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Some Order Out of Chaos in Wrongful Death Law

T. A. Smedley*

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I. INTRODUCTION

With the adoption of "Lord Campbell's Act"¹ in 1846, the English Parliament initiated a movement to reform the Anglo-Ameri-

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1. An Act for compensating the families of persons killed by accidents, 1846, 9 & 10 Vict. ch. 93 [hereinafter cited as Lord Campbell's Act]. For general discussions of subsequently enacted legislation in the American states, see D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 8.2 (1973); C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES §§ 93-106 (1935).

can common law with respect to the recovery of damages for wrongful death and the survival of personal causes of action upon the death of a party. Though the reform was long overdue and much needed, the speed and magnitude of the change in the law following the English innovation unfortunately produced a bewildering variety of legislative enactments and judicial interpretations of the pertinent statutes in the United States. As a consequence of this uncoordinated development, fifty-one diverse bodies of law currently exist in this country governing the rights and liabilities of the tortfeasor, the victim-decedent, and the decedent's relatives after a wrongful killing of a person has occurred.² Furthermore, the legal profession and state legislators have not received too-little-and-too-late efforts to achieve some degree of uniformity of the law in this field with any enthusiasm; indeed, the efforts have been thoroughly unsuccessful.³

In this Article, the author endeavors to outline a fair and manageable uniform law on wrongful death. Part II of this Article summarizes the historical development and inadequacies of the diverse types of wrongful death and survival laws in the United States. Part III explores the damages recoverable under the existing statutes. Part IV examines two significant proposals for reforming this area of the law. Finally, parts V and VI contain the author's suggestions for a fair yet manageable wrongful death statute that may serve all jurisdictions.

II. HISTORICAL DEVELOPMENT

Under Anglo-American law of the mid-19th century, the courts did not permit recovery of damages for the wrongful killing of a human being. A person killing a man's horse, sheep, or dog could be held liable for damages, but a person killing the man himself was immune from civil liability. Two long-standing common law rules prevented such recovery.⁴ These two rules were distinct in origin and import, but they overlapped to the extent that both

2. See generally D. DOBBS, *supra* note 1, at 552-56; 1 S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* § 1:9 (2d ed. 1975); 2 S. SPEISER, *supra*, § 15:1. Professor Speiser's Appendix A, 2 S. SPEISER, *supra*, at 644-787, contains the texts of applicable federal and state statutes.

3. This author's own timid attempt in 1960 to suggest a mild form of statutory revision to improve the situation in Tennessee has received little notice and produced no action in the intervening 23 years. See Smedley, *Wrongful Death Actions in Tennessee*, 27 TENN. L. REV. 447, 497-500 (1960).

4. For an extensive discussion of these rules, see Smedley, *Wrongful Death—Bases of the Common Law Rules*, 13 VAND. L. REV. 605 (1960).

precluded civil liability of the perpetrator of a wrongful death. The first rule prescribed that a personal action abates with the death of either party; the second rule provided that the killing of a human being is not a ground for civil cause of action for damages. As applied to a case of tortious infliction of personal injury, the first rule prevented recovery of damages by (1) a surviving victim if the *tortfeasor* died prior to judgment; or (2) the victim's estate if the *victim* died prior to judgment due to the effects of the tortiously inflicted injuries or due to an independent cause not related to the tort. The second rule also operated to prevent recovery of damages by the estate of the victim who died from the effects of the tortiously inflicted injuries, and further prevented recovery by third parties, including relatives of the victim, who sustained loss due to the death of the victim.

The English Parliament passed Lord Campbell's Act with two specific purposes: to create a cause of action for damages for dependents of the victim of the wrongful killing, in order to enable them to recover for the loss of support and other monetary benefits that they presumably would have received if the victim had continued to live, and to provide coincidental relief to society, which might have had to furnish support for the victim's destitute dependents. Many of the American state legislatures followed Parliament's lead during the next half century by enacting similar statutes that (1) *created* a new cause of action, which would not have existed if the victim had not died of his injuries, (2) for the benefit of *dependents* of the wrongful death victim (3) to compensate the dependents for the losses suffered due to the victim's death. These "Wrongful Death-Loss to Dependents"⁵ acts had the effect of abrogating the second common law rule described above, in regard to dependents of the decedent; these statutes did not relate to the first common law rule, as they applied to cases in which both parties to the action—the tortfeasor and the victim's surviving dependents—were still alive.

Other state legislatures took a different approach to the matter, producing "Wrongful Death-Loss to Estate" acts. This type of statute established liability of the killer-tortfeasor by preserving the personal injury cause of action that the victim would have had if he/she⁶ had not died from the effect of the tortiously inflicted

5. This author coined the terms for the acts regarding wrongful death and the preservation of personal injury actions discussed herein.

6. Purely in the interest of saving space, this Article will use the masculine pronouns from this point forward. If she or he prefers, the reader may substitute she, her, hers, or

injuries. Such legislation differed from the Loss to Dependents statutes in that it (1) *continued* a cause of action which would have been recognized at common law had the victim not died (2) for the benefit of the *estate* of the wrongful death victim (3) to enable the estate to recover for the losses that the victim suffered due to the tortiously inflicted injuries. These statutes abrogated the second common law rule and also the part of the first rule that related to cases in which the party who died was the victim of the tort and the death resulted from the tortiously inflicted injuries.

The combined effect of these two kinds of wrongful death statutes, however, still left operational the common law rule that personal causes of action abate with the death of the tortfeasor or with the death of the personal injury victim from independent causes. A third type of legislation removed these two restrictions. The "Survival of Actions" acts completely abrogated the abatement-of-actions common law rule by making personal actions—such as defamation, malicious prosecution, false imprisonment, and privacy violations, as well as actions for personal injuries—survive the death of the tortfeasor or the death of the victim either from the tort or from independent causes.

Of course, the adoption of a Survival of Actions act eliminates any need for a Wrongful Death-Loss to Estate act because the former statute served the purpose of preserving a personal injury cause of action for the benefit of the estate, the very function of the latter statute. Some state legislatures, however, either through oversight or through an overabundance of zeal, enacted both Survival of Actions and Wrongful Death-Loss to Estate statutes. Further, some states appear to have both types of wrongful death statutes, as well as a Survival of Actions statute, in force. Thus, in many states, a wrongful death case might be brought under a Survival of Actions act, adopted in nearly all states, or under one or the other type of wrongful death act, or under both types of wrongful death acts. In sum, even before the courts began the tortuous process of interpreting the new legislation in specific cases, the seeds of confusion were broadly sown.⁷

herself in place of he, him, his, or himself without changing the content of the text.

7. While some states require the victim's personal representative to choose to sue under one or the other of the wrongful death statutes, other states permit parties to sue under both statutes for the same wrongful death. See C. McCORMICK, *supra* note 1, at 338. An obvious but difficult problem arises of apportioning the damages between the different suits whenever parties bring separate suits under different statutes for the same wrongful death, since some of the same items of loss would be recoverable by various parties.

III. DAMAGES RECOVERABLE UNDER EXISTING STATUTES

As the various statutes became the basis of increasing numbers of cases, more confusion and divergence in the law were created by the varying interpretations of the broad and ambiguous provisions of the statutes. It must be noted that the legislatures have not given the courts much guidance on the matter of what damages are recoverable. Many of the statutes state only that the award shall be for "such damages . . . as . . . may be just,"⁸ or "such damages as [the jury] may think proportioned to the injury,"⁹ without much indication of what items of loss the award should include or how to measure appropriate items in dollars and cents.¹⁰

A. *Wrongful Death-Loss to Dependents Statutes*

Cases based on Wrongful Death-Loss to Dependents acts present a threshold question of whether a cause of action arises for the death only if surviving kin were actually dependent on the decedent for support. The specific purpose of the original Lord Campbell's Act clearly required such dependency for a survivor to recover, and some American courts adopted this view.¹¹ American statutes, however, often are not specific on this issue, and many jurisdictions have diluted or eliminated the dependency requirement so that the mere status of members of the family, next of kin, or surviving relatives of the decedent qualifies a person as a beneficiary of a recovery under the statutes.¹²

Regardless of whether or not a jurisdiction imposes a dependency prerequisite, the issue of how to measure the amount of the recovery remains. If actual dependency is required, then, theoretically at least, the jury must determine the extent of the loss of support *each* individual dependent sustained—parents, spouse, children (both minor and adult), siblings, and any others who would have received some financial aid from the decedent had he lived. In cases concerning multiple dependents, any attempt to cal-

8. *E.g.*, CAL. CIV. PROC. CODE § 337 (West 1973).

9. Lord Campbell's Act, *supra* note 1. Lord Campbell's Act has been the model for many American state statutes.

10. *See id.*

11. *See, e.g.*, Kirkpatrick v. Bowyer, 141 Ind. App. 86, 169 N.E.2d 409 (1960); Adams v. Sparacio, 156 W.Va. 678, 196 S.E.2d 647 (1973).

12. *See, e.g.*, Fong Lin v. Probert, 50 Cal. App. 339, 195 P. 437 (Cal. Dist. Ct. App. 1920); Domijan v. Harp, 340 S.W.2d 728 (Mo. 1960); Pancratz v. Turon, 3 Wash. App. 182, 473 P.2d 409 (1970).

culate accurately their several recoveries usually requires very lengthy consideration of the differing needs of these parties. An accurate calculation would depend on such diverse factors as the dependents' ages, health, life expectancies, talents, education, training, dispositions, and abilities to support themselves presently and eventually, as well as decedent's age, health, life expectancy, abilities, education, training, disposition, and legal obligations to provide support. If no dependency is required, then not only are these considerations still relevant, but also attention should be given to the question of which nondependent persons within the broader beneficiary category may have sustained losses from the victim's untimely death, and to the amount of those persons' losses.

An equally difficult problem with which the courts have grappled in applying the Loss to Dependents acts is whether the losses for which dependents (and nondependent relatives, if they are included as beneficiaries) may recover are limited to "pecuniary" losses.¹³ Earlier decisions generally imposed this limitation¹⁴ and essentially confined recovery to the item of loss of support.¹⁵ As the idea of allowing recovery for wrongful death became less strange and radical, however, most courts began to expand the scope of pecuniary damages. This expansion at least includes voluntary contributions beyond the necessities of support that decedent probably would have made to his dependents during his lifetime, and might include as well inheritances decedent's survivors probably would have received at the end of decedent's normal lifetime. Many courts later extended the concept of pecuniary loss beyond support, contributions, and inheritances, to less tangible but still significant benefits that a child or spouse would expect to derive from having a normal family situation—such as the guidance, education, protection, and nurture that a parent ordinarily provides for minor children in the home, and the similar benefits that one spouse provides the other within the marital relationship. However, courts generally excluded, as nonpecuniary in nature,

13. See 1 S. SPEISER, *supra* note 2, § 3:1.

14. See D. DOBBS, *supra* note 1, § 8.4; C. McCORMICK, *supra* note 1, § 98. See *Blake v. Midland Ry. Co.*, 18 Q.B. 93, 118 Eng. Rep. 35 (1852), for the decision establishing the pecuniary limitation in the original wrongful death statute, Lord Campbell's Act.

15. In some states, however, which still require pecuniary loss, a presumption—perhaps conclusive—of such loss apparently arises from the mere fact of close kinship with the decedent. See, e.g., *Brooks v. United States*, 273 F. Supp. 619 (D.S.C. 1967); *Gilmore v. Los Angeles Ry. Corp.*, 211 Cal. 192, 295 P. 41 (1930); *Ellison v. Simmons*, 238 S.C. 364, 120 S.E.2d 209 (1961).

such factors as loss of companionship, society, and love and affection. More recently, a number of jurisdictions have relaxed even this latter limitation, thereby virtually, if not expressly, abandoning the pecuniary requirement in those states.¹⁶ Most courts, however, still reject a plaintiff's requests for damages to compensate the surviving kin of the decedent for their sorrow, grief, mental anguish, or sense of bereavement arising from the death of their kinsman;¹⁷ but in recent decades a few jurisdictions have allowed recovery for these very personal but nonpecuniary losses,¹⁸ especially when the victim is a minor child and the suit for damages is brought on behalf of the parents.¹⁹

In cases in which the survivors likely would not have received any substantial benefits from the decedent by way of support, contributions inheritance, or services, the hard-line majority approach may lead to undesirable results. Unless the courts allow recovery for such rather tenuous and highly immeasurable harms as grief, sorrow, and loss of love and affection, no basis usually will exist for awarding any considerable amount of compensatory damages, and so defendants often will be virtually immunized from liability for their wrongdoing.

16. See *Selders v. Armentrout*, 190 Neb. 275, 207 N.W.2d 686 (1973); *Jones v. Carvell*, 641 P.2d 105 (Utah 1982). On these developments in the law, see generally *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 584-88 (1974). For a review of the changing law in California from 1862 to 1977, see *Krouse v. Graham*, 19 Cal. 3d 59, 67-69, 562 P.2d 1022, 1025-26 (1977).

17. See, e.g., *Blaskey v. Wheatley Trucking, Inc.*, 482 F.2d 497 (6th Cir. 1973) (interpreting Ohio law); *Krouse v. Graham*, 19 Cal. 3d 59, 562 P.2d 1022, 187 Cal. Rptr. 863 (1977); *Robertson v. White*, 11 Ill. App. 2d 177, 136 N.E.2d 550 (1956); *Deem v. Town of Newmarket*, 115 N.H. 84, 333 A.2d 446 (1975); *DeSanto v. Bahino*, 168 N.J. Super. 582, 403 A.2d 959 (App. Div. 1979).

18. See, e.g., *City of Tuscon v. Wondergem*, 105 Ariz. 429, 466 P.2d 383 (1970); *Fountain v. Chicago, R.I., & Pa. Ry.*, 243 Ark. 947, 422 S.W.2d 878 (1968); *Mishoe v. Atlantic Coast Line R.R. Co.*, 186 S.C. 402, 197 S.E. 97 (1938); *Wilson v. Lund*, 80 Wash. 2d 91, 491 P.2d 1287 (1971).

19. See, e.g., *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983) (overruling 20 earlier Texas decisions dating back to 1877). In *Sanchez*, the court emphasized that the decedent was a young child whose parents could show little, if any, pecuniary loss from the death. The cost of rearing a child during minority would almost surely be more than the value of the services and the earnings of the child during minority; consequently, if recovery were confined to monetary losses, defendant would not be liable for compensatory damages. Thus, this decision may not be sound authority for allowing damages for nonpecuniary losses in adult-death cases.

B. *Wrongful Death-Loss to Estate and Survival of Actions Statutes*

The Wrongful Death-Loss to Estate acts and the Survival of Actions acts also have permitted divergent interpretations of what items of loss may constitute the bases for the recovery of compensatory damages and of how the specific amounts of such damages should be measured.²⁰ Inasmuch as these statutes preserve the cause of action the decedent would have had if he had not died from the injuries inflicted by the tortfeasor, a logical rule would allow the victim's estate to recover for generally the same items of loss, in amounts measured by the same processes, that the decedent would recover if he had survived the tort in a permanently and totally disabled condition. Of course, this "logical" rule would be subject to some modifications necessitated by the victim's death. Under this approach the court could award damages for two components of harm that the decedent suffered. First, the estate could recover for the decedent's medical expenses, physical pain and suffering, and mental anguish, unless death was instantaneous or so nearly so as to eliminate any interval in which the decedent could have sustained these elements of harm. Second, the estate could recover damages for the decedent's loss of earning capacity, measured as if he had not been injured by the tortfeasor, from the time of the injury to the end of decedent's preinjury life expectancy, minus the amount that decedent would have devoted to his own living expenses during his normal life expectancy. Most courts deduct this latter amount because the victim's death precluded the need for those expenditures.²¹ While the logical basis of this general approach has been recognized in many jurisdictions, its actual application in Loss to Estate cases has been subjected to numerous local variations—some of which make sense and some of which, unfortunately, do not.²²

20. See generally C. McCORMICK, *supra* note 1, § 96; 1 S. SPEISER, *supra* note 2, § 3:2.

21. To put this latter item a bit cold-bloodedly, the tortfeasor has relieved his victim of the burdensome necessity of supporting himself for the rest of his expected lifetime, and in effect, has "mitigated" the damages.

22. For example, the California Survival of Actions statute, CAL. PROB. CODE § 573 (West 1961), which serves the same purpose as a Wrongful Death-Loss to Estate act in preserving the cause of action that decedent would have had if he had not died from the injuries, expressly forbids awarding "damages for pain, suffering, or disfigurement," even though decedent actually may have sustained such damages between the time of injury and death and could have recovered those damages in a personal injury suit if he had not died. Further, the same section limits the recovery to "such loss or damage as the decedent sustained or incurred prior to death." *Id.* In any case in which the victim lives for a substantial

Of course, determining the specific amount of damages to award the estates of wrongful death victims for these items of loss inevitably is a difficult and complex process. The determination requires placing a dollar value on such nonpecuniary harms as physical pain and suffering and mental anguish that the victim endures when he is under the threat of impending death. It also mandates the calculation of the length of a specific individual's life expectancy, the dollar amounts he probably would have been able to earn, and the cost of his own support during the years of his life expectancy had he been allowed to live out that prospective term. Finally, it necessitates consideration of such imponderables as whether and how much the total damages should be discounted to reduce the award to its present value, whether and to what extent future inflation should be considered in fixing the award, and whether and how the measurement of the damages should be affected by income taxation. Nevertheless, fixing the amount of damages in Loss to Estate cases appears to be a simpler and more manageable process than the comparable process in the Loss to Dependents cases, wherein lie most of the above mentioned complexities, in addition to others discussed previously in regard to fixing the separate losses of several individual beneficiaries.

C. Other Problems With Respect to Damages Under All Three Types of Statutes

Further conflicting results in cases decided under the relevant statutes in the fifty-one American jurisdictions occur with respect to (1) whether funeral expenses are recoverable as damages, (2) whether punitive damages are appropriate, and (3) whether the award in death cases is subject to the claims of creditors of the estate.

1. Recoverability of Funeral Expenses

The courts have adopted three approaches to the recoverability of funeral expenses in cases brought under Survival of Actions acts and Wrongful Death-Loss to Estate acts.²³ Some courts

period after the injury, and thus incurs medical expenses and also sustains loss of earning capacity damages both before and after death, two suits must be brought to recover full damages—one under § 573 for the losses sustained before death, and another under CAL. CIV. PROC. CODE § 377 (West 1973) for the losses sustained after death. Section 377 expressly provides for the joinder of such actions. See generally 1 S. SPEISER, *supra* note 2, at § 3:2.

23. See 1 S. SPEISER, *supra* note 2, at §§ 3:58, 3:66.

allow reasonable funeral expenses. The propriety of such an award, however, is questionable because the decedent eventually would have died, and his estate at that point would have borne some burial costs. A defendant, therefore, may argue that he did not cause these expenses to be incurred; he merely may have accelerated their occurrence. Courts that accept the logic of this argument refuse to allow any recovery for funeral expenses. The third approach also agrees with our hypothetical defendant's primary contention, but points to the acceleration to justify the rule that defendant is liable not for the expenses themselves but for interest on reasonable funeral charges during the period between the actual death and the date decedent would have died had he lived out his preinjury life expectancy.²⁴

Under Wrongful Death-Loss to Dependents acts, no rational ground for awarding damages to cover funeral expenses appears to exist since the expenses would not be losses that dependents sustained because of the victim's death. Some courts nevertheless have allowed dependents to recover for funeral expenses, while other courts have awarded such recovery only if the dependents actually paid or were legally liable to pay for decedent's funeral.

2. Recoverability of Punitive Damages

The question of whether punitive damages are recoverable for a wrongful death seems to have a ready answer based on the functions of the relevant statutes. Since the Wrongful Death-Loss to Estate and Survival of Actions acts preserve the personal injury cause of action, punitive damages awards are appropriate in cases brought under those statutes if the tortfeasor's wrongful conduct was of such aggravated nature that the jury properly could have awarded punitive damages if the decedent had survived the tort. Thus, the jury should determine whether tortfeasor's misconduct was "malicious, willful, or wanton," "in conscious disregard of the rights and safety of others," "with reckless indifference to the threat of harm of others," or whether the tortfeasor's conduct warranted punitive damages under whatever other standard the jurisdiction has adopted. On the other hand, since the Wrongful Death-Loss to Dependents acts create a new cause of action to compen-

24. This third approach may lead to the anomalous result that the defendant's liability could be greater here than under the first approach. The interest on reasonable funeral expenses, at current high interest rates, likely could amount to substantially more than the principal amount of the expenses themselves if the decedent is a relatively young person with a long life expectancy.

sate decedent's dependents or next of kin for their own losses arising from the death, a punitive damages award is not logically sustainable in cases arising under these statutes. Such damages do not serve a compensatory purpose and would not cover any losses of decedent's relatives. In some jurisdictions these logical resolutions concerning the issue of the recoverability of punitive damages are accepted;²⁵ in others, courts illogically have excluded punitive damages in cases under Loss to Estate or Survival of Actions statutes and illogically have included punitive damages in cases under Loss to Dependents statutes.²⁶

3. The Claims of Creditors of the Decedent's Estate

The different nature and functions of the different types of statutes also provide the key to determining whether or not an award is subject to the claims of the creditors of the decedent's estate. If logic and reason were to prevail in this area of the law, an award of damages obtained under a Wrongful Death-Loss to Estate act or Survival of Actions act, since it serves as compensation for the loss that the decedent and his estate sustained, would be subject to the claims of creditors of the estate. On the other hand, damages recovered under Wrongful Death-Loss to Dependents acts would be exempt from the claims of the decedent's creditors to serve more fully the statutory purpose of providing dependents of the decedent with some source of support and thereby relieving society of the burden of supporting them. Since legislatures and courts do not always act on the basis of logic and reason, the nature of the statutes in point does not always determine the rights of the decedent's creditors to obtain payment out of wrongful death damages awards.²⁷

One could say more about the complexity and diversity of the

25. See *Dunwoody v. Trapnell*, 47 Cal. App. 3d 367, 120 Cal. Rptr. 859 (1975) (punitive damages recoverable under survival of actions statute, CAL. PROB. CODE § 573 (West 1961)). But see, e.g., *Tarasoff v. Board of Regents*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (no punitive damages recoverable under Wrongful Death-Loss to Dependents statute, CAL. CIV. PROC. CODE § 377 (West 1973)).

26. See, e.g., *Burron v. Edwards*, 42 Colo. App. 141, 594 P.2d 1064 (1979) (holding that the Colorado Survival Act did not allow awards of punitive damages); *Martin v. United States Security Servs., Inc.*, 314 So. 2d 765 (Fla. 1975) (holding that the court may award punitive damages under a Loss to Dependents statute).

27. See, e.g., TENN. CODE ANN. §§ 20-5-106, -108, (1980). Though the Tennessee statute primarily is a Wrongful Death-Loss to Estate act, damages awarded under the statute are free from the claims of decedents' creditors. See *Black v. Roberts*, 172 Tenn. 20, 108 S.W.2d 1097 (1937); *Throgmorton v. Oliver*, 144 Tenn. 282, 230 S.W.967 (1921).

law regarding recovery of damages for wrongful death, but the foregoing surely suffices to indicate a substantial need for a move toward greater simplicity and uniformity.²⁸ This Article next surveys two proposals for reforming the law concerning recovery for wrongful death.

IV. REFORM PROPOSALS

A. *The Model Survival and Death Act*

Of the several proposals for achieving such reform, this author notes two widely differing approaches—that of the Model Survival and Death Act²⁹ and that of Stuart Speiser.³⁰ The National Conference of Commissioners on Uniform State Laws introduced a reform proposal in 1977 as one of its Uniform Acts, but two years later its designation was changed to “Model Survival and Death Act.”³¹ Although the Model Act attempts to cover both wrongful

28. See 2 S. SPEISER, *supra* note 2 § 15:1.

29. See *infra* notes 31-37 and accompanying text.

30. See *infra* notes 38-54 and accompanying text.

31. UNIF. LAW COMMISSIONERS' MODEL SURVIVAL AND DEATH ACT, 8A U.L.A. 591 (1983). The relevant portions of the Model Act appear below:

Uniform Law Commissioners' Model Survival and Death Act

§ 1. [Definitions]

As used in this Act:

(1) “Actionable conduct” means an act or omission that causes the death of a person for which the person could have brought and maintained a personal injury action if he had not died; the term includes an act or omission for which the law imposes strict liability or liability for breach of warranty.

(2) “Survivors of a decedent” means:

- (i) the surviving spouse, ascendants and descendants of the decedent, and
- (ii) individuals who were wholly or partially dependent upon the decedent for support and were members of the decedent's household or related to the decedent by blood or marriage.

(3) “Closely-related survivors” means the surviving spouse and ascendants and descendants of the decedent.

§ 2. [Survival Actions]

(a) An action or a [claim for relief] [cause of action]:

(1) does not abate by reason of the death of a person to or against whom it accrued, unless by its terms it was limited to the person's lifetime;

...

(b) Damages recoverable in behalf of a decedent under this section for an injury causing his death are limited to those that accrued to him before his death, plus reasonable burial expenses paid or payable from his estate. Damages so recovered become a part of the decedent's estate and are distributable in the same manner as other assets of the estate. This section does not affect the measure of damages allowable under the law for any other damages recoverable under any other [claim for relief] [cause of action].

§ 3. [Death Actions]

(a) With respect to any death caused by actionable conduct, the decedent's personal representative, acting in a fiduciary capacity on behalf of the survivors of the decedent,

death and survival of actions matters, the substantive provisions are all contained in four short sections totalling only about 750 words, nearly one-third of which serve only to define terms appearing in the statute and to designate the procedure for compromising wrongful death claims. Obviously, such a brief statute must ignore entirely a number of controversial points with which the courts have struggled under state legislation. Furthermore, the wrongful death section includes alternative provisions relating to several matters on which different jurisdictions have adopted differing rules.³² The inclusion of these alternative provisions, which allow different legislatures to establish diametrically opposite provisions into the law of different states, obviously undercuts the goal of uniformity in this area and dilutes the proposal's value as a Model Act.

In addition to these objections pertaining to lack of uniformity, the proposed Act in some significant respects restricts the extent of recovery of damages by surviving kin of the decedent. For

may bring and maintain a death action against any person or the estate of any person legally responsible for the damages, including an insurer providing applicable uninsured or underinsured motorist coverage. The death action is subject to all defenses that might have been asserted against the decedent had he survived.

...
(d) In the death action, damages awarded to survivors of a decedent are limited to the following elements:

(1) Medical expenses incident to the injury resulting in death and reasonable burial expenses, paid or payable by the survivors, to the extent that the decedent's estate could have recovered under Section 2 had the payments been made by the decedent or his estate; [and]

(2) The [present] monetary value of support, services, and financial contributions they would have received from the decedent had death not ensued[.] [; and]

[(3) For closely-related survivors, [reasonable compensation for decedent's pain and suffering before death if not separately recoverable under Section 2, and] reasonable compensation for mental anguish and loss of companionship [not exceeding the sum of \$—].]

(e) Punitive or exemplary damages [are not recoverable] [are recoverable only if they would have been recoverable by the decedent had death not ensued].

(f) The trier of fact shall make separate awards to each of the survivors entitled to damages. Conduct of a survivor which contributed to the death is a defense to the survivor's recovery to the same extent as in other actions.

...
§ 4. [Joinder of Actions]

Actions under Sections 2 and 3 are separate actions but shall be joined for trial if they are based upon the same actionable conduct. Separate verdicts and awards shall be rendered in each action.

32. See *id.* § 3(d)(2) (concerning the discounting of awards to reflect present value); *id.* § 3(d)(3) (concerning recovery by close relatives for decedent's pain and suffering and for their own mental anguish and loss of companionship); *id.* § 3(e) (concerning punitive damages).

example, section 1 defines "survivors," for whose benefit the decedent's personal representative may bring wrongful death actions under section 3(a), to include the spouse and descendants of decedent, but no other persons unless they were actually dependent on decedent for support *and* were members of decedent's household or were related to him by blood or marriage. These latter persons can recover only the monetary value of the support, services, and financial contributions that they would have received from the decedent.³³ Section 3(f) appears to require that separate proof of such losses be produced as to each survivor to justify his recovery. This is an especially heavy burden if numerous other survivors in different classifications exist. Finally, the jury faces a correspondingly difficult and complex task in making separate awards to each survivor entitled to damages. The Model Act also restricts the extent of damages recoverable by the decedent's estate. No award of damages to the estate is provided for in section 3; and section 2(b) restricts damages recoverable on behalf of decedent in survival actions to those damages accruing to decedent before his death, except for reasonable burial expenses paid or payable by the estate. The estate, therefore, cannot recover damages for decedent's loss of earning capacity during the period between his death and the end of this preinjury life expectancy. The purpose of this restriction apparently is to prevent double recovery in a case in which both the estate and survivors bring claims, under sections 2 and 3, respectively, for the same wrongful death.³⁴

Taken together, section 2(b)—no recovery for the estate for future loss of the decedent's earning capacity—and section 3(a)—only "survivors" may recover wrongful death damages—have the effect of virtually immunizing a defendant from liability in any case in which the decedent is killed instantaneously and leaves no survivors as defined by section 1(2). The decedent in such a case sustained no substantial premortem damages, and no persons who qualify as beneficiaries by having lost expected support, services, or contributions from decedent exist. Furthermore, even if the tortfeasor's misconduct causing the wrongful death was malicious, willful, or wanton to a high degree, the tortfeasor would escape liability because the Model Act under section 2 does not provide for

33. *See id.* § 3(d)(2).

34. Certainly, to allow the estate to recover for decedent's loss of future earning capacity, and in a separate case to allow dependents to recover for lost support and contributions, which would have been provided from the decedent's earnings had he not been killed, would not be proper.

punitive damages in a suit by the decedent's estate, and punitive damages would not be recoverable under section 3 because no qualifying survivors exist.³⁵ Limiting the recovery to funeral expenses in such cases means that the tortfeasor almost completely avoids liability for causing a wrongful death, and that the decedent's creditors are deprived of a source of money from which to obtain payment of their claims.

Another regrettable aspect of the section 2(b) restriction of damages in survival actions to those damages accruing to decedent before his death is that obtaining full recovery for all losses sustained in any case in which the victim survives for any substantial period after being injured usually necessitates two separate suits—one under section 2 for pain and suffering, medical and funeral expenses, and loss of earning capacity from the time of injury to the time of death, and another under section 3 for losses that the survivors sustain because of the victim's death. Some method should exist to facilitate recovery of all appropriate items through one action.³⁶

The Model Act's handling of punitive damages seems difficult to justify. Since a Survival of Actions statute preserves the cause of action that decedent would have had if he had not died, punitive damages should be recoverable under such a statute if the tortfeasor's misconduct was of an aggravated nature. Section 2(b) of the Model Act, however, does not include punitive damages in the items recoverable by decedent's estate. Furthermore, whereas no rational basis exists for allowing punitive damages in a cause of action created for the purpose of compensating the decedent's dependents for their losses, one of the alternative provisions in section 3(e) of the Act does permit recovery of such damages if the decedent could have recovered them had he not died.

Section 3(d)(3) of the Model Act contains two other questionable provisions, both of which would allow the dependents to recover damages not usually considered justifiable under Wrongful Death-Loss to Dependents statutes. Quite inexplicably, the Model Act accords closely related survivors³⁷ the right to recover for the decedent's pain and suffering if not recovered in an action under section 2. How one could regard the decedent's pain and suffering

35. See Model Survival and Death Act § 3(d)(3).

36. Section 4 does provide for joining for trial the separate actions brought under sections 2 and 3 for the same actionable conduct, but separate verdicts and awards must be rendered in regard to each action.

37. *Id.* § 1(3).

as a loss that even the closest relatives of the decedent sustained is difficult to understand. The second unorthodox allowance of damages to dependents permits compensation for the relatives' own mental anguish and loss of the companionship of decedent. This provision, like the immediately preceding one, conflicts with the general rule that limits dependents' compensatory damages for wrongful death to monetary losses. As already noted, only a small minority of the courts has recognized the dependents' personal grief, sorrow, and anguish as proper bases for awarding damages under either type of existing state wrongful death statutes.

In sum, the Model Act provides a number of unusual and seemingly inconsistent damages provisions. One may wonder whether the drafters of the Model Act tried too hard to please everyone, with a resultant total product that may please no one.

B. *The Speiser Proposal*

Stuart Speiser has proposed a uniform act that is quite different in both form and substance from the Model Act.³⁸ It contains twenty sections and covers ten and one-half pages in the author's comprehensive treatise on wrongful death law, and thus provides a great deal more detail and coverage than does the Uniform Laws Commissioners' Model Act. It also takes a specific stand on matters about which the Model Act contains alternative provisions.

The Speiser Proposal, in contrast to the Model Act, allows only one action to be brought for a wrongful death, but under section 15:6 specifies that this action is for the benefit of both the decedent's survivors and his estate, and in section 15:8 indicates which damages are recoverable for the survivors and which for the estate. This Article first examines the method of ascertaining and dividing the compensatory damages for pecuniary losses. With respect to the amount of such damages, Speiser states rather ambiguously his objective to "compensate [the estate and survivors] for the destruction of decedent's capacity to carry on life's activities,"³⁹ but the Proposal more specifically requires that the trier set the amount by determining "the gross amount of the decedent's prospective earnings over the remainder of his life expectancy . . . [minus] the estimated personal expenses that the decedent would probably have incurred for himself, exclusive of any of

38. See 2 S. SPEISER, *supra* note 2, § 15:22 [hereinafter cited as the "Speiser Proposal" or the "Proposal"].

39. Speiser Proposal, *supra* note 38, § S15:8.

his dependents, over the remainder of his life expectancy"⁴⁰

These damages are then to be divided between survivors and the estate in accordance with several provisions of the Act. The survivors' shares include compensation for the loss of amounts that they would have received from the decedent as contributions to their support,⁴¹ the loss of the decedent's services,⁴² and the loss of reasonable expectancy of inheritances from the decedent's accumulations acquired during his life expectancy.⁴³ After these separate awards for each survivor are set, any remainder in the already determined gross amount of the decedent's prospective earnings minus his estimated personal expenses goes to the estate as compensation for the destruction of his "capacity to carry on life's activities."⁴⁴ If no "survivors" exist,⁴⁵ section 15:9 provides that "the value of decedent's services . . . [for the time from the date of injury to the date of termination of the decedent's preinjury life expectancy] may be recovered for decedent's estate."⁴⁶ It is not clear whether this item of recovery is different from the one referred to in section 15:8, to be measured by the total amount of the decedent's prospective lifetime earnings minus the personal living expenses he would have incurred during his normal life expectancy.⁴⁷

In addition to the recovery of compensatory damages for pecuniary losses specified in section 15:8, a survivor may recover reasonable medical and funeral expenses of the decedent if that survivor has paid them; in other instances, the estate may recover such expenses if it has paid them or incurred liability to pay them.⁴⁸ Further, under section 15:10, survivors may recover for loss of the decedent's society, which includes not only care, attention, protection, parental instruction, education, guidance and training, but also companionship, comfort, kindly offices, filial devotion, and love and affection.⁴⁹ This section does not indicate that deprivation

40. *Id.*

41. *See id.* § S15:9.

42. *See id.*

43. *See id.* § S15:12; *see also id.* § S15:8 (summarizes and elaborates upon §§ S15:9, :12).

44. *Id.* § S15:8.

45. "Survivors" are persons qualified to recover for the decedent's death and are defined in Speiser Proposal, *supra* note 38, § S15:4(9).

46. Speiser Proposal, *supra* note 38, § S15:9.

47. *See id.* § S15:8.

48. *See id.* § S15:13.

49. *See id.* §§ S15:10, S15:4(5).

of these benefits must include any pecuniary aspect; and section 15:11 sanctions recovery for the survivors' "grief, mental anguish, solace, emotional pain and sorrow," here expressly without "any 'pecuniary loss'" limitations. For its part, section 15:8 allows the estate to recover⁵⁰ for the decedent's "premortem conscious pain and suffering."⁵¹ Finally, section 15:14 of the Speiser Proposal expressly sanctions the awarding of punitive damages against the tortfeasor, but does not indicate whether the estate or the survivors are the proper recipients of such damages; and the puzzling phraseology of section 15:14 even suggests that the court may award punitive damages to both.⁵²

The work of the jury in fixing the damages is enormously complicated by the mandate in section 15:16 that, in regard to all awards, "the trier(s) of the facts shall state separately, in any verdict, finding or report, the amount awarded to each survivor and/or to the estate."⁵³ While such a detailed procedure for assessing damages may be regarded as necessary to attain any substantial degree of accuracy in providing compensation for the different types and extents of losses sustained, one well may doubt that juries can handle the intricate and lengthy deliberations required to carry out this directive faithfully in cases in which claims are made on behalf of numerous survivors of varying ages, conditions of health, and degrees of dependency. Setting damages in cases which require the determination of the amounts of the various awards to be made to the estate when decedent did not die soon after sustaining the fatal injury would be even more complex.

In an unusually liberal extension of the benefits available in wrongful death actions, section 15:8 declares that "[i]nterest from the date of the decedent's death upon the total principal sum recovered by the plaintiff under all applicable sections of this Act shall be added to the total sum awarded by the clerk of the court."⁵⁴ Contrary to the long-standing general law in most American jurisdictions,⁵⁵ Speiser apparently intends to make the recovery of interest a matter of right on highly unliquidated damages, purely nonpecuniary losses, and even punitive damages. The insertion of this surprising provision would no doubt have the salutary

50. *See id.* § S15:11.

51. *Id.* § S15:8.

52. *See id.* § S15:14.

53. *Id.* § S15:16.

54. *Id.* S15:8.

55. *See D. DOBBS, supra note 1, at 165; C. McCORMICK, supra note 1, §§ 56-57.*

effect of stimulating good faith efforts by a defendant to make prompt settlement of a wrongful death claim and also would serve to compensate a plaintiff for the loss of use of the damages award from the time that the defendant caused the past losses to the time that the court entered the judgment.

One must commend the author of this proposed statute for his thoroughness of perspective, the degree of detail in the various provisions, and the broad coverage of so many relevant matters—qualities which are calculated to enable legislatures to establish with substantial particularity, in one comprehensive statute, a body of rules to govern recovery of damages for wrongful death. The courts and their juries, theoretically, at least, would be able to perceive the law with such certainty and to apply it with such accuracy that the proper items and amounts of damages would be awarded in the varying circumstances of each wrongful death case. These very features of the statute, however, may render it so complex in design and so cumbersome in application that the very worthy ultimate purpose would remain unattainable. Perhaps this area of the law demands, rather than all-inclusive coverage and complete specificity, greater simplicity of terms and ease of application to facilitate the administration of justice.

V. RECOMMENDED LEGISLATION

This Article suggests the following approach for revising the law and improving the results in regard to the awarding of damages for wrongful death. The proposal attempts, in a single piece of legislation, to achieve the basic purposes of the three existing statutes discussed previously. The proposed legislation would conform closely to a Loss of Estate statute but would include specific provisions for decedent's survivors that actions for the estate's benefit would not protect adequately. The new legislation should be as uncomplicated as is possible consistent with producing rational and workable solutions to the theoretical and practical problems of determining appropriate damages to be recovered in wrongful death cases.

First, the recommended statute should declare that a claim for damages for personal injuries⁵⁶ shall not abate or be extinguished by the death of the alleged tortfeasor or by the death of the alleged

56. The terms of this provision also should include other types of "personal" harms—such as defamation, false imprisonment, malicious prosecution, and violation of privacy—that give rise to "personal actions."

victim from an independent cause not directly related to the alleged tort.⁵⁷ That provision would include two thirds of the substantive coverage of the usual Survival of Actions statutes, and would leave the other one third—the matter of the death of the tort victim as a result of the injuries caused by the tortfeasor—to the parts of the statute dealing with wrongful death causes of action. Omitting this latter item from the first section would eliminate the confusion of interpretations, duplication of suits, and possible double recovery resulting from the overlapping of the three-part Survival of Actions statutes and the wrongful death statutes.

Second, the recommended statute should require that all damages for the death of a person caused by the misconduct of the tortfeasor be recovered in a single suit. This section, as in Loss to Estate statutes, preserves the cause of action for personal injuries that the decedent would have had if he had not died as a result of those injuries but rather had survived in a totally and permanently disabled condition. The fact of the victim's death, of course, would require some modifications in the scope of recovery. Any needs for compensation of survivors of the victim which are not met by the benefits they will eventually receive from the decedent's preserved cause of action should be met by special provisions allowing such compensation, rather than by creating an entirely separate cause of action for the benefit of the survivors.

A. Awards to the Estate

The proposed legislation would permit the estate to recover in a single cause of action compensatory damages for (1) decedent's medical expenses, physical pain and suffering, and mental anguish in the period between the infliction of the injury and death, if the death was not instantaneous, and (2) the loss of earning capacity of the decedent from the time of his injury to the end of his preinjury life expectancy had the tort causing the death not occurred,⁵⁸ minus the amount of the decedent's reasonable personal living ex-

57. This provision also should address such nonsubstantive matters as the proper parties to be made defendant in a suit against a deceased tortfeasor and to be made plaintiff in a suit on behalf of the deceased victim of the tort, within what period of time parties must sue, and that procedure for continuing the suit already brought but not yet prosecuted to judgment before the tortfeasor or victim died.

58. The amount of the decedent's earning capacity would include both (1) the probable earnings decedent would have recovered as a result of his full exploitation of his earning capacity during the remainder of his preinjury work-expectancy years, and (2) the probable amount of pensions and other pecuniary retirement benefits to which he would have been entitled during the expected years of retirement.

penses that would have been incurred during the remainder of his preinjury life expectancy.

Admittedly, such matters as whether to discount the award for loss of future earning capacity to present value, whether the effects of possible inflation in the future should be a consideration in setting the amount of this award, and whether such damages are taxable or exempt from taxation under income tax laws are relevant in fixing the proper amount of damages to compensate for the decedent's actual losses. This Article, however, recommends omitting from the statute any positive rules on these matters, and leaving their resolution to the courts as the individual cases are tried. Although such omissions from the statute would undoubtedly hamper the achievement of uniformity in the law in different jurisdictions, these peripheral matters depend on circumstances which tend to change as years go by. Consequently, specific rules regarding discounting, inflation's effect, and tax considerations which seem proper when legislatures enact a statute may well lead to undesirable decisions a few years or decades thereafter. Furthermore, history certainly indicates that legislatures cannot be relied on to revise the statutes to keep pace with changing conditions, whereas courts can, and are more readily inclined to, shape their decisions to achieve that purpose.

The proposed legislation *should* include specific provisions concerning funeral expenses and punitive damages. While recognizing the logic of the argument against allowing the estate to recover for funeral expenses, this Article recommends the inclusion of a provision under which the tortfeasor would be required to pay, at *his* option, either the amount of reasonable funeral expenses or an amount representing the interest on reasonable funeral expenses from the time of the actual funeral to the time that the victim would have died at the end of his preinjury life expectancy. In addition to these compensatory damages, the statute expressly should empower the jury to award punitive damages to the estate if the tortfeasor's misconduct in causing the death was of the aggravated nature that would have justified a punitive award, under the standard in effect in the jurisdiction, if the victim had survived and sued for damages for personal injuries.

The foregoing paragraphs suggest a relatively simple process for establishing the items of damages that should constitute the principal award to the estate.⁵⁹ This Article next addresses the

59. This Article discusses *infra* the matters of allowing damages to cover the plaintiff's

more difficult problems of setting up a fair and workable system for providing for special needs of the decedent's survivors.

B. Awards to Survivors

The first, and most perplexing, problem concerning the awards to survivors is dividing the estate's damages for loss of earning capacity among the survivors. In most of the cases in which society, or the law as society's spokesperson, has any real concern in this process—that is, when decedent's closest survivors consist of a spouse and minor children—simply dividing this part of the estate according to the laws of intestate succession may well achieve a good measure of “rough” justice⁶⁰—“rough” in that the operation of such a broad general rule will not *always* accurately satisfy the legitimate needs of each particular survivor. Of course, neither are all survivors' needs likely to be met by hit-and-miss results of the distributions determined through mysterious processes by various juries after ponderous deliberations over a mass of ambiguous evidence too complicated to allow for accurate ascertainment of the actual loss of probable support, contributions, and inheritances of each of a number of surviving kin. If the intestate succession statutes provide for a reasonable distribution of intestate estates in general, these same statutes usually should reach equally desirable results in governing the sharing of the part of a wrongfully killed decedent's estate that consists of damages for loss of earning capacity.

The proposed legislation, however, should not blindly endorse the intestate scheme in all circumstances. For the unusual case in which the intestate distribution system would leave some worthy and needy survivors without fair shares of the damages award, the court—judge, *not* jury—would have authority to change the distributive shares so that the particular survivors who need a greater

expenses of litigation and of allowing interest on the principal damages award.

60. Intestate succession statutes are the expressions of the policy-making branch of the government in regard to how decedents' next of kin need to receive the benefits of estates that decedents have not expressly disposed of by wills. The precise distribution of the estate among surviving kinspeople varies under the statutes in different states. Generally, the surviving spouse receives a large share—one third to one half—and the remainder is divided among the children equally. If there is no spouse, the children divide the entire estate; if there are no children, the spouse gets everything. If there is neither a spouse nor children, the parents of decedent are likely to be next in line, and if no parents survive, decedent's brothers and sisters take the estate. If none of the above is surviving, next of kin share the estate. For examples of intestacy statutes, see CAL. PROB. CODE §§ 221-226 (West 1974); 6 TENN. CODE ANN. §§ 31-203 to -204 (1982).

amount of support would receive larger shares of the damages award. Such a resolution of the problem should provide reasonable results in cases in which one or more surviving kin are unable to support themselves because of a physical or mental handicap, or in which some of the surviving minor children need support for a longer time because they are much younger than the others. Additionally, if in any given case the persons dependent on the decedent for support include some individuals who are not of close enough kin to receive benefits under the intestate succession law—such as an unadopted minor child or a handicapped adult who lived as a member of the decedent's household, or a grandchild not being supported by his parents—the proposed legislation would treat those persons as within the primary level of next of kin for the purpose of receiving distributive shares of the estate's damages for loss of earning capacity. Finally, when the surviving children of decedent include both minors and adults, the distribution under the intestate succession statutes would be modified to give the minor children greater shares commensurate with their greater need for support.

The proposed legislation would require the plaintiff's counsel to bring the need for such adjustments to the basic intestate scheme to the attention of the court and to furnish the basic information on which to make modifications in the automatic sharing plan. Judges probably are better able than juries to make these determinations because they are, generally speaking at least, legal experts familiar with the law of damages and its operation. Furthermore, the legislation could authorize the judges to refer the sharing problems to commissioners with more expertise in this area and thus relieve juries of lengthy deliberations that delay the reaching of final verdicts setting the overall damages award.

The proposed legislation would authorize an additional award of damages to surviving members of the decedent's household for loss of services in the home. The losses incurred by such persons, especially the spouse and minor children, from the death of their kinsperson usually include not only expected monetary support, contributions, and inheritances, but also less tangible but nevertheless quite significant elements such as counsel, protection, guidance, education, nurture, and training. Inasmuch as these benefits are impossible to identify, quantify, and evaluate with any substantial degree of certainty, the proposal would leave the determination of the amounts of these awards to the discretion of the jury. The several jurors, in regard to these kinds of losses, are probably

better qualified through the experiences of their own lives to make these determinations than an individual judge acting as a professional legal expert.

Since society's interest in providing damages to a decedent's survivors is to compensate survivors for their monetary losses, this model statute should expressly exclude nonpecuniary considerations from damages awards. Thus, personal deprivations such as loss of companionship, love, and affection, as well as the survivors' grief, sorrow, mental anguish, and sense of bereavement would not affect the damages award. The actual reason for supporting nonpecuniary recoveries, though courts and lawyers do not concede it frequently, may well be to grant plaintiffs money to help pay attorneys fees incurred in the litigation. Since, as stated later herein, the proposed legislation forthrightly would provide for an award of reasonable litigation expenses, no need would exist for awarding nonpecuniary damages to serve this purpose by subterfuge.

The perplexing problem regarding nonpecuniary damages points up a further advantage of putting the statute primarily in the form of a Loss to Estate act. In cases of wrongful death of minor children without dependent survivors, no need would exist to rely on ambiguous nonpecuniary damages to prevent the tortfeasors from escaping liability.⁶¹ The principal awards usually would be primarily for loss of the decedent's earning capacity for the rest of his preinjury life expectancy—likely a substantial sum, though admittedly one difficult to calculate with accuracy.

Most of the other elements of damages properly recoverable by the estate—the decedent's premortem physical pain and suffering and mental anguish, punitive damages, and usually medical and funeral expenses—have no relation to any loss that even the closest survivors sustain. Survivors, therefore, have no special claim for sharing in those damages, except through inheritances from decedent. Consequently, these damages would become part of the general assets of the decedent's estate.⁶²

Finally, the proposed legislation would address specifically the matter of survivors' rights as against the general creditors of the estate. Based on a balancing of the interests of the estate's creditors, the interests of the survivors, and the interest of society in having dependents of the decedent receive enough of the damages

61. See *supra* text accompanying notes 17-18.

62. An exception would arise if a survivor had actually paid, or become legally obligated to pay, the decedent's medical or funeral expenses. In this case, the court should award the paying survivor damages for reasonable expenses he incurred.

award to provide for their support without resort to public financial assistance, the statute should exempt the following three awards from estate creditors' claims. (1) Any recovery awarded to the survivors for having been deprived of the decedent's services in the home. These awards relate to personal losses of these individuals and do not represent assets that would have been available to satisfy the decedent's debts if he had not been killed. (2) Any awards specifically designated to actual dependents to compensate them for loss of support, contributions, and inheritance. Unlike the first type of exempted damages, these awards do represent moneys that presumably would have been available to the decedent's creditors to satisfy his debts if he had not been injured. However, society's paramount humanitarian and fiscal concerns justify the exemption of these damages from creditor claims. (3) Awards made to survivors to reimburse them for the medical and funeral expenses that the survivors have paid or have become liable to pay. These recoveries seek to satisfy, directly or indirectly, specific creditor claims that primarily were debts of the estate, and thus should be exempt from the claims of general creditors.⁶³

C. Awards to the Estate and Survivors: Interest and Litigation Expenses

This Article recommends, for several reasons, that no provision be included for the allowance of interest on the principal sum of the damages award. Foremost among these reasons, the largest part of most wrongful death damages awards, whether for the benefit of the estate or survivors, provides compensation for items of loss referable to the *future*. Those losses relate to benefits that decedent or survivors would not have received until some time later in the decedent's life had decedent continued to live without having been injured by the tortfeasor. The estate and survivors, therefore, have not lost the use of money to which they were entitled at some earlier time. Consequently, discounting to present value is usually a more appropriate adjustment to the award than allowing interest. Second, most of the damages, except possibly the medical

63. Other money recovered as compensation to the estate for losses or harms sustained by the decedent, or as punitive damages levied against the tortfeasor because of aggravated misconduct, would be available to satisfy creditor claims. If any money still remains after the debts of the decedent and the estate are paid, those funds would be distributed, in the regular administration of the decedent's estate, to the beneficiaries of the decedent's will if he left a will, or to the survivors by intestate succession if he left no will.

and funeral expenses, are highly unliquidated and unliquifiable in nature. Defendant cannot calculate even approximately the amount of his liability for the wrongful death, and thus cannot pay the proper amount of damages in advance of the verdict even if he desires to do so. Third, while the threat of having to pay interest might motivate defendants to offer reasonable settlements promptly, plaintiffs might use the same prospect to press unduly their demands for unreasonably high settlements and to delay the progress of the litigation in order to build up interest recoveries. Last, little, if any, rational basis for allowing interest on the highly discretionary and speculative awards for nonpecuniary compensatory damages and punitive damages appears to exist.

On the other hand, the proposed legislation should include a provision authorizing recovery of a reasonable amount of compensation for expenses of litigation, including but not limited to attorneys' fees, that the plaintiff reasonably incurred in bringing a successful wrongful death action. Although this award is as unorthodox as an interest allowance, and although the award runs contrary to the traditional view in American states that each litigant must bear his own expenses,⁶⁴ good reasons exist, especially applicable to wrongful death cases, for deviating from what may not be a sound general rule anyhow. First, permitting a jury forthrightly to make a specific award for litigation expenses would curb the common ploy of juries and judges of providing plaintiffs with reimbursement for litigation expenses (1) by inflating the amounts of some awards of legitimate compensatory damages items,⁶⁵ (2) by awarding punitive damages in situations in which the defendant's misconduct was not sufficiently aggravated to justify punishment, or (3) by inflating punitive damages when only mildly aggravated misconduct occurred. If plaintiffs ought to have assistance in paying their litigation expenses, let the deed be done openly rather than by subterfuge. Second, if plaintiffs' counsel are assured of reasonable payment for their services out of designated damages awards, they may be less inclined to demand high percentage contingent fees that reduce the plaintiffs' share of the recovery—an especially pertinent consideration when several of the decedent's survivors have a real and long-term need to rely on the damages for sustenance. Last, the prospect of having to pay the plaintiffs'

64. See D. DOBBS, *supra* note 1, at 194; C. McCORMICK, *supra* note 1, §§ 60-61.

65. The jury is especially likely to inflate such discretionary awards as physical pain and suffering, mental anguish, and loss of the usual benefits of normal family life.

heavy expenses arising from an extended course of litigation might serve to motivate defendants to seek early settlement of wrongful death claims.

VI. CONCLUSION

This Article has addressed the essential aspects of a needed revision of current wrongful death law in America with respect to what damages should be recoverable and to whom they should be awarded. It proposes legislation that would adopt what is basically a Wrongful Death-Loss to Estate statute, but would insert specific provisions to protect certain interests of decedents' survivors which would not be adequately protected by actions brought solely for the benefit of the estates. The primary purpose of this proposal is to achieve more manageable application of the law and yet to attain the essential goals of recognizing civil causes of action for wrongful death.⁶⁶ Acting on these recommendations, expert legislative draftsmen should be able to draw up a specific model statute that would achieve the goals of greater clarity, simplicity, and uniformity in this important area of the law.

66. In the interest of containing the length of this discussion, this Article deliberately omits reference to numerous significant matters that do not directly pertain to the "what and who" of damages awards, but that a complete wrongful death statute should cover.

