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corporate characteristics can be achieved for the most part under modern partnership agreements.

In view of all of these factors, professionals should carefully study their individual and group needs and goals before making a decision to incorporate.

JOHN E. BUGG

The New North Carolina Wrongful Death Statute

Anyone intending to sue for wrongful death in North Carolina must concern himself with four sections in Chapter 28 of the General Statutes. Sections 28-172 and 28-175, which will be referred to as the "survival statute" in this comment, permit recovery for the decedent's medical expenses, pain and suffering, and other damages incurred before his death. The decedent's right of action for these damages "survives" him and passes to his estate. Sections 28-173 and 28-174, which will be referred to as the "wrongful death statute," grant recovery to the decedent's heirs for certain losses that result from his death.

The 1969 General Assembly completely rewrote section 28-174¹ of the

¹ N.C. GEN. STAT. § 28-174 (Supp. 1969), *rewriting* N.C. GEN. STAT. § 28-174 (1966), states:

- (a) Damages recoverable for death by wrongful act include:
 - (1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;
 - (2) Compensation for pain and suffering of the decedent;
 - (3) The reasonable funeral expenses of the decedent;
 - (4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected:
 - a. Net income of the decedent,
 - b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,
 - c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;
 - (5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence;
 - (6) Nominal damages when the jury so finds.
- (b) All evidence which reasonably tends to establish any of the elements of damages included in subsection (a), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons

wrongful death statute. The rewritten section in no way resembles its predecessor, and its effect will not be limited to damages for wrongful death. This comment will discuss the new section and its practical consequences.

SCOPE OF THE NEW STATUTE

The new section's intended scope is stated in the preamble:

WHEREAS, human life is inherently valuable; and

WHEREAS, the present statute is so written and construed that damages recoverable from a person who has caused death by a wrongful act are effectively limited to such figure as can be calculated from the expected earnings of the deceased, which is far from an adequate measure of the value of human life²

The old section allowed recovery only for "such damages as are a fair and just compensation for the pecuniary injury."³ Now medical expenses that result from the injury,⁴ the decedent's pain and suffering,⁵ funeral expenses,⁶ punitive damages,⁷ and nominal damages,⁸ all of which were excluded under the old statute and case law,⁹ can be recovered in wrongful death actions. The new section also provides recovery for "the present monetary value of the decedent to the persons entitled to receive the damages recovered. . . ."¹⁰

This provision should produce a fundamental change in the measurement of loss due to wrongful death. The "present monetary value" includes eleven specific elements,¹¹ but it is not limited to them. The courts:

entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act.

² Ch. 215, § 1, [1969] N.C. Sess. L. —, which became N.C. GEN. STAT. § 28-174 (Supp. 1969).

³ Ch. 113, § 71, [1868] N.C. Sess. L. 276, which remained unchanged until 1969 as N.C. GEN. STAT. § 28-174 (1966).

⁴ N.C. GEN. STAT. § 28-174(a)(1) (Supp. 1969).

⁵ *Id.* § 28-174(a)(2).

⁶ *Id.* § 28-174(a)(3).

⁷ *Id.* § 28-174(a)(5).

⁸ *Id.* § 28-174(a)(6).

⁹ Ch. 113, § 71, [1868] N.C. Sess. L. 276. See *Armentrout v. Hughes*, 247 N.C. 631, 632, 101 S.E.2d 793, 794 (1958) (punitive and nominal damages not recoverable); *Hoke v. Atlantic Greyhound Corp.*, 226 N.C. 332, 337, 38 S.E.2d 105, 109 (1946) (damages sustained during lifetime not recoverable); *Crawford v. Hudson*, 3 N.C. App. 555, 557, 165 S.E.2d 557, 559 (1969) (funeral expenses excluded).

¹⁰ N.C. GEN. STAT. § 28-174(a)(4) (Supp. 1969).

¹¹ *Id.* § 28-174(a)(4)a-c.

are therefore given a chance to re-examine some of the principles established under the old statute and to make sweeping changes if they are merited. For instance, a court can deduct for income tax savings¹² or allow any damages in addition to those listed that reasonably reflect "the present monetary value of the decedent to the persons entitled to receive the damages recovered." Damages can be tailored to fit the circumstances in each case.

Net Income

*Net income*¹³ is the first of the eleven specific losses that can be recovered under the new section of the wrongful death statute. By this term, the legislature probably meant to perpetuate the old statute's measure of loss based on the concept of "pecuniary injury," which has been defined as

[t]he present value of the net pecuniary worth of the deceased to be ascertained by deducting the cost of his own living and expenditures from the gross income, based upon his life expectancy. As a basis on which to enable the jury to make their estimate, it is competent to show, and for them to consider the age of the deceased, his prospects in life, his habits, his character, his industry and skill, the means he had for making money, the business in which he was employed—the end of it all being to enable the jury to fix upon the *net income* which might be reasonably expected if death had not ensued¹⁴

However, net income under the new statute does not have to be identical to the net income described above. Since the new statute emphasizes the decedent's value to the beneficiaries,¹⁵ the award could be limited, as in most jurisdictions, to the portion of the income that the beneficiaries

¹² See, e.g., *O'Conner v. United States*, 269 F.2d 578, 584 (2d Cir. 1959); *Brooks v. United States*, 273 F. Supp. 619 (D.S.C. 1967); *Furumizo v. United States*, 245 F. Supp. 981 (D. Hawaii 1965); Note, *Damages—Rightful Recovery for Wrongful Death—The Income Tax Factor*, 46 N.C.L. REV. 941 (1968).

¹³ N.C. GEN. STAT. § 28-174(a)(4)a (Supp. 1969).

¹⁴ *Mendenhall v. North Carolina R.R.*, 123 N.C. 275, 278, 31 S.E. 480 (1898) (emphasis added). See also *Rea v. Simowitz*, 226 N.C. 379, 381, 38 S.E. 194, 196 (1946); *Carpenter v. Asheville Power & Light Co.*, 191 N.C. 130, 131 S.E. 400 (1925). For a discussion of the history and development of North Carolina case law on this subject, see Comment, *Wrongful Death Damages in North Carolina*, 44 N.C.L. REV. 402, 429-32 (1966) [hereinafter cited as *Wrongful Death Damages*].

¹⁵ "The present monetary value of the decedent to the persons entitled to receive the damages recovered" N.C. GEN. STAT. § 28-174(a)(4) (Supp. 1969).

would have actually received had he lived.¹⁶ But "pecuniary injury" has been thoroughly defined and delineated by case law,¹⁷ and the courts should continue to apply this measure of loss of net income. Since it is not certain who would have received the income remaining after the decedent's personal expenditures had he lived, it is reasonable to presume that the surplus would have gone to the beneficiaries in the form of contributions or inheritance. Any new limitation on damages recoverable would probably be contrary to the legislature's obvious intent to expand wrongful death recovery.

The Other Ten Enumerated Losses

Besides *net income*, ten other elements are specifically enumerated as part of the "present monetary value of the decedent" for which recovery can be had. They are "*services, protection, care and assistance* [rendered by] the decedent, whether voluntary or obligatory,"¹⁸ and "*society, companionship, comfort, guidance, kindly offices and advice . . .*"¹⁹ Prior North Carolina case law did not permit recovery of such losses²⁰ because the courts defined "pecuniary injury" to apply only to net income.²¹ But similar losses have long been recoverable as "pecuniary" in many other jurisdictions,²² and a few statutes other than North Carolina's specifically enumerate one or more of these ten losses as recoverable.²³

Jurisdictions that allow recovery for similar losses have had to grapple with whether to allow beneficiaries to recover for grief and mental suffering. The great majority purport not to allow such compensation.²⁴ By use of the term "monetary value of the decedent," the North Carolina Legislature also seems to have prohibited solatium since the beneficiaries' grief and suffering have nothing to do with the decedent's monetary worth. Companionship, society, and related benefits may be given a value

¹⁶ See C. McCORMICK, DAMAGES 344-45 (1935); W. PROSSER, LAW OF TORTS 928 (3d ed. 1964) [hereinafter cited as PROSSER].

¹⁷ See *Wrongful Death Damages* 429-32.

¹⁸ N.C. GEN. STAT. § 28-174(a)(4)b (Supp. 1969) (emphasis added).

¹⁹ *Id.* § 28-174(a)(4)c (emphasis added).

²⁰ *E.g.*, *Scriven v. McDonald*, 264 N.C. 727, 142 S.E.2d 585 (1965); *Lamm v. Lorbacher*, 235 N.C. 728, 731, 71 S.E.2d 49, 52 (1952).

²¹ See note 14 *supra*.

²² Annot., 74 A.L.R. 11 (1931); PROSSER 929-30. See, *e.g.*, *Hall v. Gillins*, 13 Ill. 2d 26, 147 N.E.2d 352 (1958); *Hertz v. McDowell*, 358 Mo. 383, 214 S.W.2d 546 (1948); *Prauss v. Adamski*, 195 Ore. 1, 244 P.2d 598 (1952).

²³ ALASKA STAT. § 13.20.340(c)(2) (1962); HAWAII REV. LAWS § 663-3 (1967); WIS. STAT. § 331.04(4) (1957); WYO. STAT. ANN. § 1-1066 (1957).

²⁴ PROSSER 929-30.

by measuring the decedent's services as a companion and confidant without awarding solatium.²⁵ Without solatium, it is possible to classify the ten enumerated elements as services²⁶ that have a monetary value but would not have produced income for the decedent.

The provision in the new statute for recovery for loss of services that have monetary worth but do not produce income led to its legislative nickname: "The Wife Bill." Housewives obviously perform many services that do not directly yield income. But a substantial number of services may also be lost when a child or a husband-father is killed, especially if the husband-father is

[a] good home handyman who repairs the vacuum cleaner, unclogs the plumbing, paints the house, points the mortar, washes the windows, sets the storm sash, builds cupboards . . . chauffeurs the family; and . . . is an educator who trains the children in swimming and sailing, fishing, camping and other sports²⁷

Juries will have to consider the actual loss sustained by the beneficiaries to award damages for loss of services. These losses cannot be intelligently measured without considering the decedent's relationship with each individual beneficiary. Therefore, awards for services should be small in such cases as *Hepp v. Ader*.²⁸ In that case, one beneficiary, the decedent's thirty-three-year-old daughter, was shown to have been married, living away from her mother's home, and communicating rarely with her.²⁹

PUNITIVE DAMAGES

Punitive damages could not be recovered in a wrongful death action under prior North Carolina law.³⁰ The new statute grants

[s]uch punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence.³¹

²⁵ *Pennsylvania R.R. v. Goodman*, 62 Pa. 329, 339 (1869).

²⁶ See PROSSER 930.

²⁷ Page, *Damages for Wrongful Death—Broadening View of Pecuniary Loss*, 30 NACCA L.J. 217 (1964), reprinted in 1 DAMAGES IN PERSONAL INJURY AND WRONGFUL DEATH CASES 383, 388 (S. Schreiber ed. 1965) [hereinafter cited as Page].

²⁸ 64 Idaho 240, 130 P.2d 859 (1942).

²⁹ *Id.* at 244-45, 130 P.2d at 861-62.

³⁰ *Armentrout v. Hughes*, 247 N.C. 631, 632, 101 S.E.2d 793, 794 (1958).

³¹ N.C. GEN. STAT. § 28-174(a) (5) (Supp. 1969).

Part of the new provision appears to be surplusage. If the personal representative can recover "the punitive damages the decedent could have recovered had he survived," does he gain anything by also being allowed to recover punitive damages for the tort-feasor's "wrongfully causing the decedent's death through maliciousness, wilful or wanton injury, or gross negligence?"³² Perhaps the wording of the new section permits recovery for death caused by acts that are malicious, wilful or wanton, or grossly negligent *and* for other behavior that would justify recovery of punitive damages under common law.³³

EVIDENCE

Recovery for loss of services will alter North Carolina's rules of evidence in wrongful death cases. The legislature anticipated these changes by providing:

All evidence which reasonably tends to establish any of the elements of damages included in subsection (a), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act.³⁴

Plaintiffs in wrongful death actions did not have to allege or prove the existence of beneficiaries under prior North Carolina case law.³⁵ Evidence of their existence, identity, or number was, in fact, considered immaterial unless a beneficiary would be inequitably enriched if he were permitted to share in the award.³⁶ But juries cannot make intelligent awards under

³² A number of common-law cases use words similar or identical to "maliciousness," "gross negligence," and "wilful and wanton injury" to describe acts that may be grounds for punitive damages. *E.g.*, *Lutz Indus., Inc. v. Dixie Home Stores*, 242 N.C. 332, 344, 88 S.E.2d 333, 342 (1955) ("actual malice," "wanton and reckless disregard of plaintiff's rights"); *Swinton v. Savoy Realty Co.*, 236 N.C. 723, 725, 73 S.E.2d 785, 787 (1953) ("wilfully"); *Binder v. General Motors Acceptance Corp.*, 222 N.C. 512, 516, 23 S.E.2d 894, 896 (1943) ("gross negligence"); *Horton v. Carolina Coach Co.*, 216 N.C. 567, 569, 5 S.E.2d 828, 830 (1939) (gross negligence, wilful tort); *Hodges v. Hall*, 172 N.C. 29, 30, 89 S.E. 802, 802 (1916) (maliciousness).

³³ A number of other grounds for recovery of punitive damages exist at common law although few involve the type of act that is likely to cause death. *E.g.*, *Robinson v. McAlhaney*, 214 N.C. 180, 184, 198 S.E. 647, 650 (1938) (fraud, oppression, wilful and wanton aggravation).

³⁴ N.C. GEN. STAT. § 28-174(b) (Supp. 1969).

³⁵ *Warner v. Western N.C.R.R.*, 94 N.C. 250 (1886).

³⁶ *McCoy v. Atlantic Coast Line R.R.*, 229 N.C. 57, 59, 47 S.E.2d 532, 534 (1948) (dictum). *But cf.* *Hicks v. Love*, 201 N.C. 773, 776-77, 161 S.E. 394, 395-96 (1931).

the new law without detailed information about the beneficiaries, and its drafters were correct in rejecting the prior holdings that excluded such evidence. Loss of companionship, services, and related damages cannot be assessed without taking note of the specific relationship between the decedent and each individual beneficiary.

PROOF

Much has been written about proving loss of services in wrongful death actions. The following is a very brief summary of some of that material.³⁷

Most jurisdictions require that the plaintiff prove the existence of benefits that the survivors would have enjoyed although the monetary value of these benefits may be left to the jury's discretion.³⁸ Their existence is often proved by testimony of the decedent's family and friends.³⁹ Proof of the monetary value of the decedent's services, even though not compulsory, is usually helpful to the plaintiff, and all jurisdictions that have considered the question have allowed such proof.⁴⁰

Evidence of the value of a housewife's services can be presented in a highly sophisticated form and is an excellent subject for expert testimony.⁴¹

The cases dealing with the use of an expert have approved the testimony of experts in the following categories: (1) an employment specialist, usually the manager or an employee of a private or government employment agency, (2) a professional home economist or other person trained in economics, (3) a family relations expert, including managers and employees of community service, welfare, and philanthropic organizations.⁴²

INCONSISTENCIES

The new section of the wrongful death statute permits recovery for two elements of damages that previously were covered only by the survival

³⁷ See, e.g., Page, *supra* note 27; Comment, *Torts—Wrongful Death—How Much is a Good Wife Worth?*, 33 Mo. L. REV. 462 (1968) [hereinafter cited as *How Much is a Good Wife Worth*]; Comment, *Damages in Wrongful Death and Survival Actions*, 29 OHIO ST. L.J. 420 (1968).

³⁸ Page, *supra* note 27, at 387.

³⁹ *How Much is a Good Wife Worth* 465.

⁴⁰ Page, *supra* note 27, at 386-87; *How Much is a Good Wife Worth* 469.

⁴¹ See *Lithgow v. Hamilton*, 69 So. 2d 776, 779 (Fla. 1954). For illustrations of the possible subject matter of expert testimony concerning a housewife's services, see 16 AM. JUR. PROOF OF FACTS 859-70 (1965).

⁴² *How Much is a Good Wife Worth*, *supra* note 37, at 471.

statute: "[e]xpenses for care, treatment and hospitalization incident to the injury resulting in death"⁴³ and "[c]ompensation for pain and suffering of the decedent."⁴⁴ The survival statute itself has not been changed, and case law to date holds that the survival and wrongful death statutes grant two distinct causes of action and that damages allowed under each must be pleaded and determined separately.⁴⁵ This rule worked well in the past because the items recoverable under each statute formerly were mutually exclusive.⁴⁶ But if the rule is applied now, it will permit double recovery of a single loss.

This problem is not eliminated by the clause in the new wrongful death statute that was intended to repeal "all laws and clauses of laws in conflict with this act"⁴⁷ because only two of the many functions of the survival statute, as interpreted by the courts, are in conflict. The survival statute grants a cause of action against a wrongdoer's estate.⁴⁸ Case law interpreting it permits recoveries for medical expenses and pain and suffering, for earnings lost before death, and for injuries that did not cause death.⁴⁹ Repeal of the survival statute or any particular clause in it would eliminate both its non-conflicting functions and its identical ones. The courts, of course, might hold that only those specific applications of the survival statute that conflict with the new wrongful death statute are invalidated. But if such a rule is adopted, problems will remain.

Medical Claimants

Any recovery under the survival statute is subject to ordinary claims against the estate, and to a lien in favor of claimants for the last medical expenses,⁵⁰ while recovery for wrongful death is subject only to claims for funeral expenses and for medical expenses up to five hundred dollars.⁵¹

⁴³ N.C. GEN. STAT. § 28-174(a)(1) (Supp. 1969).

⁴⁴ *Id.* § 28-174(a)(2).

⁴⁵ *Sharpe v. Pugh*, 270 N.C. 598, 601, 155 S.E.2d 108, 111 (1967); *In re Peacock*, 261 N.C. 749, 751, 136 S.E.2d 91, 93 (1964); *Hinson v. Dawson*, 241 N.C. 714, 718, 86 S.E.2d 585, 588 (1955); *Hoke v. Atlantic Greyhound Corp.*, 226 N.C. 332, 38 S.E.2d 105 (1946).

⁴⁶ *Hoke v. Atlantic Greyhound Corp.*, 226 N.C. 332, 337, 38 S.E.2d 105, 110 (1946).

⁴⁷ Ch. 215, § 1, [1969] N.C. Sess. L. —.

⁴⁸ N.C. GEN. STAT. § 28-172 (1966).

⁴⁹ *Brendle v. General Tire & Rubber Co.*, 408 F.2d 116 (4th Cir. 1969); *Hoke v. Atlantic Greyhound Corp.*, 226 N.C. 332, 336-37, 38 S.E.2d 105, 109 (1946); *Fuguay v. A. & W. Ry.*, 199 N.C. 499, 155 S.E.2d 167 (1930).

⁵⁰ N.C. GEN. STAT. § 44-49 (1966); *In re Peacock*, 261 N.C. 749, 751, 136 S.E.2d 91, 93 (1964).

⁵¹ N.C. GEN. STAT. § 28-173 (1966).

If medical expenses can be recovered only through the wrongful death statute, medical claimants can together assert a claim to no more than five hundred dollars, and such a result would be a windfall for the beneficiaries.

A better solution would be to require that damages subject to dual recovery be sought together in the same action and be apportioned equitably among the claimants. The common-law doctrine of merger and the policy against splitting a cause of action arguably require this result. The personal representative must bring his entire action in one suit or see the remainder merged with the original judgment.⁵² There is, however, one obstacle. A judgment on one cause of action does not merge with a separate cause of action,⁵³ and the North Carolina Supreme Court held in *Hoke v. Atlantic Greyhound Corp.*⁵⁴ that the survival and the wrongful death actions are separate and distinct causes of action.⁵⁵ One basis for the decision, however, was that there was "no overlapping of the amount recoverable"⁵⁶ under the survival and wrongful death statutes in force at the time. The overlap exists now, and it should invoke application of the merger rule.

Moreover, rule 19 of the new North Carolina Rules of Civil Procedure makes compulsory the joinder of claimants "united in interest." The personal representative can be viewed as asserting two separate claims, one belonging to the estate and the other to the beneficiaries under the wrongful death statute.⁵⁷ Rule 19, therefore, arguably requires that the two claims be asserted in the same action.

If joinder of causes or parties is perfected, there will remain the problem of apportioning the award among the claimants and the beneficiaries. In *In re Peacock*,⁵⁸ the court dealt with an analogous apportionment problem resulting from the settlement of an action without the parties' designating whether the funds represented recovery under the

⁵² Cf. *Gaither Corp. v. Skinner*, 241 N.C. 532, 535, 85 S.E.2d 909, 911 (1955); *Allison v. Steele*, 220 N.C. 318, 326, 17 S.E.2d 339, 344 (1941); *Bruton v. Carolina Power & Light Co.*, 217 N.C. 1, 7, 6 S.E.2d 822, 826 (1939); *Blume, Required Joinder of Claims*, 45 MICH. L. REV. 797 (1947).

⁵³ See *Gosnell v. Southern Ry.*, 202 N.C. 234, 237-38, 162 S.E. 569, 571 (1932); cf. *Gaither Corp. v. Skinner*, 241 N.C. 532, 535-36, 85 S.E.2d 909, 911 (1955); *Bruton v. Carolina Power & Light Co.*, 217 N.C. 1, 7, 6 S.E.2d 822, 826 (1939).

⁵⁴ 226 N.C. 332, 38 S.E.2d 105 (1946).

⁵⁵ *Id.* at 337, 38 S.E.2d at 109-10.

⁵⁶ *Id.*

⁵⁷ See Note, *Survival of Personal Injury Actions in North Carolina*, 25 N.C.L. REV. 84, 87 (1946).

⁵⁸ 261 N.C. 749, 136 S.E.2d 91 (1964).

survival statute or the wrongful death statute. The medical claimants and the decedent's beneficiaries each asserted a right to the limited funds. In apportioning the funds, the court subtracted attorney's fees, court costs, and administration fees and split the remainder in half. One half went to the medical claimants under the survival statute; the beneficiaries received the other half under the wrongful death law, less the five-hundred-dollar maximum claim for medical expenses, which was added to the medical claimants' award. General verdicts under the new wrongful death statute might be handled in much the same way. In case there is a special verdict, a sound approach would allow the court partial discretion in apportioning the award.

Funeral Expenses

Funeral expenses can now be recovered in North Carolina in a wrongful death action.⁵⁹ They have been held not recoverable in a survival action on the theory that the decedent had no right to them before his death.⁶⁰ However, a recent case from the North Carolina Court of Appeals, *Crawford v. Hudson*,⁶¹ may now permit double recovery of funeral expenses from the tortfeasor. *Crawford* held that the father could recover for his child's funeral expenses although he had already recovered damages (but not funeral expenses) as the child's personal representative in a wrongful death action. The court said that "the ends of justice and equity" require a finding that the plaintiff in this case has stated a valid cause of action⁶² since "the father of an unemancipated minor child is liable for the reasonable funeral expenses of such child"⁶³ and "the father . . . would not be able to recover such expenses from the wrongful death funds."⁶⁴ An argument based on *Crawford* may not be valid under the new form of the wrongful death statute if the personal representative has already recovered funeral expenses since "the ends of justice and equity" do not demand dual recovery.

A father has no guarantee, however, that he will be able to recoup

⁵⁹ N.C. GEN. STAT. § 28-174(a) (3) (Supp. 1969).

⁶⁰ 22 AM. JUR. 2d *Damages* § 127 (1965). Cf. *Hoke v. Atlantic Greyhound Corp.*, 226 N.C. 332, 337, 38 S.E.2d 105, 109 (1946).

⁶¹ 3 N.C. App. 555, 165 S.E.2d 557 (1969).

⁶² *Id.* at 559, 165 S.E.2d at 560.

⁶³ *Id.* at 557, 165 S.E.2d at 559.

⁶⁴ *Id.* at 558, 165 S.E.2d at 560.

completely funeral expenses from the wrongful death recovery because other beneficiaries may share in it. This problem can be easily solved by allowing a father who has paid the funeral expenses of his child to assert a claim under section 28-173 against the sum recovered in the wrongful death action. In cases in which no wrongful death action has been brought, the father should be allowed his right under *Crawford* to sue for the funeral expenses, and the personal representative should be joined in the action under rule 19.⁶⁵ The court should require joinder of the father in any wrongful death action brought by a minor's personal representative to prevent the possibility of double recovery for funeral expenses.

Distribution of the Proceeds

The newly-revised statute continues to provide for distribution of wrongful death awards to the beneficiaries as determined by the intestate succession act.⁶⁶ This method was reasonable when recovery was based solely upon the deceased's net income, but now the awards will also reflect the loss to each beneficiary of the decedent's services. In some cases, therefore, damages will be distributed to persons who have not suffered the loss upon which the award was based.

Courts in other states have departed from similar statutory provisions for distribution when to follow the intestate act's scheme would be highly unjust.⁶⁷ The North Carolina Supreme Court has refused to allow one who would be a beneficiary under the intestate succession act to share in the distribution when he was contributorily negligent in the death of the decedent⁶⁸ or when the recovery was in the form of a settlement from the negligent beneficiary's liability insurance carrier.⁶⁹ The intestate scheme of distribution should also be abandoned when the beneficiary who has suffered most of the compensable loss would be denied a fair share of the recovery.

⁶⁵ See p. 602 *supra*.

⁶⁶ N.C. GEN. STAT. § 28-173 (1966).

⁶⁷ *E.g.*, *Armstrong v. Berk*, 96 F. Supp. 182 (E.D. Pa. 1951); *Duzan v. Myers*, 30 Ind. App. 227, 65 N.E. 1046 (1903); *Eichorn v. New Orleans & C.R.R. Light & Power Co.*, 114 La. 711, 38 So. 526 (1904); *Wolf v. Lake Erie & W.R.R.*, 55 Ohio St. 517, 45 N.E. 708 (1896); Annot., 14 A.L.R. 516, 520-29 (1921).

⁶⁸ *First Union Nat'l Bank v. Hackney*, 266 N.C. 17, 145 S.E.2d 352 (1965); *Cox v. Shaw*, 263 N.C. 361, 139 S.E.2d. 676 (1965); *Forgey v. Schwartz*, 262 N.C. 185, 136 S.E.2d 668 (1964) (dictum).

⁶⁹ *In re Estate of Ives*, 248 N.C. 176, 102 S.E.2d 807 (1958).

EFFECTS OF THE NEW STATUTE

Children

*Russell v. Windsor Steamboat Co.*⁷⁰ established the North Carolina method of determining pecuniary loss in cases involving wrongful death of children:

We see no distinction in the law, nor reason for distinction, between the death of a child and of an adult. The measure of damages is the same

Where life is lost by reason of actionable negligence of another, the measure of damages is the present value of the net pecuniary worth of the life of the deceased, to be ascertained by deducting the probable cost of his own living from the probable gross income derived from his own exertions, based upon his life expectancy.⁷¹

Since the newly-revised statute makes no special provision for children, presumably North Carolina courts will continue to treat children and adults equally in measuring damages for wrongful death. Obviously, an award consisting of a child's net income over his full life expectancy plus damages for loss of his services could be incredibly large, and the courts may now look for ways under the new statute to limit recovery. One possibility is to deduct what the beneficiaries would have spent on the child, had he survived, from the award for loss of services and companionship on the theory that the resulting amount would be a more accurate measure of the "monetary value of the decedent to the . . . beneficiaries."

New Causes of Action

The new law's provision for *nominal damages*⁷² will presumably allow a cause of action simply upon the showing of a negligently-inflicted death. *Armentrout v. Hughes*,⁷³ which denied a cause of action for the death of an eighty-year-old woman because there could be no reasonable expectation of pecuniary loss, and *Scriven v. McDonald*,⁷⁴ which denied a cause of

⁷⁰ 126 N.C. 961, 36 S.E. 191 (1900).

⁷¹ *Id.* at 967, 36 S.E. at 192-93. See also *Burton v. Croghan*, 265 N.C. 392, 144 S.E.2d 147 (1965); *Rea v. Simowitz*, 226 N.C. 379, 38 S.E.2d 194 (1946); *Queen City Coach Co. v. Lee*, 218 N.C. 320, 11 S.E.2d 341 (1940); *Comer v. City of Winston-Salem*, 178 N.C. 383, 100 S.E. 619 (1919); *Gurley v. Southern Power Co.*, 172 N.C. 690, 90 S.E. 943 (1916).

⁷² N.C. GEN. STAT. § 28-174(a) (6) (Supp. 1969).

⁷³ 247 N.C. 631, 101 S.E.2d 793 (1958).

⁷⁴ 264 N.C. 727, 142 S.E.2d 585 (1965).

action for the wrongful death of an eleven-year-old retarded boy for the same reason, should now be deemed to have been overruled legislatively.

The statute will create new questions in cases involving death from prenatal injury since the provision for nominal damages and the allowance of more liberal recoveries weaken the holdings in *Gay v. Thompson*⁷⁶ and *Stetson v. Easterling*.⁷⁸ In *Gay*, the court, denying recovery for the wrongful death of a stillborn child, said:

We have based our decision on the ground there can be no evidence from which to infer "pecuniary injury resulting from" the wrongful prenatal death of a viable child *en ventre sa mere*; it is all sheer speculation. Consequently it is not necessary for us to decide in this case the debatable question as to whether a viable child *en ventre sa mere*, who is born dead, is a person within the meaning of our wrongful death act.⁷⁷

Since damages are no longer confined to pecuniary injury, the courts will now have to reconsider whether a viable child in its mother's womb who is born dead is a person within the meaning of the wrongful death statute. It may be significant that there is North Carolina authority for treating a child in its mother's womb as a person for other purposes, particularly if property is involved.⁷⁸

Stetson, decided two years after *Gay*, denied a cause of action for the loss of a child who died a few months after birth as a result of prenatal brain injuries. The basis for the court's decision was that the plaintiff would not be able to show pecuniary loss; the court remarked that "[h]ere, as in *Gay*, it would be 'sheer speculation' to attempt to assess damages as of the time of the alleged negligently inflicted fatal injuries."⁷⁹

The court will also have to reconsider *Stetson* in light of the new statute and decide whether to allow recovery when the death results from prenatal injuries and shortly follows a live birth. In determining this question, the court will first have to settle whether a child has a right to recover for prenatal injuries that do *not* result in his death, since section 28-173 of the wrongful death statute requires that the decedent have had a cause of action had he survived before there can be any recovery

⁷⁶ 266 N.C. 394, 146 S.E.2d 425 (1966).

⁷⁸ 274 N.C. 152, 161 S.E.2d 531 (1968).

⁷⁷ 266 N.C. at 402, 146 S.E. 2d at 431.

⁷⁸ See, e.g., *State v. Jordan*, 227 N.C. 579, 580-81, 42 S.E.2d 674, 675 (1947); *State v. Forte*, 222 N.C. 537, 23 S.E.2d 842 (1943); cf. N.C. GEN. STAT. § 41-5 (1966); Note, *Right of Action for Prenatal Injury*, 28 N.C.L. REV. 245 (1950).

⁷⁹ 274 N.C. at 157, 161 S.E.2d at 534 (two justices dissented).

for wrongful death. This threshold issue has not been squarely faced in North Carolina except in *Stetson* itself, in which the court said in dictum that a cause of action for a prenatal injury not resulting in death would be allowed.⁸⁰ Furthermore, there is language in *Stetson* indicating that the court would have found a cause of action for wrongful death under a statute resembling the one now in effect in North Carolina:

We are advertent to the fact *the result* reached here is in conflict with *the result* reached in decisions elsewhere

There are marked differences between the statutory provisions in force in these jurisdictions and "our Death Act . . ." Only the Ohio and Illinois statutes contain the phrase "pecuniary injury." In these jurisdictions, apparently no formula or rule has been adopted for determining "pecuniary injury," such as the rule well established in this jurisdiction Too, it is noted that in Illinois, contrary to the North Carolina rule . . . , nominal damages are recoverable in an action for wrongful death.⁸¹

CONCLUSION

"All changed, changed utterly . . ." ⁸²

On the whole the change is good. Perhaps most significantly, non-working wives were not ignored by the drafters of North Carolina's wrongful death statute. Nor were the retarded, the aged, and, hopefully, children born with the expectation of certain and immediate death from prenatal injuries. Portions of the statute need rethinking, however, and the ambiguous language in some provisions will require considerable interpretation by the courts to resolve many of the uncertainties.

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⁸⁰ *Id.* at 155-56, 161 S.E.2d at 533-34.

⁸¹ *Id.* at 157, 161 S.E.2d at 534-35.

⁸² W. B. YEATS, *Easter*.