

# The Pecuniary Loss Rule as an Inappropriate Measure of Damages in Child Death Cases

## I. INTRODUCTION

Indiana courts have traditionally held that the amount of compensation recoverable by parents for the wrongful death of a child is limited to pecuniary loss.<sup>1</sup> At one time, this rule, known as the pecuniary loss rule, was followed in nearly all jurisdictions.<sup>2</sup> Today, however, most jurisdictions have abandoned this rule because of its archaic, outmoded underpinnings in favor of a rule which recognizes the true loss to parents as the lack of the child's society, companionship, and affection.<sup>3</sup>

While always stating that the pecuniary loss rule applied, Indiana courts have expanded the definition of "pecuniary loss" in order to mitigate the harshness of the rule.<sup>4</sup> In its 1984 decision in *Miller v. Mayberry*,<sup>5</sup> the Indiana Court of Appeals, Second District, called a halt to the expansion that had taken place over the years. The evolution of the rule in Indiana until *Mayberry* had followed an almost universal trend of allowing greater recovery by dispensing with a strict pecuniary loss requirement.<sup>6</sup> It is time for Indiana to reevaluate the rule and its viability in our society, especially in light of the unfortunate reaffirmation of the rule in *Mayberry*.

This Note will examine the evolution of the pecuniary loss rule in Indiana. Further, it will demonstrate the trend in other jurisdictions in this area and discuss the measure for recovery in analogous tort situations, such as recovery for loss of parental society, recovery for loss of spousal consortium, and recovery for the loss of an unborn fetus. Finally, it

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<sup>1</sup>See, e.g., *Thompson v. Town of Fort Branch*, 204 Ind. 152, 178 N.E. 440 (1931); *Miller v. Mayberry*, 462 N.E.2d 1316 (Ind. Ct. App. 1984), *transfer denied*, Sept. 13, 1984; *Boland v. Greer*, 409 N.E.2d 1116 (Ind. Ct. App. 1980), *transfer denied*, July 13, 1981; *Childs v. Rayburn*, 169 Ind. App. 147, 346 N.E.2d 655 (1976) (en banc), *transfer denied*, Feb. 29, 1972; *Wallace v. Woods*, 149 Ind. App. 257, 271 N.E.2d 487 (1971); *Hahn v. Moore*, 127 Ind. App. 149, 133 N.E.2d 900 (1956) (en banc), *transfer denied*, Dec. 21, 1956; *Siebeking v. Ford*, 125 Ind. App. 365, 122 N.E.2d 880 (1954) (en banc), *transfer denied*, Mar. 21, 1955; *Southern Ind. Ry. Co. v. Moore*, 34 Ind. App. 154, 72 N.E. 479 (1904); *City of Elwood v. Addison*, 26 Ind. App. 28, 59 N.E. 47 (1901).

<sup>2</sup>See, e.g., *Bolinger v. St. Paul & D.R. Co.*, 36 Minn. 418, 31 N.W. 856 (1887); *City of Galveston v. Barbour*, 62 Tex. 172 (1884).

<sup>3</sup>See *infra* note 83 and accompanying text.

<sup>4</sup>See *Childs v. Rayburn*, 169 Ind. App. 147, 156-57, 346 N.E.2d 655, 662 (1976), *transfer denied*, Nov. 4, 1976; *Wallace v. Woods*, 149 Ind. App. 257, 267-68, 271 N.E.2d 487, 493 (1971) (en banc), *transfer denied*, Feb. 29, 1972; *Hahn v. Moore*, 127 Ind. App. 149, 158, 133 N.E.2d 900, 904 (1956) (en banc), *transfer denied*, Dec. 21, 1956.

<sup>5</sup>462 N.E.2d 1316 (Ind. Ct. App. 1984), *transfer denied*, Sept. 13, 1984.

<sup>6</sup>See *infra* note 83 and accompanying text.

will conclude that the pecuniary loss rule is outmoded, does not address the true loss to parents, and, therefore, should be abolished.

## II. EVOLUTION OF THE PECUNIARY LOSS RULE IN INDIANA

The pecuniary loss rule developed at a time when child labor was extremely common, and the death of a child was a genuine financial loss to the parents.<sup>7</sup> The expectations of parents for financial contributions by their children were so widespread and acceptable that the law implied a pecuniary loss to parents for which compensation could be awarded.<sup>8</sup> Because of the common practice of child labor and the parents' financial expectations, measuring loss to the parents in pecuniary terms was a logical way to redress their injury for the loss of a child. Thus, the early Indiana cases followed a very strict application of the pecuniary loss rule.<sup>9</sup> In *City of Elwood v. Addison*,<sup>10</sup> "pecuniary loss" was defined as "the value of a child's services from the time of the death until he would have attained his majority taken in connection with his prospects in life, less the cost of his support and maintenance during that period, including such as board, clothing, schooling and medical attention."<sup>11</sup> Recovery for pecuniary loss must therefore be offset against any moneys that would have been expended for the upbringing of the child but for the wrongful death of the child.

Indiana embraced the pecuniary loss rule in 1859 in *Ohio & Mississippi Railroad Co. v. Tindall*.<sup>12</sup> The Indiana Supreme Court more recently reaffirmed its adherence to the rule in 1931 when it decided *Thompson v. Town of Fort Branch*.<sup>13</sup> In *Thompson*, the father of a seventeen-year-old boy sought to recover for lost services and funeral expenses.<sup>14</sup> The jury returned a verdict for the father, but awarded him only one dollar in damages.<sup>15</sup> The court maintained that the injury to the father was an injury to a property right, and not to the father's person.<sup>16</sup> The court also recognized that a strict application of the pecuniary loss rule did not allow a jury to consider loss of comfort or society, or any physical or mental suffering sustained by the parent, as

<sup>7</sup>See Comment, *Damages for the Wrongful Death of Children*, 22 U. CHI. L. REV. 538 (1955) for a general discussion of the early roots of the pecuniary loss rule and its relation to child labor.

<sup>8</sup>*City of Elwood v. Addison*, 26 Ind. App. 28, 35, 59 N.E. 47, 49 (1901).

<sup>9</sup>See, e.g., *Cleveland, C.C. & St. L. Ry. Co. v. Miles*, 162 Ind. 646, 70 N.E. 985 (1904); *Louisville, N.A. & C. Ry. Co. v. Wright*, 134 Ind. 509, 34 N.E. 314 (1893); *Pennsylvania Co. v. Lilly*, 73 Ind. 252 (1881); *Ohio & M. R.R. Co. v. Tindall*, 13 Ind. 366 (1859); *Southern Ind. Ry. Co. v. Moore*, 34 Ind. App. 154, 72 N.E. 479 (1904).

<sup>10</sup>26 Ind. App. 28, 59 N.E. 47 (1901).

<sup>11</sup>*Id.* at 35, 59 N.E. at 49.

<sup>12</sup>13 Ind. 366 (1859).

<sup>13</sup>204 Ind. 152, 178 N.E. 440 (1931).

<sup>14</sup>*Id.* at 155-56, 178 N.E. at 441.

<sup>15</sup>*Id.* at 156, 178 N.E. at 441.

<sup>16</sup>*Id.* at 160, 178 N.E. at 443.

a measure of damages.<sup>17</sup> It pointed out, however, that the evidence had established a pecuniary loss to the plaintiff for which he could recover monetary damages over and above the funeral expenses.<sup>18</sup> Additionally, the court cited *American Motor Car Co. v. Robbins*,<sup>19</sup> where the supreme court conceded that the amount of damages that compensates a parent for pecuniary loss, though incalculable, could be estimated, even though this measurement bore some semblance to conjecture.<sup>20</sup> The *Thompson* court, noting the definition of the pecuniary loss rule in Indiana,<sup>21</sup> explained that cost of maintenance was deducted from the amount of recovery because of the parents' legal duty to support their children, not because the wrongdoer had benefited the parents in any way.<sup>22</sup>

Since the *Thompson* case, the Indiana Court of Appeals has had numerous opportunities to address this same question. In *Hahn v. Moore*,<sup>23</sup> the court of appeals, en banc, used the traditional definition of pecuniary loss as set out in *City of Elwood v. Addison*.<sup>24</sup> The court also, however, permitted an instruction that allowed the jury to consider the pecuniary value of all acts of kindness and attention that the deceased child might reasonably have rendered to his parents.<sup>25</sup> This was a departure from a strict reading of the pecuniary loss rule because kindness and attention are not normally considered pecuniary items. Indeed, in *Wallace v. Woods*,<sup>26</sup> the appellate court, again en banc, stated that "[t]he measure of damages in Indiana for a minor's death is being liberalized by the courts in an effort to meet the present day conditions."<sup>27</sup>

The most liberal interpretation of the rule was enunciated five years after the *Wallace* decision in *Childs v. Rayburn*,<sup>28</sup> where the Indiana Court of Appeals, First District, allowed a set of jury instructions that broke down compensable damages into the following categories: loss of care, loss of love and affection, loss of support and maintenance, loss of parental training and guidance, and the pecuniary value of all acts

<sup>17</sup>*Id.* at 158, 178 N.E. at 442 (quoting *McGarr v. National & Providence Worsted Mills*, 24 R.I. 447, 460-61, 53 A. 320, 325 (1902), which had cited *Louisville N.A. & C.R. Co. v. Rush*, 127 Ind. 545, 26 N.E. 1010 (1891)).

<sup>18</sup>204 Ind. at 161-62, 178 N.E. at 443.

<sup>19</sup>181 Ind. 417, 103 N.E. 641 (1913).

<sup>20</sup>*Id.* at 422, 103 N.E. 641-42.

<sup>21</sup>See *supra* note 11 and accompanying text.

<sup>22</sup>204 Ind. at 164, 178 N.E. at 444.

<sup>23</sup>127 Ind. App. 149, 133 N.E.2d 900 (1956) (en banc), *transfer denied*, Dec. 21, 1956.

<sup>24</sup>*Id.* at 158, 133 N.E.2d at 904 (quoting *City of Elwood v. Addison*, 26 Ind. App. at 35, 59 N.E. at 49). See *supra* note 11 and accompanying text.

<sup>25</sup>127 Ind. App. at 158-59, 133 N.E.2d at 904.

<sup>26</sup>149 Ind. App. 257, 271 N.E.2d 487 (1971) (en banc), *transfer denied*, Feb. 29, 1972.

<sup>27</sup>*Id.* at 267-68, 271 N.E.2d at 493.

<sup>28</sup>169 Ind. App. 147, 346 N.E.2d 655 (1976), *transfer denied*, Nov. 4, 1976 (overruled by *Miller v. Mayberry*, 462 N.E.2d 1316 (Ind. Ct. App. 1984), *transfer denied*, Sept. 15, 1984).

of kindness and attention.<sup>29</sup> The court also allowed an instruction by the trial court defining pecuniary loss as the deprivation of something to which the parents were legally entitled, or a deprivation of benefits which the parents in all probability would have received from the decedent had he not been killed.<sup>30</sup> In considering these instructions, the appellate court ruled that while the instructions did restate the law, they did not misstate it.<sup>31</sup>

In *Boland v. Greer*,<sup>32</sup> the third district appellate court ignored the interpretation by the first district in *Childs* and only considered that part which had been accepted in *Hahn* — the pecuniary value of acts of kindness and attention.<sup>33</sup> In *Boland*, the plaintiff specifically requested that the traditional pecuniary loss rule be abandoned in favor of recognition of loss of love and companionship.<sup>34</sup> The plaintiff further asserted that a failure to recognize these damages constituted a denial of equal protection.<sup>35</sup> The plaintiff argued that suing for the loss of a child's society was analogous to suing for loss of spousal consortium or loss of parental society for which loss of companionship and society are recoverable.<sup>36</sup> The court rejected the spousal consortium argument, finding that the marital relationship differed significantly from the parent/child relationship.<sup>37</sup> In distinguishing actions for loss of parental consortium,<sup>38</sup> the court noted that the child's injury also includes loss of nurture and parental guidance and training because of the parent's wrongful death.<sup>39</sup> One of the more notable points in this opinion, however, is a discussion of the viability of the pecuniary loss rule.<sup>40</sup> Although the court expressly stated that the viability of the rule was questionable, it held that it was obliged to follow the precedent established by the Indiana Supreme Court in *Thompson* and earlier cases.<sup>41</sup>

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<sup>29</sup>169 Ind. App. at 156-57, 346 N.E.2d at 662. The court also correctly allowed damages for any medical expenses the parents incurred as a result of their son's death, and funeral expenses. *Id.*

<sup>30</sup>*Id.*

<sup>31</sup>*Id.* at 159, 346 N.E.2d at 664.

<sup>32</sup>409 N.E.2d 1116 (Ind. Ct. App. 1980), *transfer denied*, July 13, 1981.

<sup>33</sup>See *supra* note 25 and accompanying text.

<sup>34</sup>409 N.E.2d at 1118.

<sup>35</sup>*Id.* at 1120.

<sup>36</sup>*Id.*

<sup>37</sup>*Id.* The court stated that the loss of sexual services is a major part of the loss of spousal consortium. There is, of course, no such element in the loss of a child's society. *Id.*

<sup>38</sup>For a more general look at the loss of parental consortium, see Note, *Recovery for Loss of the Injured Parent's Society: Ferriter v. Daniel O'Connell [sic] Sons, Inc.*, 1981 DET. C. L. REV. 987 (1981); Comment, *A Child's Independent Action for Loss of Consortium—A Change in the Iowa Tort Scheme*, 67 IOWA L. REV. 1081 (1982).

<sup>39</sup>409 N.E.2d at 1120.

<sup>40</sup>*Id.*

<sup>41</sup>*Id.* See *supra* notes 9, 13-22 and accompanying text. The court also noted that the principle of stare decisis would be seriously impaired if the law could only be considered as "dependable as the most current advance sheet." 409 N.E.2d at 1120.

Following the court's statement of general dissatisfaction with the pecuniary loss rule, the appellants submitted a petition to transfer to the Indiana Supreme Court. The petition was denied,<sup>42</sup> but not without a vigorous and scathing dissent by Justice Hunter.<sup>43</sup> Justice Hunter recognized that the rule is anomalous, at odds with today's state of affairs, and without legal or factual basis except for its stare decisis value.<sup>44</sup> The dissenting judge quoted *Wycko v. Gnodtke*,<sup>45</sup> an opinion which noted that the barbarous concept of children being economic assets, traceable to the industrial development of the nineteenth century, was a reproach to justice.<sup>46</sup> Justice Hunter pointed out that parents do not undertake the business of parenting because it is a profit-making venture, and that the idea that children are a property right in which parents have a financial interest is abhorrent.<sup>47</sup> Additionally, Justice Hunter pointed out that the court had not hesitated to overrule precedent and thus change the law in other areas.<sup>48</sup>

In light of the dissent by Justice Hunter, it is not surprising that in 1983, the trial court judge in *Miller v. Mayberry*<sup>49</sup> disregarded the pecuniary loss rule and allowed damages to be awarded for lost love and affection. On appeal, the court gave a capsulized history of the pecuniary loss rule in Indiana,<sup>50</sup> noting specifically the *Thompson*,<sup>51</sup> *Hahn*,<sup>52</sup> *Childs*,<sup>53</sup> and *Boland*<sup>54</sup> decisions.<sup>55</sup> After reviewing these cases, the court specifically held that *Childs* had improperly extended the pecuniary loss rule, and to this extent, was overruled.<sup>56</sup> Citing *Thompson*, the court held that the determination of damages was a business and

<sup>42</sup>422 N.E.2d 1236 (Ind. 1981).

<sup>43</sup>*Id.* at 1236, (Hunter, J., dissenting).

<sup>44</sup>*Id.*

<sup>45</sup>361 Mich. 331, 105 N.W.2d 118 (1960).

<sup>46</sup>*Id.* at 334-38, 105 N.W.2d at 120-21.

<sup>47</sup>422 N.E.2d at 1239.

<sup>48</sup>*Id.* (citing *Brooks v. Robinson*, 259 Ind. 16, 284 N.E.2d 794 (1972) (doctrine of interspousal immunity abolished as based on outmoded legal theories); *Troue v. Marker*, 253 Ind. 284, 252 N.E.2d 800 (1969) (prohibition of wife's recovery for loss of consortium abrogated on basis of changes in legal and social status of women); *Perkins v. State*, 252 Ind. 549, 251 N.E.2d 30 (1969) (sovereign immunity abolished in the face of the changing role of government and development of insurance)).

<sup>49</sup>462 N.E.2d 1316 (Ind. Ct. App. 1984), *transfer denied*, Sept. 13, 1984. In this case, the deceased was a seventeen-month-old boy who had been injured when he was struck by an automobile. His father had taken him immediately to the hospital for an examination. He was shortly released with the diagnosis that he was fine. The following morning the child became unconscious and died shortly thereafter from internal bleeding. *Id.* at 1316.

<sup>50</sup>*Id.* at 1317-18.

<sup>51</sup>See *supra* notes 13-22 and accompanying text.

<sup>52</sup>See *supra* notes 23-25 and accompanying text.

<sup>53</sup>See *supra* notes 28-31 and accompanying text.

<sup>54</sup>See *supra* notes 32-41 and accompanying text.

<sup>55</sup>462 N.E.2d at 1317-18.

<sup>56</sup>*Id.* at 1318.

commercial question only.<sup>57</sup> The opinion did not, however, decide whether the extension made in *Hahn v. Moore*<sup>58</sup> was improper, leaving open the question of whether the pecuniary value of acts of kindness and affection could still be considered. Notwithstanding this ambiguity, the court very clearly held that the plaintiffs' nonpecuniary loss of love and affection could not be considered in assessing damages.<sup>59</sup> Furthermore, the court reiterated that trial courts and the Indiana Court of Appeals are obliged to follow the precedent established by the Indiana Supreme Court in *Thompson v. Town of Fort Branch*.<sup>60</sup>

The Indiana Supreme Court denied transfer of this case on September 13, 1984,<sup>61</sup> effectively perpetuating an unsatisfactory rule of law. Because of the clear statement in *Mayberry* that only the Indiana Supreme Court has the power to change this rule,<sup>62</sup> the failure of the supreme court to grant transfer and to modify or abolish the rule is a failure on the part of the court to recognize that the rule is no longer viable. Again, Justice Hunter wrote a dissenting opinion to the decision to deny transfer of the case.<sup>63</sup> By reference to his dissent in *Boland v. Greer*,<sup>64</sup> Justice Hunter reiterated his position that the rule is a "brutal and archaic law,"<sup>65</sup> and that the time has come to compensate parents for the real loss they suffer.<sup>66</sup>

### III. ABANDONMENT OF THE RULE BY OTHER JURISDICTIONS

#### A. *Solutions to Proposed Problems in the Application of a Nonpecuniary Award*

Because the pecuniary loss rule has its roots in early English law,<sup>67</sup> American precedent is also very deeply rooted.<sup>68</sup> Indeed, the very basis

<sup>57</sup>*Id.* (citing *Thompson v. Town of Fort Branch*, 204 Ind. 152, 158, 178 N.E. 440, 442 (1931)). The *Thompson* court quoted *McGarr v. National & Providence Worsted Mills*, 24 R.I. 447, 53 A. 320 (1902), where the court stated, "It is therefore practically a business and commercial question only, and the elements of affection and sentiment have no place therein." *Id.* at 460-61, 53 A. at 325-26.

<sup>58</sup>*See supra* notes 23-25 and accompanying text. While *Hahn* is often considered an original extension of the rule made since the *Thompson* case, the Indiana Supreme Court, in 1891, included "the pecuniary value of all acts of kindness and attention" in their computation of damages in *Louisville, N.A. & C. Ry. Co. v. Rush*, 127 Ind. 545, 546, 26 N.E. 1010, 1011 (1891).

<sup>59</sup>462 N.E.2d at 1319. The court chastised the lower court's attempt at advancing the state of the law in this area. Rather, it stated that a trial court, as well as an appeals court, is *obliged* to follow a supreme court opinion. *Id.*

<sup>60</sup>*Id.* at 1318 (quoting *Boland v. Greer*, 409 N.E.2d 1116, 1120 (Ind. Ct. App. 1980), *transfer denied*, July 13, 1981).

<sup>61</sup>467 N.E.2d 1208 (Ind. 1984).

<sup>62</sup>462 N.E.2d at 1319.

<sup>63</sup>467 N.E.2d at 1208 (Hunter, J., dissenting) (denial of transfer).

<sup>64</sup>*See supra* notes 43-48 and accompanying text.

<sup>65</sup>467 N.E.2d at 1209 (Hunter, J., dissenting).

<sup>66</sup>*Id.* at 1210. After this case was remanded to the trial court for a redetermination of damages, the trial judge awarded damages based on the standard in *Hahn v. Moore*, which allowed compensation for the pecuniary value of all acts of kindness and attention. *Mayberry v. Miller*, No. S582-0681 (Marion County Super. Ct., Nov. 1, 1984).

<sup>67</sup>*See, e.g.*, *Blake v. Midland Ry. Co.*, 18 Q.B. 93, 118 Eng. Rep. 35 (1852).

<sup>68</sup>*See, e.g.*, *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 30 P. 603 (1892); *Pierce v.*

of recovery for wrongful death is Lord Campbell's Act.<sup>69</sup> However, Lord Campbell's Act does not in itself restrict recovery to pecuniary loss.<sup>70</sup> Rather, shortly after its enactment, it was judicially determined that damages should be limited to those losses pecuniary in nature.<sup>71</sup> Every American jurisdiction has a wrongful death statute, each somehow patterned after Lord Campbell's Act.<sup>72</sup>

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Conners, 20 Colo. 178, 37 P. 721 (1894); Southern Ind. Ry. Co. v. Moore, 34 Ind. App. 154, 72 N.E. 479 (1904); Aaron v. Missouri & Kan. Tel. Co., 89 Kan. 186, 131 P. 582 (1913); Graffam v. Saco Grange, 112 Me. 508, 92 A. 649 (1914); Oklahoma Portland Cement Co. v. Dow, 98 Okla. 44, 224 P. 168 (1924).

<sup>69</sup>Lord Campbell's Act (Fatal Accidents Act), 1846, 9 & 10 Vict., ch. 93.

<sup>70</sup>Lord Campbell's Act, in pertinent part, provides:

§ 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 before-mentioned Parties in such Shares as the Jury by their Verdict shall find and direct. *Id.* (emphasis added).

<sup>71</sup>See *Blake v. Midland Ry. Co.*, 18 Q.B. 93, 118 Eng. Rep. 35 (1852).

<sup>72</sup>See ALA. CODE §§ 6-5-391, -410 (1975); ALASKA Stat. § 9.55.580 (1962); ARIZ. REV. STAT. ANN. § 12-611 (1982); ARK. STAT. ANN. § 27-906 (1979); CAL. CIV. PROC. CODE § 377 (West Supp. 1985); COLO. REV. STAT. § 13-21-201 (1973); CONN. GEN. STAT. ANN. § 52-555 (West Supp. 1984); DEL. CODE ANN. tit. 10, § 3722 (Supp. 1982); FLA. STAT. ANN. § 768.19 (West Supp. 1984); GA. CODE ANN. §§ 51-4-2 to -4 (Supp. 1982); HAWAII REV. STAT. § 663-3 (1976); IDAHO CODE § 5-311 (Supp. 1984); ILL. ANN. STAT. ch. 70, § 1 (Smith-Hurd 1959); IND. CODE § 34-1-1-2 (1982); IOWA CODE ANN. § 633.336 (West Supp. 1983-1984); KAN. CIV. PROC. CODE ANN. § 60-1901 (1967); KY. REV. STAT. ANN. § 411.130 (Bobbs-Merrill Supp. 1984); LA. CIV. CODE ANN. art. 2315 (West Supp. 1985); ME. REV. STAT. ANN. tit. 18-A, §2-804 (1964 & Supp. 1982-1983); MD. CTS. & JUD. PROC. CODE ANN. §§ 3-902, 3-904 (1980 & Supp. 1983); MASS. GEN. LAWS ANN. ch. 229, § 2 (West 1985); MICH. COMP. LAWS ANN. § 600.2922 (West Supp. 1984-1985); MINN. STAT. ANN. § 573.02 (West Supp. 1984); MISS. CODE ANN. § 11-7-13 (Supp. 1984); MO. ANN. STAT. § 537.080 (Vernon Supp. 1985); MONT. CODE ANN. §§ 27-1-512 to -513 (1983); NEB. REV. STAT. §§ 30-809 to -810 (1943); NEV. REV. STAT. § 41.085 (1983); N.H. REV. STAT. ANN. § 556.12 (1974); N.J. STAT. ANN. § 2A:31-1 (West 1952); N.M. STAT. ANN. §§ 41-2-1 to -4 (1978); N.Y. EST. POWERS & TRUSTS LAW § 2d § 5-4.1 to -4.6 (McKinney Supp. 1984-1985); N.C. GEN. STAT. § 28A-18-2 (1976); N.D. CENT. CODE § 32-21-01 Supp. (1983); OHIO REV. CODE ANN. §§ 2125.01-.04 (Baldwin 1982); OKLA. STAT. ANN. tit. 12, § 1053 (West Supp. 1984-1985); OR. REV. STAT. § 30.020 (1983); 42 PA. CONS. STAT. ANN. § 8301 (Purdon 1982); R.I. GEN. LAWS — § 10-7-1 (1969); S.C. CODE ANN. § 15-51-10 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 21-5-1 (Supp. 1984); TENN. CODE ANN. § 20-5-113 (1980); TEX. REV. CIV. STAT. ANN. art. 4671 (Vernon Supp. 1985); UTAH CODE ANN. §§ 78-11-6 to -7 (1953); VT. STAT. ANN. tit. 14, §§ 1491-1492 (1974 & Supp. 1982); VA. CODE §§ 8.01-50 (1984); WASH. REV. CODE ANN. § 4.20.010 (1962); W. VA. CODE § 55-7-5 (1981); WIS. STAT. ANN. § 895.03 (West 1983); WYO. STAT. § 1-38-101 (Supp. 1984).

The pecuniary loss rule was initially applied to all wrongful death actions, not just those for the wrongful death of children.<sup>73</sup> Today, however, most jurisdictions allow recovery for nonpecuniary losses, such as loss of consortium, parental guidance, society, affection, love, or protection.<sup>74</sup> Especially with the wrongful death of children, the old pecuniary loss rule has been rapidly replaced by recognition of some of these "relational" damages.<sup>75</sup>

The first decision to recognize these types of damages was *Wycko v. Gnodtke*.<sup>76</sup> The court in *Wycko* noted that the pecuniary loss rule was solely a product of the child labor era,<sup>77</sup> and that the value of a child must be based on the value of a human life and the contribution that a family member has in making the family a functioning social and economic unit.<sup>78</sup> Additionally, the court recognized that adhering to this rule today perpetuates the fiction that a minor child is a breadwinner.<sup>79</sup> Obviously, quite the contrary is true. The Indiana Supreme Court has taken note of and described the changes in attitude towards child labor that have occurred since the early nineteenth century.<sup>80</sup> Indeed, if the pecuniary loss rule were strictly applied, once the expenses for maintenance, support, schooling, and other expenses were offset against the damages, most parents would end up owing the tortfeasor.<sup>81</sup> After the *Wycko* decision<sup>82</sup> many other jurisdictions soon followed suit, either by overruling precedent or by statutory amendment.<sup>83</sup>

<sup>73</sup>See *supra* note 71.

<sup>74</sup>See, e.g., *Van Cleave v. Lynch*, 109 Utah 149, 166 P.2d 244 (1946) (society, love, companionship, protection, affection of minor child); *Denver Consol. Tramway Co. v. Riley*, 14 Colo. App. 132, 59 P. 476 (1889) (society and companionship of spouse).

<sup>75</sup>See *infra* notes 76-129 and accompanying text. Relational damages include loss of society, companionship, love, affection, and acts of kindness and attention.

<sup>76</sup>361 Mich. 331, 105 N.W.2d 118 (1960).

<sup>77</sup>*Id.* at 334-38, 105 N.W.2d at 120-21.

<sup>78</sup>*Id.* at 339, 105 N.W.2d at 122.

<sup>79</sup>*Id.* at 341, 105 N.W.2d at 123.

<sup>80</sup>The Indiana Supreme Court, in *Inland Steel Co. v. Yedinak*, 172 Ind. 423, 87 N.E. 229 (1909), noted that the frightful abuses and distressing consequences of the employment of children in mines and factories led many states to prohibit child labor and the accompanying peril to the child's health, life, and limbs, thus affording the children an opportunity to enjoy their childhood. *Id.* at 435-38, 87 N.E. at 235-36.

<sup>81</sup>See Decof, *Damages in Actions for Wrongful Death of Children*, 47 NOTRE DAME LAW. 197 (1971).

<sup>82</sup>Two years after *Wycko* was decided, the Michigan legislature apparently agreed with the court, because it amended Michigan's wrongful death statute to include recovery for the loss of companionship. See MICH. COMP. LAWS ANN. § 600.2922 (West Supp. 1984-1985).

<sup>83</sup>See ARK. STAT. ANN. § 27-909 (1979); *Boies v. Cole*, 99 Ariz. 198, 407 P.2d 917 (1965) (en banc); *Krouse v. Graham*, 19 Cal.3d 59, 137 Cal. Rptr. 863, 562 P.2d 1022 (1977) (en banc); FLA. STAT. ANN. § 768.21 (West Supp. 1984); HAWAII REV. STAT. § 663-3 (1976); *Volk v. Baldazo*, 103 Idaho 570, 651 P.2d 11 (1982); *Bullard v. Barnes*, 102 Ill.2d 505, 468 N.E.2d 1228 (1984). IOWA CODE ANN. § 633-336 (West Supp. 1983-84); KAN. STAT. ANN. § 60-1904 (1976); LA. CIV. CODE ANN. art. 2315 (West Supp. 1985); ME. REV. STAT. ANN. tit. 18-a, § 2-804 (Supp. 1982); MD. CTS. & JUD. PROC.

In general, the fifty states may be classified into three categories:<sup>84</sup> those states that adhere to a strict application of the pecuniary loss rule, where damages include only loss of expected financial contributions;<sup>85</sup> those states that adhere to a looser application of the pecuniary loss rule, where recovery can be had for the pecuniary value of the lost companionship, society, and affection;<sup>86</sup> and those states that have abrogated the pecuniary loss rule in its entirety.<sup>87</sup> The large majority of jurisdictions fall into the second and third categories. Today, only a handful of jurisdictions continue to disallow recovery for the loss of companionship or society in cases involving the wrongful death of children.<sup>88</sup> The courts that have judicially abandoned the pecuniary loss rule have rarely found it necessary to refute arguments against changing the rule.<sup>89</sup> This is because there are few, if any, viable reasons, other than *stare decisis*, for retaining the pecuniary loss rule.<sup>90</sup>

The primary obstacle that a court must overcome in dispensing with the pecuniary loss rule is the *stare decisis* principle. Many courts are unwilling to engage in what they consider a usurpation of legislative power by making a judicial pronouncement that the pecuniary loss rule is no longer viable.<sup>91</sup> The courts, however, fail to realize that they need

CODE ANN. § 3-904(d) (Supp. 1983); MASS. GEN. LAWS ANN. ch. 229, § 2 (West 1985); MICH. COMP. LAWS ANN. § 600.2922 (West Supp. 1984-1985); *Fussner v. Andert*, 261 Minn. 347, 113 N.W.2d 355 (1961); *Bouroughs v. Oliver*, 226 Miss. 609, 85 So.2d 191 (1956); MO. ANN. STAT. § 537.090 (Vernon Supp. 1985); *Sanders v. Mount Haggin Livestock Co.*, 160 Mont. 73, 500 P.2d 397 (1972); *Selders v. Armentrout*, 190 Neb. 275, 207 N.W.2d 686 (1973); *Green v. Bittner*, 85 N.J. 1, 424 A.2d 210 (1980); NEV. REV. STAT. § 41.085 (1983); N.C. GEN. STAT. § 28-174 (Supp. 1982); OKLA. STAT. ANN. tit. 12, § 1055 (West Supp. 1984-1985); OR. REV. STAT. § 30.020 (1983); *Nance v. State Bd. of Educ.*, 277 S.C. 64, 282 S.E.2d 848 (1981); *Anderson v. Lale*, 88 S.D. Ill, 216 N.W.2d 152 (1974); *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983); *Jones v. Carvell*, 641 P.2d 105 (Utah 1982); VT. STAT. ANN. tit. 14, § 1492(b) (Supp. 1982); VA. CODE § 8.01-52 (1984); WASH. REV. CODE ANN. § 424.010 (Supp. 1985); W. VA. CODE § 55-7-6 (Supp. 1984); WIS. STAT. ANN. § 895.04 (West Supp. 1984-1985); WYO. STAT. § 1-38-102 (Supp. 1984).

<sup>84</sup>See Finkelstein, Pickrel & Glasser, *The Death of Children: A Nonparametric Statistical Analysis of Compensation for Anguish*, 74 COLUM. L. REV. 884, 886-87 (1974) [hereinafter cited as Finkelstein, Pickrel & Glasser].

<sup>85</sup>See, e.g., *Miller v. Mayberry*, 462 N.E.2d 1316 (Ind. Ct. App. 1984), *transfer denied*, Sept. 13, 1984; *Keaton v. Ribbeck*, 58 Ohio St. 2d 443, 391 N.E.2d 307 (1979).

<sup>86</sup>See, e.g., *Green v. Bittner*, 85 N.J. 1, 424 A.2d 210 (1980).

<sup>87</sup>See, e.g., MD. CTS. & JUD. PROC. CODE ANN. § 3-904(d) (Supp. 1983). Maryland has one of the most expansive statutes in this area. It provides for recovery for "mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education . . ." *Id.*; see also FLA. STAT. ANN. § 768.21 (West Supp. 1984).

<sup>88</sup>See *supra* note 83. See also *Sanchez v. Schindler*, 651 S.W.2d 249, 252 (Tex. 1983) (where the court stated that thirty-five states allow recovery for loss of companionship and society).

<sup>89</sup>See *Wycko v. Gnodtke*, 361 Mich. 331, 105 N.W.2d 118 (1960).

<sup>90</sup>See *Boland v. Greer*, 422 N.E.2d 1236 (Ind. 1981) (Hunter, J., dissenting) (denial of transfer); *Wycko v. Gnodtke*, 361 Mich. 331, 105 N.W.2d 118 (1960).

<sup>91</sup>*Id.*

not necessarily don a "legislative cap" in changing this rule. Many jurisdictions still follow a pecuniary loss rule, but allow recovery for the pecuniary value of the lost companionship and affection.<sup>92</sup> This is accomplished by finding that acts of kindness, affection, and companionship have a pecuniary value to the parents and are thus compensable under the statute. Moreover, the pecuniary loss rule was initially created by judicial fiat.<sup>93</sup> Consequently, there should be no bar to a court reevaluating the rule once it has become apparent that the basis for the rule no longer exists.

In addition to the stare decisis argument, it has been argued that sympathetic juries will award excessive and inconsistent verdicts.<sup>94</sup> However, in a statistical study made on the question of amount and consistency of damages, it was found that in states which limited damages to pecuniary losses, the median award was \$28,845.<sup>95</sup> Where recovery for items such as loss of society or companionship was specifically allowed, the median award was \$44,060.<sup>96</sup> This increase is to be expected because more items of loss are to be considered in the latter.<sup>97</sup> The study also found that there was actually less variation in awards in expanded recovery states than in the pecuniary loss states,<sup>98</sup> thereby refuting the contention that allowing nonpecuniary damages would result in greater inconsistency.

One reason given for greater inconsistency among pecuniary loss cases is that judges very often apply the pecuniary loss rule inconsistently. Sometimes a strict application will be required, and other times the judge will only "wink" at the rule and allow an instruction contradicting it.<sup>99</sup> This intermittent application of the rule results in a wide discrepancy among verdicts.<sup>100</sup>

Inconsistent verdicts are also the result of the basic conflict between the pecuniary loss rule and current notions of fair compensation.<sup>101</sup> One court even noted that juries often attempt to do some kind of justice despite the judges' charge, so they place an unrealistically high value on household chores.<sup>102</sup> The goal of greater uniformity would be promoted by removing the conflict between the law and human impulse.<sup>103</sup>

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<sup>92</sup>See, e.g., *Green v. Bittner*, 85 N.J. 1, 424 A.2d 210 (1980).

<sup>93</sup>See *Blake v. Midland Ry. Co.*, 18 Q.B. 93, 118 Eng. Rep. 35 (1852). See *supra* note 71 and accompanying text.

<sup>94</sup>See *Fussner v. Andert*, 261 Minn. 347, 113 N.W.2d 355 (1961) (fear of excessive jury verdicts argued by defendant).

<sup>95</sup>Finkelstein, Pickrel & Glasser, *supra* note 84, at 887.

<sup>96</sup>*Id.*

<sup>97</sup>*Id.*

<sup>98</sup>*Id.* at 892.

<sup>99</sup>*Id.*

<sup>100</sup>See 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 (1979).

<sup>101</sup>Finkelstein, Pickrel & Glasser, *supra* note 84, at 891.

<sup>102</sup>*Green v. Bittner*, 85 N.J. 1, 19, 424 A.2d 210, 219 (1980).

<sup>103</sup>Finkelstein, Pickrel & Glasser, *supra* note 84, at 891. See, e.g., *Compania Dominicana de Aviacion v. Knapp*, 251 So.2d 18 (Fla. Dist. Ct. App.), *cert. denied*, 256 So. 2d 6 (Fla. 1971) (where \$1,800,000.00 was awarded to the parents of a fifteen-year-old boy who was killed when an airplane crashed into the garage of their home).

In order to combat the problem of excessive verdicts, the authors of the statistical study advocate placing a ceiling on the amount recoverable for emotional injury.<sup>104</sup> This permits recovery for the loss of companionship and other relational injuries, while eliminating the threat of runaway verdicts.<sup>105</sup>

Some courts have made the argument that the damages awarded for the wrongful death of children must be limited to pecuniary losses because damages for lost love, affection, and society of the child are only speculative, and that no amount could truly compensate the plaintiffs for their loss.<sup>106</sup> This argument breaks down, however, when one considers that courts are constantly redressing emotional and physical injuries in terms of monetary awards. Loss of spousal consortium, emotional pain and suffering, the loss of a limb, and decreased enjoyment of life are all losses for which one cannot truly be compensated in monetary terms. The Indiana courts in particular have acknowledged that the value of a child's life is "incapable of admeasurement by any mathematical or exact rule, and the amount must be fixed by estimate, which bears some semblance to conjecture."<sup>107</sup> However, compensation to the parent of a deceased child for a nonpecuniary loss is no more conjectural than compensation for other types of physical or emotional injuries.<sup>108</sup>

### B. Two Recent Approaches

Two recent cases in other jurisdictions, *Bullard v. Barnes*<sup>109</sup> and *Sanchez v. Schindler*,<sup>110</sup> have taken different approaches to alleviating the harshness of the pecuniary loss rule. Both approaches are typical of the recent trend.

In *Bullard*, the trial court's instruction allowed the jury to consider the pecuniary value of "the parents' loss of society with the decedent."<sup>111</sup> The appellate court considered this instruction in light of the fact that of the twenty-three jurisdictions which limit recovery to pecuniary losses, fourteen of those jurisdictions allow parental recovery for the loss of society of the child.<sup>112</sup> The appellate court found that the term "pecuniary

<sup>104</sup>*Id.*

<sup>105</sup>Finkelstein, Pickrel & Glasser, *supra* note 84, at 891.

<sup>106</sup>*See, e.g.*, *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977); *Kennedy v. Byers*, 107 Ohio St. 90, 140 N.E. 630 (1923); *Koskela v. Martin*, 91 Ill. App. 3d 568, 414 N.E.2d 1148 (1980).

<sup>107</sup>*Thompson v. Town of Fort Branch*, 204 Ind. 152, 162, 178 N.E. 440, 444 (1931) (quoting *American Motor Car Co. v. Robbins*, 181 Ind. 417, 422, 103 N.E. 641, 642 (1914)). 642 (1914)).

<sup>108</sup>*See, e.g.*, *Weitl v. Moes*, 311 N.W.2d 259 (Iowa 1981); *Berger v. Weber*, 411 Mich. 1, 303 N.W.2d 424 (1981).

<sup>109</sup>468 N.E.2d 1228 (Ill. 1984).

<sup>110</sup>651 S.W.2d 249 (Tex. 1983).

<sup>111</sup>468 N.E.2d at 1231. With the *Bullard* decision, Illinois is now one of fifteen jurisdictions which allow parental recovery for loss of society of the child when the statute specifies that the loss must be pecuniary.

<sup>112</sup>*Id.* at 1232.

injuries” had received an interpretation that was broad enough to encompass the loss of a child’s society.<sup>113</sup> The court rejected the argument that the legislature was the proper body to decide the question, finding that previous decisions had extended the meaning of the term pecuniary enough so that it would be anomalous to require the legislature’s approval.<sup>114</sup> The fact that spouses and children could recover these non-pecuniary losses was further authority that the court did not need legislative approval.<sup>115</sup>

One caveat to this approach is that the court required a set-off of child rearing expenses in arriving at a verdict.<sup>116</sup> This approach is not novel,<sup>117</sup> but it does illustrate an attempt to assess more accurately the damages suffered by parents.<sup>118</sup>

In *Sanchez v. Schindler*,<sup>119</sup> the court dealt with a Texas wrongful death statute limiting recovery to “actual damages.”<sup>120</sup> Furthermore, the jury could award such damages as they thought proportionate to the injuries.<sup>121</sup> Prior to *Sanchez*, damages in child death cases had been judicially limited to pecuniary losses.<sup>122</sup>

In holding that parents could now recover for loss of their child’s society and companionship, the *Sanchez* court overruled one hundred years of precedent.<sup>123</sup> In its decision, the court noted that a true application of the pecuniary loss rule might well reward the tortfeasor and that the rule had developed during an era when children were economic assets.<sup>124</sup> Additionally, the court previously had held that injuries to the familial relationship were compensable in a suit for loss of spousal consortium.<sup>125</sup> The *Sanchez* court reasoned that the plaintiffs’ claim to

<sup>113</sup>*Id.* See also *Elliott v. Willis*, 92 Ill. 2d 530, 442 N.E.2d 163 (1982) (where the court held, based on a broad definition of pecuniary injury, that a widowed spouse had the right to recover damages for loss of consortium under the wrongful death act).

<sup>114</sup>468 N.E.2d at 1233.

<sup>115</sup>*Id.* at 1234.

<sup>116</sup>*Id.* at 1234-35.

<sup>117</sup>See, e.g., *Fuentes v. Tucker*, 31 Cal. 2d 1, 9, 187 P.2d 752, 757 (1947); *Haumersen v. Ford Motor Co.*, 257 N.W.2d 7, 17 (Iowa 1977); *Sellnow v. Fahey*, 305 Minn. 375, 382-83, 233 N.W.2d 563, 568 (1975). See also Comment, *Damages in Wrongful Death and Survival Actions*, 29 OHIO ST. L.J. 420, 447 (1968). Cf. *Jones v. Hildebrant*, 191 Colo. 1, 3 n.1, 550 P.2d 339, 341 n.1 (1976); *Sinn v. Burd*, 486 Pa. 146, 151-52 n.3, 404 A.2d 672, 675 n.3 (1979) (jurisdictions where child rearing expenses must be deducted from the award, but where no recovery for loss of society may be awarded).

<sup>118</sup>See Comment, *Damages in Wrongful Death and Survival Actions*, 29 OHIO ST. L.J. 420, 447 (1968).

<sup>119</sup>651 S.W.2d 249 (Tex. 1983).

<sup>120</sup>TEX. REV. CIV. STAT. ANN. art. 4671 (Vernon Supp. 1985). This statute creates a cause of action for “actual damages on account of the injuries causing the death. . . .” *Id.*

<sup>121</sup>*Id.* at art. 4677. This statute provides that “[t]he jury may give such damages as they may think proportionate to the injury resulting from such death.” *Id.*

<sup>122</sup>See, e.g., *Houston & T. C. Ry. v. Cowser*, 57 Tex. 293, 303 (1881).

<sup>123</sup>651 S.W.2d at 251.

<sup>124</sup>*Id.*

<sup>125</sup>See *Whittlesey v. Miller*, 572 S.W.2d 665, 668 (Tex. 1978).

damages for the loss of their child's society was closely analogous to a spouse's claim to damages for loss of spousal society; thus, it would be illogical to allow one and preclude the other. The court also pointed out that twenty-one states statutorily recognize recovery for loss of society and companionship<sup>126</sup> and that fourteen more states interpret their statutes requiring pecuniary loss to include loss of society.<sup>127</sup> Additionally, the court noted that the judiciary traditionally had been the "lawmaker" in the area of tort law.<sup>128</sup> Moreover, the *Sanchez* court extended the recovery of parents to include definition of "actual damages" for mental anguish suffered by the parents.<sup>129</sup> The *Sanchez* court was very clear in its position that the pecuniary loss rule should no longer stand as an obstacle to parents who suffer a tremendous loss upon the death of their minor child.

#### IV. ANALOGOUS TORT SITUATIONS WHERE "RELATIONAL" DAMAGES ARE AWARDED

##### A. Recovery by Children for Loss of Parental Society

The first court to recognize that children have a cause of action for the loss of parental society was the Massachusetts Supreme Court in *Ferriter v. Daniel O'Connell's Sons, Inc.*,<sup>130</sup> decided in 1980. The *Ferriter* court ruled that if emotional dependency upon the parent can be demonstrated, then the child can collect damages for the loss of that parent's society.<sup>131</sup> Interestingly, Massachusetts had already recognized a cause of action to recover nonpecuniary damages for the death of a child. The court therefore drew an analogy between recovery for the death of a parent and recovery for the death of a child, and said that if the parental interest received judicial protection,<sup>132</sup> similar protection should be afforded to children when they suffer the loss of a parent.<sup>133</sup>

Prior to the *Ferriter* case, courts had been reluctant to recognize the rights of children for the loss of a parent. The first right granted to children was the right to shelter, food, clothing, schooling, and moral support and guidance from their father.<sup>134</sup> Because the loss of consortium action in both spousal consortium and children's consortium cases arose

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<sup>126</sup>651 S.W.2d at 252-53. See *supra* note 83.

<sup>127</sup>*Id.* Fifteen jurisdictions now interpret their statutes to allow loss of society after the *Bullard* decision.

<sup>128</sup>651 S.W.2d at 252.

<sup>129</sup>*Id.* at 253.

<sup>130</sup>413 N.E.2d 690 (Mass. 1980).

<sup>131</sup>*Id.* at 696.

<sup>132</sup>In Massachusetts, parents may recover for the loss of their child's society, love, and affection if their child is wrongfully killed. MASS. GEN. LAWS ANN. ch. 229, § 1 (West 1985).

<sup>133</sup>413 N.E.2d at 693.

<sup>134</sup>*Daily v. Parker*, 152 F.2d 174, 177 (7th Cir. 1945).

out of a property right, it was commonly thought that children did not have a right to parental consortium because children did not have a property right in their parents.<sup>135</sup> In recent years, however, most states have generally recognized greater protection of children's rights.<sup>136</sup> While actual judicial protection was not afforded to children until 1980 in *Ferriter*, many courts and other authorities have expressed the desire to compensate children for the very real loss suffered when a parent dies. For example, in *Hill v. Sibley Memorial Hospital*,<sup>137</sup> the court recognized that "natural justice" supported recognition of this cause of action.<sup>138</sup> Additionally, one authority has stated that while items such as the loss of training, nurture, education, and guidance "are not, perhaps, strictly pecuniary, their allowance seems fully justified even under a functional view of damages, since this is the kind of loss for which money can supply some sort of a practical substitute."<sup>139</sup>

Following *Ferriter*, the Michigan Supreme Court in *Berger v. Weber*<sup>140</sup> said that to deny the nonpecuniary loss of parental consortium on the ground of intangibility would create unreasonable disparities in the way the law treats damage recovery in general.<sup>141</sup> Tort law is a means of providing compensation for many intangible injuries, including pain and suffering.<sup>142</sup> Consequently, the loss of society, love, and affection that a parent suffers upon the death of a child is no more inappropriate for tort law to redress than any other intangible injury.

Recognition of the loss of parental consortium as a cause of action follows the trend of greater protection of family interests and is directly related to the collateral issue of recognizing a recovery by the parents for the same types of losses. Generally, the same arguments that have been made in opposition to recognition of a compensable loss of parental society have also been made in opposition to the recognition of a compensable loss of children's society.<sup>143</sup> In *Koskela v. Martin*,<sup>144</sup> the court considered seven of the most common arguments against recognizing the loss of parental consortium and decided that they precluded recovery. These arguments are: determination of whether a child can maintain such an action should be left to the legislature;<sup>145</sup> sound precedent is

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<sup>135</sup>3 W. BLACKSTONE, COMMENTARIES \*142.

<sup>136</sup>See, e.g., IND. CODE § 31-6-1-1 (1982) (which expresses the broad purposes behind the Indiana Juvenile Code); IND. CODE § 31-6-4-3 (Supp. 1984) (which protects children from their parents' neglect or abuse).

<sup>137</sup>108 F.Supp. 739 (D.D.C. 1952).

<sup>138</sup>*Id.* at 741. See also *Hoffman v. Dautel*, 189 Kan. 165, 368 P.2d 57 (1962).

<sup>139</sup>F. HARPER & F. JAMES, TORTS § 25.14, at 1331 (1956) (emphasis in original).

<sup>140</sup>411 Mich. 1, 303 N.W.2d 424 (1981).

<sup>141</sup>*Id.* at 16, 303 N.W.2d at 435.

<sup>142</sup>See *supra* notes 106-08 and accompanying text.

<sup>143</sup>See *Koskela v. Martin*, 91 Ill. App. 3d 568, 414 N.E.2d 1148 (1980); *Weitl v. Moes*, 311 N.W.2d 259 (Iowa 1981).

<sup>144</sup>91 Ill. App. 3d 568, 414 N.E.2d 1148 (1980).

<sup>145</sup>*Id.* at 571, 414 N.E.2d at 1151.

lacking;<sup>146</sup> intangible nature of the loss makes pecuniary valuation difficult;<sup>147</sup> double recovery is a possibility;<sup>148</sup> recognition of this cause of action could result in increased litigation and multiple claims;<sup>149</sup> defendants' liability would be greatly expanded;<sup>150</sup> and damages based on the loss of consortium historically relate to impairment of the sexual life of a married couple and thus are not an element of damages in a child's claim.<sup>151</sup>

In *Weitl v. Moes*,<sup>152</sup> the Iowa Supreme Court did not find that these arguments precluded recovery of parental consortium. The decision was based on the premise that most of these arguments carried no greater weight in relation to a child's claim than they would in a parental or spousal claim.<sup>153</sup> The court noted that loss of consortium is a creation of the common law, not of the legislature, and thus is within the court's sphere of authority.<sup>154</sup> Also, the court recognized that while it may be possible to distinguish a spousal consortium claim from a child's claim of loss of consortium,<sup>155</sup> it is nevertheless difficult to find any legal distinction between a child's claim for loss of parental consortium and a parent's claim for loss of a child's consortium.<sup>156</sup> Indeed, the court even stated that if the applicable statute prohibits the bringing of this action by the children,<sup>157</sup> it must necessarily prohibit the bringing of the action on behalf of a spouse.<sup>158</sup> This same point may be made collaterally — that if it prohibits a *parent's* action, it must also prohibit a spouse's action, which is clearly not the case.

There are some issues in recognizing parental consortium as a compensable loss that are not applicable in the cases dealing with loss of children's society.<sup>159</sup> For the most part, however, courts that have allowed damages to children for the nonpecuniary loss of parental society have encountered the same arguments which were presented when courts began

<sup>146</sup>*Id.*

<sup>147</sup>*Id.*

<sup>148</sup>*Id.*

<sup>149</sup>*Id.* at 572, 414 N.E.2d at 1151.

<sup>150</sup>*Id.*, 414 N.E.2d at 1151.

<sup>151</sup>*Id.* See also Comment, *A Minor Child's Claim for Lost Parental Society and Companionship in Illinois: Another Look*, 17 J. MAR. 113, 128-36 (1984) (a more thorough discussion of each of the listed issues).

<sup>152</sup>311 N.W.2d 259 (Iowa 1981).

<sup>153</sup>*Id.* at 266.

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

<sup>155</sup>*Id.* at 265 (citing *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 448, 563 P.2d 858, 863, 138 Cal. Rptr. 302, 307 (1977)).

<sup>156</sup>311 N.W.2d at 265 (citing *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 444, 563 P.2d 858, 860, 138 Cal. Rptr. 302, 307 (1977)).

<sup>157</sup>See IOWA CODE ANN. § 613.15 (West Supp. 1984).

<sup>158</sup>311 N.W.2d at 263.

<sup>159</sup>For example, concerns over multiple litigation, joinder of parties, and the fact that children have no property interest in their parents are generally not applicable in cases where parents are attempting to recover for the lost affection, kindness, and society of their children who have been wrongfully killed.

recognizing the nonpecuniary loss of a child's society to his parent. Most courts have been unpersuaded by these arguments against the recognition of nonpecuniary losses.<sup>160</sup>

### B. Recovery by Spouses for Loss of Spousal Consortium

Recovery for the loss of spousal consortium is one of the oldest manifestations of the recognition of nonpecuniary loss that can be suffered by a person.<sup>161</sup> Recovery was first awarded only to husbands, but more recently wives have also recovered for loss of spousal consortium.<sup>162</sup> The husband's loss of the pecuniary value of his wife's services, which could be quantified, and the value of her company and affection, which was much more intangible, became known as loss of consortium.<sup>163</sup> While there is some basis for asserting that the loss of spousal consortium is a property right, the more reasoned conclusion is that the compensation is based upon the spouse's interest in the marital relationship.<sup>164</sup> Although recovery in loss of spousal consortium actions was initially limited to pecuniary losses, most courts have extended that to include loss of love, companionship, and affection.<sup>165</sup> Nearly every state recognizes the right of a spouse to recover damages for the injury to the marital relationship occasioned by the negligence of another.<sup>166</sup> For example, in *Hitafter v. Argonne Co.*,<sup>167</sup> the court adopted a statement by Prosser that the "loss of 'services' is an outworn fiction."<sup>168</sup> This statement is similar to that of the many courts that have echoed the same thought in dispensing with the pecuniary loss rule in child death cases.

Today, it is not necessary to prove a pecuniary loss of services in actions for loss of spousal consortium, because services are no longer the basis of the action, but are merely one element of the damages.<sup>169</sup>

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<sup>160</sup>See, e.g., *Weitl v. Moes*, 311 N.W.2d 259 (Iowa 1981); *Ferriter v. Daniel O'Connell's Sons, Inc.*, 413 N.E.2d 690 (Mass. 1980); *Berger v. Weber*, 411 Mich. 1, 303 N.W.2d 424 (1981).

<sup>161</sup>For a general discussion of loss of spousal consortium as a compensable injury, see H. CLARK, *THE LAW OF DOMESTIC RELATIONS* § 10.1 (1968).

<sup>162</sup>See *Hitafter v. Argonne Co.*, 183 F.2d 811 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 852 (1950) (where the court finally also gave the wife a right to recover for the loss of her husband's consortium when he was negligently injured or killed).

<sup>163</sup>For a general overview of this area, see Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923); Comment, *Negligent Injury to Family Relationships: A Reevaluation of the Logic of Liability*, 77 NW. U.L. REV. 794 (1983).

<sup>164</sup>See Comment, *Negligent Injury to Family Relationships: A Reevaluation of the Logic of Liability*, 77 NW. U. L. REV., 794, 798 (1983).

<sup>165</sup>See, e.g., *Selleck v. City of Janesville*, 104 Wis. 570, 576-79, 80 N.W. 944, 946-47 (1899) (husband's recovery not limited to the fair market value of wife's companionship and counsel); *Denver Consol. Tramway Co. v. Riley*, 14 Colo. App. 132, 140, 59 P. 476, 478-79 (1899) (husband entitled to recover for the loss of wife's society and companionship).

<sup>166</sup>Louisiana does not allow either spouse to recover for loss of consortium. See *Johnston v. Fidelity Nat'l Bank of Baton Rouge*, 152 So.2d 327 (La. Ct. App. 1963).

<sup>167</sup>183 F.2d 811 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 852 (1950).

<sup>168</sup>*Id.* at 818 (citing W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 948 (1941)).

<sup>169</sup>See *Adams v. Main*, 3 Ind. App. 232, 234-35, 29 N.E. 792, 793 (1892).

This is precisely the point that has been raised by many courts in dispensing with the pecuniary loss rule as it relates to recovery by parents for the loss of their child's society.<sup>170</sup> Because the pecuniary value of the child's services is no longer the basis for their award in any practical sense, recovery should be had for the *true* losses: the loss of the child's society, companionship, and love.

Some courts have accepted the analogy between spousal consortium actions and actions for the recovery of the loss of a child's society, while others have not.<sup>171</sup> In *Keaton v. Ribbeck*,<sup>172</sup> the court declared the analogy to be inaccurate, and summarily dispensed with it without further discussion.<sup>173</sup> Other courts (the *Boland v. Greer*<sup>174</sup> court, for example) have held that the marriage relationship is significantly different from the relationship between parents and children, primarily because of the element of damages which compensates for the loss of a sexual relationship between husband and wife.<sup>175</sup> This argument, however, ignores the fact that compensation in suits for recovery of the loss of *parental* society includes such items as loss of training, guidance, nurture, education, protection, and advice. These items comprise the bulk of the recovery by children for the loss of their parents' society, yet are not part of the loss of society for which parents claim compensation. Even so, most jurisdictions that recognize a cause of action for nonpecuniary losses of children feel that they must also, then, recognize the nonpecuniary losses claimed by parents.<sup>176</sup> Indeed, more than one jurisdiction has noted that there is no basis for distinguishing between claims made by parents and those made by children.<sup>177</sup> If such were the case, it would logically follow that there is no substantive distinction between the recognition of spousal consortium and the loss of society claimed by parents or children.

### C. Recover by Parents for Loss of Society of Their Unborn Fetus

The recognition that parents of an unborn child may bring an action under their state's wrongful death statute is relatively new.<sup>178</sup> A split of

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<sup>170</sup>See, e.g., *Boland v. Greer*, 422 N.E.2d 1236 (Ind. 1981) (Hunter, J., dissenting) (denial of transfer); *Wycko v. Gnodtke*, 361 Mich. 331, 105 N.W.2d 118 (1960); *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983).

<sup>171</sup>Compare *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983) with *Boland v. Greer*, 409 N.E.2d 1116 (Ind. Ct. App. 1980), *transfer denied*, July 13, 1981, and *Keaton v. Ribbeck*, 391 N.E.2d 307 (Ohio 1979).

<sup>172</sup>391 N.E.2d 307 (1979).

<sup>173</sup>*Id.* at 308-09.

<sup>174</sup>409 N.E.2d 1116 (Ind. Ct. App. 1980), *transfer denied*, July 13, 1981.

<sup>175</sup>*Id.* at 1120.

<sup>176</sup>See, e.g., *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983).

<sup>177</sup>See *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Repr. 302 (1977); *Weil v. Moes*, 311 N.W.2d 259 (Iowa 1981); *Green v. Bittner*, 85 N.J. 1, 424 A.2d 210 (1980).

<sup>178</sup>The first court to find a cause of action on behalf of a fetus was *Verkennes v. Corniea*, 229 Minn. 365, 38 N.W.2d 838 (1949).

authority exists as to whether unborn children are or should be covered under a state's wrongful death statute.<sup>179</sup> Of those states that do recognize a cause of action on behalf of the unborn fetus, the measure of damages varies tremendously based on the wording of the statute, and, more specifically, based upon the use of the pecuniary loss rule.

In *Dunn v. Rose Way, Inc.*,<sup>180</sup> a father brought an action for the death of his unborn child, his wife, and his two-year-old daughter.<sup>181</sup> He claimed damages for the deprivation of the unborn child's companionship, society and services.<sup>182</sup> The Iowa Supreme Court decided that a cause of action did exist for the death of the fetus under the Iowa Rules of Civil Procedure,<sup>183</sup> and that the damages were to be for the father's deprivation of anticipated services, companionship, and society of the minor child.<sup>184</sup> The court thus awarded the full amount of damages that the father would have been entitled to had the child been born, thus recognizing the loss suffered by parents when they lose a child *in utero*.

Not all courts have been so liberal in the assessment of damages, however. In *Pehrson v. Kistner*,<sup>185</sup> the Minnesota Supreme Court ruled that the plaintiffs could only recover the full amount of their pecuniary loss resulting from the wrongful death of their unborn child,<sup>186</sup> though the court noted that trying to compensate for the death of a child might be an arbitrary attempt at a difficult, if not impossible, task.<sup>187</sup>

In *Britt v. Sears*,<sup>188</sup> the Indiana Court of Appeals determined that a cause of action for the wrongful death of a fetus did exist. The court did not hesitate to change the law, even in the absence of a legislative mandate. The court reasoned that the legislature adopted the wrongful death statute at a time when medicine did not foresee the ability to administer to fetuses. Consequently, the court was only engaging in what the legislature would have done, had it foreseen the advances in medical science.<sup>189</sup>

Similarly, the pecuniary loss rule developed at a time when economic loss to the parents was a genuine loss. The legislature did not foresee

<sup>179</sup>Twenty-six jurisdictions have expressly allowed it, and sixteen continue to disallow it. Annot., 15 A.L.R.3d 992 (1967 & Supp. 1984).

<sup>180</sup>333 N.W.2d 830 (Iowa 1983).

<sup>181</sup>*Id.* at 831.

<sup>182</sup>*Id.*

<sup>183</sup>*Id.* at 832-34. Parents may sue for loss of services, companionship, and society resulting from the death of their minor child. IOWA R. CIV. P. 8.

<sup>184</sup>333 N.W.2d at 833.

<sup>185</sup>222 N.W.2d 334 (Minn. 1974).

<sup>186</sup>*Id.* at 336.

<sup>187</sup>*Id.* at 337. See also *O'Neill v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971). But see *Panagopoulous v. Martin*, 295 F.Supp. 220 (D.C. W.Va. 1969) (where the court held that in the absence of proof of loss of economic benefits, parents could still recover for sorrow, distress, and bereavement).

<sup>188</sup>150 Ind. App. 487, 277 N.E.2d 20 (1971), *transfer denied*, Sept. 19, 1972.

<sup>189</sup>*Id.* at 494, 277 N.E.2d at 24-25.

a time when substantial pecuniary losses would be unheard of as in today's society. Consequently, the Indiana Supreme Court should not be hesitant to change a law which no longer has any application in modern society.

#### V. CONCLUSION

The pecuniary loss rule developed at a time when it was responsive to the needs of society. Life has changed, however, and the law must be malleable and flexible enough to change with it; otherwise, our legal system will not be able to meet the needs of society.

In *Britt v. Sears*, the Indiana Court of Appeals was faced with the decision of whether to adopt the majority position in favor of recognizing a cause of action for the wrongful death of a fetus. The court stated that the decisions of the majority were impressive, but not decisive.<sup>190</sup> The court must evidently still adhere to this statement, because it continues to align itself with a shrinking minority even in light of dissatisfaction with the rule by legal commentators, other members of the legal profession, and members of the court itself. The use of a standard which is so inequitable in its application necessitates that the Indiana Supreme Court review and discard the obsolete pecuniary loss rule.

LORI A. TORRES

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<sup>190</sup>*Britt v. Sears*, 150 Ind. App. 487, 490, 277 N.E.2d 20, 22 (1971), *transfer denied*, Sept. 19, 1972.

