259 (1963). See also *Curwen v. James*, [1963] 2 All E.R. 619 (C.A.) (widow's damages reduced when remarriage occurred after trial but before appeal); *Meade v. Clarke Chapman & Co.*, [1956] 1 All E.R. 44 (C.A.) (appropriate to reduce damages payable to widow when there is remarriage, but reduction of damages to dependent child is error because step-father, despite evidence of love and affection, was under no legal responsibility to support).

reduce the plaintiff's recovery, and Missouri has refused to consider such a remarriage a mitigating circumstance.⁹⁶ Resourceful counsel for the defendant may, of course, seize upon a number of devices through which the finder of fact may be indirectly apprised of a remarriage, although not necessarily stating that such remarriage has conferred upon the plaintiff a better economic status than previously enjoyed. Perhaps the least subtle of such devices is to ask, during the preliminary examination of jurors to determine competence, whether the prospective juror is acquainted with the plaintiff, Mrs. Warbucks ("Warbucks" being the surname of the plaintiff's new husband.) Since the name of the deceased will soon be revealed during the course of the trial, the jurors will have indirect notice of the widow's economically advantageous remarriage. In a heroic attempt to foreclose this gambit, plaintiff's counsel in a recent wrongful death action sought a writ of prohibition to prevent the trial judge from permitting such questioning of the jurors which would advert to the remarried name of the plaintiff's widow, but the writ was denied.⁹⁷

Attention will later be given to the question whether the wrongful death action is congruent with the tort action for personal injuries. That is to say, in every case in which the defendant would be liable to the plaintiff in tort, will he be liable, in the event of the victim's death, for wrongful death?⁹⁸ At this point, however, it is appropriate to note that with regard to punitive damages the wrongful death action arguably is more liberal than the normal tort action. The wrongful death claimant may recover the substantial equivalent of punitive damages even though the pecuniary loss rule forecloses recovery of the non-pecuniary losses associated with the ordinary negligence case, losses sometimes denominated as "generals."⁹⁹ Although not labelled "punitive damages," the aggravating circumstances which the Missouri statute permits to be considered in the trial of a wrongful death case allow the

96. *Platt v. Cape Girardeau Bell Tel. Co.*, 12 S.W.2d 933 (Mo. App. 1929).

97. *Glick v. Allstate Ins. Co.*, 435 S.W.2d 17 (Mo. App. 1968). In the foregoing case the Kansas City Court of Appeals noted that it would not necessarily be improper to show the remarriage of a widow but that evidence of the circumstances of the remarriage probably should not be shown. *Id.* at 23, *citing* *Dubil v. Labate*, 52 N.J. 255, 245 A.2d 177 (1968) (leading case qualifying the rule that the remarriage of a widow may not be shown).

98. See notes 148 and 149 *infra* and accompanying text.

99. C. GREGORY & H. KALVEN, *CASES AND MATERIALS ON TORTS* 463 (2d ed. 1969).

recovery of damages which are, for all practical purposes, indistinguishable from punitive damages.¹⁰⁰ The advantage to the wrongful death claimant is that the damages are *not* called "punitive." Thus, the wrongful death claimant does not have to meet the technical requirements otherwise imposed by the Missouri case law for the recovery of punitive damages.¹⁰¹ These cases hold, for example, that in the normal tort case, when the plaintiff alleges conduct sufficient to support a claim for punitive damages, such plaintiff may not proceed on a negligence theory and is governed by principles applicable to the commission of a "wanton tort."¹⁰² Thus, in an automobile personal injury case, the plaintiff, if he wishes punitive damages, may not cast his petition in negligence, which means that he may lose the treasured "highest degree of care" instruction.¹⁰³ Although it is arguable that the plaintiff may submit alternative theories of recovery,¹⁰⁴ it should be noted that when the action is for wrongful death, no such prejudicial distinction in theories need be made.¹⁰⁵

100. *See, e.g.*, *Contestible v. Brookshire*, 355 S.W.2d 36, 42 (Mo. 1962).

101. *Id.* at 41; *Spalding v. Robertson*, 357 Mo. 37, 206 S.W.2d 517 (1947).

102. *See, e.g.*, *Ervin v. Coleman*, 454 S.W.2d 289 (Mo. App. 1970); *Nichols v. Bresnahan*, 357 Mo. 1126, 1130, 212 S.W.2d 570, 573 (1948). *Accord*, *Harzfield's Inc. v. Otis Elevator Co.*, 116 F. Supp. 512, 514 (W.D. Mo. 1953).

103. *Nichols v. Bresnahan*, 357 Mo. 1126, 1130, 212 S.W.2d 570, 573 (1948).

104. The Springfield Court of Appeals, while holding that in the case before it on appeal the instructions commingled tort theories which disproved one another, also conceded that ". . . they are not necessarily discordant." *Ervin v. Coleman*, 454 S.W.2d 289, 291 (Mo. App. 1970). The Missouri Supreme Court has refused to pass upon the question on the ground that since the jury had obviously disbelieved the claim for punitive damages based upon willful and wanton misconduct, the error, if any, was harmless. *Brown v. Payne*, 264 S.W.2d 341 (Mo. 1954).

105. *Glick v. Ballentine Produce Inc.*, 396 S.W.2d 609 (Mo. 1965); *May v. Bradford*, 369 S.W.2d 225 (Mo. 1963); *Contestible v. Brookshire*, 355 S.W.2d 36 (Mo. 1962). When contributory negligence of the deceased is conceded by a petition relying upon the so-called "humanitarian doctrine" (Missouri's characterization of the "last clear chance" rule) logic would indicate that the petition should be dismissed by virtue of Missouri Revised Statute § 537.085 (1969), which makes the contributory negligence of the deceased a defense, and which implicitly overrules the case law exceptions based upon so-called "humanitarian negligence." Logic does not prevail, however, and it is possible to employ the so-called "humanitarian negligence" theory and thereby overcome the deceased's contributory negligence in a wrongful death case. *See, e.g.*, *Krause v. Pitcairn*, 350 Mo. 339, 167 S.W.2d 74 (1942). Whether, conceding the deceased's contributory negligence, the plaintiff who submits on a so-called "humanitarian" theory may still receive an instruction authorizing the jury to take into account the aggravating circumstances, would not seem doubtful in view of the fact that the so-called "humanitarian doctrine" presupposes a higher degree of culpability than that embraced by conventional negligence theory. The exact point was passed upon

Example 17: Plaintiff is seriously injured by a car operated by a drunken driver. To obtain punitive damages, plaintiff must characterize the defendant's behavior as wilful and wanton, and risk a failure to persuade the jury on that point. If plaintiff submits his case on negligence, he loses the right to punitive damages, but obtains the very favorable "highest degree of care" instruction. While he may probably submit, in the alternative, disjunctive theories of recovery, he runs a slight risk that his evidence of "wilful and wanton misconduct" may be ruled to contradict evidence of "negligence," and that therefore neither theory can stand alone as required by Missouri Approved Instruction No. 1.02, and he has reversible error.¹⁰⁶

Example 18: Deceased is killed by a drunken driver. The plaintiff, statutory beneficiary, may introduce evidence of aggravating circumstances, ask for additional damages on that basis, and still obtain a "highest degree of care" instruction.¹⁰⁷

In conclusion a final point deserves emphasis. If the conduct of the defendant in a wrongful death case would not have permitted an award of punitive damages in a normal tort action, damages over and above those related to pecuniary loss may not be recovered under the aggravating circumstances condition of the wrongful death action.¹⁰⁸

CAUSATION PROBLEMS

Whether a particular wrongful act is, in fact, a cause of death is an evidentiary problem which can assume complex proportions.¹⁰⁹ When medical testimony is required, as is often the case, the plaintiff is faced with the need to reassure his medical expert that he is not compromising his profession if he testifies with "reasonable medical certainty" that something was the cause of the death.¹¹⁰

and approved in *Grothe v. St. Louis-S.F. Ry. Co.*, 460 S.W.2d 711 (Mo. 1970); *Spalding v. Robertson*, 357 Mo. 37, 206 S.W.2d 517 (1947). A headnote published by the West Publishing Company erroneously asserts that such an instruction is improper. See *Barnes v. Jones*, 306 S.W.2d 512 (Mo. 1957) (headnote 3 not supported by text of decision at 516).

106. *Ervin v. Coleman*, 454 S.W.2d 289 (Mo. App. 1970).

107. *E.g.*, *Hertz v. McDowell*, 203 S.W.2d 500, 501 (Mo. App. 1947), *aff'd*, 358 Mo. 383, 214 S.W.2d 546 (1948).

108. *Contestible v. Brookshire*, 355 S.W.2d 36 (Mo. 1962).

109. See, *e.g.*, *State ex rel. Richardson v. Edgeworth*, 214 So. 2d 579 (Miss. 1968) (suicide resulting from hounding by creditors, a justice of the peace, and collection agencies held actionable). *Contra*, *Wallace v. Bounds*, 369 S.W.2d 138 (Mo. 1963).

110. *James v. Sunshine Biscuits, Inc.*, 402 S.W.2d 364 (Mo. 1966). The cases on the application of the "reasonable certainty" rule in Missouri are reviewed and analyzed

Appellate judges are occasionally presumptuous enough to reverse jury verdicts on the theory that the evidentiary basis for attributing the death to the defendant's wrongful act is insufficient.¹¹¹ Absent a critical constitutional issue, there is little recourse from such an arrogation of authority from the trier of the fact, but this is a problem common to our legal system and not unique to the action for wrongful death.¹¹²

One causation problem which is unique to the action for wrongful death arises in states, such as Missouri, where the survival action is barred if the injured party dies from the wrongful act of the tortfeasor. Examples 1 and 2 illustrate how this rule operates. What makes the problem unique is that, since the survival action is different from the wrongful death action, a decision in one is not *res judicata* with respect to the issues in the other.

Example 19: X is in a car accident and dies three weeks later. During those three weeks X accumulates substantial claims for loss of earnings, pain and suffering, and medical and hospital expenses. Some question exists over whether X died from injuries in the crash or from a pre-existing aneurism. X's personal representative, proceeding on the theory that X died from the aneurism and not from injuries sustained in the accident, sues and recovers for damages which the deceased sustained during the three weeks before death. Thereafter X's widow sues the same defendant for damages for wrongful death. The defendant moves to dismiss on the theory that the earlier action by the personal representative which resulted in a recovery for the personal representative established that the deceased did not die as a result of the defendant's wrongful act. The motion to dismiss is denied. There is no collateral estoppel and the factual finding as to cause of death in the first action is not *res judicata* insofar as the widow is concerned.¹¹³

Missouri statutes prohibit recoveries for *both* wrongful death and the damages which the deceased had sustained before death. It is important to note, however, that even in the unique situation hypothesized in Example 19 duplicate recovery of damages does not result except to

in *Walker v. St. Louis Pub. Ser. Co.*, 362 Mo. 640, 658-59, 243 S.W.2d 92, 97-98 (1951). See Small, *Cause, A Many Splendored Thing*, in N.A.C.C.A., *WRONGFUL DEATH & SURVIVORSHIP* 41 (1958).

111. See *Bailey v. Kershner*, 444 S.W.2d 10 (Mo. App. 1969), noted in 36 Mo. L. REV. 127 (1971).

112. See, e.g., *Houghton v. Atchison, T. & S.F. R.R.*, 446 S.W.2d 406 (Mo. 1969), noted in 36 Mo. L. REV. 586 (1971).

113. *Harris v. Goggins*, 363 S.W.2d 717 (Mo. App. 1962), modified and affirmed, 374 S.W.2d 6 (Mo. 1963); cf. *Prenzler v. Schneider*, 411 S.W.2d 135, 139 (Mo. 1966).

the extent that the Missouri law allows the medical expenses of the deceased incurred prior to death to be recovered by the husband, in the event that the deceased is a married woman. The unusual result illustrated by Example 19 is not that duplicate damages are recovered, but that the arbitrary policy of the statute, which annihilates the survival action if the deceased in fact dies of the injuries inflicted by the tortfeasor, is defeated by a procedural rule. Today, in Missouri, a defendant faced with the danger of being held liable to both the personal representative and the statutory beneficiary designated by the wrongful death statute may bring an action of interpleader to resolve this problem.¹¹⁴

It should be pointed out, however, that since the cause of action for wrongful death does not begin to run until the death of the person injured, it is theoretically possible for an injured person to recover in a tort action maintained in his own right during his lifetime, and for the statutory beneficiary to recover in an action for death brought subsequent to the injured person's death.¹¹⁵

STATUTES OF LIMITATION

The limitation period applicable to the action for wrongful death may differ considerably from that applicable to a conventional negligence suit. First, it may be considerably shorter. In Missouri, the period of limitation applicable to the ordinary negligence action is five years.¹¹⁶ The wrongful death action, on the other hand, must be brought within at least two years from the date of death,¹¹⁷ and, as will be shown, in most instances the limitation period is in fact only one year.¹¹⁸ Secondly, the limitation may commence in a wrongful death action when it normally would not run in a negligence case. If the legislature authorizes the maintenance of an action for damages and prescribes a

114. See *Smith v. Preis*, 396 S.W.2d 636 (Mo. 1966). See also *Wallace v. Bounds*, 369 S.W.2d 138 (Mo. 1963), for an example of the rule requiring an election between the wrongful death action and the survival action.

115. *Blackwell v. American Film Co.*, 189 Cal. 689, 209 P. 999 (1922); *Rowe v. Richards*, 32 S.D. 66, 142 N.W. 664 (1913) (dictum), *overruled in part*, *Ulvig v. McKennan Hosp.*, 56 S.D. 509, 229 N.W. 383 (1930). See *Bauer, Settling a Death Case—Watch Out!*, 20 J. MO. BAR 356 (1964). The majority rule, however, is that the recovery by decedent during his lifetime bars the wrongful death action. See, e.g., *Roberts v. Union Carbide Corp.*, 415 F.2d 474 (3d Cir. 1969).

116. MO. REV. STAT. § 516.120 (1969).

117. MO. REV. STAT. § 537.100 (1969).

118. See notes 125 and 126 *infra* and accompanying text.

limitation period within which that action must be maintained, it is frequently said that the limitation period is a "built in" period.¹¹⁹ The characterization "built in" is used in order to emphasize that the limitation period which one would otherwise expect to apply to the action and to control is not applicable.

In Missouri, where the limitation period is "built in," it has been held that the tolling provisions which normally suspend the running of the generally applicable statute of limitations do not apply.¹²⁰ This follows from a logical interpretation of the relevant statutory provisions and from the case law. The effect is to allow the statute of limitations to run on the wrongful death action under circumstances in which the limitation would ordinarily be suspended.

Example 20: Defendant negligently causes the death of plaintiff's deceased, but fails to report the accident. Despite a diligently pressed search, over two years elapses before the plaintiff is able to locate and identify the defendant. Plaintiff's suit is barred, even though, had he lived, the deceased would have been able to maintain a negligence action against the same defendant at any time during a five year period subsequent to the location and identification of the defendant.¹²¹

A third problem which can arise is peculiar to those jurisdictions which designate a period of time in which certain preferred beneficiaries may sue, and, in the event that none of such beneficiaries sues, prescribes an additional and subsequent period within which other beneficiaries may sue. The language of the Missouri statute exemplifies the legislation of such jurisdictions.¹²² Following a provision which designates the spouse or minor children as the persons having standing to maintain the action for wrongful death, the statute continues:

(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 . . . , then by the father and mother. . . .¹²³

119. Davis, *Tort Liability and the Statutes of Limitation*, 33 Mo. L. REV. 171, 177 (1968).

120. *Smile v. Lawson*, 435 S.W.2d 325 (Mo. 1969); *Laughline v. Forgrave*, 432 S.W. 2d 308 (Mo. 1969); *Frazee v. Partney*, 314 S.W.2d 915 (Mo. 1958); *Baysinger v. Hanser*, 355 Mo. 1042, 199 S.W.2d 644 (1947).

121. *Frazee v. Partney*, 314 S.W.2d 915 (Mo. 1958), noted in 24 Mo. L. REV. 397 (1959); 35 N. DAK. L. REV. 171 (1959). See Comment, *First Catch Your Defendant—Limitation and the Unknown Tortfeasor*, 29 MODERN L. REV. 366 (1966).

122. MO. REV. STAT. § 537.080(1), (2) (1969).

123. MO. REV. STAT. § 537.080(2) (1969).

Elsewhere, the statute provides as follows:

Every action instituted under section 537.080 shall be commenced within two years after the cause of action shall accrue.¹²⁴

A reasonable interpretation of this statutory scheme is that the legislature intended to permit an action for wrongful death to be maintained by anyone entitled to maintain such an action within two years after the death of the deceased, but that when the deceased is married, or has children, the parents of the deceased may not maintain the action unless the spouse or children fail to begin the action themselves within one year of the decedent's death.

The reasonable interpretation is not, however, the one adopted by the Missouri courts. The Missouri Supreme Court has twice held that the failure of the wife to sue within the period equal to one half of the normal statutory period (six months under the pre-1967 law, but one year today) bars her action when there is an alternative beneficiary who wishes or is qualified to maintain the action.¹²⁵ In Missouri, therefore, it is wrong to assume that the two-year limitation spelled out in the statute applies. This is a trap for those unfamiliar with the statute. In most instances the effective limitation period is only one year.

Example 21: Defendant negligently causes the death of the deceased, who leaves a wife and child. One year and three months following deceased's death, the widow files an action for wrongful death. Two years and two days following the date of death, the widow's action is dismissed. The statute has run and no recovery can be made.¹²⁶

Although the Federal Tort Claims Act adopts the substantive law of the jurisdiction in which the tortious act occurs to determine the availability of relief and the measure of damages,¹²⁷ it is well established that federal law determines when the cause of action accrues and what is the period within which action must be brought.¹²⁸ Thus, in an ac-

124. MO. REV. STAT. § 537.100 (1969).

125. *Uber v. Missouri Pac. Ry.*, 441 S.W.2d 682 (Mo. 1969); *Forehand v. Hall*, 355 S.W.2d 940 (Mo. 1962). See also *Deming v. Williams*, 321 S.W.2d 720 (Mo. App. 1959). But see *Almcrantz v. Carney*, 490 S.W.2d 59 (Mo. 1973); *Montemayor v. Harvey*, 490 S.W.2d 61 (Mo. 1973).

126. Example is based upon facts and law announced in the cases cited in note 125 *supra*.

127. 28 U.S.C. § 2674 (1970).

128. 28 U.S.C. § 2401(b) (1970) establishes the basic limitations period of two years. The statute has been construed to require a federal test for determining the time at which the tort action against the federal government accrues and, in the case of an action for wrongful death, this has been construed to be the date of death. *Kington v.*

tion against the United States for wrongful death, under the circumstances hypothesized in Example 21, the widow's suit would not be dismissed, even though the tortious act which resulted in death occurred in Missouri.¹²⁹

Since under both federal and Missouri law the statute begins to run from the date of death, no conflicts are encountered in this respect, but in a jurisdiction which measures the limitations period from the date of the injury, the federal rule would be potentially less limiting.¹³⁰

On logical grounds, it is difficult to justify the establishment of a special limitation period applicable exclusively to the action for death. Not only is it a trap for the unwary,¹³¹ but it has been the source of considerable litigation.

CONTRIBUTORY FAULT

Most wrongful death statutes provide that the contributory negligence of the deceased bars the action. Some statutes accomplish this result by providing that an action for damages for wrongful death may not be maintained if the deceased would not have been able to recover damages for personal injury had he lived.¹³² In addition, Missouri simply provides that the contributory negligence of the deceased may be pleaded and proved by the defendant as a defense.¹³³ In the few remaining jurisdictions which today require the plaintiff to assume the burden of pleading and proving freedom from contributory negligence in the nor-

United States, 396 F.2d 9 (6th Cir. 1968), *cert. denied*, 393 U.S. 960 (1969) (widow's death claim barred because brought later than two years following the deceased's death, although within two years from discovering that deceased's death was attributable to negligence of federal employee), *noted in* 1968 DUKE L.J. 1202.

129. *Young v. United States*, 184 F.2d 587 (D.C. Cir. 1950).

130. Jurisdictions which provide that the statute of limitations begins to run from the date of the injury rather than from the date of death include Connecticut, Iowa and Massachusetts. CONN. GEN. STAT. REV. § 52-555 (Supp. 1972); IOWA CODE ANN. § 614.1 (Supp. 1972); MASS. GEN. LAWS ANN. ch. 222, § 2 (Supp. 1972).

131. The statutory language is unambiguous. "Every action instituted under section 537.080 shall be commenced within two years after the cause of action shall accrue. . . ." MO. REV. STAT. § 537.100 (1969). When one considers that the vast majority of wrongful death claims are, under technical interpretations of another provision of the law, barred after only one year, it is difficult to imagine a situation more likely to mislead. *See* note 125 *supra*.

132. *See* SPEISER 411; Oppenheim, *The Survival of Tort Actions and the Action for Wrongful Death—A Survey and a Proposal*, 16 TUL. L. REV. 386, 396 (1942).

133. MO. REV. STAT. § 537.085 (1969). Missouri appears to be the only jurisdiction in the common law world with a specific provision permitting the contributory negligence of the deceased to be proved as a defense.

mal negligence action, an exception is typically made when the suit is for wrongful death,¹³⁴ because of the obvious disabilities which such a rule would impose upon the plaintiff. The plaintiff in the wrongful death case ordinarily was not present when the events occurred and is, for this reason, hardly in a position to offer evidence as to the absence of contributory fault in the deceased.

In Missouri the burden as to contributory negligence is on the defendant, as it is in most jurisdictions.¹³⁵ Thus, the need to make a special exception for death cases is not present. But Missouri very clearly provides that the contributory negligence of the deceased will bar an action for wrongful death, and the statutory scheme underscores this point by adopting *both* of the two statutory modes referred to above.

Missouri Revised Statute section 538.080, which creates the cause of action, explicitly limits the action to those situations when the negligence is such as would, if death had not ensued, have entitled the party injured to maintain an action.¹³⁶ If the party injured had been

134. New York, by statute, has provided that in wrongful death cases the burden of pleading and proving the contributory negligence issue is on the defendant. N.Y. DECED. EST. LAW § 131 (McKinney 1964). Illinois, by judicial decision, has ruled that, although there is no presumption of due care which operates in favor of the deceased, when there are no eyewitnesses to the accident evidence as to the deceased's "careful habits" is admissible. This means that a jury verdict for the plaintiff will be upheld even though the only evidence to support the deceased's freedom from contributory negligence happens to be circumstantial evidence based upon testimony as to careful habits. Note, however, that such evidence is inadmissible if there are eyewitnesses to the accident. See *Johnson v. Livesay*, 29 Ill. App. 2d 428, 173 N.E.2d 838 (1961); *Thompson v. Bailey*, 17 Ill. App. 2d 291, 149 N.E.2d 655 (1958). But see *National Bank of Mattoon v. Hanley*, 20 Ill. App. 2d 191, 155 N.E.2d 318 (1959), holding that in the absence of eyewitnesses to the accident the deceased was to be regarded as having done everything necessary to prevent her death. The presumption of due care on the part of the deceased when there are no eyewitnesses was a rule originally generated in Iowa, but now anachronistic by virtue of a 1965 change in the Iowa law making the contributory negligence issue an affirmative defense. See SPEISER 697. The difference between the practice in Illinois and the old Iowa "no eyewitness rule" may be more academic than real. See *Gulf, M. & C.P.R. Co. v. Larkin*, 307 F.2d 225, 228 (8th Cir. 1962).

135. *Thompson v. Southwestern Bell Tel. Co.*, 451 S.W.2d 147 (Mo. 1970); W. PROSSER, LAW OF TORTS 416 (4th ed. 1971).

136. MO. REV. STAT. § 537.080 (1969). This language, which appears in a majority of the wrongful death statutes, and which conditions the existence of the new cause of action on the hypothesis of a cause of action having originally vested in the deceased, is taken directly from the original English statute. See Fatal Accidents Act of 1846, 9 & 10 Vict., c. 93 (" . . . is such as would [if Death had not ensued] have entitled the Party injured to maintain an Action . . . ")

guilty of contributory negligence, he would not have been able to maintain an action, and, therefore, no action could be maintained for his wrongful death. But apparently, just to make the point absolutely clear Missouri Revised Statute section 537.085 laconically asserts:

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.¹³⁷

A more difficult question, however, is presented by the situation in which the beneficiary of the relational action is himself guilty of negligent conduct bearing a causal relation to the death of the deceased. Since the action is not derivative but relational, this type of negligence is truly "contributory," whereas the negligence, if any, of the deceased is not really contributory but concurring.¹³⁸ Put in prosaic terms, if the gravamen of the wrongful death claimant's cause is (as it must be under conventional Lord Campbell Act theory) the destruction of the claimant's "money-making machine," then the participatory fault of the "money-making machine" itself must be viewed as "concurring" rather than "contributory" negligence. In other words, if analyzed logically, when both the breadwinner and a named defendant are negligent in bringing about the death of the breadwinner, insofar as the plaintiff's pecuniary losses are concerned, the two of them are "joint tortfeasors."

But, as we are frequently reminded, the basis of the law is experience, not logic. For this reason, the negligence of the deceased, which logically ought not to bar the innocent beneficiary if, in fact, there is negligence in a third-party, is generally regarded (with the important exception to be noted) as a bar to the action.¹³⁹ On the other hand, the statutes rarely prohibit the causally negligent beneficiary from recover-

137. MO. REV. STAT. § 537.085 (1969). See note 133 *supra*.

138. For an early recognition of the proposition that when the deceased is guilty of "contributory" negligence he is, insofar as the statutory beneficiary is concerned, a joint tortfeasor, see Wettach, *Death and Contributory Negligence*, 16 N.C.L. REV. 211, 215 (1938).

139. The original decision holding that the contributory negligence of the deceased bars the action was *Senior v. Ward*, 120 Eng. Rep. 954 (Q.B. 1859). For a discussion of the virtually unanimous acceptance of this notion by the American jurisdictions, see 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* 1289, 1290 (1956); *id.* at 130 (Supp. 1968). See also RESTATEMENT (SECOND) OF TORTS § 494 (1965); *id.*, Appendix 401-403. The exception to the rule that contributory negligence of the deceased bars a recovery for wrongful death arises in the area of products liability. See note 147 *infra* and accompanying text.

ing, which, as has been pointed out earlier, is the true example of "contributory" negligence.¹⁴⁰ However, the case law has compensated for the draftsman's oversight and generally disallows recovery by a beneficiary whose negligence may have been a causal factor in the death of the deceased.¹⁴¹

When, however, there are multiple beneficiaries, only one of whom was guilty of negligence causally related to the death of the deceased, the action for wrongful death against the negligent third party is *not* barred.¹⁴² Again, some examples may help to illustrate.

Example 22: Deceased's wife and six children were totally dependent upon deceased for their support. Deceased had refused, "on principle," to carry life insurance, and, despite unremitting entreaties from his wife, had refused, when driving, to bring his vehicle to a halt before negotiating railway crossings. Deceased is killed when his car is struck at a railway crossing by a train whose engineer was negligently exceeding the speed limit and who negligently failed to sound a warning on approaching the crossing. Deceased failed to stop before negotiating the crossing. Expert testimony establishes that if the train had been within the speed limit, or if the engineer had sounded a warning, or if the deceased had first come to a halt before negotiating the crossing, death would not have ensued. No recovery.¹⁴³

140. See text accompanying note 138 *supra*; Wettach, *supra* note 138, at 219 *et seq.* See also *Frankel v. Burke's Excavating Inc.*, 223 F. Supp. 945 (E.D. Pa. 1963), holding that the contributory negligence of the parents barred their actions for wrongful death in connection with the death of their children, but that survival actions could be maintained against the allegedly negligent defendants, and that third party complaints could be served upon the parents, impleading them as potentially responsible defendants, under a procedure permitting contribution among joint tortfeasors.

141. *Slagle v. Singer*, 419 S.W.2d 9 (Mo. 1967); *Dye v. Geier*, 345 S.W.2d 83 (Mo. 1961). For a discussion of the rule that the contributory negligence of a beneficiary bars the action for wrongful death as applied in other jurisdictions, see SPEISER 419 *et seq.*

142. *E.g.*, *Baca v. Baca*, 71 N.M. 468, 379 P.2d 765 (1963). A few jurisdictions continue to "impute" the negligence of one of the multiple beneficiaries to the others and thereby defeat the action. See SPEISER 429. For an additional example of the minority view, see *Martinez v. Rodriguez*, 215 So. 2d 305 (Fla. 1968) (wrongful death action by father for death of child as result of defendant's alleged negligence barred by the contributory negligence of the mother), noted in 9 ALA. L. REV. 126 (1956).

143. Example 22 is supported by *Floyd v. Thompson*, 356 Mo. 250, 201 S.W.2d 390 (1947), although the facts have been changed for emphasis. Note, however, that if the facts support a submission under the so-called "humanitarian" theory (last clear chance) the plaintiffs would not necessarily be barred. *Grothe v. St. Louis-S.F. Ry.*, 460 S.W.2d 711 (Mo. 1970).

Example 23: Deceased driver and passenger wife were arguing while deceased was approaching an intersection. Deceased's wife struck him which prevented him from observing another car which was obviously going to run a stop sign. Deceased's failure to observe the other car resulted in a collision causing the death of the deceased. Even though deceased was free from negligence, the widow cannot recover for wrongful death because of her own negligence.¹⁴⁴

Example 24: Same facts as in Example 23, except that the wife fails to sue. Deceased's dependent mother sues later than one year but less than two years after the accident. Deceased's dependent mother may recover damages for wrongful death.¹⁴⁵

Example 25: Deceased's mother negligently fails to maintain a careful lookout when making a left-hand turn which requires her to cross two lanes of a highway on which traffic proceeds in a direction opposite to that in which the mother was originally headed. Defendant, travelling at an excessive speed and also negligently failing to maintain a careful lookout collides with mother's car while attempting to pass a truck. Deceased is killed. Deceased's mother may not maintain the action for wrongful death, but deceased's father may maintain it, and the damages which he recovers are not diminished in proportion to deceased's mother's contributory fault.¹⁴⁶

Under a conventional Lord Campbell's Act approach, which conditions the maintenance of the wrongful death action on whether the deceased would have been able to maintain an action for personal injuries had he lived, the evolution of new theories of tort recovery would

144. The example is supported by the leading cases of *Slagle v. Singer*, 419 S.W.2d 9 (Mo. 1967), and *Dye v. Geier*, 345 S.W.2d 83 (Mo. 1961), although the facts have been embellished considerably for the purpose of emphasis.

145. While there are no cases in direct support of the example, the language of the statute clearly supports such a conclusion, as do the cases which hold that the contributory negligence of one of several or multiple joint beneficiaries does not bar the maintenance of the action, even though the contributorily negligent beneficiary is a joint party-plaintiff. See MO. REV. STAT. § 537.080(2) (1969); Note, *The Missouri Wrongful Death Statute*, 1963 WASH. U.L.Q. 125, 138; note 146 *infra*.

146. Facts in example based upon *Sanfilippo v. Bolle*, 432 S.W.2d 232 (Mo. 1968). The rule that the contributory negligence of one of multiple wrongful death beneficiaries does not bar the action or prohibit the contributorily negligent person from participating in the award was established in the leading case of *Herrell v. St. Louis-S.F. Ry.*, 324 Mo. 38, 23 S.W.2d 102 (1929). Some jurisdictions, while holding that the action is not barred, attempt to prohibit the contributorily negligent beneficiary from participating in the award. See, e.g., *Baca v. Baca*, 71 N.M. 468, 379 P.2d 765 (1963). That the contributorily negligent beneficiary may still be a party plaintiff so long as there is a joint wrongful death beneficiary who is not contributorily negligent was established in *Reynolds v. Thompson*, 215 S.W.2d 452 (Mo. 1968).

appear, automatically, to be available to the wrongful death claimant. In Missouri, however, Missouri Revised Statute section 537.085, which explicitly makes the contributory negligence of the deceased an affirmative defense, raises the question whether the wrongful death action is in fact coterminous with the expanding boundaries of tort liability.

Example 26: Deceased attempts to remedy a malfunctioning sump pump while standing on a basement floor which is flooded as a result of the malfunction. The sump pump is not grounded and deceased is electrocuted. In a tort action against the manufacturer or supplier of the sump pump based upon negligence, the contributory negligence of the person who attempted to repair a sump pump under those circumstances would probably bar the recovery of damages for personal injuries. But, if the action is predicated upon a products liability theory (either under Restatement of Torts (Second) 402A or under the appropriate provisions of the Uniform Commercial Code), the contributory negligence of the injured person is not a bar. But the action for wrongful death is statutory, and the contributory negligence of the deceased is made a defense by the statute. Somehow, however, the beneficiary in this situation may recover damages for wrongful death irrespective of the contributory negligence of the deceased.¹⁴⁷

Another problem, seldom dealt with by judicial decision, is the characterization of the action as being one for "wrongful" death. Suppose, for example, the death results from conduct which, while tortiously innocent, would generate liability under theories of strict liability, nuisance, or products liability. Some courts have held that the adjective "wrongful" means what it says, and that even though the deceased might have been able to recover damages under a products liability theory had he lived, the death action is based upon a legislatively imposed condition of culpability, and the statutory beneficiary under those circumstances may not recover for wrongful death.¹⁴⁸ The Missouri Supreme Court has rejected this notion, however, and permits an action for wrongful death resulting from a product defect, without the need to establish negligence on the part of the manufacturer or supplier.¹⁴⁹

147. Facts in example based upon *Keener v. Dayton Electric Mfg. Co.*, 445 S.W.2d 362 (Mo. 1969).

148. *DiBelardino v. Lemmon Pharmacal Co.*, 416 Pa. 580, 208 A.2d 283 (1965). *Accord*, *Gott v. Newark Motors, Inc.*, 267 A.2d 596 (Del. Super. Ct. 1970); *Miller v. Preitz*, 442 Pa. 383, 221 A.2d 320 (1966); *Hasson Grocery Co. v. Cook*, 196 Miss. 452, 17 So. 2d 791 (1944). *Contra*, *Schnabl v. Ford Motor Co.*, 54 Wis. 2d 345, 195 N.W.2d 602 (1972).

149. *Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362 (Mo. 1969).
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When two family members die simultaneously as the result of a single wrongful act, and one or the other or both would otherwise have been qualified to bring the wrongful death action for the death of such other, it would appear that the action passes to the next beneficiary or class of beneficiaries named under the statute. This problem arises, of course, only in states such as Missouri where a person other than the personal representative is normally qualified to bring the action.¹⁵⁰

Example 27: A husband and wife are simultaneously killed as the result of *D's* wrongful act. Two children survive. Either child or both may recover damages for the wrongful death of each parent.¹⁵¹

Example 28: Assume in Example 27 that the couple killed is childless, that the wife's parents are dead, but that a mother of the husband is still living. Provided some pecuniary loss can be shown, the husband's mother may sue for the wrongful death of the husband, and the personal representative of the wife's estate may sue for the wrongful death of the wife.¹⁵²

In Missouri, when two members of the same family die sequentially as the result of defendant's wrongful act, and the one dying last would have been qualified to sue for the death of the one dying first, interesting results ensue.

Example 29: A husband and wife are killed as the result of the defendant's wrongful act. The wife is killed instantly, but the husband lives for three days before succumbing. There are no children but each decedent is survived by parents. The parents of the husband may sue for his wrongful death, but it is arguable that at least during the first year, only the personal representative of the husband may sue for the wife's death since the cause of action vested in him before his death.¹⁵³

150. MO. REV. STAT. § 537.080(1)-(3) (1969); see also note 50 *supra* and accompanying text.

151. *St. Louis-S.F. Ry. v. Oxford*, 144 Ark. 966, 970, 298 S.W. 207, 209 (1927); *Tice v. Milner*, 308 S.W.2d 697 (Mo. 1957). *Accord*, *Southeastern Aviation, Inc. v. Hurd*, 209 Tenn. 639, 355 S.W.2d 436 (1962).

152. Although no case was found involving the specific facts of Example 28, the results follow from the theory that the cause of action immediately vests, upon death, in the statutory beneficiary, and if one of the statutory beneficiaries dies simultaneously with the deceased, he is, at that time, not a person in whom the cause of action can vest. *Cf. Nelms v. Bright*, 299 S.W.2d 483 (Mo. 1957).

153. Under the facts of Example 29 it is arguable that the personal representative of the husband, rather than his parents, is the only person with standing to sue under the incredibly ambiguous provisions of the Missouri statutes. See note 66 *supra* and accompanying text. The point of the example, however, is that when one spouse

Example 30: Same facts as in Example 29 except that no action is brought within one year by the personal representative of the husband for the wrongful death of the wife. The parents of the wife may then sue for damages for her wrongful death.¹⁵⁴

A method of overcoming prejudicial limitations of state law governing wrongful death appears to be infrequently considered, and is available if the death can in some way be related to an act "under color of state law" which resulted in the "deprivation of . . . rights, privileges, or immunities secured by the Constitution and laws. . . ."¹⁵⁵ The reference is to the federal tort cause of action based upon the Civil Rights Act of 1871 which was vitalized by the Supreme Court's 1961 decision in *Monroe v. Pape*.¹⁵⁶ Although the circumstances under which wrongful death can be characterized as coming within the federal statutory formula are concededly limited, in those situations when it is possible (e.g., wrongful death at the hands of police officers), an escape from the monetary limitations on recovery imposed by state law is available.

Example 31: Plaintiff's deceased dies as the result of wrongful acts of police officers and jailers of State X. Plaintiff can show no pecuniary loss, is not the person qualified under state law to bring the action, and the state law limits damages for wrongful death to \$15,000. Plaintiff may recover damages in excess of \$15,000 if the circumstances warrant it under the "federal common law."¹⁵⁷

predeceases another, and both die from the same wrongful act, the statutory beneficiaries of the person who died last have the action for the wrongful death of the person who died last. *Day v. Brandon*, 394 S.W.2d 405, 407 (Mo. 1965).

154. Although no case was found involving the specific facts of Example 30, the result clearly follows from the statutory language of Missouri Revised Statute § 537.080 (2) (1969) and the rationale of the cases cited in notes 152 and 153 *supra*. Again, it is arguable that upon the failure of the surviving husband to sue, and, after his death, the failure of his personal representative to sue, that the cause of action is in the personal representative of the wife. See note 67 *supra* and accompanying text. Although there have been intervening amendments of the statute, the situation is just as confusing today, if not more so, as it was at the time an extremely perceptive and analytical article dealing with these problems appeared. Lewis, *Can Two Be Killed As Cheaply As One?*, 22 J. Mo. BAR 368 (1966). Mr. Lewis notes that if the husband's personal representative sues, the pecuniary loss (that endured by the husband between the time of the wife's death and his own demise) is likely to be nominal, at best, whereas the pecuniary losses of the wife's heirs may be substantial. *Id.* at 371.

155. 42 U.S.C. § 1983 (1970).

156. 365 U.S. 167 (1961).

157. *McDaniel v. Carroll*, 457 F.2d 968 (6th Cir. 1972); *Kerr v. Chicago*, 424 F.2d 1134 (7th Cir. 1970); *Basista v. Weir*, 340 F.2d 74 (3d Cir. 1965); *Brazier v. Cherry*,

Recent developments in the area of conflict of laws indicate that damages and procedural disabilities of the *lex loci delicti* may not be applicable to the wrongful death action when none of the parties has any substantial nexus with the jurisdiction where the wrong occurred or when that jurisdiction has no substantial policy interest in the outcome of the action.¹⁵⁸

Example 32: Deceased and his statutory beneficiary are residents of North Dakota, which does not impose a limitation on liability for wrongful death. Defendant's wrongful act occurs in South Dakota, where defendant, although not a citizen of South Dakota, is temporarily a resident and can be sued. The death resulting from the wrongful act occurs in Minnesota. Both South Dakota and Minnesota limit the liability of a defendant for wrongful death. Whether the South Dakota conflicts rule identifies the place of the injury or the place of the wrong as the proper law to apply in a case of interstate tort, it is at least arguable that in this case the South Dakota courts will permit the plaintiff to recover the full measure of damages because of the North Dakota contacts and the absence of any substantial South Dakota or Minnesota policy interest in the outcome of the action.¹⁵⁹

In states such as Missouri, which impose a ceiling on the damages which a plaintiff may recover for wrongful death, there are virtually no exceptions to that ceiling when an action is brought under the statute. However, if there are multiple tortfeasors who would be jointly liable, there is nothing to prevent the plaintiff from executing, for consideration, covenants not to sue one or more of those potentially liable, while preserving the right to sue any one of the remaining tortfeasors for the full statutory amount. In other words, amounts which a plaintiff may receive from potential joint defendants in return for covenants not to sue may not be subtracted from the statutory maximum which he is allowed to recover from the remaining defendant or defendants.

Example 33: Deceased is killed in Missouri as a result of the combined negligence of a railroad and a trucking company. The widow gives the railroad a covenant not to sue in return for \$10,000. The widow may

293 F.2d 401 (5th Cir.), *cert. denied*, 368 U.S. 921 (1961); *Perkins v. Salafia*, 338 F. Supp. 1325 (D. Conn. 1972); *Salazar v. Dowd*, 256 F. Supp. 220 (D. Colo. 1966).

158. *Pearson v. Northeast Airlines*, 307 F.2d 131 (2d Cir. 1962); *Kennedy v. Dixon*, 439 S.W.2d 173 (Mo. 1969); *Kilberg v. Northeast Airlines*, 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961). See also RESTATEMENT (SECOND) OF CONFLICTS § 175 (1971).

159. *Merchants Nat'l Bank & Trust Co. v. United States*, 272 F. Supp. 409 (D.N.D. 1967).

recover up to \$50,000 (the statutory maximum) in her lawsuit against the trucking company.¹⁶⁰

It is now fairly well settled in most jurisdictions, including Missouri, that a pre-natal injury which causes the death of a child subsequent to its birth, can be the basis of an action for the wrongful death of the child.¹⁶¹ Whether the action may be maintained when there is a destruction of the viable fetus, or when the child is stillborn, is a matter upon which the jurisdictions disagree.¹⁶² Those who are opposed to abortion are quick to point out the inconsistency of permitting abortions while permitting a tort action for the wrongful death of a child *en ventre sa mere*.¹⁶³ The issue has been presented in Missouri, but the Missouri Supreme Court found that it did not have to resolve the question because of the absence of any apparent pecuniary loss to the statutory beneficiaries.¹⁶⁴

CONCLUSION

About the only present unifying trend is the development of a "federal common law" with respect to admiralty actions and to death actions comprehended by the limited federal tort remedy under the 1871 Civil Rights Act.¹⁶⁵ Because of its explicit adoption of state standards, even actions under the Federal Tort Claims Act are fragmented.¹⁶⁶

160. *Crowder v. Gordon Transports, Inc.*, 419 F.2d 480 (8th Cir. 1969). But note that acceptance of compensation from a joint tortfeasor in return for a covenant not to sue may be shown by the sued defendant as relevant to the actual pecuniary loss suffered by the plaintiff, and, in the event that amount received is equal to or exceeds such pecuniary loss, and there are no other bases for the award of damages, an instruction authorizing the jury so to find if the evidence so supports is not error, and a verdict for the defendant will be upheld. *Greenwood v. Wiseman*, 305 S.W.2d 474 (Mo. 1957).

161. *Steggall v. Morris*, 363 Mo. 1224, 1233, 258 S.W.2d 577, 581 (1953). The literature on the right of the parents to recover for the wrongful death of child injured when *en ventre sa mere* is enormous. For a summary, see SPEISER 352 *et seq.*; *id.* at 67 (Supp. 1972).

162. See SPEISER 352 *et seq.* Compare *Simmons v. Howard University*, 323 F. Supp. 529 (D.D.C. 1971), with *Chrisafogeorgis v. Brandenburg*, 3 Ill. App. 3d 422, 279 N.E.2d 440 (1972). See Comment, *Wrongful Death and the Stillborn Fetus*, 7 HOUSTON L. REV. 449 (1970).

163. See Note, *The Law and the Unborn Child*, 46 NOTRE DAME LAW. 349 (1971).

164. *Acton v. Shields*, 386 S.W.2d 363, 366-67 (Mo. 1965).

165. 42 U.S.C. § 1983 (1970). See note 157 *supra* and accompanying text. The recognition of a federal common law right of action for wrongful death may have a similar unifying effect. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

166. *E.g.*, *Richards v. United States*, 369 U.S. 1 (1962). See also D. SCHWARTZ & S. JACOBY, LITIGATION WITH THE FEDERAL GOVERNMENT 213-16 (1970).

As the text indicates, the much-amended Missouri statute retains a number of inexcusable anomalies and ambiguities which are extremely costly to both taxpayers and litigants. In 1971 the Missouri Bar approved a revised Wrongful Death Act. The Act was introduced during the second regular session of 76th Missouri General Assembly by Representative Martin, but was not passed. That Act is appended here.¹⁶⁷

The major changes which the revisions would accomplish are as follows:

(1) Any or all of the statutory beneficiaries would be allowed to join in the suit for wrongful death.¹⁶⁸ Although the proposed bill does not cure all the problems encountered in the settlement of a death case, it does remove the present law's ambiguities with respect to adult children, both as beneficiaries and as decedents, and reinforces the reliability of a settlement by requiring judicial approval.¹⁶⁹ The bill also does away with the statute of limitations trap under which an action can be barred after one year, even though the limitation period is two years;¹⁷⁰

(2) The monetary limitation on the amount which may be awarded is removed;¹⁷¹

(3) The limitation on the recovery of damages imposed by compliance with the "pecuniary loss" rule is repealed;¹⁷²

167. Summaries of the major differences and policy thrusts of the various wrongful death statutes are available in at least one loose-leaf service and a recent major treatise. CCH AUTOMOBILE L. REP.: ¶ 1925 (1970); S. SPEISER, RECOVERY FOR WRONGFUL DEATH (1966). The genesis of the Wrongful Death Statute approved by the Missouri Bar [hereinafter cited as Proposed Bill], reproduced in the appendix *infra*, was the appointment, in the Spring of 1969, of two subcommittees of the tort law committee of the Missouri Bar to study the problem. One subcommittee was located in Kansas City and consisted of Thaddeus McCause, Chairman; A. Warren Francis; Duke Ponick, Jr.; Phillip Waisblum; and Lawrence Ward. The other subcommittee was headquartered in St. Louis and consisted of Professor (now Judge of the St. Louis Court of Appeals) Joseph Simeone of the St. Louis University School of Law, Chairman; Professor Fred Davis of the University of Missouri-Columbia School of Law; James Hullverson; and Daniel Rabbitt. During 1969-1970, these two subcommittees did a considerable amount of analysis, study and consultation. In the Spring of 1970, a new subcommittee of the tort law committee of the Missouri Bar was appointed to wrap up the project and consisted of Professor Fred Davis, Chairman, Daniel Rabbitt, Robert Inman, Carl Sapp, and Professor Joseph Simeone. After a considerable number of meetings and drafts, the Proposed Bill was approved by the Missouri Bar.

168. Proposed Bill § 537.080 and comments following.

169. Proposed Bill § 537.095(1) and comments following.

170. Proposed Bill § 516.140 and comment following.

171. Proposed Bill § 537.090 and comment following.

172. *Id.*

(4) All the tolling provisions on the general statute of limitations are made applicable to the wrongful death action as well as to other tort actions;¹⁷³

(5) Illegitimacy is abolished as a bar to recovery by a child for a parent's death and vice-versa;¹⁷⁴

(6) In a wrongful death action, funeral expenses and damages sustained by the deceased between the time of injury and the time of death are recoverable;¹⁷⁵

(7) The implication of the present statute (which is not supported by case law) that an adult child may not recover for the loss of a parent or that the parents in an action for the wrongful death of a child may recover only damages measured by the amount of support they might have expected from the child during the period of the child's minority is rejected;¹⁷⁶

(8) The present doubt whether, in certain cases, the action should be brought by the parents of the deceased or by the personal representative of the deceased is eliminated;¹⁷⁷

(9) In the event that the damages for wrongful death are to be distributed according to the laws of descent, it provides that the judge may alter the proportions in order to take into account equitable considerations.¹⁷⁸

173. Proposed Bill § 516.140 and comment following; MO. REV. STAT. §§ 516.200-516.300 (1969); Davis, *Tort Liability and The Statutes of Limitation*, 33 MO. L. REV. 171, 177-81 (1968).

174. Proposed Bill § 537.080(1).

175. Proposed Bill § 537.090.

176. *Id.*

177. Proposed Bill § 537.080(1), (2).

178. Proposed Bill § 537.095(3).

APPENDIX

Note: Brackets indicate deleted portions of the current statutes and italics indicate new language.

AN ACT

To repeal sections 516.140, 537.080, 537.085, 537.090, 537.095, 537.100 RSMo 1969 relating to statutes of limitations and actions for death and to enact in lieu thereof five new sections relating to the same subject.

Be it enacted by the General Assembly of the State of Missouri as follows:

Section 1. Sections 516.140, 537.080, 537.085, 537.090, 537.095, 537.100 RSMo 1969 are repealed and five new sections enacted in lieu thereof to be known as sections 516.140, 537.080, 537.085, 537.090, and 537.095, to read as follows:

516.140. Within two years: An action for libel, slander, assault, battery, false imprisonment, [or] criminal conversation, [.] *wrongful death*, and [A]all actions against physicians, surgeons, dentists, roentgenologists, nurses, hospitals and sanitariums for damages for malpractice, error, or mistake [shall be brought within two years from the date of the act of neglect complained of, and an]. An action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation, and for the recovery of any amount under and by virtue of the Fair Labor Standards Act of 1938 and amendments thereto, said act being an act of Congress, shall be brought within two years after the cause accrued.

COMMENT: Previous wrongful death statutes have prescribed a limitation period different from that set forth in the general statutory provisions on limitations of actions. This has the effect of creating surplusage and denying the normal tolling provisions which in justice are made available to the plaintiff in other situations. The tolling provision which extends the cause of action following a dismissal or a "nonsuit" was made applicable by statute, but again, this was surplusage, Mo. REV. STAT. § 537.100 being a mere repetition of Mo. REV. STAT. §§ 516.200 and 516.230. The failure of the statute to set forth a tolling provision for improper acts of the defendant which foreclose the plaintiff from beginning an action resulted in the unbelievable miscarriage of justice documented in *Frazee v. Partney*, 314 S.W.2d 915 (Mo. 1958). One draft proposed by members of this committee would have added an "improper act" tolling provision to § 537.100. This is fine, as far as it goes. But it is submitted that it is foolish to handle this matter in a piecemeal fashion when it is possible to treat, for limitations purposes, the wrongful death action the same way as any other tort action. For example, even with the "improper act" tolling amendment proposed by the earlier draft, which would add to Mo. REV. STAT. § 537.100, the

action for wrongful death would not be subject to the protections of Mo. REV. STAT. § 516.250. Thus, if the sole beneficiary of the wrongful death action should die 23 months and 28 days following the death of the person with respect to whose death an action was brought, the action would be barred within two or three days, unless, of course, the personal representative was instantaneously appointed and, somehow managed to begin a new action within that period (two or three days). By amending § 516.140 and repealing § 537.100 another step would be taken in eliminating the unjust discrimination against families seeking damages for wrongful death by giving them the same kind of justice which the law extends to other torts claimants.

If the deceased's death is attributable to medical negligence, undiscovered until death, but preceding the death by more than two years, it is arguable that the action is barred under the present wording of § 516.140. It is believed that the present wording of § 516.140 is the result of a fortuity of draftsmanship which the legislature would never have adopted had it been aware of the interpretation it would be given in the cases of *Laughlin v. Forgrave*, 432 S.W.2d 308 (Mo. 1969), and *Smile v. Lawson*, 435 S.W.2d 325 (Mo. 1969). See *Davis, Tort Liability and the Statutes of Limitation*, 33 Mo. L. REV. 171, 189 (1968). Even if the statute were deliberately framed to produce such an interpretation, it is manifestly unfair and should be changed. New York, Kentucky, and Illinois have each, by judicial decision within the past two years, switched over from the "date of the wrongful act" test to the so-called "discovery" test. The only argument in favor of the discrimination resulting under the present interpretations of Mo. REV. STAT. § 516.140 is that medical people and their insurers are somehow entitled to special privileges and protections for their wrongful acts which should not be given to others. Apart from the other grounds for amendment, the fact that the present wording would bar an otherwise maintainable wrongful death case arising out of medical malpractice is sufficient ground for this committee's recommendation.

Since the replacement section for § 516.140 (listing causes of action which must be brought within two years from the date of accrual) will include within its listing the action for wrongful death, § 537.100 would be surplusage and should be repealed. Listing the action for wrongful death among the other tort actions subject to a two-year statute, it seems to us, makes more sense than having a special section establishing a limitation period.

The replacement sections which follow are replacement sections for the Wrongful Death Act itself.

537.080. 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,] *results from any act, conduct, occurrence, transaction or circumstance which if death had not ensued, would have entitled [the party injured] such person to [maintain an action and] recover damages in respect thereof, [then, and in every such case,] the person or party who, or the corporation which, would have been liable if death had not ensued shall be liable [to] in*

an action for damages, notwithstanding the death of the person injured, which damages may be sued for

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

[(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)] (2) [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 maintained and recovery had by] *By the administrator or executor of the deceased, [and the amount recovered shall be distributed according to the laws of descent.] if there be no spouse, children, natural or adopted, legitimate or illegitimate, or father or mother natural or adoptive;*

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

COMMENT: Although *Keener v. Dayton Electric Mfg. Co.*, 445 S.W.2d 362 (Mo. 1969), holds that a wrongful death action may be predicated upon products liability, there is authority to the contrary. *DiBelardino v. Lemmon Pharmacal Co.*, 416 Pa. 580, 208 A.2d 283 (1965). It is still arguable that "wrongful act, neglect or default" identifies only strictly negligent conduct and does not encompass, for example, the supplying of a defective product. The proposed change would make it clear that in *every* situation when the deceased would have had an action for damages but for his death, an action can be maintained for wrongful death when the death results from the same circumstances which caused the injury. The terms "conduct" and "circumstances" have been added to the terms of an earlier proposed draft in order to foreclose any argument that the wrongful death statute encompasses less liability-producing conduct than normal negligence and tort liability rules.

The word "party" was added to foreclose an argument that an otherwise suable defendant (*e.g.*, an unincorporated association) which is not a "person" or a "corporation" cannot be sued for wrongful death.

The preposition "in" was substituted for "to" because in the legal context "liable to" suggests an obligation to a specific party, which is not the sense of the particular phrase.

In establishing who may recover, the traditional parties (children and/or parents) are retained, with the additional identifications of "adoptive" and "illegitimate." The former designation makes good sense, and the latter would bring the law into harmony with a number of recent decisions which disapprove discrimination against illegitimate children. This status would be relevant to the measure of damages which could be recovered and it is believed that it is highly unlikely that a jury would return a sizeable verdict for the parent of an illegitimate child when such parent had failed to exercise the responsibilities of parenthood. On the other hand a highly deserving beneficiary would not be foreclosed because of technical illegitimacy. For an analogous problem under a pension program involving death benefits, see *Adduddell v. Board of Administration*, 8 Cal. App. 3d 243, 87 Cal. Rptr. 268 (1970). See also *Levy v. Louisiana*, 391 U.S. 68 (1967).

The phrase "for the death of any one person" has been added to foreclose an interpretation of the "one action . . . against any one defendant . . ." phrase to allow only one recovery where the defendant, for example, has simultaneously caused the death of both parents.

The major change, however, is the abandonment of a system of preferred beneficiaries (spouse, child, parent, personal representative) who have the power to preempt the action. The 1955 law, which gave the spouse six months to bring suit and then allowed the children to sue, had been the subject of much criticism. The 1967 changes allowed either the spouse or the minor children to initiate the action, and then passed it on, if they defaulted, to the parents. The 1967 changes, however, produced a number of uncertainties and ambiguities. Were the minor children and spouse barred after a year, even though the statute of limitations is two years? Who sues for the death of an unmarried adult? One interpretation would give that right to the parents, and another, equally sound, would give it to the administrator or executor. The proposed change would permit any one of the named beneficiaries to institute the action (spouse, child, or parent) and, in the absence of any of these, the personal representative. It is recognized that adversity between multiple beneficiaries will frequently exist and that this creates difficulties. However, it is believed that this problem is inherent in the nature of the action (multiple relational interests in the deceased with varying degrees of intensity of interest and dependence) and that it is therefore best to meet it head on, rather than to create an arbitrary system which may absolutely preempt a deserving beneficiary in favor of an undeserving one.

Although the proposed change would not solve the problem implicit in the settlement of a death case, it would simplify it to some extent. The only way to make settlements uncomplicated while at the same time retaining some guarantee of fairness among the multiple beneficiaries is to give the action to the executor or the administrator. This was the original design of the first Lord Campbell's Act, which was widely followed. But it was found that this system did not encourage imaginative and vigorous pressing of wrongful death tort claims because the personal representative and his attorney, being concerned with other aspects of the estate, tended to de-emphasize their significance.

The requirement that the other beneficiaries be given notice affords some protection against injustice, and confiding responsibility for the apportionment of the recovery to the court (MO. REV. STAT. § 537.095, *infra*) affords some protection against a disproportionate award to an undeserving beneficiary.

Note that the adjective "minor" has been omitted as a modifier of "child" or "children." The case law never supported the suggestion, implicit in the use of that adjective, that adult children could not recover for the wrongful death of their parents or that parents could not recover for the wrongful death of an adult and unmarried child. The statute should be consistent with the case law in this respect, and the use of that adjective has caused considerable confusion and ambiguity.

537.085. 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 decedent] *any defense which 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 deceased would have been entitled to bring had death not ensued.*

COMMENT: Earlier proposed drafts did not take a position with respect to Mo. REV. STAT. § 537.085, which specifically preserves the contributory negligence of the deceased as a defense. Technically, § 537.085 is unnecessary since by the explicit terms of § 537.080 an action for wrongful death may not be maintained if the deceased might not have maintained his own action for personal injuries had death not occurred. The proposed revision of § 537.080 would seem to remove any doubt through the use of the phrase "recover damages" instead of "maintain an action."

Although, in this sense, § 537.085 has always been surplusage, some members of the committee believe that it does not hurt to have it explicitly set forth that the deceased's contributory fault should bar the action for wrongful death. The only trouble is that the present § 537.085 lists only one of the defenses which the defendant would have had against the deceased—*i.e.* "contributory negligence." This inadequacy would seem to be enough to justify the change. Today, however, there is additional reason to replace this section. Injuries from defective products or which result from ultrahazardous or abnormally dangerous activities are frequently held *not* subject to the strict defense of contributory negligence. Plaintiff's unreasonable conduct may still bar his recovery, but this conduct must be specifically more culpable than that which could be classified as mere "contributory negligence." Sometimes this more culpable conduct is referred to as "contributory fault," or "assumption of the risk." Other times it is said to be so important in the chain of events leading to the injury as to amount to a supervening cause which relieves the manufacturer or seller from liability.

The point is illustrated by the recent Missouri Supreme Court decision in *Keener v. Dayton Electric Mfg. Co.*, 445 S.W.2d 362 (Mo. 1969), wherein the court clearly indicated that the more relaxed "contributory fault" test, rather than strict "contributory negligence," would be the ap-

propriate defense in a products liability case, but did not explain why, since *Keener* was a wrongful death case, the explicit statutory provision of Mo. REV. STAT. § 537.085 did not apply.

The proposed change in § 537.085 would remove all doubt from the situation and make it clear that the statute and the case law announced in the *Keener* decision are in accord.

In addition, the proposed change would make it clear that any defense which the defendant would have had against the deceased in a personal injury action brought against him by the deceased would be available in an action brought against him for wrongful death.

537.090. In every action brought under section 537.080, the [jury] *trier of the facts* may give to the [surviving] party or parties [who may be] entitled [to sue] *thereto* such damages, [not exceeding fifty thousand dollars,] as the [court or jury] *trier of the facts* may deem fair and just for the death and loss thus occasioned, [with reference to the necessary injury resulting from such death, and] having regard [for the mitigating or aggravating circumstances attending the wrongful act, neglect or default resulting in such death.] *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.*

COMMENT: The expression "trier of fact" is offered in replacement of "jury" to cover the situation in which the case, for one reason or another, is tried to the court, and avoids the ambiguity in the expression "court or jury" which can be interpreted to mean that in a case tried before a jury, either the court or the jury may pass upon the question of damages.

"Party or parties entitled thereto" seems more direct than the phrase it replaces.

Only seventeen states imposed a monetary limitation in 1935. By 1966 the number was down to twelve. Missouri's sister state of the Missouri Compromise, Maine, removed the limitation in 1965. It is almost universally conceded that the limitation is unfair, arbitrary, discriminatory and unjust. Except for the legal technicality that the action is historically a statutory action rather than a common law action, the limitation probably would have been declared unconstitutional some time ago. Many think it is unconstitutional in any case. Why wait for the United States Supreme Court to do our work for us? The limitation should be removed forthwith.

"Trier of the facts" is again substituted, for the same reasons set forth above.

The phrase "with reference to the necessary injury resulting from such death" seems redundant and ambiguous in view of the proposed changes which follow.

The phrase "wrongful act etc." is omitted for the same reasons assigned for omitting those phrases from § 537.080.

The wording which follows is designed to do away with the limitations of the "pecuniary loss" rule which have been aptly described as "savage." The rule has no defenders except as an aspect of *stare decisis*. For a full discussion of the rule and the reasons why it should be abandoned, see the opinion in the case of *Wycko v. Gnodtke*, 105 N.W.2d 118 (Mich. 1960).

It is recognized that there are difficulties involved in translating the relational losses of the types identified into dollar terms. This, however, is no reason for denying recovery. The elements listed are those which have been judicially identified in decisions not following the strict pecuniary loss rule. Although general, they provide some standards for confining the discretion of the jury and, it is submitted, they are a better pattern than the Georgia rule, which leaves the damages recoverable to the "enlightened conscience of the jury." A specific limitation is included which prohibits an award for mere grief or bereavement.

Although there is little precedent for the practice, some decisional law and the MAI indicate that a child may recover, for the death of a parent, only the support or contributions he might have received between the time of death and the time he or she reaches majority. Similarly, some decisional law and the MAI suggest that when an action is brought for the death of an unmarried minor by the parents of the minor, the support which the parents would have received during the balance of the deceased's minority is the extent of the claim. There are, however, many cases allowing recovery for the death of an unmarried adult minor where the minor was contributing to the support of the parents at the time of his death. These cases contradict the assumption that contributions during minority are the only measure of damages for the death of a child. The substituted language would make it a matter of evidence whether it would be likely that such support would continue after minority—in the case when the parents are killed as well as in the case when an unmarried minor is killed.

In Missouri the survival of tort claims for personal injuries is explicitly conditioned upon the circumstance that death occur from something other than the act for which the tort claim is pressed. MO. REV. STAT. § 537.020. This means that the accrued claims of the injured party for damages sustained and suffered between the time of injury and the time of death abate (are forfeited) upon death and the injured party's estate recovers nothing for his pain and suffering, loss of earnings, medical and hospital expenses, and special damages of one sort or another. Moreover, the only item recoverable by the beneficiary in a wrongful death action—medical and hospital expenses—is recoverable (theoretically) *only* if the beneficiary would be legally responsible therefore. This produces the following absurdity: A husband suing for the wrongful

death of his wife can recover the medical and hospital expenses incurred by his wife before her death and arising out of the injury which ultimately produced her death. But a wife may not recover, in an action for the wrongful death of her husband, the medical and hospital expenses incurred by the husband before death on the technical ground that she is not legally responsible for them.

The amendment would cure this anomaly and would also repeal the rule that damages suffered by the deceased are forfeited when he dies from injuries inflicted by a tortfeasor. Missouri is one of only five jurisdictions which adheres to this rule. It is less confusing to have these damages recoverable under a wrongful death action than to permit, as does New York and some other states, a separate survival action to recover for injuries actually suffered by the decedent. Also, there is less danger of separate juries returning overlapping damage verdicts.

Funeral expenses are not logically allocable to either the "survival" side (the injured party suffered no such expense while alive) or the "wrongful death" side (everybody must have a funeral at some time) of the damages issue. All the tortfeasor has done has been to accelerate the time for payment. Nevertheless, Missouri and some other states permit funeral expenses to be recovered as part of the wrongful death damages if the beneficiary would have been legally obligated to pay them. It seems that if funeral expenses are to be recoverable as part of the total damages in a wrongful death case, such recovery should not be contingent upon the beneficiary's legal liability for such expenses. Funeral expenses are therefore made recoverable without qualification.

It is arguable that the statutory phrase allowing the "mitigating or aggravating circumstances" to be taken into account (the meaning of which has never been all too clear—*cf.* MAI § 6.01 and the absence of any notes or comments) is surplusage in view of the expanded specification of compensable elements proposed by the new draft. Certainly it is out of place if left in its original position. Some members of the committee nevertheless believe that the phrase is one to which lawyers have become accustomed, that some judges believe that the award of punitive damages is specifically conditioned upon the "aggravating circumstances" standard, and that it would not hurt to leave the traditional phrase in the statute. For such reasons the phrase has been retained, although it has been placed at the end of the paragraph where, because of the rather general nature of the standards it permits, it seemed more appropriate to place it.

537.095. 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 RSMo. 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 by or recovery had by any administrator or executor on behalf of those persons entitled to damages, any settlement or recovery by such administrator or executor of the deceased shall 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.*

[1.] 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.

[2.] 4. The court shall order the claimant:

- (1) to collect and receipt for the payment of the judgment;
- (2) to deduct and pay 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* [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.

COMMENT: The first paragraph is new and is designed to ease the vexing problem of negotiating a settlement which all the parties desire but which heretofore could offer the defendant and/or his insurer no assurance that any such settlement would bar all relational claims based on deceased's death. The assurance of finality which this new section attempts to give depends on the quality of the diligence exercised by those settling the claim in giving notice to all parties having a cause of action or a right to intervene. It was not thought necessary to have specific language authorizing intervention at any time before approval of a settlement since it is impossible to imagine a court approving a settlement while at the same time barring an authorized beneficiary from participation therein. The final sentence of new subsection 1 states what is perhaps obvious, but the provision makes clear that the court may not

make allocations from the settlement or judgment for persons who have not joined or intervened except, as in the case, for example, of a six month old child of whose existence the judge will *ex necessitate* be apprised, and whose interest should not be cut off by other claimants.

Subsection 2 is new and is designed to remove any doubt about the power of the personal representative to recover damages for wrongful death and to distribute the damages in accordance with the laws of descent. Some members of the committee envisioned situations in which blind adherence to the laws of descent would produce monstrous injustices (*e.g.*, a disabled cousin whom the deceased was supporting and to whom the deceased was very much attached could be totally preempted by a vicious brother who is otherwise independently wealthy). For this reason a safety valve has been inserted which would permit a court, under special circumstances, to order a settlement or distribution which deviates from the normal laws of descent.

Subsection 3 contains two minor additions to the language of the existing provisions: (a) it requires what the present language fails to cover—namely, that when a *settlement* is approved by the court, the court shall formally state the total settlement approved before distribution under subsection 4 (the present law requires this only in connection with an *action*); and (b) it imposes a requirement previously assumed, but nowhere made explicit, that the distribution among multiple beneficiaries be in proportion to the losses suffered by each (which, it is important to note, would permit a court to make a deduction in the situation where one of the death action beneficiaries was himself causally responsible in some measure for the injury which produced death).

Subsection 4 is merely a renumbered section from the existing statute with no change except a provision making it possible to award an adequate fee to an attorney representing a primary claimant whose award is diminished as the result of the intervention by multiple unrepresented claimant-beneficiaries.

