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Vicky Hallick Robbins

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CASENOTES

TORTS—Wrongful Death—Parents Allowed To Recover Damages for Loss of Companionship and Society As Well As Damages for Mental Anguish for Death of Minor Child Under Texas Wrongful Death Act.

Sanchez v. Schindler,
651 S.W.2d 249 (Tex. 1983).

Johnny Sanchez, age fourteen, died as a result of injuries received in an automobile accident in 1979.¹ Mr. and Mrs. Sanchez sought damages sustained by them under the Texas Wrongful Death Act.² The jury found that the Sanchezes suffered no pecuniary loss resulting from the death of their son but still awarded Mrs. Sanchez \$102,500 damages for mental anguish.³ Disregarding the jury determination, the trial court denied recovery for mental anguish and the Corpus Christi Court of Appeals affirmed.⁴ On appeal to the Texas Supreme Court the appellant, Mrs. Sanchez, sought the jury award for mental anguish damages.⁵ Held—*Reversed*. Parents are allowed to recover damages for loss of companionship and society, as well as damages for mental anguish, for the death of a minor child under the Texas Wrongful Death Act.⁶

Lord Campbell's Act was passed into law in England in 1846 to provide

1. See *Sanchez v. Schindler*, 651 S.W.2d 249, 250 (Tex. 1983).

2. See *id.* at 353; see also TEX. REV. CIV. STAT. ANN. arts. 4671-4678 (Vernon 1952 & Supp. 1982-1983). The Sanchezes also sued as heirs of Johnny Sanchez under the express provisions of Texas' survival statute. See *Sanchez v. Schindler*, 651 S.W.2d 249, 250 (Tex. 1983); see also TEX. REV. CIV. STAT. ANN. art. 5525 (Vernon 1958).

3. See *Sanchez v. Schindler*, 651 S.W.2d 249, 250 (Tex. 1983). Additionally, the jury award to the estate included: (1) \$50,000 for the pain and suffering of the decedent from the time of the accident until his death, (2) \$7,187.41 for his medical care, (3) \$4000 in funeral and burial expenses, and (4) \$450 for damage to his motorcycle. See *id.* at 250.

4. See *Sanchez v. Schindler*, 626 S.W.2d 871, 875 (Tex. App.—Corpus Christi 1981), *rev'd*, 651 S.W.2d 249, 254 (Tex. 1983).

5. See *Sanchez v. Schindler*, 651 S.W.2d 249, 250 (Tex. 1983).

6. See *id.* at 254.

a cause of action for designated beneficiaries of a person killed by wrongful act, neglect, or default.⁷ The language of the Act itself did not limit the scope of damages that a jury could award.⁸ Shortly after its enactment the language was judicially interpreted to restrict recovery to pecuniary loss, that is, loss of financial contributions and not damages for mental suffering.⁹ Following the lead of New York in 1847,¹⁰ all states have since enacted wrongful death statutes,¹¹ most of which were initially patterned

7. See Lord Campbell's Act (Fatal Accidents Act), 1846, 9 & 10 Vict., ch. 93, *reprinted in* 2 S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* 643-44 (2d ed. 1975). Prior to the enactment of Lord Campbell's Act, the common law rule, as expressed by Lord Ellenborough, was that there could be no recovery for wrongful death. See *Baker v. Bolton*, 170 Eng. Rep. 1033, 1033 (K.B. 1808). The general purpose of the Act was to provide a right of action whereby the family of the decedent could be compensated for their loss by the person responsible for it. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 901-02 (4th ed. 1971) (Lord Campbell's Act enacted to avoid harshness of common law rule denying wrongful death recovery). For a discussion of the origin of the cause of action for wrongful death, see generally Strong & Jacobsen, *Such Damages as Are Just: A Proposal for More Realistic Compensation in Wrongful Death Cases*, 43 MONT. L. REV. 55, 57 (1982).

8. See Lord Campbell's Act (Fatal Accidents Act), 1846, 9 & 10 Vict., ch. 93, *reprinted in* 2 S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* 643-44 (2d ed. 1975). Lord Campbell's Act provides in pertinent part:

§ 1 [W]hensoever the Death of a Person shall be caused by wrongful Act, Neglect, or Default, and the Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover Damages in respect thereof, then and in every such Case, the Person who would have been liable if Death had not ensued shall be liable to an action for Damages, notwithstanding the Death of the Person injured, . . . § 2 [E]very such Action shall be for the Benefit of the Wife, Husband, Parent, and Child of the Person whose Death shall have been so caused, and shall be brought by and in the name of the Executor or Administrator of the Person deceased; and in every such Action the Jury may give such Damages as they may think proportioned to the Injury resulting from such Death to the Parties respectively for whom and for whose Benefit such Action shall be brought; and the Amount so recovered, after deducting the Costs not recovered from the Defendant, shall be divided amongst the beforementioned Parties in such Shares as the Jury by their Verdict shall find and direct.

Id., *reprinted in* 2 S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* 643 (2d ed. 1975).

9. See *Blake v. The Midland Ry. Co.*, 118 Eng. Rep. 35, 41 (Q.B. 1852). The court in *Blake* held that:

The measure of damage is not the loss or suffering of the deceased, but the injury resulting from his death to his family. This language seems more appropriate to a loss of which some estimate may be made than to an indefinite sum, independent of all pecuniary estimate, to sooth the feelings . . . It seems to us that, if the legislature had intended to go the extreme length of giving, not only compensation for pecuniary loss, but a solatium to all relations enumerated . . . language more clear and appropriate for this purpose would have been employed.

Id. at 41.

10. 1847 N.Y. Laws ch. 450.

11. See ALA. CODE §§ 6-5-391, 6-5-410 (1975); ALASKA STAT. § 9.55.580 (1962); ARIZ. REV. STAT. ANN. §§ 12-611 to -613 (1982); ARK. STAT. ANN. §§ 27-906 to -909 (1979); CAL.

after Lord Campbell's Act.¹² Today, however, the majority of states permit additional recovery of one or more "relational" damages, such as loss of society, comfort, protection, counsel, companionship, or affection.¹³

CIV. PROC. CODE § 377 (Deering Supp. 1983); COLO. REV. STAT. §§ 13-21-201 to -204 (1973); CONN. GEN. STAT. ANN. § 52-555 (West Supp. 1983-1984); DEL. CODE ANN. tit. 10, §§ 3721-3725 (Supp. 1982); FLA. STAT. ANN. §§ 768.16-.27 (West Supp. 1983); GA. CODE ANN. §§ 105-1301 to -1310 (1968 & Supp. 1980); HAWAII REV. STAT. §§ 663-3 to -8 (1976); IDAHO CODE § 5-311 (1979); ILL. ANN. STAT. ch. 70, §§ 1-2 (Smith-Hurd 1959 & Supp. 1983-1984); IND. CODE ANN. § 34-1-1-2 (West Supp. 1982); IOWA CODE ANN. § 633.336 (West Supp. 1983-1984); KAN. STAT. ANN. §§ 60-1901 to -1905 (1976); KY. REV. STAT. §§ 411.130-.145 (1972 & Supp. 1980); LA. CIV. CODE ANN. art. 2315 (West Supp. 1983); ME. REV. STAT. ANN. tit. 18-A, § 2-804 (1964 & Supp. 1982-1983); MD. CTS. & JUD. PROC. CODE ANN. §§ 3-901 to -904 (1980); MASS. ANN. LAWS ch. 229 (Michie/Law. Co-op. 1974 & Supp. 1983); MICH. STAT. ANN. § 27A.2922 (Callaghan 1980); MINN. STAT. ANN. § 573.02 (West Supp. 1983); MISS. CODE ANN. § 11-7-13 (Supp. 1982); MO. ANN. STAT. §§ 537.070-.090 (Vernon 1949 & Supp. 1983); MONT. CODE ANN. § 27-1-323 (1981); NEB. REV. STAT. §§ 30-809 to -810 (1943); NEV. REV. STAT. § 41.085 (1979); N.H. REV. STAT. ANN. § 556:12 (1974); N.J. STAT. ANN. §§ 2A:31-1 to :31-6 (West 1952 & Supp. 1983-1984); N.M. STAT. ANN. §§ 41-2-1 to -4 (1978); N.Y. EST. POWERS & TRUSTS LAW §§ 5-4.1 to -4.6 (McKinney 1981 & Supp. 1982-1983); N.C. GEN. STAT. § 28A-18-2 (Supp. 1981); N.D. CENT. CODE §§ 32-21-01 to -06 (1976 & Supp. 1981); OHIO REV. CODE ANN. §§ 2125.01-.04 (Baldwin 1982); OKLA. STAT. ANN. tit. 12, § 1053 (West Supp. 1982-1983); OR. REV. STAT. §§ 30.010-.100 (1981); 42 PA. CONS. STAT. ANN. § 8301 (Purdon 1982); R.I. GEN. LAWS §§ 10-7-1 to -13 (1969 & Supp. 1982); S.C. CODE ANN. §§ 15-51-10 to -60 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. §§ 21-5-1 to -9 (1979); TENN. CODE ANN. § 20-5-113 (1980); TEX. REV. CIV. STAT. ANN. arts. 4671-4678 (Vernon 1952 & Supp. 1982-1983); UTAH CODE ANN. §§ 78-11-6 to -7 (1953); VT. STAT. ANN. tit. 14, §§ 1491-1492 (1974 & Supp. 1982); VA. CODE §§ 8.01-50 to -56 (1950 & Supp. 1983); WASH. REV. CODE ANN. § 4.24.010 (Supp. 1983-1984) and § 4.20.005 (1962 & Supp. 1983-1984); W. VA. CODE §§ 55-7-5 to -7 (1981 & Supp. 1983); WIS. STAT. ANN. §§ 895.03-.04 (West 1983); WYO. STAT. §§ 1-38-101 to -102 (1977).

12. *See, e.g.*, *Wycko v. Gnodtke*, 105 N.W.2d 118, 119 (Mich. 1960) (predecessor of American wrongful death acts was Lord Campbell's Act); *Anderson v. Lale*, 216 N.W.2d 152, 155 (S.D. 1974) (South Dakota's statute originated from section 677 of 1877 Code of Civil Procedure, which had adopted version of Lord Campbell's Act); *Jones v. Carvell*, 641 P.2d 105, 107 (Utah 1982) (Utah's wrongful death statute patterned after Lord Campbell's Act).

13. *See, e.g.*, *Swanson v. Champion Int'l Corp.*, 646 P.2d 1166, 1170 (Mont. 1982) (consortium, comfort, society); *Nance v. State Bd. of Educ.*, 282 S.E.2d 848, 849 (S.C. 1981) (mental shock and suffering, wounded feelings, grief, sorrow, loss of society and companionship); *Van Cleave v. Lynch*, 166 P.2d 244, 249 (Utah 1946) (society, love, companionship, protection, affection of minor child). The pecuniary value of the household services the beneficiaries reasonably expected to receive from the decedent is universally accepted by the states as an element of loss to be figured into the computation of wrongful death damages. *See, e.g.*, *Vines v. Arkansas Power & Light Co.*, 337 S.W.2d 722, 724 (Ark. 1960) (widow entitled to recover for loss of service of deceased husband); *Marceleno v. State Dep't of Highways*, 367 So. 2d 882, 889 (La. Ct. App. 1978) (loss of wife-mother's services, such as cooking, cleaning, housekeeping recoverable); *Fussner v. Andert*, 113 N.W.2d 355, 357 (Minn. 1961) (father entitled to present monetary value of any future contributions in services of 17-year-old daughter).

Whether the state classifies these types of damages as pecuniary or non-pecuniary, the current trend is towards allowing for deprivation of positive benefit.¹⁴ On the other hand, the majority of American jurisdictions still do not include the attendant emotional consequences suffered by the survivors.¹⁵

The Texas legislature enacted a wrongful death act patterned after Lord Campbell's Act in 1860.¹⁶ The statute provides for the recovery of "actual

14. See 1 S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 3:49, at 308-22 (2d ed. 1975) (modern trend toward allowing recovery for companionship, comfort, and consortium); see also *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 587-88 (1974) (permitting recovery for loss of society under maritime law thereby aligning remedy with wrongful death statutes of most states). The action of a state with regard to awarding damages generally falls into one of three categories:

(1) A strict application of the pecuniary loss standard to include only loss of expected financial support and services. See *Espinoza v. O'Dell*, 633 P.2d 455, 464 (Colo. 1981) (damages limited to reasonably expected financial benefit from decedent);

(2) A liberal application of the pecuniary loss rule to allow recovery of the pecuniary value of relational damages. See MASS. ANN. LAWS ch. 229, § 2 (Michie/Law. Co-op. 1974) (permits recovery of lost pecuniary value of decedent's protection, care, assistance, society, companionship, comfort, guidance, counsel, advice);

(3) Abrogation of the pecuniary loss requirement. See HAWAII REV. STAT. § 663-3 (1976) (damages given for pecuniary injury and loss of love and affection).

15. See, e.g., OR. REV. STAT. § 30.020 (1981) (pecuniary loss, loss of society, companionship, services); VT. STAT. ANN. tit. 14, § 1492 (Supp. 1982) (pecuniary injury includes love and companionship of child, destruction of parent-child relationship); WASH. REV. CODE ANN. § 4.24.010 (Supp. 1983-1984) (loss of services, support, love, companionship of child, injury or destruction of parent-child relationship). But see ARK. STAT. ANN. § 27-909 (1979) (mental anguish); DEL. CODE ANN. tit. 10, § 3724 (Supp. 1982) (mental anguish); FLA. STAT. ANN. § 768.21 (West Supp. 1983) (mental pain and suffering); KAN. STAT. ANN. § 60-1904 (1976) (mental anguish, suffering, or bereavement); MD. CTS. & JUD. PROC. CODE ANN. § 3-904 (1980) (mental anguish, emotional pain and suffering); NEV. REV. STAT. § 41.085 (1979) (grief or sorrow); OHIO REV. CODE ANN. § 2125.02 (Baldwin 1982) (mental anguish); OKLA. STAT. ANN. tit. 12, § 1053 (West Supp. 1982-1983) (grief, mental pain and suffering); VA. CODE § 8.01-52 (Supp. 1983) (sorrow, mental anguish, solace); W. VA. CODE § 55-7-6 (Supp. 1983) (sorrow, mental anguish, solace). Additionally, a few states allow for recovery by judicial application of statutory law. See, e.g., *City of Tucson v. Wondergem*, 466 P.2d 383, 388 (Ariz. 1970) (widow entitled to recover for anguish, sorrow, mental suffering); *Nance v. State Bd. of Educ.*, 282 S.E.2d 848, 849 (S.C. 1981) (statutory beneficiaries permitted to recover for pecuniary loss, mental shock, and suffering); *Wilson v. Lund*, 491 P.2d 1287, 1290 (Wash. 1971) (language of statute construed "to provide recovery for parental grief, mental anguish, and suffering").

16. See TEX. REV. CIV. STAT. ANN. arts. 4671-4678 (Vernon 1952 & Supp. 1982-1983). The language regarding the measure of damages recoverable in the original Texas death act was taken verbatim from Lord Campbell's Act. Compare Lord Campbell's Act (Fatal Accidents Act), 1846, 9 & 10 Vict., ch. 93, § 2, reprinted in 2 S. SPEISER, RECOVERY FOR WRONGFUL DEATH 644 (2d ed. 1975) ("[T]he Jury may give such Damages as they may think proportioned to the Injury resulting from such Death . . .") with Law of Feb. 2, 1860, ch. 35, § 2, 1860 Tex. Gen. Laws 33, 4 H. GAMMEL, LAWS OF TEXAS 1395 (1898) ("[T]he jury may give such damage as they may think proportioned to the injury resulting from such

damages” by designated survivors in the event of death of a child or an adult.¹⁷ The settled judicial construction has been that “actual damages” means pecuniary loss suffered as a result of the death.¹⁸ Pecuniary loss has been given broad judicial interpretation to encompass not only loss of expected financial contributions from the decedent but also loss of benefits that can be valued in money, including household services, advice, attention, care, counsel, and protection.¹⁹ When the decedent is a minor child, the parent’s recovery is diminished by the anticipated amount of expense of the child’s care, support, education, and maintenance.²⁰ Texas, along

death”). See generally Ferguson, *Damages for the Death of a Minor Child Under the Texas Wrongful Death Act*, 4 ST. MARY’S L.J. 157, 157-62 (1972) (history and application by courts of wrongful death act).

17. See TEX. REV. CIV. STAT. ANN. art. 4671 (Vernon Supp. 1982-1983) (action for “actual damages” in wrongful death); see also *id.* art. 4677 (Vernon 1952) (damages in proportion to the injury suffered due to death).

18. See *March v. Walker*, 48 Tex. 372, 375 (1877), expressly overruled in *Sanchez v. Schindler*, 651 S.W.2d 249, 251 n.2 (Tex. 1983). *March* was the first case to interpret actual damages to mean pecuniary losses. The rationale of the court was that the Texas Wrongful Death Act was based on the English statute which had been interpreted to allow only for pecuniary damage; therefore, the Texas act would only allow for recovery of the same, “including the loss of prospective advantage.” See *id.* at 375. Courts have long adhered to the pecuniary loss rule. See, e.g., *Murray v. Templeton*, 576 S.W.2d 138, 141 (Tex. Civ. App.—Texarkana 1978, no writ) (recovery for surviving husband limited to pecuniary loss less cost of maintaining wife); *Simpson v. Barham*, 292 S.W.2d 874, 877 (Tex. Civ. App.—Amarillo 1956, no writ) (husband only allowed to recover amount of pecuniary benefits reasonably expected to be recovered from wife had she not died); *Banker v. McLaughlin*, 200 S.W.2d 699, 702 (Tex. Civ. App.—Beaumont) (parent entitled to recover only pecuniary value of child’s services and financial contributions less cost of raising child), *aff’d*, 208 S.W.2d 843 (1948), overruled by *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983).

19. See, e.g., *Dover Corp. v. Perez*, 587 S.W.2d 761, 768 (Tex. Civ. App.—Corpus Christi 1979, writ ref’d n.r.e.) (widow may recover future pecuniary loss and loss of care, maintenance, support, services, advice, and counsel); *Lee v. Andrews*, 545 S.W.2d 238, 248 (Tex. Civ. App.—Amarillo 1976, writ dism’d) (widow, individually, and on behalf of minor children, awarded compensation for services, advice, counsel, care, and financial contributions); *Page v. Scaramozi*, 288 S.W.2d 909, 912 (Tex. Civ. App.—San Antonio 1956, writ ref’d n.r.e.) (children, for loss of father, entitled to recover for loss of nurture, advice, care, education, and pecuniary loss). “[P]ecuniary loss . . . is the present monetary value of the benefits that the plaintiff had a reasonable expectation of receiving from the deceased had he not been killed. This includes not only money but everything that can be valued in money.” *Exxon Corp. v. Breecheen*, 519 S.W.2d 170, 184 (Tex. Civ. App.—Houston [1st Dist.]), *rev’d on other grounds*, 526 S.W.2d 519 (Tex. 1975).

20. See *Bedgood v. Madalin*, 600 S.W.2d 773, 775 (Tex. 1980), overruled by *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983). The court in *Madalin* stated that:

It is well settled that under the Texas Wrongful Death Act a surviving parent is entitled to recover as actual damages for the death of a child only the pecuniary value of the child’s services until he reaches his majority, less the cost and expense of the child’s care, support, education and maintenance and such sums as might be reasonably expected as contributions after the child reaches majority.

with a minority of other states, has denied recovery for the loss of companionship and society and damages for mental anguish because these elements have been considered incapable of pecuniary assessment.²¹

In recent years, the Texas Supreme Court, in two cases, has moved to expand the list of recoverable damages available when a tortious act negligently interferes with a familial relationship.²² In *Whittlesey v. Miller*,²³ a case involving injury to a spouse by a third party's negligence, the court held that a cause of action is available to either spouse for loss of consortium.²⁴ Consortium is the mutual right of the spouses to the "affection, solace, comfort, companionship, society, assistance, and sexual relations necessary to a successful marriage."²⁵ This holding marked the first time the court determined that these relational elements were capable of pecuniary evaluation.²⁶ Two years later, in *Bedgood v. Madalin*,²⁷ a case involving the death of a minor child, Justice Spears advocated a rejection of the pecuniary loss limitation in wrongful death actions.²⁸ He noted that

Id. at 775. See generally Ferguson, *Damages for the Death of a Minor Child Under the Texas Wrongful Death Act*, 4 ST. MARY'S L.J. 157, 162-67 (1972) (examination of pecuniary loss requirement on damages recoverable for death of minor child).

21. See, e.g., *Tex-Jersey Oil Corp. v. Beck*, 157 Tex. 541, 551, 305 S.W.2d 162, 169 (1957) (jury may not consider sorrow, grief, loss of companionship, love, and affection in assessing wrongful death damages); *International & G.N. Ry. Co. v. McVey*, 99 Tex. 28, 32, 87 S.W. 328, 329 (1905) (jury charge which did not exclude compensation for loss of society or companionship in wrongful death action reversible error), *expressly overruled in* *Sanchez v. Schindler*, 651 S.W.2d 249, 251 n.2 (Tex. 1983); *Penguin Indus., Inc. v. Junge*, 589 S.W.2d 842, 848 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.) (damages for grief, mental anguish, bereavement, and loss of companionship not recoverable); see also 1 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 12.08 (1969):

In answering Issues No. —, No. —, and No. —, do not allow any amount by way of consolation for the death of *Paul Payne* or for any sorrow, anguish, or grief suffered as a result of *his* death, or for the loss of the society, affection, or companionship of *Paul Payne*.

Id. at 12.08.

22. See *Bedgood v. Madalin*, 600 S.W.2d 773, 776 (Tex. 1980) (Spears, J., concurring) (death of minor child), *overruled by* *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983); *Whittlesey v. Miller*, 572 S.W.2d 665 (Tex. 1978) (injury to spouse).

23. 572 S.W.2d 665 (Tex. 1978).

24. See *id.* at 668. The spouse sued the person involved in a collision with her husband for loss of consortium for the alleged negligent injury to him. See *id.* at 666.

25. See *id.* at 666; see also *Whitley v. Whitley*, 436 S.W.2d 607, 609 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ).

26. Compare *Whittlesey v. Miller*, 572 S.W.2d 665, 667-68 (Tex. 1978) (cause of action for loss of consortium) with *Garrett v. Reno Oil Co.*, 271 S.W.2d 764, 766 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.) (wife has no cause of action for third party's negligent injury to husband).

27. 600 S.W.2d 773 (Tex. 1980) (Spears, J., concurring), *overruled by* *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983).

28. See *id.* at 777. For a discussion of how broad judicial construction has prompted

both a parent's claim for damages for the loss of a minor child and a spouse's cause of action for loss of consortium involve serious interference with a familial relationship.²⁹ Therefore, he reasoned that the elements of damage recoverable by a surviving parent should be expanded, as they were in *Whittlesey*, to include "loss of companionship, society, affection, and comfort."³⁰ Jury awards for the death of a minor child in Texas in recent years have been greater than a strict application of the pecuniary loss rule would seemingly justify.³¹ This phenomena has led commentators to suggest that juries, with tacit court approval, in fact have been compensating parents for their grief and loss of love and companionship under the guise of pecuniary loss.³²

In *Sanchez v. Schindler*,³³ the Texas Supreme Court rejected the pecuniary loss rule as the proper measure of damage for the death of a child, and in so doing, reinterpreted the language of the Texas Wrongful Death Act.³⁴ The statutory language of "actual damage" was interpreted to in-

legislatures to modify or abrogate the pecuniary loss rule, see generally Belfance, *The Inadequacy of Pecuniary Loss as a Measure of Damages in Actions for the Wrongful Death of Children*, 60 OHIO N.U.L. REV. 543, 553 (1979).

29. See *Bedgood v. Madalin*, 600 S.W.2d 773, 778 (Tex. 1980) (Spears, J., concurring), overruled by *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983).

30. See *id.* at 779.

31. See, e.g., *Green v. Hale*, 590 S.W.2d 231, 237 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.) (jury award of \$4,500 for 13-year-old boy upheld), overruled by *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983); *Landreth v. Reed*, 570 S.W.2d 486, 492 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.) (jury award of \$25,000 for death of bright, active, loving 14-month-old not excessive), overruled by *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983); *Collins v. Gladden*, 466 S.W.2d 629, 637 (Tex. Civ. App.—Beaumont 1971, writ ref'd n.r.e.) (\$20,000 verdict for 18-year-old reduced to \$17,000 by court). The cost of raising an urban child from birth to age eighteen in 1982 averaged \$85,949 nationwide; the cost of raising a rural nonfarm child averaged \$87,200. See *Updated Estimates of the Cost of Raising a Child*, 2 FAM. ECON. REV. 26, 27 (1983); see also Decof, *Damages in Actions for Wrongful Death of Children*, 47 NOTRE DAME LAW. 197, 198 (1971) (most jurisdictions deduct cost of rearing child from probable contribution). Damages awarded when the deceased is a minor child must necessarily be largely speculative; therefore, the jury is given wide latitude in making their determination. See *Riojas v. Riojas*, 289 S.W.2d 802, 805 (Tex. Civ. App.—Fort Worth 1956, no writ).

32. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 127, at 908-09 (4th ed. 1971). Juries must be compensating for prohibited sentimental aspects of family relationships with covert court approval. See *id.* at 909. Otherwise, parents would receive nothing because damages calculated following a strict pecuniary standard could only result in a negative quantity. See *id.* at 909; see also Ferguson, *Damages for the Death of a Minor Child Under the Texas Wrongful Death Act*, 4 ST. MARY'S L.J. 157, 165 (1972) (juries ignore pecuniary loss rule and permit parents compensation for loss of comfort, love, and companionship).

33. 651 S.W.2d 249 (Tex. 1983).

34. See *id.* at 251. The majority lists twenty cases which it overrules with this decision. See *id.* at 251 n.2. While the language of the court limits its decision to the death of a minor

clude the loss of the child's companionship and society as well as damages for the parent's mental anguish.³⁵ The court determined that the basis of the pecuniary loss limitation was the antiquated concept of a minor child as an economic asset, a concept which they considered neither appropriate nor realistic for today.³⁶ Refusing to be bound by the inaction of the legislature in redefining a concept which had initially been defined by the judiciary,³⁷ the court reevaluated the "statute in light of present social realities."³⁸ Accordingly, recovery was expanded to include these elements of "real loss" to parents, in addition to the loss of financial benefit previously allowed.³⁹

In a lengthy dissent, Chief Justice Pope, joined by two other justices,⁴⁰ argued that the court should not reinterpret the language of the Texas Wrongful Death Act in light of the fact that Texas courts have consistently followed the pecuniary loss rule for over one hundred years.⁴¹ He interpreted the legislature's failure to amend the provision of the Texas statute concerning damages not as legislative inaction, but rather as an indication

child, the overruled cases only include 5 in which the decedent was a child. *See* Smith v. Farrington, 117 Tex. 459, 6 S.W.2d 736 (1928); Taylor, B. & H. Ry. Co. v. Warner, 84 Tex. 122, 19 S.W. 449 (1892); Houston City St. Ry. Co. v. Sciacca, 80 Tex. 350, 16 S.W. 31 (1891); Brunswig v. White, 70 Tex. 504, 8 S.W. 85 (1888); City of Galveston v. Barbour, 62 Tex. 172 (1884).

35. *See* Sanchez v. Schindler, 651 S.W.2d 249, 251 (Tex. 1983). Curiously, the appeal only claimed damages specifically for mental anguish. *See* Petitioner's Application for Writ of Error at 30, Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983).

36. *See* Sanchez v. Schindler, 651 S.W.2d 249, 251 (Tex. 1983).

37. *See id.* at 252. The court cited several justifications for judicially changing prior interpretation of the statute. *See id.* at 252-53. First, since the court originally imposed the pecuniary loss limitation, it was logical that they be the body to abolish it. *See id.* at 252. Second, it was an antiquated doctrine. *See id.* at 252. Third, the court should not be barred by legislative inaction in the area of tort law which historically has been developed predominantly by the judiciary. *See id.* at 252. Fourth, the majority of other jurisdictions have reached the same result in wrongful death actions. *See id.* at 252-53.

38. *See id.* at 251.

39. *See id.* at 251. The holding was given application to all future cases as well as to those still in the judicial process as of April 27, 1983. *See id.* at 254.

40. *See id.* at 254 (Pope, C.J., dissenting) (Justices McGee and Barrows join in dissenting opinion).

41. *See id.* at 254-55 (Pope, C.J., dissenting); *see also* Robinson Sons, Inc. v. Wigart, 431 S.W. 2d 327, 334 (Tex. 1968) (no recovery for loss of society, affection, companionship, sorrow, anguish, and grief), *overruled by* Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983); Gulf, C. & S.F.R. Co. v. Farmer, 102 Tex. 235, 239, 115 S.W. 260, 261 (1909) (only pecuniary loss should be compensated), *expressly overruled in* Sanchez v. Schindler, 651 S.W.2d 249, 251 n.2 (Tex. 1983); March v. Walker, 48 Tex. 372, 375 (1877) (language of statute limits damages to those measured by pecuniary injury), *expressly overruled in* Sanchez v. Schindler, 651 S.W.2d 249, 251 n.2 (Tex. 1983); Appellees' Brief at 21, Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983) (court is constrained to follow law which prevents plaintiff from recovering damages for mental suffering).

that the legislature was satisfied with the present state of the law.⁴² The dissent criticized the majority for its failure to clearly set out the proof required to recover for mental anguish.⁴³ Further, if mental anguish was to be a recoverable element of damage, the dissent cautioned the court to follow precedent and allow an award only where the plaintiff could show a physical injury or conduct by the tortfeasor worse than negligence.⁴⁴

With the holding in *Sanchez*, Texas joins the majority of states which, regardless of the language of their wrongful death statutes, allow recovery for loss of companionship and society for the death of a child.⁴⁵ Recent opinions by the Texas Supreme Court, combined with the almost universal criticism of the former approach by legal commentators, foreshadowed this new interpretation of the death statute.⁴⁶ An application of the pecuniary loss rule which excluded loss of companionship and society as recoverable elements may have met the needs of a society in which a child was an economic asset.⁴⁷ The Texas Wrongful Death statute, however, must be viewed in light of present realities.⁴⁸ Today, it is the unusual circumstance

42. See *Sanchez v. Schindler*, 651 S.W.2d 249, 256 (Tex. 1983) (Pope, C.J., dissenting).

43. See *id.* at 257-58 (Pope, C.J., dissenting).

44. See *id.* at 258 (Pope, C.J., dissenting).

45. See, e.g., CAL. CIV. PROC. CODE § 377 (Deering Supp. 1983) ("such damages . . . as . . . may be just"); IDAHO CODE § 5-311 (1979) ("damages may be given as . . . may be just"); ILL. ANN. STAT. ch. 70, § 2 (Smith-Hurd 1959) ("such damages as they shall deem a fair and just compensation").

46. Compare *Bedgood v. Madalin*, 600 S.W.2d 773, 777 (Tex. 1980) (Spears, J., concurring) (antiquated concepts form bases of pecuniary loss rule), *overruled by Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983) and *Whittlesey v. Miller*, 572 S.W.2d 665, 668 (Tex. 1978) (cause of action recognized for spouse's loss of consortium) with Speiser & Malawer, *An American Tragedy: Damages for Mental Anguish of Bereaved Relatives in Wrongful Death Actions*, 51 TUL. L. REV. 1, 5 (1976) (inconsistent to allow mental anguish damages in personal injury but not wrongful death cases) and Strong & Jacobsen, *Such Damages as Are Just: A Proposal for More Realistic Compensation in Wrongful Death Cases*, 43 MONT. L. REV. 55, 56 (1982) (history alone does not justify a rule with no purpose).

47. See *Fussner v. Andert*, 113 N.W.2d 355, 359 (Minn. 1962).

48. See, e.g., *Wycko v. Gnodtke*, 105 N.W.2d 118, 121 (Mich. 1960) (time when child considered primarily as economic asset bleak era in history of childhood); *Fussner v. Andert*, 113 N.W.2d 355, 359 (Minn. 1962) (changes in life since pecuniary loss rule adopted require reappraisal of its meaning and application); *Bedgood v. Madalin*, 600 S.W.2d 773, 777 (Tex. 1980) (Spears, J., concurring) ("pecuniary loss rule based on antiquated concepts . . . totally unrelated to present day realities of modern society"), *overruled by Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983). There is nothing in the statutory language barring construction to allow for compensation of non-pecuniary elements. See TEX. REV. CIV. STAT. ANN. art. 4677 (Vernon 1952) (jury may give such damages as they think proportionate to injury resulting from death). The function of the statute is remedial and it is the court's duty to construe it liberally in light of current social conditions. Cf. *Ward v. Charter Oak Fire Ins. Co.*, 579 S.W.2d 909, 910 (Tex. 1979) (worker's compensation law liberally construed to effect remedies it grants). The Texas "Construction of Laws" article provides in section 8:

where a parent suffers any financial loss from the death of a minor child.⁴⁹ Texas, therefore, aligns itself with those jurisdictions which recognize that the real loss to parents is not monetary but the loss of the rewards which flow from the parent-child relationship.⁵⁰

While the issue before the *Sanchez* court was the mental anguish of a parent, a large part of the opinion focused on the loss of companionship and society of the child.⁵¹ The emotional reaction of the parent is a by-product of the injury to the familial relationship; therefore, it was necessary for the court to include these relational elements to arrive at the desired goal of compensation for mental anguish.⁵² The petitioner's argument, in fact, includes mental anguish as an integral part of the loss of companionship and society of the minor.⁵³ The court, in another context, could have joined those states which simply add society and companionship to other pecuniary damages recoverable under a pecuniary loss standard.⁵⁴ Instead, the court chose to additionally allow damages for the emotional consequences to survivors.⁵⁵ Texas is thereby aligned with the majority of states which allow compensation for loss of society and com-

The rule of the common law that statutes in derogation thereof shall be strictly construed shall have no application to the Revised Statutes; but the said statutes shall constitute the law of this State respecting the subjects to which they relate; and the provisions thereof shall be liberally construed with a view to effect their objects and to promote justice.

TEX. REV. CIV. STAT. ANN. art. 10, § 8 (Vernon 1969).

49. See Decof, *Damages in Actions for Wrongful Death of Children*, 47 NOTRE DAME LAW. 197, 198 (1971) (normally, child would be economic liability to parent if rule literally followed); see also Belfance, *The Inadequacy of Pecuniary Loss as a Measure of Damages in Actions for the Wrongful Death of Children*, 6 OHIO N.U.L. REV. 543, 545 (1979) (under pecuniary loss measure parent ought to reimburse tortfeasor for relief from expense of raising child).

50. Compare *Sanchez v. Schindler*, 651 S.W.2d 249, 251 (Tex. 1983) (recovery for loss of society and companionship allowed for death of minor child) with *Wardlow v. Keokuk*, 190 N.W.2d 439, 448 (Iowa 1971) (loss of society and companionship for wrongful death of minor proper element) and *Selders v. Armentrout*, 207 N.W.2d 686, 689 (Neb. 1973) (measure of damage for wrongful death of minor includes loss of society, comfort, companionship).

51. See *Sanchez v. Schindler*, 651 S.W.2d 249, 252-53 (Tex. 1983).

52. See *id.* at 253; see also *Wilson v. Lund*, 491 P.2d 1287, 1292 (Wash. 1971) (destruction of parent-child relationship cannot be separated from emotional damage).

53. See Petitioner's Application for Writ of Error at 24, *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983).

54. See, e.g., *Vines v. Arkansas Power & Light Co.*, 337 S.W.2d 722, 724 (Ark. 1960) (pecuniary damage to widow includes loss of companionship); *Volk v. Baldazo*, 651 P.2d 11, 14 (Idaho 1982) (compensatory damages for death of minor child include loss of comfort, society, and companionship); *Elliot v. Willis*, 412 N.E.2d 638, 640 (Ill. 1980) (reversible error to not permit estate instruction on lost consortium).

55. See *Sanchez v. Schindler*, 651 S.W.2d 249, 254 (Tex. 1983).

panionship and the minority of jurisdictions which go a step further in permitting recovery for mental anguish as well.⁵⁶

Damages for loss of companionship and society are no longer considered to be too intangible or speculative to be given a monetary value.⁵⁷ The attendant emotional injuries are also a basis for recovery if proven in a competent manner.⁵⁸ A main weakness of the majority opinion, criticized by the dissent, is the failure to elaborate on what specifically constitutes emotional trauma worthy of recovery.⁵⁹ As the courts clarify this standard in the future, the possibility of excessive jury verdicts exists.⁶⁰ It can be anticipated, however, that the verdicts will nonetheless represent a realistic assessment of damages, due to the supervisory power of the judiciary.⁶¹

Sanchez involves the death of a minor child; the holding of the court is specifically limited to a situation where the decedent is a minor child.⁶² The common thread to the cases listed in the opinion as overruled, however, is not that the decedent was a child but that recovery was limited to pecuniary loss.⁶³ This fact suggests that the court intended for their holding to have broader implications than the facts at hand and creates a strong likelihood that the issue will be decided similarly when the decedent is an adult.⁶⁴ Additionally, two justices, in a concurring opinion on motion for rehearing, indicated their support for expanding the affect of this decision to all beneficiaries designated by the Texas Wrongful Death statute.⁶⁵

56. See, e.g., *City of Tucson v. Wondergem*, 466 P.2d 383, 387 (Ariz. 1970) (widow entitled to recover for anguish, sorrow, mental suffering); DEL. CODE ANN. tit. 10, § 3724 (Supp. 1982) (court may consider mental anguish resulting from death in making award); KAN. STAT. ANN. § 60-1904 (1976) (damages may be recovered for mental anguish, suffering, or bereavement).

57. See *Whittlesey v. Miller*, 572 S.W.2d 665, 667 (Tex. 1978).

58. See *Sanchez v. Schindler*, 651 S.W.2d 249, 253 (Tex. 1983); see also *Wilson v. Lund*, 491 P.2d 1287, 1292 (Wash. 1971) (intangible emotional injuries require exacting proof).

59. See *Sanchez v. Schindler*, 651 S.W.2d 249, 257-58 (Pope, C.J., dissenting).

60. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 907-08 (4th ed. 1971).

61. See, e.g., *Landreth v. Reed*, 570 S.W.2d 486, 492 (Tex. Civ. App.—Texarkana 1978, no writ) (award of \$25,000 to plaintiff parents not unjustified or excessive), *overruled by Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983); *Mitchell v. Akers*, 401 S.W.2d 907, 912 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.) (\$5,000 for physical pain and suffering of child who died in pool not excessive); *Union Transp., Inc. v. Braun*, 318 S.W.2d 927, 939 (Tex. Civ. App.—Eastland 1958, no writ) (award of \$25,000 for death of mother excessive by \$12,500).

62. See *Sanchez v. Schindler*, 651 S.W.2d 249, 251 (Tex. 1983).

63. See *id.* at 251 n.2.

64. Interview with Paul F. Ferguson, Professor of Law, St. Mary's University (June 14, 1983).

65. See *Sanchez v. Schindler*, 651 S.W.2d 249, 258-59 (Tex. 1983) (Ray, J., concurring)

How the legislature will react to the court's holding can only be a matter of speculation, but considering their history of inactivity in this wrongful death damage area, it is likely that they will continue to let the courts interpret the statutory language as new questions arise in the future.⁶⁶

The Texas Supreme Court in *Sanchez* rejected the pecuniary loss limitation, thereby allowing recovery of damages for the loss of companionship and society and damages for mental anguish for the death of a minor child. The court reasoned that the pecuniary loss rule was not appropriate to modern society and resulted in hardship to the parents who obtained no recovery if no anticipated financial contribution from the decedent could be shown. The court recognized that the real loss to the parents is not the loss of financial benefit expected from the child, but is rather the loss of the familial relationship, and awarded damages accordingly.

Vicky Hallick Robbins

(joined by Justice Kilgarin); *see also* TEX. REV. CIV. STAT. ANN. art. 4675 (Vernon 1952) ("husband, wife, children, and parents").

66. Interview with Paul F. Ferguson, Professor of Law, St. Mary's University (June 14, 1983).