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A Better Interpretation of the Wrongful Death Act

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A BETTER INTERPRETATION OF THE WRONGFUL DEATH ACT

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INTRODUCTION

A viable fetus is not a person under the wrongful death act, declared the Maine Law Court in a controversial decision in 1988.[1] To reach this conclusion, the court employed one traditional and one new rule of statutory interpretation, and one traditional rule of law. The traditional rule of interpretation—that the wrongful death act is to be strictly construed because it is in derogation of the common law—dates from the earliest wrongful death cases heard by the court.[2] The new rule of interpretation—that the death statute must be harmonized with the Maine Uniform Probate Code[3]—derives from the enactment of the Code in 1981 and the placement of the wrongful death statute within it. The traditional rule of law—that recovery for wrongful death is exclusively governed by the terms of the wrongful death statute—is related to the rule of strict construction, but is based specifically on a mid-nineteenth century case[4] that held the common law did not allow recovery for wrongful death. The Law Court has consistently held since then that the common law in Maine does not allow recovery for wrongful death, and, therefore, that the statute provides the sole basis for recovery.[5]

This Article argues that all three rules should be discarded. The rule of strict construction for statutes in derogation of the common law should be rejected because the dominant nineteenth century judicial understanding of the role played by legislative enactments within the body of the law and of the role of the courts as "appli-

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* J.D., University of Maine School of Law, 1990. The author dedicates this Article to Active Retired Justice of the Maine Supreme Judicial Court, Sidney W. Wernick—student and teacher of the legal process.

1. Milton v. Cary Medical Center, 538 A.2d 252 (Me. 1988). *See infra* notes 71-81 and accompanying text for a discussion of this case. *See generally* Note, *Milton v. Cary Medical Center: A Viable Fetus Is Not A Person Under Maine's Wrongful Death Statute*, 41 MAINE L. REV. 429 (1989).

2. *See infra* notes Section I(C). Although the *Milton* court did not specifically state that the statute would be strictly construed, it noted that the statute " 'is to be limited to cases clearly within the terms of the act' " because the act " 'created a liability unknown to the common law . . . .' " Milton v. Cary Medical Center, 538 A.2d at 254 (quoting Hammond v. Lewiston, Augusta and Waterville St. Ry., 106 Me. 209, 212-13, 76 A. 672, 673 (1909)). This language is the traditional formulation of the rule of strict construction and *Hammond* is one of the earliest wrongful death cases to employ the rule.

3. *See* Milton v. Cary Medical Center, 538 A.2d at 255.

4. Nickerson v. Harriman, 38 Me. 277, 279-80 (1854). *See infra* notes 32 & 104 and accompanying text.

5. Milton v. Cary Medical Center, 538 A.2d at 253 n.2, 254.

ers," not makers, of the law is no longer vital. The Law Court's contemporary understanding of the importance of legislative enactments and its greater appreciation of its creative role in the judicial decision-making process require a reappraisal of the rule of strict construction.[6] Moreover, the rule of strict construction, as specifically applied to the wrongful death act, is no longer appropriate because contemporary common law principles overwhelmingly support recovery for wrongful death.[7] Finally, no new justifications have arisen to support the continued use of the rule.[8]

The recently introduced rule of interpreting the wrongful death act by looking primarily, if not solely, to the terms and provisions of the Uniform Probate Code should be discarded because there is neither legislative support nor sound interpretive reasons for such a requirement. *Milton v. Cary Medical Center*,[9] which announced this rule, involved the difficult issue of when a fetus becomes a legal person for purposes of the death act. This difficult legal question was decided, moreover, within the context of the emotional public debate on abortion rights and fetal protection.[10] As such it was both a "great" and "hard" case, which, true to form, created bad law.[11] As bad law in turn creates hard cases,[12] the reach of this bad law should be limited by the Law Court.

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6. *See infra* Section II(C).
7. *See infra* Section II(B).
8. *See infra* notes 142-145 and accompanying text.
9. 538 A.2d at 252.
10. The possible connection between *Milton* and the abortion issue is evidenced by the near passage of L.D. 551 (114th Legis. 1989), "An Act to Allow Recovery for Wrongful Death of Unborn Children," which was originally written by the Maine Right to Life Committee following *Milton*. *See* Legis. Rec. H-995 (1st Reg. Sess. 1989) (remarks of Rep. Clark) ("Make no mistake about this bill, this bill was proposed and is supported by the Maine Right to Life Committee."). The bill was passed by the Legislature but vetoed by the Governor. *See* Governor's Veto Message, Legis. Rec. H-1146 (1st Reg. Sess. 1989) ("Because the bill confers a legal personality on a fetus for purposes of wrongful death actions, it greatly expands the opportunities for applying this legal status to other circumstances.").
11. Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Northern Sec. Co. v. United States, 193 U.S. 197, 400-401 (1904) (Holmes, J., dissenting).

12. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 398 (1950) (A response to the particular controversy is "dangerous" because "it leads readily to finding an out *for this case only*—and that leads to a complicating multiplicity of refinement and distinction . . . . This is what the proverb seeks to say: 'Hard cases make bad law.' ").

Finally, the rule of law that the wrongful death statute, by its terms alone, governs any and all state wrongful death claims must bend, in compelling circumstances, in recognition of both the historic and, more importantly, contemporary legal principles which ground the recovery for wrongful death in the common law. The Law Court, furthermore, should recognize that the Legislature did not preempt the field of wrongful death law by the passage of the wrongful death act in 1891, but rather enacted the legislation merely to narrow the reach of the harsh judicially created rule that had denied recovery altogether.

Instead of the three rules above, the Law Court should adopt a rule of "fair construction," one which involves the court in a purposive analysis of the terms and provisions of the act without the presumption against coverage or application in the doubtful case that is at the heart of the rule of strict construction and without the fiction, integral to the rule, that *any* statutory terms are so "clear and unambiguous" that interpretation is unnecessary. In addition, instead of looking to the Probate Code as the sole source for divining the meaning of terms of the wrongful death statute, the court should use the Probate Code as only one source for particular questions of interpretation. Maine courts should be free to examine and adopt principles from other areas of law even if, in doing so, the act would be interpreted inconsistently with the Probate Code. Because wrongful death is fundamentally a tort action, tort law should especially be consulted.

Finally, by recognizing the vital contemporary common law sources that support a common law wrongful death action and, thereby, allowing the terms of the statutory action to be supplemented or extended by the common law beyond what the honestly interpreted terms of the wrongful death statute would bear, the courts would be freer to do justice in otherwise nonactionable but compelling circumstances. By recognizing a common law power to create wrongful death law supplementally through the common law process, rather than creating law only interstitially by the process of interpretation, the court could achieve justice in the particular circumstance without impinging on the legislative prerogative through the use of interpretive subterfuges.[13]

All three changes in the interpretation of the statute would allow the Law Court to better fit the law of wrongful death to the "fabric of the law" by allowing courts to more nearly meet the traditional Anglo-American jurisprudential goal of treating "like cases alike."[14] The "statutorification"[15] of the law since the turn of the century

13. G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 172-77 (1982).

14. *Id.* at 97.

15. *Id.* at 1-3. *See also* G. GILMORE, THE AGES OF AMERICAN LAW 95 (1977) (modern period as "orgy of statute making").

and, especially from the period of the New Deal, interfered with this effort and created a fundamental challenge for twentieth century courts—the task of unifying statutory and common law into a coherent whole. In the 1930's, Justice Harlan Stone wrote that the "better organization of judge-made and statute law into a coordinated system is one of the major problems of common law."[16] According to the influential legal theorists Henry Hart and Albert Sacks,[17] an important component of the judicial task of statutory interpretation is to place statutes into a dynamic, coherent legal system.[18]

Ironically, the original purpose in early English law for the rule of strict construction of statutes in derogation of the common law was to interpret the infrequent legislative enactment in a manner consistent with the body of existing, primarily judge-made law;[19] but the

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16. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 15 (1936).

17. "In a deep sense we are all followers of Henry Hart and know the moves [of purpose analysis] almost by instinct." G. CALABRESI, *supra* note 13, at 87.

18. "The purpose of a statute must always be treated as including not only an immediate purpose or group of related purposes but a larger and more subtle purpose as to how the particular statute is to be fitted into the legal system as a whole." H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1414 (tent. ed. 1958). *See also* Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 35 (1988) ("Hart and Sacks attempt to show how the process of adjudication imposes on the decision maker a duty to understand the statute in its broader legal and social context."); DWORKIN, LAW'S EMPIRE 176-224 (1986).

For an example of how the Maine Law Court has interpreted statutory provisions with a concern for creating a coherent body of related law, see McKellar v. Clark Equipment Co., 472 A.2d 411, 415 (Me. 1984) (allowing wife's civil claim for loss of consortium for injuries sustained by husband covered under the workers compensation statute "would lead to anomalous results when applied to the broad range of industrial injuries.").

19. The rule was first announced in England during a time when statutes were few and the body of the law was primarily judge made. *See* Bruncken, *The Common Law and Statutes*, 29 YALE L.J. 516, 519 (1920).

> In days when there was but little legislation, especially in the domain of private law, . . . a maxim grew up and became a legal commonplace, according to which "acts in derogation of the common law are to be construed strictly." In this abstract form, the maxim is hardly an accurate statement of the law as laid down in the decisions. An early and more precise enunciation is found in a case arising as long ago as the time of Queen Anne: "Statutes are not presumed to make any alteration in the common law, further or otherwise than the act does expressly declare." [Arthur v. Bokenham, (1708, Eng. C. P.) 11 Mod. 148, 150.] And a little further on the court continues:
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> > "Therefore in doubtful cases we may enlarge the construction of acts of Parliament according to the reason and sense of the lawmakers, expressed in other parts of the act, or guessed, by considering the frame and design of the whole. [*Id.* at 161.]"

Id. Bruncken noted the salutary effect of the rule, rightly used, to integrate statutes with the overarching legal context, but also noted the modern tendency in America to distort the rule by limiting the reach of modern statutes beyond that favored by the courts. *Id.* at 521. It is the latter distortion of the rule which Bruncken and Pound found objectionable. Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383

rule was later distorted to its present shape in the nineteenth century.[20]

Today, instead of only harmonizing statutes with the common law, the courts, through both interpretive *and* creative law-making, should seek to unify the body of law by looking to legal principles that have their sources in both the common law and statutory law. The Maine Law Court adopted this general approach to both statutory interpretation and common law decisionmaking in numerous cases during the 1980's.[21]

The goal of interpreting statutes and developing the common law in a manner that promotes unity has been described figuratively as a task for Hercules[22] and, ultimately, is perhaps unachievable.[23] If Hercules is not a realistic model, the Law Court should at least look to Hippocrates and adopt as a modest first principle of interpretation the injunction to do no harm. The current three rules of interpretation used by the court for the wrongful death act do not meet this modest first rule. The methods recommended by this Article do not guarantee that the law of wrongful death will develop in coherence with other areas of law in Maine, but they do at least clear the legal litter, from both the distant and recent past, which currently obstructs the path to that goal.

I. BACKGROUND

A. The Rule of Baker v. Bolton

In 1808, a widower brought suit in an English trial court seeking damages from the owners of a stagecoach which had overturned and fatally injured his wife, a passenger. The complaint asserted that the plaintiff had "wholly lost and been deprived of the comfort, fellowship, and assistance of his said wife, and had from thence hitherto suffered and undergone great grief, vexation, and anguish of mind."[24] The trial justice, Lord Ellenborough, instructed the jury that recovery would be allowed only for loss of services and grief suffered by the plaintiff from the time of injury to the time of death. Then, in dictum, Lord Ellenborough announced what would become known, and widely accepted, as the rule of *Baker v. Bolton*: "[I]n a civil court, the death of a human being could not be complained of as an injury."[25] Lord Ellenborough offered no source of authority for

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(1908).

20. *See infra* Section I(C).

21. *See infra* note 129.

22. R. DWORKIN, *supra* note 18, at 337-48.

23. G. CALABRESI, *supra* note 13, at 99-100.

24. Baker v. Bolton, 1 Camp. 493, 170 Eng. Rep. 1033 (1808) (nisi prius).

25. *Id.* at 493. *See generally*, 1 S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 1:1 (2d ed. 1975).

this holding, there apparently being none,[26] but this dictum would later prove to have tremendous persuasive force on both sides of the Atlantic.

For forty years not a word was written about the dictum of Lord Ellenborough. Then, in 1848, the Massachusetts Supreme Judicial Court, in a highly influential decision, adopted the rule of *Baker v. Bolton*. In *Carey v. Berkshire Railroad Co.*,[27] the court denied relief in a wrongful death action to the widow of a railroad employee killed through the alleged negligence of his employer. The court, without discussion, and with no more authority in American case law than Lord Ellenborough had in English case law,[28] simply adopted the rule of *Baker v. Bolton*.[29] *Carey*, in turn, was cited as a source of authority by the United States Supreme Court[30] and other states[31] that adopted the rule.

In 1854, the Maine Law Court first adopted the rule of *Baker v. Bolton*, also using *Carey* for supporting authority, when it denied a plaintiff damages for loss of services of a minor son who had died while employed by the defendant on an ocean-going vessel. In *Nickerson v. Harriman*,[32] the plaintiff did not allege that the defendant negligently caused the death of the son but simply that the son had died while illegally working for the defendant. Referring to *Baker*, the court stated: "If, when death is the direct and immediate consequence of a wrongful or negligent act, compensation is not recoverable, still less can it be, when at the most, it is but an indirect or remote and uncertain result."[33] Six years later, the Law Court squarely denied wrongful death damages for a widow who alleged that the defendant *negligently* caused the death of her husband. In *Lyons v. Woodward*,[34] the court simply stated, while looking to *Nickerson* and *Carey* as authority, that "[a]t common law, no cause

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26. Malone, *Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1052-62 (1965).

27. 55 Mass. (1 Cush.) 475 (1848).

28. Malone, *supra* note 26, at 1067.

29. 55 Mass. (1 Cush.) at 478. Curiously, *Carey* was the first court in either the United States or England to endorse the rule in *Baker*. In fact, *Carey* itself was cited as authority in the first appellate court decision in England that adopted the rule of *Baker v. Bolton*. *See* Osborn v. Gillet, 8 L.R.-Ex. 88, 97 (1873). *See generally*, Malone, *supra* note 26, at 1059.

30. In 1986, in The Harrisburg, 119 U.S. 199 (1886), the United States Supreme Court adopted the rule of *Baker v. Bolton* to deny a wrongful death action under federal general maritime law. The Supreme Court continued to follow the rule of *Baker v. Bolton* in subsequent maritime cases for almost a century until it undertook an exhaustive review of the law of wrongful death in Moragne v. States Marine Lines, 398 U.S. 375 (1970). *See infra* notes 113-129 and accompanying text for a discussion of the *Moragne* decision.

31. Malone, *supra* note 26, at 1067; S. SPEISER, *supra* note 25, at § 1:1.

32. 38 Me. 277 (1854).

33. *Id.* at 280.

34. 49 Me. 29 (1860).

of action accrues to the plaintiff to recover damages for the injury [caused by the wrongful act]."[35] The Law Court has never waivered from its belief that recovery for wrongful death is unknown to the common law. After passage of the wrongful death act in 1891, the court used the rule of *Baker v. Bolton* as the basis for strictly construing the death statute and for denying recovery beyond its terms.

B. Statutory Enactments

In 1891, the Maine Legislature abrogated the rule of *Baker v. Bolton* by passing a statute, modeled after Lord Campbell's Act in England,[36] that for the first time provided a general civil remedy for wrongful death.[37] The statute provided pecuniary damages of up to five thousand dollars to the widow, children, or heirs of a person who had been killed by the "wrongful act, neglect or default" of another.[38]

Since its passage in 1891, the wrongful death act has been amended on several occasions but remains substantially unchanged. The amendments to the act have most often served to increase the amount and type of damages allowed or to change the description of the class of beneficiaries. The first amendment inserted the word "widower" as a member of the beneficiary class.[39] In 1933, the cap on pecuniary damages was raised for the first time from $5,000 to $10,000.[40] In 1939, damages for recovery by the estate for medical, surgical and hospital care and treatment were allowed under the death action.[41] In 1943, the cost of funeral expenses was included as a recovery for the estate.[42] Also in 1943, the Legislature addressed the problem raised by a series of court cases which had held, with a few exceptions, that the death action could not be brought where the decedent had not died immediately from the injuries sus-

35. *Id.* at 29-30.

36. Lord Campbell's Act, 1846, 9 & 10 Vict., ch. 93.

37. In 1848 the Legislature enacted a limited wrongful death action for the heirs of decedents killed "through ignorance or gross neglect" on the part of steamship or locomotive employees. Recovery was effected "by indictment," i.e., by an action brought by the state, and damages were paid to the executor of the estate for the benefit of the heirs of the deceased. R.S. ch. 70 (1848) (approved August 10, 1848). Earlier a similar recovery had been allowed by an 1821 statute for heirs of decedents killed as a result of defective highways. R.S. ch. 118, § 17 (1822). *See generally* Anderson v. Wetter, 103 Me. 257, 267 (1899).

38. R.S. ch. 89 §§ 9 & 10 (1903).

39. P.L. 1929, ch. 1.

40. P.L. 1933, ch. 113. The cap would later be raised to $20,000, P.L. 1957, ch. 183 (effective August 28, 1957), then $30,000, P.L. 1961, ch. 315 (effective September 16, 1961), and then eliminated altogether in 1965, thereby allowing the jury to determine "fair and just compensation" without a statutorily defined upper limit. P.L. 1965, ch. 255.

41. P.L. 1939, ch. 252.

42. P.L. 1943, ch. 227.

tained.[43] The amendment specifically established that, where the decedent died after conscious suffering, the estate could bring an action for the conscious suffering in addition to the recovery already available.[44] In 1967, the act was revised to allow parents of a minor child to recover $5,000 for loss of comfort, society and companionship.[45]

In 1977, the death statute was substantially rewritten to clarify the content of the action, to allow $10,000 in damages for the loss of comfort, society and companionship of the deceased person, and to specify the distribution of settlements achieved without trial.[46] A 1979 amendment provided that wrongful death claims against governmental entities were limited under the terms of the recently enacted Maine Tort Claims Act.[47]

A major revision, and one that would have a substantial effect on the interpretation of the death statute, occurred in 1981 when the wrongful death statute was repealed, rewritten with only minor substantive change,[48] and placed within the simultaneously enacted Maine Uniform Probate Code.[49]

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43. *See infra* note 61 and accompanying text.

44. P.L. 1943, ch. 346. The wrongful death act, as amended, was contained in R.S. ch. 152 §§ 9-11 (1944), and was later moved to R.S. ch. 165, §§ 9-11 (1954).

45. P.L. 1967, ch. 369. The cap on recovery was later raised to $10,000 in 1969. P.L. 1969, ch. 266.

46. P.L. 1977, ch. 192 and 564.

47. P.L. 1979, ch. 68, § 2 (codified at ME. REV. STAT. ANN. tit. 18, § 2552 (Supp. 1979-1980)).

48. The only substantive change in the revision was the addition of the modifier "minor" to "children" in the description of the beneficiary class in § 2-804(b), formerly § 2552. The legislative record is silent on the reason for this change.

49. P.L. 1979, ch. 540 (effective Jan. 1, 1981). The new wrongful death statute, ME. REV. STAT. ANN. tit. 18-A, § 2-804 (1981) provides in its entirety:

> (a) Whenever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then the person or the corporation that would have been liable if death had not ensued shall be liable for damages as provided in this section, notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as shall amount to a felony.
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> (b) Every such action shall be brought by and in the name of the personal representative of the deceased person, and the amount recovered in every such action, except as otherwise provided, shall be for the exclusive benefit of the surviving spouse, if no minor children, and of the children if no surviving spouse, and one-half for the exclusive benefit of the surviving spouse and one-half for the exclusive benefit of the minor children to be divided equally among them, if there are both surviving spouse and minor children, and to the deceased's heirs to be distributed as provided in section 2-106, if there is neither surviving spouse nor minor children. The jury may give such damages as it shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the persons for whose benefit the action is brought, and in addition thereto shall give such dam-

Since 1981, the act has been amended to raise the cap on damages for loss of society from $10,000 to $50,000[50] and then to $75,000.[51] When the cap was raised to $75,000 in 1989, the amendment allowed damages resulting from "emotional distress arising from the same facts as those constituting the underlying claim."[52] The amendment also included damages for loss of comfort, society and companionship, in addition to damages for emotional distress.[53]

C. *A Century of Interpretation*

After Maine enacted the wrongful death statute, the Maine Law

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ages as will compensate the estate of the deceased person for reasonable expenses of medical, surgical and hospital care and treatment and for reasonable funeral expenses, and in addition thereto may give damages not exceeding $10,000 for the loss of comfort, society and companionship of the deceased to the persons for whose benefit the action is brought, provided that the action shall be commenced within 2 years after the decedent's death. If a claim under this section is settled without an action having been commenced, the amount paid in settlement shall be distributed as provided in this subsection. No settlement on behalf of minor children shall be valid unless approved by the court, as provided in Title 14, section 1605.

(c) Whenever death ensues following a period of conscious suffering, as a result of personal injuries due to the wrongful act, neglect or default of any person, the person who caused the personal injuries resulting in such conscious suffering and death shall, in addition to the action at common law and damages recoverable therein, be liable in damages in a separate count in the same action for such death, brought, commenced and determined and subject to the same limitation as to the amount recoverable for such death and exclusively for the beneficiaries in the manner set forth in subsection (b), separately found, but in such cases there shall be only one recovery for the same injury.

(d) Any action under this section brought against a governmental entity under Title 14, sections 8101 to 8118, shall be limited as provided in those sections.

The following official comment was added to the rewritten act:

"General. This section was added to the Uniform Probate Code version in order to preserve and integrate prior Maine law concerning wrongful death actions." The only substantive change in the revision of the former § 2552 was the addition of the modifier "minor" to "children." The legislative record is silent on the reasons for this change.

The legislative history of the wrongful death act's incorporation into the Probate Code and the effect on interpretation of the statute is fully discussed in this Article. *See infra* section II(a) and note 97.

50. P.L. 1981, ch. 213.

51. P.L. 1989, ch. 340.

52. *Id.* The 1989 amendment was in response to Purty v. Kennebec Valley Medical Center, 551 A.2d 858 (1988) which held that claims for emotional distress to a beneficiary arising from the death of the decedent could be brought under a cause of action separate from the wrongful death action. *See* L.D. 795, Statement of Fact (114th Legis. 1989), "An Act to Amend the Wrongful Death Act to Encompass Associated Claims."

53. P.L. 1989, ch. 340.

Court, like most courts in other jurisdictions,[54] applied a rule of strict construction because the statute was supposedly in derogation of the common law. As applied by the Law Court for the past century, the rule has been used both as a restraint on the court's law-creating powers to extend the functional purposes of the statute beyond the terms of the statute and as a limitation on the court's interpretation of the statute.

In an early case, *Hammond v. Street Railway*,[55] the court, in holding that the wrongful death statute must be construed strictly, stated that because the statute created "a liability unknown to the common law, [its] effect is to be limited to cases clearly within the terms of the act. No right of action is to be inferred and no remedy is to be given except as specified in the statute."[56] The court followed the " 'general principle of construction that where a right is given by statute and a remedy provided in the same act, the right can be pursued in no other mode.' "[57] The *Hammond* court also indicated the close relationship between the rule of strict construction and a rule of plain meaning. "The construction contended for by the plaintiff wrenches too violently the plain language of the statute, while that adopted follows its natural and reasonable meaning."[58] As recently as 1988, the court reiterated the rule of strict construction as the proper method of interpretation: "The wrongful death act created a right of action where none may have existed at common law. Statutes in derogation of the common law are strictly

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54. *See* S. SPEISER, *supra* note 25, at § 1:12.

55. 106 Me. 209, 76 A. 672 (1909).

56. *Id.* at 212-13, 76 A. at 673. The issue faced by the *Hammond* court was whether beneficiaries under the wrongful death act were only those who were beneficiaries at the time of the death, or whether beneficiaries also included those who fit the terms of the statute at the time suit was entered for recovery under the act. *Id.* at 211, 76 A. at 672. *See also* McKay v. New England Dredging Co., 92 Me. 454, 458, 43 A. 29 (1899). "The right to any compensation is wholly created by the statute, and the amount of the compensation is to be measured solely by the standard prescribed by the statute. At common law in cases like this there was no right of action in the widow, children or heirs for any compensation. . . . The statute is to be construed as a new statute, creating a new right, and not as affirming or reviving an ancient right." *Id.* at 458, 43 A. at 29.

57. Hammond v. Street Railway, 106 Me. at 213, 76 A. at 673 (quoting Flatley v. Memphis & Charleston R. R. Co., 56 Tenn. (9 Heisk.) 230, 234 (1872); Loague v. R. R. Co. 91 Tenn. 458, 19 S.W. 430 (1892)).

58. *Id.* at 216, 76 A. at 674. *See also id.* at 213, 76 A. at 673 ("The language of the statute under consideration is plain and unambiguous."); Chase v. Town of Litchfield, 134 Me. 122, 129, 182 A. 921, 925 (1936) ("the common law is not to be changed by doubtful implication, be overturned except by clear and unambiguous language and . . . a statute in derogation of it will not effect a change thereof beyond that clearly indicated either by express terms or by *necessary* implication"). *But see* Mundy v. Simmons, 424 A.2d 135, 137 (Me. 1980) (while "plain meaning" of wrongful death statute will generally control, the fundamental rule of statutory construction is to ascertain real purpose and intent of the Legislature).

construed."[59]

Although the Law Court has generally applied the rule of strict construction to the death statute throughout the past century,[60] the court has not been consistent in doing so. In *Sawyer v. Perry*,[61] the Law Court held that an action for wrongful death did not lie where the decedent had lived for an hour after the injury causing death. The court reasoned that to allow recovery under the wrongful death act would make the tortfeasor liable for damages under both the survival and wrongful death statutes.[62] The court based this limitation not on the explicit language contained in the statute itself, which said nothing about immediate death, but on the presumed intention of the Legislature when the act was passed in 1891.[63] The court did not derive the intent of the Legislature from an examination of the legislative history of the act, but from an earlier Law Court decision which had interpreted the limited, predecessor wrongful death action for the heirs of passengers killed on railroads.[64] The court stated that "[p]revious statutes of a similar char-

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59. Miller v. Szelenyi, 546 A.2d 1013, 1020 (Me. 1988) (citations omitted).

60. The canon of strict construction has generally been employed to help resolve questions relating to elements of damages allowed under the act. *See* Miller v. Szelenyi, 546 A.2d 1013, 1020 (Me. 1988) (emotional distress not an element of damages); Carrier v. Bornstein, 136 Me. 1, 2-3, 1 A.2d 219, 220 (1938) ("sentimental hurts" not element of damages); McKay v. New England Dredging Co., 92 Me. 454, 458, 43 A. 29 (1899) (no punitive damages; damages for suffering by the decedent; grief, distress of mind, or loss of society to beneficiaries; or damages to the estate from the injuries of decedent).

The rule has also been applied in other contexts. *See* Milton v. Cary Medical Center, 538 A.2d 252, 256 (Me. 1988) (viable fetus not a "person" under the act); Chase v. Town of Litchfield, 134 Me. 122, 133, 182 A. 921, 927 (1936) ("corporation" in death act does not include a town acting in its governmental capacity); Danforth v. Emmons, 124 Me. 156, 158-59, 126 A. 821, 822 (1924) (contributory negligence of a beneficiary for death of decedent may not reduce damages to beneficiary).

61. 88 Me. 42, 3 A. 660 (1895). For a critical discussion of the court's holding in *Sawyer* and subsequent decisions based on that holding, see Wernick, *The Maine Law of Wrongful Death*, 5 PEABODY L. REV. 57 (1940).

62. Sawyer v. Perry, 88 Me. at 47, 33 A. at 661. The fact that the Law Court interpreted the text both strictly and by looking to legislative intent, depending upon whether a particular approach would serve to restrict the scope of the act, supports the view that the Maine Law Court, like most turn of the century common law courts, was reluctant to give full respect to progressive legislation.

63. *Id.*

64. *Id.* at 46-47. In State v. Maine Central R.R., 60 Me. 490 (1872), the Law Court determined that the wrongful death action allowed under R.S. ch. 51, § 36 (heirs of decedents killed in railroad accidents allowed recovery by indictment), applied only to cases where the decedent died immediately. The court reached this determination even though the railroad death act, like the 1891 wrongful death action, did not by its terms limit the action only to cases where death was immediate. The court determined that the intent of the Legislature in allowing the action was to remedy those situations where, because a person died immediately, the survival action allowed under R.S. ch. 87, § 8 did not accrue. In such a circumstance the heirs had no remedy under the law. *Id.* at 491. The court found that to allow both a survival action and

acter having been so interpreted, we can not resist the conviction that the legislature expected and intended that this statute should receive the same interpretation."[65] Therefore, at the very beginning of the court's interpretation of the act, the court looked to legislative purposes to discern the meaning of the statute.

In several cases the Law Court interpreted the statute to give it greater coverage than a rule of strict construction would seem to otherwise require. For example, in *Danforth v. Emmons*,[66] the court determined that the word "widow" included "widower," thereby allowing the widower of the decedent to qualify as a beneficiary. In *Bernier v. Raymark Industries, Inc.*,[67] the court interpreted the act to allow an action in wrongful death based on liability under the recently enacted strict products liability act. With minimal discussion, the court concluded that actions which constituted liability under the strict products liability statute were included within the phrase "wrongful act, neglect or default" of the wrongful death statute.[68] Although strict products liability was not a recognized cause of action when the wrongful death act was passed in 1891, the court allowed the passage of the products liability statute, and its own interpretation of that statute, to determine the meaning of the terms within the wrongful death act.[69] In both these cases the court said nothing about the canon of strict construction.

Finally, the Law Court has on occasion looked to probate law, especially the law of intestate succession, as an aid to the interpreta-

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the wrongful death action where the decedent had lived for a period of time after the death causing injury would be an "absurdity." *Id.* at 492. The court's interpretation of the statute on this point has been criticized. Wernick, *supra* note 61, at 65-70, 73. "To provide a recovery by the dependents for the pecuniary losses to *them* caused by wrongful death does not conflict with, nor duplicate, a recovery by the estate under the survival statute for the decedent's *own* losses incurred before his death." *Id.* at 76.

The restrictive view of the railroad statute in State v. Grand Trunk Ry., 61 Me. 114 (1873), on which *Sawyer* was founded, was not shared by the Massachusetts Supreme Judicial Court. Commonwealth v. Metropolitan R.R., 107 Mass. 236, 237 (1871). The Legislature ultimately changed the wrongful death act to allow recovery under both the wrongful death act and the survival statute for persons who did not die immediately from injuries causing the death. P.L. 1943, ch. 346 § 10-A (effective July 9, 1943).

65. Sawyer v. Perry, 88 Me. at 47, 33 A. at 661.

66. 124 Me. 156, 126 A. 821 (1924).

67. 516 A.2d 534 (Me. 1986).

68. *Id.* at 540.

69. *Id.*

> By its own terms, section 2-804 is not limited to situations where the death producing conduct is based on fault. The statute authorizes a cause of action not only in cases of neglect but also for "wrongful acts." Under [the products liability act], the manufacturer commits a wrongful act when he puts a defective or unreasonably dangerous product into the stream of commerce.

tion of the death statute. In 1899, the court stated that the parents of the decedent, as the only living relatives, and, therefore, as the only heirs of the decedent, were proper beneficiaries under the terms of the death statute.[70] In *Milton v. Cary Medical Center*,[71] the court fundamentally altered the use of probate law in its interpretation of the death statute by relying solely on the provisions of the Probate Code to determine whether a viable fetus is a "person" under the statute. This decision is critically discussed in the section below.

For the past century the court has interpreted the wrongful death statute narrowly on some occasions and expansively on others. Generally, with the exception of *Milton* and the cases involving "immediate death" beginning with *Sawyer v. Perry*, the court's interpretation of the statute has been sound, if cautious. The major problem in the court's interpretation of the statute today involves not so much the rule of strict construction, for although the rule is unnecessary and unhelpful, the court has on occasion shown a willingness to disregard it. Rather, the excessive reliance on probate law announced in *Milton* and the court's unwillingness to extend the general principles of the statute beyond its terms present the greatest obstacles to a fuller development of the law of wrongful death. The following sections discuss current rules of interpretation and law in detail and recommend modest changes to the treatment that the Law Court presently accords the law of wrongful death.

II. A Better Interpretation Of the Wrongful Death Act

A. *Wrongful Death and the Probate Code*

Maine's Uniform Probate Code became effective on January 1, 1981.[72] The law was based upon draft statutes prepared by the Maine Probate Law Revision Commission.[73] The wrongful death act was included within Maine's Uniform Probate Code as section 2-804.

The Maine Law Court first interpreted the wrongful death act in light of its placement within the Uniform Probate Code in 1988. In *Milton v. Cary Medical Center*,[74] a sharply divided Law Court inter-

70. McKay v. New England Dredging Co., 92 Me. 454, 458, 43 A. 29, (1899). *See also* Carrier v. Bornstein, 136 Me. 1, 2, 1 A. 219 (1938).

71. 538 A.2d 252 (Me. 1988).

72. Me. Rev. Stat. Ann. tit. 18-A, § 1-101 to § 8-401 (1981 & Supp. 1990). The Maine Uniform Probate Code generally follows the Uniform Probate Code which was adopted by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association in 1969. The Maine Uniform Probate Code was enacted by P.L. 1979, ch. 540 (effective Jan. 1, 1981).

73. *See* Maine Probate Law Revision Comm'n, Report to the Commission, Recommendations Concerning the Probate Code and Constitutional Amendments (Jan. 24, 1980) and Maine Probate Law Revision Comm'n, Report of the Commission's Study and Recommendations Concerning Maine Probate Law (Oct. 1978).

74. 538 A.2d 252 (Me. 1988) (4-3 decision).

preted the word "person" in the wrongful death act as not encompassing a viable fetus. In making this decision, the Law Court substantially relied on the death statute's position within the Uniform Probate Code.[75]

The Law Court ultimately framed the issue in *Milton* as whether "a viable fetus [could] benefit as a minor child or as an heir under section 2-106 of the Probate Code from the wrongful death of a parent or antecedent[.]"[76] Although the Probate Code defines "person" as "an individual, a corporation, an organization, or other legal entity,"[77] the Law Court examined several other provisions of the Code. The court first looked to section 1-201(24), which defines "minor" as "a person under 18 years of age."[78] The court then looked to section 1-201(3), which defines "child" as including "any individual entitled to take as a child under this Code of intestate succession. . . ."[79] The court stated: "There can be no doubt that any reference to a 'child,' 'heir' or 'issue' in the Probate Code as it relates to intestate succession can only be construed as meaning a fetus that is born alive and that survives the decedent by 120 hours."[80]

The Law Court concluded:

> To construe the word "person" in section 2-804(a) to allow an action for the wrongful death of a viable fetus and not allow beneficial rights or rights of inheritance to a viable fetus for the wrongful death of a parent or antecedent under section 2-804(b) would be to create an anomaly. It becomes self-evident that because of the language of section 2-804 and its explicit integration into the Probate Code we must avoid this result in order not to do violence to the very fabric of the Probate Code.[81]

After *Milton*, at least one superior court justice construed the wrongful death statute *solely* by looking to other Probate Code provisions, specifically to the definitions contained in the general defini-

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75. Although the *Milton* court referred to non-Probate Code statutes which it felt supported its position that the word "person" means one born alive, *see id.* at 255-56 (legislative support for the court's position found in ME. REV. STAT. ANN. tit. 22, §§ 1594-95 (1978) and ME. REV. STAT. ANN. tit. 24, §§ 2501-2961 (Supp. 1987)), its holding was fundamentally based on its interpretation of various provisions of the Code and then harmonizing those provisions to the wrongful death act. *Id.* at 256. The "integration of the wrongful death statute into the Probate Code strongly indicates the Legislature's intent not to confer a legal personality on an unborn fetus." *Id.*

76. *Id.* at 255.

77. ME. REV. STAT. ANN. tit 18-A, § 1-201(29)(1981).

78. Milton v. Cary Medical Center, 538 A.2d at 255 (quoting ME. REV. STAT. ANN. tit 18-A, § 1-201(24)(1981)).

79. *Id.* (quoting ME. REV. STAT. ANN. tit. 18-A, § 1-201(3)(1981)).

80. *Id.* (quoting ME. REV. STAT. ANN. tit. 18-A, § 2-101 - 2-114 (Supp. 1987)).

81. *Id.* at 255. The Law Court cited an earlier case, Faucher v. City of Auburn, 465 A.2d 1120, 1124 (Me. 1983), for the proposition that the court should consider the statutory scheme in its entirety when construing legislative intent as to a particular provision of a comprehensive statute.

tions section.[82] In *Pottle v. Central Maine Power Co.*,[83] Justice Lipez granted the defendant's motion to dismiss a wrongful death claim on behalf of a stepchild of the decedent, concluding that the wrongful death act, by "its plain meaning," excluded stepchildren as beneficiaries.[84] After stating the traditional formula that the wrongful death act is to be strictly construed, Justice Lipez looked to the definition of "child" under section 1-201(3) of the Probate Code, which excludes a person who is "only a stepchild."[85] Although section 1-201 provides that the general definitions apply "unless the context otherwise requires," Justice Lipez held, on the basis of *Milton*, that the court was constrained to interpret the word "child" only by using the definition contained in the general definitions section.[86] Given the *Milton* court's interpretive approach, it is clear that the *Pottle* justice had no option but to define the term by simply going to the Probate Code definitions.

In construing the wrongful death act in a manner which harmonized the act with other provisions of the Maine Probate Code, the *Milton* court admittedly utilized a traditional rule of statutory construction whereby legislative intent with regard to a particular section is gleaned from examination of the entire statute. This rule of construction, however, was improperly applied to the death statute by the *Milton* court. Usually, the rule is applied in cases where the specific provision being interpreted directly and intimately relates to the law covered by the comprehensive statute.[87] The wrongful death act, however, fundamentally concerns the establishment of liability, types of damage, and designation of beneficiaries in what is essentially a tort action. The law of torts is "directed toward the compensation of individuals . . . for losses which they have suffered within the scope of their legally recognized interests generally . . . where the law consider[s] that compensation is required."[88] In *Milton* and *Pot-*

82. ME. REV. STAT. ANN. tit. 18-A, § 1-201 (1981). This section also states that its definitions are "[s]ubject to additional definitions contained in the subsequent Articles which are applicable to specific Articles or parts, and unless the context otherwise requires . . . ."

83. No. CV-87-62 (Me. Super. Ct., Sag. Cty., June 5, 1989).

84. *Id.* at 4.

85. ME. REV. STAT. ANN. tit 18-A, § 1-201(3) provides: " 'child' includes any individual entitled to take as a child under this Code by intestate succession . . . and excludes any person who is only a stepchild . . . ."

86. "Ascertaining the meaning of 'minor children' in this matter involves *only* examination of the wrongful death act and the definitions in the comprehensive statutory scheme of the Probate Code." Pottle v. Central Maine Power Co., No. CV-87-62 (Me. Super. Ct., Sag. Cty., June 5, 1989), at 4 n.2 (emphasis supplied).

87. *See, e.g.*, Faucher v. City of Auburn, 465 A.2d 1120, 1122-24 (Me. 1983), in which the Law Court harmonized various "tolling" provisions relating to statutes of limitations in the Maine Tort Claims Act, ME. REV. STAT. ANN. tit 14, §§ 8101-8118 (1981).

88. PROSSER AND KEETON ON THE LAW OF TORTS 5-6 (5th ed. 1984).

tle, for example, the wrongful death actions sought to recover damages arising under alleged acts of medical malpractice and employer negligence.[89] Another important reason for the imposition of tort liability is to prevent or deter private behavior that is socially harmful.[90] The purpose of probate law, on the other hand, is simply to transfer and distribute decedents' estates to heirs and successors.[91] The fundamental nature of the wrongful death action as a tort most likely accounts for the fact that the national model Uniform Probate Code itself does not contain a wrongful death statute.[92] It is odd, therefore, that the *Milton* court would determine a question of tort liability solely on the basis of a fetus's inability to inherit, rather than looking to general tort law and other principles of law to inform its decision.[93]

The use of the Probate Code as the sole basis for interpreting the wrongful death statute is inappropriate, moreover, because the legislative history and the official comment in the Code itself indicate that the wrongful death act has a different status within the Code than the other provisions which relate solely to probate matters. This special status, which the wrongful death act shares with other sections of the Code,[94] combined with the substantial differences between a tort-based statute and a probate-related code, argue against the overwhelming emphasis placed by the *Milton* court on harmonizing the act with the Code.

The Maine Uniform Probate Code was based upon recommendations made by the Maine Probate Law Revision Commission. These recommendations, in turn, were based substantially on the model Uniform Probate Code of the National Conference of Commission-

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89. The law of domestic relations should also be an important source for interpreting the provisions of the act, since the class of beneficiaries under the statute encompasses family members. For example, in *Pottle v. Central Maine Power, Co.*, the superior court justice should have inquired into the legal duties and obligations owed by a stepparent to a stepchild to determine whether a stepchild could be a beneficiary under the death act. The closer a stepparent's duties resemble a legal parent's, the greater the justification for equating a stepchild with "child" under the death statute.

90. PROSSER & KEETON, *supra* note 88, at 25-26.

91. *See, e.g.*, ME. REV. STAT. ANN. tit. 18-A, § 1-102 (1981).

92. *See supra* note 72.

93. In fact, the Law Court has historically looked to analogous civil actions for "principles of law" in death actions. State v. Grand Trunk Ry., 58 Me. 176, 182 (1870). *See also* Minott v. Cunningham & Sons, 413 A.2d 1325, 1331 (Me. 1980) (comparative negligence statute, ME REV. STAT. ANN. tit.14, § 156, applies to the death statute). In *Milton*, the dissent was properly concerned with harmonizing the death statute with tort law, rather than with probate law. "Unless the Court is prepared to bar a claim for prenatal injury, we are now left with the result that prenatal injury is actionable while prenatal death is not." Milton v. Cary Medical Center, 538 A.2d at 258 (Wathen, J., dissenting).

94. *See infra* note 98.

ers on Uniform State Laws.[95] The Revision Commission modified the model Uniform Probate Code to better conform the Code to existing Maine probate law and to further particular policy concerns.[96] A substantial number of the provisions, including the wrongful death act, were added to the model code simply because the provisions were contained in Title 18 of the Maine Revised Statutes, the title which contained the previous statutory probate provisions.[97] The Revision Commission explained that "some parts of the proposed Maine Probate Code that do not appear in the [model] Uniform Probate Code are simply sections preserved from present Maine law which are not covered by, and are not inconsistent with, the uniform version."[98]

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95. MAINE PROBATE LAW REVISION COMM'N, REPORT TO THE LEGISLATURE AND SUMMARY OF THE COMMISSION'S STUDY AND RECOMMENDATIONS CONCERNING MAINE PROBATE LAW 6 (Sept. 1978) [hereinafter PROBATE COMM'N REPORT].

96. *Id.* at 6-10.

97. How the wrongful death act found its way to old Title 18 is a rather long story in itself. In 1895, the death statute was grouped—along with other actions for which executors of estates were responsible (like the survival action, for example)—in the Revised Statutes under chapter 87, "Actions by Executors and Administrators." In the 1895 Revised Statutes, the individual chapters were not organized into titles. In 1903, the Revised Statutes were organized into titles for the first time. The wrongful death act continued to be grouped under the chapter headed "Actions by Executors and Administrators" and was placed under Title Nine, which itself was entitled "Civil Rights and Remedies" (presently Title 14). R.S. 1903, ch. 89, §§ 8, 9 & 10. The death statute remained in the "Civil Rights and Remedies" title until 1944, when the fateful decision was made to place the death statute and the entire chapter on actions by executors into Title 14, "Powers and Duties of Courts of Probate / Domestic Relations," chapter 152. From that time to the present, the wrongful death act, although a tort action, has been surrounded by probate law.

The Legislature did not provide any specific statement on why this placement was made. In a final report in 1944, the Joint Select Committee on the Revision stated that:

> An effort has been made in this revision to codify the public laws of the state. All related matters, as far as expedient, have been brought together. An effort has also been made to delete obsolete laws, to simplify antiquated language and to rearrange sections in an orderly manner.

R.S. 1944 at iv.

The placement of the chapter on actions by executors within the probate title in 1944 is readily understandable as merely a means of gathering in one location statutes relating to the administration of estates. There is no indication that the Legislature considered the substance of the wrongful death act as affected by its placement in the probate title. The Law Court did not treat the act any differently after 1944 than before. The first time the court made a connection between the act and its proximity to probate law occurred in *Milton*, 44 years after the revision.

98. PROBATE COMM'N REPORT, *supra* note 95, at 8. In addition to the wrongful death act, the survival of actions statute (ME. REV. STAT. ANN. tit 18-A, § 3-817 (1981)), the damages limitations in tort actions against personal representatives statute (ME. REV. STAT. ANN. tit. 18-A, § 3-818 (1981)), and provisions governing bonds (ME. REV. STAT. ANN. tit. 18-A, §§ 7-401 - 7-406 (1981)), among others, were placed in the Maine Probate Code for this reason. For a complete list of these provisions, see PROBATE COMM'N REPORT at 8 n.3.

The consultant to the Commission, Professor Merle Loper of the University of Maine School of Law, had earlier recommended that these provisions be included within the new Maine Probate Code. In a memorandum to the Commission, Professor Loper explained: "The alternative to this approach would be to leave those sections of Title 18 not already covered in the Commission's proposed code in Title 18. Most of Title 18 would be repealed, leaving those sections . . . scattered throughout a graveyard of obsolete, repealed sections."[99]

It is likely that neither the Commission nor the Legislature considered that the placement of the wrongful death act and other "remnant" Title 18 provisions in the Probate Code, without substantive change, would alter the operation or substance of those provisions. The Commission, after all, was engaged in a complex, multi-year effort to organize probate law into a comprehensive integrated whole. It would have been natural, and entirely expected, that the intellectual effort expended was focused solely on probate law and not on the problem of dealing with remnant provisions which were only tangentially related to probate law. In fact, the Legislature recognized the special character of the remnant Title 18 provisions in the official comment attached to each of these sections. For example, following the wrongful death act, the comment reads:

> **General.** This section was added to the Uniform Probate Code version in order to *preserve and integrate* prior Maine law concerning wrongful death actions.[100]

The *Milton* court's reference to the "explicit integration" of the death statute into the Probate Code very likely stems from this comment. The comment, however, does not state that the statute was added to integrate the statute with the *Code*; it only says that the statute was placed in the Code to preserve and integrate *the prior Maine law of wrongful death.* In enacting the new Code, the Legislature at the same time repealed former Title 18. The death statute, therefore, had to be placed somewhere, and the most convenient location was the Probate Code. It is in that sense that the death statute was *preserved* in the Code. And by combining three previous Title 18 provisions relating to wrongful death into one new section in Title 18-A, prior Maine law was *integrated.*[101] The comment says no more than that.

Assuming, however, that the Legislature did intend to integrate the death act into the Probate Code, the Code expressly requires

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99. Memorandum from Professor Merle Loper to the Maine Probate Law Revision Comm'n, August 1, 1978, at 2.

100. ME. REV. STAT. ANN. tit. 18-A, § 2-804 (1981) (emphasis supplied).

101. *See* ME. REV. STAT. ANN. tit. 18, §§ 2551, 2552 & 2553 (1964).

that its provisions be "liberally construed."[102] The *Milton* court, nonetheless, strictly interpreted the wrongful death statute.[103] A liberal construction of the provisions of the Code would have required the *Milton* court and Justice Lipez in *Pottle* to engage in a substantially different interpretive approach. Not only would a liberal construction require a court to focus on the remedial purposes of the wrongful death act, but also a court could look beyond the definitions contained in the Probate Code. The language in the general definitions section of the Code regarding application of those definitions "unless the context otherwise requires" contemplates, given the different area of law covered by the wrongful death act, that the general Probate Code definitions should not apply in the context of tort liability.

In conclusion, the wrongful death act was placed in the Probate Code primarily for reasons of convenience. If the statute had not been in former Title 18 in 1979, it is highly doubtful that either the Revision Commission or the Legislature would have sought out the act for inclusion into the Code. That the act itself is an anomaly within a probate code is evidenced by the fact that the national "model" Uniform Probate Code does not contain a wrongful death act. Neither the legislative history of the Code, the official comment to the wrongful death act, nor the Law Court's prior interpretation of the death statute compelled the court to interpret the act solely by harmonizing its terms with the law of intestate succession.

The better approach to interpreting the wrongful death act is to recognize that the act is fundamentally different from the probate-related provisions of the Uniform Probate Code. Therefore, its interpretation should be based on the underlying purposes and policies of the act itself, tort law, domestic relations law, and other related law, including probate law, rather than by looking solely to the Probate Code.

B. Contemporary Common Law Principles Support Recovery for Wrongful Death

The Law Court's rule of law that death actions may be brought only as allowed under the death statute and its rule of strict construction of the statute are both predicated on the Law Court's view, first announced in *Nickerson v. Harriman*,[104] that the common law does not allow recovery for wrongful death. This view of the law,

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102. ME. REV. STAT. ANN. tit. 18-A, § 1-102(a) (1981).

103. Milton v. Cary Medical Center, 538 A.2d at 254 ("both [sections] of the act are to be construed together and as they create a liability unknown to the common law, their effect is to be limited to cases clearly within the terms of the act") (quoting Hammond v. Lewiston, Augusta and Waterville St. Ry., 106 Me. 209, 212-13, 76 A. 672, 672 (1909)). *See also* Miller v. Szelenyi, 546 A.2d 1013, 1020 (Me. 1988).

104. 38 Me. 277, 279-80 (1854). *See supra* note 32 and accompanying text.

however, was incorrect in the 1850's and it is incorrect today.

As previously discussed, *Baker v. Bolton* was the first English case to state categorically that the common law did not provide an action for wrongful death.[105] Prior to *Baker*, the right to such an action was never specifically allowed or denied.[106] Commentators and jurists, however, have convincingly argued that the common law did, in fact, allow such recovery.[107] In American legal history, actions for wrongful death were allowed under the "common law" prior to 1808. During the seventeenth century it was common practice for Massachusetts courts to order both fines and compensation to the surviving family in cases of "manslaughter," "accidental discharge of weapons," or killing through "chance medley."[108] These cases awarded compensation to surviving family members as an incident to a criminal proceeding. There was, however, at least one civil case which awarded compensation for wrongful death in Massachusetts in the colonial era.[109] In a review of colonial cases, one legal historian concludes that no "colonial statutes or decisions lend any support to a belief that a death claim would have been denied by our colonial ancestors."[110] In fact, at least three American courts[111] recognized a common law action for wrongful death prior to 1848 when the Massachusetts Supreme Judicial Court adopted the rule of *Baker v. Bolton*.[112]

There were no general common law principles or doctrines, more-

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105. *See supra* Section I(A).

106. In Higgins v. Butcher, Yelv. 89, 80 Eng. Rep. 61 (K.B. 1607), a husband was denied recovery in an action arising out of the assault and subsequent death of his wife. It is unclear, however, if the denial was based on the common law maxim that a personal action does not survive the death of the person (*actio personalis moritur cum persona*) or because a wrongful death action was not recognized. Malone, *supra* note 26, at 1054.

107. *See, e.g.*, Malone, *supra* note 26, at 1052; Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. REV. 431, 436 (1916); Moragne v. States Marine Lines, 398 U.S. 375, 381-84 (1970) (Harlan, J.); Gaudette v. Webb, 362 Mass. 60, 284 N.E.2d 222 (1972). The author is unaware of any scholar who argues that the rule of *Baker v. Bolton* was correctly based on the English common law of 1808 or the American common law of the mid-nineteenth century. *See* Malone, *supra* note 26, at 1052-53 for an analysis of how English common law before 1808 would have supported a death action.

108. Malone, *supra* note 26, at 1063 (citing 2 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF THE MASSACHUSETTS BAY 1630-1692, at 56 (1901)).

109. In 1669, Matthias Button sued John Godfrey "for firing his chimney which caused his house to burn and the goods therein, also the death of his wife . . . ." 4 RECORDS AND FILES OF THE QUARTERLY COURTS OF ESSEX COUNTY 1667-1671, 130-31 (1914) (cited in Malone, *supra* note 26, at 1065).

110. Malone, *supra* note 26, at 1065-66.

111. *See* Plummer v. Webb, 19 F. Cas. 894 (No. 11234) (D.Me. 1825), *dismissed on appeal for lack of admiralty jurisdiction*, 19 F. Cas. 894 (No. 11233) (C.C.D.Me. 1827); Cross v. Guthery, 2 Root 90, 1 Am. Dec. 61 (Conn. 1794); Ford v. Monroe, 20 Wend. 210 (N.Y.Sup.Ct. 1838).

112. Carey v. Berkshire R.R. Co., 55 Mass. (1 Cush.) 475 (1848).

over, in either America or England, which supported the rule of *Baker v. Bolton* at the time of its adoption. In 1970, Justice Harlan, writing for a unanimous court in *Moragne v. States Marine Lines*,[113] undertook a broad reexamination of the rule of *Baker v. Bolton*. He first noted the fundamental jurisprudential problem with the rule:

> One would expect, upon an inquiry into the sources of the common-law rule, to find a clear and compelling justification for what seems a striking departure from the result dictated by elementary principles in the law of remedies. Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death.[114]

Justice Harlan then stated that "[o]ne expects, therefore, to find a persuasive, independent justification for this apparent legal anomaly."[115] In tracing legal history to discover a justification, Justice Harlan dismissed the strongest legal rationale offered historically for the rule[116] and concluded that the only reason for its adoption in America was that it had the "blessing of age."[117] Another explanation for the acceptance of the rule of *Baker v. Bolton* during the nineteenth century was that it expressed, in shorthand fashion, the courts' view that the enactment of the limited death acts prior to Lord Campbell's Act took the field of wrongful death law out of the purview of the common law. In other words, the death acts preempted the development of the law of wrongful death through the common law process.[118]

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113. 398 U.S. 375 (1970).

114. *Id.* at 381.

115. *Id.* at 382.

116. Justice Harlan noted that legal historians had concluded that the sole substantial basis for the rule was a feature of early English law, the felony-merger doctrine; a doctrine that had not survived into the nineteenth century even in England. *Id.* at 382 (citing POLLACK, LAW OF TORTS 52-54 (London ed. 1951) and Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. REV. 431 (1916)). The felony-merger doctrine stood for the principle that the common law did not allow civil recovery for an act which constituted both a tort and a felony. The tort was treated as less important than an offense against the Crown and therefore merged into or was preempted by the felony. *Id.* at 382. *See also* Malone, *supra* note 26, at 1055-58. Justice Harlan, however, noted that felony punishment never included forfeiture of property in this country, and therefore the only plausible legal justification for the rule in *Baker v. Bolton* had never even existed in the United States. Moragne v. States Marine Lines, 398 U.S. at 384.

117. Moragne v. States Marine Lines, 398 U.S. at 386.

118. Professor Malone, in *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043 (1965), argues that the adoption of the rule by the first American law court, the Massachusetts Supreme Judicial Court, can best be explained by the already available, but limited, statutory relief for persons killed on Massachusetts railways. Professor Malone, in his discussion of Carey v. Berkshire R.R. Co., 55 Mass (1 Cush.) 475 (1848), reasons:

Whether one accepts the view that the rule of *Baker v. Bolton* was adopted by the courts because of a respect for ancient doctrine or because it effectively served to remove the courts' common law jurisdiction from the field of wrongful death, the allowance of recovery for wrongful death under the historic common law, especially in America, cannot be denied. In short, the rule in *Baker v. Bolton* simply had no basis in either American legal history or jurisprudence at the time the rule was adopted by the Massachusetts Supreme Judicial Court in 1848 and subsequently by the Maine Law Court in 1854.

Even if the Law Court refuses to accept this modern understanding of the historic common law, contemporary legal principles in Maine support a finding that common law now allows recovery for wrongful death. Before addressing that issue, it is instructive to review the reasoning of the Supreme Court in *Moragne v. States Marine Lines*, which led to the holding that modern general maritime principles of law support the creation of a right to recover for wrongful death. The Court noted that since its adoption of the rule of *Baker v. Bolton* in *The Harrisburg*[119] there had been a

> development of major significance . . . making clear that the rule against recovery for wrongful death is sharply out of keeping with the policies of modern American maritime law. This development is the wholesale abandonment of the rule [of *Baker v. Bolton*] in most of the areas where it once held sway, quite evidently prompted by the same sense of the rule's injustice that generated so much criticism of its original promulgation.[120]

Although the Court found some rejection of the rule in judicial decisions,[121] it specifically noted that England had adopted a wrong-

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> The position adopted by the Supreme Judicial Court of Massachusetts (and by the courts that eagerly followed it) can be readily explained in terms of the practical situation with which the court was faced when it made its decision: The Massachusetts Legislature had already preempted the field of death claims, and the court was obliged to make a practical adjustment in the face of this reality. The question to be answered was not whether the wrongful death of a human being should be ignored by government, but rather whether the court should admit the prospect of recognizing and administering conflicting remedies. This, as we shall see, was the dilemma that was to be faced by virtually every American court confronted with the problem of wrongful death from *Carey* onward.

Malone, *supra*, at 1069. Professor Malone further argues that the English appellate courts also adopted the rule of *Baker v. Bolton* for this reason. *Id.* at 1059.

In 1848, the Maine Legislature passed a statute similar to the Massachusetts act allowing relief for persons killed on railways. P.L. 1848, ch. 70, § 2. Thus the Maine Law Court faced the same dilemma as the Massachusetts court when it adopted the rule of *Baker v. Bolton* in Nickerson v. Harriman, 38 Me. 277 (1854).

119. 119 U.S. 199 (1886).

120. Moragne v. States Marine Lines, 398 U.S. at 388.

121. *Id.*

ful death act in 1846 (Lord Campbell's Act), that every American state had enacted wrongful death statutes, and that Congress had created actions for wrongful death in various contexts.[122] Justice Harlan then stated that:

> These numerous and broadly applicable statutes, taken as a whole, make it clear that there is no present public policy against allowing recovery for wrongful death. The statutes evidence a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow such recovery. This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law.[123]

In addition to the statutory enactments, the Court was influenced by an elementary principle of justice: "Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death."[124]

The Supreme Court's decision in *Moragne* was, of course, not binding upon the states. However, a number of state courts have reexamined the foundations of their wrongful death statutes by using the reasoning and conclusions of the *Moragne* court.[125] The Massachusetts Supreme Judicial Court, appropriately enough, given its early role in spreading the rule of *Baker v. Bolton* in the nineteenth century, was the first state court to utilize the *Moragne* rationale this way. In *Gaudette v. Webb*,[126] the Massachusetts court held that the general statute of limitations applied for purposes of tolling the running of the statute for a decedent's minor children under the state's wrongful death act, rather than the specific limitation provisions contained in the act itself.[127] The *Gaudette* court relied exten-

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122. *Id.* at 389-90. Congressional enactments include wrongful death actions for railroad workers, Federal Employers' Liability Act, 45 U.S.C. §§ 51-59 (1908); for merchant seamen, Jones Act, 46 U.S.C. § 688; and for persons on the high seas, Death on the High Seas Act, 46 U.S.C. §§ 761, 762 (1920).

123. Moragne v. States Marine Lines, 398 U.S. at 390-91 (citing Landis, *Statutes and the Sources of Law*, HARVARD LEGAL ESSAYS 213, 226-27 (1934)). Justice Harlan also quoted from Roscoe Pound: "Today we should be thinking of the death statutes as part of the general law." *Id.* at 391-92 (quoting Pound, *Comment on State Death Statutes - Application to Death in Admiralty*, 13 NACCA L.J. 162, 189 (1954)). *See also* Traynor, *Statutes Revolving in Common-Law Orbits*, 17 CATH. U.L. REV. 401 (1968).

124. Moragne v. States Marine Lines, 398 U.S. at 390-91.

125. *See* S. SPEISER, *supra* note 25, § 1.6, for a brief discussion on the possible uses of *Moragne* by state courts.

126. 362 Mass. 60, 284 N.E.2d 222 (1972).

127. *Id.* at 71, 284 N.E.2d at 229.

sively on the *Moragne* decision, finding that "the law in this Commonwealth has also evolved to the point where it may now be held that the right to recovery for wrongful death is of common law origin, and we so hold."[128]

Contemporary principles of Maine law require the Maine Law Court to follow the general reasoning of the United States Supreme Court in *Moragne* and find that an action for wrongful death is supported by the contemporary common law in Maine.[129]

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128. *Id. See also* Mone v. Greyhound Lines, Inc., 368 Mass. 354, 331 N.E.2d 916 (1975) (fetus that is viable at the time of injury is a person under the wrongful death act) (overruling Leccese v. McDonough, 361 Mass. 64, 279 N.E.2d 339 (1972)). The court later clarified its holding in *Gaudette* by ruling that, although the wrongful death action was currently grounded in the common law, the death statute continued to be the sole source of procedures and remedies for wrongful death. *See* Hallett v. Town of Wrentham, 398 Mass. 550, 556, 499 N.E.2d 1189, 1193 (1986) (independent common law claim on behalf of minor children not allowed). Most recently, despite the common law origins of the wrongful death action, the court refused to adopt a discovery rule to extend the statute of limitations beyond the "unambiguous" terms of the act. Pobieglo v. Monsanto Co., 402 Mass. 112, 116, 521 N.E.2d 728, 731 (1988) ("Here it is of no significance that the wrongful death claim has common law origins, since we are first concerned with the meaning [of the death statute] which limits the right to bring such claims. Only if the statute is ambiguous, or couched in terms that suggest that we do so, do we look beyond the express statutory language.") This decision was vigorously disputed by Justice Liacos, now Chief Justice, in dissent. *Id.* at 120-24, 521 N.E.2d at 733-35.

A number of state courts have adopted the *Moragne* reasoning to conclude that state wrongful death actions have their origins in the common law. This conclusion has had varying effects upon the interpretation and application of wrongful death statutes. *See, e.g.*, Hanebuth v. Bell Helicopter Int'l, 694 P.2d 143, 145 (Alaska 1984) (discovery rule allowed for wrongful death action, rejecting as "formalistic legal abstraction" the doctrine that statute bars right of action and remedy) (quoting Haakanson v. Wakefield, 600 P.2d 1087, 1092 (Alaska 1979)); Summerfield v. Superior Court, 144 Ariz. 467, 473, 698 P.2d 712, 718 (1985) (wrongful death statute and precedent have combined to produce a cause of action with common law attributes); O'Grady v. Brown, 654 S.W.2d 904, 908 (Mo. 1983) (death statutes "mend the fabric of the common law" and incorporate common law principles).

Not all states that have considered the *Moragne* rationale have adopted it, however. *See, e.g.*, Moreno v. Sterling Drug, Inc., 787 P.2d 348, 353-56 (Tex. 1990) (rejecting discovery rule for wrongful death actions and holding that wrongful death is solely a statutory based action). *But see id.*, at 357-67 (dissent of three justices).

See generally RESTATEMENT (SECOND) OF TORTS § 925 comment k (1979) (noting trend to allow "ameliorating common law principles to apply" to wrongful death actions).

129. Although *Moragne* engaged the Court in creating a general maritime cause of action, the reasoning is the same as that used by common law courts to develop rules of law. Specifically, the Maine Law Court has used legislative enactments as sources for developing new common law rules in the manner advocated by Pound and Traynor, *see supra* note 123, and used by the *Moragne* Court. *See, e.g.*, Anderson v. Neal, 428 A.2d 1189, 1190-93 (Me. 1981) ("discovery rule" exception to six-year statute of limitations for legal malpractice); Myrick v. James, 444 A.2d 987, 991 (Me. 1982) ("discovery rule" adopted for foreign object medical malpractice); McKellar v. Clark Equip. Co., 472 A.2d 411, 413 n.3 (Me. 1984) (abrogation of common law rule of spousal immunity).

The Law Court should recognize that through legislative enactments, the Maine Legislature has shown that there is no general public policy against recovery for wrongful death. The death statute itself is, of course, the primary expression of legislative policy in favor of recovery for wrongful death. The Maine Workers' Compensation Act,[130] a major legislative enactment in the field of personal injury law, also specifically provides recovery for wrongful death.[131] The universal adoption of wrongful death statutes by all American states and the federal government, which so influenced the *Moragne* court, should also be given substantial weight by the Law Court.[132] Similarly, the better reasoned decisions in other jurisdictions[133] and scholarly writings[134] that have challenged the old rule against recovery for wrongful death support adopting a new rule to allow recovery under the common law. The Massachusetts Supreme Judicial Court's decision to recognize the common law sources of the wrongful death action is especially significant in light of Maine's historic ties to Massachusetts[135] and because Maine adopted the rule of *Baker v. Bolton* in substantial part upon the authority of the Massachusetts case of *Carey v. Berkshire Railroad.*

In addition, there are basic principles of Maine law that support finding a contemporary common law basis for a wrongful death action. Of primary importance is the elementary principle of justice that motivated the *Moragne* Court—the principle that recovery should be allowed where injury occurs as the result of a breach of a primary duty.[136] The Law Court has noted this "general rule" of the common law in Maine. "Since the early days of the common law a cause of action in tort has been recognized to exist when the negligence of one person is the proximate cause of damage to another person."[137]

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130. ME. REV. STAT. ANN. tit. 39 (1989 & Supp. 1990).

131. ME. REV. STAT. ANN. tit. 39, §§ 58, 142, & 143 (1989 & Supp. 1990).

132. The Law Court has frequently looked to legislative activity in other jurisdictions as guidance for developing common law rules. *See, e.g.*, Myrick v. James, 444 A.2d 987, 996 n.9 (Me. 1982); Black v. Solmitz, 409 A.2d 634, 635 (Me. 1979).

133. Hanebuth v. Bell Helicopter, 694 P.2d 143 (Alaska 1984); Summerfield v. Superior Court, 144 Ariz. 467, 698 P.2d 712 (1985); Gaudette v. Webb, 362 Mass. 60, 284, N.E.2d 222 (1972); Amadio v. Levin, 509 Pa. 1085, 501 A.2d 1085 (1985) (Zappala, J., concurring).

134. *See, e.g.*, Pound, *Admiralty Law - Comments on Recent Important Admiralty Cases*, 13 NACCA L.J. 162, 189 (1954). *See also* RESTATEMENT (SECOND) OF TORTS § 925 comment k (1977): "[T]he right of action can now be regarded as arising under the common law. . . . When recognized, this common law right has been utilized to fill in unintended gaps in present statutes or to allow ameliorating common law principles to apply."

135. *See* Davis v. Scavone, 149 Me. 189, 100 A.2d 425 (1953), for a discussion on the importance of Massachusetts judicial decisions on Maine law.

136. Moragne v. States Marine Lines, 398 U.S. 375, 381-82 (1970).

137. MacDonald v. MacDonald, 412 A.2d 71, 75 (1980).

The Law Court applied this general principle in *Black v. Solmitz*.[138] In *Black*, the court overruled an earlier decision which had adopted the rule of parental immunity from negligence suits brought by minor children.[139] In its decision, the court noted that since the rule was first adopted there had developed a

> strong trend against across-the-board application of a rule of parental immunity in tort cases [which] reflects a growing recognition that such a sweeping application results in excessive protection of the interests favored by the rule in derogation of the general principle that there should be no wrong without a remedy.[140]

This principle of justice must be accorded great weight in Maine because it is embodied in article I, section 19 of the state's constitution: "Every person, for an injury inflicted on the person or the person's reputation, property or immunities, shall have remedy by due course of law."[141]

In recognizing a common law right to recover for wrongful death, the Law Court would cure a nineteenth-century legal anomaly that has persisted throughout most of the twentieth century - that a violation of a primary legal duty that causes *injury* is recoverable, but one that causes *death* is not. Even if the court, after such recognition, were to determine that the wrongful death statute is the exclusive means of recovery, the effect on the interpretation of the statute, as discussed below, would be significant.

C. From Strict to Fair Construction

Rather than applying a strict or liberal interpretation, the Law Court should simply emulate the Minnesota Supreme Court by adopting a neutral "fair interpretation" for all statutes, including the wrongful death act: "[W]e do not permit ourselves, because it is an innovation, so to limit a statute by construction as to defeat or

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138. 409 A.2d 634 (Me. 1979).

139. *Id.* at 635 (overruling Downs v. Poulin, 216 A.2d 29 (Me. 1966)).

140. *Id.* (citing ME. CONST. art. I, § 19). The court detected the "strong trend" by looking to recent decisions in other states and recently adopted language in the RESTATEMENT (SECOND) OF TORTS § 895G (1979).

141. ME. CONST. art. I, § 19 (amended 1988). *See*, Comment, *Article I, Section 19 of the Maine Constitution: The Forgotten Mandate*, 21 MAINE L. REV. 83 (1969), *cited in* MacDonald v. MacDonald, 412 A.2d 71, 73 n.2 (Me. 1980). The Law Court relied on this constitutional provision in Gibson v. National Ben Franklin Ins., 387 A.2d 220 (Me. 1978), where the plaintiff brought suit against her workers' compensation insurance carrier and its agent for wrongfully terminating payments. Although the workers' compensation statute generally establishes exclusive remedies for actions between employees and employers (the court treated the carrier as the employer), the court held that the plaintiff could maintain her action because article I, § 19 required it to conclude that "legislation should not be deemed to preclude an injured person from having a remedy of his own for a recognized wrong in the absence of a clear manifestation of intent to that effect." *Id.* at 223.

even hinder its purpose. Our effort is rather to give any statute 'a fair construction, with the purpose of its enactment in view, not narrowed or restricted because it is a substitute for the discarded common law.' "[142] Although the Maine Law Court has not developed a consistent approach to statutory construction,[143] the court has interpreted statutes by looking to legislative purpose, and in particular to the mischief sought to be remedied.[144] For example, the court has stated that:

> The first task of a court when interpreting a statute is to ascertain the real purpose of the legislation. Once this purpose is found, a court should give effect to it, avoiding results that are absurd, inconsistent, unreasonable or illogical, if the language of the statute is fairly susceptible to such a construction. A court can even ignore the literal meaning of phrases if that meaning thwarts the clear legislative objective.[145]

A rule of "fair construction" would best accord with the general purposive interpretation of statutes employed by the court today and would respect legislative enactments in a way that the rule of strict construction does not. The rule of fair construction, moreover, is most consistent with the method the Law Court has used to interpret recently enacted legislation that has created new causes of action. For example, the court has employed a fair interpretation of the strict products liability statute enacted in 1973,[146] despite the fact that the statute establishes a cause of action in derogation of the common law.[147]

If, in addition to adopting a rule of fair construction, the Law Court accepts the argument that contemporary common law principles encompass a right of recovery for wrongful death, the act will be given a broader application through the process of statutory interpretation. Not only would the acceptance of this principle eliminate the primary basis for employing the rule of strict construction, but it would generally give the court greater confidence to extend

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142. Teders v. Rothermal, 205 Minn. 470, 472, 286 N.W. 353, 354 (1939).

143. Comment, *Statutory Construction*, 30 MAINE L. REV. 72 (1978).

144. *See generally id.* at 72-84. Although the Law Court occasionally employs the language of "legislative intent,' *see, e.g.*, Town of Arundel v. Swain, 374 A.2d 317, 319 (Me. 1977), it is clear that the ultimate approach is one looking to "legislative purpose." *See, e.g.*, McKellar v. Clark Equip. Co., 472 A.2d 411, 414 (Me. 1984).

145. State v. Niles, 585 A.2d 181, 182 (Me. 1990) (citations omitted). *See also* Maine Merchants Ass'n v. Campbell, 287 A.2d 430, 435 (Me. 1972) ("[W]hen it is clear that the policy consideration which brought about the Legislature's action was to remedy a problem by whatever practices the problem is created, we think the Court is required to so construe the statute.").

146. ME. REV. STAT. ANN. tit. 14, § 221 (1980).

147. *See* Bernier v. Raymark Indus., 516 A.2d 534; Austin v. Raybestos-Manhattan, Inc., 471 A.2d 280 (Me. 1984); Adams v. Buffalo Forge Co., 443 A.2d 392 (Me. 1982).

the coverage of the act in difficult cases.[148] But no matter how broadly one reads a statute, or creatively uses materials extrinsic to the words of a statute to divine its meaning, the process of interpretation may honestly reach only so far. Even those who would allow the greatest semantic leeway to the courts recognize that the words of a statute do delimit meaning.[149] To go beyond the proper bounds of interpretation, to engage in a "spurious interpretation"[150] so that a particular case is forced within the terms of a statute, is not only intellectually dishonest but may exceed the limits of constitutional judicial lawmaking.[151] Interpretation, then, may not be adequate to meet the goal of unifying statutes, especially old statutes, with the contemporary legal landscape.[152]

D. Beyond Interpretation

Once a court determines through a process of honest interpretation that a particular factual situation does not fall within the coverage of a statute, however, its judicial duty is not over, nor are its powers exhausted.[153] Because American courts possess both the au-

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148. *See supra* note 129 and accompanying text.

149. *See, e.g.*, G. CALABRESI, *supra* note 13, at 88.

150. Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379 (1907) (spurious interpretation is judicial lawmaking that masquerades as genuine interpretation). *See generally* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 13-28 (1975); G. CALABRESI, *supra* note 13, at 38-41.

151. Where a court *restricts* the application of a statute short of what an honest interpretation would allow, "there would seem to be no constitutional basis for [this] restrictive application unless the provision is wholly or partly unconstitutional." R. DICKERSON, *supra* note 150, at 200. Similar constitutional difficulties arise where a court tries to *broaden* the application of a statute beyond the "semantic leeway" of interpretation. *Id.* at 201.

It is not always clear whether a court is creating law through its common law making powers or through the process of statutory interpretation. For example, in Anderson v. Neal, 428 A.2d 1189 (Me. 1981), the Law Court created an exception to the general six-year statute of limitations period by establishing a discovery rule for legal malpractice. Though it is not entirely clear, the exception appears to have been created by common law making, rather than by statutory interpretation. *Id.* at 1192 ("In order to align the common law of this state with the well-considered legislative policy . . . ."). On the other hand, in Myrick v. James, 444 A.2d 987 (Me. 1982), the court established the discovery rule for "foreign object" medical malpractice cases through the process of statutory interpretation. *Id.* at 992-93 ("It is a legitimate judicial function to make law interstitially by giving meaning through judicial interpretation to vague, indefinite or generic statutory terms . . . ."). Justice Dufresne, dissenting in both cases, contended that the majority had engaged in "judicial legislation," not in a process of interpretation. *Id.* at 1005; Anderson v. Neal, 428 A.2d at 1193.

152. G. CALABRESI, *supra* note 13, at 38. "Discretion to interpret broadly and functionally entails restraint, if we are to remain honest. But restraint unfortunately deprives interpretation of the capacity to deal adequately with the problem of obsolete laws." *Id.* "[H]onest interpretation does not permit all, or even most, out-of-date laws to be brought into line." *Id.* at 88.

153. A realistic analysis of the judicial role in relation to statutes must medi-

thority to interpret and apply statutes *and* to create law through common law processes and techniques, courts may create new rules of law that extend general principles of law underlying a statute to factual situations otherwise not covered by the terms of a statute. This judicial law-making power is limited only by the legislature's power to preempt a particular field of law[154] and by the inherent constraints of the judicial decisionmaking process itself.[155]

The creative function of the courts to apply statutory principles to reach facts beyond the specific terms of a statute, once subsumed under the doctrine of "equity of the statute,"[156] had until recently generally fallen into disfavor. In the modern period, however, the United States Supreme Court[157] and legal commentators[158] have re-

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> ate between [the extremes of examining solely the words or the "judicial gloss" placed on those words] by recognizing that a court has two different, intimately related, and equally important responsibilities: (1) to read the statute in its proper context to ascertain whether and how its meaning relates to the controversy at hand (thus establishing the court's legislative terms of reference), and (2) where the meaning of the statute as so ascertained does not resolve the controversy, to apply, adjust, or create an appropriate judicial rule to resolve it. No approach that focuses on one of these functions to the neglect of the other can make sense out of what courts have been or should be doing in relation to statutes.

R. DICKERSON, *supra* note 150, at 18.

Justice Tobriner of the California Supreme Court made this distinction in a concurring opinion in Justus v. Atchison, 19 Cal. 3d 564,139 Cal. Rptr. 97, 565 P.2d 122 (1977) (wrongful death action cannot be based on death of viable fetus). After noting that contemporary California common law would allow recovery under wrongful death and that the wrongful death statute did not preclude a common law wrongful death action, Justice Tobriner based his decision against allowing recovery for the death of a stillborn fetus not on his interpretation of the act alone, but on policy reasons that would preclude recovery under common law:

> [S]ince this court decided to reject the asserted cause of action for the wrongful death of a fetus—as I believe it should—it must rest that decision on reasons of policy . . . . It cannot avoid those difficult policy choices by limiting its vision to the terms of [the wrongful death statute] and ignoring the evolving common law of today.

Id. at 586-87, 139 Cal. Rptr. at 112, 565 P.2d at 137.

154. R. DICKERSON, *supra* note 150, at 201. *See also* Myrick v. James, 444 A.2d at 992 ("That which we may not do is to change such a rule or policy once the Legislature has specifically taken it out of the arena of the judicial prerogative, in which it originally placed it, by a positive and definitive statutory pronouncement, legitimately within its own prerogative, of a specific rule or policy.").

155. *See* G. CALABRESI, *supra* note 13, at 99; F. COFFIN, THE WAYS OF A JUDGE 51-63 (1980).

156. The doctrine of the "equity of the statute" included both the justification for broad interpretation of the terms of the statute to include doubtful cases of coverage, and the application of the principles announced in a statute to cases not falling within the literal meaning of the statute. *See* R. DICKERSON, *supra* note 150, at 213.

157. *See infra* notes 160-165 and accompanying text.

158. R. DICKERSON, *supra* note 150, at 213; Traynor, *Statutes Revolving in Common Law Orbits*, 17 CATH. U.L. REV. 401 (1968); Landis, *Statutes and the Sources of Law*, HARVARD LEGAL ESSAYS 213 (1934), *reprinted in* 2 HARV. J. ON LEGIS. 7 (1965);

introduced the doctrine as a tool for harmonizing particular statutory and common law rules with broader general principles that dominate the legal landscape.

The recognition that the contemporary common law supports recovery for wrongful death, therefore, raises the ultimate question of whether the Maine Law Court should allow the common law to supplement the provisions of the statute beyond the process of honest interpretation so that the law of wrongful death can, to the greatest extent possible, conform to modern developments in Maine law.[159]

Perhaps the most influential modern decision applying the doctrine of the "equity of the statute" is *Moragne v. States Marine Lines*.[160] In that case, the Court was confronted with the question whether congressional maritime wrongful death acts preempted the creation and application of a general maritime action.[161]

> [T]he legislature may, in order to promote other, conflicting interests, prescribe with particularity the compass of the legislative aim, erecting a strong inference that territories beyond the boundaries so drawn are not to feel the impact of the new legislative dispensation. We must, therefore, analyze with care the congressional enactments that have abrogated the common-law in the maritime field, to determine the impact of the fact that none applies in terms to the situation of this case.[162]

The Court concluded that Congress had "given no affirmative indication of an intent to preclude the judicial allowance of a remedy for wrongful death to persons in the situation of this petitioner."[163] The Court then held that the plaintiff could bring suit in wrongful death under the general maritime law.[164]

In *Moragne*, the Supreme Court did not determine the precise

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Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4 (1936).

159. *See* S. SPEISER, *supra* note 25, § 1.6 (recognition of common law death action could result in allowance of action based on "otherwise unavailable" theories of liability, expand the class of beneficiaries and possible elements of damage, eliminate caps on total monetary damages, and lengthen or eliminate limitations periods).

160. 398 U.S. 375 (1970).

161. "General maritime law" is that body of admiralty law developed by judicial law-making; it is in contradistinction to statutory maritime law and is, therefore, a precise analog to a state's "common law." In *Moragne*, the plaintiff's decedent, a longshoreman, had died on a ship in Florida state waters, where no wrongful death statute, federal or state, provided recovery. Under Florida law, a wrongful death action could not be brought on the basis of the unseaworthiness of the vessel, a form of strict liability. On the other hand, the decedent was not covered under the federal Death on the High Seas Act [hereinafter DOHSA], which did include unseaworthiness as a ground of liability, but which applied only to persons who died on the high seas beyond state territorial waters. *Id.* at 398. The precise issue faced by the Court was whether the plaintiff could bring suit under a nonstatutory general maritime action based on unseaworthiness.

162. Moragne v. States Marine Lines, 398 U.S. at 392-93.

163. *Id.* at 393.

164. *Id.* at 402, 409.

content of the general maritime death action, such as the class of beneficiaries, the limitations period, or elements of damage. The Court simply stated that lower courts should look for guidance to the provisions of related state and federal wrongful death acts.[165]

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165. *Id.* at 405-408. Unfortunately, the Supreme Court's development of the content of the general maritime wrongful death action has proved to be uninspired. In Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974), the Court faced the issue of whether the plaintiff could recover damages for the nonpecuniary loss of society under a general maritime claim for the wrongful death of her husband, a longshoreman who had died in state territorial waters. The Court held that, because most state wrongful death statutes allowed recovery for loss of society, the general maritime wrongful death action would allow similar recovery, *id.* at 591, even though neither related federal statute—the Jones Act or DOHSA—allowed recovery for nonpecuniary damages. Because the decedent had died in state territorial waters, no federal statutes were directly implicated in *Gaudet*. The Court did not have to consider, therefore, whether any federal statute precluded recovery for loss of society as an element of damages under the general maritime wrongful death action.

The Court was later faced with this issue, however, in Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978), where the decedents had died on the high seas, the maritime domain covered by DOHSA. The plaintiffs, therefore, sought recovery in an area where DOHSA was applicable and where the decedent was otherwise covered by DOHSA. In *Higginbotham*, the Court implicitly recognized the plaintiffs right to bring a general maritime action, *id.* at 625, but, unlike *Gaudet*, the Court refused to allow damages for loss of society. The Court held that the specific provision of DOHSA which did not allow damages for nonpecuniary losses was an explicit limitation on the measure of damages available to the plaintiff under the general maritime action. *Id.* The Court then made an untenable distinction between proper and improper "supplementation" of DOHSA.

> There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.

Id.

This same "logic" was recently employed in Miles v. Apex Marine Corp., 111 S.Ct. 317 (1990), to deny the plaintiff recovery under the general maritime wrongful death action for loss of society of a Jones Act seaman who died in state territorial waters. The facts of *Miles* are foursquare with those in *Gaudet* except that in *Miles* the decedent was a seaman otherwise covered by the Jones Act, while in *Gaudet* the decedent was a longshoreman not covered by either the Jones Act or DOHSA. The *Miles* Court first held that the plaintiff could bring suit on the theory of unseaworthiness under the general maritime cause of action, but then held the plaintiff was not entitled to recover for loss of society because the Jones Act precluded this type of recovery. *Id.* at 323-25.

Although the results in *Higginbotham* and *Miles* are defensible and correct because they promote uniformity under the maritime law and give appropriate weight to the primary expressions of public policy in the maritime field (the Jones Act and DOHSA), the ultimate holdings and related dicta are not. In these decisions the Court unwisely and unnecessarily narrowed the scope of the federal judicial power to supplement the maritime law of wrongful death. The logic of *Higginbotham* and *Miles* is simply no logic at all. There is no principled basis for the distinction between supplementation that permits, in *Miles*, a general maritime death action for a "true seaman" on the theory of unseaworthiness but does not permit importing from the

The Maine Law Court should similarly find that the state's wrongful death statute does not preclude the court from supplementing the statute through the common law process. The enactment of the wrongful death statute by the Legislature, like the congressional enactment of wrongful death statutes in the maritime domain, was a response to prior court decisions that held the common law did not allow recovery for wrongful death. Rather than evidencing a legislative desire to preempt the field of wrongful death,

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general maritime law an element of damages. The distinction cannot rationally rest on vague determinations regarding legislative "silence" versus "speaking directly," or a statute "leaving an area open" versus an area "covered by a statute." *Id.* at 325. For in the Jones Act, the Congress surely spoke as clearly on the basis of allowed liability, i.e. negligence only, as it did on the element of damages. Yet the *Miles* court found that a general maritime action based on unseaworthiness was not precluded by the Jones Act, but nonpecuniary damages were. The only proper distinction for determining whether a court is preempted from using the common law to supplement a statute is whether the legislative body intended, *in the first instance*, to preempt the particular field of law addressed by the entire statute. Once a court determines that threshold question and decides it may use common law principles to supplement the statute, no individual provision of the statute should preclude the court's development of the specific content of that action or rule, unless the provision specifically indicates that it preempts the field. The related statutes, rather than being rendered meaningless, however, become the *primary* sources of law for guiding the further development of the supplemental action.

In *Moragne*, Justice Harlan explained that some statutes may preclude further judicial law making in a particular field, while others may not, and the first task of a court was to make this determination.

> The legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect. In many cases the scope of a statute may reflect nothing more than the dimensions of the particular problem that came to the attention of the legislature, inviting the conclusion that the legislative policy is equally applicable to other situations in which the mischief is identical. This conclusion is reinforced where there exists not one enactment but a course of legislation dealing with a series of situations, and where the generality of the underlying principle is attested by the legislation of other jurisdictions. . . . On the other hand, the legislature may, in order to promote other, conflicting interests, prescribe with particularity the compass of the legislative aim, erecting a strong inference that territories beyond the boundaries so drawn are not to feel the impact of the new legislative dispensation. We must, therefore, analyze with care the congressional enactments that have abrogated the common-law rule in the maritime field, to determine the impact of the fact that none applies in terms to the situation of this case.

Moragne v. States Marine Lines, 398 U.S. 375, 392-93 (1970). After determining that no federal death statute precluded the court from creating a general maritime law cause of action, Justice Harlan stated that the content of the cause of action would be guided, *not determined*, by related federal statutes and state wrongful death acts, and that substantial deference should be given to federal statutes, especially DOHSA. *Id.* at 393, 408. The *Miles* and *Higginbotham* Courts erred, therefore, by finding that the Jones Act precluded the court from supplementing the act on the issue of damages. The *Gaudet* Court, on the other hand, erred by not looking to DOHSA and other federal maritime law as the primary sources of law.

the statute and its subsequent amendments were merely designed to curtail a harsh judicially created rule.[166] The act does not explicitly or implicitly suggest that the Legislature intended to preclude courts from exercising their common law-making powers in the field of wrongful death.[167]

Given the important common law-making power of the Maine Law Court, *and* the constitutionally based right to relief for damages suffered from a private wrong,[168] the court should recognize a strong presumption against legislative preemption. In fact, the Law Court has already required an explicit statement from the Legislature before a particular area of law will be deemed preempted by statutory enactments.[169] The Law Court should find that the historical context of the passage of the act and the absence of any positive legislative expression to preempt the field of wrongful death law allow the court to exercise its judicial lawmaking powers to supplement the law of wrongful death beyond the interpreted terms of the statute. The nature of the death action as primarily a creature of statute, however—and this cannot be overemphasized—emphatically requires any supplementation to closely adhere to the framework of the statutory action. Principles of judicial prudence and the need to give due deference to legislative policy are particularly compelling in those areas of law, such as wrongful death, that are primarily governed by statutory law.

The Law Court should determine that the wrongful death statute was not intended to preclude the further development of a supple-

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166. *Cf.* Davies v. City of Bath, 364 A.2d 1269 (Me. 1976), discussing the effect of various statutory enactments which limited the broad common law rule of governmental immunity: "[T]he true sense of the law of the enactment as a whole was solely to *curtail* the judicial doctrine and to *cut down* the defense of governmental immunity . . . ." *Id.* at 1271 (quoting Blier v. Town of Fort Kent, 273 A.2d 732, 737 (Me. 1971)).

167. Justice Tobriner of the California Supreme Court stated the point well.

> In enacting the wrongful death statute, our Legislature probably initially conceived that it was creating a right of recovery unknown to the common law. But from this premise alone, I am unable to divine an affirmative legislative intent to *preclude* further judicial development. I find nothing in the statute or its history which anticipates and forbids the evolution of recovery for wrongful death into a universally recognized right of common law status . Judicial expansion and refinement of legal concepts characterizes the common law-any legislative intent to foreclose such traditional judicial activity should require positive expression.

Justus v. Atchison, 19 Cal. 3d 564, 586, 139 Cal. Rptr. 97, 111, 565 P.2d 122, 136 (1977) (Tobriner, J., concurring).

168. *See, e.g.*, Gibson v. National Ben Franklin Insur. Co., 387 A.2d 220 (Me. 1978).

169. *See* Anderson v. Neal, 428 A.2d 1189, 1191 (Me. 1982) ("We agree with the Massachusetts Supreme Judicial Court that, absent explicit legislative direction, definition of the time of accrual of causes of action for professional malpractice remains a judicial function."). *See also* Myrick v. James, 444 A.2d 987, 993 (Me. 1982).

mental cause of action for wrongful death. The court, however, should defer to the terms of the statute as the primary, but not exclusive, source of law in the area of wrongful death. The objective of the common law-making function in the context of supplementing the coverage or scope of a statute is to bring a particular area of the law into conformity with other, newly developed principles of law. Confining a cause of action to the terms of the most closely related statute defeats the goal of harmonizing particular statutory rules with the broader, ever-changing legal landscape. On the other hand, developing a completely independent cause of action, divorced from the primary statutory enactments, also defeats the fundamental objective of shaping common and statutory law into a coherent body of law.

So that the court supplements the death statute without creating an entirely independent, and potentially inconsistent, common law wrongful death action, the court should adopt the following guidelines. Judicial deference should be expressed by fully respecting the terms of the statute as the primary framework of wrongful death law in Maine, and by allowing supplementation of the statute only in the most compelling situations, primarily where the lack of supplementation would result in the complete denial of recovery. Judicial deference should be further expressed by allowing supplementation only in situations that are closely analogous (like cases being treated alike) to the coverage afforded under the statute. Although the court should be guided by common law rules and principles, by the law of other jurisdictions, and by scholarly writings, the primary source of law should be legal principles or rules announced by the Legislature through statutory enactments that relate closely to the law of wrongful death. Finally, the development of the supplemental cause of action for wrongful death should not be developed "whole" through the announcement of detailed rules, but gradually through the incremental, "molecular" process of change typical of the common law.

CONCLUSION

On March 31, 1991, the Maine wrongful death act observed its 100th anniversary. As this Article has shown, prior to its enactment, the Law Court, like all courts in America and England, considered an action in wrongful death beyond the pale of the common law. After its enactment, the Law Court, again in step with other jurisdictions, employed a rule of strict construction to limit the scope of the act. The court also refused to extend the statute beyond its specific terms because the statutory cause of action preempted the field of wrongful death. More recently, the court has restricted the scope of the statute by interpreting its terms by reference to the detailed provisions of the Maine Uniform Probate Code. This Article has ar-

gued that all these approaches inappropriately limit recovery under the death action, and, as a result, prevent Maine courts from harmonizing the law of wrongful death with the broader, more dynamic legal landscape. If the court continues along the same path, the effect will be to distance the law of wrongful death from other closely related fields of law, most notably the law of torts and the law of domestic relations.

As the wrongful death statute enters its second century, the Law Court should invigorate the statute by discarding the current three approaches to its application and interpretation. Instead of the rule of strict construction, the court should adopt a rule of "fair" construction. Instead of a rigid reliance on the provisions of the Probate Code, the court should look to all relevant fields of law, but especially to the law of torts and of domestic relations. Finally, instead of viewing the death statute as a preemption of the law of wrongful death, the court should use the common law to create a supplemental cause of action in those compelling cases where the "reasoning" of the statute applies, but where its words do not reach.

In order to contrast the application of the current rules with the method of analysis proposed by this Article, the following hypothetical is offered.

The Case of the Adult "Minor Child"

The death statute provides that minor children of the decedent are the sole beneficiaries in those cases where there is no surviving spouse.[170] Suppose a case, however, where a twenty-five-year-old man with two siblings under the age of 18 was totally dependent on the financial and personal (care-giving) support of his mother, the decedent, a single parent. Further suppose that the adult child is severely mentally disabled. After the personal representative brings suit under the death statute on behalf of all three children as beneficiaries, the defendant files a motion to drop the adult, mentally retarded child from the suit because he is not a "minor" child. This motion confronts the court with the issue of whether the adult child should be considered a "minor child" under the death statute itself, or if not, whether the child should be a beneficiary under a common law supplemental action.

Under the current interpretive rules, the meaning of "minor child" would be determined by reference to § 1-201(24) of the Maine Uniform Probate Code which defines "minor" as "a person who is under 18 years of age." Because of the requirement of strict construction, there would be little semantic leeway to define the term "minor child" beyond this explicit provision of the Code. It therefore appears unlikely that the adult child could be included within the phrase "minor child." Moreover, the Law Court's current rule of

170. ME. REV. STAT. ANN. tit. 18-A, § 2-804(b) (1981).

confining wrongful death actions solely to the terms of the statute would deny the adult mentally retarded child status as a beneficiary under a supplemental common law action despite the fact that the child was completely dependent upon, and was, therefore, substantially damaged by the wrongful death of the decedent-parent.

The methods advocated by this Article would substantially change the analysis of this hypothetical case, if not necessarily the ultimate result. The court would first analyze whether the Legislature intended, either explicitly or implicitly, to include within the class of beneficiaries an adult, mentally disabled child who was totally dependent, both financially and personally, on the decedent.

Legislative history offers no guidance on the legislative intent underlying the use of the phrase "minor children" in the death statute.[171] The Legislature may have intended to limit the primary beneficiary class to those persons who were actually financially dependent on the decedent. On the other hand, the Legislature may have intended to limit the beneficiary class to those children to whom the decedent had a legally enforceable obligation to provide financial support. Finally, the Legislature may have intended to encompass those children who were financially dependent on the decedent *and* to whom the decedent had a legal duty to financially support.

To determine whether an adult mentally disabled child who was financially dependent on the decedent should be included within the meaning of "minor child," the court should look not to the Probate Code, but to the law of domestic relations, specifically to the Uniform Civil Liability for Support Act.[172] Sections 442 and 443 of the Act provide that every man and woman shall support their children and spouse "when in need." "Child" is defined as "a son or daughter under the age of 21 years *and a son or daughter of whatever age who is incapacitated from earning a living and without sufficient means.*"[173] By the enactment of this statute the Legislature has declared, as a matter of public policy, that every parent has a continuing legal duty to financially support a disabled child even after the child has reached the age of majority. The support statute provides a significant policy-based rationale for a functional interpretation of the term "minor child" in the death statute, an interpretation that would necessarily include those adult children who are so disabled as to be either completely or partially dependent on the decedent parent.

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171. In 1981, the Legislature amended the death statute by adding the qualifier "minor" before "children" in § 2-804(b). No reasons for this change are stated in the Legislative Record.

172. ME. REV. STAT. ANN. tit. 19, §§ 441-53 (1981 & Supp. 1990). P.L. 1955, ch. 328.

173. *Id.* § 441 (emphasis added).

If no such legislative intent could be discovered or if, through the process of interpretation, the court declined to place the disabled, dependent child within a functional definition of minor child under the death statute, the court would next inquire whether the facts suggest that recovery in wrongful death under a supplemental common law death action would be consistent with public policies endorsed by the Legislature and reflected in related bodies of law.

As has been shown, the adult mentally disabled child shares important characteristics with members of the primary class of beneficiaries in the death statute (i.e., minor children and surviving spouses). Not only is the adult child a member of the immediate family of the decedent, but also that child had been financially dependent on the decedent, who, in turn, had a legally enforceable obligation to support the child. In these respects, therefore, the adult mentally disabled child is almost identical to the members of the statutory beneficiary class.

In addition, provisions of the Workers' Compensation Act[174] support the existence of a broad-based legislative intent to protect dependent persons. The definition of "dependency" under the Workers' Compensation Act explicitly includes disabled adult children who have been financially dependent on the decedent parent.[175] By not allowing a supplemental action to proceed in this hypothetical case, the court would create an anomalous situation where the adult disabled child of a decedent parent who died in a work-related accident could receive death benefits, while the adult disabled child of a decedent killed in a non-work-related setting could not recover for his loss.

No discernible public policy would be served by dismissing the wrongful death action in this hypothetical case. Either by the process of interpreting the statute, or through the use of a supplemental death action, the court could better promote existing public policies by allowing the adult disabled child to be a member of the beneficiary class. Given the advantages of harmonizing the death statute with the larger legal landscape, the Law Court should reform its approach to the interpretation and application of the wrongful death act by adopting the methods advocated by this Article.

174. ME. REV. STAT. ANN. tit. 39, § 58 (1989).

175. *See* Lavoie v. International Paper Co., 403 A. 2d 1186 (Me. 1979); Case of DeMerritt, 128 Me. 299, 147 A. 210 (1929).