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Tracing the statutory history of Wyoming law on wrongful death actions, Mr. Bostwick presents the view that the present Wyoming statute with respect to damages is comprehensive in scope yet sufficiently delineating to provide a definitive answer to the essential elements of this action. In addition to setting out the statutory guidelines on wrongful death actions, the author places special emphasis on the case of *Coliseum Motor Co. v. Hester* which establishes the rule and guide to practice for Wyoming attorneys in this area.

WRONGFUL DEATH AND RIGHTFUL DAMAGES

*R. R. Bostwick**

THE common law, being the basis for jurisprudence in the United States and each of the several states, it is, therefore, necessary to commence any discussion of rights, wrongs, and remedies with reference to the common law. A wrongful death action was unknown to the common law.¹ *The Coliseum Motor Co. v. Hester* case referred to has an excellent short dissertation with respect to the situation existing under the common law and refers to the case which laid down the law that "in a civil court the death of a human being cannot be complained as an injury."² With the state of the law thus announced by the court, the advent of the industrial revolution and injuries and death to human beings becoming more prevalent, the law was in need of change. Since the courts had already made a pronouncement with respect to the matter, it then became incumbent upon the legislative branch of the government to make such changes as were deemed advisable at the time. In 1846 the English Parliament passed what has become known as the Lord Campbell's Act. So that we may

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1. *Coliseum Motor Co. v. Hester*, 43 Wyo. 298, 3 P.2d. 105 (1931); 12 AM. JUR. TRIALS *Wrongful Death Actions* § 2, at 322 (1966).
2. *Baker v. Bolten*, 1 Camp. 493, 170 Eng. Rep. 1033 (N.P. 1808).

properly analyze the right created, the remedy for the breach, and the measure of damages, it is well to set forth that Act as follows:

That whensoever the death of a person shall be caused by the wrongful act, neglect, or default of another 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, and although the death shall have been caused under such circumstances as amount in law to felony. That every 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 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 among the before-mentioned parties in such share as the jury, by their verdict, shall direct.³

In 1871 Wyoming adopted an act providing for recovery for wrongful death but placed a limit of \$5,000.00 therein.⁴ To show the comparison with the original Lord Campbell's Act, it would be well to quote the Act as originally adopted in Wyoming. It is as follows:

Every such action shall be brought by and in the name of the personal representative of such deceased person; and the amount recovered in every such action shall be distributed to the parties and in the proportions provided by law, in relation to the distribution of personal estates left by persons dying interstate. In every such case, the jury shall give such damages as they shall deem fair and just; not exceeding Five Thousand Dollars, and the amount so recovered shall not be subject to any debts or liabilities of the deceased; *Provided*, that every such action

3. *Coliseum Motor Co. v. Hester*, *supra* note 1, at 305, 3 P.2d at 106.

4. *Wyo. Sess. Laws 1871*, pp. 88-89.

shall be commenced within two years after the death of such deceased person.

The law in Wyoming stayed in that form until 1909 when the Act was amended to delete the limitation of \$5,000.00.⁵ The law then remained in that form until 1939 when it was again amended. We see the beginning of the philosophical approach to the elements which constitute a measure of damages in wrongful death. A 1939 session of the legislature added these words to the Wrongful Death Act:

The court or jury may consider as elements of damages, the amount the survivors failed or will fail, by reason of the death, to receive out of the decedent's earnings, and further the court or jury may add, as an element of damage, a reasonable sum for the loss of the comfort, care, advice and society of the decedent.⁶

A research of cases in various other states will indicate much controversy about the elements that may be considered as damages. By the addition to our statute these elements are fairly well resolved in Wyoming. The law for wrongful death then remained this way until 1947 when the Act was again amended by the addition of the following words: "any other pecuniary loss directly and proximately sustained by the survivors by reason of such death including funeral expenses" The form of the Act as we now find it is as follows:

Every such action shall be brought by, and in the name of, the personal representative of such deceased person; and the amount received in every such action shall be distributed to the parties and in the proportions provided by law, in relation to the distribution of the personal estates left by persons dying intestate. In every such case, the jury shall give such damages as they shall deem fair and just. The court or jury may consider, as elements of damages, the amount the survivors failed or will fail, by reason of the death, to receive out of the decedent's earnings, any other pecuniary loss directly and proximately sustained by the survivors by reason of such death including funeral expenses, and further the court or jury may add, as an element of damage, a reasonable sum for the loss of the comfort, care, advice and

5. Wyo. Sess. Laws 1909, ch. 3, § 1.

6. Wyo. Sess. Laws 1939, ch. 104, § 1.

7. Wyo. Sess. Laws 1947, ch. 132, § 1.

society of the decedent. The amount so recovered shall not be subject to any debts or liabilities of the deceased; provided, that every such action shall be commenced within two (2) years after the death of such deceased person.⁸

Thus we find the statutory authority in Wyoming setting out in considerable detail the remedy for wrongful death of a human being.

In order that this article might be helpful in analyzing wrongful death actions, it is pertinent here to point out that the Wyoming Act has been construed to be a Lord Campbell's type of act and is not a survival action but rather gives a new cause of action vested in the personal representative of the deceased.⁹ The Wyoming Supreme Court has also decided that the personal representative of the deceased is either the administrator or the executor of the deceased estate.¹⁰

It is well to bear in mind that a wrongful death action is remedial in nature and is limited by its own wording and is generally strictly construed.¹¹

When considering specific damages for wrongful death, we might say that Wyoming is fortunate in having a statute which is so comprehensive in scope and yet delineating enough to provide a definitive answer to the elements which may be considered in such type actions. There have been many decisions in other states attempting to define those things which may be considered in assessing damages. From these various decisions a considerable body of law has developed and many writers have expounded upon the subject, the most recent of which is a new volume published by Lawyers Cooperative and Bancroft-Whitney entitled *Recovery for Wrongful Death* by Stuart M. Speiser. The Wyoming lawyer may, with a little study and practical application, use our statute to great advantage, either as a plaintiff or a defendant, in litigating a wrongful death case. Moreover, the often-cited case of *Coliseum Motor Co. v. Hester*, covers the waterfront, so to speak, in delineating the law in this state. When briefing with respect to damages for wrongful death, it is neces-

8. WYO. STAT. § 1-1066 (1957).

9. *Coliseum Motor Co. v. Hester*, *supra* note 1, at 307, 3 P.2d at 107.

10. *Bircher v. Foster*, 378 P.2d 901 (Wyo. 1963).

11. 12 AM. JUR. TRIALS *Wrongful Death Actions* §§ 3-8, at 324-35 (1966).

sary to be discriminating and eliminate all of those cases which have to do with the recovery of damages by the estate of the deceased and consider only those cases which have to do with the recovery of damages for named beneficiaries.¹²

It should be apparent by now that as we read *Coliseum Motor Co.* we find significant law, page by page. The practitioner engaged in damage litigation will find the occasion to re-visit the *Coliseum Motor Co.* many times and probably as often as the number of times in which he is engaged in wrongful death actions. It is interesting to note that although the Wyoming wrongful death statute had not been amended, except to eliminate the dollar limitation of damages at the time that *Coliseum Motor Co.* was decided, nonetheless, the court indicated the measure of damages in such a case had to be determined from the standpoint of the beneficiaries. The subsequent amendments, while directed to specific elements for consideration, seem to follow this viewpoint. The *Coliseum* case eliminated any question of mental suffering by the survivors. This is neither a physical nor a specific element for consideration under our Act. Subsequent amendments to the original Act did add some specific matters for consideration but did not include mental suffering of the survivors.¹³

Personal injury actions may present elements of damage in the area of loss of income, disability that may be permanent-partial, permanent-total, temporary-partial or total, pain, suffering, inconvenience, and a host of other terms. However, the common law maxim *Actio personalis moritur cum persona*, which literally means that a personal action dies with a person, created the necessity for delineating the elements which may be recovered in an action for wrongful death. Those statutes in various states which do not delineate the elements to be considered have given rise to the body of law previously mentioned and there is room for much argument in many instances as to what elements may be properly considered. Therefore, let us take a look at the practical aspect of the Wyoming statute. The damage question is for the jury to resolve and they must resolve it within the frame-

12. *Coliseum Motor Co. v. Hester*, *supra* note 1, at 310, 3 P.2d at 108.

13. *Id.* at 319, 3 P.2d at 111.

work of what is fair and just. To do so, they are directed that they may consider as elements first, the amount the survivors failed, or will fail, by reason of the death to receive out of the decedent's earnings. Considering only this statement for the moment, it is immediately apparent that it is not the decedent's earnings which are pertinent to the issue but rather what the survivors fail, or will fail, to receive out of those earnings that becomes a criterion for measurement. Thus, the evidence in any given case must be directed to the proportionate share which the beneficiaries will lose as a result of the death. Again it is interesting to note that in 1931, when the *Coliseum Motor Co.* case was decided, the wording above referred to was not contained in the statute; nonetheless, the Wyoming Supreme Court held in that case that an instruction which the jury could construe to mean that earnings reduced to present value constitute damages to be allowed was erroneous and said as follows:

The criterion of damages, or one of them, is not what the decedent would have earned, but the amount which the survivors probably failed, by reason of the death, to receive out of these earnings. The earnings are not an element of damages, but simply evidence to be taken into consideration, in the proper case, to determine and fix one of the elements.¹⁴

and by way of explanation, the court went on to say: "If the decedent had lived, but the persons for whose benefit suit is brought would not in any event have received any of his earnings, then these earnings could not be considered in determining the damages . . ."¹⁵ Thus, in Wyoming there is no question about the element on lost earnings, either by a plain reading of *Wyoming Statute* § 1-1066 (1957), or by reading of the *Coliseum Motor Co.* case. It is, therefore, incumbent upon the plaintiff in any given case to present before the court and jury for consideration as damages only the amount which survivors will fail to receive.

Let us proceed with the statute in question and examine the next element that the court or jury may consider. As we continue our reading of the statute, we find the following element for our consideration: "any other pecuniary loss direc-

14. *Id.* at 321, 3 P.2d at 112.

15. *Ibid.*

tly and proximately sustained by the survivors by reason of such death, including funeral expenses"¹⁶ This phrase may at first reading give cause for question. However, the *Coliseum Motor Co.* case again comes to the rescue of the Wyoming practitioner. Pecuniary loss is the fundamental basis for awarding of damages and only those matters of pecuniary nature may be considered.¹⁷ The cases discussed in the *Coliseum Motor Co.* case consider the elements of advice, comfort and society and susceptibility of these elements as pecuniary loss at the same time eliminate the mental suffering of the survivors as an element of pecuniary loss for damages. It is noted that our statute continues in its wording and says: "and further the court or jury may add as an element of damages a reasonable sum for the loss of the comfort, care, advice and society of the decedent"¹⁸

A question as to whether or not punitive damages can be given under the Statute has arisen in several trial courts. The writer knows of no decision of the Wyoming Supreme Court on this point. However, decisions from other states have quite uniformly held since the Lord Campbell's type of statute attempts to compensate for wrongful death on a pecuniary basis, the pecuniary basis is generally held to be what the decedent would probably have contributed in money, property or services during the remainder of his life expectancy. Alabama and Massachusetts still retain what can truly be described as a punitive death statute.¹⁹ The word "pecuniary" may lead some down the wrong path. However, a good discussion on it is now presented in *American Jurisprudence (Second)*.²⁰ Generally, it can be said that this word as used in death statutes, does not necessarily limit the loss to that of money or property. It looks also to the prospective damages of a pecuniary nature which have been cut off by the premature death of the person from whom the benefits would have come to the beneficiaries. There are many specific areas which can be explored under this term and it is again incumbent upon the plaintiff in a given case to explore these fully and

16. WYO. STAT. § 1-1066 (1957).

17. *Coliseum Motor Co. v. Hester*, *supra* note 1, at 315-19, 3 P.2d at 110-11.

18. WYO. STAT. § 1-1066 (1957).

19. MASS. ANN. LAWS ch. 229, § 2 (Supp. 1966); 12 AM. JUR. TRIALS *Wrongful Death Actions* § 18, at 348 (1966); 3A PERSONAL INJURY *Death Actions* § 3.06, at 160 (Frumer, Benoit, Friedman & Kaufman eds. 1965).

20. 22 AM. JUR. 2D *Death* § 123, at 692 (1965).

present to the court or jury those things which fall within that category. The guide lines are here in the statute. The ingenuity is left to the advocate. Notwithstanding the general rule of statutory construction that the listing of items is to the exclusion of all others, a little resourcefulness within the general meaning of the English language will allow a full presentation of any given case under the Wyoming statute. Four states in addition to Wyoming have covered the loss of "society" by statute and they are Hawaii, Kansas, Nevada and Wisconsin. So the body of case law in those states should very probably be of some aid in determining the scope of the term "society." Furthermore, a good dictionary is always an invaluable aid in the interpretation of words. While there are a number of definitions and various degrees of meaning for this term, we need only consider the word within the context of this statute and this context simply means company or companionship of either a friend, associate or relative.²¹ In certain states where the Wrongful Death Statute expressly limits damages for wrongful death to pecuniary loss and does not spell out the elements as does ours, the courts in those states have held that the recovery for the loss of society and companionship is allowed.²²

The elements of "advice" likewise have been held to be pecuniary loss suffered by the beneficiaries when the party who would normally be in the position of guidance and of giving counsel to the beneficiaries has been wrongfully killed. There have been some decisions denying damages for the loss of parental guidance so that the advocate will have to be careful with respect to the manner of proving the advice which is contemplated to have been lost. Considering the context in which this word is used appropriate synonyms could be instruction, information, admonition, recommendations, and in general any opinion offered as worthy to be followed in a particular situation.²³

Let's also examine the word "care" in the same context. Here we find a definition that is subject to several mean-

21. WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1957).

22. *Vines v. Arkansas Power & Light Co.*, 232 Ark. 173, 337 S.W.2d 722 (1960); 12 AM. JUR. TRIALS *Wrongful Death Actions* § 24, at 361-62 (1966); Annot., 74 A.L.R. 64 (1931); 22 AM. JUR. 2D *Death* § 135, at 703 (1965).

23. WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1957); 22 AM. JUR. 2D *Death* § 134, at 702 (1965).

ings. Also this is one which might give some trouble under our statute were it not for the *Coliseum Motor Co.* case previously discussed. We find that among the 'definitions of the word "care" that some synonyms are worry, anxiety, solicitude and perhaps grief and mental pain. Mental suffering, however, has been ruled out by the referred to case. We must then keep it within the context of the statute and find that there is ample room for its use as an element of damages notwithstanding the other meaning to which it might be subjected. In its all inclusive meaning, it covers caution, watchfulness, heed, close attention to, protection, custody and watchful regard, and it is even broad enough to include friendship, love and affection.²⁴ Whether it is broad enough to include the term "consortium" is questionable. We do know, however, that a surviving husband has no common law action for loss of consortium in addition to or separate and apart from an action for wrongful death for the loss of a wife.²⁵

The last of the four terms to consider is "comfort" and we find that in law this generally means support, assistance, countenance, and encouragement, but here again we find a word that is susceptible to some other meaning, such as a freedom from worry or pain or a state of ease and enjoyment.²⁶ So we must again be careful in the presentation of a case not to infringe upon the area prohibited by our case law. Having looked at each of these terms separately, we find a couple of Wyoming cases have actually referred to them. One stated that it was proper to assess a dollar amount for the loss by the deceased's widow and children of the society, care, and advice of the deceased,²⁷ and again all four terms were referred to as an element of damage, which although difficult to measure was within the sound discretion of the trier of fact.²⁸

Having discussed the elements of the Wrongful Death Statute individually, we should perhaps take a look at them as a composite measure of damages and realize that for any recovery to be predicated upon them, certain other matters of inquiry are essential. It is necessary for the plaintiff to point

24. WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1957).

25. *Druley v. Houdesheldt*, 75 Wyo. 155, 296 P.2d 251 (1956).

26. WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1957)

27. *Muir v. Haggerty*, 77 Wyo. 280, 314 P.2d 948 (1957).

28. *McPike v. Scheuerman*, 398 P.2d 71 (Wyo. 1965).

out with respect to the decedent some of the following and perhaps other matters, but certainly his age, health, his industry, his capacity for work, his education, intelligence, reputation for sobriety, temperance, manner and style of living, his frugality or lavishness with respect to his assets; also his future prospects, including but not limited to loss of a pension or retirement benefits, including Social Security and other plans that might be involved as well as advancement within his field of endeavor. There are many ways and means of presenting evidence in these fields and this, of course, is the advocate's responsibility. These remarks have been directed primarily with reference to a decedent who is the head of a household. However, when we have a wrongful death action, with respect to the loss of a wife and mother, other elements enter the picture such as the economics of the home. There has been much written with respect to the damages for the loss of a wife and also into the area of the loss of children. In each instance, however, before proof can really be of any value in these cases, it first must be shown that a bona fide relationship existed between the decedent and the beneficiaries and that a harmonious marital or family relationship actually exists between the parties. This, of course, can be shown through such common interests as hobbies, scholarship, art, religion, social activity and a myriad of participating events. Here again the practitioner can refer to the *Coliseum Motor* case wherein our court quoted from *Kelly v. Lemhi Irrigation & Orchard Co.*²⁹ with approval to the effect that companionship is never implied from the mere relationship. "[I]t must be proved to have existed."³⁰

Likewise, it seems that the age, health, and relationship of the heirs-at-law should be established. Re-marriage of a spouse has raised some conflict among the various courts that have had to decide the question but it seems that the weight of authority is that no consideration is to be given to such. Indeed, objections to inquiry in this field have been sustained in several district courts in Wyoming. We, perhaps, tend to equate the mode of proof primarily with the loss of the husband-father head of the household. Moreover, the pecuniary loss perhaps is more susceptible of proof when this is the situ-

29. 30 Idaho 778, 168 Pac. 1076 (1917).

30. *Coliseum Motor Co. v. Hester*, *supra* note 1, at 319, 3 P.2d at 111.

ation before the court. However, these various elements which we have discussed in this paper are equally applicable to the loss of any other member of the family that is within the collateral heirship as contemplated by our statute on descent and distribution, and again it remains only to the advocate to prepare and present his case in such a manner that the elements of damage are clearly before the court and jury so that proper damages may be awarded.

A word of caution is perhaps appropriate at this point. It must be remembered always that the duration of a person's life is an essential element of proof under all wrongful death statutes. Certainly, there must be some proof as to how long the deceased could have been expected to live and contribute to the support of the beneficiaries. Proof of this is usually done by life expectancy tables and in most cases this matter is usually stipulated between counsel and the tables printed in the Wyoming Statutes are used. In order that they be truly effective both for the defendant and the plaintiff, there should be a showing in the record with respect to the deceased's health prior to the untimely demise.

The general rule is that an award of damages which arises out of the contemplated matters for the future must be reduced to present value. This rule has found acceptance in Wyoming.³¹ The cited case indicates that the proper formula for reducing future earnings to present value is accomplished by use of the tables contained in Wyoming Statutes. The particular table for reference is either the 4% or 4½% interest table found in volume 1 of the 1957 *Wyoming Statutes* at page 593. The procedure for use is very simple in that the number of years shown in the extreme lefthand column of the table refers to the life expectancy. The column entitled "Present Value of \$1.00 Per Annum for N Years" shows the constant by which the annual loss is to be multiplied. To cite an example, we would say that if \$5,000.00 per annum is the established loss by the evidence in a given case and the person involved would have had a life expectancy of 25 years and we are to use the 4½% interest table, we would look in the column under N Years at the figure 25 and using the 4½% interest table showing the present value of \$1.00 per annum

31. *Muir v. Haggerty*, *supra* note 27.

for N years, we find a constant of 14.8282. This multiplied times \$5,000.00 shows the present value of \$5,000.00 per year for 25 years to be \$74,141.00.

While this formula has been adopted and approved in the cited case of *Muir v. Haggerty*, nonetheless, a problem still exists on the manner in which present value is to be ascertained by a jury. Whether or not an instruction covering the detail of such a procedure is to be given will have to be left to the trial court and the persuasion of counsel in any particular case.

The economic value of a life has come into considerable study in recent years. Various courts likewise have made some significant changes in the approach to the matter. As long ago as 1960, the Michigan Supreme Court changed the method of assessing damages for the death of a young child.³² This case seems to indicate that the pecuniary loss suffered by the survivors on the death of a minor child was "fiction." This opinion for the first time indicated another factor to be evaluated, namely, the loss of companionship. In effect the court held that the pecuniary value of the life was the real basis rather than the child labor theory which up until then had been the only theory of compensation, but here again in the field of litigation for wrongful death of minors, Wyoming seems to offer under its Wrongful Death Statute, at least, as adequate a measure of damages as may be indicated by the cited case.

Another area for consideration in the future is that of the economist in the courtroom. Several cases have recognized testimony by an expert in the field of economics.³³

An economist also should be able to testify by virtue of an expert opinion on the future of long term effective rates of interest and thus the proper rate could be established evi-

32. *Wycko v. Gnodtke*, 361 Mich. 331, 105 N.W.2d 118 (1960).

33. *Krohmer v. Dahl*, 145 Mont. 600, 402 P.2d 979 (1965) (The Supreme Court of Montana upheld the economic testimony on the theory that it significantly guided the jury and reduced conjecture in the area of the loss of future earnings); *Atlantic Coastline R.R. v. Braz*, 182 So. 2d 491 (Fla. 1966) (Testimony of expert as to value of deceased wife to husband was competent evidence to go to the jury on the issue of damages in action for wrongful death of wife); *Lithgow v. Hamilton*, 69 So. 2d 776 (Fla. 1954) (Covered the question of cost of a housekeeper-governess-counselor on 24-hour a day basis).

dentiary-wise which might be used under the approved formula of *Muir v. Haggerty*.

The Wrongful Death Statute in Wyoming offers a broad spectrum for the presentation of proper evidence in wrongful death actions. Although we do not have many decisions with respect to the Act, nonetheless, it is obvious when reading the body of law that has grown up with respect to the measure of damages under various other statutes, that our statute by specific direction is generally as broad as the case law has indicated it to be. The rule and guide to practice in this field in Wyoming is certainly *Coliseum Motor Co. v. Hester* and in view of the number of times that reference was made to that case in this article, an alternative title might well be "Coliseum Co. v. Hester Revisited Once Again."