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appendix than a citizen; rather, they present a compromise between those who would allow all terminations and those who would permit none.

WRONGFUL DEATH OF A MINOR CHILD: THE CHANGING PARENTAL INJURY

In Washington, an action may be brought by a parent for the wrongful death of a child along either 1 of two statutory avenues. 2 The general wrongful death statute creates a right of action in the decedent's personal representative for the benefit of parents who may be dependent upon the deceased for support. 3 Under the so-called "child-

1 Election of remedies problems created by the overlapping statutes are treated briefly in Comment, Damages in Washington Wrongful Death Actions, 35 WASH. L. REV. 441, 443 (1960).
3 Under early Anglo Saxon law the "wergild" system of monetary awards allowed recovery by parties affected by the death of another: his King, lord, and next of kin. The system functioned primarily however in a punitive fashion and disappeared with the development of criminal process. (See 1 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 52 (1895). This qualification aside, there was at common law no action for wrongful death. Hedrick v. Ilwaco R. & Nav. Co., 4 Wash. 400, 30 P. 714 (1892). Recovery is therefore exclusively by statute in all jurisdictions except, perhaps, Hawaii. "Wrongful death" and "survival" statutes enacted in various jurisdictions differ with respect both to parties entitled to maintain the action and measure of damage. "Survival" statutes preserve the cause of action the deceased himself could have maintained had he lived. See WASH. REV. CODE § 4.20.060 (1965) for Washington's survival statute. WASH. REV. CODE § 4.20.010, .020 provide for "true" wrongful death recovery. Patterned basically after Lord Campbell's Act (Fatal Accidents Act, 9 & 10 Vict. c. 93 (1846)), these provisions do not merely prevent termination of the decedent's claim; they create an action for "wrongful death" in named statutory beneficiaries. Although some jurisdictions allow recovery by the decedent's estate for its losses, Washington has no such "estate" statute.
4 In Washington, the general wrongful death statute provides:
   WASH. REV. CODE § 4.20.010—Right of Action. When the death of a person is caused by the wrongful act, neglect or default of another his personal representative may maintain an action for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony.
   WASH. REV. CODE § 4.20.020—Beneficiaries of Action. Every such action shall be for the benefit of the wife, husband, child or children or the person whose death shall have so been caused. If there be no wife or husband or child or children, such action may be maintained for the benefit of the parents, sisters, or minor brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his death.
In every such action the jury may give such damages as, under all circumstances of the case, may to them seem just.
"Dependent" has been construed to mean "substantial," though not total, dependence. See note 37 infra.
death” statute, an action may be maintained directly by a parent. No requirement of dependency obtains where the deceased was a minor.

Because the child-death statute contained, until recently amended, no measure of damages provision, courts might arguably have instructed juries to assess damages under the child-death statute in accord with the general statute’s “just... under all the circumstances” provision. However, the supreme court developed a more restrictive measure: “the value of services lost, less the cost of support and maintenance.” Lost services were evaluated on a “pecuniary loss” standard.

Honest application of a pecuniary standard does not, in today’s

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4 Prior to amendment, WASH. REV. CODE § 4.24.010 (1965), creating a right of action for injury or death of a child, provided:

A father, or in case of his death or desertion of his family, the mother may maintain an action as plaintiff for the injury or death of a minor child, or a child on whom either is dependent for support, and the mother for the injury or death of an illegitimate minor child, or an illegitimate child on whom she is dependent for support.

The text of the statute, as amended, is reprinted in note 17 infra.

5 Ch. 81, Wash. Laws Ex. Sess. 1967. As an initial proposition the problem should have been one appropriate for legislative concern. In Skeels v. Davidson, 18 Wn. 2d 358, 367, 139 P.2d 301, 305 (1943), the court expressed its dissatisfaction with the provision:

There is, perhaps, no other phase of the law of damages which is in so unsatisfactory a state as that concerned with the rule governing damages for the wrongful death of a child, under a statute such as our own which creates the right of action, but prescribes no measure of recovery.

6 See note 3 supra. At least one early case indicates that the court recognized a “fair and just” measure for determining damages under the child-death statute as well as under the general provision. Kranzusch v. Trustee Co., 93 Wash. 629, 634, 161 P. 492 (1916). Mr. John J. Kennett, in his address before Washington NACCA’s 1964 Seminar, suggests that the two statutes are in pari materia and that the general statute’s “damages as seem just” guidelines should have controlled in application of the child-death statute as well. Proceedings, NACCA of Washington Seminar, Pre-trial Discovery, Procedures and Problems—Elements of Damage—Wrongful Death Actions, Abatement Survival and Revival of Actions in Washington 194, 206 (Feb. 1964).

7 Hedrick v. Ilwaco R. & N. Co., 4 Wash. 400, 30 P. 714 (1892) apparently is the leading case.

8 Statutes in several jurisdictions, though not in Washington, insert the word “pecuniary” before the word “injury.” (See note 9 infra.) In Washington, early case law development apparently assumed that a restrictive “pecuniary” standard was implied. There is no apparent reason why “services” should not include acts of kindness and affection around the house and the more tangible nursing and baby-sitting functions. See Spokane P. & S.R. Co. v. Cole, 54 F.2d 318 (9th Cir. 1931). Nevertheless, courts generally equated the “value of services” with lost earnings and pecuniary contribution. Hedrick v. Ilwaco R. & N. Co., 4 Wash. 400, 30 P. 714 (1892), did not mention a “pecuniary” basis for evaluating services, but two years later Atrops v. Costello, 8 Wash. 149, 35 P. 620 (1894) assumed such a standard and first employed the term. Perhaps the problem was due largely to a confusion between “compensatory damages” and the conceptually more narrow “pecuniary damages.” Apparently the courts assumed that any damages other than pecuniary losses sustained were “punitive.” See, e.g., Skidmore v. Seattle, 138 Wash. 340, 343, 244 P. 545, 547 (1926):

We, of course, must recognize that the father cannot recover more than his actual pecuniary loss, since the doctrine of punitive damages has been repudiated by this court in its repeated decisions.
world, allow adequate recovery for child-death. The cost-accounting technique for measuring damages—value of services less cost of support—is archaic in a society which is not structured on child labor and the family chore framework of an agricultural community. The careless driver today usually does the parent of a deceased minor an economic favor.

Without the aid of legislation defining elements of recovery, the judiciary have long allowed substantial recoveries in practical derogation of the archaic pecuniary loss standard. In Washington, as in most jurisdictions, recognition of the inadequacy of a pecuniary standard was early reflected in relaxed proof requirements. It has long been unnecessary to introduce specific evidence of pecuniary loss. The jury has been allowed to consider the age, health and capacity of the child and the situation of the parent in order to form an estimate of pecuniary loss. By assuming that wrongful death statutes contemplate recovery of substantial damages by parents of a deceased minor, the courts justified relaxed evidence requirements as necessary to avoid frustration of legislative intent.

In jurisdictions required by statute to assess damages for "pecuniary injury" only, (see e.g., Mich. Stat. Ann. § 27A. 2922 (1948)), strained constructions are required to allow recovery for loss of companionship. These jurisdictions have not abandoned the "pecuniary" standard, but have found companionship to be a pecuniary loss, arguing that a monetary or market value can be placed on society and acts of kindness. See, e.g., Wycko v. Gnodtke, 361 Mich. 331, 105 N.W.2d 118 (1960), for a unique attempt to approach directly the problem of setting a "pecuniary" value on a child's life as part of a functioning family unit. The value of a machine to a manufacturing plant is the cost of replacement (or fair market value) plus the value of profits lost for a period of its discontinued operation. The cost of replacement of a child, like the cost of raising a bull or other organic asset to a given age, is the value of inputs: food, clothing, shelter, training. The value of profits lost is the net of services and companionship less cost of continued support. Hence, under this view, the value of a child is the sum of cost of replacement (food, clothing, training) and lost return on this investment (net value of services, if a positive sum, and companionship).


There is in many jurisdictions, though not in Washington, a presumption that parents sustain a pecuniary loss. See Annot., 14 A.L.R.2d 485 at 514-515 (1950).

See, e.g., Atrops v. Costello, 8 Wash. 149, 154, 35 P. 620, 621 (1894).


That substantial recoveries can no longer be justified on a fictional\textsuperscript{15} value of services minus cost of support standard has been recently recognized in Washington by both legislative and judicial action. Judicial remedy came first with the decision in \textit{Lockhart v. Besel}\textsuperscript{16} which redefined the measure of damages to include loss of the child's companionship but restricted the award to the child's remaining years of minority and excluded recovery for parental anguish. Loss of services was retained as an element of damages under \textit{Lockhart}, but the case did not clearly decide whether a specific showing of economic loss would subsequently be required.

Legislative response to the problem came within a week of the \textit{Lockhart} decision. To the statutory section creating the cause of action was added a separate damages provision allowing damages for medical expenses, loss of services, loss of love and companionship of the child, \textit{and injury to or destruction of the parent-child relationship.}\textsuperscript{17} The amended child-death statute does not on its face require the \textit{Lockhart} result: recovery for companionship but not for parental anguish or post-majority losses. No case has yet been decided under the terms of the new provision. \textit{Clark v. Icicle Irrigation Dist.,}\textsuperscript{18}

\textsuperscript{15}\textit{Skeels v. Davidson}, 18 Wn. 2d 358, 139 P.2d 301 (1943) must be the classic case exposing the obvious hypocrisy in awarding more than nominal damages on the basis of any value of services less cost of support formulation. An award of $1,000 over funeral expenses was allowed even though the child, aged 6\(\frac{1}{2}\), was retarded to the extent that a private physician's care had been required for over two years.

\textit{Lockhart v. Besel}, 71 Wash. Dec. 2d 109, 426 P.2d 605 (1967). Defendant motorist, attempting to pass on a curve, struck the deceased, a 17-year-old high school senior, in the latter's lane of travel. Plaintiff brought action for the wrongful death of his son pursuant to \textsc{Wash. Rev. Code} § 4.24.010, the so-called child-death statute. The jury returned a verdict in favor of the plaintiff. Plaintiff's motion for a judgment notwithstanding the verdict, increasing the amount of the award to reflect compensation for loss of the child's companionship, or alternatively, for a new trial, was denied. On appeal, the Washington Supreme Court, en banc and without dissent, reversed and remanded. \textit{Held:} The measure of damages in a wrongful death suit brought under \textsc{Wash. Rev. Code} § 4.24.010 should be extended to include, in addition the pecuniary value of the child's services, loss of companionship of a minor during his minority but without any consideration for grief or mental anguish of the parents.


A father, or in case of his death or desertion of his family, the mother may maintain an action as plaintiff for the injury or death of a minor child, or a child on whom either is dependent for support, and the mother for the injury or death of an illegitimate minor child, or an illegitimate child on whom she is dependent for support.

In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just.

\textsuperscript{17}72 Wash. Dec. 2d 202, 432 P.2d 541 (1967).
decided subsequent to the legislative and judicial developments, perhaps indicates that the court will treat the amendment as embodying only the *Lockhart* changes, although the significance of the decision on this issue is unclear. Appeal was from a judgment entered prior to the amendment's passage, and while the possibility of retroactive application might have been suggested in *Clark*, the argument was not before the court.

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19 *Id.* at 210 n.8, 432 P.2d at 546 n.8 (1967) the court suggested, in dictum: By coincidence this court and the legislature were engaged in *opening the same door* at the same time. Six days after the opinion in the *Lockhart* case was filed, the Governor signed the bill which added the... (damages provision) to R.C.W. 4.24.010 (Emphasis added).

The court did not have to face the issue of whether the amended statute expanded on the companionship extension of damages allowed under *Lockhart* v. Besel, 72 Wash. Dec. 2d 109, 426 P.2d 605 (1967).

20 Provisions added by amendment and relating to substantive rights, in accordance with the general rule applicable to original enactments, are generally presumed to operate prospectively, absent a clear showing of contrary legislative intent. Bodine v. Dept. of Labor & Indus., 29 Wn. 2d 879, 190 P.2d 89 (1948) requires "the most clear and unequivocal expression" of contrary intent, although apparently the requisite intent may be implied from the language of the amendment or circumstances surrounding its enactment. 1 J. SUTHERLAND, STATUTORY CONSTRUCTION, 435 (3d ed., Horack) (1943); Layton v. Home Indem. Co., 9 Wn. 2d 25, 113 P.2d 538 (1941). However, amendatory acts which can fairly be said to affect only procedural rights are generally given retroactive application. 1 J. SUTHERLAND, supra at 436.

The distinction is frequently drawn not in terms of "procedural" or "substantive" legislation, but in terms of acts which are "remedial" and those which are not. Cautious application of the proposition that "remedial statutes" will be given retroactive effect is required, since courts often refer to statutes as "remedial" without further characterization. In a very general sense, a "remedial" enactment is one which alleviates hardships in the common law. Hence, the Washington wrongful death statute has been termed "remedial" in application of the general maxim of statutory construction calling for liberal construction of enactments "remedial in nature." Cook v. Rafferty, 200 Wash. 234, 240, 93 P.2d 376, 379 (1939). The term is frequently used to describe statutes affecting only procedural and not substantive rights. 3 J. SUTHERLAND, supra, at 74. It is in this context—remedy as procedure—that a statute must appear "remedial" to be exempted from the general rule requiring prospective application. See *Nelson* v. Dept. of Labor & Indus., 9 Wn. 2d 621, 101 P.2d 1014 (1941) (Washington workman's compensation law); Tellier v. Edwards, 56 Wn. 2d 652, 354 P.2d 925 (1960) (Washington non-resident substitute service statute); Henry v. McKay, 164 Wash. 526, 3 P.2d 145, (1931) (Amendatory provision requiring payment of interest for delinquency in payment of taxes given retrospective application because interest is not made part of the tax—the statute relates to the mode of compelling or hastening payment only.); United States v. Mashburn, 85 F. Supp. 968, (W. D. Ark. 1949) (Amendment to Housing and Rent Act allowing the government to maintain a suit for treble damages for overcharges in rentals as well as for injunctive relief where the tenant as individual does not institute the treble damages action. The court remarked that prospective application is required "especially... when such retroactive operation would create a new liability or affect an existing liability to the disadvantage or detriment of a defendant." *Id.* at 969.) Consequently the court's denomination of the Washington wrongful death statute as "remedial in nature" (Cook v. Rafferty, supra) is not determinative of the prospective-retroactive issue. Although the court adverted to the amendment's passage in *Clark* v. Icicle Irrigation Dist., 72 Wash. Dec. 2d 202, 432 P.2d 541 (1967), the statute's new provision apparently was not argued, and the court's parenthetical mention
Four major problem areas result from the interaction of the Lockhart and Clark cases with the amended statute:

(1) Will the court now require a specific showing of net pecuniary injury when recovery is sought for lost services?

(2) Where recovery is for loss of the continued benefits of a minor child's services and companionship, are damages to be limited by the decedent's remaining years of minority as required by Lockhart?

(3) Given lost companionship as the basis of recovery under both Lockhart and the damages provision added by amendment, does the statute's cause of action section, requiring economic dependence upon an adult child-decedent, still make sense?

(4) Does the statutory provision allow recovery for parental anguish or is recovery limited to the more narrow Lockhart companionship standard?

**Loss of Services**

Lockhart recognized that loss of companionship is the real basis for allowing substantial recoveries, but did not clearly decide how loss of services, retained as an element of damages under the subsequent amendment, would be treated. It was to be predicted that, in discarding the well-established legal fiction that value of services less cost of support will always yield a positive sum, the court would subsequently be more reluctant to allow recoveries based on loss of services. The legislative intent formulation which aided recovery under the services test is satisfied so long as there is a substantial recovery of the development (72 Wash. Dec. 2d at 210 n.8, 432 P.2d at 546 n.8) leaves its treatment of the retroactivity matter unclear. It is clear, however, that courts generally, given a statute's ambiguity, decide retroactivity issues in favor of prospective application. See Bodine v. Dept. of Labor and Indus., 29 Wn. 2d 879, 190 P.2d (1948). This strong presumption favoring prospective application should be controlling. The terms "remedial," "procedural," and "substantive" are usually conclusory labels—generic terms used more as a description of what a court has decided is the proper thing to do than as analytical tools employed to make that decision. See Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 172 N.E.2d 526 (1961), treating the measure of damages for wrongful death as procedural or remedial for conflicts of laws purposes, but recognizing that "...there is authority both ways." 172 N.E.2d at 529. The New York court of appeals suggests, correctly, that the question is really one of deciding how death action damages should be treated in view of a state's public policy.

See note 17, supra.

The court often justified the allowance of substantial recoveries, despite its use of a value of services test, by arguing that the recoveries effectuated the legislative intent that more than nominal damages be recovered. See text accompanying note 14 supra. That the court recognizes the substantial-recoveries-intended crutch is no longer needed, given Lockhart's companionship allowance, see Clark v. Icicle Irrigation Dist., 72 Wash. Dec. 2d 202 at 210, 432 P.2d 541, at 546 (1967).
upon any basis. The relaxed requirements for proof of actual loss under the services less support formula are no longer needed.

Therefore, it is not surprising that, in the most recent case following *Lockhart*, the Washington court upheld a $15,000 verdict for loss of companionship, but found excessive an additional $15,000 award for loss of services. Although the case was not brought under the new statutory provisions, there is no reason to expect a different result if the amendment is applied. There may be instances in which a child's services and contributions are of net pecuniary value to the parent, but courts should now carefully examine assertions that such losses did in fact accompany the child's death.

This result would seem reasonable. Intellectual honesty would be served. More importantly, the result realistically pursues the fundamental objective of tort law—compensation for injuries sustained. The remedy is changed to reflect the recognition of injury to a different interest. The result recognizes that the same tortious conduct produces different injuries under varying conditions of society.

**Losses After Majority**

*Lockhart* limits the award for lost services and companionship to the child's remaining years of minority. No such artificial boundary on compensation is suggested by the amended statute. The only requirement concerning minority relates to the initial creation of the cause of action, which precludes recovery by the parent for death of an adult child upon whom he or she is not dependent.

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23 See text accompanying notes 13, 14 *supra*.
25 See id. at 207, 432 P.2d at 544. The situation could be expected in:
1) “Shirley Temple” cases—the child prodigy whose extreme youth would present a large cost of support set-off, but whose pre-majority earnings could reasonably be anticipated to be large;
2) Cases where, because the child is close to majority, the set-off factor is small, and the child in fact is working and contributing to the family's support. This situation would be particularly probable in a large family, where the incremental cost of maintaining one more child has a less significant effect on total overhead.
3) Agrarian family cases, where the child is old enough to perform significant tasks as part of a functioning unit, and where he works not for wages but for his "keep." It is probable that the cost to replace the child by a stranger under hire performing the same tasks would exceed the incremental cost in providing the child's "keep."
26 *Id.*
28 Under Wash. Rev. Code §4.24.010 (1965), a parent can recover for death or injury of a minor child “...or a child on whom either (parent) is dependent for support.” See note 17 *supra*, for text of amended statute. Discussion of the dependency requirement is found in text 601-63 *infra*. 
The restriction of loss of services damages to the years of minority is out of step with the majority of jurisdictions. These jurisdictions recognize that recovery "need not be based upon any legal right to services, but only expectation." No arbitrary cut-off point is fixed for "lost services" damages. Under the new provision, "loss of services and support" is retained as one element of economically measurable loss. In a complex society, where a minor child is not likely to be a financial asset, loss of reasonably anticipated contributions after majority should be compensable. Certainly parents of a college student, to whose development and education countless hours and thousands of dollars have been contributed, should be allowed to prove the loss of any reasonably anticipated return intended by a grateful son or daughter.

It is even less reasonable to cut off loss of companionship awards at the age of majority. Such a loss is correctly described as continuing over the full course of the parent-child mutual life. The measure should be the parents life expectancy, not the child's remaining years of minority.

DEATH OF AN ADULT CHILD

There is room for substantial improvement beyond the narrow problem of damage response to a minor's death. The parent of a deceased

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30 W. Prosser, TORTS 931 (1964).
32 In the few jurisdictions which do not allow recovery, the loss after majority is considered too speculative since the child may have died or married or for other reasons become "unable or unwilling" to support his parents throughout those years. See Annot., 14 A.L.R.2d 485 at 489 (1950). Such damages can no more appropriately be attacked as "speculative" than corresponding economic damages awards allowed for the years of minority. This was especially true under former Washington practice where substantial recoveries were allowed for the death of extremely young infants under the pre-Lockhart loss of services test. Nevertheless, in jurisdictions which do allow recovery, stiffer evidence requirements generally obtain where damages based on losses after majority are sought. See Annot., 14 A.L.R.2d 485 at 506 n.2 (1950). But see Foerster v. Direito, 75 Cal. App. 2d 323, 170 P.2d 986 (1946), recognizing in California a rebuttable presumption that a child's financial contributions to the parent and parent's enjoyment of child's comfort, friendly association, and protection would have continued during the parents' life expectancy.
33 See Currie v. Fiting, 375 Mich. 440, 134 N.W.2d 611 (1965). Held: if award is reduced to present value, it is no error to allow $1,000 per year for loss of society and companionship over the life expectancy of the parents for death of their 21-year-old daughter, a college student.
34 This result assumes a shorter life expectancy of parent-beneficiary than child-decedent. Since the appropriate measure is mutual life, a showing of existant terminal disease in the child should require a different result.

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twenty-one-year-old seldom has even the initial cause of action because recovery under both wrongful death statutes and the survival statute requires a showing of "substantial dependency" upon an adult child-decedent. The new damages provision, employing a loss of companionship theory, is inconsistent with a cause of action section employing an economic dependency test. In practical application, a parent who is not "substantially dependent" at the exact time of death does not recover. If it is unfair that the parent of a twenty-year-old college student should receive damages for loss of only one year's companionship, how much less equitable is it that the parents of a twenty-one-year-old student who had previously arranged to live with and support them have no cause of action at all?

While the court is not bound by express statutory language to fix the measure of damages at majority where death of a minor child is involved, the statutory restriction on its power to remedy the adult child problem presents an obstacle to judicially initiated reform. The child-death statute specifically requires that the decedent, except where a minor, be a child on whom either parent "is" dependent for support. The general and survival statutes allow recovery only by parents who "may be" dependent upon a child over twenty-one at the time of death. While a broad reading of the words "may be" as "may at some time be" or "may become" is possible, the "is" language

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25 Under the general wrongful death statute, WASH. REV. CODE §§ 4.20.010, 020 (1965), recovery is conditioned upon a showing of dependence whether the child was a minor or an adult. WASH. REV. CODE § 4.24.010 (1965), the child-death statute, requires the parent's dependence on the deceased only when that child was an adult. WASH. REV. CODE § 4.20.060 (1965). Unlike the child-death statute (see note 35 supra), the survival statute does not distinguish between minor and adult decedents. Whether or not the child had attained majority before death, parent-plaintiff's dependence upon him must be shown.


27 See Grant v. Libby, McNell & Libby, 145 Wash. 31, 258 P. 842 (1927) (Dependency must be based on condition, not promise of deceased to contribute to future support).

28 See text accompanying note 28 supra.


32 The result under these statutes, unlike the child-death provision, is the same in the case of a minor child. See notes 35, 36 supra.

33 In practice, such a construction would eliminate the hardships inherent in requiring dependence at the exact moment of death. The result in terms of sound tort theory would be recognition that present condition is not the sole indicia of reasonable expectation.
guage of the child-death statute would seem prohibitively inflexible. Legislative action striking the dependency requirements altogether is suggested. In the first place, it would not be necessary to perform judicial gymnastics to effectuate a reasoned policy. Secondly, and more importantly, the inconsistency in allowing substantial recovery for non-pecuniary damages while basing the action on economic dependence would be avoided.

**Parental Grief and Mental Anguish**

While recovery for after-majority losses is generally favored, compensation for parental suffering has not been widely allowed. The majority rule disallows recovery for mental anguish, but it is compensable in at least eight states. Damages for grief and mental anguish of beneficiaries has been specifically permitted by statute in some states, but similar recovery has been allowed under provisions calling only for "fair and just" awards. While there is nothing in either the general statute or the amended child-death provision which specifically disallows such an award, mental anguish of statutory beneficiaries has not been recovered in any wrongful death action in Washington. The court has not faced the issue under the amended statute.

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46 Arkansas, Florida, Kansas, Louisiana, South Carolina, South Dakota, Virginia, and West Virginia. See notes 47, 48 infra.
49 For text of both statutes, see notes 6 (general wrongful death) and 17 (child-death) supra.
50 As opposed to the decedent's pain and suffering, which is allowed under the survival statute (Wash. Rev. Code § 4.20.060 (1965)). See Orcutt v. Spokane County, 58 Wn. 2d 846, 364 P.2d 1102 (1961).
52 See note 19 supra and accompanying text.
The Washington court has not clearly declared why damages for parental suffering may not be recovered. Rather, the restriction enjoys the "assumed as given" status which, before Lockhart and the amendment, protected the no-recovery-for-loss-of-companionship principle. One case indicates an early identification of mental anguish recovery with exemplary damages. Recovery for parental anguish may more reasonably be understood as compensation for injury which, although mental, is real.

It is probably under an assumption that wrongful death statutes undertook to create only a specific protected interest—the right to "positive benefits" from the continued life of the minor—that courts have continued to disallow recovery for the beneficiary's mental anguish, a type of "negative harm" assumed remaining in the legally unprotected area still governed by common law no-recovery principles. It is not seriously doubted that wrongful death statutes patterned after Lord Campbell's Act initially contemplated only recovery for loss of economic benefits "in the form of support, services or contributions during the remainder of [the decedent's] lifetime if he had not been killed." If this was the initial legislative intent, allowance of recovery for loss of non-pecuniary benefits under the "companionship" label indicates that intent no longer controls.

In other areas of tort law, it has long been recognized that mental pain and suffering is a real injury. Mental and emotional peace is a

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22 Penoza v. Northern Pac. Ry. Co., 215 F. 200, (W..D. Wash. 1914). The court noted that it found no case where grief and anguish were recovered except in jurisdictions which allowed exemplary damages. Id. at 202. The same confusion once supported the well-accepted rule denying loss of companionship recovery. See note 8 supra.


[W]e are...restricting the losses to pecuniary losses...not the sorrow and anguish caused by its death. This is not because these are not suffered and not because they are unreal. The genius of the common law is capable, were it left alone, of ascertaining such damages, but the legislative act creating the remedy forbids.

The Michigan statute, Mich. STAT. ANN. § 27A.2922 (1948), specifically requires "pecuniary injury" for recovery, a restriction not imposed by the express language of the Washington statutes. The Michigan court found companionship loss a "pecuniary" injury (see note 9 supra), but could not apparently allow the beneficiary's mental anguish damages without openly abandoning the pecuniary standard.

24 Fatal Accidents Act, 9 & 10 Vict. c. 93 (1846). Lord Campbell's Act was the English solution to the absence of remedy for wrongful death at common law: "Pure"—i.e. not "survival" or "estate"—wrongful death statutes are patterned fundamentally after Lord Campbell's Act. See note 2 supra.

protected interest: injury to that interest alone may now subject the transgressor to liability in tort. Whether or not a separate common law cause of action arises for negligent infliction of emotional harm, its progress to "parasitic" status as an element of damages where an independent basis for liability exists is well established. Where recovery is not allowed, objections often center around the speculative nature of the injury and danger of "run-away verdicts." More valid objections are to the possibility of fraud and the difficulty in defining the scope of defendant's duty. Recognition of a spectator's tort, creating a cause of action in third party bystanders and remote relatives, could subject the defendant to unlimited liability.

These objections are not applicable to the statutory recovery for wrongful death. Recovery is tied to an independent statutory cause of action which creates rights only in certain named beneficiaries who are members of the immediate family. Because remote parties cannot recover, the likelihood of feigned emotional injury is greatly reduced.

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28 The law presently protects the mental interest to different degrees depending on its manner of invasion. Intentional infliction of emotional harm generally creates liability in tort, while negligent infliction of the same injury often does not. Id. The question has arisen in the wrongful death context whether, on the theory of negligent infliction of mental harm alone, (i.e. without the statutory cause of action), a remedy exists at common law. See Amaya v. Home Ice Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513 (1963), holding that "contemporaneous bodily contact" or an "independent cause of action" is required, absent negligence approaching "wilful, wanton" stature.
29 The action is usually based on accompanying (e.g. "impact" cases) or resultant (e.g. miscarriage cases) physical injury, but may be based on other independent bases. W. Prosser, Torts 348 (3d ed. 1964). See note 58 supra.
30 See generally W. Prosser, Torts 349-354, 929-30 (3d ed. 1964). Juries every day are trusted with similar "speculating" responsibilities; and in fact they were required to make determinations no less speculative under the old "value of services less cost of support" test. Evaluating mental anguish in disfigurement and intentional infliction cases, where recovery is generally allowed, requires the same "speculation." Measuring "physical" pain and suffering of the automobile accident victim poses similar problems of valuation. (Where the decedent has suffered non-physical injury, beneficiaries recover for his suffering under the Washington survival statute, Wash. Rev. Code § 4.20.060 (1965). See note 50 supra.) The problem is thus apparently not one of the speculative evaluation of the extent of damage, though lip-service is often given to this objection. Rather, it is one of initially establishing the genuineness of the claim to injury at all. The examples above, where recovery is allowed, have one common characteristic—a high reliability factor. See note 63 infra.
31 The danger of "run-away verdicts" should not seriously be considered. The "remittitur" device and appellate review serve as the traditional check to this problem. See Comment, Damages In Washington Wrongful Death Actions, 35 Wash. L. Rev. 441, 452 (1960). The law should not be so timid as to refuse recovery for injury because it questions the accuracy of the jury.
33 See generally id., at 352-4.
Parental recovery for child-death presents a circumstantial guarantee of trustworthiness: there is a high probability that substantial emotional harm has resulted.\textsuperscript{63}

If the barrier to recovery for mental distress is that the wrongful death award is a statutory recovery, and that the statute creates a protected interest only in the beneficiary's right to "positive benefits" accruing from the minor's continued existence, then the statute too narrowly defines the interest to be protected. It is not clear, however, from the language of the recently added damage provision,\textsuperscript{64} that such a limitation is required by the statute.

The provision allows compensation for, in addition to the traditionally recognized losses of services and support,\textsuperscript{65} "loss of love and companionship and for injury to or destruction of the parent-child relationship..." (Emphasis added.)\textsuperscript{66} Implied is the thought that the two—loss of companionship and destruction of the parent-child relationship—involve different injuries. Since "services and support" covers both prospective earnings and acts of kindness around the household,\textsuperscript{67} and since "love and companionship" is a generic term for positive, non-pecuniary benefits flowing from the child,\textsuperscript{68} compensation for the "loss" of continued benefits flowing from child-decedent to parent-beneficiary is provided without the aid of the "parent-child relationship" addition. The section before the conjunction "and," in short, encompasses all elements recovered through \textit{Lockhart} in the common law handling of damages in Washington. Moreover, recovery is not for "loss" of the parent-child relationship, but for some type of interest invaded when the "parent-child relationship" is injured or destroyed. It would therefore seem that the section provides for recovery not for termination of receipt of "positive benefits" which

\textsuperscript{63} The ease of recovery for feigned emotional injury is undoubtedly the primary consideration underlying the present insistence on accompanying physical injury, however slight, in other tort situations. \textit{W. Prosser, Torts} 350 (3d ed. 1964). Where the physical impact "rule-of-thumb" has been abandoned, it has been in cases where there is a high probability that the claim of serious mental distress is genuine. \textit{Id.} at 349. Recognizing that child-death involves a similar high credibility factor, the jury in Gamble v. Hill 208 Va. 171, 156 S.E.2d 888, 894 (1967), was allowed to infer "sorrow, suffering and mental anguish" of parents from the fact of death, without direct proof of the injury.

\textsuperscript{64} Ch. 81, Wash. Laws Ex. Sess. 1967.

\textsuperscript{65} See text \textit{supra} discussing the services element.

\textsuperscript{66} Ch. 81, Wash. Laws Ex. Sess. 1967. See note 17 \textit{supra}.

\textsuperscript{67} See Spokane, P. & S. R.R. Co. v. Cole, 54 F.2d 318, 321 (9th Cir. 1931).

\textsuperscript{68} \textit{E.g.}, love, society, comfort, advice, and protection.
would have continued in futuro, but for the infliction of a "negative harm" or detriment unrelated to decedent's inability to confer benefits. Parental mental suffering is the only element of damages which is both not covered by the pre-conjunction provisions and responds to the type of "negative" injury contemplated by the post-conjunction language.

A more direct approach to construction of the "parent-child relationship" language is possible. The concept of a protected "relational interest" is not new. The interest is usually discussed in connection with actions for alienation of spousal affections and for the kidnapping or seduction of a child. Wrongful death situations involve injury to the same interest. With the cause of action established, recovery for loss of companionship and the parent's mental anguish is allowed. Damages are allowed to compensate for injuries to interests arising out of the existence of a parent-child relationship and damaged by interference with—a temporary "destruction of" or "injury to"—that relationship. But they are harms to an interest belonging peculiarly to the parent, in the sense that they exist independent of any interruption of continued positive benefits occasioned. They are the same "negative harms" suffered by the parent of a child not abducted but dead.

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See Green, Relational Interests, 29 Ill. L. Rev. 460 (1934); W. Prosser, Torts 894-909 (3d ed. 1964).

The connection is seldom recognized. But see Green, Relational Interests, 29 Ill. L. Rev. 460, 469-73 (1934).


Little v. Holmes, 181 N.C. 413, 107 S.E. 577 (1921). Dean Prosser views the recovery in terms of "deprivation of the child's society" and "the wound to (the parent's) feelings." W. Prosser, Torts 905 (3d ed. 1964).

Similarly, action for seduction of a daughter generally requires establishing a technical loss of services, but courts recognize that invasion of the interest subjects the transgressor to liability for "loss of her society and comfort, and for (the parent's) wounded feelings." W. Prosser, Torts 906 (3d ed. 1964). And see Wash. Rev. Code § 4.24.020 (1965) which allows recovery by parents for the seduction of a daughter even though "there be... no loss of service."

It may be objected that these are actions for intentional interference with the relational interest. But the distinction is without significance where, with liability established (i.e. given that the interest is protected from negligent invasion by the statute), the question is one of defining the characteristics of the interest. This is a determination which can be made without reference to the particular manner of its invasion.

It is furthermore recognized that under both approaches to dealing with the language of the amendment, the assumption has been that the post-conjunction language is not mere excess verbiage. It is apparent that the strongest objection to this construction of the statute supposes that if the legislature intended to contradict a long-standing common law rule barring mental anguish recovery, it would have done so unambiguously. Cf. Weaver v. Bank of America Nat'l Trust & Sav. Ass'n, 59 Cal. 2d 428, 380 P.2d 644, n.6 (1963).
Under either approach—direct or process of elimination—to construction, support for parental anguish recovery can be found in the language of the statute. Given the statute's ambiguity, the courts should not needlessly restrict the statute's scope to create *damnnum absque injuria*—harm without redressible "injury."

Tort law seeks to compensate injuries as those injuries are understood in light of changing social and economic conditions. In so far as the development of tort law has seen the expansion of the body of recognized, protected interests, conduct once immune now subjects the actor to liability. Where conduct has long been subject to liability in tort, the type of injury it causes must be re-evaluated in terms of different interests invaded as conditions change.

The wrongful death of a child once subjected a transgressor to no liability at all. Statutes modeled on Lord Campbell's Act and enacted in times when the child was an economic asset to the parent, recognized a protected interest in the parent's right to the child's labor and services. Notwithstanding this initial statutory intent, both court and legislature have recognized that today the injury sustained by a parent on the death of his child is not primarily economic. The law recognizes an interest in emotional and mental well-being. If this is the primary interest invaded when a parent loses his minor child, tort law should look to that injury, and fashion an appropriate remedy.

**Conclusions and Suggestions**

The new amendment, coupled with instructions allowing the jury to consider, along with those elements specifically enumerated in the provision, parental grief and mental anguish and losses past majority in assessing damages, could eliminate some of the inequities in recovery by parents for death of a minor child. Relevant matter

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But it is just as likely that the legislature was less than crystal-clear because it wanted the courts to continue the redefining process. It may have felt the courts to be the appropriate agency for determining what is a "fair and just" response to an injury to the relational interest as that interest acquires new characteristics in a changing society. *See generally* Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963), asserting the propriety of a creative judicial role in continuous tort law reform.

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75 Fatal Accidents Act, 9 & 10 Vict. c. 93 (1846). See notes 2, 55 supra.

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76 The general rule is that the jury may consider the decedent's relation with his parents and particularly his propensity to aid them, where loss of services and support is sought. *Annot.*, 14 A.L.R.2d 485, 522 (1950); 2 A.L.R.2d Later Case Service 148 (1965). *See* Dean v. Oregon R. & Nav. Co., 38 Wash. 565, 80 P. 842.
should be freely admitted, so as to allow proof of all reasonably sustained losses. In affixing a value to a particular parent-child relationship, the jury should be allowed to determine what compensation is fair and just under all the circumstances.\textsuperscript{77}

Should courts hold under the new amendment that parental pain and suffering may not be considered, legislative action should be taken. The damages provision could be amended in the direction of increased generality to allow the jury to find “such damages as seem fair and just,” without specific enumeration of elements.\textsuperscript{78} However, lack of guidance would again be a problem.\textsuperscript{79} An alternative approach toward increased specificity would be preferable.\textsuperscript{80} Amendment of the child-

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(1905). Judgment of substantial damages for loss of services and earnings during minority of a son serving in the Army against parents' will was affirmed on appeal, 44 Wash. 564, 87 P. 824 (1906), on the basis of letters from son to parents and conversations indicating son's intent to return home and his probable contributions. \textit{See also Comment, Damages in Washington Wrongful Death Actions}, 35 WASH. L. REV. 441 (1960), citing Clason v. Velguth, 168 Wash. 242, 11 P.2d 249 (1932); Walker v. McNeill, 17 Wash. 582, 50 P. 488 (1897), Lund v. City of Seattle, 163 Wash. 254, 1 P.2d 301 (1931); Creamer v. Moran Bros. Co., 41 Wash. 636, 84 P. 592 (1906). An examination of the nature of the relationship goes directly to establishing how reasonable the expectation of benefits is in a particular case. The result is consistent with allowing post-majority losses in minor-child death cases, because it recognizes expectation, not right, as the basis of recovery. \textit{See} note 30 and accompanying text supra. A logical extension, then, would be elimination of the dependency requirement in adult-child cases, where expectation, not present condition, should be the measure. \textit{See} note 44 supra and accompanying text.


Established evidentiary policy correctly requires exclusion of testimony which is clearly irrelevant or prejudicial. For example, while evidence of the “degree of intimacy” between parent and child may be properly admitted to determine damages for loss of companionship, (see note 76 supra), courts may be unwilling to hear certain types of evidence offered to establish that fact. \textit{See}, e.g., Gamble v. Hill, 208 Va. 171, 156 S.E.2d 888 (1967), where defendant sought to introduce evidence of plaintiff’s deceased minor daughter’s bad character. While the fact of frequent separation of the child from her parents may have tended to establish the value of the relationship, the evidence of immoral character per se was properly considered irrelevant on both companionship and mental anguish issues. The court also found the closing argument of plaintiff’s counsel “improper” as unsupported by evidence (query whether also prejudicial), where counsel referred to the deceased, mother of one illegitimate child at age 13 and again pregnant at the time of death three years later, as “‘sweet sixteen' and ‘innocent of wrongdoing.’” \textit{See} 156 S.E.2d at 895.

Similar provisions are held in Virginia and West Virginia to allow mental anguish of parent-beneficiaries. (See note 48 supra). One advantage would be that no inference would be drawn from the concurrent inclusion of some specifically enumerated items and omission of unambiguous language establishing parental suffering as an element of damage. Another advantage would be the obvious flexibility left to the courts.

\textsuperscript{7} \textit{See} notes 5,6 supra.

\textsuperscript{8} Even under the “increased generality” alternative suggested immediately above, the absence of unambiguous language allowing mental anguish recovery could bottom
death statute to spell out that parental suffering may be considered and that majority is not a cut-off line for damage recovery would allow more adequate awards. In addition, legislative action removing the dependency requirement is needed. The recent amendment to the child-death statute is a step in the direction of curing multiple ills in the entire wrongful death situation—but only that.

REGULATION OF TREATY INDIAN FISHING

On December 26, 1854, the Treaty of Medicine Creek was concluded between the United States and nine western Washington Indian tribes. The Indians ceded to the United States all rights in a large portion of their tribal lands, but reserved the "right of taking fish, at all usual and accustomed grounds and stations ... in common with all citizens of the Territory." Whatever the representatives of the United States or the Indian chiefs meant by this clause has been lost in antiquity. It is certain that they could not have foreseen the acrimony an inference that such recovery is not contemplated by the statute. While the general provision for "fair and just" awards avoids implication from the concurrent specific enumeration of some elements (see note 79 supra), it might still be suggested that if the legislature intended to contradict a long-standing common law rule it would have done so explicitly. (See note 73 supra.) Moreover, it is not certain that the Washington court would reconsider its restrictive construction of what is contemplated by a "fair and just" award. (See Penoza v. Northern Pac. R.R., 215 Fed. 200 (W.D. Wash. 1914), discussed note 51, supra.)

2 Acting for the United States was Isaac I. Stevens, Governor of Washington Territory.
3 The Indian tribes signing the treaty were the Nisqually, Puyallup, Steilacoom, Squak sin, S'ilhomamish, Steh-chass, T'Peeksin, Squ-aitl, and Sa-heh-wamish.
4 The Indians ceded approximately 2,240,000 acres and reserved reservations comprising 3,840 acres. See AMERICAN FRIENDS SERVICE COMMITTEE, AN UNCOMMON CONTROVERSY 23 (1967). The Indians received from the government $35,750, or about 1.6 cents per acre.
5 Treaty with Nisquallys, Dec. 26, 1854, 10 Stat. 1132, art. III.
6 The Indians' claims to the right to fish free of state regulation have been countered by the demands of commercial and sport fishermen that the Indians' fishing be subjected to state regulation. See Hearings on S.J. Res. 170 and S.J. Res. 171 Before Subcomm. on Indian Affairs, 88th Cong., 2d Sess. (1964), especially app., at 211-29. The claims of the Indians have become something of a civil rights cause celebre, with Dick Gregory and Marlon Brando participating in "fish-ins" protesting state regulation of treaty Indian fishing. See AMERICAN FRIENDS SERVICE COMMITTEE, AN UNCOMMON CONTROVERSY 109-13 (1967). The latter reference contains an excellent, though not wholly unbiased, account of the entire controversy over state regulation of treaty Indian off-reservation fishing. It concentrates primarily on the Puyallup, Nisqually, and Muckelshoot tribes, and delves deeply into the historical and sociological aspects of the controversy, while placing a lesser emphasis on the legal issues.