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Damages in Washington Wrongful Death Actions

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COMMENTS

DAMAGES IN WASHINGTON WRONGFUL DEATH ACTIONS

At common law there was no right of recovery for wrongful death and the cause of action for personal injuries did not survive the death of either the injured person or the tort-feasor. In 1846 Lord Campbell's Act[1] was adopted, and not long thereafter wrongful death legislation appeared in every state, patterned largely after the English statute.

THE STATUTORY SCHEME

Wrongful death statute. The present Washington legislation[2] creates a new cause of action on behalf of designated beneficiaries to compensate them for the loss they suffer through the death of the decedent. Procedurally the action is brought by the decedent's personal representative, but the recovery is for the exclusive benefit of the statutory beneficiaries and is not an asset of the decedent's estate.[3] This cause of action survives the death of the tort-feasor.[4]

Survival statute. RCW 4.20.060 is a hybrid statute. Survival statutes seek to redress the interest which a person has in his bodily integrity and continued existence by perpetuating his cause of action beyond his death. The Washington statute is peculiar in that it does not perpetuate the decedent's cause of action for personal injuries unless those injuries caused his death.[5] Consequently the operation of this section is limited to the occurrence of a wrongful death.[6] Furthermore, the recovery is for the exclusive benefit of the statutory beneficiaries, who are the same persons compensated under the wrongful death statute, and this recovery is not an asset of the estate.[7] Proced-

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[1] Fatal Accidents Act of 1846, 9 & 10 Vict., c. 93.

[2] RCW 4.20.005-.030. For a general survey see Brady, *The Action for Wrongful Death in Washington*, 4 WASH. L. REV. 61 (1929).

[3] Koloff v. Chicago, M. & P.S. Ry., 71 Wash. 543, 129 Pac. 398 (1913); Archibald v. Lincoln County, 50 Wash. 55, 96 Pac. 831 (1908); Copeland v. City of Seattle, 33 Wash. 415, 74 Pac. 582 (1903).

[4] RCW 4.20.045; See 28 WASH. L. REV. 201 (1948).

[5] Bland v. King County, 154 Wash. Dec. 632, 342 P.2d 599 (1959).

[6] Slauson v. Schwabacher Bros., 4 Wash. 783, 31 Pac. 329 (1892), which emasculated RCW 4.20.040 is still applicable to abate a cause of action for personal injuries when the injured person's death was not caused by those injuries.

[7] Creditors who have relied principally upon the debtor's earning capacity in extending credit find their most basic security impaired without protection from the statutory reform.

urally, the action is brought by the decedent's personal representative. The cause of action is independent from that under the wrongful death statute and recoveries under both may be sustained, with or without joinder of the actions.[8]

Child-death statute. RCW 4.24.010 allows a parent to bring an action, as an individual and not in a representative capacity, for the wrongful death of his child. To the extent that the parent is dependent upon the deceased child for support, this section and the wrongful death statute overlap and there is an election of remedies. The election should usually be made in favor of suing under the wrongful death statute because of the possibility of a greater recovery due to the difference in cut-off rates for measuring damages.[9]

The child death statute is not in the form of wrongful death legislation and has been the subject of individualized construction.

MEASURE OF DAMAGES

Statutory measure. The wrongful death statute includes within it the general statement that "the jury may give such damages as, under all circumstances of the case, may to them seem just."[10] This provision has been quoted and emphasized in many cases but an appraisal of the cases indicates that its principal utility has been in restatement by way of supporting a decision which has already been reached.[11] The existence of the language does not serve any useful function in statutory construction since remedial legislation is invariably liberally construed.[12] It is the author's view that *Shead v. Riser*,[13] correctly spells out the proper construction of this general statement, viz., that it is only declarative of the jury's function in the absence of such a proviso and consequently is not entitled to consideration in deciding a question presented to the court. Thus it has been left to the courts to prescribe the measure of damages under its interpretation of the basic theory of the statute.

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[8] Grant v. Fisher Flouring Mills Co., 181 Wash. 576, 44 P.2d 193 (1935); Whiting v. City of Seattle, 144 Wash. 668, 258 Pac. 824 (1927); Machek v. City of Seattle, 118 Wash. 42, 203 Pac. 25 (1921).

[9] See cases cited, *infra* note 35.

[10] RCW 4.20.020.

[11] The provision has been used as support for: love and affection as a damage element, Hinton v. Carmody, 182 Wash. 123, 45 P.2d 32 (1935); loss of society and companionship as an element (contra to the holding under the Federal Employer's Liability Act), Davis v. North Coast Transp. Co., 160 Wash. 576, 295 Pac. 921 (1931); indicating the court's control over the jury's verdict and the introduction of prejudicial testimony, Clason v. Velguth, 168 Wash. 242, 11 P.2d 249 (1932).

[12] Johnson v. Ottomeier, 45 Wn.2d 419. 275 P.2d 723 (1954) (stating the rule of liberal construction as applicable to the wrongful death statute).

[13] 136 Wash. 270, 239 Pac. 562 (1925).

Pecuniary loss. Some states have adopted, as the basic theory of compensation under wrongful death legislation, the philosophy that the decedent's estate should be compensated for the loss resulting from his death. In Washington, and in the majority of states with statutes patterned after Lord Campbell's Act, the basic theory is that of compensating the deceased's survivors for the loss they have suffered by reason of his death. The statutory beneficiaries who may recover under the Washington wrongful death and survival statutes are all relatives of the deceased; those who are more closely related being preferred by not having to prove dependency upon the deceased.[14] Consequently, these statutes provide damages for injury to the interest which one member of the family has by reason of his family relation to the injured person.[15]

The compensable loss suffered by the statutory beneficiaries has always been limited to *pecuniary* loss. "The action proceeds on the theory of compensating the individual beneficiaries for loss of the *economic benefit* which they might reasonably have expected to receive from the decedent in the form of support, services or contributions during the remainder of his lifetime if he had not been killed." [Emphasis added].[16] There can be no recovery for the survivor's grief or anguish[17] nor can any award be made by way of solace to the survivor's affections.[18] Implicit in the concept of pecuniary loss to survivors is the notion of a reasonably anticipated receipt from the decedent, if he had lived, on which may be placed a monetary value. Consequently, a detriment suffered by survivors which did not arise by reason of the decedent's inability to confer a benefit is not within the measure of damages.[19]

In *Clason v. Velguth*,[20] the admission of a widow's testimony that she had no means of support since she was not qualified or trained in any trade or occupation and had been entirely dependent upon her husband as the bread-winner for a number of years, was held to be prejudicial error. The court noted that evidence of the statutory beneficiary's

[14] But parents of the deceased must prove dependency in order to recover under the wrongful death statute; contra under the child-death statute with regard to minor children.

[15] McCORMICK, DAMAGES § 98 (1935).

[16] PROSSER, TORTS at 713 (2d ed. 1935).

[17] Penoza v. Northern Pac. R. R., 215 Fed. 200 (W.D. Wash. 1914); Walker v. McNeill, 17 Wash. 582, 50 Pac. 518 (1897).

[18] Pearson v. Picht, 184 Wash. 607, 52 P.2d 314 (1935), *but see* cases cited, *infra* note 21.

[19] Allen v. Hart, 32 Wn.2d 173, 201 P.2d 145 (1948) (no compensation for survivor's lost wages).

[20] 168 Wash. 242, 11 P.2d 249 (1932).

condition or circumstances that lends no aid in determining the character or value of the anticipated receipt from the decedent is immaterial to the issue at hand and may be prejudicial because of its probable effect on the jury.[21] Consequently, evidence of the beneficiary's earning capacity or financial resources is not properly introduced. An illustration of this concept is that of the decedent who has left his family in a comfortable financial position. Of course his survivors should not be penalized for his prudence; quite to the contrary, their reasonable expectations of support and assistance are considerably greater in scope than the average and logically should result in a greater award. The *Clason* case also approved the proposition that it was proper to prove that the deceased was his survivor's sole means of support during his life, although it was not proper to show the financial circumstances of the survivor. This dictum may be subject to criticism. When valuing the reasonably expected contributions by the decedent which have been lost to his survivor because of the untimely death, is it material to know the *degree* to which the survivor depended upon the decedent for support? It seems that the *amount* of support which the survivor had a reasonable expectation of receiving from the decedent in the future is the critical issue. Partial dependence on a high-income producer might result in a greater economic loss than total dependence on a low-income producer.

Elements of damage. The elements of damage commonly stated in instructions where a *parent* has died are loss of: daily services, attention, and care; physical, moral, and intellectual instruction and training; comforts, conveniences, and education; advice; nurture; protection; love; guidance; support; earnings; and maintenance. When a *spouse* has died they are stated as loss of: companionship and society; services; care and attention; protection; advice; earnings; maintenance; support; and the reasonable expenses to be incurred by the surviving spouse for the care of the children.[22]

[21] *But see* Estes v. Schulte, 146 Wash. 688, 264 Pac. 990 (1928) where a recovery exceeding the amount of decedent's past contributions to his surviving older sister, extended throughout the period of her life expectancy, was affirmed. The court indicated that the jury might have properly thought that her expenses would have increased with her advancing age and that the deceased would have underwritten those increased costs. Apparently evidence of the survivor's physical condition is pertinent if it may be inferred that the decedent would have responded to the increased cost of maintenance. See also Heath v. Stephens, 144 Wash. 440, 258 Pac. 321 (1927) where evidence of a child's injuries received in the same accident that caused his parent's death was held improperly admitted, and Schultz v. Western Farm Tractor Co., 111 Wash. 351, 190 Pac. 1007 (1920), where the court erroneously considered the financial condition of the beneficiaries in apportioning a settlement.

[22] Of course no instruction has been found which includes all of these elements. Some elements overlap others and a concise statement seems preferable.

The statement of the above elements should enlighten the attorney on the interpretation which has been placed on the phrase "pecuniary loss." The word *pecuniary* is recognized as not being used with its normal connotations. The court has not been so materialistic as to limit compensation entirely to the loss of purely tangible contributions of money, property, shelter, and food. In valuing a life the court has felt justified in allowing the jury to place a monetary amount on the material intangible contributions which constitute the basis and core of the familial relationship. The Washington court, contrary to the majority view, appears to allow damages for loss of society.[23] No one would deny the valuable nature of these intra-family benefits and most would agree that they are inherent elements in the truly compensatory award. The problem arises in guarding against speculative damages when such intangibles must be translated into dollars. Judge Weaver, speaking for the court, recently remarked, "No phase of the law of damages is in such an unsatisfactory state as that concerned with the rule governing damages for wrongful death."[24] As long as placing value on human life in terms of loss to surviving relatives is attempted this "unsatisfactory state" will remain. However, it is a monument to our legal system that the injustice of the common law rule was unanimously recognized and "damages of a character which, although real, were theretofore not the subject of judicial computation and could not be allowed or estimated by any exact rule of mathematical calculation"[25] are now awarded.

Where the deceased was the head of the family the estimated value of that portion of his earnings which he would have contributed to his family during his life expectancy will likely be the principal element of damages. Where the facts allow the increased value of his potential earnings over his present earnings may be shown by evidence of his prospects of advancement in his employment and the commensurate increase in financial return.[26]

In establishing a reasonable expectation of benefits from the de-

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[23] Hinton v. Carmody, 182 Wash. 123, 45 P.2d 32 (1935); Davis v. North Coast Transp. Co., 160 Wash. 576, 295 Pac. 921 (1931); *contra,* Walker v. McNeill, 17 Wash. 582, 50 Pac. 488 (1897). The court sometimes strains in emphasizing the "pecuniary" loss of society. Felt v. Puget Sound Elec. Ry. 175 Fed. 477, 481 (9th Cir. 1909).

[24] Kramer v. Portland-Seattle Auto Freight, Inc., 43 Wn.2d 386, 395, 261 P.2d 692, 697 (1953).

[25] Philby v. Northern Pac. Ry., 46 Wash. 173, 175, 89 Pac. 468, 469 (1907).

[26] Pearson v. Picht, 184 Wash. 607, 52 P.2d 314 (1935). See Fogarty v. Northern Pac. Ry., 85 Wash. 90, 147 Pac. 652 (1915), (an FELA action).

ceased, evidence of the family relationship is pertinent,[27] and is especially desirable where an inference from the fact of a divided family unit may be made which will minimize the expectations of surviving relatives.[28] Evidence that the deceased head of the family was unemployed, immoral or improvident,[29] or was habitually devoted to intoxicants[30] may serve to reduce what would otherwise be a reasonable expectation of economic benefits.

The potential receipt of an inheritance from the deceased has been held to be outside the measure of damages.[31] This holding seems questionable since the property which the deceased could be reasonably expected to have accumulated throughout the remainder of his life and left to the natural objects of his bounty is of a demonstrably more tangible character than some other recognized elements of damage, and appears to meet the pecuniary loss standard.[32] The fact that the expected economic benefit is a death benefit rather than a contribution during life is merely a difference in the form of conferring the benefit without a distinction in substance, unless the survivor's life expectancy is less than that of the deceased.

Funeral and burial expenses have consistently been allowed as an element of damages[33] under the wrongful death statute although this

[27] Clason v. Velguth, 168 Wash. 242, 11 P.2d 249 (1932); Walker v. McNeill, 17 Wash. 582, 50 Pac. 488 (1897).

[28] Lund v. City of Seattle, 163 Wash. 254, 1 P.2d 301 (1931); Creamer v. Moran Bros. Co., 41 Wash. 636, 84 Pac. 592 (1906). *But see* Piland v. Yakima Motor Coach Co., 162 Wash. 456 ,298 Pac. 419 (1931), where an interlocutory divorce decree alimony award was relied upon to fix damages.

[29] Rochester v. Seattle, R. & S. Ry., 67 Wash. 545, 122 Pac. 23 (1912).

[30] Fleming v. City of Seattle, 45 Wn.2d 477, 275 P.2d 904 (1954), (offer of eleven justice court convictions for drunkenness was improperly refused). *But see* Lundberg v. Baumgartner, 5 Wn.2d 619, 106 P.2d 566 (1940), wherein the court stated that proof of three instances of drunkenness within an eight month period before death would not, standing alone without the daughter's testimony on frequent drinking, have established a habit. The court also held that the fact that arrests were made was not evidence of the asserted conduct and stated that since contributory negligence by reason of intoxication was in issue the plaintiff would have been entitled to an instruction limiting consideration of the habitual drunkenness to the damages issue.

[31] Rochester v. Seattle, R. & S. Ry., 75 Wash. 559, 135 Pac. 209 (1913).

[32] "An element of damage which is infrequently asserted in these cases, but which seems properly allowable, is the present value of any additional accumulations which the deceased would have made during the remainder of his life if he had not been killed and which he could reasonably be expected to leave to his wife and children eventually at his death." MCCORMICK, DAMAGES 350 (1935); See National Airlines, Inc. v. Stiles, 268 F.2d 400 (5th Cir. 1959) *cert. denied* 361 U.S. 885 (1959); see also Martin v. Atlantic Coast Line R.R., 268 F.2d 397 (5th Cir. 1959), (decided under the Federal Employer's Liability Act which measures damages by the pecuniary loss to survivors).

[33] Hinton v. Carmody, 182 Wash. 123, 45 P.2d 32 (1935); Castner v. Tacoma Gas & Fuel Co., 126 Wash. 657, 219 Pac. 12 (1923). *But see* McMullen v. Warren Motor Co., 174 Wash. 454, 25 P.2d 99 (1933) where funeral expenses were recovered by the personal representative even though there were no statutory beneficiaries in existence. See also Lamb v. Mason, 26 Wn.2d 879, 176 P.2d 342 (1947), where dictum seems to indicate that the recovery for funeral expenses should insure to the benefit of the estate.

item will not bear analysis under the previous statement of the pecuniary loss to survivors standard for measuring damages.

Under the survival statute the principal damages recoverable are medical expenses, pain and suffering, and loss of earnings, all computed relative to the period between the injury and death. If this statute actually had the effect of perpetuating the deceased's personal injury claim the above measure would constiute only partial compensation, but this is a hybrid statute which establishes a concurrent remedy with that under the wrongful death statute. If the decedent's loss of earning capacity throughout the period of life expectancy were recoverable, this would result in a double recovery since at least a portion of his earning capacity is recoverable in the wrongful death action by the same beneficiaries.

Loss of services. Upon the death of a child the measure of damages differs, depending upon whether the action is brought under the wrongful death or the child-death statute. When the decedent is a minor ordinarily the action will be maintained under the latter statute[34] since the parents are usually unable to show their dependency upon the child for support. Under the child-death statute the measure of damages is the value of the child's services from the time of injury to the prospective date of reaching majority, less the cost of his support and maintenance during that period.[35] This statute has been interpreted as extending the common law right of a parent to recover for the loss of services of his child during the period of minority when a personal injury has impaired the child's earning power. Consequently, the recovery for loss of services, upon the child's death, is extended throughout the entire prospective period of minority.[36] On the other hand, where the statutory beneficiary can show that he is dependent upon the deceased child for support, there is an election of remedies and suit under the wrongful death statute will result in a recovery for loss of that support computed without regard to any remaining period of minority and limited only by the anticipated duration of the continued support.[37]

Few children are likely to be a financial asset to their parents during minority and defendant's evidence on the necessary expenses of

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[34] RCW 4.24.010.

[35] Atkeson v. Jackson Estate, 72 Wash. 233, 130 Pac. 102 (1913) *aff'd on rehearing* 74 Wash. 700, 134 Pac. 175 (1913); Hedrick v. Ilwaco R. & Nav. Co., 4 Wash. 400, 30 Pac. 714 (1892). As to distinction between statutes with reference to time limitation see Kanton v. Kelly, 65 Wash. 614, 118 Pac. 890 (1911).

[36] Mesher v. Osborne, 75 Wash. 439, 134 Pac. 1092 (1913).

[37] Skeels v. Davidson, 18 Wn.2d 358, 139 P.2d 301 (1943); Machek v. City of Seattle, 118 Wash. 42, 203 Pac. 25 (1921).

clothing, lodging and otherwise maintaining the child during minority, together with testimony on the parents' intentions to educate the child throughout this period, may serve to destroy any objective appraisement of a net balance in favor of the parents.[38] In this sense, the death might result in a purely economic *benefit* to the parents. Nonetheless, the court has consistently allowed substantial damages to be recovered[39] and has further held that there need be no proof of special damages since this would be impracticable if not impossible in the case of young children.[40]

The disparity between the measure of damages and the results of the cases caused an extended discussion in *Skeels v. Davidson*,[41] after which the court concluded that, although it was common knowledge that damages could not be objectively assessed in most cases, the child-death statute evinced a public policy in favor of awarding substantial damages in all cases where the child's death was caused by the defendant's wrongful conduct. The court stated that the damages rule is liberalized because of necessity, but it is submitted that in fact it has been destroyed and replaced by the court's statement of public policy.[42] The statement of policy is no doubt correct and is probably applicable to the entire wrongful death statutory scheme. The problem of guarding against speculative damages is now the focal point for inquiry.

Funeral and burial expenses are recoverable under the child-death statute, although the theory of compensation is not stated, and medical expenses appear to be recoverable although there is no related survival statute.[43]

In proving damages, photographs of the child are admissible for the

[38] Apparently this occurred in Kramer v. Portland-Seattle Auto Freight, Inc., 43 Wn.2d 386, 261 P.2d 692 (1953).

[39] Atkeson v. Jackson Estate, 72 Wash. 233, 130 Pac. 102 (1913) (recovery of $1,000 although parents intended to underwrite the infant's education throughout his minority; the court referred to the "probability" that the family might suffer adversity and therefore have need for and require the child's services for monetary gain). See Scholz v. Leuer, 7 Wn.2d 76, 109 P.2d 294 (1941).

[40] Sweeten v. Pacific Power & Light Co., 88 Wash. 679, 153 Pac. 1054 (1915); Atrops v. Costello, 8 Wash. 149, 35 Pac. 620 (1894). *But see* Mieske v. P.U.D. No. 1, 42 Wn.2d 871, 259 P.2d 647 (1953) where the court indicated that merely the proof of age, general intelligence and health, and energetic qualities woud not be sufficient to support a $10,000 award for the death of a 5 year old girl.

[41] 18 Wn.2d 358, 139 P.2d 301 (1943).

[42] In Northern Pac. Ry. v. Everett, 232 F.2d 488 (9th Cir. 1956) the court upheld an award of more than $8,000 for the death of a 16 year old girl, after restating the measure of damages and the rule of substantial damages where death is negligently caused.

[43] Swenland v. Gregory, 118 Wash. 640, 240 Pac. 597 (1922); Hedrick v. Ilwaco R. & Nav. Co., 4 Wash. 400, 30 Pac. 714 (1892).

purpose of establishing his health and physical condition,[44] as is evidence of the child's industriousness[45] and testimony concerning special services which it was anticipated that the child would render.[46] Of course any evidence which may touch on the child's earning power is material.[47]

Application of Measure

Dependency. There are two classes of beneficiaries under the wrongful death statute. The surviving spouse and children compose the first class. Members of the second class, viz., parents, sisters, and minor brothers, only have a cause of action when the decedent left no surviving spouse or children[48] and then must prove dependency upon the decedent for support as a prerequisite to recovery.[49] This requirement serves a double purpose in that its satisfaction establishes the necessary proof on the damage issue. Dependency for the purpose of maintaining a cause of action is sufficient to entitle the claimant to substantial damages.[50] Partial dependency is sufficient but it must be "substantial."

The test to determine substantial dependency requires a need by the claimant, which amounts to an actual inability to support himself, coupled with a substantial financial recognition of that need by the decedent, thereby resulting in a reasonable expectation of continued support.[51] Contributions which may be characterized as casual gifts

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[44] Kramer v. Portland-Seattle Auto Freight, Inc., 43 Wn.2d. 386, 261 P.2d 692 (1953).

[45] Atrops v. Costello, 8 Wash. 149, 35 Pac. 620 (1894).

[46] Tecker v. Seattle, R. & S. Ry., 60 Wash. 570, 111 Pac. 791 (1910), (where blind father intended to use his son as a guide).

[47] Kranzusch v. Trustee Co., 93 Wash. 629, 161 Pac. 492 (1916) (even though witness was experienced in only one occupation).

[48] Joski v. Short, 1 Wn.2d 454, 96 P.2d 483 (1939).

[49] Members of the first class, such as adult children, need not prove dependency. Reamer v. Griffiths, Inc., 158 Wash. 665, 291 Pac. 714 (1930); Jensen v. Culbert, 134 Wash. 599, 236 Pac. 101 (1925); *contra*, Castner v. Tacoma Gas & Fuel Co., 123 Wash. 236, 212 Pac. 283 (1923) (failing to distinguish between the pecuniary loss and dependency requirement).

[50] Where actions under the wrongful death and survival statutes were joined, having been brought for the benefit of deceased's parent, and the jury granted an award under the survival statute action but not under the wrongful death statute, the inconsistent verdict was properly set aside and a new trial ordered on both actions. Mitchell v Rice, 183 Wash. 402, 48 P.2d 949 (1935).

[51] Bortle v. Northern Pac. Ry., 60 Wash. 552, 111 Pac. 780 (1910) (adult son not living with parents sporadically contributed about $100 per year to his father who earned a small salesman's commission; court held payments to be gifts and father's low income the result of lack of effort, not inability). In Cook v. Rafferty, 200 Wash. 234, 93 P.2d 376 (1939) recovery was allowed where an adult defrayed a portion of the household expenses, although she paid no room or board fee, in order to aid her unemployed parents.

do not achieve the required status. In *Mitchell v. Rice*,[52] the court held dependency to be an issue for the jury, after recognizing the facts as presenting a borderline situation. In that case the deceased adult son had been intermittently employed at a low salary and had made very small contributions to his father who held several properties which were not then profitable due to depressed market conditions.

Dependency must be based upon an existing situation and not upon a promise to make contributions at some future time.[53] But once dependency is found to exist, apparently the possibility of increased dependency in the future may be considered.[54]

Division of award. When there is a settlement of a wrongful death claim or the judgment does not specify what portion of the total award is allocable to each beneficiary, the probate court will exercise its jurisdiction and apportion the recovery between the beneficiaries.[55] Initially there was some dispute whether allowing the jury to make the allocation was prejudicial error because the jury's sympathy was aroused,[56] but such an argument was never upheld[57] and it is now the common practice to require the jury to make the appropriate allocation.[58] It is the better view that the injury to the familial interest and consequent loss to each beneficiary is separate and distinct and should be so viewed by the jury in its deliberations.[59]

Life expectancy. Life expectancy is the common measuring rod used to determine the duration of a survivor's reasonable expectations of pecuniary benefit. The measuring life is that of the deceased unless the survivor is older than the deceased. Mortality tables are used as evidence of the appropriate person's life expectancy and in *Bradshaw v. City of Seattle*,[60] where other evidence of life expectancy was the sole basis for computation, the trial court was admonished to use the Insurance Commissioner's 1941 Standard Ordinary Table of Mor-

[52] 183 Wash. 402, 48 P.2d 949 (1935).

[53] Grant v. Libby, McNeill & Libby, 145 Wash. 31, 258 Pac. 842 (1927), (the court noted that it would be unusual to find a normal child who would not promise to support his parents in their old age).

[54] Estes v. Schulte, 146 Wash. 688, 264 Pac. 990 (1928).

[55] Hansen v. Stimson Mill Co., 195 Wash. 621, 81 P.2d 855 (1938); Schultz v. Western Farm Tractor Co., 111 Wash. 351, 190 Pac. 1007 (1920).

[56] Stephenson v. Parton, 89 Wash. 653, 155 Pac. 147 (1916).

[57] Heath v. Stephens, 144 Wash. 440, 258 Pac. 321 (1927).

[58] Kramer v. Portland-Seattle Auto Freight, Inc., 43 Wn.2d 386, 261 P.2d 692 (1953); Hinton v. Carmody, 182 Wash. 123, 45 P.2d 32 (1935).

[59] Fogarty v. Northern Pac. Ry., 74 Wash. 397, 133 Pac. 609 (1913) (an FELA action).

[60] 43 Wn.2d 766, 264 P.2d 265 (1953).

tality. More recently published tables are also utilized.[61] Of course mortality tables are little more than a guide in determining the life expectancy of a particular individual since the tables are based upon the average life expectancy of persons in the same age bracket.

Life expectancy is just a measuring rod. Any evidence that has probative value in determining the duration of a survivor's reasonable expectations of pecuniary benefit is admissible.[62] When valuing prospective earnings lost to the survivors no Washington case has made any distinction between "earning expectancy" and life expectancy by way of differentiating between the prolonged ability to confer a pecuniary benefit and prolonged life in a time sense.[63] Perhaps pension and other retirement plans largely fill whatever gap might exist.

Once the duration of expected future benefits is found and those benefits have been valued the court must instruct the jury that this amount must be discounted to its present value. The rate of discount to be used in this computation is not the legal rate of interest but that rate which could fairly be expected on safe investments which a person of ordinary prudence, but without particular financial experience or skill, could make in the locality.[64] The determination of the discount rate to be applied is a question of fact for the jury to decide upon the evidence presented in accordance with the above standard.[65]

Excessive awards. The difficulties inherent in mathematically computing the value of a person's life in terms of his survivors has resulted in this inexact process being continuously questioned on appeal on the ground that the damages awarded are excessive. The inadequate award

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[61] See Immel, *Actuarial Tables and Damage Awards,* 19 OHIO ST. L. J. 240 (1958).

[62] In Rochester v. Seattle, R. & S. Ry., 67 Wash. 545, 122 Pac. 23 (1912), evidence of bad health was stated as a factor which could operate to preclude the jury from considering any damages for the benefit of the surviving child after reaching majority on the ground that such an assessment would be based on mere conjecture. Without such evidence a child's pecuniary loss is not necessarily limited to the minority period. Lund v. City of Seattle, 163 Wash. 254, 1 P.2d 301 (1931). Aronson v. City of Everett, 136 Wash. 312, 239 Pac. 1011 (1925) is not authority to the contrary since the plaintiff voluntarily limited his damage claim to the minority period. *But see* dissent, believed to be erroneous, in Piland v. Yakima Motor Coach Co., 162 Wash. 456, 298 Pac. 419 (1931).

[63] "The probability is that a man fifty-eight years of age will, during the rest of his life, suffer first a reduction in his earnings and then some considerable time before his death a termination of his employment. . . . [T]he cost of his maintenance and the burden of his care will continue or quite probably become greater. . . ." MacValee v. United States, 81 F.Supp. 372, 377 (W.D. Wash. 1948) (action under the Federal Tort Claims Act).

[64] Kellerher v. Porter, 29 Wn.2d 650, 189 P.2d 223 (1948), noted 28 WASH. L. REV. 283 (1948), with regard to the point discussed.

[65] Wentz. v. T. E. Connolly, Inc., 45 Wn.2d 127, 275 P.2d 585 (1954).

has also been recognized both under the wrongful death[66] and the child-death statutes.[67]

Before 1933 enough awards had resulted in a conditional or unconditional grant of a new trial that an appeal on this ground must certainly have been the subject of thoughtful consideration by every unsuccessful defendant. In that year the concept of the excessive award was extensively discussed in *Kramer v. Portland-Seattle Auto Freight, Inc.*[68] by a court which noticed its failure to spell out its thinking in previous cases where recoveries were deemed excessibe. The test which the truly excessive award must meet, in the absence of affirmative evidence that the jury's sympathy was improperly incited, is that of a comparison between the evidence and the amount of recovery which shocks the conscience of the judges. Only then will the existence of passion or prejudice in the jury's verdict be indicated unmistakenly.[69] The wide latitude given to the jury in this area will probably be most evident in cases where the deceased was not the family's bread-winner since the court noted that the risk of uncertainty should be borne by its creator.

While the court did not state a new black-letter rule, it is submitted that its discussion is of great utility as delineating its subjective approach to a subjectve problem which has been faced and similarly decided by many courts, and may relieve some congestion in our appellate court without injustice to litigants.

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[66] Olson v. King County, 188 Wash. 334, 62 P.2d 719 (1936) (award of $6,400 raised to $11,400); Pearson v. Picht, 184 Wash. 607, 52 P.2d 314 (1935) ($1,500 award raised on appeal to $11,500); Danielson v. Carstens Packing Co., 115 Wash. 516, 197 Pac. 617 (1921) (grant of new trial on ground of inadequacy upheld), 121 Wash. 645, 210 Pac. 12 (1922) (affirming award made at second trial).

[67] Skidmore v. City of Seattle, 138 Wash. 340, 244 Pac. 545 (1926) (increasing award from $1,200 to $2,500).

[68] 43 Wn.2d 386, 261 P.2d 692 (1953) (recovery of $50,000 general damages for the death of a wife and mother of an infant was affirmed).

[69] A reference to lower awards given in other cases for the purpose of comparison will often be somewhat countered by judicial notice of the dollar's decreased purchasing power. Sasse v. Hale Morton Taxi & Auto Co., 139 Wash. 359, 246 Pac. 940 (1926); Allison v. Bartelt, 121 Wash. 418, 209 Pac. 863 (1922).