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# Wrongful Death Damages in Pennsylvania: A Suggestion for Expanded Recovery

## I. INTRODUCTION

The statutory wrongful death action creates a right in designated beneficiaries of a deceased to recover damages sustained by the survivors due to the loss of life of a family member.<sup>1</sup> Traditionally, damages for these actions have been limited to pecuniary losses only.<sup>2</sup> These losses include recovery for medical bills, funeral expenses and the economic support the deceased would have provided the beneficiaries if he or she had lived.<sup>3</sup> Pennsylvania courts, adhering to this tradition,<sup>4</sup> have interpreted the statute to exclude compensation for emotional losses caused by the death, such as

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1. See 42 PA. CONS. STAT. ANN. § 8301 (Purdon Supp. 1983-1984). The statute reads as follows:

(a) *General rule.*—An action may be brought to recover damages for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another if no action for damages was brought by the injured individual during his lifetime.

(b) *Beneficiaries.*—Except as provided in subsection (d), the right of action created by this section shall exist only for the benefit of the spouse, children or parents of the deceased, whether or not citizens or residents of this Commonwealth or elsewhere. The damages recovered shall be distributed to the beneficiaries in the proportion they would take the personal estate of the decedent in the case of intestacy and without liability to creditors of the deceased person under the statutes of this Commonwealth.

(c) *Special damages.*—The plaintiff in an action under subsection (a) shall be entitled to recover, in addition to other damages, damages for reasonable hospital, nursing, medical, funeral expenses and expenses of administration necessitated by reason of injuries causing death.

(d) *Action by personal representative.*—If no person is eligible under subsection (b) to bring an action under this section, the personal representative of the deceased may bring an action for the damages expressly specified in subsection (c).

*Id.*

2. *Altamuro v. Milner Hotel, Inc.*, 540 F. Supp. 870, 878 (E.D. Pa. 1982). A wrongful death action is to be distinguished from a survival action, in which the estate is substituted for the decedent, and recovery is based upon the rights of action which were possessed by the decedent at his or her death. Utilizing a survival action in Pennsylvania, the estate may recover for the loss of the decedent's past and future earning power, for the decedent's pain and suffering prior to death and for the cost of medical services, nursing and hospital care provided to the decedent. *Incollingo v. Ewing*, 444 Pa. 263, 309, 282 A.2d 206, 229 (1971). See 42 PA. CONS. STAT. ANN. § 8302 (Purdon 1982).

3. See *Altamuro v. Milner Hotel, Inc.*, 540 F. Supp. 870, 878 (E.D. Pa. 1982).

4. *Id.* See 2 FELDMAN, PENNSYLVANIA TRIAL GUIDE § 33.14 (1982).

grief, mental anguish and loss of society and companionship.<sup>5</sup> Thus, what are often the deepest losses—and in fact what may be the only losses in the case of a minor or an adult with no dependents<sup>6</sup>—are not compensable.

The rule has been changing in other jurisdictions.<sup>7</sup> Recently, Texas<sup>8</sup> and New Jersey<sup>9</sup> have departed from tradition and allowed recovery for items not generally considered pecuniary. This comment will trace the historical development of wrongful death damages in Pennsylvania, explore the reasons why this law is now anomalous, and examine the judicial approaches embraced by New Jersey and Texas which are available for adoption by the courts of Pennsylvania.

## II. THE ORIGINS OF WRONGFUL DEATH DAMAGES IN PENNSYLVANIA

A wrongful death action is a statutorily created cause of action.<sup>10</sup> The Pennsylvania legislature enacted its first wrongful death act in 1855;<sup>11</sup> the current statute is the same in substance as the origi-

5. *First Nat'l Bank of Meadville v. Niagra Therapy Mfg. Corp.*, 229 F. Supp. 460, 470 (W.D. Pa. 1964) (applying Pennsylvania law); *Pennsylvania R.R. Co. v. Zebe*, 33 Pa. 318, 330 (1858).

6. See Decof, *Damages in Actions for Wrongful Death of Children*, 47 NOTRE DAME LAW. 197 (1971).

7. Thirty-nine states now allow recovery for emotional losses such as loss of companionship or the mental anguish of survivors. Some states limit such damages to death of minor child cases or death of adult cases. See *infra* notes 68-70 and accompanying text.

8. See *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983).

9. See *Green v. Bitner*, 85 N.J. 1, 424 A.2d 210 (1980).

10. The first wrongful death statute, Lord Campbell's Act (Fatal Accidents Act), 1846, 9 & 10 Vict., ch. 93, appeared in England in 1846. Various states adopted statutes similar to the English act in the nineteenth century. W. PROSSER, *LAW OF TORTS* 902 (4th ed. 1971). For three hundred years before the Fatal Accidents Act was passed, there was no civil cause of action at common law for wrongful death. English law, however, had not always taken that position. The accidental killing of a human being was a compensable wrong even before the Norman Conquest. POLLACK & MAITLAND, *THE HISTORY OF ENGLISH LAW* 48 (1895).

Apparently damages were available for wrongful death in some of the colonies, including Pennsylvania, prior to 1750, at which point the English rule of no damages was adopted in Pennsylvania and elsewhere until after Lord Campbell's Act was passed. MORRIS, *STUDIES IN THE HISTORY OF AMERICAN LAW* 252-58 (1959). See also Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043 (1964-1965) which traces the history of very early common law death actions which preceded the nineteenth century statutes.

11. 1855 Pa. Laws 309. An act passed in 1851 provided that when death was caused by violence or negligence and no suit was brought by the injured party during his life, the widow or personal representatives "may maintain an action for and recover damages for the death so occasioned." 1851 Pa. Laws 669. The courts were unclear whether the legislature intended a survival action or a wrongful death action by this language. *Pennsylvania R.R. v. McClosky*, 23 Pa. 526, 530 (1854). Consequently the act of 1851 was replaced by the death

nal.<sup>12</sup> Since the wrongful death statute does not now, nor ever has, specified what damages are recoverable, the law of damages in death actions has been developed by the courts. The Supreme Court of Pennsylvania first ruled on this issue in 1858 in *Pennsylvania Railroad Co. v. Zebe*.<sup>13</sup>

In *Zebe*, parents brought an action to recover compensation for the death of their minor son who was killed by a passing train as he alighted from a passenger car.<sup>14</sup> The trial judge's charge left the question of damages entirely to the discretion of the jury,<sup>15</sup> and the jury awarded a verdict for the plaintiffs in the sum of \$1,500.<sup>16</sup> Reversing the trial court, the supreme court addressed the issue of damages in wrongful death actions, noting: "[I]t is our duty to announce such principles of compensation as we think the legislature intended by the Act in question, that there may be some approximation to uniformity of results in such cases."<sup>17</sup> The court, instead of giving "unrestricted license" to the jury as the trial judge had done, ruled that the damages should be confined to pecuniary losses which the court described as the monetary value of the boy's services to his parents during his minority plus the expense the plaintiffs incurred due to the decedent's medical and funeral expenses.<sup>18</sup>

Justice Thompson, the author of the *Zebe* opinion, took great measures specifically to exclude a recovery for damages resulting from the loss of society or the grief of the survivors. In so doing, he noted that this view was consistent with the English rule prohibiting recovery of damages for loss and suffering of the decedent's family.<sup>19</sup> He further observed that such damages would be speculative.<sup>20</sup> Justice Thompson's final reason for ruling out damages for *solatium* was that he feared such "extravagant and exterminating"

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statute of 1855.

12. There have been modifications in the wording of the act. See Historical Note following 42 PA. CONS. STAT. ANN. § 8301 (Purdon 1982).

13. 33 Pa. 318 (1858).

14. *Id.*

15. The judge stated: "If the jury find for the plaintiff, the question of damages is for the jury entirely." *Id.* at 321.

16. *Id.* at 322.

17. *Id.* at 327-28.

18. *Id.* at 330. In setting forth the pecuniary loss only rule, the court relied on the precedent set by the English courts. See *Blake v. Midland Rep.*, 18 Q.B. 93, 118 Eng. Rep. 35, 42-43 (Q.B. 1852).

19. *Zebe*, 33 Pa. at 329.

20. Justice Thompson observed: "No money could measure the affliction." *Id.* at 330.

damages could ruin the railroads.<sup>21</sup>

The pecuniary loss only rule was restated in *Pennsylvania Railroad Co. v. Vandever*,<sup>22</sup> an 1860 adult death case. In this case, a widow sued the railroad after her husband died as a result of a fall from a railroad car. He fell as he was put off of a passenger car because he did not produce his ticket.<sup>23</sup> As in the *Zebe* case the trial court's charge on damages was that the jurors should let their own good sense determine the amount if they found for the plaintiff.<sup>24</sup> The supreme court, on appeal, noted that although civil law and Scottish law allowed non-pecuniary damages in death cases, this was not the law in Pennsylvania.<sup>25</sup>

The rules set down in the early cases on wrongful death action damages have continued unaltered to the present day.<sup>26</sup> The present state of the law in Pennsylvania is a result of mid-nineteenth century judicial thought when American courts relied heavily on English precedent in tort law;<sup>27</sup> when there was great uncertainty about awarding damages for emotional suffering because such damages were feared to be too speculative;<sup>28</sup> and when the law reflected a social and economic policy to protect the railroads from liability costs.<sup>29</sup> Due to the fundamental changes in viewpoint which have occurred, the rule is obsolete today.

### III. ANOMOLIES IN THE PRESENT LAW

#### A. *The Historical Rationale is No Longer Relevant*

The pecuniary loss only rule has developed from case law, not from statutory proscription.<sup>30</sup> Thus, the rule is based purely on precedent and an examination of the rationale on which the early cases establishing this precedent were decided reveals that the un-

21. Justice Thompson wrote: "No road, great or small, but would fall beneath the weight of such a rule, if applied; and for an injury happening by a mere oversight, amounting of course, to negligence, by some agent in the transit of the cars, it would be a severe penalty to visit the company with. . . ." *Id.*

22. 36 Pa. 298 (1860).

23. *Id.* at 301.

24. *Id.* at 303. The jury brought in a verdict of \$1,734. *Id.* at 302.

25. *Id.* at 304.

26. Compare *Zebe*, 33 Pa. 318, 330 (1858), with *Altamuro v. Milner Hotel, Inc.*, 540 F. Supp. 870, 878 (E.D. Pa. 1982).

27. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 409 (1973).

28. *Zebe*, 33 Pa. 318, 330 (1858). See *supra* note 20 and accompanying text.

29. See GILMORE, *THE AGES OF AMERICAN LAW* 62-67 (1977) for the development of legal theories fostering *laissez-faire* economics and limits on damages.

30. See Speiser & Malawer, *An American Tragedy: Damages for Mental Anguish of Bereaved Relations in Wrongful Death Actions*, 51 TUL. L. REV. 1, 5-8 (1976).

derlying basis of the pecuniary loss rule is outmoded and obsolete.

One argument cited by nineteenth century Pennsylvania courts for denying non-pecuniary damages was English precedent; the English cases interpreting the Fatal Accidents Act had set forth the rule.<sup>31</sup> The Pennsylvania statute was based on the English statute,<sup>32</sup> thus English cases were logical precedent. American courts, for the most part, however, have stopped relying on English precedent;<sup>33</sup> consequently, what was an expected argument in the nineteenth century is no longer persuasive in the late twentieth century.

A second argument put forth as a basis for limiting recovery was that non-pecuniary damages were too speculative.<sup>34</sup> Damages for pain and suffering in personal injury cases were available in the nineteenth century but the concept that other non-pecuniary losses were generally compensable remained to become more firmly established in twentieth century law.<sup>35</sup> Recovery for fright and shock,<sup>36</sup> humiliation,<sup>37</sup> invasion of privacy<sup>38</sup> and other non-pecuniary injuries have become widely established in American tort law in the one hundred and thirty years since the original formulation of the Pennsylvania rules for wrongful death damages. Thus, the argument by the court in *Zebe*, that the affliction could not be measured,<sup>39</sup> is not an argument that should be seriously advanced today.

The other argument made for limiting recovery, the socio-economic policy of protecting the railroads from financial losses,<sup>40</sup> did not even survive until the end of the nineteenth century. In 1868

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31. *Zebe v. Pennsylvania R.R. Co.*, 33 Pa. 318, 328-29 (1858).

32. *Id.* See *supra* note 18 and accompanying text.

33. FRIEDMAN, *supra* note 27, at 98-100.

34. *Zebe v. Pennsylvania R.R. Co.*, 33 Pa. 318, 330 (1858). See *supra* note 20 and accompanying text. See also PROSSER, *supra* note 10, at 50.

35. PROSSER, *supra* note 10, at 50.

36. *Id.* See *Neiderman v. Brosky*, 436 Pa. 401, 413, 261 A.2d 84, 90 (1970) (plaintiff may recover for fright and shock suffered while watching his son struck by defendant's auto).

37. PROSSER, *supra* note 10, at 50. Damages for humiliation may be recovered in Pennsylvania under the cause of action of invasion of privacy. *Bennett v. Norban*, 396 Pa. 94, 99, 151 A.2d 476, 479 (1959). See *infra* note 38.

38. PROSSER, *supra* note 10, at 802-18. The seminal article on this cause of action appeared in the late nineteenth century. See Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). See *Hull v. Curtis Publishing Co.*, 182 Pa. Super. 86, 94-95, 125 A.2d 644, 647-48 (1956) which sets out the development of invasion of privacy as a cause of action in Pennsylvania.

39. *Zebe v. Pennsylvania R.R. Co.*, 33 Pa. 318, 330 (1858).

40. *Id.* See *supra* note 21 and accompanying text.

the Pennsylvania legislature passed an act which limited a common carrier's liability for personal injury to \$3,000 and for death to \$5,000.<sup>41</sup> This act and its ramifications were debated during the constitutional convention in 1872-1873. The constitutionalists viewed the act of 1868 as being unjust to the victim, as arbitrary and unfair.<sup>42</sup> The remedy was to add a provision to Pennsylvania's Constitution in 1874 providing that the legislature could not limit the amount to be recovered for personal injury, property damages or death.<sup>43</sup> The Pennsylvania Supreme Court declared the Act of 1868 unconstitutional in 1880,<sup>44</sup> and, thus, the protectionist argument only survived approximately twenty-five years. Consequently, none of the arguments on which the original rule of limited damages was based have survived to the present time. With no persuasive legal foundation justifying the rule, it should be changed.

## *B. The Pecuniary Loss Only Rule and Survivors' Compensation*

### *1. Inadequacy of Damages*

The wrongful death action was created by statute to compensate certain named beneficiaries for their own personal losses which were caused by a family member's death.<sup>45</sup> Compensation for these

41. 1868 Pa. Laws 58. Section 2 reads as follows:

That in all actions now or hereafter instituted against common carriers or corporations owning, operating or using a railroad as a public highway, whereon steam or other motive power is used, to recover for loss and damage sustained and arising either from personal injuries or loss of life, and for which, by law, such carrier or corporation could be held responsible, only such compensation for loss and damage shall be recovered as the evidence shall clearly prove to have been pecuniarily suffered or sustained, not exceeding, in case of personal injury, the sum of three thousand dollars, nor in case of loss of life, the sum of five thousand dollars.

*Id.*

42. See 2 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 1872-1873, 727-43 (1873). See also Martel, *No-Fault Automobile Insurance in Pennsylvania—A Constitutional Analysis*, 17 VILL. L. REV. 783, 801-04 (1972) for an analysis of these debates.

43. PA. CONST. art. 3, § 21 (1874) reads as follows:

No Act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property; and, in cases of death from such injuries, the right of action shall survive and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted. No Act shall prescribe any limitations of time within which suits may be brought against corporations for injuries to persons or property, or for other causes, different from those fixed by general laws regulating actions against natural persons, and such acts, now existing, are avoided.

*Id.*

44. *Thirteenth & Fifteenth Street Passenger Ry. v. Boudrou*, 92 Pa. 475, 482 (1880).

45. See *supra* notes 10-12 and accompanying text.

losses is only partially available because of the pecuniary loss only rule which has developed in Pennsylvania case law. Damages based on the pecuniary loss only rule include the portion of the decedent's income which would have gone for the benefit of the survivors, the value of the services the decedent would have rendered to the beneficiaries and the gifts that the decedent would have given them.<sup>46</sup> In addition, medical and funeral expenses incurred by the beneficiaries are expressly provided for by the statute as items of damages.<sup>47</sup>

The largest item of damages is often the loss of the decedent's income which would have gone to benefit the survivors.<sup>48</sup> Consequently, the size of the recovery is directly dependent upon the financial position of the decedent. It is conceded that this is an approximate consequence in the measurement of pecuniary losses, but, it is not clear that the real or most significant loss when death occurs is an economic one. Because the statute was drafted to compensate the statutory beneficiaries for their injuries, it should be interpreted to include compensation for what is often the greatest loss: the loss of the loved one's society and companionship. The limited recovery that the present rule allows is inconsistent with the expressed purpose of the statute.<sup>49</sup>

The inadequacy of the remedy is also well illustrated by an examination of the law as it applies to an action for a death of a minor. Commentators have often noted the anomaly of the pecuniary loss only rule with respect to children.<sup>50</sup> The loss of an economically dependent child is usually a pecuniary gain to the parents. Even Justice Thompson, the author of the *Zebe* opinion<sup>51</sup> which set down the rule on wrongful death damages in 1858, noted in the context of a different issue regarding wrongful death damages, that there was no intention in the rule to discuss whether the death was an actual loss or gain and further, that such a discussion would be

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46. *Altamuro v. Milner Hotel, Inc.*, 540 F. Supp. 870, 878 (E.D. Pa. 1982). See also FELDMAN, *supra* note 4.

47. 42 PA. CONS. STAT. ANN. § 8301(c) (Purdon Supp. 1983-1984). See *supra* note 1.

48. SPEISER, RECOVERY FOR WRONGFUL DEATH § 3.4 (1966).

49. See *supra* note 1.

50. Decof, *supra* note 6; Finkelstein, Pickrel & Glasser, *The Death of Children: A Nonparametric Statistical Analysis of Compensation for Anguish*, 74 COLUM. L. REV. 884 (1974); Note, *Wrongful Death of Children—The Real Injury*, 5 W.S.U.L. REV. 253 (1978); Note, *Wrongful Death of Minors, Missouri Ends the Fiction*, 47 U.M.K.C. L. REV. 121 (1978).

51. *Zebe*, 33 Pa. 318 (1858).



"shocking."<sup>52</sup> Shocking or not, a pecuniary loss only rule leads naturally to such a discussion. The court must ask how much the decedent was earning, and how much the survivors thereby lost by his or her death. In the case of a child whose income is limited to at most a few dollars a week, if that, the parents who are the beneficiaries under the wrongful death statute actually stand to gain financially because they no longer have to spend money to feed, clothe and educate the child. The absurdity is, as noted by Dean Prosser and others, that taken literally the rule would lead to the parents paying the tortfeasors.<sup>53</sup>

## 2. Devices Used to Soften the Impact of the Rule

Various devices have been used in Pennsylvania to soften the harsh result of the pecuniary loss only rule. For example, in *Altamuro v. Milner Hotel*,<sup>54</sup> a federal court applying Pennsylvania law allowed \$50,000 as wrongful death damages under the category of "non-monetary or intangible services which the deceased would have provided to wife and children."<sup>55</sup> The court stated that these damages included the value of the society and comfort the dead man would have given to his family had he lived, the work around the house and the "guidance, tutelage and moral upbringing he would have given his children."<sup>56</sup> This sounds very much like a departure from the pecuniary loss only rule although the court announced earlier in the same discussion that pecuniary losses only are allowed under the Pennsylvania wrongful death statute.<sup>57</sup>

The *Altamuro* court relied on *Spangler v. Helm's New York-Pittsburgh Motor Express*<sup>58</sup> as authority for allowing damages for

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52. North Pa. R.R. v. Robinson, 44 Pa. 175, 179 (1863) (\$1500 verdict should be divided among joint plaintiffs per the intestate laws, regardless of actual damages each individually suffered).

53. This is obviously an extreme statement. See Sanchez v. Schindler, 651 S.W.2d 249, 251 (Tex. 1983). PROSSER, THE LAW OF TORTS 909 (4th ed. 1971). The harshness of the rule as applied to minors has been softened in Pennsylvania since Pennsylvania courts allow recovery for the loss of future earnings of a deceased minor under the survival action. Prince v. Adams, 229 Pa. Super. 150, 154, 324 A.2d 358, 360 (1974).

54. 540 F. Supp. 870, 879 (E.D. Pa. 1982) (a forty-three year old husband and father of three was killed while attempting a rescue in a hotel fire).

55. *Id.*

56. *Id.* The court cited the following cases in support of this item of damages: Thomas v. Conemaugh Black Lick R.R., 133 F. Supp. 533 (W.D. Pa. 1955), *aff'd*, 234 F.2d 429 (3d Cir. 1956); Spangler v. Helm's New York-Pittsburgh Motor Express, 396 Pa. 482, 153 A.2d 490 (1959); Gaydos v. Domabyl, 301 Pa. 523, 152 A. 549 (1930).

57. 540 F. Supp. at 878.

58. 396 Pa. 482, 153 A.2d 490 (1959).

loss of the decedent's society. In *Spangler*, the decedent was a thirty-six year old working wife and mother for whose death in a vehicle accident a jury awarded approximately \$46,000 in a combined survival-wrongful death action.<sup>59</sup> A portion of the award had been for loss of her services to the family. Speaking for the Pennsylvania Supreme Court the late Justice Musmanno noted that, even though the late Mrs. Spangler's services of love could not be converted into a precise money award, the tortfeasor was still responsible for the loss of these services. After discussing the evidence of the great devotion and services performed by Mrs. Spangler presented at trial, Justice Musmanno wrote, "All these things,—such as companionship, comfort, society, guidance, solace and protection which go into the vase of family happiness—are things for which a wrongdoer must pay when he shatters the vase."<sup>60</sup> In neither *Altamuro*<sup>61</sup> nor *Spangler*<sup>62</sup> did the court depart from the pecuniary loss only rule. The courts rather gave pecuniary value to the services of the parents, viewing the loss of these services as actual economic losses, rather than as emotional losses.

In order to provide compensation for the death of a minor, the loss of present and future earnings can be sought under the survival act with the recovery being sought in the name of the estate.<sup>63</sup> Courts usually consider the parents' financial position, level of education and career when speculating on the future earnings of a young child.<sup>64</sup> Although these guesses about a child's future allow the parents to recover, they are subject to the same criticisms which can be levelled when lost earnings are the major portion of a wrongful death award: it is not a measurement of the real loss.<sup>65</sup>

Plaintiffs have been making direct assaults on the rule from the

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59. *Id.* at 483, 153 A.2d at 491.

60. *Id.* at 485, 153 A.2d at 492. Apparently the loss of the decedent's society and service had been apportioned to the survival action damages, but it could have been correctly apportioned to the wrongful death damages as well. Recovery for lost earnings and services is available under both statutes. When survival and death actions are joined for trial, the jury is instructed to bring in separate damages under each action pursuant to PA. R. Civ. P. 213(e). The court will then mold the verdict to prevent a double recovery. See *Ferne v. Chadderton*, 363 Pa. 191, 69 A.2d 104 (1949).

61. 540 F. Supp. at 879 (E.D. Pa. 1982).

62. 396 Pa. at 485, 153 A.2d at 492.

63. Lost earnings awards can usually be sought under either statute when the person bringing the action is a spouse. In the case of a parent bringing a wrongful death action, there would be little recovery for lost earnings because the parents are unlikely to be dependent on a child's future earnings.

64. *Frankel v. Willow Brook Marina, Inc.*, 275 F. Supp. 320, 325 (E.D. Pa. 1967); *Prince v. Adams*, 220 Pa. Super. 150, 152, 324 A.2d 358, 359 (1974).

65. See *supra* note 48 and accompanying text.

time it was enunciated in 1858.<sup>66</sup> Although occasional awards, especially in the case of a parent's death, are allowed for loss of companionship, officially, the pecuniary loss only rule is still applicable in Pennsylvania.<sup>67</sup>

#### IV. JUDICIAL SOLUTIONS OF SISTER STATES

Thirty-nine states today allow recovery for emotional losses in a wrongful death action.<sup>68</sup> Of these, twenty-five states have statutes which specifically allow for loss of companionship, mental anguish, or both.<sup>69</sup> In other jurisdictions, the law has been developed by the courts through interpretation of their wrongful death statutes.<sup>70</sup>

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66. For example, in *Caldwell v. Brown*, 53 Pa. 453 (1866) (where a minor child was killed in defendant's rolling mill) the court observed: "Plaintiffs are not to be allowed for the agonized feelings of parents, nor the loss of his society. . . . The jury gave \$200 in damages and we see no error of which the plaintiff could complain." *Id.* at 459 (citation omitted). In *Corcoran v. McNeal*, 400 Pa. 14, 23, 161 A.2d 367, 372-73 (1960) the supreme court noted that recovery for loss of life's pleasures was not appropriate in wrongful death or survival actions. Similarly, the superior court remanded in *Willinger v. Mercy Cath. Med. Ctr.*, 241 Pa. Super. 456, 362 A.2d 280 (1976), *aff'd*, 482 Pa. 441, 393 A.2d 1188 (1978) because the trial court judge had allowed "loss of life's amenities" as part of the damages in a wrongful death and survival action. *Id.*

67. *Altamuro v. Milner Hotel, Inc.*, 540 F. Supp. 870, 878 (E.D. Pa. 1982); *Spangler v. Helm's New York-Pittsburgh Motor Express*, 396 Pa. 482, 483, 153 A.2d 490, 492 (1959). See also *Buchecker v. Reading Co.*, 271 Pa. Super. 35, 57, 412 A.2d 147, 158 (1979) where the court said that the widow of the thirty-four year old decedent whose car collided with one of the defendant's trains was entitled to recover for the society and comfort the family would have received if he had lived. *Id.*

68. Alaska, Arizona, Arkansas, California, Delaware, Florida, Hawaii, Idaho, Iowa, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming. See *infra* notes 69-70.

69. ALASKA STAT. § 09.55.580(c)(4)(1983) (loss of consortium for spouse); ARK. STAT. ANN. § 27-909 (1979); DEL. CODE ANN. tit. 10, § 3724 (1982); FLA. STAT. ANN. § 768.21 (West Supp. 1983); HAWAII REV. STAT. § 663-3 (1976); KAN. STAT. ANN. § 60-1904 (1976); KY. REV. STAT. ANN. § 411.135 (Baldwin 1979) (loss of companionship of deceased minor child only); LA. CIV. CODE ANN. art. 2315 (West Supp. 1984); ME. REV. STAT. ANN. tit. 18-A, § 2-804(b) (1983); MD. CTS. & JUD. PROC. CODE ANN. § 3-904 (Supp. 1983); MASS. ANN. LAWS ch. 229, § 2 (Michie/Law. Co-op. Supp. 1983); MICH. COMP. LAWS ANN. § 600.2922(2) (Supp. 1983-1984); MO. ANN. STAT. § 537.090 (Vernon Supp. 1984); NEV. REV. STAT. § 41.085 (1979); N.C. GEN. STAT. § 28A-18-2(b) (1976); OHIO REV. CODE ANN. § 2125.02 (Page Supp. 1982); OKLA. STAT. ANN. tit. 12, §§ 1053, 1055 (West Supp. 1983-1984); OR. REV. STAT. § 30.020(2)(d) (1981); R.I. GEN. LAWS § 10-7-1.2 (Supp. 1983) (loss of companionship of deceased parent when beneficiaries are unemancipated minors); VT. STAT. ANN. tit. 14, § 1492(b) (Supp. 1981) (loss of companionship and love of deceased minor child); VA. CODE § 8.01-52 (Supp. 1983); WASH. REV. CODE ANN. § 4.24.010 (Supp. 1983-1984) (loss of companionship and love of a deceased minor child); W. VA. CODE § 55-7-6 (1981); WIS. STAT. ANN. § 895.04(4) (West 1983); WYO. STAT. ANN. § 1-38-102(c) (1977).

70. In the following states the wrongful death statutes permit the court or jury to

The supreme courts of New Jersey<sup>71</sup> and Texas<sup>72</sup> have recently made changes in the respective interpretations of their statutes. The two courts used different approaches, but reached the same conclusion, permitting a broader recovery in wrongful death cases.

*A. The New Jersey Approach: Green v. Bitner*

The wrongful death statute in New Jersey, unlike Pennsylvania's, specifically includes a reference to "the pecuniary injuries resulting from such death."<sup>73</sup> In *Green v. Bitner*,<sup>74</sup> the plaintiffs had prevailed at trial on liability, but the jury had returned no damages.<sup>75</sup> The decedent was a high school senior who had been killed in an automobile accident.<sup>76</sup> The trial judge had instructed the jury that her family's damages should be measured by the value of her services and household chores minus the cost of her support and maintenance. Consequently, the jury returned no damages.<sup>77</sup> The Supreme Court of New Jersey reversed and remanded for a new

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award such damages as are just and the courts have interpreted this language to include loss of companionship or mental anguish of the survivors, or both: Arizona: *City of Tucson v. Wondergem*, 105 Ariz. 429, 433, 466 P.2d 383, 386 (1970); California: *Krouse v. Graham*, 19 Cal. 3d 59, 70, 562 P.2d 1022, 1025, 137 Cal. Rptr. 863, 868 (1977); Idaho: *Gardner v. Hobbs*, 69 Idaho 288, 294-95, 206 P.2d 539, 543 (1949); Illinois: *Elliott v. Willis*, 89 Ill. App. 3d 1144, 1149, 412 N.E.2d 638, 641 (1980); Indiana: *N.Y. Central R.R. v. Wyatt*, 135 Ind. App. 205, 235, 184 N.E.2d 657, 671 (1962) (loss of companionship of adult decedent compensable); Iowa: *Wardlow v. City of Keokuk*, 190 N.W.2d 439, 448 (Iowa 1971); Mississippi: *Thornton v. Insurance Co. of North America*, 287 So. 2d 262, 265 (Miss. 1973); Montana: *Swanson v. Champion Int'l Corp.*, 646 P.2d 1166, 1170 (Mont. 1982); South Carolina: *Nance v. Board of Education*, 277 S.C. 64, 65, 282 S.E.2d 848, 849 (1981); Texas: *Sanchez v. Schindler*, 651 S.W.2d 249, 252 (Tex. 1983); Utah: *Jones v. Carvell*, 641 P.2d 105, 108 (Utah 1982); Washington: *Pike v. United States*, 652 F.2d 31, 33-34 (9th Cir. 1981) (applying Washington law, court allowed damages for loss of companionship of a deceased parent).

In three states where the wrongful death statute specifically limits damages to pecuniary losses, the courts have interpreted this language to include recovery for emotional losses: Minnesota: *Fussner v. Andert*, 261 Minn. 347, 353, 113 N.W.2d 355, 359 (1961); Nebraska: *Selders v. Armitrout*, 190 Neb. 275, 280, 207 N.W.2d 686, 689 (1973) (loss of companionship of a deceased minor child) and *Ensor v. Compton*, 110 Neb. 522, 524, 194 N.W. 458, 459 (1923) (loss of companionship of a deceased spouse); New Jersey: *Green v. Bitner*, 85 N.J. 1, 4, 424 A.2d 210, 211 (1980) (loss of companionship of a deceased minor); *Meehan v. Central R.R. Co.*, 181 F. Supp. 594, 611 (S.D.N.Y. 1966) (applying New Jersey law, loss of companionship of a deceased parent).

71. *Green v. Bitner*, 85 N.J. 1, 424 A.2d 210 (1980).

72. *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983).

73. N.J. STAT. ANN. 2A:31-5 (West 1983-1984).

74. 85 N.J. 1, 424 A.2d 210 (1980).

75. *Green*, 85 N.J. at 6, 424 A.2d at 212.

76. *Id.* at 3, 424 A.2d at 211.

77. *Id.* at 6, 424 A.2d at 212.

trial on damages.<sup>78</sup>

The supreme court held that the pecuniary value of the loss to the parents of the child's companionship and guidance was compensable.<sup>79</sup> The court noted that, although the pecuniary loss only rule was undergoing changes and challenges elsewhere,<sup>80</sup> this holding was not to be interpreted as a change in New Jersey's pecuniary loss only rule.<sup>81</sup> Rather, the court stated that it was adhering to the rule but expanding recovery under it.<sup>82</sup> Loss of companionship damages, the court stated, should be measured in terms of what the value of the services of a professional companion, often employed by the aged or the infirm, might be.<sup>83</sup> In fact, the holding was framed in terms of what the parents' needs will be as they grow older. Acknowledging that such an award would necessarily be based on uncertainties, such as what the child's circumstances would have been, how long the parents would live and whether one could realistically attach a pecuniary value to the child's services and companionship, the court determined that its holding was nevertheless warranted, especially in light of the fact that parents' life expectancies are increasing.<sup>84</sup>

In holding such damages available for parents who are bringing actions for the wrongful death of their children, the court was following what had been the rule for some years in cases involving the death of a parent.<sup>85</sup> The rationale used in the parents' death cases has paralleled the rationale in *Green*. While affirming the pecuniary loss only rule, courts have said that the rule will be given a broad enough meaning to include the loss of a "mother's nurture"<sup>86</sup> or the care, guidance and advice of a father.<sup>87</sup>

The New Jersey courts have thus taken a concept—loss of soci-

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78. *Id.* at 4, 424 A.2d at 211. See Comment, *New Jersey's Expanding Scope of Tort Liability and Recoverable Damages*, 12 SETON HALL L. REV. 58 (1981).

79. *Green*, 85 N.J. at 4, 424 A.2d at 211.

80. *Id.* at 7-10, 424 A.2d at 213-14.

81. *Id.* at 12, 424 A.2d at 215.

82. *Id.* at 15, 424 A.2d at 217.

83. *Id.* at 12, 424 A.2d at 215.

84. *Id.* at 15-20, 424 A.2d at 217-19.

85. *Meehan v. Central R.R. Co.*, 181 F. Supp. 594, 611 (S.D.N.Y. 1960) (applying New Jersey law); *Hudgins v. Serrano*, 186 N.J. Super. 465, 481, 453 A.2d 218, 227 (1982).

New Jersey courts allow compensation for "nurtural damages" to be awarded to children when a parent dies. Nurtural damages are usually fixed at ten percent of the amount of lost future earnings. *Hudgins*, 186 N.J. Super. at 481, 453 A.2d at 227.

86. *McStay v. Przychocki*, 9 N.J. Super. 365, 370, 74 A.2d 370, 372 (1950), *aff'd*, 7 N.J. 456, 81 A.2d 761 (1951).

87. *Fraiser v. Public Serv. Interstate Transp. Co.*, 244 F.2d 668, 670 (2d Cir. 1957) (applying New Jersey law).

ety and companionship—which has traditionally been considered an emotional loss and demonstrated that it is in actuality an item which can be measured in pecuniary terms.

### B. *The Texas Approach: Sanchez v. Schindler*

Prior to the Texas Supreme Court's decision in *Sanchez v. Schindler*,<sup>88</sup> a surviving parent's damages in a wrongful death action were limited to the pecuniary value of the child's services and financial contributions, minus the cost of the child's support and maintenance.<sup>89</sup> This rule was a matter of judicial interpretation.<sup>90</sup> The statute which the courts had interpreted to mean pecuniary loss only is a broader one than that of New Jersey: it states that "the jury may give such damages as they think proportionate to the injury resulting from such death."<sup>91</sup>

Taking a direct approach, the Texas court in *Sanchez* overruled the prior cases which had interpreted the statute to mean pecuniary loss only where the action was for the wrongful death of a minor.<sup>92</sup> The court held that a plaintiff could recover for loss of companionship and society and for damages for mental anguish for the death of his or her child.<sup>93</sup> The rationale for the decision was largely based on the rationale of the New Jersey Court in *Green v. Bitner*,<sup>94</sup> that the pecuniary loss only rule, especially in cases of deaths of children, could result in inadequate recoveries, or in no

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88. *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983).

89. *Id.* at 251.

90. *Id.* See *March v. Walker*, 48 Tex. 372, 375 (1877).

91. TEX. REV. CIV. STAT. ANN. art. 4671 (Vernon 1982-1983).

92. 651 S.W.2d at 251. See, e.g., *J.A. Robinson Sons, Inc. v. Wigart*, 431 S.W.2d 327, 334-35 (Tex. 1968); *Tex-Jersey Oil Corp. v. Beck*, 157 Tex. 541, 549, 305 S.W.2d 162, 169 (1957); *Smith v. Farrington*, 117 Tex. 459, 463, 6 S.W.2d 736, 737 (1928).

93. *Sanchez*, 251 S.W.2d at 251. The pecuniary loss only rule still applies to actions brought for the death of adults in Texas; the *Sanchez* holding only applies to actions brought for wrongful death of minors. Spouses and children of adult decedents who were economically dependent on the deceased can recover for loss of future earnings under the Texas wrongful death statute, but when a child dies no future earnings may be recovered, since the child had no dependents at the time of death. *Miller v. Alexandria Trade Lines*, 273 F.2d 897, 900 (5th Cir. 1960) (applying Texas law). See also Rubenstein, *Personal Injuries and the Texas Survival Statute: The Case for Recovery of Damages for a Decedent's Lost Future Earnings*, 12 ST. MARY'S L.J. 49, 50-55 (1980) for a comparison of the damages available under Texas survival and wrongful death statutes. The concurrence in *Sanchez* called for applying the new rule to actions brought for wrongful death of adults. *Sanchez*, 651 S.W.2d at 255 (Ray, J., concurring). But cf. the Pennsylvania rule which allows the future earnings of adults and minors to be recovered under the survival statute.

94. 85 N.J. 1, 424 A.2d 210 (1980). See *supra* notes 74-84 and accompanying text.

recovery at all.<sup>95</sup> The Texas court noted that many other jurisdictions had changed their rule on damages, and also that commentators had frequently been advocating such a change.<sup>96</sup>

Interestingly, the court also noted that there had been attempts in the Texas legislature to allow damages for loss of society and companionship and for mental anguish, but that none of the bills had passed. The court justified taking action in the absence of a legislative mandate by noting that refinements in tort law doctrines were usually inadequate when undertaken by legislatures and that the appropriate forum for such change was the judiciary.<sup>97</sup>

## V. CONCLUSION

Both the New Jersey and the Texas courts have succeeded in expanding recovery in wrongful death cases. The Texas court's approach is far more direct than that of New Jersey in that Justice Spears, writing for the *Sanchez* majority, announced that a new law was being made.<sup>98</sup> The New Jersey court took a different approach by announcing that the loss of society and companionship of a child should be considered a pecuniary loss.<sup>99</sup> Considering the greater specificity of the New Jersey statute such an approach was necessary. Either rationale, however, is available to the Pennsylvania judiciary.

There are several strong arguments for changing the pecuniary loss only rule in Pennsylvania wrongful death actions to include damages for loss of companionship and society. The historical basis underlying the rule no longer has relevance. Second, the remedy in a death action should reflect the true loss, which includes the enormous emotional loss, sometimes to the exclusion of pecuniary loss. Finally, it would put Pennsylvania in concert with the growing number of jurisdictions which allow such a recovery.

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95. *Green v. Bitner*, 85 N.J. 1, 4, 424 A.2d 210, 211 (1980).

96. *Sanchez v. Schindler*, 651 S.W.2d 249, 251 (Tex. 1983). See *Green, Protection of the Family Under Tort Law*, 10 HASTINGS L.J. 237, 245 (1959). See also *supra* note 70.

97. *Sanchez*, 651 S.W.2d at 252.

98. *Id.* at 251.

99. *Green*, 85 N.J. at 4, 424 A.2d at 211.