

# THE MISSOURI WRONGFUL DEATH STATUTE

## INTRODUCTION

No action existed at common law for death caused by a wrongful act.<sup>1</sup> The social and economic consequences of this rule were considered undesirable<sup>2</sup> and in 1846 Parliament passed what is now known as Lord Campbell's Act.<sup>3</sup> This statute created a cause of action for wrongful death, to be brought in the name of the personal representative of the deceased for the benefit of specified persons. In 1855 the Missouri Legislature enacted a similar statute "for the better security of life, property and character."<sup>4</sup> The statute now provides:

Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, 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

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1. *Rositzky v. Rositzky*, 329 Mo. 662, 46 S.W.2d 591 (1932); *Wells v. Davis*, 303 Mo. 388, 261 S.W. 58 (1924); *Clark v. Kansas City, St. L. & C.R.R.*, 219 Mo. 524, 118 S.W. 40 (1909); *Huggins v. Butcher*, 1 Brownl. 205, 123 Eng. Rep. 756 (K.B. 1607).

The English rule also precluded recovery by third persons for the loss of services. *Baker v. Belton*, 1 Camp. 493, 170 Eng. Rep. 1033 (N.P. 1808). Missouri courts did not agree with this rule until long after enactment of the wrongful death statute. *James v. Christy*, 18 Mo. 162 (1853); *Marx v. Parks*, 39 S.W.2d 570 (Mo. Ct. App. 1931). In *Marx*, the court held a parent's suit was barred under the death act because there was failure to allege that the deceased, a minor daughter, was unmarried and childless, but it held plaintiff had stated a cause of action for loss of services. A different result was reached in *Mennemeyer v. Hart*, 359 Mo. 423, 221 S.W.2d 960 (1949). The supreme court, without mentioning the *Marx* case, held that the statute pre-empted the field and was now the exclusive remedy for wrongful death. *Cf.*, *Bloss v. Dr. C. R. Woodson Sanitarium Co.*, 319 Mo. 1061, 5 S.W.2d 367 (1928).

2. See generally PROSSER, *TORTS* § 105 (2d ed. 1955).

3. *An Act for Compensating the Families of Persons killed by Accidents*, 1846, 9 & 10 Vict., c. 93.

4. MO. REV. STAT., ch. LI, at 647 (1855). The Missouri act contained two separate wrongful death sections. MO. REV. STAT., ch. LI, § 2, at 647 (1855) applied to deaths caused by public carriers and their employees. MO. REV. STAT., ch. LI, § 3, at 648 (1855) covered all other situations. The operation of the former was penal in character. See *Greir v. Kansas City, C. C. & St. J. Ry.*, 286 Mo. 523, 228 S.W. 454 (1921); *Boyd v. Missouri Pac. Ry.*, 249 Mo. 110, 155 S.W. 13 (1913); Russell, *Measure of Damages Under Missouri Wrongful Death Act*, 15 Mo. L. REV. 31 (1950). The other section has always been considered compensatory. See, e.g., *McCullough v. W. H. Powell Lumber Co.*, 205 Mo. App. 15, 216 S.W. 803 (1919); *Johnson v. Dixie Mining & Dev. Co.*, 171 Mo. App. 134, 156 S.W. 33 (1913). In 1955 the legislature revised the statute and eliminated the penal section. Mo. Laws 1955, § 1, at 778.

thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured. . . .<sup>5</sup>

The statute designates those persons who have standing to sue. They are the spouse, children, parents of a minor child and personal representative of the deceased, in that order of priority.

### I. NATURE OF THE ACTION

After the creation of this statutory cause of action, courts had to decide its nature and relation to other causes of action. This involved a consideration of the death act's relation to the survival act, personal injury actions of the beneficiary and contract actions. In addition the courts had to decide whether the statute merely gave to the beneficiary the cause of action of the deceased or created a new and different cause of action.

#### A. *Survival Act*

Missouri has both a death and a survival act. The survival act prevents the abatement of an action for personal injuries *not* resulting in death, because of the subsequent death of either the person injured or the tortfeasor,<sup>6</sup> while the death act applies only to injuries causing death. The remedies created by the two acts theoretically are mutually exclusive. The distinction is clear in the abstract, but may be difficult to apply in a given factual situation. For example, if there is some doubt whether the death was caused by the injuries, there is a possibility of double recovery. A judgment under the survival act in such a case does not preclude an action under the death act.<sup>7</sup> The injured party may institute suit and then die. His personal representative could then continue the action and receive judgment, provided he is able to "prove" the death did not result from the act of negligence. However, it is possible that the spouse could "prove" in an action for wrongful death that the injuries *did* cause the death. The spouse then also could receive judgment. The tortfeasor would be held liable twice for the same act of negligence notwithstanding the theoretical mutual exclusivity of the remedies. The court has indicated that the proper remedy for defendant is to interplead, in a separate action, all potential plaintiffs in order to bind them to the factual determination of the cause of death.<sup>8</sup>

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5. MO. REV. STAT. § 537.080 (1959).

6. MO. REV. STAT. § 537.020 (1959).

7. *Plaza Express Co. v. Galloway*, 365 Mo. 166, 280 S.W.2d 17 (1955); *Downs v. United Ry.*, 184 S.W. 995 (Mo. 1916).

8. This remedy under Mo. REV. STAT. § 507.060 (1959) is needed since the

### B. Personal Injury Actions of Beneficiary

The wrongful death action is independent of any action for personal injuries to the beneficiary himself. Even if the action for death arises out of the same accident as that for personal injuries, bringing them separately is not splitting a cause of action.<sup>9</sup>

### C. Contract Actions

The courts have held that the cause of action conferred by the statute sounds in tort and not contract.<sup>10</sup> However, the existence of a contractual relation between the tortfeasor and either the deceased or the beneficiary does not preclude an action for wrongful death.

It is well settled that while a "tort" is a wrong done independent of contract, there are torts committed in the nonobservance of contract duties. And if a tort arising out of nonobservance of such duties results in a death, a surviving person entitled to sue may avail himself of the Wrongful Death Statute.<sup>11</sup>

When death results from the negligent performance of a contractual duty, one cannot recover damages for death under a contract action.<sup>12</sup>

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doctrine of *res judicata* will not bar the multiple liability. *Plaza Express Co. v. Galloway*, *supra* note 7.

The measure of damages under the survival act is what the deceased could have recovered. This does not include loss of earnings beyond the date of death. *Adelsberger v. Sheehy*, 336 Mo. 497, 79 S.W.2d 109 (1935). Under the death act, the measure is the pecuniary loss of the beneficiary. Cases cited note 107 *infra*. Loss of capacity to earn wages is a proper item of damage. *Overby v. Mears Mining Co.*, 144 Mo. App. 363, 128 S.W. 813 (1910). Therefore, loss of earnings between injury and death may be considered under either statute. The problem of how to handle this overlap is a difficult one in those jurisdictions where the survival and death acts give concurrent remedies and various solutions have been worked out. See *Hindmarsh v. Sulpho Saline Bath Co.*, 108 Neb. 168, 187 N.W. 806 (1922); Note, 91 U. PA. L. REV. 68 (1942). This problem is not present in Missouri since the remedies are mutually exclusive.

9. *Chamberlain v. Missouri-Arkansas Coach Lines, Inc.*, 354 Mo. 461, 189 S.W.2d 538 (1945).

10. *Braun v. Riel*, 40 S.W.2d 621 (Mo. 1931); *Bloss v. Dr. C. R. Woodson Sanitarium Co.*, 319 Mo. 1061, 5 S.W.2d 367 (1928). At this point it should be noted that there can be no recourse to the wrongful death act where workmen's compensation laws are applicable. MO. REV. STAT. § 287.120 (1959).

11. *Braun v. Riel*, *supra* note 10, at 623. Although the court used the word "nonobservance," it would have been more correct to say "negligent performance" as there must be some undertaking under the contract before a tort liability can arise. See *Glen v. Hill*, 210 Mo. 291, 109 S.W. 27 (1908). In the *Glen* case the court said that "even if the promise to repair had been made upon a valuable consideration, and the defendants had breached the contract, such breach would not have furnished a basis for an action of tort . . . but the remedy would be an action for breach of the contract." *Glen v. Hill*, *supra* at 299, 109 S.W. at 29. This indicates there must be some minimum performance.

12. *Bloss v. Dr. C. R. Woodson Sanitarium Co.*, 319 Mo. 1061, 5 S.W.2d 367

### *D. Theory of Recovery*

The court has vacillated between two conceptualizations of the basic nature of the right created by the statute. One is the "transferred right" theory which states that the beneficiary has the same cause of action as the deceased. The other is the "new cause of action" theory which maintains that the beneficiary has a new, statutory right not enjoyed by the deceased. The statute is ambiguous on this point. This controversy has been given more importance than it deserves. Its principal effect lies in the application of the dead man statute.<sup>13</sup> If the deceased was a party to the cause of action, the defendant is precluded from testifying; but if the statute creates a new cause of action in the beneficiary that the deceased never held, the defendant may testify.<sup>14</sup>

In 1875, the supreme court in *Entwhistle v. Feighner*<sup>15</sup> held that the statute conferred a new cause of action on the beneficiary. A wife sued for the wrongful death of her husband. The lower court had ruled that defendant was incompetent to testify in his own behalf. The supreme court reversed on the ground that the deceased was never a party to this cause of action. This case was ignored by later Missouri cases espousing the transferred right theory,<sup>16</sup> which was accepted law until 1904. In *Behen v. St. Louis Transit Co.*<sup>17</sup> the court did not specifically say that the statute creates a new cause of action, but this conclusion can be inferred from the authorities on which

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(1928). A patient died because of the failure of the defendant's employees to watch over him. The statute of limitations on wrongful death had run so plaintiff based the action on the contract. The court held that in essence the action was an attempt to recover damages for wrongful death and as such was barred by the statute of limitations.

13. The courts constantly refer to one theory or the other as if the results would be different depending upon which was applied. However, apart from application of the dead man statute, the conceptualization of the nature of the right is seldom controlling. For example, the court in *Behen v. St. Louis Transit Co.*, 186 Mo. 430, 85 S.W. 346 (1904) gave the new cause of action theory as a reason for holding that the personal representative of the beneficiary may maintain the action. In *Cummins v. Kansas City Pub. Serv. Co.*, 334 Mo. 672, 66 S.W.2d 920 (1933) the court still embraced the new cause of action theory but rejected the proposition upheld in the *Behen* case.

14. See *State ex rel. Thomas v. Daves*, 314 Mo. 13, 283 S.W. 51 (1926); *Entwhistle v. Feighner*, 60 Mo. 214 (1875).

15. 60 Mo. 214 (1875).

16. *Millar v. St. Louis Transit Co.*, 216 Mo. 99, 115 S.W. 521 (1908); *Bates v. Sylvester*, 205 Mo. 493, 104 S.W. 73 (1907); *Strode v. St. Louis Transit Co.*, 197 Mo. 616, 95 S.W. 851 (1906); *Hennessy v. Bavarian Brewing Co.*, 145 Mo. 104, 46 S.W. 966 (1898); *Gray v. McDonald*, 104 Mo. 303, 16 S.W. 398 (1891); *Gibbs v. City of Hannibal*, 82 Mo. 143 (1884); *Proctor v. Hannibal & St. J.R.R.*, 64 Mo. 112 (1876).

17. 186 Mo. 430, 85 S.W. 346 (1904).

it relied. The failure to discuss contrary Missouri cases greatly weakened the authority of *Behen*, however, and it was quickly discredited.<sup>18</sup> So the transferred right theory was still the law in 1929 when the supreme court in *State ex rel. Thomas v. Daves*<sup>19</sup> again was faced with the *Entwhistle* problem: the lower court had refused to allow a defendant to testify on the ground that he was a party to the cause of action. The supreme court decided that the theory in *Entwhistle* was the better rule and adopted the new cause of action theory. With *State ex rel. Thomas* the rule was settled and all subsequent cases have followed it.<sup>20</sup>

The adoption of the new cause of action theory added greater theoretical consistency to the wrongful death statute. The apparent reason for enacting such a statute is to provide a means of compensation for those who have materially suffered from the death. The statute makes no claim of preventing the abatement of the deceased's action as does the survival act. It merely states that the tortfeasor is liable to the beneficiary "notwithstanding" the death. The damages are considered compensation for the beneficiaries, not the estate,<sup>21</sup> and the damages are not the same under the statute as those which the deceased would have received. Therefore it is more realistic and logical to say that the beneficiary has a statutory right which confers a new and different cause of action.

## II. WHO MAY SUE

The plaintiff in a wrongful death action has the burden of establishing that he falls within a statutorily created class of persons. There may be clear negligence, but if no plaintiff can qualify to bring an action, the tortfeasor will not be held liable for his wrongful act.

It is important to keep in mind that the subject of this subsection is *who* may sue and that this problem is distinct from the question of proving actual damages to that person. The beneficiary section states:

damages may be sued for and recovered;

- (1) By the husband or wife of the deceased; or
- (2) If there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased, whether such minor child or children of the deceased be the natural born or adopted child or children . . . or

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18. See *Bates v. Sylvester*, 205 Mo. 493, 104 S.W. 73 (1907).

19. 314 Mo. 13, 283 S.W. 51 (1926).

20. *Glasgow v. City of St. Joseph*, 353 Mo. 740, 184 S.W.2d 412 (1944); *Goldschmidt v. Pevely Dairy Co.*, 341 Mo. 982, 111 S.W.2d 1 (1937); *Jordan v. St. Joseph Ry., Light, Heat & Power Co.*, 335 Mo. 319, 73 S.W.2d 205 (1934); *Cummins v. Kansas City Pub. Serv. Co.*, 334 Mo. 672, 66 S.W.2d 920 (1933).

21. *Hegberg v. St. Louis & S.F.R.R.*, 164 Mo. 514, 147 S.W. 192 (1912).

- (3) If such deceased be a minor and unmarried, whether such deceased unmarried minor be a natural born or adopted child . . . then by the father and mother . . . or
- (4) If there be no husband, wife, minor child . . . or if the deceased be an unmarried minor and there be no father or mother, then . . . by the administrator or executor of the deceased. . . .<sup>22</sup>

### A. Spouse's Suit

No difficult problems arise when a spouse sues within six months of the death of the deceased spouse. Remarriage of the survivor has no effect on the right of that spouse to maintain the action.<sup>23</sup>

The wording of the statute creates special problems when the spouse fails to bring suit but has made a settlement. The problem of whether defendant is protected from a subsequent suit by the children centers around the provision that if there is a spouse the child's right to sue is withheld for six months after death. This section is viewed as giving the spouse a preferential right, provided he or she fulfills the condition of "appropriating" the right within six months of death.<sup>24</sup> What the court means by appropriation is unclear. Some cases<sup>25</sup> indicate that the bringing of a suit is a condition precedent to the vesting of the right. However, in *Hamilton v. Missouri Pac. Ry.*,<sup>26</sup> the court said that the authority to bring suit implies an existing cause of action in the wife, and that the six months is merely a limitation on the time she has to control the cause of action. In this case the children of the deceased brought an action after the six month period. The widow had never brought suit, but had received payment and signed a release. The court held the payment and release were sufficient appropriation of the cause of action to bar the children. But in *Chamberlain v. Missouri-Arkansas Coach Lines, Inc.*,<sup>27</sup> the court said in *dicta* that the wrongful death action did not vest immediately but must be ap-

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22. Mo. REV. STAT. § 537.080 (1959).

23. *Davis v. Springfield Hosp.*, 204 Mo. App. 626, 218 S.W. 696 (1920). *Pope v. Missouri Pac. Ry.*, 175 S.W. 955 (Mo. 1915) held that a common law wife has the same rights under the statute as a wife married with statutory formalities, but the case was based on the fact that the law then recognized such marriages, which is no longer true. Mo. REV. STAT. § 451.040 (1959). Therefore a common law wife probably no longer qualifies.

24. *Huss v. Bohrer*, 317 Mo. 204, 295 S.W. 95 (1927); *Shephard v. St. Louis, I.M. & So. Ry.*, 3 Mo. App. 550 (1877).

25. See *Chamberlain v. Missouri-Arkansas Coach Lines, Inc.*, 354 Mo. 461, 189 S.W.2d 538 (1945); *Huss v. Bohrer*, *supra* note 24; *Packard v. Hannibal & St. J.R.R.*, 181 Mo. 421, 80 S.W. 951 (1904); *McNamara v. Slavens*, 76 Mo. 329 (1882).

26. 248 Mo. 78, 154 S.W. 86 (1913); *accord*, *Blessing v. Chicago B. & Q.R.R.*, 171 S.W.2d 602 (Mo. 1943).

27. 354 Mo. 461, 189 S.W.2d 538 (1945).

propriated. This language could be at odds with the *Hamilton* case because it implies that bringing suit is a condition precedent to vesting of the right. On the other hand, a release could be considered an appropriation. A weakness of the *Hamilton* opinion is that it is based in part on language that is no longer part of the wrongful death act. That language was not controlling in the decision, however. Taking all factors into consideration, a release by a spouse without bringing suit will probably still be considered a bar to the right of the children.

If a spouse brings suit under the statute after the initial six months, the fact that there are no minor children must be averred,<sup>28</sup> and the fact that there are minor children will prove fatal.<sup>29</sup> A suit commenced after six months cannot be saved by amending the petition to include the children as plaintiffs after the one year statute of limitations has run, because the original petition stated no cause of action.<sup>30</sup> Once the suit is instituted within the six months, the spouse has appropriated the cause of action and a voluntary nonsuit or dismissal without prejudice will not affect the right to bring a new action after the six months regardless of the existence of minor children.<sup>31</sup>

### B. Child's Suit

A suit by a child offers more difficulty. The important thing is that they be *minor* children. As the court in *Mingus v. Kurn*<sup>32</sup> said:

The fact that the plaintiffs are the children of the deceased gives them no cause of action unless they were minor children, a fact which is not alleged . . . There must be an allegation of minority, and of course this followed by proof of minority. A suit under this provision of the statute cannot be maintained by adults and minors jointly.<sup>33</sup>

In any action by a minor child, all the minor children must be joined.<sup>34</sup> Failure to do so is fatal because the statute is viewed as conferring an

28. *Barker v. Hannibal & St. J.R.R.*, 91 Mo. 86, 14 S.W. 280 (1886).

29. *Coover v. Moore*, 31 Mo. 574 (1862).

30. *Fair v. Agur*, 354 Mo. 394, 133 S.W.2d 402 (1939); *Goldschmidt v. Pevely Dairy Co.*, 341 Mo. 982, 111 S.W.2d 1 (1937).

31. *Huss v. Bohrer*, 317 Mo. 204, 295 S.W. 95 (1927); *Shepard v. St. Louis I.M. & So. Ry.*, 3 Mo. App. 550 (1877) (dismissal without prejudice held voluntary nonsuit); *Anderson v. Asphalt Distrib. Co.*, 55 S.W.2d 688 (Mo. 1932); *Packard v. Hannibal & St. J.R.R.*, 181 Mo. 421, 80 S.W. 951 (1904).

32. 142 S.W.2d 877 (Mo. Ct. App. 1940).

33. *Id.* at 879.

34. *Nelms v. Bright*, 299 S.W.2d 483 (Mo. 1957). Posthumous children have been held to be covered by the statute. *Bonnarens v. Lead Belt Ry.*, 309 Mo. 65, 273 S.W. 1043 (1925).

indivisible right; no child has a separate interest under the statute.<sup>35</sup> If the child was a minor at the time of the parent's death, the right of action is not lost by attaining majority<sup>36</sup> because "when the right of action accrues to the child, it is a vested right which is not determined by the attainment of majority. . . ."<sup>37</sup>

A divorce decree and an award of custody will not divest the child of the right of action for the death of the parent to whom custody was not awarded.<sup>38</sup> The reason given is that the child is "in no sense precluded by a judgment to which he was not a party"<sup>39</sup> and, therefore, he still has a right to care and support by the parent.

Turning next to the effect on a suit by the minor children of the spouse's preferential right, it has been held that when both parents die as the result of a common disaster, the children need not wait until the end of the six month period.<sup>40</sup> The court reasoned there was no presumption of survivorship in such a situation. "The very language of the statute presupposes, as a condition precedent to a six months' wait, that the father or mother . . . should be *in esse*."<sup>41</sup> One case held that where a spouse had instituted suit but had died while it was pending, the minor children could later bring suit.<sup>42</sup> The reason given was that it is the spouse's right to recover, not the mere commencement of the suit, that cuts off the children's rights. This case was decided when the personal representative of the beneficiary had no rights under the statute, however, which is not now the law.<sup>43</sup> Thus the reasoning in the case is no longer compelling, and doubt is cast on the validity of the rule.<sup>44</sup>

35. *Nelms v. Bright*, *supra* note 34, at 487; *Fair v. Agur*, 345 Mo. 394, 133 S.W.2d 402 (1939); *Clark v. Kansas City, St. L. & C.R.R.*, 219 Mo. 524, 118 S.W. 40 (1909).

36. *Nelms v. Bright*, *supra* note 34, at 487; *Rutter v. Missouri Pac. Ry.*, 81 Mo. 169 (1883).

37. *Rutter v. Missouri Pac. Ry.*, *supra* note 36, at 171. This harmonizes with the rule that remarriage will not divest the right of the wife to maintain the action. See *Davis v. Springfield Hosp.*, 204 Mo. App. 626, 218 S.W. 696 (1920).

38. *Sipple v. Laclede Gaslight Co.*, 125 Mo. App. 81, 102 S.W. 608 (1907).

39. *Id.* at 94-95, 102 S.W. at 613.

40. *Aley v. Missouri Pac. Ry.*, 211 Mo. 460, 111 S.W. 102 (1908).

41. *Id.* at 479, 111 S.W. at 107.

42. Provided they did so before the one year statute of limitations expired. *Cummins v. Kansas City Pub. Serv. Co.*, 334 Mo. 671, 66 S.W.2d 920 (1933).

43. Mo. Rev. STAT. § 537.020 (1959) authorizes the personal representative to continue the suit.

44. If the personal representative of the beneficiary can continue the action, the children have no rights under the statute because the cause of action is indivisible. See cases cited note 35 *supra*. However, the rule in *Cummins v. Kansas City Pub. Serv. Co.*, 334 Mo. 672, 66 S.W.2d 920 (1933), which allows the child to sue (see note 42 *supra*), may be preferable because the measure of damages in a suit by the personal representative of the beneficiary is that of the spouse and not



### C. Parents' Suit

The problems involved in a suit by the parents for the wrongful death of a minor child are diverse. Not only must the relation between the parents and the child be explored, but the relation between the parents as well. The basis of the right to recover is not the loss of services of the child but rather the right of the child itself to recover.<sup>45</sup> Therefore, the emancipation of the son is no defense to an action by a parent for that son's wrongful death.<sup>46</sup> Likewise, a divorced mother, without custody, can maintain the action even though through the decree she lost the right to his services.<sup>47</sup>

The mother may sue for the wrongful death of her illegitimate child.<sup>48</sup> The court based this rule on the fact that the illegitimate child may inherit from the mother; thus, where the child could not inherit from the father, the father could not sue for the death of the child.<sup>49</sup> The parents may also sue for death due to prenatal injuries.<sup>50</sup>

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of the children. The possible effect of rejecting the *Cummins* rule is that the amount of recovery will be lessened to the detriment of the children, who probably will be the eventual recipients of the proceeds of the suit.

For example, a surviving spouse is entitled to recover, as one item of damage, the burden of supporting any minor children. *Infra*, note 122. But when the spouse is deceased and the action is continued by the personal representative the amount recoverable is properly limited by that shorter known life span. *Morton v. Southwestern Tel. & Tel. Co.*, 280 Mo. 360, 217 S.W. 831 (1920); see note 120 *infra*. Thus, the children would be cut off from support for the remaining period of minority in so far as that period overlapped with the life expectancy of the supporting parent, which would be a proper measure of damage for them under the *Cummins* rule. See *McPherson v. St. Louis I.M. & So. Ry.*, 97 Mo. 253 (1888); *Goss v. Missouri Pac. Ry.*, 50 Mo. App. 614 (1892). Thus, that amount should either be included in the suit by the personal representative of the surviving spouse, or, to achieve the same result, the children rather than the surviving spouse's personal representative could be permitted to sue, as in *Cummins*.

45. *Dalton v. St. Louis Smelting & Ref. Co.*, 188 Mo. App. 529, 174 S.W. 468 (1915); *Hennessy v. Bavarian Brewing Co.*, 145 Mo. 104, 46 S.W. 966 (1898); *cf. James v. Christy*, 18 Mo. 162 (1853). There is dictum to the contrary in *Menne-meyer v. Hart*, 359 Mo. 423, 221 S.W.2d 960 (1949), but the court confused the measure of damages with the basis of the action.

Looking at the right of the child does not violate the new cause of action theory. The court does not say that the parents have the child's action but merely use this as a test to determine whether the parents have a cause of action under the statute. The statute specifically authorizes such a test by saying the action may be maintained when death results from such negligence "as would, if death had not ensued, have entitled the party injured to maintain an action . . ." Mo. REV. STAT. § 537.080 (1959).

46. *Matlock v. Williamsville, G. & St. L. Ry.*, 198 Mo. 495, 95 S.W. 849 (1906).

47. *Hennessy v. Bavarian Brewing Co.*, 145 Mo. 104, 46 S.W. 966 (1898).

48. *Marshall v. Wabash R.R.*, 120 Mo. 275, 25 S.W. 179 (1894).

49. *Id.* (dictum). Adoption of the deceased's child would cut off the right of either natural parent in favor of the adopting parents. Mo. REV. STAT. § 453.090 (1959).

Since the child has a right of action for prenatal injuries, the parents also have such a right if the injuries result in death.

The relation of the surviving parents has been likened by the courts to a tenancy by the entirety.<sup>51</sup> The death of one while the suit is pending will not abate the action.<sup>52</sup> The courts rely on the use of the word "survivor"<sup>53</sup> in the statute. The courts have had more difficulty in determining whether or not one parent may maintain the action alone if the other is still alive. The statute prior to 1955 said that suit could be maintained by "the father and mother, who may join in the suit, and each shall have an equal interest in the judgment . . ."<sup>54</sup> The use of "may" would seem to make joinder permissive, but the court held that the parents must be joined, and an unwilling parent cannot be joined involuntarily.<sup>55</sup> This meant that a husband could settle with the defendant, and then refuse to join with the wife, thus cutting off her right. This construction was changed by the 1955 revision. The statute now provides that "if the surviving parents are unable or decline or refuse to join in the suit within six months after such death, then either parent may bring . . . the action in his or her name alone. . ."<sup>56</sup> However, the recovery is to be for the use and benefit of both parents.

#### *D. Suit By Personal Representative of the Deceased*

The personal representative of the deceased had no cause of action until 1905.<sup>57</sup> When the beneficiary section was extended to add the personal representative of the deceased, the courts set certain qualifications. The general theory of recovery is that the administrator does not sue for the benefit of the estate but rather as trustee for the beneficiaries.<sup>58</sup> This significantly affects the damages that may be recovered; he cannot recover what the deceased could recover, but

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50. *Steggall v. Morris*, 363 Mo. 1224, 258 S.W.2d 577 (1953).

51. *Herrell v. St. Louis - San Francisco Ry.*, 324 Mo. 38, 23 S.W.2d 102 (1929).

52. *Senn v. Southern Ry.*, 124 Mo. 621, 28 S.W. 66 (1894); *Tobin v. Missouri Pac. Ry.*, 18 S.W. 996 (Mo. 1891).

53. Mo. REV. STAT. § 537.080 (3) (1959). See *Tobin v. Missouri Pac. Ry.*, *supra* note 52.

54. Mo. REV. STAT. § 3652 (1939).

55. *Clark v. Kansas City, St. L. & C.R.R.*, 219 Mo. 524, 118 S.W. 40 (1909).

56. Mo. REV. STAT. § 537.080 (3) (1959).

57. Mo. Laws 1905, p. 135.

58. *Demattei v. Missouri-Kansas-Texas R.R.*, 139 S.W.2d 504 (Mo. 1940), where recovery by a foreign administrator was allowed because it is not an asset of the estate and therefore not subject to the claims of the creditors of the deceased. *Accord*, *McCullough v. W. H. Powell Lumber Co.*, 205 Mo. App. 15, 216 S.W. 803 (1919); *Troll v. Laclede Gaslight Co.*, 182 Mo. App. 600, 169 S.W. 337 (1914); *Johnson v. Dixie Mining & Dev. Co.*, 171 Mo. App. 134, 156 S.W. 33 (1913); *Hegberg v. St. Louis & S.F.R.R.*, 164 Mo. App. 514, 147 S.W. 192 (1912).

merely the pecuniary loss of the beneficiary.<sup>59</sup> There must be an allegation and evidence that someone is competent to take under the descent laws.<sup>60</sup> Those persons must be named, and their relationship to the deceased shown.<sup>61</sup> The essential difference between the beneficiaries who take under the descent laws, and the beneficiaries specifically designated in the death act, called the statutory beneficiaries, is that the latter may bring the suit while the former have no standing by themselves. They can recover only through the personal representative of the deceased. The personal representative cannot maintain this action if any of the statutory beneficiaries survive the deceased.<sup>62</sup> This is so even when the survival is only for a few hours, and death stems from the same disaster that claimed the life of the deceased.<sup>63</sup>

#### *E. Suit By Personal Representative of the Beneficiary*

There was some conflict in Missouri cases whether the personal representative of the statutory beneficiary has any cause of action under the statute. In the early case of *Gibbs v. City of Hannibal*,<sup>64</sup> the court said that the cause of action "is a right personal to the beneficiary, and does not survive to his personal representatives."<sup>65</sup> Here all the beneficiaries died in a common disaster, and there was no person to whom the action could survive. The reasoning does not make it clear whether the court held that the cause of action could not survive or merely that there was no possibility of knowing to whom it should survive. Later in *Behen v. St. Louis Transit Co.*,<sup>66</sup> the court, without mentioning the *Gibbs* case, held the administrator of the deceased beneficiary could revive the cause of action. A distinction between the two cases is that in the *Behen* case the beneficiary had already instituted suit while in the *Gibbs* case the administrator initiated the suit. However, much of the reasoning in the two cases is in conflict. *Behen* accepts the new cause of action theory, while *Gibbs* relies on the transferred right theory. On the other hand, both

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59. *Wente v. Shaver*, 350 Mo. 1143, 169 S.W.2d 947 (1943); *Johnson v. Dixie Mining & Dev. Co.*, *supra* note 58.

60. *Kirk v. Wabash R.R.*, 265 Mo. 341, 177 S.W. 592 (1915); *Lynch v. St. Louis Pub. Serv. Co.*, 261 S.W.2d 521 (Mo. Ct. App. 1953); *McCullough v. W. H. Powell Lumber Co.*, 205 Mo. App. 15, 216 S.W. 803 (1919).

61. *Johnson v. Dixie Mining & Dev. Co.*, 171 Mo. App. 134, 156 S.W. 33 (1913).

62. *Cummins v. Kansas City Pub. Serv. Co.*, 334 Mo. 672, 66 S.W.2d 920 (1933); *Betz v. Kansas City So. Ry.*, 314 Mo. 390, 284 S.W. 455 (1926); *Longan v. Kansas City Ry.*, 299 Mo. 561, 253 S.W. 758 (1923).

63. *Betz v. Kansas City So. Ry.*, *supra* note 62.

64. 82 Mo. 143 (1884).

65. *Id.* at 149.

66. 186 Mo. 430, 85 S.W. 346 (1904).

cases speak in general terms which would seem to justify no distinction. If the right of the beneficiary is a personal right, as *Gibbs* says it is, then it should make no difference whether the beneficiary brought the action or not. Finally, the court in *Millar v. St. Louis Transit Co.*<sup>67</sup> rejected *Behen* on all points. In this case, like the *Behen* case, the beneficiary had brought suit before his death. Not only was the distinction rejected, but the court reasserted the transferred right theory<sup>68</sup> and said that the statute conferred a personal right. This firmly established the rule that the right did not extend to the personal representative of the beneficiary. This was a very harsh rule. For example, in *Betz v. Kansas City So. Ry.*,<sup>69</sup> the court held that the survival of the husband meant that no cause of action accrued to the administrator of the wife. Then, the husband having died a few hours after the wife, there was no one left who could sue under the statute. The tortfeasor completely escaped liability even though there might have been someone such as a mother, father, brother or sister pecuniarily damaged by his tort. The legislature then amended the statute to allow the personal representative of the beneficiary to maintain the action.<sup>70</sup>

### III. DEFENSES

#### A. Scope of Liability

Plaintiff in an action for wrongful death has no more difficulty in proving liability than in the usual tort case. The courts' wide application<sup>71</sup> of the death act is shown by cases in which the wrongful act merely hastened death. An early Missouri case<sup>72</sup> said the wrongful death act did not apply to this situation. Two subsequent cases<sup>73</sup> have

67. 216 Mo. 99, 115 S.W. 52 (1909); *accord*, *Cummins v. Kansas City Pub. Serv. Co.*, 334 Mo. 672, 66 S.W.2d 920 (1933). See text at notes 42-44 *supra*.

68. The *Millar* case, *supra* note 67, was later overruled on this point. *State ex rel. Thomas v. Daues*, 314 Mo. 13, 283 S.W. 51 (1926). See text accompanying notes 16-20 *supra*.

69. 314 Mo. 390, 284 S.W. 455 (1926). *But see* *Cummins v. Kansas City Pub. Serv. Co.*, 334 Mo. 672, 66 S.W.2d 920 (1933).

70. Mo. Laws 1949, p. 633 amending MO. REV. STAT. § 3670 (1939) which is now MO. REV. STAT. § 537.020 (1) (1959). This section reads as follows:

Causes of action for death shall not abate by reason of the death of any party to any such cause of action, but shall survive to the personal representative of such party bringing such cause of action and against the person . . . liable for such death . . .

71. The courts have gone so far as to hold an aider and abetter liable. *Gray v. McDonald*, 104 Mo. 303, 16 S.W. 398 (1891).

72. *Jackson v. St. Louis I.M. & So. Ry.*, 87 Mo. 422 (1885).

73. *McDonald v. Metropolitan St. Ry.*, 219 Mo. 468, 118 S.W. 78 (1909). The early case was distinguished on the grounds that the court was asked whether hastening is causing, while here the question is as to the propriety of the instruction stating that the injury directly caused the death. The court indicated that if

criticized this early decision, but both were decided on other grounds. The indication, therefore, is that such an action will lie under the statute.

### *B. Tortfeasor's Death*

There was at one time an exception to this broad concept of liability. The courts said that the statutory action could not be maintained against the personal representative of the tortfeasor even though suit had already begun.<sup>74</sup> The legislature changed this rule, and now the death of the tortfeasor will not abate the action.<sup>75</sup>

### *C. Release Before Death*

A questionable rule still in effect is that a release by and payment to the deceased is a bar to any action for wrongful death.<sup>76</sup> Two reasons underlie the rule: (1) if it were not a bar there could be double compensation; and (2) the court should not place hinderances in the way of settlements. However, such a settlement may not contemplate death,<sup>77</sup> *i.e.*, it may be settlement for the personal injuries but not for death. In such a case there would be no double compensation because the measure of damages for the personal injury is different than that under the death act.<sup>78</sup>

### *D. Contributory Negligence*

The statute specifically states that the defendant may "plead and prove as a defense that such a death was caused by the negligence of

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it were faced with the same issue as the early case that case would be overruled. *Accord*, *Strode v. St. Louis Transit Co.*, 197 Mo. 616, 95 S.W. 851 (1906) (decided on the grounds of a release signed by the deceased). See also *Fetter v. Fidelity & Cas. Co.*, 174 Mo. 256, 73 S.W. 592 (1903).

74. *Mennemeyer v. Hart*, 359 Mo. 423, 221 S.W.2d 960 (1949); *Hendricks v. Kauffman*, 340 Mo. 74, 101 S.W.2d 84 (1936); *Bates v. Sylvester*, 205 Mo. 493, 104 S.W. 73 (1907).

75. MO. REV. STAT. § 537.020 (2) (1959). It makes no difference that the defendant died before the plaintiff. *Harrison v. Weisbrod*, 358 S.W.2d 277 (Mo. Ct. App. 1962).

76. *Strode v. St. Louis Transit Co.*, 197 Mo. 616, 95 S.W. 851 (1906). *Cf. State ex rel. Thomas v. Daues*, 314 Mo. 13, 283 S.W. 51 (1926); *Entwhistle v. Feighner*, 60 Mo. 214 (1875). In the *Strode* case, which held that a release by the deceased barred any subsequent claim under the death act, the court seemed to accept the transferred right theory, but said it made no difference which theory they followed. In *State ex rel. Thomas v. Daues* the court said that the *Strode* case did not really accept the transferred right theory but rather avoided the question. However, it is submitted that the rule of the *Strode* case is not sound if one follows the new cause of action reasoning of *State ex rel. Thomas v. Daues*.

77. See settlement and facts in *Strode v. St. Louis Transit Co.*, *supra* note 76.

78. See text accompanying note 102 *infra*. For a discussion of overlapping damages see note 8 *supra*.

the deceased.”<sup>79</sup> It should be noted that the statute refers only to the negligence of the deceased. But the court has held that the contributory negligence of the beneficiary will also bar recovery.<sup>80</sup> But when only one of the beneficiaries was negligent in a suit by the parents of a deceased minor child, the court reasoned, in *Herrel v. St. Louis-San Francisco Ry.*,<sup>81</sup> that because the cause of action is indivisible between the parents, contributory negligence must be a complete defense or none at all. The father’s contributory negligence would not bar the mother if she sued alone. Therefore, unless the negligence could be imputed to her, their joint action was not barred by it. The court overruled prior cases and refused to impute the negligence to her, thus permitting recovery in spite of the father’s negligence. This rule was weakened when a court of appeals said that, “if the negligence of the father was the primary and proximate cause of the injury it would defeat his recovery, even though he had joined the mother . . . .”<sup>82</sup> The supreme court, however, later re-affirmed its former decision when it held that in the absence of joint enterprise or agency “the negligence of the wife is no bar to recovery by the husband and wife for the death of their minor son . . . .”<sup>83</sup>

#### *E. Statute of Limitations*

The statute of limitations<sup>84</sup> requires suit to be brought within one year of the date of death, but there are liberal provisions for extension. The time that a defendant is absent from the state is not calculated within the period.<sup>85</sup> Also, any voluntary nonsuit, arrested judgment or reversal of a favorable verdict will extend the period another year.<sup>86</sup>

There is a conflict in the cases whether the statute of limitations is a matter of substantive right or merely one of limitation and repose. If it is the latter, then it is not an integral part of the right and failure to raise the point at trial waives it. However, if it is a substantive right, then it is inseparable from the whole statutory right and can be raised anytime. In 1913, the court in *Chandler v. Chicago*

79. MO. REV. STAT. § 537.085 (1959).

80. *Chawkey v. Wabash Ry.*, 317 Mo. 782, 297 S.W. 20 (1927); *Wiese v. Remme*, 140 Mo. 289, 41 S.W. 797 (1897); *White v. National Lead Co.*, 99 S.W.2d 535 (Mo. Ct. App. 1936); *Howard v. Scarritt Estate Co.*, 161 Mo. App. 552, 144 S.W. 185 (1912).

81. 324 Mo. 38, 23 S.W.2d 102 (1929).

82. *White v. National Lead Co.*, 99 S.W.2d 535, 540 (Mo. Ct. App. 1936).

83. *Reynolds v. Thomas*, 215 S.W.2d 452, 454 (Mo. 1948).

84. MO. REV. STAT. § 537.100 (1959).

85. *Ibid.*

86. *Ibid.*

& *A.R.R.*<sup>87</sup> said, "when a statute creates a *new* right, and goes on to prescribe the means of acquiring it, the statutory plan is exclusive, and parties are confined to the statutory remedy."<sup>88</sup> This case held that the limitations section was a matter of substantive right, ignoring the earlier case of *Cytron v. St. Louis Transit Co.*<sup>89</sup> In the latter case, the plaintiff father had not joined the mother until after the one year limitation had expired. The court said that failure to raise the point at trial was a waiver, the statute being merely one of limitation and repose. The *Chandler* case, however, is bolstered by the more recent case of *Baysinger v. Hanser*,<sup>90</sup> which held the limitation of the death act is one of substantive right and not a mere technical bar to the remedy.

The cause of action accrues on the death of the deceased.<sup>91</sup> The failure to discover the identity of the tortfeasor will not halt the running of the time period.<sup>92</sup> Filing a petition, even in the wrong court, and issuing a summons, even though not timely served, commences the action and the statute is tolled.<sup>93</sup>

An interesting aspect of the statute of limitations is the relating-back concept, applicable when the petition is amended after the statute of limitations has run. The question is whether the court will allow a defective petition to be cured by such amendment. The determining factor is whether the party asserting the right had an interest in the action at the time the statute of limitations expired. For example, in *Slater v. Kansas City Terminal Ry.*,<sup>94</sup> a widow sued as administratrix within the statutory period under the Federal Employers Liability Act. Her claim was improper,<sup>95</sup> so she filed an amended petition under the wrongful death act after the statutory period. The court held that "the substitution by amendment was a mere change in

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87. 251 Mo. 592, 158 S.W. 35 (1913).

88. *Id.* at 600, 158 S.W. at 37.

89. 205 Mo. 692, 104 S.W. 109 (1907); *accord*, *Wentz v. Price Candy Co.*, 352 Mo. 1, 175 S.W.2d 852 (1943) (dictum). The dictum in the *Wentz* case was the chief source of confusion since this case was decided after *Chandler v. Chicago & A.R.R.*, 251 Mo. 592, 158 S.W. 35 (1913). Except for this, it could have been assumed that the *Chandler* case had tacitly overruled the *Cytron* case.

90. 355 Mo. 1042, 199 S.W.2d 644 (1947).

91. *Fraze v. Partney*, 314 S.W.2d 915 (Mo. 1958); *Glasgow v. City of St. Joseph*, 353 Mo. 740, 184 S.W.2d 412 (1945); *Kennedy v. Burrier*, 36 Mo. 128 (1865).

92. *Fraze v. Partney*, *supra* note 91, at 919; *cf.* *Kober v. Kober*, 324 Mo. 379, 23 S.W.2d 149 (1929).

93. *Tice v. Milner*, 308 S.W.2d 697 (Mo. 1957). The court, however, limited its decision to cases where the filing of the petition in the wrong court was not due to negligence.

94. 271 S.W.2d 581 (Mo. 1954).

95. The husband was not an employee of the defendant.

capacity in which plaintiff sued"<sup>96</sup> (*i.e.*, widow and not administratrix); therefore, the change was not a commencement of a new action, but related back to the filing of the original petition. Likewise, one spouse may amend by adding the name of the other spouse after the year, for the spouse alone has an interest in the action.<sup>97</sup> A different rule exists when a widow with minor children, who has sued after the six months preferential right, tries to add the children to the suit after the year. She is a stranger to the suit after the six months, and has no interest in it. Her original petition has no validity, so there is nothing to which the amendment may relate back.<sup>98</sup>

#### IV. MEASURE OF DAMAGES

The Missouri statute is vague in stating the measure of damages. It merely says that such damages may be awarded "as the jury may deem fair and just . . . with reference to the necessary injury . . ."<sup>99</sup> The same is true of wrongful death statutes in most other states.<sup>100</sup> The courts of these states, in the absence of legislative guide lines, have developed two general theories of compensation: (1) loss to the estate; and (2) loss by the survivors.<sup>101</sup>

Courts that follow the loss to the estate rule are divided into three groups depending upon the verbal formula used.<sup>102</sup> The first group allows damages to be determined by the present worth of the probable net earnings the deceased would have made during his life expectancy, deducting his expenses.<sup>103</sup> A second theory is the accumulations formula. This is generally held to be the amount that the deceased, by his own efforts, would have saved during the remainder of his life expectancy.<sup>104</sup> Obviously, recovery would be less under this theory than the previous one because normally the deceased would have accumulated less than his net earnings. The third view is the same as the first except that there is no deduction for the living expenses of the deceased.<sup>105</sup>

Missouri courts have adopted the measure of recovery determined by the loss to the survivors.<sup>106</sup> However, such loss is limited to

96. *Id.* at 583.

97. *Cytron v. St. Louis Transit Co.*, 205 Mo. 692, 104 S.W. 109 (1907).

98. *Fair v. Agur*, 345 Mo. 394, 133 S.W.2d 402 (1939).

99. MO. REV. STAT. § 537.090 (1959).

100. MCCORMICK, DAMAGES § 95 (1935).

101. See generally *ibid.*

102. *Id.* at § 96.

103. See, *e.g.*, *Louisville & N.R.R. v. Garnett*, 129 Miss. 795, 93 So. 241 (1922).

104. See, *e.g.*, *Hough v. Illinois Cen. R.R.*, 169 Iowa 224, 149 N.W. 885 (1914).

105. See, *e.g.*, *Williams v. McCranie*, 27 Ga. App. 693, 109 S.E. 699 (1921).

106. *Troll v. Laclede Gaslight Co.*, 182 Mo. App. 600, 169 S.W. 337 (1914).



pecuniary injury.<sup>107</sup> "The test of the right of recovery . . . is the reasonable probability of pecuniary benefit from the continued life of the deceased, or a pecuniary injury from the death."<sup>108</sup> Any consideration of damages necessarily centers around the court's definition of pecuniary injury. The requirement is derived from the statutory words "necessary injury"<sup>109</sup> and it has been said that the statute is broad enough to include any such injury, "whether present, prospective, or proximate."<sup>110</sup> However, pecuniary injury does not include the pain and suffering of the deceased<sup>111</sup> nor the mental anguish of the beneficiary.<sup>112</sup> The jury is not limited to precise mathematical calculation, but is given wide discretion by the appellate courts, and its assessment will not be altered unless there is an abuse of such discretion.<sup>113</sup> However, the statute places a maximum limit on recovery which now is twenty-five thousand dollars.

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107. *Domijan v. Harp*, 340 S.W.2d 728 (Mo. 1960); *Miller v. Williams*, 76 S.W.2d 355 (Mo. 1934); *Barth v. Kansas City Elec. Ry.*, 142 Mo. 535, 44 S.W. 778 (1898); *McGowan v. St. Louis Ore & Steel Co.*, 109 Mo. 518, 19 S.W. 199 (1892). The failure to prove pecuniary damages still leaves plaintiff the right to recover nominal damages. *Stroud v. Masek*, 262 S.W.2d 47 (Mo. 1953).

Although damages are said to be limited to the pecuniary loss, this is not always true. For example, in the case of a child's death, recovery often exceeds the amount arrived at by a strict calculation under the excompounded measure. See note 145 *infra*. Also, in the case of a wife's death, recovery for loss of comfort and society is in conflict with a strict interpretation of the pecuniary loss rule. See note 130 *infra* and accompanying text. Also, the statute specifically allows aggravating circumstances to be considered and punitive damages to be awarded. This provision means that recovery in certain circumstances can be more than purely compensatory. Where the facts justify exemplary damages, the financial standing of the defendant may be considered. *Cole v. Long*, 207 Mo. App. 528, 227 S.W. 903 (1921). Little is said in the cases on mitigating damages. However, it is clear that the insurance on the deceased's life is not to be considered. *Bright v. Thacher*, 202 Mo. App. 301, 215 S.W. 788 (1919). This rule is based on the idea that the tortfeasor should not be relieved of the consequences of his wrongful act by relying on the prudence of the deceased in providing, at the deceased's expense, for the maintenance of his dependents.

108. *Domijan v. Harp*, *supra* note 107, at 734.

109. Mo. REV. STAT. § 537.090 (1959).

110. *Barth v. Kansas City Elec. Ry.*, 142 Mo. 535, 559, 44 S.W. 778, 785 (1898).

111. *Boyd v. Missouri Pac. Ry.*, 286 Mo. 54, 139 S.W. 561 (1911); *McGowan v. St. Louis Ore & Steel Co.*, 109 Mo. 518, 19 S.W. 199 (1892); *Goss v. Missouri Pac. Ry.*, 50 Mo. App. 614 (1892).

112. *Barth v. Kansas City Elec. Ry.*, 142 Mo. 535, 559, 44 S.W. 778, 785 (1898); *McGowan v. St. Louis Ore & Steel Co.*, *supra* note 111; *Calcaterra v. Iovaldi*, 123 Mo. App. 347, 100 S.W. 675 (1906); *Goss v. Missouri Pac. Ry.*, *supra* note 111.

113. *Domijan v. Harp*, 340 S.W.2d 728 (Mo. 1960); *Marlow v. Nafziger Baking Co.*, 333 Mo. 790, 63 S.W.2d 115 (1933). The test is whether the amount of the verdict shocks the conscience of the court. *Wright v. Osborn*, 356 Mo. 382, 201 S.W.2d 935 (1947). Those factors to which the courts most often look in

*A. Spouse's Suit*

## I. DEATH OF HUSBAND

The law will imply pecuniary loss from the negligent killing of a husband,<sup>114</sup> but this is no help in determining the specific amount.<sup>115</sup> To do this, consideration must be given to those things the courts consider a pecuniary interest. Most obvious of those is the deceased's lost wages. His earning capacity is a proper consideration for the jury,<sup>116</sup> but the

loss is not necessarily the whole amount of the deceased's probable earnings. This, simply from the fact that she is not entitled to the whole of such earnings after her support and other matters of pecuniary loss are secured therefrom.<sup>117</sup>

However, neither is she limited to the actual earnings of the deceased;<sup>118</sup> it is proper to consider the possibility of increased wages and other services he might render to her. For example, a wife of a retired man is not excluded because he earns no wages. Accumulating, protecting and managing money and property wisely may have been assets of the husband, and the loss of one who had such capacity could be a grievous pecuniary loss.<sup>119</sup> Other important factors to be considered are a husband's age, state of health and probable length of life.<sup>120</sup> Evidence of all the mentioned factors are admissible without

determining excessiveness of the verdict are age, physical condition, earning capacity and size of family, as they are applicable. *Parsons v. Missouri Pac. Ry.*, 94 Mo. 286, 6 S.W. 464 (1887); *Marx v. Parks*, 39 S.W.2d 570 (Mo. Ct. App. 1931); *Stookey v. St. Louis-San Francisco Ry.*, 215 Mo. App. 411, 249 S.W. 141 (1923); *Cole v. Long*, 207 Mo. App. 528, 227 S.W. 903 (1921); *Kelly v. City of Higginsville*, 185 Mo. App. 55, 171 S.W. 966 (1914).

114. *Steinmetz v. Saathoff*, 84 S.W.2d 434 (Mo. Ct. App. 1935).

115. The failure to prove an exact amount will not necessarily limit recovery to nominal damages. *Most v. Goebel Constr. Co.*, 199 Mo. App. 336, 203 S.W. 474 (1918). This is because the court will give a wife every possible benefit of the presumption of pecuniary loss. The wife stands, in this respect, in a much more favorable position than the personal representative. See text accompanying notes 148 & 150 *infra*.

116. *Overby v. Mears Mining Co.*, 144 Mo. App. 363, 128 S.W. 813 (1910).

117. *Knight v. Sadtler Lead & Zinc Co.*, 75 Mo. App. 541, 549 (1898); *accord*, *Haines v. Pearson*, 107 Mo. App. 481, 81 S.W. 645 (1904). Any consideration of future earnings must be discounted to their present worth; what will be received in the future does not have the same value as that which is immediately realizable. See *Clark v. Chicago, R.I. & P. Ry.*, 318 Mo. 453, 300 S.W. 758 (1927) (personal injuries); *Bagley v. City of St. Louis*, 268 Mo. 259, 186 S.W. 966 (1916).

118. *Boyd v. Missouri Pac. Ry.*, 236 Mo. 54, 139 S.W. 561 (1911).

119. *Loomis v. Metropolitan St. Ry.*, 188 Mo. App. 203, 175 S.W. 143 (1915).

120. *Schaub v. Hannibal & St. J.R.R.*, 106 Mo. 74, 16 S.W. 924 (1891). In looking at the probable length of life of the deceased, it is also necessary to consider the probable length of life of the plaintiff, as recovery is based on

specific allegation for they are damages that flow naturally from the injury.<sup>121</sup> The burden of educating and supporting the children alone during their minority is another proper element in the damages.<sup>122</sup> Therefore, it is proper for the widow to plead and prove the number and ages of her children.<sup>123</sup>

An important restriction is that there can be no recovery for loss of the comfort and society of the husband.<sup>124</sup> However, in *Haines v. Pearson*,<sup>125</sup> the court said that "the personal attention of the husband to insure her comfort, and the many ways he might make himself helpful and useful to her are proper things to consider in setting damages."<sup>126</sup> This language comes suspiciously close to allowing damages for the loss of comfort and society, but the court specifically disaffirmed the idea.<sup>127</sup>

## II. DEATH OF WIFE

The basis of a husband's damages for the death of his wife is much like that of the widow's suit. In calculating damages he may rely on such items as her capacity to do housework<sup>128</sup> and the expense of her

whoever's life expectancy is the shorter. *Morton v. Southwestern Tel. & Tel. Co.*, 280 Mo. 360, 217 S.W. 831 (1920). Remarriage will not affect the amount of recovery. *Davis v. Springfield Hosp.*, 204 Mo. App. 626, 218 S.W. 696 (1920). The cases do not consider whether the wife may recover funeral and medical expenses as they do in other situations. *Wilt v. Moody*, 254 S.W.2d 15 (Mo. 1953) (wife's death); *Rains v. St. Louis, I.M. & So. Ry.*, 71 Mo. 164 (1879) (child's death). It could be argued that the wife normally incurs no such expense but the husband's estate does. See *McCORMICK, DAMAGES* § 102 (1935).

121. *Holmes v. St. Louis, I.M. & So. Ry.*, 176 S.W. 1041 (Mo. 1915).

122. *Wilkerson v. Missouri Pac. Ry.*, 69 S.W.2d 299 (Mo. Ct. App. 1934); *Burton v. Kansas City*, 181 Mo. App. 427, 168 S.W. 889 (1914).

123. *Holmes v. St. Louis, I.M. & So. Ry.*, 176 S.W. 1041 (Mo. 1915); *Boyd v. Missouri Pac. Ry.*, 236 Mo. 54, 139 S.W. 561 (1911); *O'Mellia v. Kansas City, St. J. & C.B.R.R.*, 115 Mo. 205, 21 S.W. 503 (1893).

124. *Boyd v. Missouri Pac. Ry.*, *supra* note 123; *Schaub v. Hannibal & St. J.R.R.*, 106 Mo. 74, 16 S.W. 924 (1891); *Haines v. Pearson*, 107 Mo. App. 481, 81 S.W. 645 (1904); *Knight v. Sadtler Lead & Zinc Co.*, 75 Mo. App. 541 (1898).

125. 107 Mo. App. 481, 81 S.W. 645 (1904). The husband was sixty-eight and earned \$35 a week. The issue was whether a verdict for \$2,500 was excessive.

126. *Id.* at 486, 81 S.W. at 646.

127. A husband may recover for loss of the comfort and society of his wife. Cases cited note 130 *infra*. Consider the following language in *Furnish v. Missouri Pac. Ry.*, 102 Mo. 669, 676, 15 S.W. 315, 317 (1891): "By the term 'society' . . . is meant such capacities for usefulness, aid and comfort as a wife." How different are these words from those of the *Haines* case? See text accompanying note 126 *supra*.

128. *Hartzler v. Metropolitan St. Ry.*, 140 Mo. App. 665, 126 S.W. 760 (1910). He may likewise put into evidence the cost of a housekeeper to take care of his children. *Leaman v. Campbell 66 Express Truck Lines*, 355 Mo. 939, 199 S.W.2d 359 (1947).

last illness.<sup>129</sup> The principal difference is that a husband may recover for the loss of the comfort and society of his wife.<sup>130</sup>

### *B. Child's Suit*

In a child's suit for wrongful death of the parent, juries are not limited to exact calculations, but are vested with considerable discretion.<sup>131</sup> Reflecting this, damages are not limited to the amount of the earnings of the deceased parent, nor does failure to show such earnings limit recovery to nominal damages.<sup>132</sup> In discussing damages, an appellate court said that:

[I]n actions such as this the physical, mental and moral training of a child by its parent is to be considered as having a pecuniary value in estimating the loss which the child sustains by reason of the parent's death; . . . the child is entitled to recover for the loss of a parent's care, nurture, guidance, training, and education; and . . . these may be considered as having a pecuniary as well as moral value.<sup>133</sup>

Such damages, however, are limited to the period of the child's minority.<sup>134</sup> In considering loss of moral training and advice, the jury is to take into account the fitness of the parent to render such services.<sup>135</sup>

### *C. Parent's Suit*

In a parent's suit for the wrongful death of a minor child, the law will presume the life of the child was of pecuniary value to the parent.<sup>136</sup> It is no defense to show that the child was not living with the parent.<sup>137</sup> The measure of damage is basically the loss of services of the child during minority, to which is added the funeral and related

129. *Wilt v. Moody*, 254 S.W.2d 15 (Mo. 1953).

130. *Martin v. St. Louis-San Francisco Ry.*, 227 S.W. 129 (Mo. Ct. App. 1921); *Smith v. Simpson*, 221 Mo. App. 550, 288 S.W. 69 (1926); *cf.*, *Furnish v. Missouri Pac. Ry.*, 102 Mo. 669, 15 S.W. 315 (1891).

131. *Gamache v. Johnston Tin Foil & Metal Co.*, 116 Mo. App. 596, 92 S.W. 918 (1906).

132. *Stoher v. St. Louis, I.M. & So. Ry.*, 91 Mo. 509, 4 S.W. 389 (1887); *Sipple v. Laclede Gaslight Co.*, 125 Mo. App. 81, 102 S.W. 608 (1907).

133. *Gentry v. Wabash R.R.*, 172 Mo. App. 638, 652-53, 156 S.W. 27, 31-32 (1913). *Accord*, *Stoher v. St. Louis, I.M. & So. Ry.*, *supra* note 132; *Gamache v. Johnston Tin Foil & Metal Co.*, 116 Mo. App. 596, 92 S.W. 918 (1906); *Goss v. Missouri Pac. Ry.*, 50 Mo. App. 614 (1892).

134. *McPherson v. St. Louis, I.M. & So. Ry.*, 97 Mo. 253, 10 S.W. 846 (1889); *Goss v. Missouri Pac. Ry.*, *supra* note 133.

135. *Goss v. Missouri Pac. Ry.*, *supra* note 133.

136. *Parsons v. Missouri Pac. Ry.*, 94 Mo. 286, 6 S.W. 464 (1888).

137. *Heath v. Salisbury Home Tel. Co.*, 27 S.W.2d 31 (1927).

expenses, minus the expenses of support and maintenance.<sup>138</sup> Under this formula it would be possible to find liability but no damages since the support expense might far exceed any loss of services or funeral expenses. In such case the jury would be limited to awarding nominal damages.<sup>139</sup>

The early rule in Missouri was that there could be no recovery for loss of society of the child.<sup>140</sup> The status of this rule was confused when the supreme court in *Sharp v. National Biscuit Co.*<sup>141</sup> stated in *dicta* that it would allow such recovery. This indication of a shift in policy caused a few cases to be appealed on the point. The courts of appeals refused to believe the supreme court would follow the *dicta*.<sup>142</sup> They labeled the statement inadvertent and not binding because the supreme court, in *Behen v. St. Louis Transit Co.*,<sup>143</sup> had re-affirmed its adherence to the rule limiting recovery to pecuniary injury. The *Behen* case, however, was not concerned with this particular problem. While it did support the pecuniary injury concept, it never considered loss of society.<sup>144</sup> The appellate courts prevailed

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138. *Oliver v. Morgan*, 73 S.W.2d 993 (Mo. 1934); *Harrison v. St. Louis-San Francisco Ry.*, 291 S.W. 525 (Mo. 1927); *Parsons v. Missouri Pac. Ry.*, 94 Mo. 286, 6 S.W. 464 (1888); *Calcaterra v. Iovaldi*, 123 Mo. App. 347, 100 S.W. 675 (1906); see *Rains v. St. Louis, I.M. & So. Ry.*, 71 Mo. 164 (1879) for a listing of items of damage. An allegation of general damages will allow evidence of such items as burial, hospital, medical and ambulance expenses. *Hildreth v. Key*, 341 S.W.2d 601 (Mo. Ct. App. 1960).

139. See *Oliver v. Morgan*, 73 S.W.2d 993 (Mo. 1934) (dictum). In considering whether or not the damages are excessive, an appellate court will look at the possibility of an increase in earning power. *McCrary v. Ogden*, 267 S.W.2d 670 (Mo. 1954).

140. *Leahy v. Davis*, 121 Mo. 227, 25 S.W. 941 (1894).

141. 179 Mo. 553, 78 S.W. 787 (1904).

142. *Howard v. Scarritt Estate Co.*, 161 Mo. App. 552, 144 S.W. 185 (1912); *Dando v. Home Tel. Co.*, 126 Mo. App. 242, 103 S.W. 103 (1907); *Calcaterra v. Iovaldi*, 123 Mo. App. 347, 100 S.W. 675 (1906); *Marshall v. Consolidated Jack Mines Co.*, 119 Mo. App. 270, 95 S.W. 972 (1906).

143. 186 Mo. 430, 85 S.W. 346 (1904).

144. It is not inconceivable that if the court had been faced with this particular issue in *Behen* it could have adhered to the pecuniary injury concept and still have allowed recovery for the loss of society. Those cases which allow the husband to recover for the loss of the society of the wife show that such recovery and pecuniary injury are not necessarily incompatible. See *Martin v. St. Louis-San Francisco Ry.*, 227 S.W. 129 (Mo. Ct. App. 1921); *Smith v. Simpson*, 221 Mo. App. 550, 288 S.W. 69 (1926). At least the court could define pecuniary injury so broadly as to encompass loss of society. See *Haines v. Pearson*, 107 Mo. App. 481, 81 S.W. 645 (1904). It is interesting to note that the decisions in *Haines* and *Sharp* were handed down the same year. This adds weight to the argument that the dictum in the *Sharp* case actually did represent a change in attitude. Unfortunately, the question did not reach the supreme court until 1934, thus leaving unanswered the question of where the 1904 court actually stood.

and the accepted rule today is that there can be no recovery for loss of the child's society.<sup>145</sup> There is, however, a way to circumvent it. Evidence of a child's devotion to his parents is admissible when coupled with evidence that he turned over earnings to them, because this bears on the possibility of future gifts.<sup>146</sup>

#### *D. Suit By Personal Representative*

As previously mentioned, a suit by the personal representative of the deceased must show that the beneficiary is competent to take under the descent laws. This means that the descent laws are controlling in determining who may share in the recovery and the amount each is to receive. The legislature, by allowing the personal representative to sue for the benefit of others, greatly extended the number of people who might qualify as beneficiaries. The courts, fearful of allowing persons to recover who had suffered no injury, added the requirement that pecuniary damage must be shown.<sup>147</sup> Definite and exact proof is not required, for whenever there is a reasonable probability of pecuniary benefit from the continued life of another, the untimely death raises a presumption of pecuniary loss.<sup>148</sup>

There is a partial exception to the rule requiring a showing of pecuniary loss. Where the suit is for the benefit of more than one relative, the courts have said that evidence of pecuniary loss may be admitted, even though it applies only to some of the beneficiaries and not to others.<sup>149</sup> This is the case when because of the descent laws all the beneficiaries would share equally in the judgment.

It is necessary to translate pecuniary loss into some ascertainable sum. The failure to do so could limit recovery to nominal damages.<sup>150</sup>

145. See *Oliver v. Morgan*, 73 S.W.2d 993 (Mo. 1934). However, note that the courts have sustained verdicts beyond what the normal measure of damages would allow. See Russell, *Measure of Damages Under Missouri Wrongful Death Act*, 15 Mo. L. REV. 31, 41 (1950). A permissible conclusion is that in reality the courts do allow recovery for loss of comfort and society.

[I]n such cases substantial verdicts have been sustained, where it is very evident that the jury have stepped in when the court would not, and in reality have compensated for the loss of sentimental aspects of the family relation. PROSSER, *TORTS* § 105, at 715 (2d ed. 1955).

146. *Szofran v. Century Elec. Co.*, 255 S.W.2d 443 (Mo. Ct. App. 1953).

147. *Wente v. Shaver*, 350 Mo. 1143, 169 S.W.2d 947 (1943). Failure to show such damage will limit recovery to nominal damages. *Bagley v. City of St. Louis*, 268 Mo. 259, 186 S.W. 966 (1916).

148. *Wente v. Shaver*, *supra* note 147.

149. *Hegberg v. St. Louis & S.F.R.R.*, 164 Mo. App. 514, 147 S.W. 192 (1912); see *Johnson v. Dixie Mining & Dev. Co.*, 171 Mo. App. 134, 156 S.W. 33 (1913). However, those relatives who have not suffered pecuniary loss may not be considered in the instructions. *Newell v. St. Louis Transfer Co.*, 205 Mo. App. 543, 226 S.W. 80 (1920).

150. *Morgan v. Oronogo Circle Mining Co.*, 160 Mo. App. 99, 141 S.W. 735

Debts owed by the deceased to the beneficiary, however, are not considered, for the recovery does not go into the estate of the deceased, and the defendant is not, by reason of his tort, bound to pay the debts of the deceased.<sup>151</sup> Pecuniary injury may be shown even though the deceased was not legally bound to support the beneficiary. The courts have said that dependency in fact, and not law, is the important thing.<sup>152</sup> The same reasoning is not used when, without consent of the deceased, the beneficiary voluntarily assumes an obligation the law would not have imposed; thus funeral and medical expenses are not to be considered if there was no legal obligation for the beneficiary to incur them.<sup>153</sup>

#### CONCLUSION

The statute, in its present form, does not totally abrogate the common law rule of no recovery for wrongful death. It neither provides for total compensation nor does it compensate all those pecuniarily injured. Furthermore, there are indications that it is not the intention of the legislature to abolish totally that rule. First, the statute has always contained a limit on the amount of recovery. This clearly indicates that the statute was not intended to indemnify but rather to partially shift the loss. Second, the statute has always retained the concept of a preferential right. The practical effect of this is that the person considered most deserving by the legislature receives compensation while all others receive nothing, and this has persisted even though the legislature has at times extended the provisions of the act to cover new persons. Whether the legislature fully realized the im-

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(1911). Here the plaintiff failed to show what the deceased could reasonably accumulate in his lifetime. The court held he was entitled, at least, to nominal damages. The indication is that the court would have allowed more but had no guide lines as to how much. The approach of the court in determining such accumulation is similar to the rule in those states that follow the "loss to the estate" formula; the court looks at the probable net earning of the deceased during his life expectancy, deducting his expenses. *Bagley v. City of St. Louis*, 268 Mo. 259, 186 S.W. 966 (1916). See text accompanying note 105 *supra*. Missouri courts have not ruled squarely on whether loss of inheritance is an element of damage. Loss of prospective earnings is closely related but it is not quite the same. The above cases are as far as the courts have gone on the subject. Such consideration should be limited to the personal representative's suit. See 25 C.J.S. *Death* § 110 (1941).

151. *McCullough v. W. H. Powell Lumber Co.*, 205 Mo. App. 15, 216 S.W. 803 (1919).

152. *Wente v. Shaver*, 350 Mo. 1143, 169 S.W.2d 947 (1943); *McCullough v. W. H. Powell Lumber Co.*, *supra* note 151.

153. *Miller v. Williams*, 76 S.W.2d 355 (Mo. 1934); *McCullough v. W. H. Powell Lumber Co.*, *supra* note 151. This rule probably also applies to a suit by a wife or child. See *McCORMICK, DAMAGES* § 102 (1935).

port of these factors is not possible to determine in the absence of a clear legislative pronouncement; and, whether the results are desirable is a political question beyond the scope of this note. Assuming that the policy behind the statute is that of partial compensation, it may be said that the statute has adequately fulfilled its purpose.