

NEW MEASURE OF RECOVERY FOR WRONGFUL DEATH OF MINOR

Wycko v. Gnodtke

361 Mich. 331, 105 N.W.2d. 118 (1960)

This action was brought under the Michigan Death Act¹ by the administrator of a 14 year old boy, who was killed by an automobile driven by defendant. The jury found the defendant negligent and made an award of \$14,000 plus \$979.50 for funeral and burial expenses. The trial court ordered a new trial unless remittitur of \$6,500 were filed.² The Michigan Supreme Court reversed,³ rejected the child-labor theory as the sole measure of pecuniary loss, and held that damages for a child's wrongful death should be based upon "the pecuniary value of the life"⁴ and that the judgment was not excessive. The court declared that in order to ascertain this value,

we must consider the expenses of birth, of food, of clothing, of medicines, of instruction, of nurture and shelter The value of mutual society and protection, in a word, companionship Finally if, in some unusual situation, there is in truth . . . a wage-profit capability in the infant . . . the loss of such expectation should not be disregarded⁵

At common law neither a decedent's representative nor the members of his family had a cause of action for the loss caused by his death through a wrongful act.⁶ This note concerns statutory remedies for wrongful death,⁷ patterned after the English Lord Campbell's Act,⁸ which have been enacted in every state.⁹ In interpreting "pecuniary loss," the majority of American jurisdictions hold that the basic measure of recovery for death is the loss by the beneficiaries of the support and contributions which decedent probably would have contributed to them during the remainder of his life expectancy.¹⁰ In others, however, the basic measure of recovery

¹ Mich. Comp. Laws § 691.581-583 (1948).

² The trial court based its order upon the rule that under the death act, the measure of the pecuniary loss suffered through the death of a minor is the estimated earnings and services of the child prior to his reaching majority minus the cost of his rearing. *Coutney v. Apple*, 345 Mich. 223, 76 N.W.2d 80 (1956); *Hurst v. Detroit City Ry.*, 84 Mich. 539, 48 N.W. 44 (1891).

³ Three justices of the eight justice court dissented in this opinion. Since the last decision on the question presented in the instant case, the court's membership has partially changed.

⁴ *Wycko v. Gnodtke*, 361 Mich. 331, 105 N.W.2d 118, at 122 (1960).

⁵ *Ibid.*

⁶ *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808).

⁷ Wrongful death actions are to be distinguished from survivorship actions which preserve the decedent's cause of action.

⁸ Lord Campbell's Act, 1846, 9 & 10 Vict., c. 93.

⁹ Prosser, *Torts* § 105 (2d ed. 1955).

¹⁰ *Harrison v. Sutter St. Ry.*, 116 Cal. 156, 47 Pac. 1019 (1897); *Rouse v. Detroit Elec. Ry.*, 128 Mich. 149, 87 N.W. 68 (1901); *Fisher v. Trester*, 119 Neb.

for wrongful death is the loss to the decedent's estate, and in these jurisdictions three formulae for recovery are found. A few courts have held that the recovery should be that amount which decedent probably would have earned had he remained alive minus his own living expenses.¹¹ Others declare the recovery to be the present worth of the amount decedent would have likely saved during the rest of his life expectancy.¹² Finally, Georgia and Kentucky declare the present worth of gross earnings which decedent would have earned, without deduction for any expenses whatever, to be the measure of recovery.¹³

Recovery under the death acts has been generally limited to loss of pecuniary benefits,¹⁴ that is, the measure of recovery is generally the value of support, services, and contributions which the beneficiary might have expected to receive had death not intervened. This principle has been applied in cases of wrongful death of minor children, and heretofore two measures of recovery have emerged from the opinions. The child-labor measure—recognized in Michigan prior to the instant case—allows recovery of the value of the probable earnings and services of the child prior to his reaching majority minus the cost of his rearing.¹⁵ However, other courts permit recovery of the present value of any services or contributions which the child might be expected to render after majority in addition to the net value of services during minority.¹⁶ The first rule is labelled arbitrary because exclusion of the value of aid after majority precludes consideration

529, 229 N.W. 901 (1930); *Greer v. Bd. of Comm'rs*, 33 Ohio App. 539, 169 N.E. 709 (1927); *Glasco v. Green*, 273 Pa. 353, 117 Atl. 79 (1922).

¹¹ *Louisville & N. Ry. v. Garnett*, 129 Miss. 795, 93 So. 241 (1922); *Pittman v. Merriman*, 80 N.H. 295, 117 Atl. 18 (1922); *Gurley v. Southern Power Co.*, 172 N.C. 690, 90 S.E. 943 (1916).

¹² *Arizona Binghamton Copper Co. v. Dickson*, 22 Ariz. 163, 195 Pac. 538 (1921); *Florida E. Coast R.R. v. Hayes*, 67 Fla. 101, 64 So. 504 (1914); *Haugh v. Illinois Cent. R.R.*, 169 Iowa 224, 149 N.W. 885 (1914).

¹³ *Michael v. Western & Atl. R.R.*, 175 Ga. 1, 165 S.E. 37 (1932); *Williams v. McCranie*, 27 Ga. App. 693, 109 S.E. 699 (1921); *Lexington Util. Co. v. Parker*, 166 Ky. 81, 178 S.W. 1173 (1915).

¹⁴ *Louisville & N. Ry. v. Stephens*, 298 Ky. 328, 182 S.W.2d 447 (1944); *Karr v. Sixt*, 146 Ohio St. 527, 67 N.E.2d 331 (1946); *Gaydos v. Domabyl*, 301 Pa. 523, 152 Atl. 549 (1930); *Tuffy v. Sioux City Transit Co.*, 69 S.D. 368, 10 N.W.2d 767 (1943).

¹⁵ McCormick, *Damages* § 101 (1935). This rule has also been accepted in Arkansas, District of Columbia, Indiana, Iowa, Maryland, Missouri, North Dakota, Pennsylvania, Rhode Island, and Washington.

¹⁶ McCormick, *Damages* § 101 (1935). This is said to be the rule in Arizona, California, Colorado, Idaho, Illinois, Kansas, Maine, Mississippi, Montana, Nebraska, New Jersey, New York, Texas, Utah, and Virginia. The leading case for this view is *Bond v. United R.R.*, 159 Cal. 270, 113 Pac. 366 (1911). The Ohio rule seems to follow this view. However, in *Immel v. Richards*, 154 Ohio St. 52, 93 N.E.2d 474 (1950), the court said there is no exact rule regarding the amount of damages, and the factors for consideration are age, sex, physical and mental condition of the child and the position in life, occupation, physical and economic conditions of the parents.

of the only pecuniary benefit which the parents could expect.¹⁷ Courts have generally held that parents are not permitted to recover for the loss of a minor child's companionship.¹⁸ However, such loss has been compensated for in a minority of jurisdictions,¹⁹ but with misgivings.²⁰

In modifying its prior position, the Michigan Supreme Court discussed the change in social conditions since the child-labor measure was first adopted. This concept of *value* is a remnant of an era when large numbers of children worked in mills and mines.²¹ Application of this rule is illustrated in *Courtney v. Apple*²² where the Michigan Supreme Court in 1956 held a verdict of \$700, the amount of funeral and burial expenses, sufficient to compensate the parents of a three-year-old boy killed by defendant's negligently driven automobile. The court explained that it was quite possible for the jury to find that the cost of raising the child would exceed his probable contributions. Justice Smith, who wrote the majority opinion in the instant case, dissented and pointed out that had the defendant killed a bull on the highway, the owner could recover its actual value. However, the parents of this child were not entitled to any damages whatever under the child-labor measure of recovery.

Certainly the child-labor standard is obsolete unless the *value* of a child is limited to its *actual money profit* to its "beneficiaries." The Michigan court has thus discarded a callous standard which is not in accord with present social values and one finds it difficult to disagree. The question remains as to whether the new elements of recovery are satisfactory.

The phrase "the pecuniary value of the life" is ambiguous, but the

¹⁷ McCormick, Damages § 101 (1935).

¹⁸ East St. Louis Elec. St. Ry. v. Burns, 77 Ill. App. 529 (1898); Louisville N.A. & C. Ry. v. Rush, 127 Ind. 545, 26 N.E. 1010 (1890); Costello v. Buffalo General Elec. Co., 183 App. Div. 48, 170 N.Y. Supp. 1006 (1918); Kennedy v. Byers, 107 Ohio St. 90, 140 N.E. 630 (1923); Kalsow v. Grob, 61 N.D. 119, 237 N.W. 848 (1931).

¹⁹ Bond v. United R.R., *supra* note 16; Roby v. Kansas City So. Ry., 130 La. 896, 58 So. 701 (1912); Gulf Ref. Co. v. Miller, 153 Miss. 741, 121 So. 482 (1929); Beaman v. Martha Washington Mining Co., 23 Utah 139, 63 Pac. 631 (1901).

²⁰ The California Supreme Court in the case of Bond v. United R.R., *supra* note 16, at 285, 113 Pac. 373, although allowing plaintiff to recover for loss of companionship, states the main objection to such recovery: "It is evident to us, however, from the cases that have come before us, that it often leads to extravagant verdicts in which the jury, in fact, allow a supposed compensation for sad emotions and injured feelings, instead of confining their verdict to the actual pecuniary loss."

²¹ Wycko v. Gnodtke, *supra* note 4. The court explained that the rule originated in an era when "Loss meant only money loss, and money loss from death of a child meant only his lost wages. All else was imaginary. The only reality was the King's shilling. That this barbarous concept of the pecuniary loss to a parent from the death of his child should control our decisions today is a reproach to justice. We are still turning, actually, for guidance in decision, to 'one of the darkest chapters in the history of childhood.' . . . In most areas the development of the law has paralleled the enlightened conscience of our people." 105 N.W.2d 121. See also Beall, "Wrongful Death and Survivorship," N.A.C.C.A.—6th Circuit Regional Meeting and Seminar Report § 3.3 (1958).

²² Courtney v. Apple, *supra* note 2.

court in the instant case explained the elements which are to make up this value. The court retained the child-labor test by specifying that if the child is in fact a wage-earner or there is a reasonable expectation that he would be such, the excess of his wages over the cost of his keep should be included in the damages. However, by compensating the parents for past expenditures for food, shelter, and clothing, and the value of companionship, the court has substantially enlarged the measure of recovery. By including the costs of rearing a child, the court has permitted a new element of recovery to compensate parents for their actual expenses in raising the child. These tangible costs of raising a child are ascertainable,²³ and their inclusion seems justified. The value of companionship, however, is not easily determinable and the inclusion of this element may well lead to excessive verdicts by juries influenced by parent's mental anguish.²⁴ Excessive verdicts, however, are not a new problem for the courts and this court must be commended for its modification of an archaic measure of damages.

²³ See Dublin & Lotka, *The Money Value of a Man* 44 (1946).

²⁴ The court emphasized that the recovery is not to include sorrow and anguish suffered by the parents because such recovery is forbidden by the death act. However, juries are likely to be affected by parental suffering when determining the value of companionship.

