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ever to mean all persons in the general vicinity, not just those doing the same or similar work.[39] The status of the contact-with-the-premises exception is unclear due to an apparent conflict in holdings.[40] Neither the actual[41] nor the positional[42] risk theory has been adopted by the court.

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Wrongful Death—Measure of Damages—Evidence of Retirement Income.

In the recent case of *Bryant v. Woodlief*[1] the North Carolina Supreme Court held that evidence of railroad retirement payments received by the decedent is admissible on the issue of damages in a wrongful death action.[2] This holding[3] and the court's incidental discussion of the measure of damages in North Carolina raises two questions. First, how far will the court extend the holding in *Bryant,* which seemingly is in conflict with prior decisions, to other types of income similar to that involved in the principal case? Secondly, what inference can be drawn from the inconsistency reflected in the court's discussion in *Bryant?*

The evidence admitted in the principal case is difficult to reconcile with the tacit rule of past cases that wrongful death damages in North

[39] See Pope v. Goodsen, *supra* note 38; Fields v. Tompkins-Jenkins Plumbing Co., *supra* note; 38 Plemmons v. White's Serv., Inc., 213 N.C. 148, 195 S.E. 370 (1938).

[40] Perkins v. Sprott, 207 N.C. 462, 177 S.E. 404 (1934); Whitley v. Highway Comm'n, 201 N.C. 539, 160 S.E. 827 (1931). The application of the exception could leave the court in an illogical position if a case ever arose where one eye was injured directly by an object and the other eye injured by shattered glass from a window. Apparently compensation would be awarded for injury to one eye under the premises exception but disallowed for the other under the increased risk theory.

[41] The language in Fields v. Tompkins-Johnston Plumbing Co., 224 N.C. 841, 32 S.E.2d 623 (1945), strongly indicates that no recovery would be allowed for a heatstroke suffered on a hot day unless some additional harmful factor were present. The actual risk theory would require nothing more than labor in the hot sun. Compare Hughes v. St. Patrick's Cathedral, 245 N.Y. 201, 156 N.E. 665 (1927).

[42] Utilization of the positional risk doctrine would have allowed compensation in Whitely v. Highway Comm'n, 201 N.C. 466, 160 S.E. 827 (1931).

[1] 252 N.C. 488, 114 S.E.2d 241 (1960).

[2] Heskamp v. Bradshaw's Adm'r, 294 Ky. 618, 172 S.W.2d 447 (1943), was relied upon in the principal case. Kentucky's death statute, KY. REV. STAT. § 411.130 (1959), has been construed to provide recovery for "loss to the estate." Chesapeake & O. Ry. v. Bank's Adm'r, 153 Ky. 629, 156 S.W. 109 (1913). The North Carolina statute, N.C. GEN. STAT. § 28-174 (1950), is given the same construction. Rea v. Simowitz, 226 N.C. 379, 38 S.E.2d 194 (1946).

[3] Other jurisdictions have reached the same result; Kowtko v. Delaware & Hudson R.R., 131 F. Supp. 95 (M.D. Penn. 1955) (training subsistence payments from the Veterans Administration); Barrow v. Lence, 17 Ill. App. 2d 527, 151 N.E.2d 120 (1958) (monthly pension); Trust Co. v. Cummings, 320 Ill. App. 437, 51 N.E.2d 616 (1943) (old age assistance); Jessee v. Slate, 196 Va. 1074, 86 S.E.2d 821 (1955) (monthly social security payments). And the measure of damages used is not determinative of the question of the admissibility of such evidence. Virginia, for example, allows such evidence and its measure is "loss to certain near relatives." Conrad v. Thompson, 195 Va. 714, 80 S.E.2d 561 (1954).

Carolina are to be based on loss of income expected from probable future exertions of the decedent. Although never formally stated, this rule has developed around the phrase, "from his own exertions during his life expectancy," which relates to the determination of net pecuniary value of decedent's life. This value is ascertained by deducting probable living costs of the decedent from his probable gross income expected to be derived *from his own exertions during his life expectancy.*[4] The use of the words "exertions during his life expectancy" would seem to mean exertions during that time the decedent would have had earnings *but for* the wrongful act. To be admissible, therefore, the probable income must be due to exertions of the decedent which would have been performed had the decedent lived out his life expectancy. Under this interpretation it is clear that the rewards from exertions prior to death are not to be considered; thus the phrase would not seem to comprehend retirement pensions. Such rewards from past earnings would be a part of the decedent's accumulated capital rather than a part of his probable future earnings.

In essence the question before the court in *Bryant* was whether the evidence was to be restricted to decedent's probable future earnings or whether probable earnings plus income from other sources should be admitted. By admitting evidence of retirement income the court decided in favor of the latter alternative. Thus the court drew no distinction between the income expected from future earnings and that attributable to past earnings. The only restriction placed on the admissibility of evidence of income from sources other than future earnings by the court in *Bryant* is that the income must be of such a nature as to stop upon the death of the decedent.[5] The court adopted the theory that a pension is a substitute for earning power. This may be so in practical result; but the legal theory of the tacit or unexpressed rule does not seem to be satisfied thereby. The court should have stated that they could find no sound basis for excluding evidence of pension income which is attributable to the past exertions of the decedent while allowing consideration of income from probable future exertions. Although the court has never held that income like that in *Bryant* was inadmissible, the language of the previous decisions[6] would not seem logically to warrant the result in the principal case. If the plain meaning of these previous cases is not to be followed, then it should be so stated. Other-

[4] Journigan v. Little River Ice Co., 233 N.C. 180, 184, 63 S.E.2d 183, 186 (1951); Rea v. Simowitz, 226 N.C. 379, 38 S.E.2d 194 (1946); Carpenter v. Asheville Power & Light Co., 191 N.C. 130, 131 S.E. 400 (1926); Russell v. Windsor Steamboat Co., 126 N.C. 961, 36 S.E. 191 (1900).

[5] 252 N.C. at 494, 114 S.E. at 246, "[W]e do not understand that the general rule in this respect would exclude the inclusion of income from an annuity, life estate, retirement pay, or other income for life only, in arriving at the pecuniary loss sustained by reason of wrongful death."

[6] Cases cited note 4 *supra.*

wise, *Bryant* will stand as dubious precedent for any type of life income rather than pensions.

Whatever might be said about the apparent conflict with precedent, the principal case does, this writer submits, reach a sound result. There seems to be no valid reason why evidence of probable future earnings should be admitted and evidence of future income from past earnings excluded. The time of the actual exertion does not seem significant. Indeed whether the income was derived from any exertion at all does not logically affect what the estate of the decedent has lost by his wrongful death because the loss of a life income in any form is a pecuniary loss which the estate of the decedent has suffered.[7] Also, as was pointed out in *Bryant*,[8] it is more reasonable to assume that a pension will continue until the pensioner's death than that salary or wages would continue. The problem is how far should the court go in admitting evidence of income other than that attributable to past or future exertions and to what extent it will feel bound by its language in previous cases.

The court intimated that it will admit evidence of any kind of life income which death has cut short, to wit: "an annuity, life estate, retirement pay or other income for life only."[9] Conceivably, however, some problems may arise in applying this broad statement to differing fact situations. If the annuity, for example, is of the survivorship type providing larger payments to the decedent than to his widow it may not be readily apparent what the estate has lost.[10] If the life estate, to use another illustration, was held jointly by the decedent and another, the question is also a closer one than that in the principal case.

Because of the unexpressed rule it is even possible, although the court in *Bryant* does not say so, that in future cases an inquiry will be made into how the decedent acquired the life estate or right to a life income, so that evidence of a gift of such an interest could be excluded. It is submitted, however, that such a result should not be encouraged because nothing in *Bryant* requires the courts to look beyond the life income itself. Rather the opinion seems to establish only one criterion to use in the admission of evidence of income, and that is whether the wrongful death terminated income or property rights which the decedent would have had for the remainder of his life. Under this rule it would not

[7] Of course, if the property which produced the income is owned by the decedent, e.g., a trust fund, there is no ground for admitting such income because it is not affected adversely by the death of the decedent. The rule that investment income is not admissible demonstrates the application of this principle. See, *e.g.*, White v. North Carolina R.R., 216 N.C. 79, 3 S.E.2d 310 (1939); Underwood v. Old Colony St. Ry. Co., 33 R.I. 319, 80 Atl. 390 (1911).

[8] 252 N.C. at 497, 114 S.E.2d at 248.

[9] *Id.* at 494, 114, S.E.2d at 246.

[10] A sum equal to the difference in the two payments would seem one logical answer. Nevertheless it is clear that where the estate (or beneficiary) receives less than the decedent would have had he lived, a sum equal to that difference is ascertainable and should be included in the computation of probable future earnings.

matter that the decedent had been given his life income as a gift or that he had purchased the same with capital savings, salary earnings, or windfall receipts like remote inheritances or raffle prizes.

If this interpretation of the court's statements and holding in *Bryant* is correct, it seems clear that they amount to a repudiation of the tacit rule.[11] On the other hand, regardless of the outcome of any future controversy concerning the source of the income, the mere admission of evidence of the product of previously earned income is an extension of that rule.

The second question raised by the opinion in the *Bryant* case concerns the proper measure of damages for wrongful death in North Carolina.

The common law gave no remedy for wrongful death since the decedent's rights for tortious injury were considered to be personal and to terminate upon his death.[12] England in 1846[13] and North Carolina in 1854[14]—changed this situation by giving to the personal representatives of the deceased a statutory right of action for wrongful death.

Today there are three different views of what constitutes a proper measure of damages for wrongful death.[15] One view regards the proven pecuniary loss sustained by certain members of the family as the proper measure. Under this rule the plaintiffs may prove loss of financial assistance from the decedent[16] and loss of services of a pecuniary value by reason of decedent's death.[17] Competent evidence includes the health of the plaintiffs,[18] their life expectancy and financial condition[19] and their relationship to the decedent.[20] The "loss to the family" measure is the majority rule[21] and is the measure used by the English courts.[22] It is also the rule adopted under the Federal Employer's Liability Act.[23]

Another view, held by a small minority, is that the size of the recovery depends upon the degree of the defendant's culpability and is unrelated to pecuniary loss.[24]

[11] See text accompanying note 4 *supra.*
[12] Armentrout v. Hughes, 247 N.C. 631, 101 S.E.2d 793 (1958).
[13] Lord Campbell's Act, 1846, 9 & 10 Vict., c. 93.
[14] N.C. Pub. Laws 1854, ch. 39. The present statute is N.C. GEN. STAT. § 28-173 (1950).
[15] McCORMICK, DAMAGES § 95 (1935).
[16] Meekin v. Brooklyn Heights R.R., 164 N.Y. 145, 58 N.E. 50 (1900).
[17] Lichtenstein v. L. Fish Furniture Co., 272 Ill. 191, 111 N.E. 729 (1916).
[18] Simoneau v. Pacific Elec. Ry., 166 Cal. 264, 136 Pac. 544 (1913).
[19] Francis v. Atchison, T. & S.F. Ry., 113 Tex. 202, 253 S.W. 819 (1923).
[20] Pierce v. Conners, 20 Colo. 178, 37 Pac. 721 (1894).
[21] McCORMICK, DAMAGES § 106 (1935). See generally 44 HARV. L. REV. 980 (1931).
[22] Barnett v. Cohen, [1921] 2 K.B. 461; 28 HALSBURY LAWS OF ENGLAND § 110 (3d ed. 1959).
[23] Kansas City So. Ry. v. Leslie, 238 U.S. 599 (1915); Gulf, Colo. & Santa Fe R.R. Co. v. McGinnis, 228 U.S. 173 (1913).
[24] MASS. ANN. LAWS c. 229, § 2C (1955); Macchiaroli v. Howell, 294 Mass. 144, 200 N.E. 905 (1936).

By the third view, which is followed in North Carolina,[25] what is sought is compensation for the pecuniary loss to the decedent's estate. This loss is usually determined by deducting probable future personal living expenses from probable future gross income of the decedent. Under this measure it would not seem to matter whether there are any next of kin of the decedent since the recovery would—under the North Carolina view[26]—escheat to the state as would intestate property where decedent leaves no relatives.

The reason a question about the North Carolina measure is raised by the *Bryant* opinion is that the court cites early North Carolina cases in conflict with the "loss to the estate" rule. These early cases are to the effect that the proper measure of damages is the loss to the family of the decedent. In *Collier v. Arrington*,[27] the court said that the only question was "how much has the plaintiff [widow] lost by the death of the person injured." And in *Kesler v. Smith*[28] the language used was, "what was the reasonable expectation of pecuniary advantage to the family of the deceased from the continuance of his life." There are several other early cases using similar language,[29] and there is even judicial expression to the effect that such cases were following the English rule.[30]

Another and more recent group of cases employ the phrase "loss to the estate of the decedent" as stating the proper measure.[31] In other recent cases, however, the court seems to have returned to the principle of "loss to the family." *Hanks v. Norfolk & W. Ry.*[32] was such a case; the court allowed evidence of a guilty plea by the decedent in a non-support action on the theory that it showed decedent's character. It was the defendant's intention thus to show how little the decedent's family had lost, in a pecuniary sense, by the decedent's death. In *Lamm v. Lorbacher*[33] the trial judge charged the jury to "arrive at the pecuniary

[25] McCoy v. Atlantic Coast Line Ry., 229 N.C. 57, 47 S.E.2d 532 (1948); Carpenter v. Asheville Power & Light Co., 191 N.C. 130, 131 S.E. 400 (1926); Russell v. Windsor Steamboat Co., 126 N.C. 961, 36 S.E. 191 (1900). It is interesting to note that while the proceeds of a wrongful death recovery are to be disbursed in accordance with the statute of distribution, such funds are not part of the decedent's estate so as to be subject to decedent's debts. N.C. GEN. STAT. § 28-173 (1950).

[26] McCoy v. Atlantic Coast Line Ry., 229 N.C. 57, 47 S.E.2d 532 (1948); Warner v. Western N.C. R.R., 94 N.C. 250 (1886).

[27] 61 N.C. 356, 358 (1867).

[28] 66 N.C. 154, 157 (1872).

[29] *E.g.*, Carter v. Railroad, 139 N.C. 499, 52 S.E. 642 (1905); Mendenhall v. North Carolina R.R., 123 N.C. 275, 31 S.E. 480 (1898); Burton v. Wilmington & Weldon R.R., 82 N.C. 505 (1880).

[30] Purnell v. Rockingham R.R., 190 N.C. 573, 130 S.E. 313 (1925).

[31] *E.g.*, Carpenter v. Asheville Power & Light Co., 191 N.C. 130, 131 S.E. 400 (1926); Horton v. Seaboard Air Line Ry., 175 N.C. 472, 95 S.E. 883 (1918).

[32] 230 N.C. 179, 52 S.E.2d 717 (1949). This case and the earlier North Carolina decisions on this point are discussed in Note, 28 N.C.L. REV. 106 (1949).

[33] 235 N.C. 728, 71 S.E.2d 49 (1952).

worth of the deceased to her family or estate."[34] The court held that the use of the word "family" in the connection in which it was used may be understood as meaning "estate" and thus the charge was not in error. It is doubtful that the jury understood the word in other than its common meaning. Then in *Armentrout v. Hughes*[35] the court said, "Our statute has from its passage been interpreted to accord with the interpretation given by the English courts to Lord Campbell's Act."[36] This broad statement evidently overlooked *Russell v. Windsor Steamboat Co.*,[37] wherein it was pointed out that North Carolina has a measure of damages different from that used by the English courts.

In the principal case the court quotes with approval the language of three of the early North Carolina cases previously mentioned herein.[38] Also the court cites[39] an English case which held that a father who had a reasonable expectation of benefit from the continuance of his son's life could maintain an action for damages for his wrongful death. This result seems quite proper under the English or "loss to the family" rule, but it could not follow from the North Carolina or "loss to the estate" rule.

It is not clear what the court sought to achieve in *Bryant* by its collection of seemingly contradictory authority, but it is possible that a change in the law is contemplated. There is, however, an expression in the opinion to the effect that no former opinion is sought to be altered, modified, or overruled.[40] In spite of this disclaimer there does seem to be a shift towards the English or majority rule. There also possibly emerges a trend away from the judicially self-imposed test of "income derived from deceased's *own exertions*" and back to the language of the statute itself which is: "fair and just compensation for the pecuniary injury resulting from such death."[41]

In summary it can only be said that *Bryant* perpetuates the confusion surrounding this area of the law, even if it does not alter precedent.

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[34] *Id.* at 729, 71 S.E.2d at 50.
[35] 247 N.C. 631, 101 S.E.2d 793 (1958).
[36] *Id.* at 632, 101 S.E.2d at 795.
[37] 126 N.C. 961, 36 S.E. 191 (1900).
[38] Mendenhall v. North Carolina RR., 123 N.C. 275, 31 S.E. 480 (1898); Kesler v. Smith, 66 N.C. 154 (1872); Collier v. Arrington, 61 N.C. 356 (1867).
[39] 252 N.C. at 496, 114 S.E.2d at 247.
[40] *Id.* at 498, 114 S.E.2d at 248.
[41] N.C. GEN. STAT. § 28-174 (1950).