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Blind Imitation of the Past: An Analysis of Pecuniary Damages in Wrongful Death Actions

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NOTE

BLIND IMITATION OF THE PAST: AN ANALYSIS OF PECUNIARY DAMAGES IN WRONGFUL DEATH ACTIONS

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

*Oliver Wendell Holmes**

INTRODUCTION

COLORADO presently adheres to the "pecuniary loss" doctrine in wrongful death cases. Under this doctrine, the plaintiff is entitled to recover only for the economic loss he has suffered as a result of the death. Neither mental anguish nor loss of companionship, guidance, or consortium is, under this rule, a compensable injury. The history of the pecuniary loss rule is a peculiar one. Since Anglo-Saxon times it has taken curious twists, sometimes for good reasons, but all too frequently for bad ones. As a result of this anomaly, policies which became antiquated a hundred years ago still control the Colorado courts. This note will (1) examine the historical development of the pecuniary loss rule; (2) analyze the policies on which it is based, comparing them with current social policies; (3) examine the ways in which modern courts have dealt with the question; and (4) suggest an avenue of reform.

I. THE HISTORICAL DEVELOPMENT OF THE PECUNIARY LOSS RULE

A. *The English Background*

1. The Common Law Heritage

In the landmark case of *Baker v. Bolton*[1] Lord Ellenborough laid down the basic common law rule that absent a statute no action will lie for wrongful death.[2] The origin of the rule in *Baker* dates back to the middle ages where a civil action for

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* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

[1] 1 Campbell 493, 170 Eng. Rep. 1033 (C.P. 1808).

[2] This rule has been criticized for 150 years. *See, e.g.*, Hay, *Death as a Civil Cause of Action in Massachusetts*, 7 HARV. L. REV. 170 (1893); Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. REV. 431 (1916); Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043 (1965); Smedley, *Wrongful Death — Bases of the Common Law Rules*, 13 VAND. L. REV. 605 (1960).

wrongful death was, under the doctrine of merger,[3] superseded by the criminal action of homicide, which belonged to the crown.[4] Notwithstanding the doctrine of merger, however, the clan of a person wrongfully killed was entitled to a payment ("wer"), the amount of which depended on the social status of the deceased.[5]

Thus, at common law, the wer served as compensation to the deceased's family. By 1808, however, this doctrine was virtually extinct. Instead, English law had devised another form of compensation known as appeal. By this means a convicted felon could secure a release from criminal liability from the plaintiff, who in certain cases was very generously rewarded.[6] However, in 1819 this remedy was also abolished,[7] and England was left with only half a policy; the rule in *Baker* still applied to thwart any wrongful death actions, but the compensation which the criminal law provided and which was implicit in the *Baker* rationale no longer existed.

At this point in history, the very nature of wrongful death changed. Prior to the 19th century the typical defendant in a wrongful death action would have been a felon — most likely a highwayman or burglar. Such a person, if apprehended, usually went to prison and, consequently, it was appropriate that the matter should be within the purview of the criminal law.[8] With the advent of the industrial revolution, the typical defendant was no longer a felon, but a railroad or factory. The wrong was not malicious, but merely negligent.

> Then suddenly at mid-century society faced up in a panic to a virtually new phenomenon — accidental death through corporate enterprise. Tragedy as a result of indifference and neglect was suddenly upon us in the factory, or the city streets, and on the rails. Nor was the principal villain of the piece any longer the impecunious felon. In his place stood the prospering corporation with abundant assets to meet the needs of widows and orphans.[9]

Perhaps in response to this change[10] Parliament in 1846 passed the "Fatal Accidents Act," more commonly known as

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[3] Holdsworth, *supra* note 2.

[4] Higgins v. Butcher, Yelv. 89, 80 Eng. Rep. 61 (K.B. 1607).

[5] Malone, *supra* note 2, at 1055. *See generally* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 448-62 (2d ed. 1968).

[6] Hay, *supra* note 2, at 172-73.

[7] An Act to Abolish Appeals of Murder, Treason, Felony or Other Offences, and Wager of Battel, or joining Issue and Trial by Battel, in Writs of Right, 59 GEO. 3, c. 46 (1819).

[8] Hay, *supra* note 2, at 176.

[9] Malone, *supra* note 2.

[10] 15 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 220 (1965).

Lord Campbell's Act.[11] The Act provided that in all cases in which the deceased, had he lived, would have had a cause of action against the tort-feasor, certain named beneficiaries could sue in their own name and be awarded such damages as the jury felt were "proportioned to Injury resulting from such Death."[12]

2. Blake v. Midland Railway Co.

At first glance, the provision for damages in Lord Campbell's Act would seem to give the jury almost unlimited discretion in assessing the measure of damages in a wrongful death action. Judicial construction, however, quickly restricted the jury's latitude. The key decision in this regard is *Blake v. Midland Railway Co.*[13] in which it was held that damages should be limited to the pecuniary loss suffered by the plaintiff. The importance of this rule cannot be underestimated. It serves as the basis for the entire law of damages in wrongful death actions, not only in England, but in most American jurisdictions as well. Nevertheless, close inspection reveals that *Blake* was based on highly suspect reasoning.

The facts in *Blake* were simple. The deceased was killed in a train crash and his wife sued, basing her claim upon Lord Campbell's Act. Liability was confessed, and the only issue became one of damages. At the trial, the judge instructed the jury that:

> [H]e thought there was great difficulty in fixing any measure but that of pecuniary injury: but that, if they considered the plaintiff entitled to any compensation for bereavement she had sustained, beyond the pecuniary loss, they were to make their estimates accordingly.[14]

This broad instruction was the basis of the reversal; yet there were excellent reasons for upholding it. First, the concept of solatium was not new. It was well recognized as a legitimate item of damages for wrongful death in Scotland. Indeed, as plaintiff's attorney pointed out, Lord Campbell himself, while still a practicing attorney, had observed that:

> Although, by the English law, if a man's wife or son were killed by negligence, he could have no action, because "the English law allows no solatium in this respect," "the Scotch law" "says more

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[11] Act for Compensating the Families of Persons Killed by Accidents, 9 & 10 Vict., c. 93 (1846).

[12] *Id.* The act also stated that the beneficiaries could sue regardless of whether the tort-feasor's act was also felonious. Thus, the merger doctrine, which had been so important in the *Baker* case would not be a factor in any construction of the Act.

[13] 18 Q.B. 93, 118 Eng. Rep. 5 (1852).

[14] *Id.* at 96-97, 118 Eng. Rep. at 36.

> sensibly that in such a case a solatium shall be granted to the person injured in his happiness and circumstance by the death of his wife or child."[15]

Moreover, solatium was also recognized as a proper item of damages in normal trespass actions.

In refusing to grant this item of damages to a decedant's survivors, Lord Coleridge drew a distinction between wrongful death and personal injury and pointed out that "[w]hen an action is brought by an individual for a personal wrong, the jury, in assessing the damages, can with little difficulty award him a solatium for his mental suffering alone, with an indemnity for his pecuniary loss."[16] To argue that juries have an easier time computing solatium for people who survive than for the relatives of the people who die, seems unjustifiable. Solatium, pain, and anguish are all elements of damages which different juries have responded to in very different ways. It is precisely because juries on occasion have brought in rather huge awards based on these hard-to-prove categories that good defense attorneys are at such a premium. In fact, juries will bring back huge awards because it seems just, not because they had an easy time computing the dollar value of an injured plaintiff's emotional injuries.

The main thrust of Coleridge's opinion, however, is aimed at the unfair burden a broad rule of damages would place on businesses. He stated: "We must recollect that the Act we are construing applies not only to great Railway Companies but to little tradesmen who send out a cart and horse in the care of an apprentice."[17] This facet of the rationale, however, seems to have been based more on empathy than sound logic. The courts had found no need to protect the small businessman whose negligence merely maimed a victim. In such cases, as we have seen, solatium was a legitimate item of damages. Why then protect him when his actions wrongfully caused a death? If anything, the rules should be reversed. Not only is killing someone a more serious injury than maiming him, but it happens less frequently. Thus if the courts were serious about protecting businesses from solatium damages, they would protect them in the nondeath cases first.

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[15] *Id.* at 100, 118 Eng. Rep. at 38. This quote is taken from the clerk's record of the argument and represents the plaintiff's attorney's statement of Lord Campbell's argument in Duncan v. Findlater, 6 Cl. & Fin. 894, 7 Eng. Rep. 934 (1839).

[16] 18 Q.B. 93, 111, 118 Eng. Rep. 35, 41-42 (1852).

[17] *Id.* at 111, 118 Eng. Rep. at 42.

In part, the oral argument in *Blake* was addressed to the intent of Parliament when it passed the statute.[18] As Lord Campbell, the Act's author, was himself one of the judges hearing the case, the court was in an unusually good position to determine the intent of the legislature. Lord Campbell's actions in the case remain, however, a mystery. He took an active part in the oral argument, constantly interrupting the attorney for the railroad, in one instance resolving a point in favor of the plaintiff.[19] His own bias, one would assume based on his comment about the Scottish law and his authorship of the Act itself, may well have favored extended liability. Nevertheless, he not only failed to write an opinion in the case, he was not present when the opinion was issued.[20] Consequently, one can only speculate as to his influence in the decision. However, there is some evidence that it was minimal. Lord Campbell himself does not appear to have attached much importance to his wrongful death act. In fact, in his autobiography he not only fails to mention the "Fatal Accidents Act" but said: "I did not take any very prominent part in the business of the session of 1846."[21] Additionally, the week that the decision in *Blake* was handed down, a new government was being formed. From Lord Campbell's *Journal,* it seems that politics, not law, was paramount in his mind.[22] The point of this digression is that Lord Campbell's presence on the court which rendered the decision does not necessarily mean that Justice Coleridge's opinion accurately reflects the intent of Parliament when it passed the Act.

B. *From England to Colorado*

In the beginning it appeared that American courts would not fall into the same historical tangle as the English courts. In fact, for the first half of the 19th century, American courts rejected the rule that at common law wrongful death could not be considered a legal injury.[23] However, in 1848, the decision in *Carey v. Berkshire Railroad Co.*[24] began a trend in the United States of adopting the rule in *Baker v. Bolton.*[25] In response,

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[18] *Id.* at 104, 118 Eng. Rep. at 39.

[19] *Id.* at 106, 118. Eng. Rep. at 40.

[20] *Id.* at 108, 118 Eng. Rep. at 40.

[21] II HARDCASTLE, LIFE OF LORD CAMPBELL 199 (1881).

[22] *Id.*

[23] Cross v. Guthery, 2 Root 90, (Conn. 1794), Ford v. Monroe, 20 Wend. 210 (N.Y. Sup. Ct. 1838); Plummer v. Webb, 19 F. Cas. 894 (No. 11234) (C. Mo. 1825) (dictum). *See also,* F. TIFFANY, DEATH BY WRONGFUL ACT (2d ed. 1913); Malone, *supra* note 2, at 1066.

[24] 55 Mass. (1 Cush.) 475 (1848).

[25] F. TIFFANY, *supra* note 23; Malone, *supra* note 2.

American jurisdictions began to pass wrongful death statutes, most of them modeled after Lord Campbell's Act.[26]

Colorado originally passed such a statute in 1872[27] and 5 years later modified and re-enacted the statute.[28] Except for modifications as to the maximum amount of damages permissible, this statute is the same as Colorado's present wrongful death statute,[29] which, in defining the measure of damages, provides:

> [T]he jury may give such damages as they may deem fair and just, not to exceed forty-five thousand dollars, with reference to the necessary injury resulting from such death, to the surviving partner, who may be entitled to sue.[30]

In 1874, the Colorado Supreme Court, obviously basing its opinion on *Blake*[31] adopted the pecuniary loss rule of compensatory damages.[32] Speaking for the majority, Justice Belford stated:

> It seems to me, therefore, that the survivors are not entitled to compensation for such anguish as they may have endured by reason of the taking of the parent. . . . Whatever is susceptible of pecuniary compensation enters into the rule, and what can not be included must be left out.[33]

In 1894 the Court affirmed this rule and stated the rule of damages in wrongful death actions which has gone basically unchanged since then:

> The true measure of compensatory relief in an action of this kind, under the act of 1877, *supra*, is a sum equal to the net pecuniary benefit which plaintiff might reasonably have expected to receive from the deceased in case his life had not been terminated by the wrongful act, neglect or default of the defendant. Such sum will depend on a variety of circumstances and future contingencies, and will, therefore, be difficult of exact ascertainment; but the damages to be awarded in each case may be approximated by considering the age, health, condition in life, habits of industry or otherwise, ability to earn money, on the part of the deceased, including his or her disposition to aid or assist the plaintiff; not only the kinship or legal relation between the deceased and the plaintiff, but the actual relations between them as manifested by acts of pecuniary assistance rendered by the deceased to the plaintiff, and also contrary acts may be taken into

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[26] S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 1.8 (1966) [hereinafter cited as SPEISER].

[27] Section 1, [1872] Colo. Sess. Laws 117 (repealed 1877).

[28] Ch. 25, §§ 878-81, [1915] Colo. Sess. Laws 342-44.

[29] COLO. REV. STAT. ANN. § 41-1-3 (Supp. 1969), *amending* COLO. REV. STAT. ANN. § 41-1-3 (1963).

[30] *Id.*

[31] While the court does not cite *Blake*, the language is so similiar as to leave little doubt that *Blake* was the basis of the court's opinion.

[32] Kansas Pac. Ry. v. Miller, 2 Colo. 442 (1874).

[33] *Id.* at 466-67.

consideration. But it must be borne in mind that the recovery allowable is in no sense a *solatium* for the grief of the living occasioned by the death of the relative or friend, however dear. It is only for the pecuniary loss resulting to the living party entitled to sue resulting from the death of the deceased that the statute affords compensation. This may seem cold and mercenary, but it is unquestionably the law.[34]

II. The Pecuniary Loss Rule and Social Change

A. *The 19th Century and Limited Liability*

The pecuniary loss rule is a product of 19th-century conditions and values. As society changed, the law, in its characteristically tardy manner, failed to keep pace. In the history of tort law, the period from 1800-1850 is one in which courts consistently restricted liability. During this period, for example, the courts created the fellow-servant rule,[35] the doctrines of contributory negligence[36] and assumption of the risk,[37] as well as adopting the duty,[38] privity,[39] and foreseeability[40] limitations to liability.

Prosser explains the 19th-century trend toward limited liability when he states: "The explanation . . . probably lay in the highly individualistic viewpoint of the common law courts, and their desire to encourage industrial undertakings by making the burden upon them as light as possible."[41] Afraid of a great increase in litigation,[42] which would make members of society each other's insurers and severely cripple growing industry, the courts' response was to limit liability. Thus when Justice Coleridge said: "We must recollect that the Act we are con-

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[34] Pierce v. Conners, 20 Colo. 178, 182, 37 P. 721, 722 (1874). This doctrine has been consistently upheld in Colorado. Denver & R.G.R.R. v. Spencer, 27 Colo. 313, 61 P. 606 (1900); City of Longmont v. Swearingen, 81 Colo. 246, 254 P. 1000 (1927); Lehrer v. Lorenzen, 124 Colo. 17, 233, P.2d 382 (1951); St. Luke's Hosp. Ass'n v. Long, 125 Colo. 25, 240 P.2d 917 (1953); McEntyre v. Jones, 128 Colo. 461, 263 P.2d 313 (1953); Rigot v. Conda, 134 Colo. 375, 304 P.2d 629 (1956); Herbertson v. Russell, 150 Colo. 110, 371 P.2d 422 (1952); Kogul v. Sonheim, 150 Colo. 316, 372 P.2d 731 (1962); Lewis v. Great W. Distrib. Co., 168 Colo. 424, 451 P.2d 754 (1969).

[35] Priestley v. Fowler, 3 M. & W. 1, 150 Eng. Rep. 1030 (Ex. 1837).

[36] Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (K.B. 1809); W. Prosser, Law of Torts § 65 n.1 (4th ed. 1971) [hereinafter cited as Prosser].

[37] Priestley v. Fowler, 3 M. & W. 1, 150 Eng. Rep. 1030 (Ex. 1837); Prosser, *supra* note 37, § 69 n.9.

[38] Vaughan v. Menlove, 3 Bing. N.C. 468, 132 Eng. Rep. 490 (C.P. 1837); Landridge v. Levy, 2 M. & W. 519, 150 Eng. Rep. 863 (Ex. 1837); Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842); Prosser, *supra* note 36, § 53.

[39] Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

[40] Greenland v. Chaplin, 5 Ex. 243, 155 Eng. Rep. 104, (1850); Rigby v. Hewitt, 5 Ex. 240, 155 Eng. Rep. 103 (1850); Prosser, *supra* note 36, § 43.

[41] Prosser, *supra* note 36, § 80.

[42] *Id.* § 4.

struing applies not only to great Railway Companies but to little tradesmen who send out a cart and horse in the care of an apprentice,"[43] he was merely handing down one more decision, typical of the period, restricting liability to protect growing industry.[44]

But the society of the 19th century is not the society of today. The era of revering the individual has subsided. Through such policies as medicare, welfare, and mandatory insurance, we have accepted the principle that to a certain extent in our society each person is the other's insurer. Nor is industry in such an infant stage that it needs vigilant protection, even when it commits a tort. Through the medium of insurance policies, society has spread the risk to insure that small merchants are not wiped out by one large tort action. Given this change in society it is not surprising that in the 20th-century many of the 19th-century limits on liability have been erased or modified, and that the modern trend is toward more extended liability. Yet in Colorado, as in many American jurisdictions, our wrongful death law continues to reflect 19th-century principles.

B. *The Child Cases*

The injustice of the pecuniary loss rule is most obvious in the cases in which the deceased is a small child. Because in modern society children are a pecuniary burden to their parents, damages in such cases have frequently been very small. Typical of such cases is *Kogel v. Sonheim.*[45] In *Kogel* the defendants negligently stored a spot welder, which fell, killing the plaintiff's 4-year-old son. The jury returned a verdict of only $700, over $600 of which went to pay for the dead child's funeral expenses. The plaintiff appealed the judgment claiming that:

> (1) the damages awarded by the jury were grossly and manifestly inadequate; and
> (2) in wrongful death actions of this type the measure of damages should not be the net pecuniary loss sustained by the parents but rather the replacement value of the child as measured by the cost of infantile hospitalization and care, clothing, support and education up to the child's death.[46]

Nevertheless, the court, restating the pecuniary loss rule, af-

[43] Blake v. Midland Ry., 18 Q.B. 93, 111-12, 118 Eng. Rep. 35, 42 (1852).

[44] The close circle of the English aristocracy which controlled the courts during this period probably accounts for a greater homogeneity of judicial attitudes in 19th-century England than we have in America today. For example, Lord Abinger, the judge most famous for his decisions restricting liability, was Lord Campbell's father-in-law.

[45] 150 Colo. 316, 372 P.2d 731 (1962).

[46] *Id.* at 318, 372 P.2d at 732.

firmed; the parents of the deceased child were "compensated" for their loss by only $700.

The application of the pecuniary loss rule to child death cases has been widely criticized,[47] and for good reason. Nineteenth-century England was highly agricultural. Children on farms were expected to work, and were a real pecuniary asset to their parents. Even in the cities, employment of children, at least among the working class, was common, and a child's income was frequently a benefit to his whole family.[48]

In the modern setting, however, children are rarely a pecuniary benefit to their families. Few minors work before their teens. Even then work is usually limited to part-time or summer jobs, the profits of which are generally kept by the child himself and not contributed to the family. Additionally, the costs of raising children are high, especially if the child goes to college.[49] Thus in a modern setting, the parents' loss is emotional, not pecuniary; but this very real injury remains virtually incompensable, at least in Colorado.

Recognizing that an old rule of law does not fit modern times, some courts have rejected the application of the traditional pecuniary loss rule to child death cases. The leading case is *Wycko v. Gnodtke*,[50] in which the Supreme Court of Michigan stated:

> The interpretation of the requirement of pecuniary loss found in the early cases, which even today are followed as precedent, reflected the mores and legal standards of their times. . . .[51]

After summarizing the social conditions of the times, the court continued:

> This, then, was the day from which our precedents come, a day when employment of children of tender years was the accepted practice and their pecuniary contributions to the family both substantial and provable. It is not surprising that the courts of such a society should have read into the statutory words "such damages as they [the jury] may think proportional to the injury resulting from such death" not only the requirement of a pecuniary loss, but, moreover, a pecuniary loss established by a wage benefit-less-costs measure of damages. Other losses were unreal and untangible and at this time in our legal history the

[47] *See, e.g.*, Decof, *Damages in Actions for Wrongful Death of Children*, 47 NOTRE DAME LAW. 197 (1971); Johnson, *Wrongful Death and Intellectual Dishonesty*, 16 S.D.L. REV. 36 (1971); Comment, *Damages for the Wrongful Death of Children*, 22 U. CHI. L. REV. 538 (1955).

[48] Comment, *supra* note 47, at 545-46.

[49] *Id.* at 546-47.

[50] 361 Mich. 331, 105 N.W.2d 118 (1960). *Wycko* has since been severely limited by Breckon v. Franklin Fuel Co., 383 Mich. 251, 174 N.W.2d 836 (1970). Neverthless, *Wycko* remains one of he best reasoned cases in this area, regardless of the scope of its authority in Michigan.

[51] 361 Mich. at 334, 105 N.W.2d at 120.

> courts would have no truck with what Chief Baron Pollock termed . . . "imaginary losses." Loss meant only money loss, and money loss from the death of a child meant only his lost wages. All else was imaginary. The only reality was the King's shilling.[52]

In short, the *Wycko* court said that the object of damages is, as far as possible, to make the wronged party whole. As time has gone by, and our economic system has changed, there has come a realization that lost earnings are simply a part of the damage suffered by the parents of a dead child.

Wycko deals with the measure of damages for actions in which the decedent is a child. Perhaps the injustice of the present rule of damages shows itself most strongly in child death cases, but the logic of a broader rule of damages applies equally well to cases in which adults have been the victims. A middle-aged person may be totally dependent on his spouse emotionally, but not financially. Yet if that spouse is killed wrongfully, the survivor may collect almost no damages at all. A small child whose nonworking mother is killed certainly suffers a severe injury. Yet unless that child can show a pecuniary loss, his injury is incompensable.[53]

III. CIRCUMVENTING THE RULE

The Colorado Supreme Court has long recognized the inequity of the pecuniary loss rule. After stating the general rule, the court in *Pierce v. Conners*[54] added: "This may seem cold and mercenary, but it is unquestionably the law."[55] In response to this, two lines of cases have developed in Colorado. The first, which includes *Pierce, Kogel v. Sonheim,*[56] and *Herbertson v. Russell*[57] has taken the traditional narrow view of pecuniary damages. A second line of cases beginning with *Kansas Pacific Railway Co. v. Lunden,*[58] gives lip service to the pecuniary loss rule, and then allows a broader rule of damages. In *Lunden* the court said:

> As a matter of sentiment, life has no pecuniary value, but considered with reference to the relations of deceased with others,

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[52] *Id.* at 336, 105 N.W.2d at 121. For similar cases see Fussner v. Andert, 261 Minn. 347, 113 N.W.2d 355 (1962); Lockhart v. Besel, 17 Wash. Dec. 2d 109, 426 P.2d 605 (1967).

[53] For an analysis of the rule of damages in such cases *see* Comment, *The Unemployed Housewife-Mother: Fair Appraisal of Economic Loss in a Wrongful Death Action,* 21 BUFFALO L. REV. 205 (1971).

[54] Pierce v. Conners, 20 Colo. 178, 37 P. 721 (1894).

[55] *Id.* at 182, 37 P. at 722.

[56] Kogul v. Sonheim, 150 Colo. 316, 372 P.2d 731 (1962).

[57] 150 Colo. 110, 371 P.2d 422 (1962).

[58] 3 Colo. 94 (1876).

> it is capable of such estimate. In this sense a parent is entitled to the services of children during their minority, and to support and maintenance from them in his declining years; a husband is entitled to the assistance of his wife in the affairs of life, and a wife is entitled to support from her husband; children may demand nurture and education from parents, and all these services may be compensated in some sort and degree by money. It is in this sense, with reference to the probable benefits that would have been derived by survivors from the life of the deceasd, if he had lived, that the phrase should be understood in the law, for otherwise all will be left to the discretion of the jury.[59]

In *Southern Colo. Power Co. v. Pestance*[60] the court allowed a recovery of $5,000 although there was no evidence that the deceased son had ever contributed any pecuniary benefit to his parents' household, or ever would. The court said:

> Are the damages excessive? We think not. The son was a steady, hard-working, healthy, active, intelligent college boy, working to earn money to finish his college course. His parents were between fifty and sixty years old. Without including any solatium, the jury might well have found that the probable pecuniary loss to these parents was five thousand dollars. The son was bound by law to support them in their old age, and his physique, character and conduct, as shown by the evidence, proves his ability and willingness to do so. It is never possible in such cases to prove the damages with any approximation to certainty. The jury must estimate them as best they can be reasonable probabilities, but that is no reason for denying them altogether. . . . The boy might have turned out an invalid and not supported his parents at all, or a millionaire and supported them in luxury; the probability is between the two.[61]

Similarly in *Longmont v. Swearingen*[62] the court approved a verdict of $3,500 for the wrongful death of a minor who was not contributing financially to the household. In *St. Lukes Hospital Association v. Long*[63] the defendant hospital had placed a 3-year-old boy in an adult bed from which he took a fatal fall. The jury returned a verdict of $5,000. In affirming the court cited *Lunden* and said:

> The objection is based solely upon the ground that there was no evidence in its support other than mortuary and cemetery bills. There was testimony that the boy was in good health and the court sustained objection of defendant to further evidence along that line. It is impossible to establish with any definiteness or certainty the future earning ability of a three-year-old boy or his future generosity toward his parents. To hold that no recovery could be had in the absence of such showing would be in effect to abolish the right to recovery by parents of young

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[59] *Id.* at 102-03.
[60] 80 Colo. 375, 251 P. 224 (1926).
[61] *Id.* at 379, 224 P. at 226.
[62] 81 Colo. 246, 254 P. 1000 (1927).
[63] 125 Colo. 25, 240 P.2d 917 (1952).

> children and such was not, we think, the legislative intent in the enactment of the statute.[64]

St. Lukes was approved in *McEntyre v. Jones*[65] a case in which the court affirmed a judgment of $7,500, awarded the parents of a 13-year-old girl even though there was no evidence to indicate that the parents had suffered any actual pecuniary loss. Finally, in *Dawkins v. Chavez*[66] the court upheld an award of $10,000 to the parents of a 9-year-old child who had been killed while crossing a street. Again, there was no evidence to indicate that the parents had suffered any pecuniary loss.

The two lines of cases are irreconcilable. While indicating that Colorado follows a pecuniary loss rule, in those cases where juries have failed to follow the trial court's instructions, the supreme court has frequently refused to reverse. One can only speculate as to why the supreme court has acted this way. However, one answer may be that the court has recognized the injustice of its own rule, and rather than overturn it, has occasionally merely refused to follow it. If both courts and juries were consistent in granting more liberal damages than the traditional pecuniary loss rule would dictate, there might be little problem. Since courts and juries have not been consistent, it is purely fortuitous as to whether a plaintiff will receive a large or small amount of compensation.

IV. SOLUTIONS TO THE PROBLEM

Critics of the pecuniary loss rule have proposed different solutions to the problem. The most common of these is to add some flexible item of damages so that jurors may in fact bring back the verdict they deem to be "fair and just." At least 14 states, in adopting a more liberal rule,[67] have included at least one item of damages which when put in the hands of a jury becomes extremely flexible. While different states have different terms for such flexible items, they can roughly be divided into three categories: (1) mental anguish, grief and sor-

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[64] *Id.* at 33, 240 P.2d at 922.

[65] 128 Colo. 461, 263 P.2d 313 (1953).

[66] 132 Colo. 61, 285 P.2d 821 (1955).

[67] These states include Ariz., Cal., Fla., Idaho, Minn., Miss., Mont., Pa., S.C., Tex., Utah, Wash., W. Va., and probably Mich. For a complete state-by-state analysis, see SPEISER, *supra* note 26, § 3:1 nn.6, 16.

row, solatium;[68] (2) loss of society, companionship and consortium;[69] (3) loss of care, guidance, and support.[70]

The manner in which these states have adopted a broadened rule of damages is worthy of note. In only one state, West Virginia, does the local wrongful death statute specifically provide for nonpecuniary damages.[71] Seven states have judicially abandoned the pecuniary loss rule.[72] The remaining seven states have retained a pecuniary loss rule, but have a broader definition of pecuniary loss than does Colorado.[73] Thus it has been held in California that:

> Although damages must be measured by pecuniary loss to the plaintiffs, in fixing such loss the trier of facts is not limited to proof of loss in dollars and cents, but may properly consider pecuniary value of such non-economic interests of a family as loss of comfort, society and protection.[74]

Consequently, it would be possible for Colorado to broaden its present rule of damages without abandoning its long-standing commitment to the pecuniary loss rule.

Unfortunately, none of these solutions has been seriously considered in Colorado. Rather, the path of reform has been muddled by a series of constitutional arguments which have been rejected by the Colorado Supreme Court. The leading proponent of such an approach was Justice Albert Franz.

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[68] *See, e.g.*, Sanders v. Green, 208 F. Supp. 873 (E.D.S.C. 1962); City of Tuscon v. Wondergem, 105 Ariz. 429, 466 P.2d 383 (1970); Lynch v. Alexander, 242 S.C. 208, 130 S.E.2d 563 (1963); Wolfe v. Lockhart, 195 Va. 479, 78 S.E.2d 654 (1953); Stamper v. Bannister, 146 W. Va. 100, 118 S.E.2d 313 (1961).

[69] Fussner v. Andert, 261 Minn. 347, 113 N.W.2d 355 (1962); Delta Chevrolet Co. v. Wald, 211 Miss. 256, 51 So. 2d 443 (1951); Mize v. Rocky Mt. Bell Tel. Co., 38 Mont. 521, 100 P. 971 (1909); Spangler v. Helm's N.Y.-Pittsburgh Motor Express, 396 Pa. 482, 153 A.2d 490 (1959); Lynch v. Alexander, 242 S.C. 208, 130 S.E.2d 563 (1963); Van Cleave v. Lynch, 109 Utah 149, 166 P.2d 244 (1946); Burbidge v. Utah Light & Traction Co., 57 Utah 566, 196 P. 556 (1921). *See, e.g.*, Boies v. Cole, 99 Ariz. 198, 407 P.2d 917 (1965); Kemp v. Pinal County, 8 Ariz. App. 41, 442 P.2d 864 (1968); Hale v. San Bernadino Valley Traction Co., 156 Cal. 713, 106 P. 83 (1909); Tyson v. Romey, 88 Cal. App. 2d 752, 199 P.2d 721 (1948); Holder v. Key Sys., 88 Cal. App. 2d 925, 200 P.2d 98 (1948); Lithgow v. Hamilton, 69 So. 2d 776 (Fla. 1954); Hepp v. Ader, 64 Idaho 240, 130 P.2d 859 (1942); Wycko v. Gnodtke, 361 Mich. 331, 105 N.W.2d 118 (1960).

[70] *See, e.g.*, Platis v. United States, 288 F. Supp. 254 (D. Utah 1968); Gilmore v. Los Angeles Ry., 211 Cal. 192, 295 P. 41 (1930); Duncan v. Smith, 376 S.W.2d 877 (Tex. Civ. App. 1964); David v. North Coast Transp. Co., 160 Wash. 576, 295 P. 921 (1931); Aronson v. City of Everett, 136 Wash. 312, 239 P. 1011 (1925).

[71] SPEISER, *supra* note 26 app. A.

[72] Ariz., Fla., Idaho, Miss., S.C., Va., and Wash. *See* SPEISER, *supra* note 26, § 3:1 nn.6, 16.

[73] Cal., Mich., Minn., Mont., Pa., Tex., and Utah. *See* SPEISER, *supra* note 26, § 3:1 nn.6, 16.

[74] Holder v. Key Sys., 88 Cal. App. 2d 925, 940, 200 P.2d 98, 106 (1948).

In both his dissent in *Kogel v. Sonheim*[75] and his concurrence in *Herbertson v. Russell*[76] Justice Franz attempted to do away with the duplicity involved in the Colorado Supreme Court's treatment of wrongful death actions. Franz's disagreement with the majority opinion in these cases was based on his interpretation of the Colorado Bill of Rights. In particular, he felt that the following sections made imperative a broader rule of damages in wrongful death actions:

> Section 3. Inalienable rights — All persons have certain natural, essential and inalienable rights, among which may be reckoned the rights of enjoying and defending their lives and liberties . . . .[77]
> Section 6. Equality of justice — [there shall be] a speedy remedy afforded for every injury to person, property or character . . . .[78]
> Section 25. Due process of law — No person shall be deprived of life, liberty or property without due process of law.[79]

Examination of each of these sections, however, reveals the weakness of Franz's argument. In attempting to apply sections 3 and 25, Franz fails to take into consideration who the plaintiff is. The Colorado wrongful death statute does not transfer an old cause of action to new plaintiffs, but creates an entirely new cause of action by which the beneficiaries may be compensated for *their own* injuries.[80] Consequently, it is the rights of the survivors, not of the decedent which must be infringed upon before the constitutional protections can mandate a broader rule of damages. First, it is clear that neither the survivors' lives nor liberty are at issue; the survivors are both alive and free regardless of what rule of damages is applied. Second, the right to be compensated for lost property is similarly irrelevant, for property losses are already covered under the present pecuniary loss rule. It is rather the more intangible losses — mental anguish, companionship, solatium — which are not yet compensable in Colorado. Third, to argue that section 6 is grounds for a broader rule of damages is circular. This section says, in essence, that every legal injury must be compensated. What *Blake* and *Pierce* hold is that absent a statute, wrongful death is not a legal injury. Thus if judicial modifica-

[75] Kogul v. Sonheim, 150 Colo. 316, 323-25, 372 P.2d 731, 735-36 (1962).
[76] Herbertson v. Russell, 150 Colo. 110, 118-26, 371 P.2d 422, 427-31 (1962).
[77] COLO. CONST. art. 2, § 3.
[78] *Id.* § 6.
[79] *Id.* § 25.
[80] Moffatt v. Tenney, 17 Colo. 189, 30 P. 348 (1892); COLO. REV. STAT. ANN. § 41-1-3 (Supp. 1969), *amending* COLO. REV. STAT. ANN. § 41-1-3 (1963) states that damages are to be awarded "with reference to the necessary injury resulting from such death, *to the surviving parties* . . . ." (emphasis added).

tion of the pecuniary loss rule is desired, it must be done through statutory construction not constitutional interpretation.

Given the weakness of his arguments, it is not surprising that Justice Franz was unable to persuade his colleagues to take a more enlightened view of the pecuniary loss rule. It is, nonetheless, unfortunate. The real question is not a constitutional one; it is how best to tailor the law of torts to a modern, industrial setting.

The basic premise of tort law is that wrongful injuries should be compensable. It is, therefore, of paramount importance that rules of damages approach, as closely as possible, the injury suffered. The language of the present Colorado wrongful death statute is broad enough to allow just compensation; only judicial fiat has interfered.

Conclusion

We have seen that the pecuniary loss rule is based on insecure underpinnings. The rule in *Baker v. Bolton* was probably ill-advised when it was handed down, for it failed to recognize that the doctrine of merger was no longer applicable. Lord Campbell's Act was a step in the right direction, but the strict construction it was given in *Blake v. Midland Railway* reflected the court's 19th-century concern over extended tort liability. Colorado adopted the rule in *Blake* and has consistently upheld it despite the change in social conditions which has taken place since *Blake* became law. Applying the pecuniary loss rule to child death cases makes clear its archaic character, but analytically there is no reason why any modification in the case of children should not apply to adults as well. The Colorado court is not bound; many other jurisdictions have judicially expanded or abandoned the pecuniary loss rule.

The real point of the underlying tort theory is that wrongdoers should compensate the people they injure. In a 19th-century setting it may have made sense to limit liabiilty, but in a modern society there is no reason why injured parties should not be compensated. While mere money can never fully compensate the loss of a loved one, it is a beginning, and is certainly more complete compensation than nothing at all. Given these social realities, it is time that Colorado changed its rule of damages by adding some flexible item such as loss of companionship. If the supreme court fails to act, then the legislature should modify the present wrongful death statute. Whatever the source, there should be quick and immediate action, for as the court in *Wycko* pointed out, "[t]hat this barbarous

concept of pecuniary loss . . . should control our decisions today is a reproach to justice."[81]

David K. Rees

[81] Wycko v. Gnodtke, 361 Mich. 331, 337, 105 N.W.2d 118, 121 (1960).