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## ARTICLES

### DAMAGES FOR THE DEATH OF A MINOR CHILD UNDER THE TEXAS WRONGFUL DEATH ACT

PAUL F. FERGUSON\*

#### INTRODUCTION

Parents of a minor child may recover for the death of the child under the Texas Wrongful Death Statute. Texas courts, however, have construed the Death Statute as limiting recovery to pecuniary injury or loss. Herein follows an examination of the origin of the pecuniary loss requirement and a discussion of its effect on the damages recoverable for the death of a minor child.

#### ORIGIN OF THE PECUNIARY LOSS REQUIREMENT

In Texas, as in most jurisdictions, there was no common law action for wrongful death.<sup>1</sup> The legislature enacted the original Texas Wrongful Death Statute in 1860.<sup>2</sup> Section 2 of the Texas Act was patterned after Lord Campbell's Act,<sup>3</sup> which was the forerunner and prototype for many wrongful death statutes in the United States. Section 2 contains the same language as Lord Campbell's Act in providing for the measure of damages recoverable: "And in every such action the jury may give such damages as they think proportioned to the injury resulting from such death . . . ." At the outset, it should be noted that neither the Texas Act nor Lord Campbell's Act expressly limit damages recoverable to pecuniary damages or loss. This limitation is included in some states' wrongful death statutes.<sup>4</sup>

In 1877, however, in *March v. Walker*, the Texas Supreme Court interpreting the 1860 act said:

The language of the statute, "damages proportioned to the injury resulting from such death," is the same as in the English statute, and it is well settled, that the damages given by such

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<sup>1</sup> *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182, 186 (Tex. Sup. 1968).

<sup>2</sup> Tex. Laws 1860, ch. 35, § 1 *et seq.*, at 32, 4 H. GAMMEL, LAWS OF TEXAS 1394 (1898). 39 & 10 Vict. c. 93, § 2 (1846).

<sup>4</sup> *E.g.*, N.Y. ESTATES, POWERS AND TRUSTS LAW § 5-4.3 (McKinney 1967), "fair and just compensation for the *pecuniary injuries*." (Emphasis added.); OHIO REV. CODE ANN. § 2325.02 (Page 1971), "The jury may give such damages as it thinks proportioned to the *pecuniary injury* resulting from such death . . . ." (Emphasis added.)

statutes are measured by the *pecuniary injury* to the respective parties entitled, including the loss of prospective advantage. The measure of damages is not the same as when a party himself sues for injuries received, and recovers compensation for physical and mental suffering.<sup>5</sup>

The only case cited by the court is *Blake v. Midland Ry.*,<sup>6</sup> where the English court held that under Lord Campbell's Act damages are confined to pecuniary loss and no recovery can be had for mental anguish suffered by the survivors. The *Walker* case was a suit by minor children for the death of their father and the *Blake* case was an action brought by a widow for the death of her husband.

So began the emasculation by the courts of the Texas Death Act. As has been observed by Dean Leon Green, the English courts severely limited the effectiveness of Lord Campbell's Act because it trenched on the common law, and the Texas court and other American courts followed suit and restricted the operation of their Death Acts relying on English case law.<sup>7</sup> Certainly the Death Act is remedial legislation and, as such, should have been given a liberal interpretation to accomplish its purposes<sup>8</sup> rather than the narrow construction that it was given in *Walker* and in later cases. As was argued by counsel in *Blake v. Midland Ry.*, "[T]he statute itself does not use any language confining the remedy to pecuniary injury. Had that been intended, no more was necessary than to insert the word 'pecuniary' before 'injury' in Section 2."<sup>9</sup>

The Death Act was modified in the Revised Statutes of 1879, and the first sentence of article 2899, which was added, reads: "An action for *actual damages* on account of injuries causing the death of any person may be brought in the following cases. . . ." (Emphasis added.) Article 2901 was also added and reads: "When the death is caused by the willful act or omission or gross negligence of the defendant, exemplary *as well as actual damages* may be recovered." (Emphasis added.) Article 2909 is similar to the original 1860 statute in providing: "The jury may give such damages as they may think proportioned to the injury from such death. . . ." Again the legislature did not limit recovery to pecuniary loss. On the contrary, the legislature is assumed to have been aware of the judicial interpretation given the 1860 Act, and in adding the pro-

<sup>5</sup> 48 Tex. 372, 375 (1877) (emphasis added).

<sup>6</sup> 118 Eng. Rep. 35 (Q.B. 1852).

<sup>7</sup> Green, *The Texas Death Act*, 26 TEXAS L. REV. 133, 135 (1947).

<sup>8</sup> *Farmers' & Mechanics' Nat'l Bank v. Hanks*, 104 Tex. 320, 137 S.W. 1120 (1911).

<sup>9</sup> 118 Eng. Rep. 35, 39 (Q.B. 1852).

vision for recovery of actual damages in the Revised Statutes with no qualifying language they could be found to have intended to abolish the pecuniary damage requirement of the *Walker* case.<sup>10</sup>

The early cases followed the *Walker* case and limited recovery to pecuniary loss when interpreting the Death Statute as it was included in the Revised Statutes. In *Houston & T.C. Ry. v. Cowser*,<sup>11</sup> a mother and father brought suit for the death of their adult child. The court held that damages for the death of a child under the Texas Act were not confined to the minority of the deceased but could extend beyond minority in appropriate cases. However, the court held that the verdict of \$9,000 was excessive and not supported by the evidence. The court stressed that damages must be limited to pecuniary loss and the burden was on the plaintiff to produce evidence of such loss, so that the jury would be able to return a verdict based on more than mere speculation. The court said:

Under the ruling of the court in this case the plaintiffs were confined to the *actual* damages sustained. (Emphasis added.)

The measure of actual damages in such cases, as said in *March v. Walker*, 48 Tex. 375, is the pecuniary injury sustained, and is not the same as when the party who is himself injured sues and recovers compensation for physical and mental suffering. It has been almost universally held that the principle under which such damages are to be assessed, under similar statutes, is that of pecuniary injury and not as a *solatium*.<sup>12</sup>

In so holding the court followed the *Walker* case in limiting recovery to pecuniary injury and interpreted the phrase "actual damages" as used in the Revised Statutes as synonymous with "pecuniary injury."

In *Houston City St. Ry. v. Sciacca*,<sup>13</sup> a suit by parents for the death of an 18 month old child, the court approved jury instructions which provided in part, "No mental grief or agony can be computed in a case of this sort, but only actual compensatory, pecuniary damages, if any, can be recovered . . ."<sup>14</sup> In *City of Galveston v. Barbour*<sup>15</sup> the court held it error not to instruct the jury that in an action by parents for the death of their son no damages could be given for the distress, sorrow, or mental suffering of the parents.

<sup>10</sup> See, e.g., *Gateley v. Humphrey*, 151 Tex. 588, 254 S.W.2d 98 (1952).

<sup>11</sup> 57 Tex. 293 (1881).

<sup>12</sup> *Id.* at 303.

<sup>13</sup> 80 Tex. 350, 16 S.W. 31 (1891).

<sup>14</sup> *Id.* at 355, 16 S.W. at 33.

<sup>15</sup> 62 Tex. 172 (1884).

In *Galveston, H. & S.A. Ry. v. Worthy*<sup>16</sup> the court again equated the terms "actual damage" and "pecuniary injury" and held that recovery under the Death Statute must be confined to actual damages; "actual damages" as used in the statute meaning compensation for the pecuniary injury sustained. In *McGown v. International & Great N. Ry.*<sup>17</sup> the court also interpreted the actual damage provisions of the statute as precluding recovery for grief or loss of society as did the court in *International & Great N. Ry. v. McVey*.<sup>18</sup> Starting with this line of cases, the Texas courts have repeatedly held that beneficiaries under the Death Statute may not recover for grief, loss of society or companionship, or mental pain and anguish. Furthermore, the jury should be instructed to exclude these elements from their consideration.<sup>19</sup>

The early cases, including those discussed above, interpret the "actual damage" provision of article 2899 as limiting damages to those of a "pecuniary" nature. Most of the cases cite the *Walker* case as authority, but, as noted above, that case was decided under the original 1860 statute which contained no reference to "actual damage." The *Walker* case merely read into the original act the pecuniary loss requirement.

The courts' construction of the actual damage provision of article 2899 of the Texas Revised Statutes as providing for pecuniary injury only and their conclusion that pecuniary injury does not include loss of companionship, mental anguish, and grief was an unwarranted and restrictive interpretation of the Death Statute. This is especially true in view of Revised Statutes, Final Title Section 3 which provides for a liberal construction of statutes, including those which are in derogation of the common law "to effect their objects and promote justice."<sup>20</sup>

In divining the intent of the legislature when it drafted Title LII (Injuries Resulting in Death—Actions for) of the Texas Revised Statutes, it would seem that the term "actual damages" was used to distinguish the exemplary damages recoverable under article 2901.<sup>21</sup> In providing for recovery of actual damages the legislature did not restrict in any way the type of actual damages recoverable. By definition, "general actual damages" are those damages "as naturally result from the act complained of. . . ."<sup>22</sup> and include losses of a non-pecuniary as

<sup>16</sup> 87 Tex. 459, 29 S.W. 376 (1895).

<sup>17</sup> 85 Tex. 289, 20 S.W. 80 (1892).

<sup>18</sup> 99 Tex. 28, 87 S.W. 328 (1905).

<sup>19</sup> See, e.g., *Robinson Sons v. Ellis*, 412 S.W.2d 728, 741 (Tex. Civ. App.—Amarillo 1967, writ ref'd n.r.e.).

<sup>20</sup> *Farmers' & Mechanics' Nat'l Bank v. Hanks*, 104 Tex. 320, 325, 137 S.W. 1120, 1123 (1911).

<sup>21</sup> See *Anderson v. Alcus*, 42 S.W.2d 294, 296 (Tex. Civ. App.—Beaumont 1931, no writ).

<sup>22</sup> *Relle v. Western Union Tel. Co.*, 55 Tex. 308, 311 (1881).

well as pecuniary nature. In *Galveston, H. & S.A. Ry. v. Le Gierse*,<sup>23</sup> the supreme court, referring to the Death Statute, said: "[T]he act was intended, according to the well-settled construction of similar statutes, to give *compensatory* damages only; but the Constitution went a step beyond and gave also exemplary damages."<sup>24</sup> In non-death cases, injury to the feelings,<sup>25</sup> mental suffering<sup>26</sup> and mental anguish<sup>27</sup> have long been held to be elements of actual or compensatory damages. Is there a valid distinction between such damages in death actions and non-death cases? In both instances the plaintiffs have suffered actual damage which is the only requirement in the Death Statute.

The difficulty involved in putting a dollar and cents figure on "non-pecuniary" damages in death actions is no greater than doing the same thing in non-death cases. Judge Coleridge in the *Blake* case denied recovery for mental suffering under Lord Campbell's Act because he was concerned about the great difficulty involved in valuing such damages in money and noted the problems encountered in apportioning the recovery among the beneficiaries. These problems, however, were not insolvable and their mere existence was not a valid reason for the denial of a very real element of damages.

Under the Texas Death Act, on the other hand, recovery can be had for the reasonable value of the nurture, care, training, and education rendered by a deceased parent.<sup>28</sup> The court asserts that a money value can be placed on these items, hence the deprivation thereof is considered a pecuniary loss.<sup>29</sup> This is so, even though the courts have recognized that it is difficult to estimate in money the value rendered by a parent to his child's training and education.<sup>30</sup> Is it really any more difficult to estimate in money the value of loss of companionship? In *Houston & T.C. Ry. v. Davenport*,<sup>31</sup> the court was more realistic and held that recovery may be had for loss of advice and counsel of the deceased and said:

It is also true that under proper allegations and proof the appellees would have been entitled to recover for the loss of advice and

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<sup>23</sup> 51 Tex. 189 (1879).

<sup>24</sup> *Id.* at 203 (emphasis added).

<sup>25</sup> *See, e.g.*, *Relle v. Western Union Tel. Co.*, 55 Tex. 308 (1881).

<sup>26</sup> *See, e.g.*, *Hays v. Houston & Great N. Ry.*, 46 Tex. 272 (1876).

<sup>27</sup> *See, e.g.*, *Stewart v. Western Union Tel. Co.*, 66 Tex. 580, 18 S.W. 351 (1886).

<sup>28</sup> *Continental Bus Sys. v. Biggers*, 322 S.W.2d 1 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.).

<sup>29</sup> *Id.* at 12.

<sup>30</sup> *See, e.g.*, *Texas & P. Ry. v. Riley*, 183 S.W.2d 991 (Tex. Civ. App.—Texarkana 1944, writ ref'd), *cert. denied*, 325 U.S. 873, 65 S. Ct. 414, 89 L. Ed. 1991 (1945).

<sup>31</sup> 110 S.W. 150 (Tex. Civ. App. — 1908), *aff'd*, 102 Tex. 369, 117 S.W. 790 (1909).

counsel of the deceased; but we do not understand that this would have been a pecuniary loss in the sense contemplated by the article of our statute, which restricts the right of recovery in such cases, according to the settled construction of said article, to the pecuniary injury sustained. It is true, the jury, in arriving at a just compensation for such loss and in fixing the amount thereof, would have to measure it in money; but the only "pecuniary loss" within the strict meaning of that term, and as would be ordinarily understood by the jury, is the loss of maintenance and support.<sup>32</sup>

Rather than speciously contending that certain losses (nurture) can be given a money value and are therefore pecuniary, and other similar losses (companionship) cannot and are therefore nonpecuniary, the court held that the loss of advice and counsel is recoverable as damages even though they are nonpecuniary in nature. The supreme court, in affirming the court of civil appeals, pointed out that although counsel and advice are compensated for pecuniarily, it is not a loss that the jury would understand to be of a pecuniary nature.<sup>33</sup>

Nevertheless, the Texas courts, through a narrow interpretation of the Texas Death Statute, have read into the statute the requirement that the "actual damages" recoverable thereunder must be of a pecuniary nature. They then even further constrict the application of the Act and define "pecuniary damages" as not including grief, mental suffering, or loss of companionship. Although its origin is based on questionable logic and a dubious interpretation of the 1860 Death Statute made in the *Walker* case almost a hundred years ago, the rule of no recovery for nonpecuniary damages has been reiterated in many cases and is firmly entrenched in Texas law.

#### DAMAGES RECOVERABLE FOR THE DEATH OF A MINOR CHILD

Like other beneficiaries under the Death Statute, a parent seeking to recover damages for the loss of a child must show pecuniary loss.<sup>34</sup> The pecuniary loss suffered by the parent is the present value of the probable contributions by the child to the parent whether in money or in services.<sup>35</sup> A parent may not recover for loss of the companionship or comfort of his child or for the mental anguish suffered because of the

<sup>32</sup> *Id.* at 154.

<sup>33</sup> *Houston & T.C. Ry. v. Davenport*, 102 Tex. 369, 117 S.W. 790 (1909).

<sup>34</sup> *Houston & T.C. Ry. v. Cowser*, 57 Tex. 293 (1882); *International & Great N. Ry. v. Kindred*, 57 Tex. 491 (1882).

<sup>35</sup> *E.g.*, *Brunswick v. White*, 70 Tex. 504, 8 S.W. 85 (1888); *Gulf, C. & S.F. Ry. v. Ballew*, 66 S.W.2d 659 (Tex. Comm'n App. 1933, holding approved).

child's death.<sup>36</sup> "The law does not allow compensation for the real damages suffered by these good parents—their grief, sorrow and loss of companionship."<sup>37</sup> There is no recovery for nominal damages<sup>38</sup> or exemplary damages<sup>39</sup> in an action for wrongful death of a child.

The difficulty incurred in putting a dollar and cents value on the pecuniary loss suffered by the parents through the death of a child is apparent. As was said by the court in a case where a 16 month old child was killed:

The evidence in this type of case from the very nature of things cannot furnish the measure of damages with that certainty and accuracy with which it may be done in other cases and, therefore, the question of damages must be left largely to the discretion of the jury.<sup>40</sup>

In an early case, the court recognized the difficulty of arriving at a definite figure for the death of a six-year-old child where the testimony was that she was a bright, intelligent girl in good health who assisted her mother in household chores.<sup>41</sup> The court held that based on such testimony the jury in its discretion could determine the value of the pecuniary loss sustained by the parents. However, because of the indefinite nature of the damages in such cases and the difficulty in computing the loss, the courts are clothed with the power and duty to review the jury's award.<sup>42</sup>

Although the jury is given broad discretion in computing the parents' pecuniary loss, in Texas there is no presumption of pecuniary loss and the plaintiff must prove that he had a reasonable expectation of receiving services and contributions from the deceased child.<sup>43</sup> It is not necessary to prove, however, that the child had actually made contributions of money to the parents; it is sufficient if the evidence shows that the child was dependable, affectionate, industrious and energetic.<sup>44</sup> If such

<sup>36</sup> Taylor, B. & H. Ry. v. Warner, 84 Tex. 122, 19 S.W. 449 (1892); City of Galveston v. Barbour, 62 Tex. 172 (1884); Jasper County Lumber Co. v. McMillan, 188 S.W.2d 731 (Tex. Civ. App.—Beaumont 1945, writ ref'd).

<sup>37</sup> Hernandez v. United States, 313 F. Supp. 349, 364 (N.D. Tex. 1969).

<sup>38</sup> McGown v. International & Great N. Ry., 85 Tex. 289, 20 S.W. 80 (1892); Rishworth v. Moss, 191 S.W. 843, 852 (Tex. Civ. App.—San Antonio 1917), *aff'd*, 222 S.W. 225 (Tex. Comm'n App. 1920, holding approved).

<sup>39</sup> Smith v. Farrington, 8 S.W.2d 317 (Tex. Civ. App.—Amarillo 1928, no writ).

<sup>40</sup> Riojas v. Riojas, 289 S.W.2d 802, 805 (Tex. Civ. App.—Fort Worth 1956, no writ).

<sup>41</sup> Brunswig v. White, 70 Tex. 504, 8 S.W. 85 (1888).

<sup>42</sup> Banker v. McLaughlin, 200 S.W.2d 699, 702 (Tex. Civ. App.—Beaumont 1947), *aff'd*, 146 Tex. 434, 208 S.W.2d 843 (1948).

<sup>43</sup> Houston & T.C. Ry. v. Cowser, 57 Tex. 293, 304 (1882); Cantu v. Southern P. Ry., 166 S.W.2d 963, 964 (Tex. Civ. App.—Amarillo 1942, writ ref'd).

<sup>44</sup> Gulf, C. & S.F. Ry. v. Ballew, 66 S.W.2d 659 (Tex. Comm'n App. 1933, holding approved).



evidence is produced, it is for the jury, exercising its judgment and common sense, to arrive at a value for pecuniary loss and it is not a matter calling for opinion testimony.<sup>45</sup>

In arriving at a net figure for pecuniary loss, the jury must deduct from the probable loss of services and contributions the reasonable expenses of maintaining and educating the child through minority.<sup>46</sup> The jury can, without the aid of experts, estimate the cost of support and maintenance just as it may estimate the value of services and contributions.<sup>47</sup>

In most instances today, if a family loses a minor child and the "net loss" formula, *i.e.*, value of services and contributions over maintenance and education, is applied, there is a resulting economic gain to the parents. In few cases is there a reasonable probability that the child's services or contributions would exceed in money value the cost of supporting and educating the child. This result might have obtained in the last century when the pecuniary loss rule was first adopted by the courts. At that time, society was largely rural. A child's labor on a farm was an economic asset and there were no child labor laws.<sup>48</sup> Today, a child's earnings at most pay for part of his own education or support and usually do not aid in the maintenance of the home. His services, although sometimes helpful, have little monetary value. As was pointed out by a United States court of appeals in a wrongful death action under the Federal Tort Claims Act, if the "net loss" theory is applied and the cost of rearing a child is deducted from an award, "the effect of such a deduction, however, would almost always result in a minus figure where the deceased child was of tender years."<sup>49</sup> The court observed that in such cases if the "net loss" theory is applied the incalculable loss of a child becomes a "pecuniary gain."

Courts in other jurisdictions have discarded the formula of value of services over cost of support as a measure of damages for the death of a minor child and allow recovery for loss of comfort and companionship.<sup>50</sup> As the Washington Supreme Court said:

We must now conclude that to award more than nominal dam-

<sup>45</sup> *Brunswick v. White*, 70 Tex. 504, 8 S.W. 85 (1888).

<sup>46</sup> *Houston City St. Ry. v. Sciacca*, 80 Tex. 350, 16 S.W. 31 (1891); *Galveston, H. & N. Ry. v. Olds*, 112 S.W. 787 (Tex. Civ. App. 1908, no writ).

<sup>47</sup> *Rishworth v. Moss*, 191 S.W. 843, 851 (Tex. Civ. App.—San Antonio 1917), *aff'd*, 222 S.W. 225 (Tex. Comm'n App. 1920, holding approved).

<sup>48</sup> See *Fussner v. Andert*, 113 N.W.2d 355 (Minn. 1962).

<sup>49</sup> *Hoyt v. United States*, 286 F.2d 356, 361 (5th Cir. 1961).

<sup>50</sup> *Wardlow v. City of Keokuk*, 190 N.W.2d 439 (Iowa 1971); *Fussner v. Andert*, 113 N.W.2d 355 (Minn. 1962); *Lockhart v. Besel*, 426 P.2d 605 (Wash. 1967).

ages in every case where we limit damages to the loss of a minor child's earnings above the cost of his support and maintenance, is an affront to reason and logic.<sup>51</sup>

It has been estimated that the cost of raising a child for the first 18 years of life ranges from \$19,360 for a rural non-farm child in the North Central Region to \$25,000 for a rural non-farm child in the West.<sup>52</sup> The average cost per year is well over \$1,000, and as the child grows older the cost increases. So when a verdict is returned for \$17,500 for the death of a six and one-half-year-old child, as in *Lampasas v. Roberts*,<sup>53</sup> the jury is saying in effect that the child would have rendered services and contributions of a money value of \$17,500 over and above the cost of his maintenance and support of approximately \$15,000. This is hardly realistic. In most instances, the cost of raising the child will far exceed the money value of his services and contributions.

Nevertheless, supposedly following the instructions of the court and limiting damages to pecuniary loss, *i.e.*, value of probable contributions and services less cost of maintenance and support, juries have returned substantial verdicts which were upheld on appeal. A \$28,000 verdict was upheld for the death of a 14-year-old child;<sup>54</sup> \$25,000 for the death of a 15-year-old child;<sup>55</sup> \$15,000 for the death of a 9-year-old child;<sup>56</sup> \$15,000 for the death of a one-year-old child,<sup>57</sup> and the court reduced a \$20,000 verdict for the death of an 18-year-old child to \$17,500.<sup>58</sup> The question arises whether juries in arriving at such verdicts actually compute the pecuniary loss as instructed by the court, or do they assuage the parents' grief and sorrow under the guise of pecuniary loss? When we examine economic realities, the latter would seem probable. Appellate courts in upholding ample awards for the death of a child ostensibly follow the net pecuniary loss rule. It would seem, however, what they actually do is ignore the pecuniary loss rule with its inevitable harsh result and permit parents to be compensated for the very real and tragic loss of the comfort, love, and companionship of a child. As Dean Prosser describes the situation, juries take the bull by the horns and compensate for the "prohibited sentimental aspects of the family rela-

<sup>51</sup> *Lockhart v. Besel*, 426 P.2d 605, 609 (Wash. 1967).

<sup>52</sup> Pennock, *Cost of Raising a Child*, FAM. ECO. REV. 13, 14 (March 1970).

<sup>53</sup> 398 S.W.2d 612 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.).

<sup>54</sup> *City of Austin v. Selter*, 415 S.W.2d 489 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.).

<sup>55</sup> *Missouri K.-T. Ry. v. Hamilton*, 314 S.W.2d 114 (Tex. Civ. App.—Dallas 1958, writ ref'd n.r.e.).

<sup>56</sup> *McKinney v. Fromly*, 386 S.W.2d 564 (Tex. Civ. App.—Tyler 1964, writ ref'd n.r.e.).

<sup>57</sup> *Sharpe v. Munoz*, 256 S.W.2d (Tex. Civ. App.—San Antonio 1953, writ ref'd n.r.e.).

<sup>58</sup> *Collins v. Gladden*, 466 S.W.2d 629 (Tex. Civ. App.—Beaumont 1971, writ ref'd n.r.e.).

tion, with the court benevolently winking at a flagrant violation of the rule it has laid down."<sup>59</sup>

The solicitude which the appellate courts show for a surviving parent is illustrated in the recent case of *Smith v. Red Arrow Freight Lines*.<sup>60</sup> The jury found that a mother suffered no pecuniary loss for the death of her 16-year-old son. The evidence showed that the son had earned money in a grocery store and paper route, paid for his "things in school," gave his mother \$3 a week and groceries, and "had made his own way in connection with money." The jury had been instructed that they should consider the reasonable value of the child's services "*less the reasonable and probable cost or expense of his care, support, and maintenance during such time.*"<sup>61</sup> Apparently following the instructions of the trial judge, the jury found that the cost of maintenance and support exceeded the value of the services and contributions even though there was considerably more evidence of such services and contributions than is present in most cases. The court did not discuss the cost of maintenance and support and held that in view of the uncontradicted evidence as to the services and contributions of the son, the jury's verdict of no pecuniary loss was "so contrary to the overwhelming weight and preponderance of the evidence as to be manifestly unfair and unjust."<sup>62</sup> The court seems to be saying that as a matter of law the value of the child's services and contributions exceeded the cost of supporting and maintaining the child. As has been stated, however, juries should be allowed broad discretion in arriving at pecuniary loss and in determining both the value of services and contributions and the cost of maintenance and support. It has been held that in arriving at an estimate the jury may find that the cost of support and maintenance exceed the value of services and they may return a verdict of no damages.<sup>63</sup>

Committed to the pecuniary loss measure of damages, how will the Texas courts treat a case where a retarded or crippled child is killed? In such a case it is difficult to imagine how a court could justify a verdict for more than medical and funeral expenses. It would be indulging in fantasy to maintain that the death of a helpless child results in a

<sup>59</sup> W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 127, at 909 (4th ed. 1971).

<sup>60</sup> 460 S.W.2d 257 (Tex. Civ. App.—San Antonio 1970, writ ref'd n.r.e.).

<sup>61</sup> Petitioner's Application for Writ of Error at 7, *Smith v. Red Arrow Freight Lines* (No. B-2435) (emphasis added).

<sup>62</sup> *Smith v. Red Arrow Freight Lines*, 460 S.W.2d 257, 261 (Tex. Civ. App.—San Antonio 1970, writ ref'd n.r.e.).

<sup>63</sup> *Rishworth v. Moss*, 191 S.W. 843, 852 (Tex. Civ. App.—San Antonio 1917), *aff'd*, 222 S.W. 225 (Tex. Comm'n App. 1920, holding approved).

pecuniary loss to the parents. The result is, therefore, that under the present pecuniary loss rule the parents of a physically or mentally disabled child can recover at most only funeral and medical expenses for the child's death regardless of the degree of culpability of the defendant. The North Carolina Supreme Court so held in *Scriven v. McDonald*<sup>64</sup> in which the court construed the state's Wrongful Death Statute which expressly limited recovery to "fair and just compensation for the *pecuniary* injury resulting from such death."<sup>65</sup> The jury had returned a verdict of \$5,750 for the death of an 11-year-old mentally retarded boy. The supreme court reversed and held that the action should have been nonsuited because the evidence showed no pecuniary loss. The court observed that the death statute leaves no room for sentiment and confers a right only for pecuniary loss. The court added, "[B]e that as it may, it seems appropriate to say that the mental picture gained from a reading of the record is one of tenderness and a consideration for a beloved but seriously retarded and handicapped boy."<sup>66</sup>

A doleful result indeed! However, although of slight consolation to the parents involved in the case, the opinion undoubtedly contributed to the enactment of humane legislation. In 1969, the North Carolina legislature changed its death statute, and it now provides that damages are recoverable for the loss of "society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered."<sup>67</sup> Texas case law leads to the inevitable, albeit unhappy, conclusion that when a child who is loved and cherished by his family is killed by a wrongdoer and the child's earning capacity and ability to perform services is nonexistent, the parents will be held to have suffered no damage and the wrongdoer will go free. Such a result calls for a reexamination of our case law and points up the effect of the courts' failure to give the Texas Death Statute the liberal interpretation for which the legislation calls.

#### CONCLUSION

In view of the mass of case law construing the Death Statute as requiring pecuniary loss, it would be less than realistic to anticipate an overruling of this line of authorities.<sup>68</sup> As a solution, the Texas Death Statute should be amended so as to provide specifically for recovery of

<sup>64</sup> *Scriven v. McDonald*, 142 S.E.2d 585 (N.C. 1965).

<sup>65</sup> *Id.* at 587 (emphasis added).

<sup>66</sup> *Id.* at 588.

<sup>67</sup> N.C. GEN. STATS., § 28-174(a)(4)c (Supp. 1971).

<sup>68</sup> *See, e.g., Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182 (Tex. Sup. 1968).

damages for the mental anguish and suffering of the beneficiaries as well as for recovery for the loss of the society, comfort, and companionship of the deceased.<sup>69</sup> If there is concern about juries being overly generous in awarding damages for such losses, a maximum recovery could be provided. If such an amendment is enacted, the courts and juries will no longer have to indulge in the fiction of pecuniary loss in awarding damages for the death of a minor child, and the bereaved parents will be compensated for the real loss they have suffered.

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<sup>69</sup> Decof, *Damages in Action for Wrongful Death of Children*, 47 NOTRE DAME LAW. 197, 228 (1971).