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Damages—Wrongful Death—Evidence of Improvident Attitude of Decedent

Garfield Hanks was convicted of non-support and ordered to pay \$10 per week for support of his children. Later Hanks filed a complaint for absolute divorce, alleging an agreement respecting custody and support of the three minor children. The next day, and before service of this summons and complaint, Hanks was killed when struck by the defendant's train at a crossing. His wife as administratrix successfully brought an action for wrongful death, and put in evidence the gross earnings of deceased for the past several years and his average weekly wage at the time of his death. The defendant excepted to exclusion of the non-support judgment and the summons and complaint for divorce, as well as to exclusion of its offer of the inventory of Hanks' estate. On the appeal, by a 4-3 decision, the North Carolina Supreme Court held that exclusion of the evidence was error.¹

There are two main theories in general use for determining the amount of recovery in a wrongful death action:² (1) loss to surviving relatives, or the amount of money and services these relatives would have received had the deceased lived out his life expectancy, and (2) loss to the estate, which, depending upon the jurisdiction, is (a) present worth of probable gross earnings less personal expenses had death not occurred, (b) present worth of probable savings of deceased had death not occurred, or (c) gross earnings during the life expectancy which was cut short.

The North Carolina statutes provide for an action for wrongful death, in which a fair and just compensation for the pecuniary injury may be awarded and disposed of in the manner of personal property in case of intestacy.³ The statutes do not detail the manner in which this pecuniary injury shall be measured, but leave this question to judicial determination. As to this measure of damages, North Carolina can be placed in category (2) (a), namely, the present worth of probable gross earnings less personal expenses had death not occurred.⁴

¹ *Hanks v. Norfolk & W. Ry.*, 230 N. C. 179, 52 S. E. 2d 717 (1949).

² *McCORMICK, DAMAGES* §95 (1935).

³ N. C. GEN. STAT. §28-174 (1943): "The plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such a death" N. C. GEN. STAT. §28-173 (1943): ". . . The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy."

⁴ *Rea v. Simowitz*, 226 N. C. 379, 38 S. E. 2d 194 (1946); *White v. N. C. R. R.*, 216 N. C. 79, 3 S. E. 2d 310 (1939); *Gurley v. Southern Power Co.*, 172 N. C. 690, 90 S. E. 943 (1916); *Mendenhall v. N. C. R. R.*, 123 N. C. 275, 31 S. E. 480 (1898) ("The measure of damages is the 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 ex-

North Carolina decisions have made it perfectly clear that there is a marked distinction between the North Carolina statute based on present worth of the net pecuniary value of the life of the deceased, and statutes of other jurisdictions, including the Federal Employer's Liability Act, based on the pecuniary loss sustained by the beneficiaries;⁵ that the number and age of children dependent upon deceased is inadmissible on the damage issue in a wrongful death action;⁶ that whether or not deceased would have accumulated anything should not be considered;⁷ that the cause of action did not belong to the deceased, and that those entitled to receive damages do not claim through him;⁸ and that the personal expenses of deceased which are to be deducted from gross earnings to arrive at expected net income do not include contributions to the support of his family or dependents.⁹ These decisions indicate that North Carolina has confined the question of damages in a wrongful death action to finding out (1) how much money decedent would have made if he had lived, and (2) how much of this he would have spent on himself alone, independently of family expense. After this is done, the personal expenses are subtracted from gross income. The present worth of this sum is then the dollar and cents amount recovered.¹⁰ According to the majority opinion, the abandonment and non-support order, the complaint for divorce with custody agreement, and the inventory of the decedent's estate were offered in evidence "to show the character of the deceased and his disinclination to provide for dependent members of his family." A number of North Carolina decisions contain statements that character evidence is admissible in a wrongful death action.¹¹ These opinions do

pectancy."); *Benton v. N. C. R. R.*, 122 N. C. 1007, 30 S. E. 333 (1898) ("The measure of damages for loss of life of plaintiff's intestate is the present value of his net income, and this is to be ascertained by deducting the cost of living and expenditure from his net gross income and then estimating the present value of the accumulation from such net income, based upon his expectation in life.").

⁵ *Carpenter v. Asheville Power & Light Co.*, 191 N. C. 130, 131 S. E. 400 (1925); *Horton v. Seaboard A. L. Ry.*, 175 N. C. 472, 95 S. E. 883 (1918).

⁶ *Bradley v. Ohio R. & C. R. R.*, 122 N. C. 972, 30 S. E. 8 (1898).

⁷ *Roberson v. Greenleaf Johnson Lumber Co.*, 154 N. C. 328, 70 S. E. 630 (1911).

⁸ *Hood v. American T. & T. Co.*, 162 N. C. 92, 77 S. E. 1094 (1913).

⁹ *Rigsbee v. Atlantic C. L. R. R.*, 190 N. C. 231, 129 S. E. 580 (1925).

¹⁰ "Under the state law, the damages for the pecuniary worth of the deceased are to be ascertained by deducting the probable cost of his own living and usual or ordinary expenses from the probable gross income derived from his own exertions based upon his life expectancy (*Purnell v. Railroad*, 190 N. C. 573, 130 S. E. 313). And, in ascertaining these damages, the jury is at liberty to take into consideration the age, health, and expectancy of life of the deceased, his earning capacity, his habits, his ability and skill, the business in which he was employed, and the means he had for making money—the end of it all being to enable the jury fairly to determine the net income which the deceased might reasonably have been expected to earn, had his death not ensued." *Carpenter v. Asheville Power & Light Co.*, 191 N. C. 130, 131 S. E. 400 (1925). "If a man's net earnings are but \$100 per annum, that is his pecuniary value to his family, whether large [family] or small." *Kesler v. Smith*, 66 N. C. 154 (1872).

¹¹ *Hancock v. Wilson*, 211 N. C. 129, 189 S. E. 631 (1936); *Poe v. Raleigh*

not deal with whether or not character evidence is admissible generally, or for a specific purpose, but in at least one case it is stated that evidence of the character of the deceased was relevant only on the question of his earning capacity.¹² The dissent in the principal case states that any evidence not excluded by a specific rule of law and having a logical tendency to show either probable gross income of deceased or probable costs of deceased's own living and personal expenses should be admitted. The view of the dissent would seem to be correct, as evidence of character or otherwise which tended to show probable earnings or spendings of the deceased would bear upon the question of expected net income of the deceased. It is submitted, however, that unless character evidence does tend to show either probable earnings or personal expenditures of the deceased, it is irrelevant on the issue of damages in a wrongful death action in North Carolina.

The majority opinion would admit the evidence to show the character of the deceased because it tended to show a lack of a provident attitude by the deceased toward his family. Following this viewpoint, the court seems to be adopting a loss to the beneficiaries theory, for it is self-evident that a family whose husband and father had been quite generous in providing for their needs and desires has lost by his death more from a financial standpoint than a family whose husband and father was niggardly in his support. But if those designated by statute to receive the recovery receive an amount dependent only upon the father's probable earnings and personal expenditures, provident attitude or lack of one would be immaterial.

A great deal of the language used in a number of earlier North Carolina decisions on the measure of damages in wrongful death actions would seem to indicate that the measure of damages in North Carolina is the pecuniary advantage which might be expected from continuance of deceased's life *by the family*,¹³ or pecuniary worth *to the family*.¹⁴ The first of these, the case of *Kesler v. Smith*,¹⁵ was decided in 1872 and the opinion in the case states that the statute under which the action was brought provided that the amount recovered in a wrongful death action should be for the exclusive and sole benefit of the widow and issue of the deceased¹⁶ in all cases where they are surviving. Conse-

& Augusta A. L. R. R., 141 N. C. 525, 54 S. E. 406 (1906); *Mendenhall v. N. C. R. R.*, 123 N. C. 275, 31 S. E. 480 (1898).

¹² *Speight v. Seaboard A. L. Ry.*, 161 N. C. 81, 76 S. E. 684 (1912).

¹³ *Burton v. Wilmington & W. R. R.*, 82 N. C. 505 (1880).

¹⁴ *Burns v. Asheboro & M. R. R.*, 125 N. C. 304, 34 S. E. 495 (1899); *Mendenhall v. N. C. R. R.*, 123 N. C. 275, 31 S. E. 980 (1898); *Kesler v. Smith*, 66 N. C. 154 (1872).

¹⁵ 66 N. C. 154 (1872).

¹⁶ Actually, though this wording was enacted in 1855, N. C. Pub. Laws 1868-69, c. 113, §72 had changed this provision to read that recovery would be disposed of as provided for personal property in case of intestacy.

quently the term, "injury to the family" was used in that case, and later cases merely repeated it. Later cases seem to omit the phrase "to the family," and in a more recent case¹⁷ it is stated that the recovery for the value of a child's life is not what his services might have been worth to someone else during his minority, but what his entire life would have been worth to *himself* if he had lived. In *Queen City Coach Co. v. Lee*¹⁸ the judge's charge was "pecuniary worth (of deceased) to his estate," and this was held to be in accordance with North Carolina authorities. If there is no family or next of kin to take the recovery, the University of North Carolina is entitled to the recovery¹⁹ indicating clearly that the recovery does not depend on loss to the family of the decedent.

Evidence of the provident attitude of the deceased was admitted in one case²⁰ when offered by the plaintiff, but it was considered that the evidence of deceased's having been a good provider for his family showed a constant attention to his business, and thus was admitted to show earning capacity. In the principal case, the non-support order, the divorce complaint, and the inventory do tend to show lack of a provident attitude by deceased, but tend very remotely, if at all, to show earning capacity or decedent's own living expenses. When the evidence on non-support, however, is coupled with the inventory of decedent's estate there is an indication of the decedent's personal expenditures, and on this ground these two offers could be relevant, for if a man has given his family a small amount of his wages and his estate shows almost nothing, then a high degree of probability exists that personal expenditures were high. But as pointed out by the dissent, there was nothing in the record to show that deceased's contributions to his family were controlled by the support order. Accordingly this combination of evidence has little probative value.

Inasmuch as the majority opinion would permit the excluded evidence to come in to show lack of provident attitude, this case seems to be out of line with the other North Carolina cases holding to a strict net-income theory and rejecting the loss to beneficiaries theory.

BASIL SHERRILL.

Domestic Relations—Actions—Wife's Tort Liability to Husband

In *Scholtens v. Scholtens*,¹ plaintiff husband brought an action against his wife to recover damages for personal injuries which he received in an automobile accident allegedly caused by her negligence. Thus the

¹⁷ *Russell v. Windsor Steamboat Co.*, 126 N. C. 961, 36 S. E. 191 (1900).

¹⁸ 218 N. C. 320, 11 S. E. 2d 341 (1940).

¹⁹ *Warner v. Western N. C. R. R.*, 94 N. C. 250 (1886).

²⁰ *Hicks v. Love*, 201 N. C. 773, 161 S. E. 395 (1931).

¹ 230 N. C. 149, 52 S. E. 2d 350 (1949).