Wrongful Death Damages in North Carolina

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that a defendant file a petition containing a “short and plain statement of the facts” supporting removal and that the petition be filed before trial.\textsuperscript{100} Because of the nature of claims arising under section 1443(1), the Fifth Circuit decisions create a powerful weapon for delay of the trial procedure.\textsuperscript{110} No matter what the substance of the allegations may prove to be, petitioner is at least entitled to a hearing on their merits in the federal district courts. The harassment of local and state prosecutors and the overcrowding of already burdened federal court dockets are no small price to pay. It is hoped that some means of strict and speedy scrutiny of removal petitions may be developed to meet this problem.

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The common law recognized no right of action for wrongful death.\textsuperscript{2} Lord Campbell’s Act in 1846 created the first statutory right of action for wrongful death,\textsuperscript{2} and such rights of action now

\textsuperscript{100} 28 U.S.C. § 1446 (1964).
\textsuperscript{110} See 43 N.C.L. Rev. 628 (1965).

\textsuperscript{2} Higgins v. Butcher, Yelv. 89, 80 Eng. Rep. 61 (1606). This is the first case in England where damages for wrongful death were sought in a civil suit. The plaintiff declared that the defendant had assaulted and beaten the plaintiff’s wife and that she died as a result of her injuries. Recovery was denied in the action for loss of the deceased’s services. “[I]f a man beats the servant of J. S. so that he dies of the battery and loss of the service, because of the servant dying of the extremity of the battery, it is now become an offense to the crown, being converted into a felony, and that drowns the particular offense, and private wrong offer’d to the master before, and his action is thereby lost....” 80 Eng. Rep. at 61. See Hoke v. Atlantic Greyhound Corp., 226 N.C. 332, 334, 38 S.E.2d 105, 107 (1946).

The common-law rule made it cheaper to kill than to injure. For example, it is said that the reason the first Pullman cars were so constructed that passengers slept with their heads towards the front of the train was so they would be killed rather than injured if an accident occurred. It is also suggested that the fire axes placed in each car were to aid the conductor in dispatching those passengers only injured. Gamble, Actions for Wrongful Death in Tennessee, 4 Vand. L. Rev. 289 (1950).

\textsuperscript{2} The Fatal Accidents Act, 1846, 9 & 10 Vict., c. 93, §§ 1-6.

\textsuperscript{2} § 1. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall
exist by statute in all fifty states\(^3\) and in the territories of the United States.\(^4\) Three federal statutes provide for wrongful death recovery in particular situations,\(^5\) and the Warsaw Convention provides for recovery when the death results from international air travel.\(^6\)

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have been caused under such circumstances as amount in law to a felony.
§ 2. Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the afore-mentioned parties in such shares as the jury by their verdict shall find and direct.

Lord Campbell’s Act has been modified five times since its passage. The Fatal Accidents Act, 1864, 27 & 28 Vict., c. 95 §§ 1-3 (beneficiaries may bring the action also); The Law Reform (Miscellaneous Provisions) Act, 1934, 24 & 25 Geo. 5, c. 41, § 2 (recovery for, or by, illegitimates and adopted; recovery for funeral expenses); The Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c. 28, §§ 1-7 (instituted comparative negligence standard); The Law Reform (Limitation of Actions, &c.) Act, 1954, 2 & 3 Eliz. 2, c. 36, § 3 (statute of limitations extended to three years); The Fatal Accidents Act, 1959, 7 & 8 Eliz. 2, c. 65, §§ 1-2 (class of beneficiaries extended; no insurance, gratuity or pension may be considered in assessing damages).

Lord Campbell’s Act was construed in Blake v. Midland Ry., 18 Q.B. 93, 118 Eng. Rep. 35 (1852). “The measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death to his family.” 18 Q.B. at 110, 118 Eng. Rep. at 41.

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\(^4\) D.C. CODE ANN. § 16-1201 (1961); PHIL. ANN. LAWS tit. 28, § 1 (1956); P.R. LAWS ANN. tit. 32, §§ 310-11 (1955), tit. 31, § 5141 (Supp. 1964); V.I. CODE tit. 5, § 76 (1957). These territorial statutes will not be used in the statistical figures in the article. All statistics in the article are compiled from the fifty-four jurisdictions listed in Appendix A.


Lord Campbell’s Act and its successors in the various jurisdictions generally provide a new cause of action separate from any action that the decedent might have had if he had lived.\(^7\) Three statutes, however, merely specify that the action of the deceased will survive rather than create a new cause of action for wrongful death.\(^8\) Several states, including North Carolina, give a right of action under survival statutes for the decedent’s injury prior to his death, and also have a wrongful death statute conferring a right of action for damages caused by the death itself.\(^9\)

The majority of the wrongful death statutes are practically the

shall be liable for damages sustained in the event of the death . . . of a passenger . . . if the accident . . . took place on board the aircraft or in the course of any of the operations of embarking or disembarking.’ Id. at ch. III, art. 17. “The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.” Id. at ch. III, art. 20(1). “If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may . . . exonerate the carrier wholly or partly from his liability.” Id. at ch. III, art. 21. “In the transportation of passengers the liability of the carrier for each passenger is limited to the sum of 125,000 francs.” Id. at ch. III, art. 22(1).

See, e.g., Block v. Compagnie Nationale Air France, 229 F. Supp. 801 (N.D. Ga. 1964). This was a suit for wrongful death in the crash of the Atlanta Art Association charter flight from Atlanta to Paris and back. The court held that the Warsaw Convention superseded any state wrongful death statute and accordingly limited damages to $8300 under the provisions of the convention.


\(^8\) Connecticut, Louisiana and Tennessee.


North Carolina’s survival statute is typical. N.C. GEN. STAT. §§ 28-172, 175 (1950).

§ 28-172. Liability survives to and against representative.—Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as hereinafter provided, shall survive to and against the executor, administrator or collector of his estate.

§ 28-175. Actions which do not survive.—The following rights of action do not survive:

2. Causes of action for false imprisonment and assault and battery.
3. Causes where the relief sought could not be enjoyed, or granting it would be nugatory, after death.
same in their basic language and application, but as to the method of measurement of the damages and distribution of the recovery, the jurisdictions are split. The action for wrongful death under current statutes generally can be brought whenever the death of the decedent is caused by the "wrongful act, neglect or default" of the defendant. A criminal act of the defendant causing the death does not affect the action, however, it may provide a basis for the additional recovery of punitive or exemplary damages. The death of the wrongdoer prior to judgment will abate the action against him for wrongful death in the majority of jurisdictions. If the deceased was compensated for his injury before he died as a result of it, there is no right of action for the death. A release by the decedent bars any action for the death also. The reasons for these rules are that the defendant should not be required to pay twice for the same wrongful act, and the wording of most statutes requires that the injured party have a cause of action against the defendant at the time of his death for a wrongful death action to lie.

There are two generally accepted methods of measuring damages caused by wrongful death. The measure used by forty-three jurisdictions is that of loss to the survivors or beneficiaries caused by the death of the decedent. Six states compute damages according

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Concerning wrongful death caused by breach of warranty of fitness, see generally 30 N.C.L. Rev. 478 (1952).

21 The majority of the wrongful death statutes expressly provide for a right of action notwithstanding the death was caused by a criminal act. See, e.g., Arizona, Delaware, Florida, Illinois, North Carolina.

22 See, e.g., Kentucky, New Mexico, South Carolina and Texas.

23 Prosser 927. Several states have statutory provisions to the effect that the death of the defendant will not abate the action, however, and that recovery can be had against his estate. See, e.g., Alabama, California, Maryland, North Carolina, Ohio, Oklahoma, South Carolina and Washington. 9 N.C.L. Rev. 101, 102 (1930).


25 9 N.C.L. Rev. 101, 102 (1930).

26 Alaska, Drale v. Steele, 13 Alaska 680 (1952); Arizona, Merritt-Chapman & Scott Corp. v. Frazier, 289 F.2d 849 (9th Cir. 1961), cert. denied, 368 U.S. 835 (1961) (no definitive state case on point since the
to the loss to the estate of the deceased only.\(^{18}\) Of the jurisdictions using neither of these methods, two states base recovery solely on the culpability of the defendant in causing the wrongful death;\(^{19}\)


\(^{19}\) Alabama, Parker v. Fies & Sons, 243 Ala. 348, 10 So. 2d 13 (1942); \textit{Massachusetts}, Massachusetts Bonding & Ins. Co. v. United States, 352 U.S. 128 (1956).
one state attempts to measure the damages according to the loss to the decedent himself;\textsuperscript{20} and two states use a combination of the loss-to-beneficiaries and loss-to-estate measures.\textsuperscript{21}

Whether the court is using the yardstick of loss to the beneficiaries or of loss to the estate of the decedent in order to determine the damages, there are elements of consideration in computing the loss that are common to both methods. Using either measure of damages the jury will consider the age of the decedent, his health, habits, occupation, capacity to earn money, and other elements having a bearing upon his possible financial successes in life.\textsuperscript{22} Additional considerations are determined by the measure of damages of each jurisdiction.

\textsuperscript{20} Connecticut, Chase v. Fitzgerald, 132 Conn. 461, 45 A.2d 789 (1946) (compensation for destruction of capacity to carry on life's activities).

\textsuperscript{21} Delaware, Kwiatkowski v. Shellhorn & Hill, Inc., 201 A.2d 455 (Del. Super. Ct. 1964). Where the spouse sues, the damages are loss to the beneficiary, but if no spouse survives, damages are measured by loss to the estate. Georgia, Hudson v. Cole, 102 Ga. App. 300, 115 S.E.2d 825 (1960), GA. CODE ANN. § 105-1309. Where the decedent leaves a spouse, parent or child surviving, the measure of damages is loss to the estate of total earnings of the decedent with no deductions. If none of these survive the decedent, the administrator sues for the next of kin, but the measure here is loss to the beneficiary.

\textsuperscript{22} See, \textit{e.g.}, Dixon v. Serodino, Inc., 331 F.2d 668 (6th Cir. 1964) (habits of work and conduct, nonsupport of family and intoxication); Tetterton v. Arctic Tankers, Inc., 116 F. Supp. 429 (E.D. Pa. 1953) (mental illness); Atlantic Coast Line R.R. v. Grimes, 99 Ga. App. 774, 109 S.E.2d 890 (1959) (earnings of both decedent and his business); Hudnut v. Schmidt, 324 Ill. App. 548, 58 N.E.2d 929 (1944) (personal characteristics, habits of industry and sobriety, mental and physical capacity, age, usual earnings); Temperly v. Sarrington's Adm'r, 293 S.W.2d 863 (Ky. 1956) (earnings of business, age, occupation, health, habits, accumulations, mental and physical ability); Anderson v. Lavelle, 285 Mich. 194, 280 N.W. 729 (1938) (feeble-mindedness); Shepard v. Harris, 329 S.W.2d 1 (Mo. 1959) (good and willing worker, number of jobs held, earnings, tender age); Zielinski v. Cornwall, 100 N.H. 34, 118 A.2d 734 (1955) (ability, disposition to work, habits of industry and earning power); Wimberly v. City of Paterson, 75 N.J. Super. 594, 183 A.2d 691 (App. Div. 1962) (physical, mental and moral characteristics, likely earnings); Caudle v. Southern Ry., 242 N.C. 466, 88 S.E.2d 138 (1955) (age, health, expectancy, earning capacity, habits, ability and skill, occupation and means for making money); Quam v. Wengert, 86 N.W.2d 741 (N.D. 1957) (sobriety, industry, earnings, fixed future wage increases).

In jurisdictions using loss to beneficiaries as the measure of damages, the life expectancy of the beneficiary is a valid consideration since the beneficiary is only awarded what he lost by the death. If the beneficiary's expectancy is less than the decedent's, the damages should be computed on the shorter expectancy to prevent recovery of more than the beneficiary would have received if the decedent had not been killed. Francis v. Sauve, 34 Cal. Rptr. 754 (Dist. Ct. App. 1963); Union Transp., Inc. v. Braun, 318 S.W.2d 927 (Tex. Civ. App. 1958).
I. LOSS TO THE BENEFICIARIES

Thirty-nine states, the Federal Employers’ Liability Act, the Jones Act, the Death on the High Seas Act and Lord Campbell’s Act use the loss-to-beneficiaries measure of damages. The loss is the present value of the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased. Within this rule of recovery, the jurisdictions separate into four groups on the basis of what they consider to be recoverable loss to the beneficiaries of the action. All of these jurisdictions allow pecuniary loss to be recovered, but in many cases the problem is determining what is a pecuniary loss, and what, if any, recovery is to be given for collateral nonpecuniary losses. The estate the deceased would have accumulated during the remainder of his expectancy and from which the beneficiary had expectation of receiving a share by inheritance at the decedent’s death is an element of pecuniary loss just as is the loss of contributions that the deceased would have made to the beneficiary during his lifetime.

A. Pecuniary Loss of Financial Contributions Only

Two jurisdictions using the loss-to-beneficiaries measure of damages limit the recovery to the financial contributions that the beneficiary had reasonable expectation of receiving from the decedent if he had lived. The use of this actual cash measure of damages can lead to the situation where the deceased may not have been making any direct monetary contribution, but to replace the decedent’s gratuitous services the beneficiary would have to pay a

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23 See note 17 supra.
24 Ibid.
25 Ibid.
26 Ibid.
27 Ibid.

Delaware, when measuring damages by loss to beneficiaries, allows only pecuniary contributions to be considered. Kwiatkowski v. Shellhorn & Hill, Inc., 201 A.2d 455 (Del. Super. Ct. 1964). West Virginia limits recovery to financial loss after the first $10,000 is awarded.
third party, thereby incurring a loss.\textsuperscript{31} Recovery here would be small, if anything at all, no matter how valuable the decedent's services might have been to the beneficiary.

\textbf{B. Pecuniary Loss Including the Value of the Decedent's Services}

Twelve states,\textsuperscript{32} the Federal Employers' Liability Act,\textsuperscript{33} the Jones Act,\textsuperscript{34} the Death on the High Seas Act\textsuperscript{35} and Lord Campbell's Act\textsuperscript{36} compute the loss to beneficiaries based upon the pecuniary loss, including the value of the decedent's services that have a monetary value. The beneficiary can recover both the pecuniary value of the decedent's services and the monetary contributions that he has lost by reason of the death. Compensable damage includes loss of such services as parental "care, guidance and control,"\textsuperscript{37} and a mother's "care and attention to the physical, moral, and educational welfare of her children, and a husband's loss of her services in the household."\textsuperscript{38} There is generally no recovery allowed for the loss of society, companionship or protection,\textsuperscript{39} although it is reasonable to

\textsuperscript{33} Brabeck v. Chicago & N.Ry., 264 Minn. 160, 117 N.W.2d 921 (1962).
\textsuperscript{36} Berry v. Humm & Co., [1915], 1 K.B. 627.
\textsuperscript{38} Prauss v. Adamski, 195 Ore. 1, 24, 244 P.2d 598, 608 (1952). The court held that a "pecuniary loss" meant more than the actual earnings or contributions by the decedent. Compensable loss includes financial assistance and also the loss of other things that have a monetary worth. "The measure of damages is the monetary value of such services." Id. at 24, 244 P.2d at 608.
\textsuperscript{39} First Nat'l Bank v. National Airlines, Inc., 171 F. Supp. 528 (S.D.N.Y.}
assume that such recovery might be justified in certain situations where the discontinuance resulted in a pecuniary loss or the service had an actual pecuniary value. These elements of damage should obviously be compensable in cases where the services might of necessity have to be replaced by a paid companion, as in a case where the beneficiary is mentally incompetent or is an invalid.

C. Pecuniary Loss Including Value of Services, Plus Compensation For "Sentimental Loss"—Consortium, Society, Companionship, Love and Affection

Seventeen states allow recovery for the pecuniary loss of con-


Nebraska upheld an instruction allowing the jury in an automobile accident death case to consider the husband's "loss of services and companionship... in so far as they have a monetary value." This recovery for deprivation of companionship is limited to special circumstances. Ensor v. Compton, 110 Neb. 522, 523, 194 N.W. 458, 459 (1923).


tributions and services resulting from the death and award compensation for intangible losses not necessarily of a pecuniary nature. The courts of these jurisdictions perform the virtually impossible task of determining the amount of monetary damages suffered as a result of the loss of "love and affection," "marital relations," and "society." These losses are indisputably tragic and, in most cases, real, but fixing their pecuniary worth would appear to be sheer speculation on the part of a jury. There is no real basis from which to proceed in computing damages for these losses. In the area of nonfatal personal injury, speculative damages are extremely difficult to recover. The "vase of happiness" does not exhibit a readily discernible price tag.

D. Pecuniary Loss Including Value of Services and "Sentimental Loss," Plus Compensation For the Mental Anguish and Grief of the Beneficiaries

Eight states allow a beneficiary to recover for mental suffering, anguish or grief caused by the wrongful death in addition to damages for pecuniary and sentimental losses. Arkansas and Florida expressly provide for this recovery by statute, although the

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In Capone v. Norton, 11 N.J. Super. 189, 78 A.2d 126 (1950), the court stated that deprivation of affection, sentiment, society and companionship are excluded from consideration as elements of damage as they are incapable of being defined by any recognized measure.
46 Spangler v. Helm's N.Y.-Pittsburgh Motor Express, 396 Pa. 482, 153 A.2d 490 (1959). The court's "vase" was composed of companionship, comfort, society, guidance, solace and protection. The award for the loss of these elements caused by the death of a thirty-six-year-old woman was $46,059.54.
48 Recovery is limited to immediate family and those in loco parentis.
Florida act only operates to compensate parents for their anguish caused by the death of their child. Mental anguish is the most liberal element of damage recoverable in a wrongful death action and is almost entirely speculative. The only instance in which the jury would be restrained in awarding compensation for mental anguish or grief would be in a case that showed on its face that this element of damage was not present to any substantial degree.

II. Loss to the Estate of the Decedent

Loss to the estate of the deceased is the measure of damages used by six states including North Carolina. The recovery is not based upon any loss the beneficiaries or survivors of the deceased might have sustained as a result of his death, but solely on the pecuniary loss caused to the deceased's estate by his death. The states employing the loss-to-estate measure use one of three rules in determining the amount of the damages.

A. Present Worth of the Probable Life Savings of the Deceased

The measure of recovery used by Iowa and Rhode Island is that of the probable accumulations that the deceased would have earned and saved by his own efforts if he had not been killed. All

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40 FLA. STAT. ANN. § 768.03 (1964).
41 Beaty v. Buckeye Fabric Finishing Co., 179 F. Supp. 688 (E. D. Ark. 1959); Peugh v. Oliger, 233 Ark. 281, 345 S.W.2d 610 (1961). There is no recovery allowed for mental anguish which consists simply of annoyance, disappointment or a mental suffering growing out of an imaginary situation. 18 Ark. L. Rev. 161 (1964) states that the test applied by Arkansas is that of "more than normal grief" with varying proof required according to the circumstances of the particular case. Id. at 165. The mental anguish must be real. See generally 22 Am. Jur. 2d Damages § 195 (1965).
42 Recovery for mental anguish inevitably opens the door to extremely high verdicts. See, e.g., Hord v. National Homeopathic Hosp., 102 F. Supp. 792 (D.D.C. 1952), aff'd, 204 F.2d 397 (D.C. Cir. 1953) (recovery of $17,000 in the death of a newborn child who died as a result of a fall through a hole in the delivery table).
44 McCormick § 95.
expenses, personal and family, or for any other purpose, are deducted in fixing the recovery at the probable life savings of the decedent.\textsuperscript{55} This recovery does not include probable accumulations which would yield some benefit without the effort, skill or capacity of the deceased, such as property or capital that do not require effort to enhance their value.\textsuperscript{56}

\textit{B. Aggregate of the Probable Gross Earnings of the Deceased During His Expectancy}

Kentucky\textsuperscript{57} bases recovery for wrongful death on the amount of the probable gross earnings of the deceased for the remainder of his life reduced to its present value, without deductions for any expenses whatever.

\textit{C. Present Net Pecuniary Worth of the Life of the Deceased}

New Mexico,\textsuperscript{58} North Carolina\textsuperscript{59} and Tennessee\textsuperscript{60} measure damages according to the present net worth of the deceased’s life. This rule is only concerned with the probable gross earnings of the deceased for the remainder of his life if he had not been killed, minus his personal expenses.\textsuperscript{61} In addition to other elements, age and manner of living are considered by the jury in ascertaining probable personal expenses\textsuperscript{62} to determine future earnings of the deceased.\textsuperscript{63}

\textsuperscript{55} See notes 53 and 54 \textit{supra}.
\textsuperscript{56} McCormick \S 96. The North Carolina court in Carter v. North Carolina R.R., 139 N.C. 499, 501, 52 S.E. 642, 643 (1905), attacked the probable life savings measure of damages stating that nine-tenths of the people would be beyond the protection of the law because few men ever accumulate estates. The earnings of the majority were said to be spent on their families rather than saved. By this measure the family of a miser would benefit while the beneficiaries of a generous man who provided for their needs with his earnings would get nothing.

Rhode Island has also used the net-pecuniary-worth-of-the-decedent’s-life measure, which has not yet been expressly overruled. McCabe v. Narragansett Elec. Lighting Co., 26 R.I. 427, 59 Atl. 112 (1904).

\textsuperscript{57} Lexington Util. Co. v. Parker’s Adm’r, 166 Ky. 81, 178 S.W. 1173 (1915). See Bays v. Cox’ Adm’r, 312 Ky. 827, 229 S.W.2d 737 (1950) (destruction of power to earn money).
\textsuperscript{59} Mendenhall v. North Carolina R.R., 123 N.C. 275, 31 S.E. 480 (1898).
\textsuperscript{61} McCormick \S 96; 28 N.C.L. REV. 106, 107 (1949). See 3 N.C.L. REV. 98 (1925), on the refusal of the North Carolina court to allow recovery for loss of consortium in a negligent death action.
\textsuperscript{63} See note 22 \textit{supra}. 
Whether the loss-to-beneficiaries or loss-to-estate measure is used by the jurisdiction, generally no recovery will be given for substantial damages if there is no loss proved. The damages recovered are normally reduced to their present value. The great majority of jurisdictions hold that insurance benefits paid because of the death or the remarriage of the surviving spouse are not elements to be considered by the jury in computing damages.

III. Difficult Decedents

There are three classes of decedents for whose deaths a recovery is difficult or impossible to measure or obtain, depending on the measure of damages used. They are (1) minor children, (2) the elderly or handicapped, and (3) a wife and/or mother.

A. Minor Children

The loss-to-estate measure of damages requires that a jury, with a minimum of information because of the extremely short life of the decedent, determine the lifetime earnings of a deceased child who was no more than a babe-in-arms at the time of death. The

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speculative nature of such a determination can hardly be questioned. The jurisdictions employing the measure of loss to beneficiaries, regardless of what are considered to be elements of damage, have a somewhat less difficult task. The jury here only has to attempt to determine the amount, if any, of the reasonable expectancy of pecuniary advantage from the continued life of the deceased. If the plaintiff does not prove any reasonable expectancy, there is no recovery. This is more definite than the job of a jury using the loss-to-estate measure, which must determine the earnings as well as the personal expenditures of the deceased infant for the remainder of his life, based only on testimony of the child's age, health, size and appearance. Reaching into the future as far as seventy years for the earnings and expenses of an infant is hardly a realistic gauge of the loss caused by the death.

Various states have attempted to provide for facilitation of recovery in the case of death of a child through special statutory provisions and judicial construction of existing statutes. Eleven state statutes contain provisions for the parent of the deceased child to maintain the action for wrongful death rather than the executor or administrator, and one state specifies only parents can recover damages for mental anguish. Wycko v. Gnothke, a 1960 Mich.
igan decision, overturned the previous measure of damages in the death of a minor, which had been earnings during minority less the cost of the child's support. The court instituted a "pecuniary value of life" measure based on the loss to the parent of the child's companionship and the loss of investment in raising the child until his death.\textsuperscript{76} Michigan was the first of the jurisdictions using the "child labor theory" to abandon it judicially.\textsuperscript{77} Minnesota followed the lead of \textit{Wycko} and in 1961 judicially reconstructed its wrongful death act as applied to children.\textsuperscript{78}

There is questionable logic in making special rules for recovery in the case of a child's death since any rule would necessarily be based on a child's age and status. Thus, with the passing of time or the emancipation of the child, the rule would automatically change, making the measure of damages different from one day to another.\textsuperscript{79} The majority of jurisdictions, including North Carolina, use the same measure of damages for both children and adults.\textsuperscript{80} Loss to the estate is an especially difficult and speculative measure when applied to the death of a minor, but if the loss-to-beneficiaries measure is the test, the same standard can be applied in cases of decedents of all ages with a minimum of the speculation attached to fixing of death damages. The only question for the jury would be that of "reasonable expectation."\textsuperscript{81}

\textsuperscript{76} \textit{Wycko} v. \textit{Gnodtke}, 361 Mich. 331, 338, 105 N.W.2d 118, 122 (1960). Michigan measures damages by the loss to beneficiaries. See Note 41 \textit{supra}. Loss of investment to the parent resulting from a child's death may appear sound at first blush, but it is not logical. If a pianist's hands were amputated in an accident he would not attempt to recover the cost of his music lessons or the value of the time that he had spent practicing the piano.

\textsuperscript{77} 46 \textit{Iowa L. Rev.} 944, 947 (1961). Using the child labor theory, damages for the death of a child are computed by subtracting the cost of the child's maintenance from the amount he would probably have earned during his minority.


\textsuperscript{79} This would be the inevitable result of maintaining two standards of measurement that would necessarily shift from a child's standard to that of an adult when a child attained a specified age or became emancipated.

\textsuperscript{80} \textit{Russell} v. \textit{Windsor Steamboat Co.}, 126 N.C. 961, 967, 36 S.E. 191, 192 (1900); \textit{Prosser} 961.

\textsuperscript{81} \textit{Presley} v. \textit{Upper Miss. Towing Corp.}, 153 So. 2d 416, 420 (La. App. 1963); \textit{McCormick} § 99 ("might reasonably have expected to receive"); \textit{Prosser} 931 ("might have expected to receive").
B. The Elderly or Handicapped

An area of less litigation, but no fewer problems, is that of the elderly or handicapped decedent. In a jurisdiction using loss to the estate as a measure, or where loss to beneficiaries is used but limited to financial contributions, there is no chance of recovery when it is shown that the decedent would not have been capable of earning money beyond the cost of his own support during the remainder of his expectancy. The court allowing recovery of non-pecuniary losses and damages for mental anguish would be able to award some compensation, though it would be speculative. The logical measure would be one allowing recovery of the pecuniary value of the decedent’s services that were lost to the beneficiaries. This element of damages would provide a yardstick for the worth of the deceased to the beneficiaries and would allow a just recovery for the death of those who do not have any expectation of earning wages, but who confer benefit through some service having a monetary value, however small.

C. Wife and/or Mother

The problem of recovery in the death of a wife and/or mother is confined to the jurisdictions using the loss-to-estate measure and

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82 The North Carolina court in Scriven v. McDonald, 264 N.C. 727, 142 S.E.2d 585 (1965), held that the lower court erred in denying a nonsuit in an action for the death of a mentally retarded child who would have been a dependent person incapable of earning a livelihood all of his life. See Schreck v. State, 35 Misc. 2d 929, 231 N.Y.S.2d 563 (Ct. Cl. 1962) where an action was brought for the negligent deaths of epileptics in a state institution. The court allowed only funeral expenses to be recovered by the beneficiaries since the decedents were so handicapped by epilepsy that there was little or no chance that they would ever leave the institution and resume a normal place in society. The beneficiaries of the one boy who had a good chance to assume a normal role in life were awarded $10,000. In Jefferson v. Joiner, 75 Nev. 207, 337 P.2d 622 (1959), only nominal damages were allowed for the death of an insane man where there was no showing that he would ever return to a normal condition. In Armentrout v. Hughes, 247 N.C. 631, 101 S.E.2d 793 (1957), the plaintiff could not show any earning power of the eighty-year-old female decedent. The court upheld a verdict for the defendant, and taxing of costs to the plaintiff, refusing to grant nominal or punitive damages even though the defendant had admitted the felonious killing. In Parsons v. Easton, 184 Cal. 764, 195 Pac. 419 (1921), the court reversed as excessive a $6,000 recovery for the death of a crippled and mentally deficient decedent.

83 See generally notes 41 & 47 supra.

84 See generally Pierce v. Mowry, 105 N.H. 428, 201 A.2d 901 (1964). The court stated that although the decedent was crippled and probably would never have earned any money that this did not preclude the jury from considering the decedent’s capacity to earn money. This required the consideration of the value of the decedent’s services,
those that use the loss-to-beneficiaries measure without allowing the value of the decedent's services to be considered as an element of damages. Using the loss-to-estate measure, the North Carolina court awarded only 4,000 dollars damages for the death of an educated thirty-three-year-old wife and mother of two children.\textsuperscript{85} The jury was to determine only the probable future earnings of the decedent.\textsuperscript{85} The result is necessarily the same in jurisdictions where the damages are calculated by loss to beneficiaries with no recovery for any loss beyond actual financial contributions.\textsuperscript{87} Pecuniary benefit can come in other forms than specie, and anyone would feel enriched financially if he acquired free maid service, baby sitting, and moral, educational and physical training for his children, plus an interested manager to care for the household and its members, all on an around-the-clock basis. Would a person not suffer a real pecuniary loss if these gratuitous, but necessary, services were taken from him?

It has been computed that the cost of duplicating just the labor of a housewife thirty-six years of age with one six-year-old child and a thirty-seven-year-old husband would be 228,109 dollars in present net worth.\textsuperscript{88} A United States district court has determined the loss caused by the death of a wife and mother of six children at 125,100 dollars,\textsuperscript{89} and a Mississippi court awarded damages in the amount of 307,060 dollars for the death of a thirty-four-year-old mother of eight children.\textsuperscript{90} The loss-to-beneficiaries measure of

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  \item \textsuperscript{85}Lamm v. Lorbacher, 235 N.C. 728, 71 S.E.2d 49 (1952).
  \item \textsuperscript{86}Id. at 732, 71 S.E.2d at 52.
  \item \textsuperscript{87}See note 30 \textit{supra}.
  \item \textsuperscript{89}Legare v. United States, 195 F. Supp. 557 (S.D. Fla. 1961). The court relied upon the decision in Lithgow v. Hamilton, 69 So. 2d 776 (Fla. 1954), where $100,000 was awarded for the death of a wife after evidence showed that it would cost $250 per month plus maintenance to hire a substitute to care for the decedent's family.
  \item \textsuperscript{90}Lambert, \textit{How Much Is a Good Wife Worth?}, 41 B.U.L. REV. 328, 334 (1961). See Fabrizi v. Griffin, 162 F. Supp. 276 (W.D. Pa. 1958), aff'd sub nom., 261 F.2d 594 (3d Cir. 1958). The court awarded the husband of the fifty-five-year-old decedent $68,100 for the present value of her services to the husband in his business, and $12,200 was awarded as the value of her earnings. In discussing the actual value of companionship of a spouse, the court stated: "This companionship is the elixir of life to the youth and middle-aged, but it is the necessity of life, as oxygen is to the air, to those who are treading the pathway of life in the later years of one's existence on earth." Id. at 279. In Continental Bus Sys., Inc. v.
Wrongful Death Damages

Damages allowing recovery for the value of services is the most equitable, and only logical, method of determining damages from the death of a wife and/or mother. Some courts go beyond pecuniary loss in allowing intangible damages to be recovered, but this approaches speculation, and it would seem sufficient to limit damages to contributions plus the value of services that require payment of third persons to replace.

IV. Elements of Recovery

The recovery of expenses for the medical, hospital, funeral and burial services stemming from the wrongful death varies with the jurisdiction. The jurisdictions that allow recovery for medical and hospital costs do so under either a survival statute or a wrongful death statute. Costs of the funeral cannot be recovered in a survival action since the decedent would not have had an action for burial costs if he had lived. Eighteen jurisdictions allow recovery under their wrongful death statutes for both medical and funeral expenses. Twelve jurisdictions grant recovery for the

Toombs, 325 S.W.2d 153 (Tex. Civ. App. 1959), there was a $100,000 recovery for the death of a wife and mother of two children.

See notes 41 & 47 supra.


Survival statutes only transfer a right of action that the decedent would have had if he had lived. See note 9 supra.


Arkansas, Bockman v. Butler, 226 Ark. 159, 288 S.W.2d 597 (1956); California, Francis v. Sauve, 34 Cal. Rptr. 754 (Dist. Ct. App. 1963); Colorado, Espinoza v. Gurule, 144 Colo. 381, 356 P.2d 891 (1960); Dela-
funeral expenses alone, with the majority requiring that the beneficiary must have either paid for the funeral or incurred the debt for it. The theory for allowing recovery here is that the funeral is a pecuniary loss to the beneficiary. Iowa does not allow the recovery of funeral expenses because this is an expense that inevitably would have been incurred, but does allow recovery of interest for the premature cost of the service for the period of the decedent's life expectancy. The North Carolina wrongful death act provides that the recovery of the decedent's net pecuniary worth is subject to the payment of hospital, medical and burial expenses up to 500 dollars, subject to approval by the clerk of superior court.

The three federal statutes do not provide for the recovery of funeral costs, but the Federal Employers' Liability Act and the Jones Act have survival provisions under which the medical and hospital costs can be recovered.

The conscious pain and suffering of the deceased in the interval between injury and death is generally recovered under survival statutes, but this compensation can be recovered in an action under the wrongful death statutes of nine jurisdictions. To be compensable under either the wrongful death statutes or the survival


McCormick § 102. See Annot., 14 A.L.R. 485, 535. At least one state has allowed the parents of beneficiaries of the deceased to recover out-of-pocket damages for costs of the medical, hospital and funeral expenses that were not recoverable under the wrongful death statute. Graul v. Adrian, 49 Ill. App. 101, 199 N.E.2d 631 (1964), aff'd, 32 Ill. 2d 345, 205 N.E.2d 444 (1965).


statutes, the pain and suffering of the decedent must be conscious and must be more than that pain merely incident to the killing.

Exemplary or punitive damages have been allowed in at least fourteen states. The prerequisite for recovery of punitive damages where they are allowed in addition to compensatory damages is a willful act or gross negligence. The majority of jurisdictions do not award punitive damages since the wrongful death action had its beginning as a compensatory act to give a remedy for the injury to the beneficiaries of the deceased. There is no logical reason for awarding punitive damages not based on any loss to beneficiaries of the deceased. Any punishment necessary for a wrongful killing can be meted out in the criminal courts.

Six states and the Death on the High Seas Act have given prejudgment interest on wrongful death damages. In the jurisd-

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106 Alabama and Massachusetts allow only punitive damages. Parker v. Fies & Sons, 243 Ala. 348, 10 So. 2d 13 (1942); Massachusetts Bonding & Ins. Co. v. United States, 352 U.S. 128 (1956). Of the twelve other states allowing recovery of punitive damages, four expressly provide for this recovery by statute. Kentucky, New Mexico, South Carolina, Texas.

107 McCormick §§ 79 & 103.


dictions where this question has been expressly treated, it is usually important whether the instruction to the jury asked for a determination of the damages as of the time of the death or as of the time of trial.111

V. PARTY AUTHORIZED TO BRING THE ACTION

Of the acts of the fifty states, the Federal Employers' Liability Act, the Jones Act, the Death on the High Seas Act and Lord Campbell's Act, only the statutes of Iowa and Maryland do not expressly designate the party who is to bring the action for wrongful death. Thirty-one jurisdictions, including North Carolina, specify that only the personal representative, executor or administrator can bring the action.112 Other jurisdictions list combinations of the spouse and personal representative,113 the heirs and personal representative,114 and the persons entitled to recover under the act.115 The use of time periods by which the right to sue extends to an increasing number of persons if suit is not promptly instituted is incorporated into several statutes.116

VI. BENEFICIARIES

A. Parties Receiving Recovery

Regardless of the measure used to determine the amount of damages, the persons who actually receive the money do so according to the distribution provided for in the wrongful death statutes. The actual recovery in a jurisdiction using the loss-to-estate measure of damages is generally specified by the wrongful death statute as not subject to the debts of the deceased117 and is stated to be "for the exclusive benefit of" the beneficiaries under the statutes.

111 See, e.g., id. Interest was allowed where damages were computed as of the date of death rather than the date of trial. Sisson v. Weatherman, 252 Iowa 786, 108 N.W.2d 585 (1961), stated that interest would be allowed if the jury was not instructed to compute it.


113 See, e.g., Arizona, Delaware, Tennessee.

114 See, e.g., California, North Dakota, Pennsylvania.

115 See, e.g., Florida, Hawaii, Kansas.

116 See, e.g., Colorado, Missouri, North Dakota.

117 See, e.g., Iowa, North Carolina.
measuring damages by the loss to beneficiaries.\textsuperscript{118} Twenty-seven of the fifty-four jurisdictions have exclusive classes of beneficiaries.\textsuperscript{119} Six states, including North Carolina, provide for the intestate succession law or the statute of distributions of the state to determine the beneficiaries of the recovery.\textsuperscript{120} Forty-one jurisdictions expressly provide for recovery by the surviving spouse,\textsuperscript{121} although only five make this recovery exclusive of all other surviving parties.\textsuperscript{122} Twenty-seven statutes provide expressly for recovery by the surviving spouse and any children,\textsuperscript{123} with fourteen of these statutes making this an exclusive class.\textsuperscript{124} Six states have statutes requiring that the recovery go to the spouse and next of kin.\textsuperscript{125} Nine jurisdictions place the parent of the deceased on the same level of recovery with the spouse or children,\textsuperscript{126} with seven statutes only setting up one general class of "heirs" to recover.\textsuperscript{127} One statute specifies that the estate of the deceased is to receive the recovery.\textsuperscript{128} Only three statutes provide for the recovery of damages by a non-related dependent of the deceased.\textsuperscript{129} The use of succession statutes

\textsuperscript{118} See, e.g., Alaska, Indiana, Maine, Death on the High Seas Act.
\textsuperscript{119} Alaska, Arizona, Delaware, Florida, Georgia, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, New Mexico, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Virginia, Washington, Wisconsin, Federal Employers' Liability Act, Jones Act.
\textsuperscript{120} Alabama, Iowa, New Jersey, North Carolina, West Virginia, Wyoming.
\textsuperscript{122} Delaware, Florida, Massachusetts, Missouri, New Mexico.
\textsuperscript{124} Kentucky, Louisiana, Maine, Mississippi, New Hampshire, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Washington, Wisconsin, Federal Employers' Liability Act, Jones Act.
\textsuperscript{125} Illinois, Michigan, Minnesota, Nebraska, Ohio, Vermont.
\textsuperscript{126} Arizona, Arkansas, California, Hawaii, Maryland, Pennsylvania, Texas, Death on the High Seas Act, Lord Campbell's Act.
\textsuperscript{127} Montana, Nevada, New Jersey, North Dakota, Utah, West Virginia, Wyoming.
\textsuperscript{128} Connecticut.
\textsuperscript{129} Alaska, Florida, Hawaii.
and exclusive classes of beneficiaries in determining the persons eligible to receive compensation is not in line with a purpose of compensating those damaged by the death, regardless of the measure used in computing the amount of damages. Under the majority of the statutes, a dependent relative outside the specified class of exclusive beneficiaries or a nonrelated dependent has no means of receiving compensation no matter how great his pecuniary loss.

B. Apportionment of Recovery

The apportionment of the damages to the distributees is expressly provided for by the wrongful death statutes of forty-nine of the fifty-four jurisdictions. Fourteen of these statutes require the jury, if there is one, to apportion the damages among the beneficiaries. The judge distributes the recovery in eight jurisdictions. Thirteen states apportion according to intestate distribution statutes, and eleven states apportion pursuant to provisions in the wrongful death statutes themselves. The judge apportions subject to the wrongful death statute provisions in three jurisdictions. Of the six states using the loss-to-estate measure, four distribute damages recovered according to the provisions of the wrongful death statutes, and the other two follow intestate succession laws. In a jurisdiction using loss to beneficiaries as the measure of damages, it seems illogical to apportion damages by any other means than a jury, if there is one, since the jury that determines the amount of damages according to the loss to the beneficiaries is best qualified to distribute this recovery among the individual beneficiaries.

180 See notes 119, 120, 122, 124, & 125 supra.
181 See note 129 supra.
182 Idaho, Louisiana, Montana, Nevada, and Utah are the five jurisdictions that do not provide expressly for apportionment of damages.
184 California, Illinois, Kansas, Michigan, Minnesota, North Dakota, South Dakota, Death on the High Seas Act.
186 Delaware, Georgia, Kentucky, Massachusetts, Mississippi, Nebraska, New Hampshire, New Mexico, Oregon, Rhode Island, Tennessee.
187 New York, Vermont, Wisconsin.
188 Kentucky, New Mexico, Rhode Island, Tennessee.
189 Iowa, North Carolina.
C. Death of a Beneficiary

The death of a beneficiary of a wrongful death action before judgment will not abate the action in those states using loss to the estate as the measure of damages, since the existence of beneficiaries is not material to the action. In the majority of jurisdictions where damages are measured by loss to beneficiaries, the action abates only where the dying beneficiary is the last or sole surviving beneficiary qualifying to receive compensation for the wrongful death. Even then, the estate of the deceased beneficiary may be able to recover the damages suffered by the beneficiary from the time of the decedent's death until the death of the beneficiary. The statutes of a few states provide that the right of action vests in the estate of the decedent where there are no beneficiaries.

VII. Contributory Negligence

Contributory negligence of the decedent defeats recovery in actions for wrongful death in most jurisdictions. The statutes of thirty-two of the fifty-four jurisdictions contain language limiting the right of recovery to cases in which the decedent could have recovered for his injuries if he had lived. Generally, this language imposes the bar of contributory negligence to the action, but in the jurisdictions where the standard of comparative negligence is used in personal injury actions, the damages would only be dimin-

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140 The North Carolina court has held that when an action is brought under the wrongful death statute and there is no surviving beneficiary entitled to recover under the Interstate Succession Act, any recovery obtained in the action escheats to the University of North Carolina just as any other unclaimed property held by executors and administrators of intestates. Warner v. Western N.C.R.R., 94 N.C. 250 (1886).


143 See, e.g., Delaware, Florida, Kentucky, Oregon.

144 Wettach, Wrongful Death and Contributory Negligence, 16 N.C.L. Rev. 211, 212 (1938) [hereinafter cited as Wettach].


146 See generally Wettach.
ished. The Federal Employers' Liability Act, the Jones Act, the Death on the High Seas Act and an amendment to Lord Campbell's Act expressly provide that contributory negligence of the decedent will not bar recovery, but that the damages will be diminished in proportion to the decedent's fault.

There is also the question of contributory negligence of a beneficiary of the damages in a wrongful death suit. The majority provide that the action for damages may be allowed, but the recovery is reduced by the amount of the contributorily negligent beneficiary's share. It follows that if the contributorily negligent beneficiary is the sole beneficiary, no action is allowed. A minority of courts dogmatically hold that contributory negligence is not relevant, or that it bars all recovery under the statute.

VIII. LIMITATIONS AND SPECIAL PROVISIONS

A. Limitations On Amount of Recovery

Limitations on the amount that can be recovered under wrongful death statutes are fixed in thirteen states. Colorado provides the


148 The Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c. 28, § 1.


A father's contributory negligence will not prevent him from suing as administrator for the death of his son although it will bar him from any share of the recovery. Davis v. Railroad, 136 N.C. 115, 48 S.E. 591 (1904).

150 Wettach 225. When damages are reduced or the entire action barred in North Carolina by the contributory negligence of a beneficiary or beneficiaries, why not award this forbidden recovery to the University of North Carolina as is done when there are no surviving distributees rather than allowing the defendant to benefit? See note 140 supra.

151 Wettach 220.

152 Wettach 224.

153 Colorado, $10,000 maximum ($3,000 minimum when killed as passenger on a common carrier); Illinois, $30,000 maximum; Kansas, $25,000 maximum; Maine, $30,000 maximum; Massachusetts, $30,000 maximum—$3,000 minimum ($4,000 maximum if death caused by a defective way); Minnesota, $25,000 maximum; Missouri, $25,000 maximum; New Hampshire, $20,000 maximum ($40,000 maximum if decedent left a spouse, child or dependent parent surviving); Oregon, $25,000 maximum; South Dakota, $20,000 maximum; Virginia, $35,000 maximum; West Virginia, $10,000 maximum without proof of pecuniary loss—$100,000 maximum with proof of loss required beyond $10,000. Wisconsin, $22,500 maximum recovery for pecuniary
lowest maximum recovery with a limit of 10,000 dollars, while 100,000 dollars is the limit in West Virginia. Rhode Island provides a minimum recovery of 5,000 dollars in wrongful death actions. Difficulty of ascertainment of the damages with the consequent chance of excessive verdicts is the only practical reason for a statute to contain a limitation on recovery, and this is not sufficient justification. Personal injury actions often present equally difficult problems of computation, but no statutory limits are placed on these actions. Excessive verdicts are the responsibility of the judge or appellate court.

B. Limitation of Actions

The great majority of the states, the Federal Employers' Liability Act, the Jones Act, and Lord Campbell's Act start the statute of limitations running with the death of the decedent. A few jurisdictions, however, begin the running of the statute with the act of negligence of the defendant. Connecticut uses a combination statute. The average length of the statutes of limitations for wrongful death actions is 2.1 years. This time would seem sufficient for bringing an action if the statute of limitations begins to run at death. Once death has occurred, there is no chance of further unknown injury arising as in the case of a personal injury. Logically, the statute of limitations should start to run at the time

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injury. $3,000 maximum for loss of society and companionship to spouse, unemancipated or dependent child or parents. If the decedent leaves dependent children under eighteen years of age, the maximum limit for pecuniary loss is increased $2,000 for each child, but not to exceed a total increase of $10,000. The Warsaw Convention has a limit of 125,000 francs. See note supra.

_Cf._ Coliseum Motor Co. v. Hester, 43 Wyo. 298, 3 P.2d 105 (1931) (elements of damage withheld from jury because of a lack of limit on recovery).

See, _e.g._, Alabama, Arkansas, Florida, Hawaii, Illinois, Indiana, Louisiana, Maine, Nebraska, Oregon, South Dakota, Vermont, Virginia, West Virginia, Wyoming.

See, _e.g._, Colorado, Minnesota.

A one-year limitation is provided from date the injury is first sustained or discovered, or should have been discovered in the exercise of reasonable care, but no action may be brought more than three years from the date of the act or omission of the defendant.

of the decedent's death since the decedent may live for a consider-
able time after being injured. Otherwise, the effect is that the
statute of limitations for a wrongful death action would have been
running while the decedent was still alive, although the action itself
could not be brought until the decedent died.

C. Special Provisions

Almost half of the jurisdictions include special provisions in
their wrongful death acts. These deal generally with problems or
situations of particular interest in the jurisdiction. Comparative
negligence and compromise or settlement sections help to facilitate
just and speedy disposition of the cases. Holding the county
liable for a death by lynching has the obvious purpose of preventing
homicides. Common carriers are treated separately in some
statutes and are often protected by recovery limitations. The
"guest statute" provides special limitations on liability for death as
well as personal injury. England has enacted an Air Carriage
Act to supplement Lord Campbell's Act in cases of air disasters.
Some of the statutes expressly provide an action for the death of,
or recovery by, illegitimate or adopted children. This specifi-
cation is to make definite any ambiguity or close any gaps in the state
laws on the rights and status of illegitimates and adopteds.

109 See, e.g., Florida (ships and boats); Massachusetts (defective way);
Mississippi (consumption commodities); Nebraska (published notice of dis-
tribution); Texas (steamboats and stagecoaches); Virginia (ships or ves-
sels); Death on the High Seas Act (right of action under laws of foreign
countries); Federal Employers' Liability Act and the Jones Act (carriers in
territories outside the United States).
110 See, e.g., Arkansas, North Dakota, Ohio, Oregon, Virginia, West
Virginia.
111 See, e.g., Colorado, New Mexico.
112 Virginia includes a "guest statute" in its wrongful death act whereby
gross negligence or wanton conduct is necessary in order to recover for the
death of a guest passenger in a motor vehicle.
113 The Carriage By Air Act, 1932, 22 & 23 Geo. 5, c. 36, § 1(4). This
statute is similar in content and effect to the provisions of the Convention
for the Unification of Certain Rules Relating to International Transportation
114 See, e.g., California (illegitimate); Illinois (adopted); Louisiana
(adopted); Mississippi (adopted and illegitimate); Missouri (adopted);
South Carolina (illegitimate); Maryland (illegitimate).
115 The North Carolina wrongful death statute does not make any ex-
press provision concerning adopteds or illegitimates, but the intestate succes-
sion law under which recovery of any death damages is distributed stipulates
the rights of adopteds and illegitimates. See N.C. Gen. Stat. §§ 29-1 to
-30 (Supp. 1965).
The statutory direction for damages in wrongful death in North Carolina is that "the plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death." The North Carolina court has been strict in interpreting the entire statute, and it would seem to be well settled that the measure of damages is the present net worth of the decedent to his estate. However, there are some inconsistencies in the decisions. A change is also apparently developing concerning the elements of damage to be considered, which leaves room for doubt as to the exact state of the law in particular areas.

The first case to construe the North Carolina statute was Collier v. Arrington, which referred to the measure of damages as the amount "the plaintiff lost by the death of the person injured." In Kesler v. Smith, the court stated:

The English statute (9-10 Vic., Ch. 93) is substantially the same as ours... [T]he rule of damages which the courts have laid down is "the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased."... To bring this case under the rule the principal inquiry is, "what was the reasonable expectation of pecuniary advantage to the family of the deceased from the continuance of his life?"

These statements seem to refer to the measure of damages as loss to the beneficiaries rather than as loss to the estate of the deceased, the generally accepted North Carolina rule. This latter rule was fully stated by the court in Mendenhall v. North Carolina R.R. in 1898:

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171 61 N.C. 356 (1867).
172 Id. at 358.
173 66 N.C. 154 (1872).
174 Id. at 157.
175 123 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 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 reasonably be expected if death had not ensued . . . \(^{176}\)

However, in 1949, the court in *Hanks v. Norfolk & W.R.R.*\(^{177}\) talked of the "pecuniary worth of the deceased to his family,"\(^{178}\) before it went on to state that evidence of the deceased's improvident attitude toward his family should have been admitted for the jury's consideration. The court said: "The evidence was admissible as bearing upon the moral fiber of the deceased and as tending to show what manner of man he was, especially in providing for those of his own household who were dependent upon him."\(^{179}\) The court apparently extended *Hicks v. Love*\(^{180}\) to include evidence of the decedent's attitude. If the court had been using a strict loss-to-estate measure of damages here, it would not have been material whether the deceased had a provident attitude toward his family; only his earning capacity and personal expenditures would have been

\(^{176}\) Id. at 278, 31 S.E. at 480. In *Carter v. North Carolina R.R.*, 139 N.C. 499, 52 S.E. 642 (1905), the court stated: "[The] rule requires the jury to deduct only the reasonably necessary personal expenses of the deceased, taking into consideration his age, manner of living, business calling or profession, etc." Id. at 501, 52 S.E. at 643. In *McLamb v. Wilmington & W.R.R.*, 122 N.C. 862, 29 S.E. 894 (1898), the court upheld an instruction to the jury that the amount deductible from the decedent's gross income was his "cost of living and expenditures." Id. at 867, 29 S.E. at 896. What are reasonably necessary personal expenditures? Apparently a man's income determines what is reasonably necessary for him, but would this include any lavish expenditures of an extremely wealthy decedent?

\(^{177}\) 230 N.C. 179, 52 S.E.2d 717 (1949).

\(^{178}\) Id. at 182, 52 S.E.2d at 719.

\(^{179}\) Id. at 183, 53 S.E.2d at 720.

\(^{180}\) 201 N.C. 773, 161 S.E. 394 (1931) (size of decedent's farm, facts of a comfortable home, plenty for family to eat and wear were held admissible). Erwin, J., dissenting in *Hanks v. Norfolk & W.R.R.*, 230 N.C. 179, 188, 52 S.E.2d 717, 723 (1949), stated the rule as the court had stated it previously. [The measure of damages for wrongful death is the present worth of the net pecuniary value of the life of the deceased to be ascertained by deducting the probable costs of his own living and usual and ordinary expenses from the probable gross income derived from his own exertions based upon his life expectancy.
at issue. The character evidence admitted in other North Carolina cases has been ostensibly for the purpose of aiding the jury in determining the gross income and expenditures of the deceased.\textsuperscript{181} The relevance in this case of the father's lack of a provident attitude would seem to indicate that the court slipped from the loss-to-estate rule that it had previously applied.\textsuperscript{182} The \textit{Hanks} decision has not been expressly overruled or modified by any subsequent decision, but \textit{Journigan v. Little River Ice Co.}\textsuperscript{183} in 1951 stated the measure of damages to be the "present worth of the net pecuniary value of the life of the deceased."\textsuperscript{184} All cases since have adhered to this measure.\textsuperscript{185}

At least nine North Carolina cases have held that the pecuniary value of the life of the decedent is the net income that the decedent might have been expected to earn from \textit{his own} labor or exertion during his expectancy.\textsuperscript{186} The court, in 1960, held that a pension the deceased had been receiving for life when he was killed was a proper element for the jury to consider in determining the net pecuniary worth of the deceased.\textsuperscript{187} The court stated, "[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

\textsuperscript{181} See, \textit{e.g.}, Queen City Coach Co. v. Lee, 218 N.C. 320, 11 S.E.2d 341 (1940); Carpenter v. Asheville Power & Light Co., 191 N.C. 130, 131 S.E. 400 (1926); Purnell v. Rockingham R.R., 190 N.C. 573, 130 S.E. 313 (1925).

\textsuperscript{182} 28 N.C.L. Rev. 106 (1949).

\textsuperscript{183} Id. at 184, 63 S.E.2d at 186 (citing Carpenter v. Asheville Power & Light Co., 191 N.C. 130, 131 S.E. 400 (1926); Gurley v. Southern Power Co., 172 N.C. 690, 90 S.E. 943 (1916)).

\textsuperscript{184} Id.

\textsuperscript{185} See, \textit{e.g.}, Sanders v. George, 258 N.C. 776, 129 S.E.2d 480 (1963). The court held that the admission of testimony of the bad and questionable conduct of the intestates carried the jury too far from the critical question of the fair and just compensation for the pecuniary injury resulting from death. Caudle v. Southern R.R., 242 N.C. 466, 88 S.E.2d 138 (1955); Lamm v. Lorbacher, 235 N.C. 728, 71 S.E.2d 49 (1952).

\textsuperscript{186} Id.

sustained by reason of the wrongful death." The court did not indicate expressly or impliedly that these life incomes must be the result in any manner of the labor of the decedent. Since the defendant challenged the trial court on the admission in evidence of the pension, it would seem that if the court required the life income to have been gained through the exertions of the decedent, even indirectly, it would have stated as much. Apparently the North Carolina court will now allow the jury to consider any income for life only as a legitimate element of damage, even though obtained by the decedent as a gift or devise. The jury presumably can look at social security payments and even welfare benefits that the decedent had been receiving in fixing the damages.

The North Carolina loss-to-estate measure of damages is in the small minority and has the definite potential of permitting inequitable results in certain situations.

The court has stated that the North Carolina wrongful death statute was modeled after Lord Campbell's Act and that it has been interpreted on some points in the same way as the English courts have interpreted the English statute. However, the similarity between the North Carolina statute and Lord Campbell's Act and the majority of other wrongful death acts is in substance slight. The latter measure damages by the loss suffered by the beneficiaries as a result of the wrongful death, while North Carolina and a few other jurisdictions apply the loss-to-estate, or the worth-of-deceased's-life, measure. Also, North Carolina allows recovery only for loss of financial contributions, whereas the English statute and the majority of other jurisdictions using the loss-to-beneficiaries measure allow recovery for services that the deceased rendered gratuitously but that would have required payment to third persons.

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188 Id. at 494, 114 S.E.2d at 246.
189 Id. at 493, 114 S.E.2d at 245.
190 The court stated: "It is not intended that this opinion shall alter, modify or overrule any of our previous opinions dealing with the measure of damages for wrongful death." Id. at 498, 114 S.E.2d at 248. But see notes 186 & 188 supra.
191 See note 195 infra.
194 See note 28 supra.
195 See note 52 supra.
196 See notes 59 & 61 supra.
to replace.\textsuperscript{197} A substantial number of jurisdictions allow other damages in addition to those for pecuniary loss of contributions and services.\textsuperscript{198}

The loss-to-estate-of-deceased, or net-pecuniary-worth-of-decedent’s-life, measure of damages is an unreasonable burden to place upon a jury. Consideration is given to the decedent’s health, habits, age, earning capacity, and employment (provided he was old enough to exhibit these factors).\textsuperscript{199} However, asking a jury to look into the future on the basis of these considerations and reasonably predict the gross earnings of the decedent, and the probable amount of his personal expenditures,\textsuperscript{200} is something that cannot be done with any hope of accuracy. When the death is that of a child, the jury must make an even more speculative determination than in the case of an adult since the child has a longer life expectancy and there is no history of earning power. Often the evidence is limited to sex, age, health and appearance.\textsuperscript{201} The loss-to-beneficiaries measure of damages reduces the burden on the jury by requiring that only a beneficiary’s reasonably expected pecuniary benefit or advantage be determined.\textsuperscript{202} If there is no benefit to be reasonably expected, and resort must be had to speculation or conjecture to determine damages, there is no recovery.\textsuperscript{203} The jury is not asked

\textsuperscript{197}See notes 32-36, 41, 47 \textit{supra}.
\textsuperscript{198}See notes 41 & 47 \textit{supra}.
\textsuperscript{201}See, e.g., Bumgardner v. Allison, 238 N.C. 621, 78 S.E.2d 752 (1953) ($25,000 for a strong, healthy eleven-year-old girl of more than average ability); Rea v. Simowitz, 226 N.C. 379, 38 S.E.2d 194 (1946) ($15,000 for normal, healthy, unusually attractive nine-year-old girl); Russell v. Windsor Steamboat Co., 126 N.C. 961, 36 S.E. 191 (1900) ($1,000 for five-month-old baby of normal health).

to determine lifetime income, but only what benefits the beneficiary can prove that he lost as a result of the death. Evidence of the amount of damage to the beneficiary can thus be admitted on two sides of the issue in the loss-to-beneficiaries measure: (1) earning capacity, occupation, age, habits, etc., including value of services (in all but two jurisdictions using this measure); and (2) evidence of the amount of money and the value of services the beneficiary would have a reasonable expectancy of receiving.

The inequities of the loss-to-estate measure of damages are apparent in Lamm v. Lorbacher where the life of a thirty-three-year-old wife and mother of two children was found to be worth 4,000 dollars. The court stated:

[T]his court has uniformly held, in view of this restrictive language (N.C. Gen. Stat. § 28-173), that the consideration of the jury should be confined to determining the amount of money the decedent would have earned . . . to ascertain . . . the pecuniary value of the life of the decedent to his estate.

This rules out any recovery for the value of the services the decedent rendered gratuitously as a housewife and mother. The court in Bradley v. Ohio River & C.R.R., in 1898, stated that the "value of the labor" of the deceased should be taken into account in determining damages, but the court in ruling on the issue of damages in Lamm expressly stated that this language was not intended to extend the damages to include recovery for uncompensated services. This measure of damages results in the finding that the life of the wife and mother in Lamm is worth only sixteen percent as much in death damages as the life of the sixteen-year-old girl whose estate recovered 25,000 dollars in Bumgardner v. Allison. This result obviously was reached by the jury because the wife and mother was saddled with gratuitous homemaking services and had little prospect of taking a wage-paying job because of her responsibilities to her family. The decedent in Bumgardner, who

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205 The result would be the same in Colorado and Maine which use loss to beneficiaries, but do not allow recovery for loss of services. See generally cases cited note 30 supra.
207 Id. at 731, 71 S.E.2d at 52.
208 122 N.C. 972, 30 S.E. 8 (1898).
209 Id. at 973, 30 S.E. at 8.
211 238 N.C. 621, 78 S.E.2d 752 (1953).
had never been a wage earner and hence was untested as such (though the jury must have found as fact her future earnings), had no responsibilities that precluded speculation of her lifetime earning capacity.212

Without question, the loss resulting from the death of a wife and mother can be much greater in actual financial injury than the loss incurred by the destruction of a working woman’s earning power. Few women earn salaries of sufficient size to enable them to purchase the twenty-four-hour, seven-day-a-week services that a woman bestows upon her family.213 It is also important to remember that the services of a wife and mother, because of her care in performing these services resulting from natural affection, are worth more than the mere labor itself.214 It is patently unjust to

212 There was no evidence that the wife and mother in Lamm v. Lorbacher ever could have reasonably expected to earn wages because of the responsibilities of her domestic duties. It would seem that the $4,000 award was based more on sympathy than the rule as stated by the cases cited in Lamm. See Carpenter v. Asheville Power & Light Co., 191 N.C. 130, 131 S.E. 400 (1926); Gurley v. Southern Power Co., 172 N.C. 690, 90 S.E. 943 (1916).

213 In Weiss v. Rubin, 11 App. Div. 2d 818, 205 N.Y.S.2d 274 (1960), a malpractice action for the wrongful death of a twenty-five-year-old mother of two children resulting from an incompatible blood transfusion, the jury awarded $130,000 for the negligent death. The plaintiff used the testimony of an expert from the Yonkers Family Service Society who itemized the cost of replacing the decedent’s motherly duties.

<table>
<thead>
<tr>
<th>Description</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wages for substitute mother (combination nurse-governess):</td>
<td></td>
</tr>
<tr>
<td>$80 a week for first 5 years</td>
<td>$20,800.00</td>
</tr>
<tr>
<td>$75 a week for the next 15 years</td>
<td>58,500.00</td>
</tr>
<tr>
<td>Wages for part-time housekeeper, $1.50 an hour,</td>
<td></td>
</tr>
<tr>
<td>16 hours a week for 20 years</td>
<td>24,960.00</td>
</tr>
<tr>
<td>Wages for baby sitter, $1.00 an hour, 6 hours</td>
<td></td>
</tr>
<tr>
<td>a week (48 weeks a year) for 5 years</td>
<td>1,440.00</td>
</tr>
<tr>
<td>Social Security for 3 employees (substitute mother, housekeeper, and baby sitter)</td>
<td>4,149.12</td>
</tr>
<tr>
<td>Workmen’s Compensation insurance for 3 employees</td>
<td>1,500.00</td>
</tr>
<tr>
<td>Liability insurance</td>
<td>240.00</td>
</tr>
<tr>
<td>Advertising for, interviewing and screening applicants for substitute mother</td>
<td>1,200.00</td>
</tr>
<tr>
<td>Agency supervision and training of substitute mother</td>
<td>1,980.00</td>
</tr>
<tr>
<td>Family counseling and psychological guidance for father</td>
<td>5,000.00</td>
</tr>
<tr>
<td>TOTAL for 20-year period</td>
<td>$119,769.12</td>
</tr>
</tbody>
</table>

This verdict was affirmed in Weiss v. Rubin, 9 N.Y.2d 230, 213 N.Y.S.2d 65 (1961), with a reduction of the judgment to $90,000.

214 Byrne v. Matczak, 254 F.2d 525 (3d Cir. 1958). In Continental Bus Sys., Inc. v. Toombs, 325 S.W.2d 153 (Tex. Civ. App. 1959), the court stated:

In computing the damages of a husband for the death of his wife,
tell a husband and his children that they are entitled to no recovery because the wife and mother was too burdened with the responsibility of caring for them and the home to have the probability of becoming a wage earner, which would enable recovery of damages for her death.

The loss-to-beneficiaries measure of damages would help relieve situations where no recovery can now be given in North Carolina for the death of the handicapped or elderly who have no prospect of earning wages. These persons may have a definite pecuniary value to their beneficiaries because of benefit from gratuitous services that is completely overlooked by the current "monetary contribution only" approach in North Carolina.

The North Carolina wrongful death statute provides that the recovery obtained in the action be distributed according to the Intestate Succession Act. The beneficiaries take statutorily prescribed shares with no regard for the injury that may have been caused to them individually by the death of the decedent. It is possible that a spouse or child who was completely independent from, and even hostile to, the decedent before he was killed, may take a lion's share of the recovery, while a totally dependent child, grandchild, parent or grandparent receives a lesser portion, or nothing. The recovery should not be limited to the recovery of the cost of a menial servant. Neither should the recovery be limited to what the wife would have earned working for another, nor to a combination thereof. Rather would these be included along with the recovery for the value of her services in counseling, advising, inspiring, comforting and otherwise serving her husband as would have reasonably been expected from a wife who was the kind of person she is shown to have been.

Id. at 167.


See cases cited note 215 supra. Contra, Hepp v. Ader, 64 Idaho 240, 130 P.2d 859 (1942). The court awarded $10,000 to the husband of the decedent who had been so crippled for twenty-five years before her death that she could not work, walk or dress herself. Although the jury was allowed to consider loss of society, companionship, comfort and protection, damages were also based on the decedent's guidance, advice and intellectual training.


219 The Intestate Succession Act provides a rigid statutory scheme for distribution with no regard to any consideration other than the legal relationship of the parties involved. See statute cited note 217 supra. See Avery v. Brantley, 191 N.C. 396, 131 S.E. 721 (1926); 5 N.C.L. Rev. 72 (1926).
dent nonrelative gets no compensation at all, even when there are no relatives. These are obvious inequities, for the purpose of the wrongful death statutes, with few exceptions, is to compensate the relatives or dependents of the decedent for their loss, not to provide a windfall for a person in the chain of intestate succession who may have suffered no loss at all because of the death.

It is not logical, even if it were possible, to compensate the deceased for losses that he never incurred. The injuries the decedent suffered prior to death are recoverable under the survival statute. Damages under a wrongful death statute are indisputably for the loss sustained by the beneficiaries. Compensation should be computed on the basis of actual loss to those suffering injury because of the death. Why measure damages by loss to the estate of the deceased? The damages were not sustained by the deceased and cannot be compensatory to anyone for the death itself. The loss suffered by the beneficiaries should measure the recovery and its distribution. Otherwise, the result is analogous to dressing the beneficiaries in a suit of mourning clothes that was tailored for the deceased, and tailored badly at that.

J. Troy Smith, Jr.

APPENDIX A

WRONGFUL DEATH STATUTES


220 Only relatives are provided for under the Intestate Succession Act. See notes 140 & 217 supra.
221 See Davenport v. Patrick, 227 N.C. 686, 44 S.E.2d 203 (1947) (beneficiary, not the administrator, is the real party in interest).
222 See note 9 supra.
Idaho: IDAHO CODE ANN. §§ 5-310 to -311 (1948).
Maryland: Md. ANN. Code art. 67, §§ 1, 2, 6 (1957), 4 (Supp. 1965).
Minnesota: MINN. STAT. ANN. § 573.02 (Supp. 1964).
Nebraska: NEB. REV. STAT. §§ 30-809 to -810 (1956).
New York: N.Y. DECED. EST. LAW §§ 130-34.
Ohio: OHIO REV. CODE ANN. §§ 2125.01-.04 (1954).


These fifty-four statutes are the source of the statistics used in this article.

APPENDIX B

PROPOSED NORTH CAROLINA WRONGFUL DEATH STATUTE
(1) When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the
person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors shall be liable to an action for damages, to be brought by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony.

*Comment:* The first section is similar to the present North Carolina wrongful death statute and leaves intact the law as to contributory negligence of the decedent, the right of the executor, administrator or collector alone to bring the action, and the fact that the action is not affected because the death is the result of a criminal act.

(2) The recovery obtained by an action under this statute shall not be subject to the debts of the estate of the deceased, but is for the exclusive benefit of the beneficiaries hereinafter named.

(3) Damages may be given to compensate the surviving spouse, children, parents and any whole or partial dependent of the deceased. Recovery shall be for the loss of any pecuniary benefit or advantage reasonably to have been expected from the continuance of the life of the deceased. The fact of kinship shall not give rise to any presumption of pecuniary loss.

*Comment:* This is contrary to the present North Carolina rule that measures damages by the loss to the estate of the deceased. The damages here are based on the injury actually resulting from the death. Recovery is not limited to any class of beneficiaries, but is extended to include any persons wholly or partially dependent upon the decedent, whether legally related or not.

(4) Damages are limited to the pecuniary loss to the beneficiaries qualifying under § 3 as a result of the wrongful death. Pecuniary loss is the reasonably expectable receipt, if the decedent had lived, of

a. monetary contributions, and
b. gratuitous services having a pecuniary value.

(5) The jury, or the judge if there is no jury, shall distribute the damages according to the proved losses, as defined by § 4, of each beneficiary.

(6) There shall be no recovery for the funeral expenses of the deceased unless this results in a pecuniary loss to a beneficiary. Any
recovery under this section is limited to One Thousand dollars ($1,000).

Comment: Although death is inevitable, the beneficiary who pays for the funeral when the decedent is wrongfully killed might not be the one who would have to bear the cost if the decedent lives out his expectancy. Recovery is limited in order to maintain reasonable expenses for the burial of a decedent.

(7) If any beneficiary qualifying under § 3 dies before judgment is rendered in an action under § 1, the beneficiary’s estate shall recover such damages as defined by § 4 as the beneficiary suffered from the time of the wrongful death of the decedent until his own death.

Comment: The effect of this section is to change the North Carolina law so as to abate the action upon the death of the sole surviving beneficiary except for recovery of damages that he actually suffered before death. The award is not taken by the University of North Carolina by escheat because the defendant should only be required to compensate injuries his action caused. The University of North Carolina suffers no injury as a result of the wrongful death.

(8) If there are no survivors qualifying under § 3, no recovery shall be allowed under this statute unless the estate of the decedent is insolvent. If the estate is insolvent, the recovery shall be limited to reasonable burial and estate administration expenses not exceeding Fifteen Hundred dollars ($1,500).

Comment: This section prevents any judgment against a defendant where there are no injured parties to suffer damage because of the death. It also prevents the state from having to pay the expenses of administration and decedent’s burial.