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Ellen M. Hamilton

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WRONGFUL DEATH OF CHILDREN IN OKLAHOMA: STATUTORY EXPANSION OF RECOVERABLE DAMAGES

One summer afternoon a fourteen-year-old girl was swimming with her friends in a municipal swimming pool when she suddenly disappeared from view. It was discovered that she had been sucked into a twelve-inch diameter pipe under the water's surface and drowned while trying to free herself. Her father brought a wrongful death action and recovered \$2000 for the loss of her services during her minority and \$8000 for her services after her majority.¹

Genta Marie, a child of 2 years and 9 months, and her grandmother were killed when the automobile in which they were riding was involved in an accident. The child's parents recovered \$10,000 in a wrongful death action.²

What do these cases have in common?

The measure of damages in both cases was based solely, at least in theory, on the "pecuniary loss" of the child to the parents as next of kin³ under the existing wrongful death statute.⁴ The parents' emotional suffering and loss of companionship and love apparently were not considered.⁵ Both cases would have undoubtedly involved higher judgments if brought after October 1, 1975, the effective date of a recently enacted statute⁶ which expands the measure of damages in recovering for the wrongful death of a child.

This note will discuss the individual elements of recovery under the new statute, the reasons for its enactment, and the problems involved in interpreting its effective date.

THE NEW WRONGFUL DEATH STATUTE

The new Act provides:

In all actions hereinafter brought to recover damages for the death of an unmarried, unemancipated minor child, the

1. *Fike v. Peters*, 175 Okla. 334, 52 P.2d 700 (1935).

2. *Stevens v. Schickendanz*, 316 P.2d 1111 (Okla. 1957).

3. *Rogers v. Worthan*, 465 P.2d 431, 438 (Okla. 1970).

4. *See* OKLA. STAT. tit. 12, § 1053 (1971).

5. *Nat'l Tank Co. v. Scott*, 191 Okla. 613, 617, 130 P.2d 316, 320 (1942); *Blunt v. Chicago, Rock Island & Pac. R.R.*, 70 Okla. 149, 150, 173 P. 656, 657 (1918).

6. 2 Okla. Sess. Laws 213-14, to be codified as OKLA. STAT. tit. 12, § 1055 (Supp. 1975).

damages recoverable shall include medical and burial expense, loss of anticipated services and support, loss of companionship and love of the child, destruction of parent-child relationship and loss of monies expended by parents or guardian in support, maintenance and education of such minor child, in such amount as, under all circumstances of the case, may be just.⁷

What exactly are the elements of damages recoverable under the new statute?

Medical and Burial Expenses

Oklahoma case law already allows *medical and burial expenses*⁸ as damages in a wrongful death action under the general wrongful death statute, which the new statute supplements.⁹ Therefore, there has been no change in the existing law in this area.

Loss of Anticipated Services and Support

In Oklahoma, pecuniary loss is the measure of damages in a wrongful death action to recover for the death of a child.¹⁰ It appears, that the phrase *loss of anticipated services and support* in the new statute merely restates the traditional rule.

Pecuniary loss is determined by the sums of money and the acts and services of a pecuniary value which the child would likely have earned and contributed for the benefit of his parents had his death not occurred.¹¹ This pecuniary loss includes "anything of a monetary value" to the claimant¹² and "anything that was merely reasonably probable"

7. 2 Okla. Sess. Laws 213-14, to be codified as Okla. Stat. tit. 12, § 1055 (Supp. 1975) amending OKLA. STAT. tit. 12, § 1053 (1971) which provides in pertinent part:

When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, . . . if the former might have maintained an action had he lived, against the latter, . . . for an injury for the same act or omission. . . . The damages must inure to the exclusive benefit of the surviving spouse and children, if any, or next of kin; to be distributed in the same manner as personal property of the deceased.

8. *Crossett v. Andrews*, 277 P.2d 117, 118 (Okla. 1954); *Stanolind Oil & Gas Co. v. Jamison*, 204 Okla. 93, 98-99, 227 P.2d 404, 410 (1951).

9. OKLA. STAT. tit. 12, § 1053 (1971), amended by 2 Okla. Sess. Laws 213-14.

10. *Rogers v. Worthan*, 465 P.2d 431, 437 (Okla. 1970); *Sample v. Campbell*, 305 P.2d 1033 (Okla. 1957); *Parkhill Trucking Co. v. Hopper*, 208 Okla. 429, 430, 256 P.2d 810, 812 (1953).

11. *Southwestern Light & Power Co. v. Fowler*, 119 Okla. 244, 248, 249 P. 961, 965 (1926); *Kaw Boiler Works v. Frymyer*, 100 Okla. 81, 88, 227 P. 453, 459 (1924).

12. *Okmulgee Gas Co. v. Kelly*, 105 Okla. 189, 232 P. 428 (1924).

that the claimant would have received.¹³

It is conceded that actual earning capacity is more difficult to gauge in the death of a child than in the case of an adult. If there is no exact testimony regarding the economic conditions under which the child was raised or the amount of financial contributions he would have made to his parents, the law presumes at least nominal damages;¹⁴ and a jury may determine the pecuniary loss and allow substantial damages using its members' judgment and experience, knowing only the age, sex and condition in life of the deceased child.¹⁵

In determining the pecuniary loss measure of damages there is a preferred instruction that a deduction for educational and maintenance expenses, or the "upkeep" of the child, should be made from the child's contributions,¹⁶ but failure to so instruct is not reversible error.¹⁷ This is true because "actual pecuniary loss" already contemplates that such deductions be made.¹⁸ In many cases, parents spend more on a child than they might ever receive as benefits from the child. Therefore, juries tended to "wink at" actual proof of damages and grant awards not quite substantiated by evidence so as not to leave parents with a cause of action but without adequate compensation.¹⁹ The Oklahoma Legislature, by enacting the new statute, has attempted to provide for substantial recovery for the actual damages sustained and to insure that juries need not resort to a biased viewing of evidence or to legal fictions.

Under the existing general wrongful death statute, there has been some confusion as to the circumstances under which damages may be allowed for contributions the decedent would have made after reaching majority. Most states, including Oklahoma, allow the recovery of these damages.²⁰ Recovery based on contributions after the child's majority has generally been awarded on account of a *parent's dependency* and the reasonable expectations that the contributions would be made.²¹

13. *Weleetka Cotton Oil Co. v. Brookshire*, 65 Okla. 293, 166 P. 408 (1917).

14. *Lakeview, Inc. v. Davidson*, 166 Okla. 171, 173, 26 P.2d 760, 762 (1933).

15. *Id.* at 171, 26 P.2d at 760.

16. *Sample v. Campbell*, 305 P.2d 1033, 1035 (Okla. 1957); *Stanolind Oil & Gas Co. v. Jamison*, 204 Okla. 93, 99, 227 P.2d 404, 410 (1951); *Fike v. Peters*, 175 Okla. 334, 338, 52 P.2d 700, 704 (1935).

17. *Sample v. Campbell*, 305 P.2d 1033, 1036 (Okla. 1957).

18. *Lakeview, Inc. v. Davidson*, 166 Okla. 171, 173, 26 P.2d 760, 762 (1933).

19. See Finkelstein, Pickrel & Glasser, *The Death of Children: A Nonparametric Statistical Analysis of Compensation for Anguish*, 74 COLUM. L. REV. 884, 892 (1974) [hereinafter cited as Finkelstein].

20. W. PROSSER, *LAW OF TORTS* 909 (4th ed. 1971).

21. *Parkhill Trucking Co. v. Hopper*, 208 Okla. 429, 432, 256 P.2d 810, 813 (1953);

But there is some authority that damages can be awarded only until the time of majority or that an award of contributions after majority is error.²²

Rogers v. Worthan,²³ involving the death of an eighteen-year-old son, provided some clarification of this issue by holding that a parent's dependency is not a factor in the recovery of damages. Although the opinion did not mention majority as being a limit on the period for which damages are figured, it can be argued that damages for the period after the decedent's majority must have been a consideration in order to support the award of \$25,000 for the death of the decedent.

The court in finding that the award was not excessive relied on evidence that the decedent would have made contributions to his mother, who was not in prime health, and that he had intended to put his younger brother through college after he finished his own college education.²⁴ The rule was stated to be:

Recovery in a wrongful death action is not contingent upon a showing that the claimant had been dependent, to some extent, upon the deceased. Even great wealth would not, of itself, preclude the recovery of damages for any pecuniary benefits which a claimant might, reasonably, have expected to receive if the deceased had lived.²⁵

In the *Rogers* case, the basic factor determining whether there would be recovery was not the parent's dependence, but rather whether it could

reasonably be said that there was a probability, or a reasonable expectancy on the part of the claimant, that the decedent, except for his death, would have contributed money,

Foster v. Higginbotham, 186 Okla. 276, 277, 97 P.2d 63, 64 (1939); Fike v. Peters, 175 Okla. 334, 339, 52 P.2d 700, 705 (1935); Folsom-Morris Coal Mining Co. v. Morrow, 102 Okla. 33, 34, 226 P. 53, 54 (1924); Weleetka Cotton Oil Co. v. Brookshire, 65 Okla. 293, 296, 166 P. 408, 410 (1917); Muskogee Elec. Traction Co. v. Hairel, 46 Okla. 409, 415-16, 148 P. 1005, 1007 (1915).

22. Hathaway v. Beatley, 127 F. Supp. 634, 636 (W.D. Okla. 1955); Hart v. Lewis, 187 Okla. 394, 397, 103 P.2d 65, 68 (1940) where the court held that although an instruction failing to omit damages at the time the deceased reached majority was error, it was not reversible error where the verdict was not excessive; Lakeview, Inc. v. Davidson, 166 Okla. 171, 173, 26 P.2d 760, 762 (1933); Shawnee Gas & Elec. Co. v. Motesenbocker, 41 Okla. 454, 457, 138 P. 790, 793 (1914).

23. 465 P.2d 431 (Okla. 1970).

24. *Id.* at 439. Oklahoma's lowering of the age of majority from 21 to 18 for males has obviously left the *Rogers* rule unimpaired. OKLA. STAT. tit. 15, § 13 (Supp. 1974) defines majority. See Bassett v. Bassett, 521 P.2d 434 (Okla. App. 1974) holding that Oklahoma's former statute defining minors as females under 18 and males under 21 was unconstitutional as violative of the equal protection clause of the fourteenth amendment.

25. *Id.* at 438.

aid, services, or anything else that would have a pecuniary value to the claimant.²⁶

Hopefully, a definitive case will be decided to clear up this confused area.

Loss of Companionship and Love of the Child

Although recovery for *loss of companionship* of the deceased child has been allowed under several states' statutes²⁷ the term itself has not been uniformly defined. Perhaps the most useful description thus far is:

Just as with respect to a manufacturing plant, or industrial machine, value involves the costs of acquisition emplacement, upkeep, maintenance service, repair, and renovation, so, in our context, we must consider the expenses of birth, of food, of clothing, of medicines, of instruction, of nurture and shelter. Moreover, just as an item of machinery forming part of a functioning industrial plant has a value over and above that of a similar item in a showroom, awaiting purchase, *so an individual member of a family has a value to others as part of a functioning social and economic unit. This value is the value of mutual society and protection, in a word, companionship.* The human companionship thus afforded has a definite substantial, and ascertainable pecuniary value and its loss forms a part of the "value" of the life we seek to ascertain. . . .²⁸

How the pecuniary amount is ascertained, though, seems contingent on evidentiary factors subject to a jury's consideration. This element will also be discussed in the next section.

Destruction of the Parent-Child Relationship

The new Oklahoma statute bears a remarkable resemblance to the 1967 amendment to the Washington wrongful death statute which states in part:

[D]amages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all circumstances of the case, may be just.²⁹

26. *Id.* at 439.

27. FLA. STAT. ANN. § 768.21 (Supp. 1975-76); HAWAII REV. STAT. § 663-3 (Supp. 1974); KAN. STAT. ANN. § 60-1904 (Supp. 1974); KY. REV. STAT. § 411.135 (1970); NEV. REV. STAT. § 41.090 (1973); WASH. REV. CODE ANN. § 424.010 (Supp. 1974); WYO. STAT. ANN. § 1-1066 (Supp. 1975).

28. *Wycko v. Gnodtke*, 361 Mich. 331, 333, 105 N.W.2d 118, 122 (1960) (footnotes omitted, emphasis added).

29. WASH. REV. CODE ANN. § 4.24.010 (Supp. 1974).

Washington is the only state, other than Oklahoma, that allows recovery for *destruction of the parent-child relationship*. Therefore, Washington's statute as construed by its state courts may be considered as a guide for future interpretations of the Oklahoma statute.

The Washington Supreme Court construed the amended wrongful death statute as granting recovery for "*several integral . . . [and] inseparable, elements of damage; viz., (a) loss of love, (b) loss of companionship, and (c) injury to or destruction of the parent-child relationship.*"³⁰ The court went on to conclude:

We cannot refuse to give positive meaning to one of the statutory phrases—"parent-child relationship"—merely because it is unique, and the language seems to have no readily ascribable "ordinary meaning. . . ."

We construe the language "loss of love . . . and . . . injury to or destruction of the parent-child relationship" *to provide recovery for parental grief, mental anguish and suffering as an element of damages intended by the legislature to be recoverable under appropriate circumstances in cases involving the wrongful death of or injury to a child.*³¹

The court reasoned that "intangible-physical" injuries were regularly provided for and that there was no "substantial justification for denial of recovery for 'intangible-emotional' injuries."³² By definition, the statutory phrase "loss of love and companionship of the child and for injury to or destruction of the parent-child relationship" was held to involve "intangible emotional reactions and responses."³³ As a cautionary note, it was found that the "intangible-emotional injury" was subject to certain limitations such as the necessity of "competent, often expert, proof," for example, that of a psychiatrist.³⁴

Because Washington and Oklahoma are the only states whose statutes include the phrase "destruction of the parent-child relationship," there is little background regarding its meaning besides the ordinary meaning of those words. There are no cases in Oklahoma dealing with that term thus far and until definitive case law does evolve, it is helpful and authoritative to look to Washington's definitions and construc-

30. *Wilson v. Lund*, 80 Wash. 2d 91, 94, 491 P.2d 1287, 1290 (1970) (emphasis in original).

31. *Id.* at —, 491 P.2d at 1290 (emphasis in original). The facts showed that the plaintiff-mother of the deceased five-year-old boy tried to admit psychiatric testimony of her emotional anguish and harm as a result of the child's death. Because admission of the evidence was denied, the decision was reversed and a new trial for damages ordered.

32. *Id.* at —, 491 P.2d at 1291 (emphasis in original).

33. *Id.* at —, 491 P.2d at 1292.

34. *Id.*

tions for they are the only judicial expressions concerning the statutory term.

The Washington Supreme Court, interpreting the statute in a recent opinion, reaffirmed its earlier holding³⁵ that "the statutory terms 'loss of love and injury to or destruction of the parent-child relationship' were intended by the legislature to add the elements of 'parental grief, mental anguish and suffering' as elements of damages as well as those elements contained within the term 'loss of companionship'."³⁶

The Washington statute has also been construed not to limit damages for the loss of companionship and destruction of the parent-child relationship to the period of the decedent's majority.³⁷ Therefore, a jury could award such damages for a period after the decedent would have reached majority.

Loss of Monies Expended by Parents or Guardian in Support, Maintenance and Education of such Minor Child

Perhaps the most radical extension of damages in the new statute is in its last phrase, *loss of monies expended by parents or guardian in support, maintenance and education of such minor child*. This contemplates a return of those expenditures made by a parent which are considered an investment in his child. It is essentially a refund of the "investment value" the parent has in the decedent.³⁸

The necessary proof of damages for this element involves the testimony of an expert, such as an economist, who can delineate the different amounts a parent normally would spend for the support, maintenance, and education of his child. The "important facts and circumstances to be shown in the statistical approach to establishing the parents' investment in the birth and rearing of a child wrongfully killed" are:

- Estimate of cost to parents
 - average annual family income
 - age of parents
 - age of child at time of death
 - number of children in family
 - cost of prenatal and obstetrical care and of hospitalization during birth

35. See *Wilson v. Lund*, 80 Wash. 2d 91, 491 P.2d 1287 (1971). See text accompanying notes 30-34 *supra*.

36. *Hinzman v. Palmanteer*, 81 Wash. 2d 327, 329, 501 P.2d 1228, 1230 (1972).

37. *Balmer v. Dilley*, 81 Wash. 2d 367, 502 P.2d 456, 459 (1972).

38. S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* § 4:27 (1966).

- percentage of total family income required by child year by year
- value of services performed by child.³⁹

REASONS FOR THE MORE LIBERAL WRONGFUL DEATH STATUTE

What was the impetus behind the extraordinary broadening of recoverable losses under the new wrongful death statute?

Apparently, the new Oklahoma statute is not based on any particular state's statute or on a specific case, but rather stems from a general realization by the Oklahoma Trial Lawyers Association and the legislators who helped sponsor the bill⁴⁰ that a reform in the measure of damages was necessary.

Proponents of a wrongful death statute providing for more liberal damages, including loss of companionship, argue traditional damages are inadequate.

Honest application of a pecuniary standard does not, in today's world, allow adequate recovery for child-death. The cost-accounting technique for measuring damages—value of services less cost of support—is archaic in a society which is not structured on child labor and the family chore framework of an agricultural community. The careless driver today usually does the parent of a deceased minor an economic favor.

. . . .

. . . [B]oth court and legislature have recognized that today the injury sustained by a parent on the death of his child is not primarily economic. The law recognizes an interest in emotional and mental well-being. If this is the primary interest invaded when a parent loses his minor child, tort law should look to that injury, and fashion an appropriate remedy.⁴¹

The pecuniary loss rule in wrongful death actions has long been criticized; however reform allowing, in addition, damages for emotional injury was delayed for two principal reasons:

First, there is probably "a lively fear [that] the overenthusiasm of sympathetic juries" would lead to excessive awards and in-

39. *Id.* at 347.

40. According to State Rep. Charles Henry, Shawnee, Okla., principle sponsor, and Jefferson G. Greer, Tulsa attorney and past President of the Oklahoma Trial Lawyers Association, the principle drafter of House Bill No. 1336.

41. Recent Development, *Wrongful Death of a Minor Child: The Changing Parental Injury*, 43 WASH. L. REV. 654, 655-56, 668 (1968) (footnotes omitted).

creased insurance premiums. Second, there is the objection that any award would be arbitrary because no amount could in fact compensate the survivors for their loss of companionship and emotional hurt.⁴²

The authors of a statistical analysis of compensation for anguish⁴³ found that these fears of consistently excessive awards under a statute allowing damages for loss of comfort were groundless. They did admit however, that under such a statute extraordinary awards may occasionally be given.⁴⁴ In the commentators' opinion actual pecuniary loss plays only a minor role in influencing the amount of awards when compared with other individual, local and state factors considered in adjudicating a final award.⁴⁵ One of these factors has been the relaxation of strict proof requirements in an effort to compensate for injuries which are not encompassed by the pecuniary loss measure of damages.⁴⁶

Today most courts require only a token showing of loss of services.⁴⁷ Some jurisdictions, as indicated above, have softened the pecuniary loss doctrine to allow substantial recovery. Other states, while allowing more comprehensive loss damages, have used restraint in determining awards by using comparable cases as a strict guideline.⁴⁸ Setting maximum awards is another means of limiting damages.⁴⁹ However, this method is precluded by the Oklahoma constitution.⁵⁰

42. Finkelstein, *supra* note 19, at 885 (footnotes omitted).

43. *Id.*

44. *See* *Compania Domicana de Aviacion v. Knapp*, 251 So. 2d 18 (Fla. Dist. Ct. App. 1971), *cert. denied*, 256 So. 2d 6 (Fla. 1971). In that case, a \$1,800,000 award was upheld in an action for the death of two of plaintiff's three sons which occurred when an airplane crashed into the shop where the boys were working. A teacher testified that one of the sons "stood head and shoulders above his contemporaries;" and a psychiatrist testified as to the profound grief of the father who saw the accident, and of the mother who had been speaking to one of the sons on the telephone when the accident happened.

45. Finkelstein, *supra* note 19, at 889-90.

46. *Id.* at 892. *See* Recent Development, *Wrongful Death of a Minor Child: The Changing Parental Injuriy*, 43 WASH. L. REV. 654, 656 (1968).

47. Recent Development, *Wrongful Death of a Minor Child: The Changing Parental Injury*, 43 WASH. L. REV. 654, 656 (1968).

48. Finkelstein, *supra* note 19, at 892.

49. *See, e.g.*, KAN. STAT. ANN. § 60-1903 (Supp. 1974) with a limit of \$50,000 and costs; ME. REV. STAT. ANN. tit. 18 § 2552 (Supp. 1974-75) limiting damages to \$10,000 for the death of a minor child in an action on behalf of the parents for loss of consortium; W. VA. CODE ANN. § 55-7-6 (Supp. 1975) which limits damages to \$10,000 where there is no showing of pecuniary loss and a maximum of an additional \$100,000 if supported by evidence of pecuniary loss, plus reasonable funeral, hospital, medical and other expenses; WIS. STAT. ANN. § 895.04 (Supp. 1975 76) which provides a limit of \$5000 for loss of society. This list of statutes is not intended to be exhaustive.

50. OKLA. CONST. art. 23, § 7. *See* *Producers' & Refiners' Corp. v. Castile*, 89 Okla. 261, 267-68, 214 P. 121, 127 (1923).

The foregoing analysis provides an answer to the opponents of more liberal wrongful death statutes. The authors of the previously mentioned statistical study stated:

Despite the seemingly greater latitude under an all-inclusive loss statute, the statistics indicate that the goal of rational uniformity would be promoted by removing the conflict between rule and impulse which is currently forced on decision-makers in pecuniary loss jurisdictions.⁵¹

Although the Oklahoma reform may provide more uniform awards, it is estimated that awards in wrongful death actions for children may increase as much as five to six times over the amounts that would have been awarded under the original general wrongful death statute.⁵²

Oklahoma's new statute has brought about a long awaited and necessary change in the law. States which allow recovery for loss of companionship and other related damages are still not in the majority. There were only twelve states in 1974 whose statutes specifically allowed recovery to survivors for anguish and loss of comfort,⁵³ although additional states allow recovery for such damages through case law.⁵⁴ At least seven states have refused to allow such recovery.⁵⁵ While not

51. Finkelstein, *supra* note 19, at 893.

52. Stated by Jefferson G. Greer, Tulsa attorney and past President of the Oklahoma Trial Lawyers Association as well as the principle drafter of the new wrongful death statute, in a conversation with the author.

53. See Finkelstein, *supra* note 19, at 884-85 n.3: (1) ARK. STAT. ANN. § 27-909 (1962); (2) FLA. STAT. ANN. § 768.03 (1964); (3) HAWAII REV. STAT. § 663-3 (Supp. 1973); (4) KAN. STAT. ANN. § 60-1904 (1964); (5) KY. REV. STAT. § 411.135 (1970); (6) ME. REV. STAT. ANN. tit. 18 § 2552 (Supp. 1973); (7) MD. ANN. CODE art. 67, § 4 (Supp. 1973); (8) NEV. REV. STAT. § 41.090 (1973); (9) VA. CODE ANN. § 8-636 (Supp. 1973); (10) WASH. REV. CODE ANN. § [4.]24.010 (Supp. 1973); (11) W. VA. CODE ANN. § 55-7-6 (Supp. 1973); (12) WIS. STAT. ANN. § 895.04 (Supp. 1973).

The citations to some of the statutes listed in the above article have changed as follows: FLA. STAT. ANN. § 768.21 (Supp. 1975-76); HAWAII REV. STAT. § 663-3 (Supp. 1974); KAN. STAT. ANN. § 60-1904 (Supp. 1974); ME. REV. STAT. ANN. tit. 18 § 2552 (Supp. 1974-75); VA. CODE ANN. § 8-636.1 (Supp. 1975); WASH. REV. CODE ANN. § 4.24.010 (Supp. 1974); W. VA. CODE ANN. § 55-7-6 (Supp. 1975); WIS. STAT. ANN. § 895.04 (Supp. 1975-76).

MD. ANN. CODE art. 67 was repealed by Acts 1973, 1st Sp. Sess., ch. 2, § 2 effective Jan. 1, 1974.

54. 25A C.J.S. *Death* § 104 (1966, Supp. 1975).

55. See *Shockley v. Prier*, 66 Wis. 2d 394, 225 N.W.2d 495, 499 n.2 (1975). See also *Smith v. Richardson*, 277 Ala. 389, 171 So. 2d 96 (1965); *Butler v. Chrestman*, 264 So. 2d 812 (Miss. 1972); *Ekalo v. Constructive Service Corp. of America*, 46 N.J. 82, 215 A.2d 1 (1965); *Brennan v. Biber*, 93 N.J. Super. 351, 225 A.2d 742 (Sup. Ct. Law Div. 1966), *aff'd per curiam*, 99 N.J. Super. 247, 239 A.2d 261 (Sup. Ct. App. Div. 1968); *Gilbert v. Stanton Brewery, Inc.*, 295 N.Y. 270, 67 N.E.2d 155 (1946); *Kalsow v. Grob*, 61 N.D. 119, 237 N.W. 848 (1931); *Quinn v. City of Pittsburgh*, 243 Pa. 521, 90 A. 353 (1914); *McGarr v. Nat'l & Providence Worsted Mills*, 24 R.I. 447, 53 A. 320 (1902).

Shockley provides a notable innovation in the law by holding that parents in

included in the above figures, Oklahoma has certainly taken a great step forward by joining the states which have progressive wrongful death statutes.

THE EFFECTIVE DATE OF THE NEW WRONGFUL
DEATH STATUTE

The pertinent language of the new wrongful death statute, effective October 1, 1975,⁵⁶ reads: "In all actions hereinafter brought to recover damages:"⁵⁷

It is uncertain whether the statute can be retroactively applied to actions filed after October 1, 1975 where the death of the child occurred before the effective date. The better interpretation would be that actions filed after that date would receive the new statute's benefits. It is a basic rule that a statute should be given prospective operation only, *unless contrary legislative intent is expressed clearly or is necessarily implied from language used.*⁵⁸ It can be argued that in this statute the Legislature clearly intended partial retrospective effect by using the words "in all actions hereinafter brought," thereby affecting a suit brought after the effective date but in which the cause of action accrued before the effective date.

The argument against retroactive effect is based on *Phillips v. H. A. Marr Grocery Co.*,⁵⁹ which involved a new statute granting extraterritorial jurisdiction to hear claims for injuries incurred in another state. The court held the statute was substantive, not purely procedural, and, therefore, did not apply to an injury sustained prior to the effective date of the act. However, that statute's wording is distinguishable from that of the new wrongful death statute.

The Oklahoma Supreme Court stated in *Phillips*:

"The general rule that statutes are to be construed as prospective only, unless the language employed conclusively negatives that construction, applied to remedial statutes, and

Wisconsin may maintain an action for loss of aid, comfort, society and companionship of an *injured*, but not deceased, minor child against a negligent tortfeasor, provided that the parents' cause of action is combined with that of the child for the child's personal injuries.

56. 2 Okla. Sess. Laws 213-14, to be codified as OKLA. STAT. tit. 12, § 1055 (Supp. 1975).

57. *Id.*

58. *Benson v. Blair*, 515 P.2d 1363 (Okla. 1973); *Freshour v. Turner*, 496 P.2d 389 (Okla. 1972); *Sunray DX Oil Co. v. Great Lakes Carbon Corp.*, 476 P.2d 329 (Okla. 1970).

59. 295 P.2d 765, 766 (Okla. 1956).

such statutes will not be given retrospective or retroactive effect if to do so would impair or destroy contracts, disturb vested rights, or create new obligations. . . .

. . . [W]here the statute is not purely procedural, it will not be so construed if the intention to give the act a retrospective effect is not so clearly found as to satisfy the court that such was the intention, and if, from the reading of the act, the court is doubtful whether such was the intention, the doubt must be resolved against the retrospective effect."⁶⁰

The new wrongful death statute will almost certainly be determined to be substantive rather than procedural, but whether it was clearly intended to have a retrospective effect on *actions accrued before but not brought until after the effective date* due to the phrase "in all actions hereinafter brought" remains to be decided.

CONCLUSION

Oklahoma has enacted a far-reaching and progressive statute which will allow recovery, in the event of the wrongful death of a child, for the actual injuries that occur to the survivors. Thus, the woefully inadequate pecuniary loss concept will no longer be the only measure of damages. Also recoverable will be "loss of companionship and love of the child, destruction of parent-child relationship and loss of monies expended by parents or guardian in support, maintenance and education of such minor child."⁶¹ These phrases, though they have an ordinary meaning, have already been subject to litigation in other states, notably in Washington. Case law has developed in Washington construing statutory language similar to that contained in Oklahoma's statute, and, therefore, provides persuasive authority for future litigation in Oklahoma.

Although there are many unanswered questions concerning the new statute, judicial interpretation consistent with its legislative purpose should remedy the inequities of the past rule. Then it will no longer be necessary to resort to the unrealistic concept of pecuniary loss as the basis for damages.

Such a reform in the area of adult wrongful death actions is also contemplated with the proposal of a new bill which was written by the drafters of the new wrongful death statute for minors and which will be introduced in the next session of the Oklahoma Legislature.

60. *Id.* at 768, quoting 82 C.J.S. *Statutes* § 416 (1953).

61. 2 Okla. Sess. Laws 213-14, to be codified as OKLA. STAT. tit. 12 § 1055 (Supp. 1975).

Damages under the new statute will be more stable and yet the possibility of “runaway” awards cannot be ignored. The outcome is unsure but it is certain that awards will be substantially larger. The advantage of the new Oklahoma statute is that there is now an adequate remedy for the real injuries occurring in the wrongful death of a child.

Ellen M. Hamilton